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YEARBOOK OF PRIVATE INTERNATIONAL LAW

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FOREWORD

With contributions from more than ten different countries, the first volume of our *Yearbook* is enjoying a resounding response. The numerous spontaneous reactions have convinced us that it was not only correct but also necessary to have the new *Yearbook* serve as a globally accessible platform for a scholarly dialogue on private international law. The possibility of having access to such a broadly based medium for the exchange of ideas has been greeted with enthusiasm particularly in Asia and Eastern Europe. Why? In Asia because the opening of markets has continued to bring about progress, thus increasing the desire for greater cooperation in legal matters as well, and in Eastern Europe because the number of independent States has increased by leaps and bounds, thus making the conflict of laws an infectious topic.

The gratifying response to our first volume has encouraged us to attempt to broaden the international dialogue between conflicts experts, raising it to an even higher level, both scholarly and geographically. In this sense, volume two focuses on the legal protection of natural persons, minors as well as adults, whereas volume one was devoted to topics on marriage, procedural law and jurisdiction.

During this initial period it is of particular importance that the national reports receive the broadest possible coverage. This applies in particular to contributions from countries or areas that have been insufficiently represented in international legal literature until now. After last year's reports from China, Hungary and Venezuela, the new volume contains national contributions from, *inter alia*, Australia, Brazil and Macao. In this way we hope to provide the international legal community in a few years with a representative overview of what really matters in the daily practice of the attorney in Freetown or before the Court in Kanton. In doing this, our aim is to offer a marketplace for scholarly exchange where new solutions to crucial problems can be tested in an open discussion. As we all know, the primary condition for a fruitful dialogue between experts is the mutual knowledge and awareness of what is going on in the minds and spirits of fellow colleagues on the other side of the world.

In this sense, preparations are currently underway for a discussion of topics that are of concern to many of us and are keeping judges busy in Japan, as well as in North America, Australia or Europe. In our information age, the mutual exchange of scholarly wisdom is the appropriate key to open the door to new intellectual awareness. Conflicts lawyers who are interested in participating in this exchange and would like to contribute to the building of such a forum in private international law are encouraged to submit their articles.

Petar ŠARČEVIĆ Paul VOLKEN

ABBREVIATIONS

Am. J. Comp. L.	American Journal of Comparative Law
Am. J. Int. L.	American Journal of International Law
Clunet	Journal de droit international
I.C.L.Q.	International and Comparative Law Quarterly
I.L.M.	International Legal Materials
id.	idem
IPRax	Praxis des internationalen Privat- und Verfahrensrechts
OJ	Official Journal
PIL	Private International Law
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
Recueil des Cours	Recueil des Cours de l'Académie de la Haye de droit international = Collected Courses of The Hague Academy of International Law
Rev. crit. dr. int. pr.	Revue critique de droit international privé
REDI	Revista española de derecho internacional
Riv. dir. int. priv. proc.	Rivista di diritto internazionale privato e processuale
Riv. dir. int.	Rivista di diritto internazionale
RIW	Recht internationaler Wirtschaft
RSDIE	Revue suisse de droit international et européen = Schweizerische Zeitschrift für internationales und europäisches Recht

DOCTRINE

THE NEW HAGUE CONVENTION ON THE PROTECTION OF ADULTS

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I. Introduction

A. Need for the Convention

A new Convention on the International Protection of Adults was recently concluded under the auspices of the Hague Conference on Private International Law.[1] It is designed to replace the *Convention concernant l'interdiction et les mesures de protection analogues* signed at the Hague on 17 July 1905. The 1905 Convention has been ratified by only a few States. It is old-fashioned and little used. Further ratifications are unlikely. There is a clear need to replace it by a new Convention likely to appeal to a much wider range of countries.

The number of adults suffering from some incapacity which prevents them from managing their own affairs is increasing. Such adults often have connections with more than one country. It is contrary to the interests of these unfortunate adults, and of the carers looking after them and of the public officials charged with their cases, if there are doubts and disputes on such matters as jurisdiction,

[1] The Convention was drawn up by two Special Commissions which met at the Hague. The first (called here the First Special Commission) met from 3 to 12 September 1997 and prepared a preliminary draft. It was assisted by the work of an informal working group which had prepared a draft initial text for discussion and which was itself greatly assisted by a detailed draft text proposed by the Swiss delegation at the conclusion of the proceedings on the Children Convention of 1996. The second (called here the Second Special Commission) took the form of a Special Commission of a Diplomatic Character and met from 21 September to 2 October 1999. Thirty States were represented on the Second Special Commission by delegations and 9 States and organisations participated as observers. The Convention has already been signed by The Netherlands and officially bears the date of that signature – 13 January 2000. The text of the Convention is published in this *Yearbook*, pp. 205-222.

applicable law and the recognition in one country of measures taken in another. It is in the interests of all concerned if there are mechanisms in place for international co-operation.

B. Background in Domestic Laws

Part of the background to the Convention is that many countries have recently reformed their laws on the protection of such adults or are in the course of reforming them.[2] A common theme has been the abandonment of old rigid techniques such as interdiction and all-embracing tutory or curatory and the substitution of more flexible approaches designed to preserve the adult's legal capacity as much as possible and to confine interventions to the minimum necessary in the particular case. Another common theme has been the recognition that adults while capable may wish to make their own arrangements for their representation should incapacity ensue at a later stage in their lives. Many legal systems have accordingly made new provisions for enduring powers of attorney[3] or mandates with a view to incapacity. The powers of representation given by such techniques are generally subject to some control or supervision. The choice of law rules applying to normal powers of representation in the commercial field[4] are not necessarily appropriate to this new type of representation of an incapable person.

C. Influence of the 1996 Children Convention

The Hague Convention of 1996 on the protection of children[5] was influential in the preparation of the new Convention. This is not surprising. Many of the problems are the same and there was every reason to utilise solutions which had already been agreed. Many of the delegations consisted of the same experts who had drawn up

[2] For the situation in Europe see the Council of Europe's Recommendation No. R (99) 4 on *Principles Concerning the Legal Protection of Incapable Adults* and the accompanying explanatory memorandum.

[3] Terminology in English-speaking countries varies – 'enduring powers of attorney', 'continuing powers of attorney', 'durable powers of attorney' are all found. Sometimes a distinction is drawn between a continuing power, which was exercisable before incapacity and continues to be exercisable after incapacity and a 'springing power' which springs into existence only when incapacity occurs.

[4] For example, those contained in the Hague Convention of 1978 on the Law Applicable to Agency.

[5] The full name of the Convention is the *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*.

the Children Convention. Accordingly the two Conventions are recognisably similar in structure and approach.

In the debates on the Adults Convention it quickly became apparent, however, that there were important differences in the normal situations of children and incapable adults.

In the case of children there is often a contest for custody and a real risk of conflicts of jurisdiction. In the case of adults the difficulty may be to find someone to take on the role of legal representative and there is little risk of a conflict of jurisdiction. Children rarely have sufficient property to cause legal problems. Adults often have. Adults may have made arrangements for their own representation after incapacity. This does not happen in the case of children. Parental responsibility, carrying extensive duties and rights, is in all legal systems conferred on parents, or some parents, by operation of law. Wide powers of representation in relation to incapable adults are not normally conferred by operation of law, although limited powers in certain restricted areas (such as consent to medical treatment) may be conferred on close relatives in some legal systems.

II. Outline of the Convention

A. General

The Convention obliges Contracting States to introduce uniform rules on jurisdiction for matters within its scope, to adopt uniform rules on the law applicable to the taking and implementation of measures of protection and to mandates with a view to incapacity, to recognise and enforce measures from other Contracting States and to set up mechanisms for co-operation. What follows does not purport to be more than an outline, with selective comments.[6] The Convention itself contains important refinements and qualifications. An excellent detailed analysis of its provisions is contained in the Explanatory Report by Professor Lagarde[7] and there is no point in covering the same ground here.

[6] Many of the comments are based on the personal recollections of the author. The Proceedings of the Special Commissions have not yet been published and do not always contain the full detail, particularly in the earlier stages.

[7] A draft of which has been seen by the author. The text of the Explanatory Report is now available on the website of the Hague Conference at: http://www.hcch.net/

B. Scope

1. Persons Covered

The Convention applies to adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests.[8] Adults are defined as persons who have reached the age of 18 years.[9] There was some discussion in the Special Commission about whether physical, as opposed to mental, impairment or insufficiency was covered. Attempts to clarify the matter were rejected but the answer is probably that physical incapacity which is not accompanied by any mental incapacity does not put a person into a position where he or she cannot take decisions, such as to seek help voluntarily or employ an adviser or agent, and thereby protect his or her interests. On human rights grounds, compulsory measures of protection would not be justified in relation to persons who have full decision-making capacity. The implication from the actual provisions of the Convention[10] is that it is concerned with those who lack decision-making capacity.

2. Matters Covered

The Convention applies to the protection of the adults within its scope.[11] Matters not involving such protection are not covered by the Convention. So, for example, measures taken, not to protect the adult concerned, but to protect the spouse of the adult or a third party or the public at large are beyond the scope of the Convention.

Article 3 contains an illustrative list of the type of measures of protection which fall within those provisions of the Convention dealing with measures. The list mentions almost all the types of measures found in contemporary legislation on adults with incapacity, from the traditional *tutelle* and *curatelle* to the more flexible 'tailor-made' measures found in many recently reformed laws.

Article 4 contains a list of matters to which the Convention does not apply. Some of the items in the list are of doubtful necessity because the Convention's rules on jurisdiction and recognition would probably not apply to them anyway

[8] Art 1(1).

[9] There is a special provision in Article 2(2) which enables measures taken in advance of the attainment of the age of 18 to be recognised and enforced under the Convention. Jurisdiction to take such measures in relation to a person under the age of 18 would depend on other laws and not on the Convention but, under article 22 (2) recognition of such measures could be refused if in fact the ground of jurisdiction founded on was not 'in accordance with' the Convention's provisions. For countries that ratify the Children Convention of 1996 this will not pose a problem as habitual residence is the main ground of jurisdiction under both Conventions.

[10] E.g. article 3.

[11] Art. 1(1).

(either because they are not measures by a judicial or administrative authority[12] or because they are not measures of protection[13] or because they are not sufficiently related to an individual adult)[14] and because they are clearly not covered by the rules on applicable law.[15] Others are potentially important and, by excluding particularly sensitive matters where there are strong State interests, ought to remove hesitations about ratification.[16]

An important provision[17] makes it clear that, even where a matter is excluded, the question of representation in relation to that matter is not excluded. So, for example, decisions on immigration are excluded but that does not mean that a measure appointing a representative for an incapable adult for the purpose of immigration proceedings is outside the Convention.

It is implicit in the Convention that it is not concerned with measures of protection which have nothing to do with incapacity but which would be taken even in relation to a fully capable adult. Jurisdiction to grant an injunction against encroachment on property would, for example, depend on normal rules governing injunctions and not on the provisions of the Convention, even if the person whose property would be protected just happened to be suffering from an incapacity at the time. Jurisdiction to order payment of a debt would depend on ordinary rules even if the creditor was an adult with incapacity and the measure could be said to be directed to the protection of his or her patrimony.

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[12] E.g. maintenance obligations, succession, the formation of marriage or any similar relationship. The Convention's provisions on measures of protection apply only to measures by a judicial or administrative authority. They do not apply to measures by a legislative authority. 'Trusts' are expressly excluded from the scope of the Convention but, as a trust would almost always be set up by a settlor, or in some cases by operation of law, and not by a judicial or administrative authority, the exclusion seems unimportant.

[13] E.g. measures directed *solely* to public safety.

[14] E.g. public measures of a *general* nature in matters of health. It is implicit in the rest of the Convention that a 'measure of protection' must relate to an individual case. Only in such a case do the rules on jurisdiction, applicable law, recognition and enforcement make sense. See section III.B below.

[15] A trustee, for example, is not a representative of the settlor and so trusts would also be outside the provisions of article 15 on 'powers of representation granted by an adult'.

[16] E.g. social security, measures taken in respect of a person as a result of penal offences committed by that person, decisions on the right of asylum and on immigration.

[17] Proposed by Professor SIEHR of the German delegation and welcomed as a useful clarification of a point which had proved troublesome.

C. Jurisdiction

1. General Policy

It is implicit in the Convention, as it was in the Children Convention,[18] that a Contracting State remains free to adopt any grounds of jurisdiction it thinks fit in relation to persons who are not habitually resident in any Contracting State. It is also implicit in the Convention that in relation to adults who are habitually resident in a Contracting State the Convention's grounds of jurisdiction must be adopted by all Contracting States. If it were otherwise one of the main objectives of the Convention would not be achieved.[19]

2. Habitual Residence

The main ground of jurisdiction in the Convention is the habitual residence of the adult.[20] This proved entirely uncontroversial at all stages of the debates. The international consensus on this point must be regarded as a very important advance.

3. Nationality

The nationality of the adult is an independent ground of jurisdiction in any case where the authorities of the State of the nationality consider that they are in a better position to assess the interests of the adult.[21] However, there is an obligation to inform the authorities of the Contracting State of the habitual residence and, in cases of conflict, nationality yields to habitual residence.[22] Of course, nationality and habitual residence will usually coincide and in many cases where they do not there will never be any conflict of jurisdiction. Given the provisions of the Convention on the recognition of measures and on co-operation between authorities there should be little reason in practice to disturb a protective regime once it has been established by authorities having jurisdiction at the time.

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[18] See the Explanatory Report on the Children Convention by Professor LAGARDE, para 84, at p. 573 of the Proceedings of the Eighteenth Session of the Hague Conference on private international law.

[19] Namely the objective, set out in the preamble and in article 1(2)(a), of avoiding conflicts in respect of jurisdiction.

[20] Article 5(1). There is a special provision in article 6 for adults who are refugees or who are internationally displaced and for adults whose habitual residence cannot be established. In such cases the authorities of the Contracting State where they are present have the jurisdiction normally possessed by the State of the habitual residence. In what follows, references to the State of the habitual residence should be read as including the State having the substitute jurisdiction under article 6.

[21] Article 7(1).

[22] Article 7(1), (2) and (3).

4. Property

The authorities of a Contracting State where property of the adult is situated have jurisdiction to take measures of protection concerning that property,[23] to the extent that those measures are compatible with any taken by the authorities having primary jurisdiction.[24] This ground of jurisdiction proved uncontroversial. It is likely to be particularly useful in those cases where the authorities having primary jurisdiction have never been asked to take any measures and where the need for some intervention is first felt in the State where the property is situated.

5. Urgency

The authorities of a Contracting State where the adult or property belonging to the adult is present have jurisdiction to take any necessary measures of protection in all cases of urgency.[25] There are provisions for the measures to lapse when the authorities having jurisdiction on more settled grounds[26] have taken the measures required by the situation.[27] This ground also proved uncontroversial at all stages.

6. Presence

Article 11 provides that, by way of exception,[28] the authorities of a Contracting State in whose territory the adult is present have jurisdiction to take measures of a temporary character for the protection of the adult which have a territorial effect limited to the State in question. The measures must be compatible with any already taken by an authority of a Contracting State having jurisdiction on the normal, non-urgent Convention grounds[29] and lapse as soon as any such authority has taken a decision in the case.[30] The authorities proposing to exercise the presence jurisdiction must inform the authorities of the habitual residence before doing so.[31]

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[23] Article 9.

[24] I.e. the authorities of the habitual residence or nationality or any authority to whom jurisdiction has been transferred under article 8 (considered below).

[25] Article 10.

[26] I.e. habitual residence, nationality, property or transfer under article 8.

[27] Article 10(2) and (3).

[28] Words inserted to make it clear that this was not to be regarded as a normal ground of jurisdiction.

[29] I.e. habitual residence, nationality or transfer under article 8.

[30] Article 11(1).

[31] They must inform the other authorities before exercising jurisdiction. The limitation to the habitual residence is for practical reasons. The authority proposing to exercise the presence jurisdiction would not necessarily know which other authorities might have jurisdiction.

There is a similar article in the Children Convention of 1996[32] but, initially, it was not thought that an equivalent was needed in relation to adults. The article in the Children Convention was intended to prevent the urgency provision being abused to cover cases where there was in fact no urgency. Specifically, it was designed to enable preventive action to be taken to protect children temporarily present in a Contracting State, for example, on a visit to a holiday camp or on an international exchange or in the course of residential access. The article ensured that the local authorities could take temporary measures to protect children on their territory without being obliged to wait until the situation degenerated into one of urgency. At a late stage in the proceedings on the protection of adults it became apparent that there would be value in a similar provision for adults. Earlier proposals for a special presence jurisdiction for measures relating to medical treatment had proved controversial, partly because they appeared to suggest that certain matters which would not on any view be measures by a judicial or administrative authority might be within the Convention's rules on jurisdiction.

Article 11 could be useful in any case where there is a need for a judicial or administrative authority of the State where the adult is temporarily present to take temporary measures to prevent a danger to the adult or avoid a deterioration in his or her personal or patrimonial position but where the case cannot be regarded as one of urgency. Some such cases may involve the authorisation of medical treatment[33] but the article could also be useful in the following type of case.

A man suffering from incapacity is found in a disturbed state at a railway station and is admitted to a hospital, under emergency procedures, for his own protection. Under the laws of the country where he is present an emergency admission justifies detention for only 48 hours. By the end of this period it is clear that the patient is a national of, and habitually resident in, another Contracting State but there has not been time to come to any detailed arrangement with the authorities of that State for his safe return and further protection. The authorities of the State where the patient is present would like to be able to detain him for his own protection, in the particular hospital where he is, for a further temporary period until satisfactory arrangements can be worked out with the authorities of the habitual residence. They clearly do not have jurisdiction to take any such measure on the basis of habitual residence or nationality. There is, on one view, not really a case of urgency. The patient is safe where he is. He is in no immediate danger. There has not been time to set up a transfer of jurisdiction under article 8 of the Convention and, in any event, the authorities need only a temporary jurisdiction, for which section 8 may seem to be too heavy.

Without article 11, the authorities would, on one view, have to release the patient and wait until there was a real case of urgency. With article 11 they can be

[32] Article 12.

[33] See section III.C below.

given jurisdiction to take a further territorially limited and temporary measure of protection, provided that they inform the authorities of the habitual residence.

Another type of measure for which article 11 could prove useful might be the appointment of a temporary local representative for a particular limited purpose.

7. Transferred Jurisdiction

Article 8 provides a mechanism whereby jurisdiction can be transferred by agreement from the authorities of the Contracting State of the habitual residence to the authorities of certain other Contracting States having a connection with the adult.[34] The transfer can take place either at the request of the authorities of the habitual residence or at the request of the other authorities. It can relate to all or only to some aspects of the adult's protection. The States to whom jurisdiction can be transferred in this way are: the State of the nationality; the State of the preceding habitual residence of the adult; a State in which property of the adult is situated; the State whose authorities have been designated by the adult in writing; the State of the habitual residence of a person close to the adult prepared to undertake his or her protection; the State in whose territory the adult is present, but only with regard to the protection of the person of the adult.

In theory, article 8 provides an ingenious and flexible mechanism which ought to be useful, but it requires a strong element of co-operation and trust between the authorities concerned and, given that other 'direct' grounds of jurisdiction should cater for most commonly encountered situations, it will be interesting to see how much it is used. The advantage for, say, the State of nationality or the State of the situation of property, in receiving a transfer under article 8 rather than relying directly on articles 7 or 9 (the direct grounds) is that the restrictions in those articles do not apply.

D. Applicable Law

1. Law to Be Applied in Taking Measures of Protection

In exercising their jurisdiction to take measures for the protection of an adult the judicial or administrative authorities of a Contracting State are to apply their own law.[35] This rule, which has the obvious merit of convenience and practicability, proved to be entirely uncontroversial throughout the discussions on the draft Convention. It is qualified by a provision which allows the authorities, exceptionally and in so far as the protection of the adult's person or property so requires, to apply or take into consideration the law of another State with which the situation

[34] There is a similar provision in articles 8 and 9 of the Children Convention of 1996.

[35] Article 13(1).

has a substantial connection.[36] This provision is designed to add some flexibility and to enable, for example, the law of the place where property is situated to be taken into account.

2. Law to Be Applied in Implementing Measures of Protection

Where a measure taken in one Contracting State is to be implemented in another Contracting State 'the conditions of its implementation' are governed by the law of that other State.[37] This provision is consistent with the provisions on enforcement of measures in another Contracting State which provides that the measure, once declared enforceable or registered for enforcement, is to be enforced as if it were a measure taken by the authorities of the requested State and in accordance with the law of that State.[38] The governing policy in both cases is that the mechanics of implementation or enforcement of a measure depend on the law of the State where it is to be put into effect.

3. Law Governing Mandates with a View to Incapacity

Article 15 of the Convention provides that the law governing the existence, extent, modification and extinction of powers of representation granted by an adult, by an agreement or unilateral act, to be exercised after incapacity is the law of the State of the adult's habitual residence at the time of the agreement or unilateral act unless the adult has chosen another law expressly and in writing.[39] The other law will displace the law of the habitual residence only if it is the law of a State of which the adult is a national, or where the adult was formerly habitually resident, or where property of the adult is situated.[40] The reasons for having such a limited list were partly pragmatic – to prevent an adult being pressurised into opting into a law with lax controls and to prevent the authorities of States with 'attractive' laws on this topic from being overwhelmed by opt-ins – but partly reflected an unease on the part of some delegations with a legal technique as yet undeveloped in their own countries.

The manner of exercise of powers of representation under mandates with a view to incapacity is governed by the law of the State in which they are exercised.[41] If, for example, the law governing the power of representation allows the representative to withdraw funds without any restriction but the law of the place where

[36] Article 13(2).

[37] Article 14.

[38] Article 27.

[39] Article 15(1).

[40] Article 15(2). In the last case (situation of property) the chosen law applies only with respect to that property.

[41] Article 15(3).

particular funds are located requires some authorisation before a representative of an incapable person can withdraw funds over a certain amount then the representative would need to obtain the authorisation in the same way as one whose powers were governed by the local law.

There may be cases where powers of representation to be exercised fall almost entirely in a State other than that whose law governs them. For example, the adult may have become habitually resident in another State after granting the powers and all the adult's affairs may be based in the State of the new habitual residence. The State of the new habitual residence has a clear interest in protecting the adult and, as we have seen, its laws will normally apply to any measures of protection taken. Its laws may well provide that the appointment of a guardian, tutor or other representative by a court supersedes the powers of a representative appointed by an adult. Indeed, in some cases the reason for appointing a representative by a judicial measure may be precisely that a representative appointed by the adult is not fulfilling his or her duties and may not even reply to communications. There is a potential conflict here between article 13, which says that the authorities taking the measure apply their own law and may only exceptionally apply or take into consideration the law of another State with which the situation has a substantial connection, and article 15 which says that the law governing the modification or extinction of powers of representation granted by an adult is the law laid down by that article, normally the law of the adult's habitual residence when the powers were granted. This proved a difficult issue to resolve. Some delegations saw the problem primarily from the point of view of powers voluntarily conferred by adults under their law and were reluctant to give the authorities of the current habitual residence powers to set these powers aside. Some other delegations saw the problem primarily from the point of view of the adult in need of current protection where a voluntarily appointed representative was failing to meet the needs of the situation and where the authorities of the current habitual residence might be the only authorities with jurisdiction to act. In the end the difficulty was resolved by providing that where, but only where, the voluntarily conferred powers of representation are not being exercised in a manner sufficient to guarantee the protection of the person or property of the adult they may be withdrawn or modified by measures taken by an authority having jurisdiction under the Convention.[42] Where this is done, the law governing the powers of representation must be taken into consideration to the extent possible.[43] If, for example, that law provides for a substitute representative nominated, in advance, by the adult to take over if the initially appointed representative fails in his or her duties then it would be anticipated that the authorities taking the measure would do everything possible to ensure that that person can take over as the adult's representative.

[42] Article 16. This assumes, of course, that the authorities have the necessary powers under their own law.

[43] Article 16, second sentence.

4. Other Provisions

a) Protection of Third Parties

There is a provision, based on a similar provision in the 1996 Children Convention, protecting third parties who enter into a transaction with someone who, under the law of the place where the transaction takes place, would be entitled to act as the adult's representative.[44] A doctor, for example, who in good faith accepts in State A a consent from a person who under the law of State A could give consent to a minor operation, would be protected by this provision if he or she did not know and could not reasonably be expected to know that the person was not entitled to give such consent by the law of State B, which actually governed the extent of the person's powers.

b) Preservation of Effect of Mandatory Rules

The Convention's rules on applicable law do not prevent the application of those provisions of the law of the State where the adult is to be protected where the application of those provisions is mandatory whatever law would otherwise be applicable.[45] Again an example can be taken from the medical field. If the law of State A provides that any medical operation on an adult who is in fact capable of giving informed consent can be performed only if the adult consents, then that rule will apply even if a power of representation governed by a foreign law purports to give a representative power to consent in place of the adult.

c) Public Policy

The application of the law designated by the rules in the Convention can be refused if such application would be manifestly contrary to public policy.[46] Again this could be a useful safeguard in relation to excessive powers conferred on a voluntarily appointed representative.

d) Renvoi

This is excluded. For the purposes of the Convention's provisions on applicable law, references to the law of a State are to the law in force in that State other than its choice of law rules.

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[44] Article 17.

[45] Article 18.

[46] Article 21. In the nature of things the safeguard is likely to be of no relevance in relation to the law applicable in the taking of measures. The authorities of a State who are taking a measure are unlikely to refuse to apply that State's own law and have a discretion as to the application of any other State's law.

E. Recognition and Enforcement

1. Recognition

The general rule is that measures taken in one Contracting State for the protection of an adult with incapacity are to be recognised by operation of law in all other Contracting States.[47] The potential utility of this rule is enormous. A person appointed as the adult's representative by the courts of the adult's habitual residence will have his or her authority recognised in all other Contracting States and will not need to go to the expense and trouble of seeking a separate appointment in each State where the adult has funds or property requiring management.

a) Grounds on Which Recognition May Be Refused

The grounds on which recognition may[48] be refused are limited. Recognition may be refused:[49]

> (a) if the measure was taken by an authority whose jurisdiction was not based on, or was not in accordance with, one of the grounds provided for in the Convention,
> (b) if, in certain cases, the adult was not given an opportunity to be heard,[50]
> (c) if recognition would be manifestly contrary to public policy in the requested State or conflicts with a provision of the law of that State which is mandatory whatever law would otherwise be applicable,
> (d) if the measure is incompatible with a later measure taken in a non-Contracting State which would have had jurisdiction under the rules in articles 5 to 9 (habitual residence, nationality, property) where the later measure fulfils the requirements for recognition in the requested State or
> (e) if the procedure for notification of placements abroad has not been complied with.[51]

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[47] Article 22(1).

[48] Note that the word is 'may', not 'must'.

[49] Article 22(2).

[50] This does not apply in cases of urgency or if the lack of an opportunity to be heard did not violate fundamental principles of procedure of the requested State. A State cannot refuse to recognise a measure on this ground if it itself would not have given the adult any opportunity to be heard in the circumstances.

[51] The effect of this ground for non-recognition, which was regarded as extremely important by a number of delegations at the Special Commission, is that a Contracting State can refuse to recognise a placement in an institution on its territory by a foreign authority if

b) Supplementary Provisions

It can sometimes be useful to know in advance whether a measure will be recognised in a particular country. Article 23 provides that any interested person may request from the competent authorities of a Contracting State that they decide on the recognition or non-recognition of a measure taken in another Contracting State.

2. Enforcement

In relation to adults suffering from incapacity the recognition of foreign measures, such as the appointment of a representative with powers to manage the adult's affairs, is likely to be much more important than enforcement. Only rarely would enforcement be an issue. Nonetheless the Convention provides that a measure which is enforceable in the State of origin and which is recognised in another Contracting State can, on request, be declared enforceable or registered for enforcement in that other State and can then be enforced there in the same way as measures taken by that State's own authorities.[52]

F. Co-operation

There are extensive provisions on co-operation between Contracting States.[53] The key to the co-operation mechanisms is the establishment in each Contracting State of a Central Authority.[54] However, direct communication between other authorities is not precluded by the Convention and was seen by some delegations as potentially important and useful, particularly where good direct links already exist.

A serious concern during the debates on the 1996 Children Convention and during the earlier debates on the Adults Convention was that onerous duties of co-operation could be costly and could deter States from ratifying. To meet this concern the Convention follows the policy of the Children Convention in ensuring that there are very few obligations laid on Contracting States which would require additional expense.[55] The Convention establishes a framework for co-operation

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the foreign authority has not, as required by article 33, provided the requested State with full advance information and given the requested State's authorities an opportunity to object to the placement.

[52] Article 25. Enforcement takes place in accordance with the law of the requested State. Article 27.

[53] Articles 28 to 37.

[54] Article 28. Federal States or States with more than one system of law or autonomous units can have more than one Central Authority but must designate one as a permitted channel for communications with other States.

[55] One article which does impose a strict obligation on a Contracting State is article 33 which, as noted above, obliges an authority contemplating the placement of an

which is capable of being used and of being expanding as the need arises but which is not expected to be onerous. The important point is that the authorities in each Contracting State would have a known Central Authority with whom they could communicate, and exchange information, where this would be useful for the protection of an incapable adult having connections with two or more countries.

G. General Provisions

The rules on recognition of measures and on the law applicable to powers of representation, already useful, are fortified by a provision for official certificates to be issued indicating the capacity in which a representative can act and the powers conferred.[56] The powers stated in the certificate are presumed to be vested in the representative in the absence of proof to the contrary.[57] The certificate can state the position only at the date when it is granted. So in practice it would sometimes be necessary to confirm with the issuing authority that the position was, so far as it knew, unchanged.

There are provisions to ensure the confidentiality of data gathered or transmitted for the purposes of the Convention[58] and the usual technical provisions, including a sophisticated set of rules for countries which have two or more systems of law or sets of rules of law applicable to different territories or groups of persons.[59]

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adult in an establishment in another Contracting State to consult with the Central Authority or other competent authority in that State and to furnish a report on the adult together with the reasons for the proposed placement. The decision to place may not be made if the authorities of the requested State indicate their opposition within a reasonable time. Although this is a firm obligation it arises only if such a foreign placement is contemplated and ought not, in practice, to occasion much if any additional expense. Some States would not contemplate such foreign placements by their authorities.

[56] Article 38. Model certificates and other model forms were prepared by a committee under the chairmanship of Mme BAUR (France). The Second Special Commission formally recommended the use of these forms, which are appended to its Final Act.

[57] Article 38(2).

[58] Articles 39 and 40.

[59] Articles 45 to 47. The draft of these articles was prepared by a committee chaired by Professor BORRÁS (Spain).

III. The Difficult Areas

A. The Nationality Jurisdiction

This was a difficulty at, but only at, the First Special Commission. There were two opposing views.[60] The first, persuasively advanced by Professor Lagarde of the French delegation, among others, was that in the case of adults with incapacity, unlike children, there was little practical risk of conflicts of jurisdiction and that a greater danger was that there might be difficulty in ensuring that anyone sought a measure of protection. There was therefore no reason for not including a ground of jurisdiction which was normal and uncontroversial in many countries. The danger that nationality might in some cases be a purely juridical link could be met by requiring some additional criterion to be satisfied, such as the presence in the country concerned of someone willing to take charge of the adult. The other view, advanced equally persuasively by Professor Bucher of the Swiss delegation, among others, was that there were obvious advantages in following the Children Convention of 1996 and in not building unnecessary complexity and an unnecessary potentiality for conflicts into the Convention on adults. The role of the State of the nationality could be adequately recognised in the transfer jurisdiction. Earlier Conventions[61] which had attempted to provide for both habitual residence and nationality as grounds of jurisdiction had run into trouble for precisely that reason. After much discussion the First Special Commission had an indicative vote on the general approach to be adopted. The result was in favour of excluding nationality as an independent concurrent ground of jurisdiction.[62] The narrowness of the vote was such, however, that it was clearly an unsatisfactory basis for progress. The Commission would have been split down the middle and the unresolved difference of opinion could have cast a blight over all further discussions and prejudiced the prospects for ratifications. Several delegations therefore supported the idea of seeking a solution which would command more general acceptance. After various compromise solutions had been proposed and discussed a small committee was set up to attempt to find a solution.[63] The committee duly recommended the scheme which forms the basis of the present provisions in the Convention and this was warmly welcomed. As we have seen, it recognises nationality as an independent ground of jurisdiction, without the need for any reinforcing factors, but has provisions which give precedence to the habitual residence in cases of conflict. This

[60] Various intermediate or compromise solutions were also suggested at various times.

[61] Such as the Hague Convention of 1961 on the protection of minors.

[62] See the Report of Meeting No 7 of the First Special Commission on the morning of Saturday 6 September.

[63] Professor PÉREZ VERA (Spain) (Chair), Mr ADENSAMER (Austria), Ms DE HART (USA), Professor SIEHR (Germany), and Professor STRUYCKEN (The Netherlands).

scheme was not challenged, or even questioned, at the Second Special Commission although some technical refinements and improvements were introduced.

B. The Concept of a 'Measure of Protection'

The term 'measure of protection' is not new in Hague Conventions. It was used, for example, in the old Convention of 1905 on *l'interdiction et les mesures de protection analogues*. Its meaning, however, is not elucidated in the new Convention on adults, or in the Children Convention of 1996. It seems clear in retrospect that this was responsible for some unacknowledged difficulty in the discussions. The concept of a 'measure of protection' is an important one because it determines the scope of the Convention in relation to jurisdiction, some of the rules on applicable law and recognition and enforcement.

It is clear, first of all, that the Convention is concerned only with measures of protection by judicial or administrative authorities. These are expressly mentioned in article 5, on jurisdiction based on habitual residence, and subsequent references to 'the authorities' must be taken as referring back to judicial or administrative authorities. The negative corollaries are significant. The Convention is not concerned with the powers of legislative authorities, except in so far as a Contracting State may be obliged to legislate in order to give effect to the rules in the Convention. Even legislative requirements of an obviously protective nature, such as a requirement to lodge accounts or inventories or a strict limit on the length of time for which an adult can be detained against his or her will, although measures of protection in a lay sense are not measures of protection within the Convention. It is also clear that the Convention is not concerned with the powers of individual doctors or medical teams who would not come within the category of judicial or administrative authorities.

A 'measure of protection' is seen in the Convention as a juridical concept – something in relation to which it makes sense to talk of jurisdiction, applicable law and recognition abroad. Again the negative corollary is important. A purely factual measure of protection is not within the Convention. An example may help. A court order appointing a representative for an adult with incapacity is a measure of protection within the meaning of the Convention. The provision by the representative of a smoke alarm for the adult's house, or of a crash helmet for the adult to wear while cycling, or the establishment of a system of accounting in relation to the adult's finances, may be measures of protection in the ordinary lay sense of the words but are not measures of protection within the meaning of the Convention. Similarly, the prescription or administration of an antibiotic, or the stitching of a wound, or the removal of a cancerous tumour might be measures of protection in a lay sense but are not as such measures of protection in the juridical sense in which the term is used in the Convention.

A 'measure of protection' as the term is used in the Convention is concerned only with a particular individual. It is only in relation to such an indi-

vidualised measure of protection that it makes any sense to base jurisdiction on the habitual residence, nationality or presence of an adult. It follows that general measures of protection such as those taken by administrative authorities for the inspection and registration of establishments or institutions are not measures of protection within the Convention.

Unless the true nature of a 'measure of protection' as the term is used in the Convention is appreciated there is a danger that the Convention may be thought to be of wider scope than it actually is. That could cause unnecessary difficulties for States considering ratification.

C. Medical Treatment

One of the greatest difficulties in negotiating the Convention was determining how it should deal with decisions relating to the medical treatment of adults with incapacity. A solution, acceptable to all, was reached only at the last minute and only after extensive informal discussions outside the meeting chamber.[64]

There were two fears, both now met by the terms of the Convention. One fear was that the Convention's rules on jurisdiction would be too restrictive in the medical field and would prevent doctors from giving necessary medical treatment. This was an unrealistic fear in relation to almost all ordinary cases because, as we have seen, a doctor would not be a judicial or administrative authority for the purposes of the Convention and actual medical treatment would not be a measure of protection as that term is used in the Convention. Before the presence jurisdiction of article 11 was introduced the fear had, however, some substance in the following type of case.

Authorisation by a specified local court is required for a particular operation or treatment on any incapable person but the incapable person in question is habitually resident elsewhere. The operation or treatment is highly recommended for the adult's condition, but is only available in a country other than that of the adult's habitual residence.

This problem was identified by the Finnish delegate[65] and caused much anxious deliberation. One answer of course is that the urgency jurisdiction could sometimes be used. Sometimes it could, but not always. The situation may not be at all urgent. In the absence of the presence jurisdiction now included in article 11 it is difficult to see how this difficulty could be overcome.

Fortunately the presence jurisdiction solves the problem. This jurisdiction, it will be remembered, can be used, exceptionally, by the authorities of the State

[64] Professor BUCHER (Switzerland) played an energetic and important role in brokering this solution. Valuable contributions to finding a solution had also been made at earlier stages by small committees led by Professor NYGH (Australia) and Professor POCAR (Italy) respectively.

[65] Mr HELIN.

where the adult is present. The measure must be of a temporary character for the protection of the person of the adult. It must have a territorial effect limited to the State in question. It must be compatible with any measures already taken by the authorities having primary jurisdiction (that is, normally, those of the habitual residence) and there is an obligation to inform those authorities. If we suppose a case where all concerned are anxious to secure the best treatment for the adult's condition, and where there is full co-operation between the authorities of the habitual residence and those of the presence, there seems to be no reason why these requirements should not be met in the type of case under consideration. The measure would be the authorisation by the court, not the actual medical treatment itself.[66] It would clearly be for the protection of the person of the adult. It could be of a temporary character, authorising treatment only within a specified period of weeks or even days. It could be of a territorial effect limited to the State in question, authorising treatment only in a named hospital in that State. All the conditions could be satisfied and the treatment could be given, which is clearly a satisfactory outcome in this type of case.

The other fear was that a wide presence jurisdiction would give rise to a danger of measures authorising dubious treatments, such as sterilisations for non-medical reasons, being taken in a country other than that of the adult's habitual residence and contrary to the wishes of the authorities of the habitual residence. Those most concerned on this point recognised that there would always be a danger of such treatments in non-Convention countries and that the terms of the Convention could not eliminate the danger. Nonetheless they were understandably anxious that the Convention itself should not be seen as facilitating undesirable practices. It was to meet these fears that the requirements of article 11 were made more rigorous. In particular, the State of the primary jurisdiction (normally that of the habitual residence) retains control because of the obligation of information and because any measure taken in the State of the presence must be compatible with measures taken by the State of the primary jurisdiction and must yield to any measure taken by the authorities of that State. A Contracting State could not, consistently with the Convention, allow its judicial or administrative authorities to use the presence jurisdiction to authorise controversial medical treatments in disregard of the views of the authorities of the State of the habitual residence.

D. Placements in Another Contracting State

One of the measures of protection which is listed as being within the scope of the Convention is 'the placement of the adult in an establishment or other place where

[66] The actual treatment would be a factual matter and not a measure of protection within the meaning of the Convention. See the discussion of the meaning of 'measure of protection' above.

protection can be provided'.[67] There was an understandable concern within the Special Commissions, first expressed by the Portuguese delegate[68] and taken up with some vigour by the Scandinavian delegations,[69] that the obligation to recognise measures taken by other Contracting States could lead to placements in other countries without the legitimate interests of the receiving country being taken into account. There was also, however, an understandable view, expressed with some eloquence by members of the French and Spanish delegations,[70] that it would be undesirable to place too many additional obstacles of a bureaucratic nature in the way of cross-border placements which, although unlikely to be frequent, might in particular cases be highly advisable in the interests of the adult concerned. The two views proved difficult to reconcile, but in the end it came down to the question whether a cross-border placement should require the consent of the receiving State or merely its non-opposition within a reasonable time of being consulted, with a reasoned report, on the proposed placement. As we have seen, the latter solution was the one adopted.[71] It appeared to command general acceptance.

E. Mandates with a View to Incapacity

Mandates with a view to incapacity, or enduring powers of attorney, have proved to be popular in those countries which have legislated on them. They give the adult some control over what will happen in the event of supervening incapacity. They can save money on costly procedures. Provided there is adequate public control they need involve no more danger than the appointment of a representative by a judicial or administrative authority.

The delegations from the United States of America and Canada were anxious to ensure that the benefits of enduring powers of attorney could be enjoyed across international borders.[72] They therefore argued for a liberal choice of law regime, with maximum autonomy for the adult and maximum respect for the law governing the powers conferred.

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[67] Article 3(e).

[68] Professor MARQUES DOS SANTOS

[69] Notably Professor JÄNTERÄ-JAREBORG (Sweden).

[70] Notably Mme BAUR (France) and Professor PÉREZ VERA (Spain).

[71] Article 33. The article applies only to placements contemplated by 'an authority having jurisdiction under Articles 5 to 8'. It does not apply to private arrangements made by, for example, a relative or guardian. In such cases there is no need for the provision in article 33 because there is no measure by a judicial or administrative authority which must be recognised under the Convention.

[72] The delegations provided very full and helpful information about the content of their laws on enduring powers of attorney and similar devices. The Quebec legislation, framed in civil law terminology, proved particularly interesting.

Some delegations from countries whose legislation does not, or does not yet, provide for mandates with a view to incapacity had reservations about the possibility of a liberal choice of law regime. There were several fears. One was that if adults could opt too easily for the application of a country's laws, that country might in practice be forced to apply or even introduce protective laws even if it had no real connection with the adult.[73] Another was that, if modification or extinction of the representative's powers were governed by the law of, say, a former habitual residence, the authorities of the current habitual residence might experience difficulties in taking necessary measures of protection. Another was that the powers conferred might enable the representative to take decisions of a kind which would be unacceptable in the country obliged to give effect to them.[74]

There was a certain underlying tension between these two points of view, both reasonable in themselves, at various points in the debates but the difficulties were eventually resolved. The solution contained several ingredients. First, the adult's freedom to choose a governing law was confined to the law of a State with which he or she had a strong connection.[75] Secondly, it was recognised that the authorities of the current habitual residence could take measures of protection, and apply their own laws in doing so, even if there was a representative operating under a mandate governed by a foreign law,[76] provided that they would withdraw or modify the powers of the privately appointed representative only where those powers were not exercised in a manner sufficient to guarantee the protection of the adult and that they would take into account the law governing those powers to the extent possible.[77] Thirdly, it was provided that the normally applicable law would not prevent the application of provisions of a mandatory nature in the State where the adult was to be protected.[78] And finally it was made clear that the application of the normally applicable law could be refused if this application would be manifestly contrary to public policy, a provision which, although now almost routine, is particularly well calculated to deal with the most controversial types of decision in the medical field.

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[73] This fear was expressed by the Finnish delegate, Mr M. HELIN, with particular reference to an early draft which gave too wide a choice of law to the adult.

[74] Decisions relating to the giving or refusal of certain types of medical treatment might be particularly controversial, as was pointed out forcefully by the Swiss delegate, Professor A. BUCHER.

[75] Basically habitual residence, preceding habitual residence, nationality and, in relation to that particular property, the situation of property. See Article 15.

[76] The problem here is not essentially different from that which might arise where the appointment of a representative by a judicial or administrative authority of a former habitual residence falls to be recognised.

[77] Article 16.

[78] Article 20.

IV. Conclusion

There is a need for a new Convention in this area. This Convention is a good one. Its core provisions – based on the importance of the habitual residence of the adult as a connecting factor and on the desirability of co-operation between Contracting States – proved entirely uncontroversial. Its more technical provisions draw on experience gained in the drafting of many previous Hague Conventions and, in particular, the Children Convention of 1996. The difficulties which did arise, all reflecting genuine and reasonable concerns held by delegates on both sides of the arguments, were resolved in ways which seem entirely satisfactory. It is to be hoped that the Convention will be widely ratified.

PUBLIC POLICY IN THE FRAMEWORK OF THE BRUSSELS CONVENTION

Remarks on Two Recent Decisions by the European Court of Justice

Rui Manuel MOURA RAMOS*

I. Introduction

The view is commonly held that public policy (*ordre public international)* is one of the concepts of private international law most strongly influenced by the presence of domestic principles and attitudes, thus constituting a barrier to the application of foreign laws designated by choice-of-laws rules, either in conventions or legislation. Nevertheless, it appears that the operation of the public policy exception is almost irreducible, depending on whether the relationship in question is in the process of creation, has already been created abroad or is recognized by a foreign judgment.[1]

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[1] Its effects in these different situations is in decreasing order. On this topic, see MOURA RAMOS R., 'L'ordre public international en droit portugais', in *Boletim da Faculdade de Direito da Universidade de Coimbra* 1998, pp. 45-62. On public policy in general, see LAGARDE P., *Recherches sur l'ordre public en droit international privé*, Paris 1959; DOLINGER J., *A Evolução da Ordem Pública no Direito Internacional Privado*, Rio de Janeiro

Yearbook of Private International Law, Volume 2 (2000), pp. 25-39

Besides this general character of the mechanism, one should also emphasize the uncertainty of its application due to its jurisdictional nature. Therefore, the inclusion of such a clause in international conventions is often regarded as a potential threat to the uniform application of the choice-of-laws rules embodied therein and to the goal of promoting unification of law.

In these circumstances, the presence of such a clause in an instrument of Community law [even in the broad sense, as in the case of a Community convention enacted under Article 220 of EC Treaty (now Article 293 CE)],[2] is always the subject of great interest. This is especially true in light of clarifications of its interpretation made by the Court of Justice when answering preliminary questions put by the courts of the Member States.[3] In fact, if such possibility exists, these preliminary rulings can eliminate the threat posed by such a concept to the uniform application of a convention on foreign judgments.[4] Moreover, due to the above-mentioned characteristics of such a clause, these preliminary rulings are the only mechanism having such effect, which is one more reason to take account of the respective case law.

The Court of Justice's case-law on the Brussels Convention was recently enriched with two judgments[5] dealing with three questions important in this field: the nature of the rules whose infringement can prompt recourse to the public policy exception; delimitation of the concept of the infringement of a fundamental principle of the State where the enforcement of the foreign judgment is sought; and, particularly, the role of fundamental rights in the determination of such principles. Furthermore,

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1979; HORN N., 'Die Entwicklung des internationalen Wirtschaftsrechts durch Verhaltensrichtlinien. Neue Elemente eines internationalen ordre public', in *RabelsZ* 1980, pp. 423-454; EPE A., *Die Funktion des ordre public im deutschen internationalen Privatrecht*, 1983; SPICKHOFF A., *Der ordre public im internationalen Privatrecht. Entwicklung-Struktur-Konkretisierung*, Frankfurt a.M. 1989; MOSCONI F., 'Exceptions to the operation of choice of law rules', in *Recueil des Cours*, Vol. 217, 1989-V, pp. 9-214; BUCHER A., 'L'ordre public et le but social des lois en droit international privé', *ibidem*, Vol. 239, 1993-II, pp. 11-116.

[2] Reference is to the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

[3] The use of preliminary questions in the framework of the Brussels Convention is provided for in the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

[4] This is also the case in regard to the provisions of the Rome Convention of 19 June 1980 on the law applicable to contractual obligations; however, the First and Second Protocol to this Convention of 19 December 1988 that enable domestic courts to make use of preliminary references are still not in force.

[5] Judgments of 28 March 2000 in case C-7/98, *Dieter Krombach*, not yet published, and of 11 May 2000 in case C-38/98, *Régie Nationale des Unions Renault SA*, not yet published.

these judgments present a complete and comprehensive description of the operation of public policy in connection with the recognition of foreign judgments. I will comment briefly on these four topics before attempting to reach a general conclusion on the position taken by the Court of Justice (when referring to the Brussels Convention) regarding the role of public policy and the extent of its impact on matters relating to the recognition of foreign judgments.

II. Operation of the Public Policy Exemption in Matters Relating to the Recognition of Foreign Judgments

The public policy exemption embodied in Article 27(1) of the Brussels Convention provides that a judgment[6] shall not be recognized if such recognition would be contrary to the public policy of the State where recognition is sought.[7] When interpreting this provision in the two cases cited, the Court of Justice first followed its own case law.[8] After placing this article in the context of the purpose of the Convention[9] and stressing that recourse to the public policy clause should be taken only in exceptional cases,[10] the Court recalled[11] that Article 27 in its entirety must be interpreted restrictively as it constitutes an obstacle to the attainment of one of the fundamental objectives of the Convention.

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[6] According to Article 31 of the Convention, this refers to a judgment given in a Contracting State on matters covered by the Convention (for an enumeration of these matters see Article 1 of the Convention).

[7] The other grounds of non-recognition are specified in Articles 27(2) to (5) and 28(1).

[8] Case 145/86, *Hoffmann v Krieg* [1988] ECR 645, paragraph 21, and Case 78/95, *Hendrykman and Feyen v Magenta Druck & Verlag* [1996] ECR I-4943, paragraph 23.

[9] The Court recalled that the aim of Convention is that of facilitating, 'to the greatest possible extent, the free movement of judgments by providing for a simple and rapid enforcement procedure'. Furthermore, it stressed that 'this procedure constitutes an autonomous and complete system independent of the legal systems of the Contracting States and that the principle of legal certainty in the Community legal system and the objectives of the Convention in accordance with Article 220 of the EC Treaty (now Article 293 EC) on which it is founded, require a uniform interpretation in all Contracting States of the Convention rules and the relevant case-law of the Court' (see Case 7/98, paragraphs 19 and 20).

[10] Case 7/98, paragraph 21, and Case 38/98, paragraph 26.

[11] Following the rule affirmed in Case 414/92, *Solo Kleinmotoren* [1994] ECR I-2237, paragraph 20. See the paragraphs mentioned in the previous note.

In view of its place in the theory of private international law, this starting point does not constitute a novelty. Furthermore, all legal literature on private international law in the Savigny tradition[12] unanimously stresses the exceptional nature of the public policy mechanism. I would only add that the Court of Justice neither referred to nor could refer to this undisputed notion, having felt the need to draw the same conclusions from the purpose of the Convention and the particular effects of the application of the public policy clause.

Subsequently, the Court of Justice referred to another of the generally recognized characteristics of the public policy mechanism – its national character,[13] stressing that, in principle, the Contracting States are free to determine the requirements of public policy in accordance with their own views.[14] However this acknowledgement did not preclude the Court of Justice from maintaining that such freedom is not unlimited, its exercise being subject to review by the Court of Justice as regards the limits within which the courts of each Contracting State may invoke the concept for the purpose of refusing the recognition of a judgment emanating from another Contracting State.[15]

The essential point is that public policy is no longer purely a domestic matter. Even if the Court of Justice allows the national courts of the Member States to decide on its application, it refuses to grant them unlimited freedom in this matter. On the contrary, it affirmed its power to monitor their use of the public policy exemption. To that end, the Court of Justice has not communitarized the public policy concept, as this depends on the general principles of law of the recognizing state and the extent to which recognition of the foreign judgment impinges on those general principles. However, as it did with the public policy clause in Article 48(3) EC Treaty [now

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[12] See, e.g., MOURA RAMOS R. (note 1), p. 58, and SYMEONIDES S./ PERDUE W.C./VON MEHREN A.T., *Conflict of Laws: American, Comparative, International. Cases and Materials*, St. Paul, Minn. 1998, pp. 889-891. These authors emphasize that 'the public policy exception operates only in these unusual cases where the foreign judgment is repugnant to fundamental notions of what is decent and just in the State where enforcement is sought, or when the judgment tends clearly to undermine the public interest, the public confidence in the administration of the law, or security for individual rights or personal liberty or of private property' (p. 890).

[13] See MOURA RAMOS R. (note 1), p. 88.

[14] Case 7/98, paragraph 22 and Case 38/98, paragraph 27. Relying on this idea [which Andreas BUCHER refers to as *spatial relativity* of the concept (note 1) p. 47], some authors have doubted the ability of the Court of Justice to express itself in concrete terms on the public policy clause, stressing that it could affect interpretation of the domestic law of the Contracting States. See TEIXEIRA DE SOUSA M./MOURA VICENTE D., *Comentário à Convenção de Bruxelas de 27 de Setembro de 1968 relativa à competência judiciária e à execução de decisões em matéria civil e comercial e textos complementares*, Lisbon 1994, p. 143.

[15] Case 7/98, paragraph 23 and Case 38/98, paragraph 28.

Article 39(3)],[16] it reserves the power to control its application, thereby preventing national courts of the Member States from jeopardizing the main objectives of the Convention.

By adhering to such an approach, the Court of Justice does not deny the special nature of public policy in matters relating to the recognition of foreign judgments and, more generally, in matters of private international law. It merely reconciles those distinctive characteristics with the needs of Community law, thus avoiding the risk that particularism might endanger the free movement of judgments served by the Convention.

It should be noted, however, that this is the first time that the Court of Justice has enunciated this principle with such clarity. In fact, until now, when dealing with the public policy clause in Article 27(1) of the Brussels Convention, the Court of Justice had limited itself to following the Jenard-Schlosser Report,[17] stressing that, 'according to the scheme of the Convention, use of the public policy clause [...] ought to operate only in exceptional cases',[18] and that 'recourse to it is in any event precluded when the issue must be resolved on the basis of a specific provision such as Article 27(2).'[19]

III. Infringement of the Convention's Rules on Jurisdiction and the Public Policy Exception; the Nature of the Rules Whose Infringement Prompts Recourse to the Public Policy Exception

Now dealing with recourse *in concreto* to the public policy exception, the Court of Justice had to answer the question whether the court of the State where enforcement

[16] See in this respect MOURA RAMOS R., 'Les nouveaux aspects de la libre circulation des personnes. Vers une citoyenneté européenne', in *Rapport général sur le thème III au XVème Congrès FIDE*, Lisbon 1992, pp. 395-453, esp. 413-414. On the impact of Community law on public policy (regarding Article 16 of Rome Convention), see STEINDORFF E., 'Europäisches Gemeinschaftsrecht und deutsches internationales Privatrecht. Ein Beitrag zum ordre public und zur Sonderanknüpfung zwingenden Rechts', in *Europarecht* 1981, pp. 426-441, esp. 433-435.

[17] Jenard-Schlosser Report, *OJ* 1979, C 59, p. 19.

[18] Judgment of 4 February 1988, in Case 145/86, *Hoffmann v Krieg* [1988] ECR 662, paragraph 21.

[19] Judgment of 10 October 1996, in Case C-78/95, *Hendrykman and Feyen* [1996] ECR I-4943, paragraph 23.

was sought could, with respect to a defendant domiciled in that State, take into account the fact that the court of the State of origin based its jurisdiction on the nationality of the victim of an offence.

According to Article 3 of the Convention, persons domiciled in a Contracting State may be sued in the courts of another Contracting State only by virtue of the rules set out in Sections 2 to 6 of Title II of the Convention. Not only is nationality not provided for in these sections, it is expressly excluded. Therefore, the fact that the court of the Contracting State where the judgment was given based its jurisdiction on the nationality of the victim of the offence amounts to an infringement of the rules of the Convention on jurisdiction. The question put to the Court of Justice was to decide whether such an infringement justifies recourse to the public policy exception.

The Court's negative answer is based on the fact that the Convention does not provide for review of the jurisdiction of the court of the State of origin in these circumstances.[20] Furthermore, Article 28(3) expressly specifies that 'the test of public policy referred to in point 1 of Article 27 may not be applied to the rules relating to jurisdiction'.

Thus the Court of Justice restricted itself to applying this well-established rule,[21] adding only that the generality of the wording of Article 28(3) dictates its application even in cases where the court of the State of origin had based its jurisdiction on an exorbitant criterion (such as nationality). The ruling is in line with the principle that review of the jurisdiction of the court that gave the judgment is excluded and relies on a declarative interpretation of Article 28(3). Even if we agree with this interpretation of the scope of the public policy exemption, it is appropriate to ask whether review of the jurisdiction of the court of the State of origin should take place not only in the situations mentioned in Article 28(1), but also in cases where a rule prohibiting exorbitant jurisdiction is violated. Within the framework of a double convention, the main reason for according recognition is the establishment of uniform criteria of jurisdiction. Thus the question arises (on the less *de lege ferenda*) whether recognition is dictated in a case where the court of origin, in addition to having no

[20] Such review only takes place in the situations referred to in Article 28(1).

[21] See, e.g., KAYE P., *Civil Jurisdiction and Enforcement of Foreign Judgments. The application in England and Wales of the Brussels Convention of 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters under the Civil Jurisdiction and Judgments Act 1982*, Oxon 1987, p. 1439; CARRASCOSA GONZALEZ J., 'Articulo 27' in CALVO CARAVACA A. (ed.), *Comentário al Convenio de Bruselas relativo a la competencia judicial y a la execucion de resoluciones judiciales en matéria civil y mercantil*, Madrid 1994, p. 483; TEIXEIRA DE SOUSA M./MOURA VICENTE D. (note 14), p. 144; GAUDEMET-TALLON H., *Les Conventions de Bruxelles et de Lugano. Compétence internationale, réconnaissance et éxecution des jugements en Europe*, 2nd ed., Paris 1996, p. 253; KROPHOLLER J., *Europäisches Zivilprozeßrecht. Kommentar zu EuGVÜ und Lugano-Übereinkommen*, 5th ed., Heidelberg 1996, p. 349.

jurisdiction under the Convention, had wrongly based its jurisdiction exclusively on a ground expressly excluded by the Convention (exorbitant forum). The conventional option seems to give extraterritorial effect to the infringement of the uniform rules set up by the Convention on the part of the judge who gave the first judgment.[22] However, the grounds for doing so do not appear to be sound. This is especially true when one recalls the precondition for imposing the system of automatic recognition by the Convention, i.e., confidence in the judgment of the court of origin and its ruling on jurisdiction.

Although such a situation could justify reference to the infringement of prohibition of the use of exorbitant *fora* within the meaning of Article 28(1), it cannot be considered to be covered by the public policy clause due to the exceptional character of this mechanism.

IV. The Public Policy Exception and Potential Infringement of Rules of Community Law

In view of the indeterminate nature of the public policy exception, one of the main tasks of private international lawyers is to define its operation.[23] Constituting an exception to the operation of conflict rules, public policy must be construed narrowly: fundamental principles, rules or policies of the forum must be offended and such a violation must be manifest. This means that the result of the recognition of a foreign judgment (or the application of a foreign law) must depart so radically from the forum's concepts of fundamental justice that it would be intolerable to the forum judicial conscience.[24] Since the crystallisation of such a concept is of major importance, it is necessary to take account of the judicial consequences drawn by the Court of Justice in this matter.

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[22] Expressly in this sense MUIR-WATT H., 'Droit judiciaire international. Contre une géometrie variable des droits fondamentaux de la procédure' in *Justices* 1996, pp. 329-338, esp. 333. And pleading for a restrictive interpretation of Article 28(3) that would limit its application to cases of judgments given in view of the grounds for jurisdiction specified by the Convention itself, see SCHLOSSER P., 'Jurisdiction in international litigation – The issue of human rights in relation to national law and to the Brussels Convention', in *Riv. dir. int.* 1991, pp. 5-34, and IDEM, 'Das internationale Zivilprozeßrecht der Europäischen Wirtschaftsgemeinschaft und Österreich', in *Festschrift Winfried Kralik*, Wien 1986, pp. 287-299, esp. 294-296.

[23] See MOURA RAMOS R. (note 1), p. 58.

[24] See, in this sense, SCOLES E.F./HAY P./BORCHERS P.J./SYMEONIDES S., *Conflict of Laws*, 3rd ed., St. Paul, Minn. 2000, pp. 139-140; and STONE P., *The Conflict of Laws*, London 1995, pp. 259 and 335-339.

Clearly expressed in the two judgments cited above, the Court's position follows the lines generally accepted by the doctrine of private international law. First of all, by not permitting any review of a foreign judgment as to its substance, the Convention[25] prohibits the courts of the State in which enforcement is sought from refusing to recognize or enforce that judgment on the ground that there is a discrepancy between the legal rule applied by the court of the State of origin and the one that would have been applied by the court of the State where recognition is sought, had it been seized of the dispute.[26] After this negative assessment, the Court of Justice takes a positive approach, stressing that recourse to the public policy clause could be deemed possible only where enforcement of the judgment delivered in another Contracting State would be at variance with the legal system of the State in which enforcement is sought to such a degree that it infringes a fundamental principle. The Court concluded that the prohibition of any review of the foreign judgment as to its substance requires that the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal system of the State in which enforcement is sought or of a right recognized as being fundamental within that legal system.[27]

After this totally orthodox theoretical framework concerning the *modus operandi* of the public policy exception,[28] the Court was led to affirm, in Case C-38/98, that recognition of a foreign decision cannot, without undermining the aim of the Convention, be refused solely on the ground that the court of the State in which enforcement is sought considers that an error on the applicable law had taken place, irrespective of whether it concerns national or Community law.[29]

The coherence of the judicial reasoning seems indisputable with regard to the construction placed on public policy. In view of the prohibition of review of foreign judgments as to their substance embodied in Article 29, misapplication of the relevant law should not lead to the operation of public policy or to refusal of recognition on any other ground. The fact that the conclusion does not change when that law is Community law seems to confirm the correctness of the Court of Justice's approach and its compliance with the methodology of private international law by recognizing that application of the public policy exception requires a 'manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought.'[30]

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[25] Articles 29 and 34(3).

[26] Case 7/98, paragraph 36 and Case 38/98, paragraph 29.

[27] Case 7/98, paragraph 37 and Case 38/98, paragraph 30.

[28] See, e.g., the works cited *supra*, note 1.

[29] Case 38/78, paragraph 33.

[30] Case 38/78, paragraph 34. That was certainly not the case in the situation under consideration in this preliminary reference, where the judgment whose compatibility with the principles of free movement of goods and freedom of competition was at stake, concerned the

V. Public Policy and Fundamental Rights: The Right to a Fair Hearing and its Position vis-à-vis Other Rights of Defence

Although this first development of the public policy exception may have been considered uncontroversial, this is not at all the case as regards the decision on the facts of the other case submitted to the Court of Justice. On the contrary, the problem discussed there has resulted in different positions being adopted both by the courts and in legal scholarship.

In this case, the question put to the Court of Justice concerned whether the court of the State in which enforcement is sought could take recourse to 'public policy' within the meaning of Article 27(1) on the ground that the criminal court of the State of origin did not allow the debtor to be defended by a lawyer in a civil-law proceeding for damages instituted within the criminal proceedings because he, as a resident of another Contracting State, was charged with an intentional offence and did not appear in person.[31] The point was therefore whether denying a defendant the right of representation by a lawyer in these particular circumstances could qualify as a manifest infringement of public policy and thus constitute a ground for refusing recognition.

The reasoning of the Court of Justice focuses on the position of fundamental rights within the framework of Community law. Recalling that these rights form an integral part of the general principles of law, whose observance it must guarantee, the Court remarked that it draws its inspiration for that purpose from the constitutional traditions common to the Member States, as well as from the guidelines supplied by international treaties for the protection of human rights, on which the Member States collaborated or of which they are signatories. In this context the Court stressed the particular importance of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[32] Adding that it had already recognized the general principle of Community law that everyone is entitled to fair legal process,[33] as

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existence of an intellectual property right in body parts for cars enabling the holder to prohibit traders in another Contracting State from manufacturing, selling, transporting, importing or exporting such body parts in that Contracting State (see paragraph 31).

[31] See Case 7/98, paragraph 17, question 2.

[32] Case 7/98, paragraph 25.

[33] See in this respect, PEDROT P., 'Les droits fondamentaux spécifiques au procès civil' in *Droits et libertés fondamentaux* (sous la direction de REMY-CABRILLAC, FRISON-ROCHE M.-A., REVET T.), Paris 1997, pp. 423-437 and QUILLERE-MAJZOUB F., *La défense du droit à un procès équitable*, Bruxelles 1999. As for the developments on harmonization of laws in respect of such a right, see NORMAND J., 'Le rapprochement des procédures civiles à l'intérieur de l'Union européenne et le respect des droits de la défense', in *Nouveaux juges, nouveaux pouvoirs? Mélanges en l'honneur de Roger Perrot*, Paris 1996, pp. 337-350.

inspired by those fundamental rights, the Court recalled that this case law is embodied in Article F(2) of the Treaty on European Union [now, after amendment, Article 6(2) EU].[34]

Dealing with the substance of the case, the Court of Justice underlined that the right of defence occupies a prominent position in the organization and conduct of a fair trial and is one of the fundamental rights derived from the constitutional traditions common to the Member States.[35] Furthermore, it recalled that the European Court of Human Rights had on several occasions ruled in cases relating to criminal proceedings that, although not absolute, the right of every person charged with an offence to be effectively defended by a lawyer constitutes one of the fundamental elements in a fair trial and an accused person does not forfeit entitlement to such a right simply because he is not present at the hearing.[36] In these circumstances the Court concluded that a national court of a Member State is entitled to rule that the refusal to hear the defence of an accused person who is not present at the hearing constitutes a manifest breach of a fundamental right.[37]

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[34] Case 7/98, paragraphs 26 and 27. The Court of Justice referred expressly to Case C-185/95 P *Baustahlgewebe v Commission* [1998] ECR I-8417, paragraphs 20 and 21 (in competition matters) and to the judgment of 11 January 2000 in joined cases C-174/98 P and C-189/98 P *Netherlands and Van der Wal v Commission*, not yet published, paragraph 17 (relating to access to information).

[35] *Ibidem*, paragraph 38. In the sense that it is a right that does not permit restrictions, see SUDRE F., 'La dimension internationale et européenne des droits et libertés fondamentaux', in *Droits et libertés fondamentaux* (note 33), pp. 37-56, esp. 47-48.

[36] *Ibidem*, paragraph 39. For the confirmation of the case law of the European Court of Human Rights in this sense, see, most recently, the judgment of 21 January 1999 in *Van Geyseghem v Belgium*, not yet reported, paragraphs 26-36, where the denial of defence by a lawyer when the defendant is not present at the hearing was held to be an infringement of Article 6(1) and (3)(c), of the European Convention of Human Rights. See also the judgments of 23 November 1993 in *Poitrimol v France*, Series A n.° 277-A, and of 22 September 1994 in *Lala v Netherlands*, Series A n.° 297-A and *Pellaoah v Netherlands*, Series A n.° 297-B. As for an overview of the importance of the right to a fair hearing in the system of ECHR, see *Les nouveaux développements du procès équitable au sens de la Convention Européenne des Droits de l'Homme*, Bruxelles 1996.

[37] *Ibidem*, paragraph 40. In this context, the Court of Justice stressed that observance of the right to a fair hearing is, in all proceedings initiated against a person that are likely to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the proceedings in question (paragraph 42). It dismissed the argument based on the wording of Article II of the Protocol extending the scope of the Convention to the criminal field that refers to persons who are not nationals of the State where the judgment had been given and who are domiciled in another Contracting State only in so far as they are being prosecuted for an offence committed unintentionally, in spite of the fact that preceding case-law (see Case 157/80 *Rinkau* [1981]

The case law[38] referred to confirms that, although the Convention is intended to secure the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals, it is not permissible to achieve that aim by undermining the right to a fair hearing.[39]

Therefore, the Court of Justice concluded that recourse to the public policy clause must be possible in exceptional cases where the guarantees laid down in the legislation of the State of origin and in the Convention itself have been insufficient to protect the defendant from a manifest breach of his right to defend himself before the courts of origin, as recognized by the ECHR.[40] It declared therefore that the court of the State in which enforcement is sought can, with respect to a defendant domiciled in that State and prosecuted for an intentional offence, take account, in relation to the public policy clause in Article 27(1) of the Convention, of the fact that the court of the State of origin refused to allow that person to have his defence presented unless he appeared in person.[41]

The interest in this decision is very clear, from the point of view of both Community law and private international law.

As far as Community law is concerned, it may be said that the judgment follows the path already laid down by earlier case law. In fact, the essential position taken reaffirms the precedent case law concerning the place and contents of fundamental rights in Community law.

Recalling that they are part of the general principles of law whose observance the Court ensures, the Court mentioned its inspiration in this respect[42] and emphasized

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ECR I-1391, paragraph 12) had construed this restriction as meaning that the Convention seeks to deny the right to be defended without appearing in person to persons who are being prosecuted for offences which are sufficiently serious to justify this (paragraph 41).

[38] Case 49/84, *Debaecker and Plouvier v Bouwman* [1985] ECR, 1779, paragraph 10.

[39] Case 7/98, paragraph 43.

[40] *Ibidem*, paragraph 44. The Court of Justice set aside the argument that Article II of the Protocol should be construed as precluding the court of the State in which enforcement is sought from being entitled to take account, in relation to public policy, as referred to in Article 27(1) of the Convention, of the fact that, in an action for damages based on an offence, the court of the State of origin refused to hear the defence of the accused person, who was being prosecuted for an intentional offence, solely on the ground that that person was not present at the hearing.

[41] *Ibidem*, paragraph 45.

[42] Reference is made, as usual, to the constitutional traditions common to the Member States and to the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories.

the particular significance of the ECHR.[43] Relying on the case law of the Strasbourg Court of Human Rights, the Court of Justice also stressed that the right to be effectively defended by a lawyer is one of the fundamental elements in a fair trial.[44] Furthermore, this is a universal right applicable to all persons and as such constitutes a general principle of Community law already recognized in its case law. In those circumstances, it follows that the denial to hear such a defence constitutes a breach of a fundamental right so manifest that it justifies exceptional recourse to the public policy clause, if the other remedies provided for in legislation and in the Convention were insufficient to protect the person from the manifest breach of his fundamental right, as recognized by the ECHR.

In any case, this shows that the Court of Justice recognizes the instrumental role played by conflicts and jurisdiction concepts (such as public policy) in the protection of fundamental rights – which is by no means new in the area of private international law.[45] Moreover, in accordance with the exceptional nature of public

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[43] As pointed out in Opinion 2/94 [1996] ECR I-1759, paragraph 33 and Article 6(2) EU.

[44] That element cannot be set aside just because the accused person is not present at the hearing.

[45] See in this respect the discussion on the relationship between the Constitution and private international law that followed the judgment of the German Constitutional Court of 4 May 1971 in MOURA RAMOS R., *Direito Internacional Privado e Constituição. Introdução a uma análise das suas relações*, 3rd ed., Coimbra 1994, *maxime* pp. 210-235; see also the various contributions (mainly those of WEINTRAUB R.J., VON MEHREN A.T. and TRAUTMAN D.T., SEDLER R.A., MARTIN J.A. and TWERSKI A.D.) to the Symposium on 'Choice-of-Law Theory after Allstate Insurance Co. v Hague', in *Hofstra Law Review* 1981, No. 1; and HAMMJE P., 'Droits fondamentaux et ordre public', in *Rev. crit. dr. int. pr.* 1997, pp. 1-31 (26-31). In regard to the protection of the rights granted by the ECHR, see SCHÜTZ D., *Der internationale ordre public. Der Ausschluss Völkerrechtswidrigen fremden Rechts im internationalen Privatrecht der Bundesrepublik Deutschland*, Frankfurt am Main 1984, pp. 29-30; COHEN D., 'La Convention européenne des droits de l'homme et le droit international privé français', in *Rev. crit. dr. int. pr.* 1989, pp. 451-483; MAYER P., 'La Convention européenne des droits de l'homme et l'application des normes étrangères', *ibidem*, 1991, pp. 651-665 (662-664); LEQUETTE Y., 'Le droit international privé et les droits fondamentaux', in *Droits et libertés fondamentaux* (note 33), pp. 75-96, esp. 88-95; NIBOYET-HOEGY M.-L., 'La mise en oeuvre du droit international privé conventionnel (incidences du droit des traités sur les pouvoirs du juge national)', in *Nouveaux juges, nouveaux pouvoirs? Mélanges en l'honneur de Roger Perrot* (note 33), pp. 316-336, esp. 323-329; and FOHRER E., *L'incidence de la Convention européenne des droits de l'homme sur l'ordre public international français*, Bruxelles 1999. Portuguese legal scholarship, in particular, has been very clear when underlining the inclusion of fundamental rights in the operation of the public policy clause. See in this respect, MOURA RAMOS R., *Direito Internacional Privado e Constituição*, pp. 216-220; FERRER CORREIA A., 'A revisão do Código Civil e o direito internacional privado', in *Estudos vários de direito*, Coimbra 1982,

policy,[46] the Court of Justice limits recourse to public policy to 'exceptional cases.'[47] One should in fact recall that the Court had already ruled[48] that 'according to the scheme of the Convention, use of the public policy clause [...] is in any event precluded when, as here, the issue is whether a foreign judgment is compatible with national judgment; the issue must be resolved on the basis of the specific provision under Article 27(3)'. This could lead to the conclusion that recourse to the public policy clause under Article 27 (1) should be excluded when the case in question falls under one of the other provisions of this Article.

This brings us to a very sensitive question of private international law, namely the scope of the public policy clause in matters relating to the recognition of foreign judgments.

In fact, some writers have stated that such a clause should only include the substantive public policy and not the procedural public policy, which is addressed at least in part by Article 27(2).[49] From that point of view, infringement of procedural public policy should only constitute a ground for the refusal to recognize a foreign judgment under the conditions specified in that provision. On the other hand, the opposite view has also been expressed[50] that Article 27(1) should be construed as allowing, under this provision, a reaction not only on grounds of the substantive public policy but also in defence of procedural public policy.

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pp. 279-307 (300-302); VIEIRA DE ANDRADE, *Os direitos fundamentais na Constituição portuguesa de 1976*, Coimbra 1983, pp. 289-290, note 75; MARQUES DOS SANTOS A., 'Constituição e direito internacional privado. O estranho caso do artigo 51, n.° 3, do Código Civil', in MIRANDA J. (ed), *Perspectivas Constitucionais. Nos 20 anos da Constituição de 1976*, Vol. III, Coimbra 1998, pp. 367-390, esp. 373-375; and MIRANDA J., *Manual de Direito Constitucional*, T. II - *Constituição*, 4th ed., Coimbra 2000, pp. 308-311.

[46] See *supra*, note 12.

[47] Case 7/98, paragraph 44.

[48] Case 145/86 (cited *supra*, note 8) paragraph 21.

[49] On the rights of defence, see CARRASCOSA GONZALEZ J. (note 21), pp. 483-484; GAUDEMET-TALLON H. (note 21), pp. 254-255, 256 and 264-266, and KESSEDJIAN C., Note on the judgments of *Cour d'appel de Versailles* (1st chamber) 26 september 1991 and of *Cour de Cassation* (1st civil chamber) 9 october 1991, in *Rev. crit. dr. int. pr.* 1992, pp. 516-527, esp. 524-527. According to these writers, rights of defence and procedural public policy come only under Article 27(2), even if GAUDEMET-TALLON H. is less affirmative on this point (p. 266).

[50] See, e.g., KROPHOLLER J. (note 21), pp. 326-329; KAYE P. (note 21), pp. 1443-1444; MUIR-WATT H. (note 22), pp. 332-338; and MAYER P., 'Droit au procès équitable et conflits de jurisdictions', in *Les nouveaux développements du procès équitable au sens de la Convention Européenne des Droits de l'Homme* (note 36), pp. 124-138, esp. 134-138. Underlining the risks incurred by the decisions that have followed this view, see PLUYETTE G., 'La Convention de Bruxelles et les droits de la défense (Propos sur la libre circulation des jugements dans l'Europe communautaire)', in *Etudes offertes à Pierre Bellet*, Paris 1991, pp. 427-438, esp. 454-456.

Furthermore, the discussion has not focused exclusively on the interpretation of Article 27(1) of the Brussels Convention, but has also extended to the scope of public policy in matters relating to the recognition of foreign judgments in domestic legal systems.

Concerning the first question, the courts of some Member States had explicitly decided, contrary to previous positions,[51] that Article 27(1) deals not only with the contents of a judgment but also with its formative process,[52] and that denial of the right of access to courts granted by Article 6(1) of ECHR is also included in this concept.[53] In regard to the role of the public policy clause in the recognition of foreign judgments by national courts, I refer to the situation in Portuguese legal scholarship: While some writers restrict application of the relevant provision[54] to substantive public policy,[55] others argue that such interpretation can only be regarded as the consequence of treating procedural public policy[56] separately in another provision,[57] thus apparently indicating that these two aspects are an integral part of the concept.[58]

By taking this position, the Court of Justice embraced a broad interpretation of the public policy exception on recognition and enforcement matters, expressly bringing itself in line with the case law of the Strasbourg Court of Human Rights. In

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[51] For the theoretical foundations of these positions, see the authors mentioned *supra*, note 49.

[52] *Corte di Cassazione italiana*, 18 May 1995, No. 5451, Emilianauto SpA/Studio Profeos Briketts Solicitors. The court invokes Article 28(3) to draw the conclusion that just the consideration of jurisdiction rules, not those of a procedural nature, is excluded. And, regarding Article 27 of Lugano Convention, the Swiss case law reveals that the absence of a fair judge can be construed under this provision: see PATOCCHI P./GEISINGER E., *Code DIP annoté*, Lausanne 1995, p. 171.

[53] See the judgment of the French *Cour de cassation* (1st civil chamber) of 16 March 1999 (in *Clunet* 1999, pp. 773-781) and the concurring note of André HUET.

[54] Article 1096(f) of 1997 Portuguese Code of Civil Procedure.

[55] MARQUES DOS SANTOS A., 'Revisão e confirmação de sentenças estrangeiras no novo código de processo civil de 1997 (alterações ao regime anterior)', in *Aspectos do novo processo civil*, Lisbon 1997, pp. 105-155, esp. 136.

[56] MOURA RAMOS R., *A reforma do direito processual civil internacional*, Coimbra 1998, p. 45.

[57] Now Article 1096(e) of the Code of Civil Procedure.

[58] This assertion can be read on the line of thought of John RAWLS, according to which 'pure procedural justice, (...) when there is no independent criterion for the right result', can be achieved by a correct or fair procedure in such a way 'that the outcome is likewise correct or fair, whatever it is, provided that the procedure has been properly followed'. However, 'a fair procedure translates only its fairness to the outcome only when it is actually carried out' (in *A Theory of Justice*, Oxford 1989, p. 86).

doing so, it took a stand in the old dispute concerning the sensitivity of private international law institutions to the essential values[59] of substantive law (here embodied in fundamental rights) and refused to give a special position to the Brussels Convention in human rights issues. As a result, it prevented a conflict from arising between the ECHR and the Brussels Convention, thus emphasizing the importance of the former in the hierarchy of Community rules (even in the realm of private international law matters).

VI. Conclusion

In these two cases concerning the contents and effects of the public policy clause within the framework of the Brussels Convention, the Court of Justice has followed the basic concepts of private international law developed in legal scholarship on this matter. However it has not limited itself to this stand, having also affirmed its power to monitor the application of this clause by the courts of the Member States.

In regard to the particular nature of the Brussels Convention, the Court excluded jurisdiction matters from the reach of this clause, stressed that this mechanism applies regardless of whether or not the infringed provisions in question belong to Community law, and included the protection of fundamental rights in its scope, as provided for in the ECHR and recognized by its case law. These results are to be commended. Not only do they represent the reception of the main conceptions of private international law in this matter, but they can also influence the case law of the Member States in a positive way with respect to the recognition and enforcement of judgments in general. In particular, the consideration of fundamental rights within the scope of public policy reinforces the protection of these rights inside the Community legal order, while emphasizing the openness of private international law institutions in matters concerning basic standards of justice.

[59] See, e.g., ZWEIGERT K., 'Zur Armut des internationalen Privatrechts an sozialen Werten', in *RabelsZ* 1973, pp. 435-452; MOURA RAMOS R. (note 45), pp. 97-153; LOUSSOUARN Y., 'La règle de conflit est-elle une règle neutre?', in *Travaux du Comité français de dr. int. pr.* 1980/81, t. 2, p. 43 *et seq.;* LIPSTEIN K., 'Private International Law with a social content – A super law?', in *Festschrift Konrad Zweigert*, Tübingen 1981, pp. 179-197; and VEKAS L., 'Wertorientierungen und ihre Grenzen im IPR', in *Internationales Privatrecht. Internationales Wirtschaftsrecht*, Köln 1985, pp. 145-159.

THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW AND ITS CURRENT PROGRAMME OF WORK CONCERNING THE INTERNATIONAL PROTECTION OF CHILDREN AND OTHER ASPECTS OF FAMILY LAW

by William DUNCAN*

I. Introduction

The objective of this article is to provide an overview of the current programme of work and of some of the activities of the Hague Conference on Private International Law in relation to the international protection of children and other family law matters.

The Hague Conference has a very long history of achievement in international family law in general, and in international child protection in particular, dating back one hundred years to its Third Session when the Hague Convention governing the guardianship of infants[2] was drawn up.

Since that time the protection of families and of children in transfrontier situations has, by reason of well known demographic factors, become an

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[1] For a more detailed survey of the work of the Hague Conference in relation to the 1980 Convention, see DUNCAN W., 'Action in Support of the Hague Convention. A View from the Permanent Bureau', to be published in the *New York University Law Review*.

[2] *La Convention pour régler la tutelle des mineurs*, first signed in 1902.

Yearbook of Private International Law, Volume 2 (2000), pp. 41-54

enormously challenging problem.[3] The fundamental building blocks underpinning the response of private international law have shifted over the years. The important role attributed to nationality, a feature of the 1902 Convention, has given way to the child's habitual residence as the principal connecting factor. The development of systems of international judicial and administrative co-operation for the protection of vulnerable children are a hallmark of the modern Hague Conventions. The whole edifice is strongly influenced by the movement towards child-centred laws, encapsulated in the UN Convention on the Rights of the Child of 20 November 1989.[4]

The development of well functioning systems of administrative and judicial co-operation is still in progress and represents one of the most exciting and challenging enterprises in which the Hague Conference is engaged.[5] It requires not only the building of firm legal structures to bridge the divide between legal and administrative systems which are set in varying cultural contexts; it also calls for the support and imagination of national authorities in committing the resources necessary to make the new systems function effectively.

The work of the Hague Conference can conveniently be divided into two strands. First there is the work of promoting, monitoring, and reviewing the operation of existing Hague Conventions, and of providing necessary support in terms, for example, of training and advice. Secondly, there is the developmental work which involves identifying new problem areas, researching them and working towards possible solutions, including if necessary the drafting of new instruments.

II. Maintenance Obligations

The next long-term developmental project on the family law agenda of the Hague Conference is the preparation of a new international instrument on maintenance obligations. A Special Commission was held in April 1999 to examine the practical operation of the four existing Hague Conventions of 1956, 1958 and 1973, as well

[3] See generally LOWE N./DOUGLAS G. (ed.s), *Families Across Frontiers*, The Hague [etc.] 1996, and DETRICK S./VLAARDINGERBROEK P., *Globalisation of Child Law. The Role of the Hague Convention*, The Hague [etc.] 1999.

[4] See, for example, DYER A., 'Case Law and Co-operation as the Building Blocks for Protection of International Families', in *Families Across Frontiers* (note 2), at p. 24, and VAN LOON J.H.A., 'The Increasing Significance of International Co-operation for the Unification of Private International Law', in *Forty Years On. The Evolution of Postwar Private International Law in Europe*, Deventer 1990, pp. 101, 107.

[5] See DUNCAN W., 'Administrative and Judicial Co-operation with Regard to the International Protection of Children', in *International Law and The Hague's 750th Anniversary* (edited by HEERE W.P.), The Hague 1999, at p. 199.

as the New York Convention of 1956 on the Recovery Abroad of Maintenance.[6] A variety of problems were identified at this Special Commission. They ranged from, on the one hand, a complete failure by certain States to fulfil their Convention obligations, particularly under the 1956 Convention, to, on the other hand, differences in interpretation and practice under the various Conventions. These differences related to such matters as the establishment of paternity, locating the defendant, approaches to the grant of legal aid and the payment of costs, the status of public authorities and of maintenance debtors under the New York Convention, enforcement of index-linked judgments, the question of the cumulative application of the Conventions and detailed matters such as mechanisms for transferring funds across international frontiers.

There was clearly disappointment at the 1999 Special Commission that many of the problems identified appeared to have remained unresolved despite the attention that had already been drawn to them by the previous Special Commission of 1995. That earlier Special Commission had taken the view that there was no need to consider major reforms of the relevant Conventions. The emphasis was placed on improving practice under the existing Conventions.[7] This approach was advocated again during the 1999 Special Commission. There was a natural reluctance among delegates to consider further international instruments in an area in which so many instruments already exist. Apart from the four Hague Conventions and the New York Convention, there are various regional conventions and arrangements, including the Brussels and Lugano Conventions and the system that operates among Commonwealth countries, as well as a proliferation of bilateral treaties and less formal agreements.

Despite this natural reluctance to embark on the drafting of yet further international instruments, the Special Commission of 1999 in the end came down in favour of a radical approach, namely that the Hague Conference should commence work on the elaboration of a new worldwide instrument. The reasons for this perhaps unexpected conclusion may be summarised as follows:

- disquiet at the chronic nature of many of the problems associated with some of the existing Conventions;

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[6] See 'Report on and Conclusions of the Special Commission on Maintenance Obligations of April 1999', drawn up by the Permanent Bureau, Hague Conference on Private International Law, December 1999, and 'Note on the Desirability of Revising the Hague Conventions on Maintenance Obligations and Including in a New Instrument Rules on Judicial and Administrative Co-operation', drawn up by DUNCAN W., Preliminary Document No 2 of January 1999 for the attention of the Special Commission.

[7] See 'General Conclusions of the Special Commission of November 1995 on the operation of the Hague Conventions Relating to Maintenance Obligations and of the New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance', drawn up by the Permanent Bureau, Preliminary Document No 10 of May 1996 for the attention of the Eighteenth Session.

- a perception that the number of cases being processed through the international machinery was very small in comparison with real needs;
- a growing acceptance that the New York Convention of 1956, though an important advance in its day, had become somewhat obsolete and that the open texture of some of its provisions was contributing to inconsistent interpretation and practice;
- an acceptance of the need to take account of the many changes that have occurred in national systems for determining and collecting maintenance payments, as well as the opportunities presented by advances in information technology;
- a realisation that the proliferation of instruments (multilateral, regional and bilateral), with their varying provisions and different degrees of formality, were complicating the tasks of national authorities.

The proposal to begin work on a new worldwide international instrument adopted by the 1999 Special Commission contains a number of important guidelines. An essential element would be the provisions relating to administrative co-operation; the instrument should be comprehensive and should not reject the best features of the existing Conventions but build upon them; the work should be carried out in co-operation with other relevant international organisations. It was also emphasised that the project should not inhibit the continuing work of the Hague Conference in promoting the ratification of and the effective operation of the existing Conventions.

It is relevant to observe that the recommendation emerged from a Special Commission comprising forty States, with four international organisations, including the United Nations and four non-governmental organisations, present as observers.[8]

III. Intercountry Adoption

The second Special Commission on the operation of the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption* will be held from 28 November to 1 December 2000. The first Special Commission was held in 1994 and discussed implementation issues, the application of the Convention to refugee children and certain standard forms.[9] The 'family' of

[8] The Recommendation was supported by the Special Commission of May 2000 on General Affairs and Policy of the Conference. See Preliminary Document No 10 of June 2000 for the attention of the Nineteenth Session, drawn up by the Permanent Bureau, June 2000.

[9] See 'Report of the Special Commission on the Implementation of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Inter-

Convention States has grown rapidly in the intervening years. There are now 40 States Parties to the Convention from all around the world. They are a roughly equal mixture of countries of origin and receiving countries.[10] Many other States are at various stages in the process of implementation. In the United States, which now receives about seventeen thousand children through intercountry adoption per year and is consequently by far the largest 'receiving State', the Senate recently approved implementing legislation.[11] Despite this important step, the legislative process is not yet complete. This and the establishment of an accreditation system are likely to take approximately one year and a half.

Among the issues likely to be discussed at the second Special Commission are systems and criteria for the accreditation of bodies which perform functions under Chapter IV of the Convention, and various questions surrounding the meaning of 'improper financial gain' in connection with activities related to intercountry adoption, which is forbidden by Article 32(1) of the Convention.

It is perhaps worth mentioning that the Permanent Bureau of the Hague Conference, in collaboration with the International Social Service in Geneva, has developed a support programme to assist in the effective implementation of the Convention in certain countries, and to provide training for those involved in the Convention processes, whether they be judges, Central Authorities or accredited body personnel. This programme has been developed as part of the Hague Project for International Co-operation and the Protection of Children,[12] under which funding is being sought for this and similar initiatives.

IV. Unmarried Couples and Registered Partnerships

The Permanent Bureau began work on the law applicable to married couples more than twelve years ago. Three notes have been prepared,[13] and a detailed survey was

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country Adoption (17-21 October 1994)', drawn up by the Permanent Bureau, March 1995, and Annexes A, B and C.

[10] Details concerning the status of this, and all other Hague Conventions, including lists of Central Authorities, may be found at the Hague Conference website at http://www.hcch.net.

[11] On 27 July 2000, 106th Congress, 2d Session, Bill H.R. 2909, with an amendment.

[12] Further information on the Hague Project is available on the Hague Conference website, see note 9 above.

[13] In 1987, 1999 and 2000. The third of these notes is entitled: 'Private International Law Aspects of Cohabitation Outside Marriage and Registered Partnerships', Preliminary Document No 9 of May 2000, drawn up by the Permanent Bureau for the attention of the Special Commission of May 2000. This note which contains references to the relevant

carried out in 1992 on the status of the unmarried couple in comparative law and possible approaches to resolving the private international law problems surrounding 'free unions'. The matter has been retained on the agenda of the Conference without priority, the scope of the subject matter having been extended in 1996 to 'jurisdiction, applicable law and recognition and enforcement of judgments in respect of unmarried couples'.

As regards the social dimensions of the subject matter,[14] there is no doubt that the number of persons co-habiting outside marriage continues to increase in many countries. The forms and nature of such co-habitation differ from country to country and within countries. They include trial marriage, same sex relationships or simply dependant adult relationships. As regards the legal responses in national law, two directions may perhaps be noted which are not mutually exclusive. First, there are several countries in which the gradual extension of privileges, rights and duties to unmarried partners on an *ad hoc* basis has continued, whether through statute[15] or by judicial activity.[16] In such countries it is common to find a different definition of co-habitation for different legal purposes. In other words, developments in this direction have been fragmentary, and not based on the idea of a settled legal status for co-habitation. Secondly, (and in some countries this has been a parallel development) there has in the last ten years been a movement towards granting a much broader status to certain types of co-habitation. The best known example is the 'registered partnership'.[17]

Reports is also available on the Hague Conference website (note 10 above) under "Work in Progress".

[14] A bibliographical overview of books and articles published between 1977-1987 appears in the Note of April 1992. EEKELAAR J./NHLAPO T., *The Changing Family, Family Forms and Family Law*, Oxford 1998, contains a number of relevant chapters. See also KIERNAN K., 'Partnership Behaviour in Europe: Recent Trends and Issues', in COLEMAN D., *Europe's Population in the 1990's*, Oxford 1996, pp. 62-91; ROTHENBACHER F., 'Social Change in Europe and its Impact on Family Structures', in *The Changing Family, Family Forms and Family Law* (*supra*), pp. 4-31.

[15] Some States have preferred the policy of legislating for cohabitation as a factual relationship giving rise to dependency. See, for example, the De Facto Relationships Act 1984 (New South Wales), now renamed the Property (Relationships) Act. See Property (Relationships) Legislation Amendment Act 1999.

[16] See for example the decision of the Canadian Supreme Court in *Attorney General for Ontario v M. and H.* No 25838 (20 May 1999), and the decision of the South African Constitutional Court in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*, Case CCT 10/99 (2 December 1999).

[17] Introduced in Denmark (1989), Norway (1993), Sweden (1995), Iceland (1996) and the Netherlands (1998). In France the analogous *pacte civil de solidarité* was introduced in 1999 (*Loi No 99-944 du 15 novembre 1999*). See generally FORDER C. (assisted by LOMBARDE S.H.), *Civil Law Aspects of Emerging Forms of Registered Partnerships*, Ministry of Justice, The Hague, 1999, and BAILEY M., *Marriage and Marriage-like Relationships*, Law

The challenges posed by these trends for private international law are very real. The absence of uniform private international law rules creates familiar problems of uncertainty with regard to status, and this impacts on mobility and the principle of free movement. The problems are ones which cannot be avoided, even by States that might prefer not to address them. The difficulties in finding uniform solutions should not be underestimated. There is the public policy question, how far will States which do not accept registered partnerships be prepared to go in recognising their effects on their own territories? There are also practical difficulties. How does one develop a private international law regime for an elusive concept like co-habitation for which there are multiple definitions even within legal systems? These are difficulties which are likely to remain. There is, for example, no indication of a trend towards a uniform definition of co-habitation. There is therefore little point in waiting for the phenomenon to become more 'settled'. Apart from the development of registered partnerships and analogous institutions, the fragmentary development of legal rules governing co-habitation is likely to remain a feature of the legal landscape for many years to come.

As regards the possible involvement of the Hague Conference in the development of uniform private international law rules governing co-habitation in general and registered partnerships in particular, the main issues are perhaps first whether the practical difficulties occasioned by the absence of uniform rules are serious enough to merit the beginning of a search for a solution and secondly whether there is the possibility at this stage of moving towards a consensus on what the right approach should be. The recent Special Commission on General Affairs and Policy of the Conference held in May 2000, had before it a proposal by the delegations of Austria, Canada, Croatia, Denmark, Finland, the Netherlands, Norway, Spain and Sweden that the agenda of activities for the Twentieth Session of the Hague Conference should include an exploratory examination of the private international law issues related to registered partnerships and non-marital co-habitation.[18] To this effect it was suggested that a working group should be set up for interested Member States within the Hague Conference, whose task it would be to study the possibility of establishing common principles of private international law in this field, or even the feasibility of drawing up a multilateral instrument, and to make relevant recommendations to the Twenty-first Session. The debate on this proposal was evenly divided. On the one hand several delegations drew attention to the importance of the private international issues raised by the acceleration in the development of legal frameworks for different forms of co-habitation outside marriage, and the unavoidable practical problems which are already beginning to arise and are likely to increase in the coming years. On the other hand several delegations noted that the resolution of some of these problems raised serious and sensitive considerations of public policy. As a result of this division of opinion, it was

Reform Commission of Canada, 1999 (*Le Mariage et les Unions Libres*, Commission du droit du Canada, 1999).

[18] Working Document No 4 of 9 May 2000.

decided not to press ahead with the proposal, so that the issue of jurisdiction, applicable law and recognition and enforcement of judgments in respect of unmarried couples remains on the agenda of the conference without priority and the Permanent Bureau will maintain a watching brief on developments in this area. It may well be that within a relatively short period of time a majority of Member States will call for a more active approach.[19]

V. International Child Abduction[20]

The *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, now has 62 States Parties.[21] The pace of ratifications of and accessions to the Convention has been remarkable. Most of those States entitled to ratify the Convention have done so, including Turkey, whose ratification became effective on 1 August 2000. Half of the accessions have occurred within the last five years. Considering that these include jurisdictions as far apart as South Africa, Turkmenistan, Brazil and Hong Kong, the global character of the Convention becomes apparent. It is notable also that, in May 2000, Morocco made a formal declaration of its intention to accede to the Convention.[22]

The Convention has been described as the jewel in the crown of the Hague Conference. But it is a jewel which requires constant attention if it is to maintain its lustre. Drafted at a time when fathers were thought of as the typical abductors, it now has to adjust to the phenomenon of abduction by mothers who are primary caretakers of their children. In fact, the Convention is currently subject to criticism from two apparently contradictory directions. On the one hand, charges have been levelled at certain Contracting States for lack of speed or rigour in the application of the Convention and for making too ready use of the defences under Article 13, especially the objections of the child, to justify refusals to make return orders.[23] There has also been

[19] For arguments in favour of the Hague Conference commencing work in this area, see BOELE-WOELKI K., 'De wenselijkheid van een IPR-verdrag in zake samenleving buiten huwelijk', in *Tijdschrift voor Familie- en Jeugdrecht* 1999, pp. 11-13; ŠARČEVIĆ P., 'Private International Law Aspects of Legally Regulated Forms of Non-marital Cohabitation and Registered Partnerships', in this *Yearbook* 1999, pp. 37-48.

[20] For a more detailed survey of the work of the Hague Conference in relation to the 1980 Convention, see DUNCAN W., 'Action in Support of the Hague Convention. A View from the Permanent Bureau', to be published in the *New York University Law Review*.

[21] For further details, consult the Hague Conference website (note 9 above).

[22] This unusual step was taken by the Minister of Justice of Morocco at The Hague on 1 May 2000.

[23] See, for example, the Resolution of the US House of Representatives (the Senate concurring) of 23 March 2000 (106th Congress, 2d Session, H.Con.Res.293) urging

an inability among Contracting States to give real effect to those provisions of the Convention designed to secure rights of access/contact. On the other hand, concern is increasingly expressed that the Convention, when applied with rigour, is too drastic a remedy for some situations in which it is commonly applied.[24] Typical of such cases would be that of the caretaking mother who has, following the breakdown of an unhappy and perhaps violent marriage, removed herself and her children to her country of origin where she feels safe and has the prospects of employment. The use of the return order on the application of a father whose real concern is not custody but rather the safeguarding of his visitation rights, it is argued, is a form of overkill.

The next (and fourth) general review of the operation of the 1980 Convention is to take place in The Hague in March 2001. The draft agenda for that session concentrates on certain key areas which experience has shown are central to its successful operation, especially those in respect of which there are significant difficulties or differences of approach among States Parties. The agenda items are set out in Preliminary Document No 6 of April 2000 for the attention of the Special Commission of May 2000 on General Affairs and Policy of the Conference, and these were in fact approved by that Special Commission. They are worth setting out in detail because they give an idea of the range of issues surrounding the practical operation of a Convention that is just approaching its twentieth birthday.

1) *The role and functioning of Central Authorities*
   - *a)* resources and capacities;
   - *b)* the role played by Central Authorities at different stages in the Hague process;
   - *c)* information and statistics.

2) *Judicial proceedings, including appeals, and enforcement issues*
   - *a)* courts organisation;
   - *b)* provision of legal representation;
   - *c)* speed of Hague procedures, including appeals;
   - *d)* manner of taking evidence, especially in relation to the Article 13 defences;
   - *e)* procedures for hearing the child and determining whether the child objects to return;
   - *f)* methods and speed of enforcement;
   - *g)* interpretation of key concepts such as habitual residence, rights of custody, acquiescence, etc.

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compliance by contracting parties, as well as certain named States, with the Hague Convention of 1980.

[24] See, for example, KAYE M., 'The Hague Convention and the Flight from Domestic Violence: How Women and Children are being Returned by Coach and Four', in *International Journal of Law, Policy and the Family*, Vol. 13, No 2, August 1999, at p. 191.

3) *Issues surrounding the safe return of the child (and the custodial parent, where relevant)*
   a) safe harbour orders, mirror orders and undertakings, including questions of international jurisdiction and the enforcement of orders;
   b) criminal proceedings and immigration issues;
   c) direct judicial communications – their feasibility and limits;
   [*d)* the role of Central Authorities. See Item 1 above.].

4) *Procedures for securing cross-frontier access/contact between parent and child*
   a) the role of Central Authorities and other intermediaries;
   b) promoting agreement by mediation, etc;
   c) jurisdiction, recognition and enforcement in respect of cross-frontier contact.

5) *Securing State compliance with Convention obligations*
   a) the accession process;
   b) monitoring/reviewing State practice;
   c) frequency and form of Special Commissions.

6) *Miscellaneous and general*
   a) the role of the Permanent Bureau;
   b) the International Child Abduction Database (INCADAT);
   c) judicial (and other) training and networking;
   d) encouraging further ratifications and accessions;
   e) non-Hague States and bilateral arrangements.

In addition to the preparations for this general review, the Permanent Bureau of the Hague Conference continues on a day to day basis to carry out work to support the 1980 Convention. This work includes assisting in the maintenance of good communications between Central Authorities, giving informal advice and assistance to Central Authorities and others on matters of interpretation and procedure under the Convention, drawing the attention of States Parties to, and offering advice about, situations in which serious obstacles have arisen to the proper functioning of the Convention, offering advice and referrals in individual cases, advising Contracting States in relation to implementation of the Convention, organising and supporting training conferences and seminars for judges, Central Authority personnel and practitioners, and the gathering of statistics.

A particular challenge is that of encouraging uniform interpretation of the Convention among the courts in the 62 States Parties to the Convention. In the absence of a single court to give authoritative rulings on the interpretation of the Convention, there is the challenge of achieving a reasonable level of consistency in

its interpretation. Alternative methods of encouraging uniform interpretation have to be found. Resort to the Explanatory Report by Elisa Pérez-Vera in several jurisdictions has been helpful. The courts in many jurisdictions have also accepted that in interpreting Convention terms such as 'rights of custody', they should not adopt a narrow approach based on the domestic law of a particular system, but should search for an autonomous Convention meaning. Citation of foreign judgments is frequent in certain jurisdictions. Resort has even been made, as an interpretative aid, to the Reports of the Special Commissions held by the Hague Conference on the operation of the Convention.[25] The Permanent Bureau has also over the years played a role in spreading information about notable decisions.

A pre-requisite of uniform interpretation is ready access to the many judgments which have now been delivered in the different national courts. To help fulfil this need, the Permanent Bureau in May 2000 launched its international child abduction database (INCADAT)[26] during the course of the Special Commission on general affairs and policy of the Conference. By the end of the year 2000, INCADAT should contain summaries in English and French of about 500 leading decisions from around the world. It is hoped that ultimately INCADAT will embrace most of the 1500 or so judgments which are known to exist. At the same time INCADAT will be keeping up with current case law. The summaries of cases on INCADAT are in standard form and are searchable by way of key concepts, such as habitual residence, rights of custody, acquiescence or by reference to a number of fields such as country, date, court, article of disposition. The summaries are followed, where possible, by the full text of the judgment or judgments in their original language. As with other projects which fall outside the normal budget of the Hague Conference, the Permanent Bureau has had to raise funds separately to support the development of INCADAT.

VI. Transfrontier Parent/Child Access/Visitation

At the May 2000 Special Commission on General Affairs and Policy, experts from Australia, Spain, the United Kingdom and the United States put forward a proposal[27] that the Permanent Bureau should prepare a report on the desirability and potential usefulness of a protocol to the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction that would provide in a more satisfactory and detailed manner than Article 21 of that Convention for the effective exercise of access/contact between children and their custodial and non-custodial parents in the context of international child abductions and parent re-locations, and as an alternative

[25] All now included on the Hague Conference website at http://www.hcch.net.

[26] Http://www.incadat.com.

[27] Working Document No 3, 9 May 2000.

to return requests. The framers of the 1980 Convention recognised the close links between the issues of international parent/child contact and the phenomenon of abduction. The preamble and Article 1 of the 1980 Convention make it clear that the objectives of the Convention include securing 'protection for rights of access', and 'effective respect' for such rights. Article 21 of the Convention provides for applications to Central Authorities 'to make arrangements for organising or securing the effective exercise of rights of access'. However, while Article 21 provides a basic structure and the potential for improving the effective exercise of transfrontier parent/child contacts, its lack of clarity and the absence of provisions for enforcement have in practice reduced its effectiveness and led to differing interpretations. It is now widely recognised that this is an area in which substantial improvements are needed.

Any future work of the Hague Conference in this area will need to take account of developments elsewhere. For example the Council of Europe has developed a draft convention on contact concerning children[28] which should be completed by the year 2001. The objects of that draft convention are, first, to determine general principles to be applied when making or amending contact orders or agreements; second, to fix, particularly in cases of transfrontier contact, appropriate safeguards and guarantees to ensure the proper exercise of such contact and the immediate return of children at the end of the period of contact; and third, to establish co-operation between Central Authorities, Judicial Authorities and other bodies in order to promote and improve contact between a child and parents, and other persons having family ties with children. The European Court of Human Rights has also been active in this field, using Article 8 of the European Convention on Human Rights to underline the positive obligation which states have to provide legal safeguards designed to secure an effective protection of the right of parents and children to respect for their family life, which includes mutual rights of access.[29] There has been some emphasis on the procedural rights of the parent seeking access and the importance of his or her involvement in the decision making process. There are also plans within the European Union for a Council regulation on the mutual enforcement of judgments on rights of access to children.

The Permanent Bureau has already begun its work on this project. One of the factors to be taken into account is the important role to be played by the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children, when it becomes operative. The 1996 Convention certainly does not provide solutions to all the problems. However, it does establish in Chapter II a rational set of jurisdictional standards applicable also to access/contact

[28] Developed by the Working Party on Custody and Access of the Committee of Experts on Family Law.

[29] See, in particular, the Court's recent judgments in *Elsholz v Germany* (Applic. No 25735/94) 13 July 2000, and *Ciliz v The Netherlands* (Applic. No 29192/95) 11 July 2000.

cases; it provides in Chapter IV for the recognition by operation of law, and for the enforcement, of access/contact orders (one of the deficiencies of Article 21 of the 1980 Convention); it also contains a special procedure in Article 35 to enable a parent who is seeking to obtain or maintain access to a child to obtain from a court where he is habitually resident a preliminary finding as to his suitability to exercise access, and on what conditions.

It needs to be borne in mind that some of the problems at the international level derive from differing approaches to parent/child contact at the national level,[30] as well as differing national rules concerning enforcement of contact/access orders. The importance of encouraging alternative means of dispute resolution in the international sphere, with a view to promoting agreement between the parents, is another important consideration. The question also arises as to whether the powers and responsibilities of Central Authorities should be strengthened with regard to access/contact applications, particularly in relation to the assistance which is given to foreign applicants for access orders.

VII. The 1996 Convention on the Protection of Children

The third of the modern Hague Children's Conventions, the *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*, is not yet in force.[31] Its broad scope makes implementation a substantial exercise for national legislatures. European States have in general felt obliged to deal first with the implementation of the Brussels 2 Regulation, the subject matter of which corresponds in one area to that of the 1996 Convention. Some States have been waiting for the conclusion of the *Convention on the International Protection of Adults*, with a view to implementing it and the 1996 Convention together. Despite the delay, the prospects for the 1996 Convention are good, and reactions to it in governmental and academic circles have been positive.

One task of the Permanent Bureau is to continue to draw attention to the great practical value which the Convention will have in different contexts. Three examples from among many will serve to illustrate. First, the Convention is an important complement to the 1980 Convention on Child Abduction. It makes explicit the jurisdictional principle which is implicit in the 1980 Convention, underlining the primary role played by the authorities of the child's habitual residence

[30] For an interesting discussion of some of the issues, see the recent decision of the English Court of Appeal in *Re L (a Child), Re V (a Child), Re M (a Child), Re H (a Child)*, 19 June 2000, as yet unreported.

[31] As of 1 August 2000, the Convention has been signed by Morocco, the Netherlands and Slovakia and ratified by Monaco and the Czech Republic.

in making orders for the protection of the child. The Convention also clarifies the subsidiary role which may be played by the authorities of the State where the child is present, whether through the taking of provisional or urgency measures. In so doing, the Convention provides the basis on which a judge making a return order will make additional orders for the protection of the child pending the taking of appropriate measures by the authorities of the child's habitual residence. Until such measures are taken, under the 1996 Convention the provisional or urgent measures made by the judge ordering return will be entitled to recognition and enforcement in the state of the child's habitual residence. Second, as has already been mentioned, the 1996 Convention will make a substantial contribution in the context of transfrontier parent/child contact/access disputes, through the provision of a rational set of jurisdictional principles which avoid competing jurisdictions, through provision for the automatic recognition and enforcement of contact/access orders, and by the special provisions contained in Article 35. Third, the Convention may be particularly helpful in relation to the growing number of situations in which children are being placed in alternative care across frontiers, for example under fostering or other long term arrangements falling short of adoption. Article 33 offers the opportunity for some control over these arrangements by the receiving State.

NATIONAL REPORTS

CHOICE OF LAW IN TORTS IN AUSTRALIA*

Peter NYGH**

* Abbreviations used in this article;

LR QB	Law Reports Queen's Bench (England)
LR PC	Law Reports Privy Council (UK)
QB	Queen's Bench (England)
AC	Appeal Cases (UK)
DLR	Dominion Law Reports (Canada)
NSWLR	New South Wales Law Reports (Australia)
CLR	Commonwealth Law Reports (Australia)
VR	Victorian Reports (Australia)
SR (NSW)	State Reports (New South Wales) (Australia)
ALJ	Australian Law Journal
SASR	South Australian State Reports (Australia)
ALR	Australian Law Reports (Australia)
ALRC	Australian Law Reform Commission

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Yearbook of Private International Law, Volume 2 (2000), pp. 55-73

I. The Rule in *Phillips v Eyre*

> 'As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England; [...] Secondly, the act must not have been justifiable by the law of the place where it was done.'[1]

These famous words were uttered by Willes J of the English Court of Queen's Bench in 1870. His Lordship cannot have dreamt that his words would achieve the status of a statute, to be analysed and re-interpreted as time went on. Nor could he have anticipated that his pronouncement would be carried with the Union Jack to the furthest ends of the world, including Australia. Yet, it was perhaps fitting that Australia should not merely receive his definition, but be arguably the last major country to remain bound by it in the twenty-first century. For Mr Eyre is a national hero of sorts in Australia. Of British birth he came to Australia to explore. He was the first to travel overland from South Australia to Western Australia and a large inland depression which occasionally fills with water, Lake Eyre, is named after him.

The plaintiff, Phillips, did not sue him for anything done in Australia. After his exploits in Australia and probably because of them, Eyre became governor of Jamaica. In that capacity he suppressed a rebellion. Mr Phillips sued the former governor after his return to England for assault and false imprisonment which he had suffered at the hands of the governor and his agents in Jamaica. The defendant pleaded that his action had subsequently been justified by an Act of Indemnity passed by the local legislature. Willes J held that he could rely upon this *ex post facto* legislation to avoid liability. His actions, in other words, had been justified by the law of the place where they were done.

The two limbed Rule was a peculiarity of English law. It is not found outside the former British Empire. Like much of English law, it appears to be born out of a reaction to situations which English courts would not tolerate. The first limb originated in a refusal by English courts to subject the owners of a British ship to liabilities not known under English law.[2] The second limb reflects the 'vested rights' theory which had then become known in England through the writings of von Savigny.[3] According to this theory, as Willes J explained, the obligation

[1] *Phillips v Eyre* (1870) 6 LR QB 1, at 28-9.

[2] *The Halley* (1868) LR 2 PC 193.

[3] See VON SAVIGNY F.C., *Treatise on the Conflict of Laws*, translated by GUTHRIE W., Edinburgh 1869.

'derives its birth from the law of the place [of the wrong] and its character is determined by that law.'[4]

There was an uneasy tension between the second limb which by then was almost universally accepted as the *lex loci delicti* rule, and the first rule which represented English judicial chauvinism. The balance was soon disrupted by the decision of the English Court of Appeal in *Machado v Fontes*.[5] In that case the plaintiff sued the defendant for defamation committed in Brazil. The defendant pleaded that the law of Brazil did not provide for civil action in respect of defamation but only provided for criminal action. The Court of Appeal held, however, that the words 'not justifiable' in the Willes formula meant that the act must be 'not innocent' by the law of the place of commission. Since a criminal act is 'not innocent', the second condition was satisfied.

This interpretation reduces the role of the *lex loci delicti* to minimal proportions. Once the wrongfulness of the defendant's conduct under the *lex loci delicti* is established, that law has no further function to perform and the law of the forum determines exclusively the extent of the liability of the defendant. In *Machado v Fontes* the plaintiff could recover damages in England for an act for which, it was assumed on the pleadings, he could not have recovered damages in Brazil. Since, judging by their names, the parties were both Brazilians, the case is an early example of 'forum shopping'.

Despite severe criticism, *Machado v Fontes* remained the law of England until 1971. In that year the House of Lords reviewed the law in *Boys v Chaplin*.[6] On the face of it that case did not call for any revision of *Machado v Fontes*: The application of its principle would have achieved the result each of their Lordships apparently desired. In that case the plaintiff and the defendant were both British servicemen stationed in Malta. They collided in a traffic accident in Malta caused by the negligence of the defendant. The plaintiff brought action against the defendant in England. There was no doubt that the negligence of the defendant was 'not innocent' under the law of Malta. But the extent of the damages was radically different in each country. Malta would only permit the recovery of economic loss which in this case was minimal. It would not permit recovery of pain and suffering which was the major source of the damages the plaintiff sought to recover in the English proceedings. *Machado v Fontes* would have led without detours to the application of English law. This was the preferred route of two of their Lordships.[7] But Lord Wilberforce preferred to restate the Rule in *Phillips v Eyre* in a more restrictive manner. He required 'actionability as a tort according to English law,

[4] (1870) 6 LR QB 1 at 28 per Willes J.

[5] [1897] 2 QB 231.

[6] [1971] AC 356.

[7] Lords Donovan and Pearson. Lord Guest wanted to introduce a simple *lex loci delicti* rule but avoided its effect in this case by classifying the plaintiff's claim as 'procedural'. Only Lord Hodson gave some support to the views of Lord Wilberforce.

subject to the condition that civil liability in respect of the relevant claim exists as between the actual parties under the law of the foreign country where the act was done.'[8] This re-definition of 'not justifiable' was clearly inconsistent with *Machado v Fontes*. Lord Wilberforce required not merely that 'a civil liability' exist under the law of Malta. Such a liability did exist, albeit a minor one. But he required that it exist 'in respect of the relevant claim'. In the case before the House the 'relevant claim' which the plaintiff sought to have vindicated was one of damages for pain and suffering which his Lordship regarded as a substantive claim quite distinct of that for recoupment of economic loss. Since there was no liability under Maltese law to pay compensation for pain and suffering, the result should have been that the plaintiff could only recover in England what a Maltese court would have given him: his out-of-pocket expenses amounting to a few pounds.

However, Lord Wilberforce did not stop there. Taking the statutory interpretation approach to the hallowed words of Willes J, he noted that the latter had referred to his formulation as 'a general rule'. Hence there was room for an exception. Lord Wilberforce took the view that the 'general rule' of *Phillips v Eyre* was not applicable in all circumstances. As he explained:

> '[...] in a case such as the present, where neither party is a Maltese resident or citizen, further enquiry is needed rather than an automatic application of the rule. The issue, whether this head of damage should be allowed, requires to be segregated from the rest of the case, negligence or otherwise, related to the parties involved and their circumstances and tested in relation to the policy of the local rule and of its application to these parties so circumstanced.'

Using language reminiscent of the American 'governmental interest analysis' approach, his Lordship continued:

The rule limiting damages is the creation of the law of Malta, a place where both plaintiff and defendant were temporarily stationed. Nothing suggests that the Maltese State has any interest in applying this rule to persons resident outside it, or in denying the application of the English rule to these parties. No argument has been suggested why an English court, if free to do so, should renounce its own rule. That rule ought in my opinion to apply.[9]

I have argued elsewhere that little purpose is served by analyzing non-existing governmental interests.[10] This so-called 'flexible exception' is better explained on the basis that the relationship between the parties should be governed by a law other than the *lex loci delicti*. As such it has its counterpart in other legal

[8] *Ibid*., at 389.

[9] *Ibid*., at 392.

[10] See NYGH P., *Conflict of Laws in Australia,* 6th ed., at p. 23.

systems.[11] Although the *ratio decidendi* of *Boys v Chaplin* was at first uncertain,[12] it was accepted by the Privy Council in *Red Sea Insurance Co Ltd v Bouygues SA*[13] that the reasoning of Lord Wilberforce in *Boys v Chaplin* must now be regarded as its *ratio decidendi*.

Lord Wilberforce in *Boys v Chaplin* still gave priority to the law of the forum. As he said:

> 'I accept what I believe to be the orthodox judicial view that the first part of the rule is laying down, not a test of jurisdiction, but what we now call a rule of choice of law: is saying in effect, that actions on foreign torts are brought in English courts in accordance with English law.'[14]

However, the law of the forum lost its pre-eminence in the Privy Council decision (on appeal from Hong Kong) in *Red Sea Insurance Co Ltd v Bouygues SA.*[15] In that case the Privy Council held that the 'flexible exception' could also prevail against the first limb of the Rule, leading in that case to the exclusive application of the *lex loci delicti*. This, in effect, led to the 'gutting' of the venerable rule and its replacement with a 'closest connection' rule which could point to either the law of the forum, or the law of the place of wrong or, conceivably, some other law. It is not surprising therefore that shortly afterwards the Rule in *Phillips v Eyre* was formally abolished in the United Kingdom by s. 10 of the Private International Law (Miscellaneous Provisions) Act 1995.[16] In the same year the Supreme Court of Canada abandoned the Rule, at least as regards intra-Canadian conflicts, in *Jensen v Tolofson.*[17]

II. The Last Outpost of the Empire

Unlike New Zealand, which still remains subject to the judicial authority of the Privy Council in London, the Australian judicial hierarchy has been completely independent since the passing of the Australia Acts in 1986. It is therefore free to

[11] Cf. German Rule, see EGBGB Article 41.

[12] See for a closer analysis, NYGH P., 'Some Thoughts on the Proper Law of a Tort', (1977) 26 I.C.L.Q. 932.

[13] [1995] 1 AC 190 (appeal from Hong Kong).

[14] [1971] AC 356, at 385.

[15] [1995] 1 AC 190.

[16] With the curious exception of the law applicable to defamation claims, *ibid.* s. 13.

[17] (1995) 120 DLR 4th 289.

refashion the law in relation to choice of law in torts, as it sees proper. Most of the case law in Australia arises out of interstate conflicts between the six states[18] and two self-governing territories[19] that make up the Australian federation. Torts conflicts involving the application of the law of a foreign country are relatively rare.[20] Unlike the United States, the common law in Australia does not differ from state to state. If different interpretations occur in state courts, they can be rectified by the High Court of Australia as the ultimate court of appeal in both state and federal matters. Conflicts of law within Australia occur either because one state has altered the common law by statute and the other state has not, or because both have changed the common law by statute in different ways. In relation to torts, conflicts arise most frequently because states have different periods of limitation in relation to personal injuries, or where the law of defamation has been amended by abolishing the common law right to punitive damages or by requiring the defendant to establish that the publication was not only true but that its publication was for the public benefit. More recently, conflicts have arisen in relation to motor accidents where some states have retained unqualified common law rights, other states have retained those rights but have imposed a maximum limit on the damages recoverable for non-economic loss and yet others have abolished the common law right to recover damages replacing it with an insurance scheme which is not based on fault.

Although most reported cases are concerned with interstate conflicts, it was generally assumed until 1988 that the same choice of law rules applied to both interstate and international conflicts. As Windeyer J said in *Pedersen v Young*,[21] Australian courts proceeded on the basis that each Australian jurisdiction is 'foreign' to each other for the purposes of private international law. In 1988 some members of the High Court in *Breavington v Godleman*[22] accepted the proposition that a different set of rules applied within Australia because of the imperatives of the full faith and credit requirement found in s 118 of the Australian Constitution. However, this was not a majority view and in 1991 the majority of the High Court in *McKain v R W Miller & Co (SA) Pty Ltd*[23] re-iterated the traditional view that for the purposes of the conflict of laws the states are separate and independent entities.

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[18] New South Wales, Victoria, Tasmania, Queensland, South Australia and Western Australia.

[19] The Australian Capital Territory (ACT) and the Northern Territory.

[20] See, e.g., *Lazarus v Deutsche Lufthansa AG* (1985) 1 NSWLR 188 (tort committed in India); *James Hardie Pty Ltd v Hall* (1998) 43 NSWLR 554 (tort committed in New Zealand).

[21] (1964) 110 CLR 162 at 170.

[22] (1988) 169 CLR 41, at 99 per Wilson and Gaudron JJ and at 136 per Deane J. The other justices: Mason CJ, Brennan, Dawson and Toohey JJ did not agree that there was such a constitutional mandate; see, NYGH P., 'Full Faith and Credit: A Constitutional Rule for Conflict Resolution?' in (1991) *Sydney Centenary Essays in Law*, p. 183.

[23] (1991) 174 CLR 1 at 39 per Brennan, Dawson, Toohey and McHugh JJ.

With one possible exception to be discussed below, courts dealing with the rare case of an international conflict of laws have proceeded on the basis that the rules developed by the High Court in intra-Australian cases are applicable to international cases as well.[24]

A. The Reception of the Rule in *Phillips v Eyre* in Australia

The High Court of Australia formally accepted the *Phillips v Eyre* formula and applied it to a conflict of laws between two Australian States in *Koop v Bebb*.[25] The High Court did express some doubt, *obiter*, about the correctness of the decision in *Machado v Fontes* suggesting that the words 'not justifiable' required the existence of a civil liability under the law of the place of wrong.[26] But the issue did not arise in that case.

However, the majority of the High Court accepted the primacy of the law of the forum. Whatever the requirement to be satisfied under the law of the place of the wrong, it was a threshold question only. As they said:

> 'English law as the law of the forum enforces an obligation of its own creation in respect of an act done in another country which would be a tort if done in England, but refrains from doing so unless the act has a particular character according to the *lex loci actus*.'[27]

This states what has afterwards become known as the 'justiciability theory'. That is to say, the introductory words used by Willes J in *Phillips v Eyre* 'in order to found a suit in England' have been read literally as stating a condition of jurisdiction *ratione materiae*, not a choice of law rule in the strict sense. First, the two conditions must be fulfilled. Secondly, only if those conditions are met, the question of choice of law will arise. And the choice of law rule is that the law of the forum applies.[28]

A few years later in *Anderson v Eric Anderson (Radio and TV) Pty Ltd*[29] the High Court re-iterated the application of the Rule to intra-Australian conflicts. The decision is of interest as one of the few reported cases since *The Halley* where the

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[24] See *Lazarus v Deutsche Lufthansa AG* (1985) 1 NSWLR 188; *James Hardie Pty Ltd v Hall* (1998) 43 NSWLR 554.

[25] (1951) 84 CLR 629 at 642 per Dixon, Williams, Fullagar and Kitto JJ. The fifth justice, McTiernan J, favoured the application of the *lex loci delicti* (*ibid*., at 649, 650).

[26] *Ibid*., at 643 per Dixon, Williams, Fullagar and Kitto JJ.

[27] *Ibid*., at 644.

[28] See *Anderson v Eric Anderson (Radio and TV) Pty Ltd* (1965) 114 CLR 20 at 42 per Windeyer J.

[29] (1965) 114 CLR 20.

plaintiff failed because the law of the forum denied him a remedy. Usually plaintiffs are smarter than that. The plaintiff, a resident of New South Wales, collided in the Australian Capital Territory with a van driven by an employee of the defendant company, a New South Wales corporation. The plaintiff, who could have sued in the ACT, brought action instead in the District Court in Sydney. He was found to have contributed to the accident through his own negligence although the defendant's driver was found to have the greater blame. Under the law of the ACT the plaintiff would have recovered reduced damages. Under the law of New South Wales, as it then stood, he recovered nothing.

Subject to the query raised by the High Court in *Koop v Bebb* about the correctness of the decision in *Machado v Fontes*, it can be seen that until 1971 the law in Australia was the same as in England on this point. Both countries accepted the two-limbed Rule in *Phillips v Eyre* and both accepted that the law primarily applicable was the law of the forum, subject to a threshold inquiry about the law of the place of wrong.

However, the decision of the House of Lords in *Boys v Chaplin* caused a divergence amongst Australian judges. In the first place, decisions of the House were never as a matter of law binding upon Australian courts. However, Australian judges were well aware that the same persons who constituted the Judicial Committee of the House also formed the core of the Judicial Committee of the Privy Council across the road, as it were, in Westminster. A strong decision of the House would be a good indication of what the Privy Council was likely to hold, and vice versa. But the decision in *Boys v Chaplin* was not, at first sight, a strong one. All five Law Lords arrived at the same conclusion by different means. Thus, while some Australian judges were sufficiently perceptive to see that Lord Wilberforce's opinion would eventually prevail,[30] others refused to depart from what they considered to be the law as defined by the High Court of Australia. Thus, the Court of Appeal of New South Wales in *Kolsky v Mayne Nickless*[31] refused to apply 'the double liability' general rule proposed by Lord Wilberforce and held that once the action of the defendant could be described as 'not innocent' under the law of the place of wrong, that law had no further relevance even if it denied recovery of the damages suffered by the plaintiff.

[30] See, e.g., Adam J of the Supreme Court of Victoria in *Corcoran v Corcoran* [1974] VR 164 applying the 'flexible exception' to allow a Victorian wife to sue her equally Victorian husband in Victoria although the motor accident occurred in New South Wales which still maintained the common law rule of interspousal immunity at the time.

[31] (1970) 72 SR (NSW) 437. For an argument that the views of Lord Wilberforce were contrary to the decisions of the High Court, see NYGH P., '*Boys v Chaplin* or The Maze of Malta', (1970) 44 ALJ 160.

B. The Revolution that Failed

The High Court of Australia had to consider the Wilberforce proposition in *Breavington v Godleman*. That case arose out of a motor car collision in the Northern Territory where the plaintiff was then resident. The plaintiff subsequently brought action against the defendant in the Supreme Court of Victoria. The reason why he did so was obvious. In the Northern Territory he had been precluded from bringing an action for common law damages for loss of earnings and earning capacity by the Motor Accidents (Compensation) Act 1979 (NT) which had introduced a non-fault compensation schemes for victims of motor accidents and had in s. 5(1) of that Act abolished the common law right of plaintiffs resident in the Territory at the time of the accident to sue in the Territory for such damages suffered as a result of a motor car accident occurring in the Territory. The trial judge in the Supreme Court of Victoria found that the plaintiff's right to recover damages should be determined by the law of the forum, that is to say, the law of Victoria, only.

The High Court did not share that view. All seven justices agreed in the end result that the plaintiff could not by resorting to the Victorian Supreme Court recover damages in that Court which were not available to him under the law of the Northern Territory. The decision is therefore clearly authority for the proposition that *Machado v Fontes* is no longer part of the law of Australia, if it ever was. Beyond that, however, as in *Boys v Chaplin*, the opinions of their Honours, as expressed in six separate judgments, diverged quite radically.

In the view of some academic commentators,[32] it was possible to discern a majority composed of the then Chief Justice Mason and Justices Wilson, Deane and Gaudron for the following propositions:

1. That as between Australian jurisdictions, the choice of law rules developed in relation to international conflicts should not be applied automatically but should be modified to take account of the basic homogeneity or similiarity in the common law and the statute law in force in the various Australian states and territories. The aim should be to ensure that there would be uniformity of outcome no matter where in Australia a matter is litigated.[33]
2. That the Rule in *Phillips v Eyre* should no longer be applied to intra-Australian litigation, but should be replaced by a simple rule referring

[32] NYGH P., *Conflict of Laws in Australia*, 5th ed, 1991, at pp. 234, 235; SYKES E.I./PRYLES M.C., *Australian Private International Law*, 3rd ed., 1991, at p. 565.

[33] (1988) 169 CLR 41 per Mason CJ at 77-79. However, Mason CJ did not share the view expressed by Deane J (*ibid*., at 136,137) and Wilson and Gaudron JJ (*ibid*., at 90), that s. 118 of the Australian Constitution (the 'full faith and credit' clause) mandated such an approach.

questions affecting the liability of the defendant for a tortious act to the law of the place of wrong only without any 'flexible exception'.[34]

3. That this is a choice of law rule and not a condition of justiciability.

The concurrent, and *a fortiori* the primary application of the law of the forum, which had been retained by Lord Wilberforce in *Chaplin v Boys*, was specifically rejected by Mason CJ in *Breavington v Godleman* as presenting 'a needless complication'.[35] With this basic 'one law approach', which excluded any effective role for the law of the forum Wilson and Gaudron JJ in their joint opinion[36] and Deane J in his separate opinion[37] agreed.

The majority therefore arrived at a position which some years later was reached by the Supreme Court of Canada in relation to intra-Canadian torts in *Jensen v Tolofson*: The application of the law of the place of wrong without any rule of displacement or 'flexible exception'. As Mason CJ explained, an Australian moving from one state within Australia to another should be aware that he or she was moving to a place where different laws might prevail.[38] In other words, an Australian driving a motor car across an internal border should insure against whatever risk the law of the state entered might impose.

Academic writers celebrated the end of *Phillips v Eyre* and the start of a new era in Australian conflicts law.[39] But it was not merely an academic mirage. The conclusion that, following *Breavington v Godleman*, the Rule in *Phillips v Eyre* was no longer law, was drawn by the New South Wales Court of Appeal in *Australian Broadcasting Corporation v Waterhouse*.[40] However, this was not to be.

C. The Counter-Revolution: a Return to Orthodoxy

In *Breavington v Godleman* the three minority justices (Brennan, Dawson and Toohey JJ) had also come to the conclusion that the law of the place of wrong should determine the extent of the defendant's liability. But, they arrived at this position by applying the Rule in *Phillips v Eyre*, as re-interpreted by Lord Wilberforce in *Boys v Chaplin*. Although each of the three justices delivered a separate opinion, the leading opinion amongst them was that of Brennan J (as he

[34] (1988) 169 CLR 41 at 77 per Mason CJ.

[35] *Ibid.*, at 77 per Mason CJ.

[36] *Ibid.*, at 99 per Wilson and Gaudron JJ.

[37] *Ibid.*, at 136 per Deane J.

[38] *Ibid.*, at 82 per Mason CJ.

[39] PRYLES M.C., 'The Law Applicable to Interstate Torts: Farewell to Phillips v Eyre?', (1989) 63 ALJ 158, esp. at 181.

[40] (1991) 25 NSWLR 519. See also *Byrnes v Groote Eylandt Mining Co Pty Ltd* (1990) 93 ALR 131 per Kirby P. at 139-140, per Hope AJA at 149.

then was). He rephrased the Wilberforce proposition somewhat more elaborately as follows:

> A plaintiff may sue in the forum to enforce a liability in respect of a wrong occurring outside the territory of the forum if:
> 1. the claim arises out of circumstances of such a character that, if they had occurred within the territory of the forum, a cause of action would have arisen entitling the plaintiff to enforce against the defendant a civil liability of the kind which the plaintiff claims to enforce; and
> 2. by the law of the place in which the wrong occurred, the circumstances of the occurrence gave rise to a civil liability of the kind the plaintiff claims to enforce.[41]

This formula repeats in essence the 'double liability test' framed by Lord Wilberforce as the general rule. Under that test the plaintiff must establish that he or she can recover damages in respect of the same head of damages under both the law of the forum and the law of the wrong. It is not sufficient that some damages are recoverable against the defendant under the law of the place of wrong. As we have seen, in both *Boys v Chaplin* and in *Breavington v Godleman* the plaintiff could have recovered damages of some kind (economic loss in Malta, non-economic loss in the Northern Territory, respectively), but not of the same kind. The claim in respect of pain and suffering in *Boys v Chaplin* was maintainable in England, but not in Malta. The claim for loss of future income in *Breavington v Godleman* was maintainable in Victoria, but not in the Northern Territory. The plaintiff can only recover the common denominator in damages.

It is also quite clear from the context of his remarks that the two conditions 'are not merely criteria of the forum's jurisdiction; they state the substantive law which governs a plaintiff's right to recover a judgment in respect of an extra-territorial wrong'.[42] As shown earlier, this had not been the view of Lord Wilberforce in *Boys v Chaplin* who had maintained the primacy of the law of the forum. The two co-dissenters, Dawson and Toohey JJ, did not agree with Brennan J on this point.[43]

The issue arose somewhat unexpectedly before the High Court again in *McKain v R W Miller & Co (SA) Pty Ltd* in 1991.[44] In the meantime the composition of the Court had changed: upon the retirement of Sir Ronald Wilson, McHugh J had been appointed to the vacancy. On the face of it, the case did not involve the issue of the law governing liability. At issue was whether a seaman

[41] (1988) 169 CLR 41 at 110-111 per Brennan J.

[42] *Ibid.*, at 110 per Brennan J.

[43] *Ibid.*, at 145 per Dawson J and at 160,161 per Toohey J.

[44] (1991) CLR 1.

who had been injured in an accident in a South Australian port on board a South Australian vessel owned by a South Australian company could bring suit in New South Wales where at that time a six year limitation period applied, despite the fact that the three year limitation period prescribed by South Australian law had expired. Long standing authority in Australia supported the view that statutes of limitation were of a procedural character governed by the law of the forum[45] and thus did not fall within the scope of the choice of law rule in relation to substantive liability in tort, whatever that rule might be. Counsel for the plaintiff conceded that under *Breavington v Godleman*, substantive liability was governed exclusively by the law of South Australia, but argued that this was not a question of substantive liability. Counsel for the defendant sought to extend the 'one law' principle announced in *Breavington v Godleman* to cover the hitherto 'procedural' statutes of limitation.

A majority of the High Court consisting of the three justices who had been in the minority in *Breavington v Godleman* (Brennan, Dawson and Toohey JJ) joined by the new member of the Court, McHugh J, delivered a joint opinion. In that joint opinion they endorsed the formula put forward by Brennan J in *Breavington v Godleman* raising it thereby from minority to majority status. To those two conditions, they added a third:

> '[...] the civil liability to which the law of the place in which the wrong occurred gave rise must be a continuing liability; if that civil liability be extinguished, the cause of action conferred by the common law of the forum is extinguished too.'[46]

This third condition does not add anything new. Indeed it reflects the decision in *Phillips v Eyre* itself. The Act of Indemnity passed by the Jamaican colonial legislature extinguished *ex post facto* whatever liability might have attached to Governor Eyre's actions in relation to the suppression of the rebellion. Accordingly, Willes J had held that he was not liable in England.

For good measure the majority opinion also made it clear that there is no room for any 'flexible exception' in the case of intra-Australian conflicts in relation to torts. They left open the question which would arise if the tort had occurred abroad.[47] Although in *McKain* it was not necessary to consider the 'flexible exception' as a departure from the law of the place of wrong, the issue did arise before the Full Court of the Supreme Court of South Australia in *Nalpontides v Stark*[48] where both plaintiff and defendant were residents of South Australia and the

[45] *Pedersen v Young* (1964) 110 CLR 162 at 166 per Kitto J, at 166-167 per Menzies J. The ruling reflects English case law going back into the nineteenth century.

[46] (1991) 174 CLR 1 at 39 per Brennan, Dawson, Toohey and McHugh JJ.

[47] *Ibid.*, at 38, 39 per Brennan, Dawson, Toohey and McHugh JJ.

[48] (1995) 65 SASR 454.

accident occurred when they were travelling together in a South Australian car to a neighbouring town just across the border in Victoria. The Full Court held that Victorian law determined the existence of liability (which it denied) and there was no flexible exception. The High Court refused to grant leave to appeal.

Because this joint opinion represented to a certain extent a compromise between the views expressed by Brennan, Dawson and Toohey JJ in *Breavington*, it left unclear whether the two main conditions were 'threshold requirements' which had to be satisfied before the law of the forum could be applied as the substantive law, or whether they were choice of law rules.

The remaining survivors on the High Court Bench of the majority in *Breavington v Godleman* (Mason CJ and Deane and Gaudron JJ) protested that they had been in the majority in the previous case, a proposition which the new majority denied by counting the opinion of Mason CJ in *Breavington v Godleman* in support of their position. This proposition was denied by Mason CJ himself and rightly so. He had only supported the views of Brennan, Dawson and Toohey J on the constitutional point. If there was any doubt about the legitimacy of the counter-revolution in *McKain*, this was settled in favour of orthodoxy when the same group of justices re-stated their views in another joint opinion in *Stevens v Head*.[49]

D. The Restoration of the Law of the Forum in its Primacy

The decision in *Stevens v Head* can be seen as completing the circle. The plaintiff in that case, who was a tourist from New Zealand, had been injured while crossing a road in Tweed Heads, New South Wales, some 800 meters south from the border between that state and Queensland. The driver was a resident of Queensland and the motor car was registered and insured there. The plaintiff brought suit against him in Queensland. A conflict of laws arose because the New South Wales had sought to 'cap' the damages recoverable in respect of damages recoverable for non-economic loss arising out of motor car accidents. In Queensland there was no such limitation. The Queensland court had held, following *Breavington v Godleman*, that the plaintiff could not recover more in Queensland than the law of the place of wrong allowed her. The High Court, by the same majority as in *McKain*, reversed that decision holding that she could recover her damages according to the law of the Queensland forum. Although they restated their support for the formula put forward by Brennan J in *Breavington*, they avoided its effect by classifying the New South Wales law capping the damages recoverable as 'procedural'.[50] They distinguished the outcome in *Breavington v Godleman* because the Northern Territory legislation in that case had abrogated any claim in respect of economic loss replacing it with an insurance claim. The New South Wales

[49] (1993) 176 CLR 433 at 453 per Brennan, Dawson, Toohey and McHugh JJ.

[50] (1993) 176 CLR 433 at 456, 457 per Brennan, Dawson, Toohey and McHugh JJ.

legislation, in contrast, had not abolished the common law right to sue for damages, but had merely limited the amount of damages recoverable. This distinction was subsequently applied by the New South Wales Court of Appeal in *Thompson v Hill*[51] where that Court held that a plaintiff injured in a motor car accident in Victoria after that state had introduced a no-fault insurance scheme, could not recover in New South Wales because the common law action for damages had been abolished altogether in Victoria. The High Court refused to grant leave to appeal because in its view the law on this point was clear.

The same issue arose before the New South Wales Court of Appeal in *James Hardie & Co Pty Ltd v Hall*[52] with two notable differences. In the first place, the place of the tort was New Zealand and not another part of the Australian federation. In the second place the injury did not arise out of a motor car accident, but out of the use of asbestos products manufactured by the defendant Australian company. New Zealand has an accident compensation scheme which replaces all common law actions for tort in respect of personal injury. The Court of Appeal held that the plaintiff could not bring an action in tort in New South Wales when the law of the place of wrong denied common law recovery altogether. Again the High Court refused to grant leave to appeal.

The decisions are, of course, perfectly explicable on policy grounds. In *Stevens v Hill* the defendant was insured under Queensland law to meet Queensland's unlimited liability. To deny unlimited recovery to the plaintiff who had nothing to do with New South Wales, would be to hand an undeserved windfall to the defendant's insurer. In *Thompson v Hill* the incident arose out of the use of a Victorian car in Victoria. The insurer could expect to meet liability according to that law. Again in *James Hardie* the defendant had engaged in industrial activities in New Zealand. It could expect that it would meet the liability imposed by New Zealand law if as a result of its enterprise one of its local employees was injured in that country.

The effect of *Stevens v Hill* is to reduce sharply the role of the law of the place of wrong. It will determine whether there is a liability in respect of the particular head of damage, but it will not determine the extent of that damage. It can be argued, therefore, that the law has returned to the statement in *Koop v Bebb* referred to earlier that the law of the forum defines the liability but refrains from doing so if that liability does not exist under the law of the place of wrong. The only change since then is that the question posed by the High Court in *Koop v Bebb* has now been answered: the liability must be of a civil kind. If this is so, the two conditions as restated by Brennan J in *Breavington* are merely conditions of justiciability and the law applicable to questions of substantive liability is the law of the forum. This was the view taken by Dawson J when sitting in the original

[51] (1995) 38 NSWLR 714. See also, *Nalpontides v Stark* (1995) 65 SASR 454.

[52] (1998) 43 NSWLR 554.

jurisdiction of the High Court in *Gardner v Wallace.*[53] But this view is not universally accepted.[54]

III. Future Directions

Despite the apparent settled nature of the present law in Australia, there are some doubts about the future direction which Australian law might take. This is largely due to the determined rearguard action fought by Justice Gaudron in support of the 'one law' view that she embraced in *Breavington v Godleman* and which she has never abandoned. Together with McHugh J she is the only survivor on the High Court Bench of the justices who sat in *McKain's* case and *Stevens v Head*. Thus, in *Kruger v Commonwealth*[55] she re-iterated her view that 'the choice of law rules of all States and Territories direct application of the *lex loci delicti*'. She took the view that *McKain* had not overruled *Breavington v Godleman* in that respect. Subsequently, in *Commonwealth v Mewett*[56] after Dawson J (who was then still on the Court) had expressed the view that the applicable law in relation to an interstate tort was the law of the forum,[57] she described as 'wholly inappropriate' the application 'of choice of law rules developed by the common law of England to determine the legal consequences of events occurring in one independent nation State and litigated in another ... for the resolution of legal controversies with respect to events occurring in Australia and involving the exercise of federal jurisdiction'. Hence she proposed a new version of the 'one law' approach: Where an Australian court is exercising federal jurisdiction the Rule in *Phillips v Eyre* is not applicable and that only the 'body of law' that operates in the state or territory where the incident occurred, should be applied.[58] The issue was not essential for the determination of that case and none of the other justices adverted to it. However, it must be acknowledged that Justice Gaudron is by now the most senior justice on the High

[53] (1995) 184 CLR 95 at 98. This was also the conclusion of Clarke JA in *Thompson v Hill* (1995) 38 NSWLR 714 at 735.

[54] See the discussion of the issue by Sackville J in *Mason v Murray's Charter Coaches and Travel Services Pty Ltd* (1998) 159 ALR 45 at 63-65. Drummond J in that case took the view that the second condition was a choice of law rule pointing to the law of the place of wrong (*Ibid.,* at 56). On that view it is the first condition which is a threshold requirement.

[55] (1997) 190 CLR 1 at 140 per Gaudron J.

[56] (1997) 191 CLR 471.

[57] *Ibid.,* at 510, 511 per Dawson J.

[58] *Ibid.,* at 523 - 526 per Gaudron J.

Court after the Chief Justice, Gleeson CJ. And even he was appointed after her tenure on the Court began. Her views therefore must be treated with great respect.

Whatever the merits of the 'one law' approach advocated by her Honour, the distinction she draws between the exercise of state or territorial jurisdiction where she acknowledges that she must accept the *McKain* formula, and the exercise of federal jurisdiction, where she asserts she is not bound to do so, is fraught with problems. Although federal courts in Australia cannot exercise jurisdiction under state law,[59] state and territorial courts have expressly been invested with most of the jurisdiction of the High Court and federal courts.[60] Actions brought in a state court may rely both on state and on federal law. Not only would the application of different choice of law rules as between different levels of courts cause confusion, this will be compounded if the same court in entertaining litigation between the same parties had to apply different choice of law rules depending on how each claim was framed.

There is little doubt that the existing law in Australia is unsatisfactory. It has attracted severe academic criticism.[61] No doubt a respectable case could be made for the application of the law of the forum in cases where the plaintiff has suffered damage there. In most cases the plaintiff will also reside there. Many cases have justified the exercise of jurisdiction on that basis,[62] and no doubt one could justify the application of the law of that place as well. Situations such as occurred in *Machado v Fontes*, where the tort was committed in Brazil and the plaintiff presumably resided there, could be avoided by appropriate choice of law rules. Conversely, one could also put up an even more respectable case for the application of the law of the place of wrong to substantive liability. After all, it is the primary rule nowadays not only in the civil law world but in the United Kingdom and Canada as well. But to combine both requirements in the one rule makes little sense. It is not surprising that the rule is constantly evaded either through the use of Lord Wilberforce's 'flexible exception', or by the High Court of Australia's use of clever classification. A rule which needs such desperate measures to avoid obvious hardship in its application, is not worth keeping.

The Australian Law Reform Commission was asked to consider reform of the choice of law rules applicable in Australian courts. In 1992 it issued its *Report on Choice of Law*.[63] Included in that Report was a consideration of the law in rela-

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[59] See *Re Wakim, ex parte McNally* (1999) 163 ALR 270.

[60] Judiciary Act 1903 (Cth) s. 39(2); Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth) s. 4(1).

[61] See JUENGER F.K., 'Tort Choice of Law in a Federal System', (1997) 19 *Syd. LR* 529; DAVIES M., 'Exactly What is the Australian Choice of Law Rule in Torts Cases?', (1996) 70 ALJ 711.

[62] *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458 (Privy Council on appeal from New South Wales); *Bier v Mines de potasse d'Alsace* [1976] ECR 1735.

[63] ALRC, *Choice of Law*, Report No 58, 1992.

tion to torts. The Report has described the Rule in *Phillips v Eyre* as redefined by the majority of the High Court in *McKain* as engendering 'confusion, uncertainty, injustice and forum shopping'.[64] As has been shown, subsequent developments have not improved the situation. Relying on the Report of the English law Commission which ultimately led to the enactment of the Private International Law (Miscellaneous Provisions) Act 1995 (UK),[65] the Australian Law Reform Commission likewise recommended the abolition of the Rule in *Phillips v Eyre* and its replacement as the primary rule with the application of the law of the place of wrong as the sole determinant of the liability of the defendant.[66] The influence of the law of the forum would be further reduced by the Commission's proposal that the role of the law of the forum in procedural matters be confined to the 'mechanism of litigation' which does not affect the outcome.[67]

Again following the United Kingdom proposals and in order to avoid hardship caused by an inflexible application of the law of the place of wrong, the Commission recommended that the application of the law of the place of wrong as the primary rule be subject to a 'rule of displacement' in favour of the application of the law of a place other than the place of wrong, where the circumstances of the claim in tort or of a question arising in relation to such a claim, have a substantially greater connection with such place, and, if both places are within Australia, the purpose of the law in force in both places will be promoted if the matter is determined in accordance with the law in force in the other place.[68] This, in effect, would make Lord Wilberforce's 'flexible exception' part of Australian law. Although the primary focus of the reference to the Commission was on the law applicable to intra-Australian conflicts, the Commission framed its proposals in such a way that they would also be applicable to international conflicts. The only exceptions were in cases where as is indicated in relation to the 'rule of displacement' special considerations should apply where both places were within Australia.

In relation to motor car accidents, the Commission proposed that in determining whether the rule of displacement should apply, the court have regard to the residence of the parties to the proceedings and the place where the vehicles involved in the accident were registered and insured. This would have ensured that the same result of applying Queensland law would have been reached in *Stevens v Head*. It would also have avoided the obvious injustice in applying Victorian law to the case of the South Australian parties in *Nalpontides v Stark* who drove a few kilometers across the Victorian border in a car registered and insured in South Australia. In addition to any tort claim which a person might have under these

[64] *Ibid.*, para. 6.14.

[65] English Law Commission Report No 193 (1990) para. 211.

[66] ALRC, *Choice of Law*, para. 6.27.

[67] *Ibid.*, para. 10.13.

[68] *Ibid.*, para. 6.27.

proposals, the right of a party to non-fault compensation under a scheme in force in the place of residence of that party, the place of registration of the motor vehicle involved or of the place of the accident, should be preserved.[69] This would have given both parties in *Nalpontides v Stark* the option of claiming under the Victorian scheme if that was more favourable.

As at the time of writing in 2000, the recommendations have not been implemented. They were put forward as the basis of a uniform scheme requiring action by both the federal and state legislatures. It is my understanding that the recommendations have been considered by the Standing Committee of Federal and State Attorneys-General, but that the requisite consensus has not as yet been achieved. It may be that, due to the lapse of time since 1992 some of the proposals will need revision. But the need for reform has increased rather than gone away. Alternatively, of course, the High Court which has almost entirely changed its composition since 1993 might reconsider its decisions in the light of the recommendations, and the changes in the law in the United Kingdom and Canada. There is a natural Australian tendency to remain loyal to museum pieces. In many instances this is harmless. In this instance it is not.

IV. Post Scriptum – The Wheel Turns Again!

Since this article was written the High Court of Australia has once again changed course. On 21 June 2000 the Court handed down its decision in *John Pfeiffer Pty Ltd v Rogerson*.[70] That case, like all the other High Court decisions discussed earlier, involved an intra-Australian conflict. The plaintiff was injured in New South Wales in an industrial accident. He sued his employer in the Australian Capital Territory where his employer had its principal place of business and where the plaintiff was normally employed. Under the law of New South Wales there was a maximum limit on the amount recoverable. No such limit was imposed by the law of the Territory. According to the High Court's earlier decision in *Stevens v Head*,[71] the plaintiff should have been able to recover the full amount to which he was entitled under the law of the forum. But the High Court repudiated its earlier decision.

In a joint judgment to which the Chief Justice, Gleeson, and justices Gaudron, McHugh, Gummow and Hayne took part, the Court formally rejected the ancient Rule in *Phillips v Eyre* as an anachronistic inheritance from the colonial era. On purely policy considerations, it embraced a rule favouring the application

[69] *Ibid.*, para. 7.15.

[70] (2000) 172 ALR 625

[71] (1993) 176 CLR 433

of the *lex loci delicti* without any flexible exception or rule of displacement as regards torts committed in other Australian jurisdictions. In coming to this conclusion, it was encouraged by the similar decision of the Supreme Court of Canada in *Tolofson v Jensen*.[72] As regards the distinction between substance and procedure, the Court adopted a 'realistic approach'. As the majority put it:

> '[…] matters that affect the existence, extent or enforceability of the rights and duties of the parties to an action are matters that, on their face, appear to be concerned with issues of substance, not with issues of procedure.'

It followed that statutes of limitation and statutes limiting the amount of damages that are recoverable should now be classified as substantive. Consequently the plaintiff could only recover what the law of New South Wales allowed. Kirby J delivered a concurring judgment. Callinan J confined himself to concurring on the classification point. He did not consider it necessary to decide the fate of *Phillips v Eyre*. It is interesting to note that McHugh J who, as a newly appointed justice, had joined the 'counter-revolution' in *McKain* now helped to bury it. For Gaudron J, after many years in the wilderness, it was an ultimate vindication. The High Court has returned to the majority position in *Breavington v Godleman*.[73]

What is the effect of this decision in international matters? It is clear that *Phillips v Eyre* is dead for domestic Australian purposes. The majority, this time, is convincing. Although the High Court expressly confined its decision to intra-Australian conflicts in torts, it would be very hard to believe that Australian courts will still apply a rule to international torts which the High Court as stigmatised as an anachronism. The rule applicable to international torts is therefore likely to be one that primarily relies on the *lex loci delicti*. The only issue that the joint judgment expressly left open is whether there is room for a 'flexible exception' in relation to international torts.[74]

It is to be hoped that the girations of the High Court on this issue are now over. However, as Kirby J pointed out,[75] there are still a number of unresolved issues. Since their Honours made repeated, and approving, reference to the unimplemented Report of the Australian Law Reform Commission, it may be that it will receive much needed attention by the federal and state governments in the near future.[76]

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[72] (1995) 120 DLR 4th 289

[73] (1988) 169 CLR 41.

[74] *John Pfeiffer Pty Ltd v Rogerson* (2000) 172 ALR 625 at 647 [80].

[75] *Ibid*., at 664-5.

THE NEW UNIFORM LAW WITH REGARD TO JURISDICTION RULES IN CHILD CUSTODY CASES IN THE UNITED STATES

Robert G. SPECTOR*

I. Introduction

The United States has a federal system of government where some of the functions are performed by the federal government and others by the individual unit states. The problems of domestic relations, including the subjects of marriage, divorce or dissolution of marriage, maintenance, division of marital property, custody and access to children, as well as other areas of parental responsibility, are almost exclusively within the control of the individual states.[1]

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[1] The federal government does play a peripheral role in some family law areas that are of national concern. For example, the federal government may regulate, pursuant to the Full Faith and Credit Clause of the United States Constitution, the effect that the judgments and laws of one state have in another state. See the discussion in SCOLES E./HAY P., *Conflict of Laws*, 2nd ed., St. Paul 1992, pp. 949-996. In another example, the federal government passed the 'Defense of Marriage' Act, Publ. L. No. 104-199, 110 Stat. 2419 (1996)(codified in 1 U.S.C. §7), which authorized the individual states to refuse to recognize a same-sex marriage performed in other states. That law also provides that, for federal law purposes,

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Even if a federal court were to have jurisdiction over the parties on an independent federal ground, such as diversity of citizenship,[2] it will abstain from deciding issues of domestic relations which are more properly decided by courts of the individual states.[3] Since each individual state is solely competent to decide cases involving problems of domestic relations, such as custody and access issues, they relate to each other in the same way as independent countries. It has therefore become necessary to develop some method to determine which state will have jurisdiction to decide issues involving custody of and access to children.

The first major attempt to provide uniform rules of private international law[4] in cases involving custody of children occurred in 1968 when the National Conference of Commissioners on Uniform State Laws (NCCUSL) promulgated the Uniform Child Custody Jurisdiction Act (UCCJA).[5] The UCCJA was ultimately adopted by all fifty states, the District of Columbia and the Virgin Islands. A number of adoptions, however, significantly departed from the original text as promulgated by NCCUSL.[6] In addition, almost thirty years of litigation since the promulgation of the UCCJA produced substantial inconsistent interpretations by state courts.[7]

As a result, the goals of the UCCJA were rendered unobtainable in many cases.[8] Ultimately the Drafting Committee of the replacement for the UCCJA, the

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such as federal income taxation and social security, a marriage shall be defined as one man and one woman.

[2] 28 U.S.C. §1332.

[3] *Barber v Barber*, 62 U.S. 583 (1858); *Burrus v Burrus*, 136 U.S. 586 (1890).

[4] Or Conflict of Laws as the subject is known in the United States.

[5] The National Conference of Commissioners on Uniform State Laws (NCCUSL) attempts to bring about national uniformity by developing laws which they hope will be adopted by all fifty states. It is somewhat different from organizations like the Hague Conference on Private International Law which attempt to bring about uniformity among different countries by promulgating treaties on rules of jurisdiction, applicable law and recognition. However, some of the products of NCCUSL are similar to those of the Hague Conference in that they concern the competence of individual state courts to decide certain issues. The Uniform Child Custody Jurisdiction Act, as well as its replacement the Uniform Child Custody Jurisdiction and Enforcement Act, are such products.

[6] For example, Alaska omitted the significant connection jurisdiction basis of UCCJA §3(a)(2), ALASKA STAT. 25.30.020 (Michie 1997); Texas prioritized home state jurisdiction over the other jurisdictional bases, TEX. FAM. CODE ANN. 152.003 (West 1998); Arizona equated domicile with home state, ARIZ. REV. STAT §25-433 (1998).

[7] For example, on the issue of whether an order entered pursuant to emergency jurisdiction must be a temporary order or whether it can be a permanent order, compare *Curtis v Curtis*, 574 So.2d 24 (Miss. 1990)(temporary) with *Cullen v Prescott*, 394 S.E.2d 722 (S.C. Ct. App.1990)(can be permanent if no other custody case is pending).

[8] One of the main reasons why the goals of the UCCJA were not accomplished is because the goals were incompatible. The UCCJA embodied two main goals: 1) to prevent

Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) concluded that no coherent act could be drafted which attempted to maintain the primacy of both goals. Therefore, while trying not to lose sight of the promise of individual decision making, the focus of the UCCJEA is that it is more important to determine which state has jurisdiction to make a determination than to find the 'best' state court to make the determination.

In 1980, the federal government enacted the Parental Kidnapping Prevention Act (PKPA),[9] to address the interstate custody jurisdictional problems that continued to exist after the adoption of the UCCJA. The PKPA mandates that state authorities give full faith and credit to other states' custody determinations, so long as those determinations were made in conformity with the provisions of the PKPA. The PKPA provisions regarding bases for jurisdiction, restrictions on modifications, preclusion of simultaneous proceedings, and notice requirements are similar to those in the UCCJA. There are, however, some significant differences.[10] To further complicate the process, the PKPA partially incorporates individual state UCCJA law in its language. There existed disagreement among a number of courts as to whether the federal PKPA was inconsistent with the UCCJA and whether it preempted some of the latter's provisions.[11] The

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parental kidnapping of children by attempting to provide clear rules of jurisdiction and enforcement and 2) to provide that the forum which decided the custody determination would be the forum that could make the most informed decision. These goals proved to be mutually incompatible. As a result, courts rendered decisions that were doctrinally inconsistent as they provided for the primacy of one goal or another depending on the result they wished to accomplish in an individual case. GOLDSTEIN A., 'The Tragedy of the Interstate Child: A Critical Reexamination of the Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act', in *University of California Davis Law Review* 1992, p. 845 (exhaustively and authoritatively documenting how the inconsistency of the UCCJA goals produced inconsistent court decisions).

[9] 28 U.S.C. §1738A (1980).

[10] E.g., the PKPA authorizes continuing exclusive jurisdiction in the original decree state so long as one parent or the child remains there and that state has continuing jurisdiction under its own law. The UCCJA did not directly address this issue.

[11] Whether there are major inconsistencies between the UCCJA and the PKPA has been the subject of some debate. One of the authors of the PKPA maintains that the two can be read together and that therefore it is not necessary to consider whether the PKPA preempts the UCCJA. COMBS R., 'Interstate Child Custody: Jurisdiction, Recognition and Enforcement', in *Minnesota Law Review* 1982, pp. 822-847. However, a large number of courts have found that there are inconsistencies and that the PKPA does preempt the UCCJA. See generally *Martinez v Reed*, 623 F Supp 1050, 1054 (E.D. La 1985), aff'd. without opinion by 783 F.2d 1061 (5th Cir.1986); *Esser v Roach*, 829 F Supp 171, 176 (E.D. Va 1993); *Ex parte Blanton*, 463 So.2d 162, 164 (Ala. 1985); *Rogers v Rogers*, 907 P.2d 469, 471 (Alaska 1995); *Atkins v Atkins*, 823 S.W.2d 816, 819 (Ark.1992); *Marriage of Pedowitz*, 225 Cal Rptr 186, 189 (1986); *Matter of B.B.R.*, 566 A.2d 1032, 1036 n.10 (D.C. 1989); *Yurgel v Yurgel*, 572 So.2d 1327, 1329 (Fla. 1990); *In re Marriage of Leyda*, 398 N.W.2d 815, 819 (Iowa 1987); *Wachter v Wachter*, 439 So.2d 1260,

relationship between these two statutes became 'technical enough to delight a medieval property lawyer'.[12]

As documented in an extensive study by the American Bar Association's Center on Children and the Law,[13] inconsistency of interpretation of the UCCJA and the technicalities of applying the PKPA, resulted in a loss of uniformity of approach to child custody adjudication among the states. This study suggested a number of amendments that would eliminate the inconsistent state interpretations and harmonize the UCCJA with the PKPA.[14]

In 1995 NCCUSL appointed a Drafting Committee to revise the Uniform Child Custody Jurisdiction Act. That revision, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) was promulgated in 1997 and, as of

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1265 (La. Ct. App 1983); *Guardianship of Gabriel W.*, 666 A.2d 505, 508 (Me 1995); *Delk v Gonzalez*, 658 N.E.2d 681, 684 (Mass.1995); *In re Clausen*, 502 N.W.2d 649, 657 n.23 (Mich. 1993); *Glanzner v Glanzer*, 835 S.W.2d 386, 392 (Mo. Ct. App. 1992); *Ganz v Rust*, 690 A.2d 1113, 1118 n.5 (N.J. Super. Ct. App. Div.1997); *Tufares v Wright*, 644 P.2d 522, 524 (N.M. 1982); *Leslie L. F v Constance F*, 441 N.Y.S.2d 911, 913 (N.Y. Fam Ct 1981); *Dahlen v Dahlen*, 393 N.W.2d 765, 767 (N.D. 1986); *Holm v Smilowitz*, 615 N.E.2d 1047, 1053-54 (Ohio. Ct. App.1992); *Barndt v Barndt*, 580 A.2d 320, 326 (Pa. Super. Ct. 1990); *Marks v Marks*, 315 S.E.2d 158, 160 (S. C. App. Ct. 1984); *Brown v Brown*, 847 S.W.2d 496, 499 (Tenn 1993); *In re S.A.V.*, 837 S.W.2d 80, 87-88 (Tex 1992); *In re D.S.K.*, 792 P.2d 118, 128 (Utah Ct. App. 1990); *State v Carver*, 789 P.2d 306 (Wash.1990); *Arbogast v Arbogast*, 327 S.E.2d 675, 679 (W. Va. 1984); *Michalik v Michalik*, 494 N.W.2d 391, 394 (Wis. 1993); *State, ex rel., Griffin v District Court*, 831 P.2d 233, 237 n.6 (Wyo 1992).

[12] CLARK H., *Domestic Relations*, 2nd ed , St. Paul 1988, p. 494.

[13] GIRDNER L./HOFF P. eds., *Final Report: Obstacles to the Recovery and Return of Parentally Abducted Children*, Washington 1993.

[14] In addition, in 1994 NCCUSL's Scope and Program Committee adopted a recommendation of the NCCUSL Family Law Study Committee that the UCCJA be revised to eliminate any conflict between it and the PKPA. In the same year the Governing Council of the Family Law Section of the American Bar Association unanimously passed the following resolution at its spring 1994 meeting in Charleston, South Carolina:

RESOLUTION

> WHEREAS the Uniform Child Custody Jurisdiction Act (UCCJA) is in effect in all 50 of the United States, and the Federal Parental Kidnapping Prevention Act (PKPA), 28 U.S.C.A. §1738A, governs the full faith and credit due a child custody determination by a court of a U.S. state or territory, and
>
> WHEREAS numerous scholars have noted that certain provisions of the PKPA and the UCCJA are inconsistent with each other,
>
> THEREFORE BE IT RESOLVED the Council of the Family Law Section of the American Bar Association urges the National Conference of Commissioners on Uniform State Laws (NCCUSL) to study whether revisions to the UCCJA should be drafted and promulgated in a revised version of the uniform act.

this writing, has been adopted in seventeen of the American states.[15] Unlike comparable European conventions, such as the 1996 Hague Children Convention, the UCCJEA does not have any article on the law applicable. This is because American states will apply their own law in any case in which they have jurisdiction.

II. Jurisdiction

A. Custody Proceeding

The first issue in any case involving children is to determine whether the jurisdictional rules contained in the UCCJEA are applicable. The UCCJEA provides that these rules apply any time a child custody determination will be made in a child custody proceeding. Section 102(3) defines a child custody determination as a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child. The term includes a permanent, temporary, initial, and modification order. The term, however, does not include an order relating to maintenance of a child, child support or other monetary obligation of an individual.[16] The definition of 'child-custody determination' now closely tracks the definition in the federal statute (the PKPA) which provides for full faith and credit of certain child custody determinations between states of the

[15] Those states are: Alabama, North Carolina, Connecticut, New Hampshire, Maine, West Virginia, Tennessee, Minnesota, North Dakota, Arkansas, Texas, Oklahoma, Iowa, Montana, Utah, California and Oregon.

The UCCJEA is a much broader act than its predecessor. In addition to covering jurisdiction, it also contains provisions on enforcement mechanisms and cooperation. Those provisions are not covered in detail in this article, which focuses on the jurisdictional revisions. However, one of the enforcement provisions is of special interest in international cases. Section 305 provides a simple mechanism for the registration of custody determinations from other states and foreign countries. The process allows for a predetermination of the validity of the decree and whether it would be enforced in the registering state. This provision ought to be very valuable when a custodial parent in a foreign country is planning to send their child to the United States for visitation. Article 26 of the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children (1996 Hague Children Convention), 35 I.L.M. 1391 (1996), requires those states which accede to the Convention to provide such a procedure.

[16] By excluding proceedings involving monetary obligations, the UCCJEA continues the idea of divided jurisdiction. A court may well have jurisdiction to dissolve the marriage or to make an order for child support without having jurisdiction to make a custody determination. See *Stevens v Stevens*, 682 N.E.2d 1309 (Ind. Ct. App. 1997).

United States. It encompasses any judgment, decree or other order that provides for the custody of or visitation with a child,[17] regardless of local terminology, including such labels as 'managing conservatorship' or 'parenting plan'.

A child custody proceeding is defined in Section 102(4) as a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue. The term includes a proceeding for divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence, in which the issue may appear. The term does not include a proceeding involving juvenile delinquency, contractual emancipation, or an action under the 1980 Hague Convention on the Civil Aspects of International Child Abduction or a proceeding for the enforcement of a child custody determination. The definition has been expanded from the comparable definition in the UCCJA. The listed proceedings in the UCCJEA have generally been determined to be the type of proceeding to which the UCCJA and PKPA are applicable. The list of examples removes any controversy about the types of proceedings where a custody determination can occur with the effect that proceedings that affect access to the child are subject to the jurisdictional provisions of the UCCJEA.[18] The only excluded proceeding affecting custody of a child is an adoption proceeding. (See UCCJEA §103). Most states have specific statutory provisions governing jurisdic-

[17] As in the PKPA, the UCCJEA definition specifically includes temporary orders. The comparable definition in the UCCJA §2(2) was ambiguous as to whether temporary orders were covered.

[18] Section 2(3) of the UCCJA did not contain an exhaustive list of proceedings that were covered by the Act. The only proceedings specifically enumerated were divorce, separation, child neglect and dependency. While most states applied the UCCJA to all cases where access to a child could be at issue, a number of states, either legislatively, or by court decision, did not extend the UCCJA to all proceedings involving custody of children. New York, for example, refused to apply the UCCJA to cases involving child protective proceedings, termination of parental rights, or proceedings involving guardianship of neglected or dependent children. Domestic Relations Law §75-c[3] . This meant that a custody determination of another state decided in conformity with the UCCJA would be denied enforcement if the proceeding was in juvenile court rather than domestic relations court. See *Matter of Sayeh R.*, 693 N.E.2d 724 (N.Y. 1997). See also *T.B. v M.M.J.*, 908 P.2d 345 (Utah Ct. App. 1995)(termination of parental rights cases are not governed by the UCCJA); *State ex rel., D. H. S. v Avinger*, 720 P.2d 290 (N.M. 1986). To compound matters, the PKPA's definition of custody proceeding does not mention the words 'neglect' or 'dependent' which has led some states to conclude that the PKPA specifically allows them to modify another state's custody determination in a dependent or neglected child proceeding. See *L.G. v People*, 890 P.2d 647 (Colo. 1995); *In re L.W.*, 486 N.W.2d 486 (Neb.1992). By specifying every proceeding to which the Act is applicable, the UCCJEA disapproves of the use of juvenile or other proceedings to undermine the jurisdictional scheme of this Act. Whatever need a state has for the immediate exercise of its extraordinary *parens patrai* powers to protect a child can be accomplished though the jurisdictional process set up under the temporary emergency jurisdiction provisions of Section 204.

tion in adoption cases. The inclusion of proceedings related to protection from domestic violence is necessary because some state domestic violence proceedings may affect custody of and visitation with a child.[19] Juvenile delinquency or proceedings to confer contractual rights are not 'custody proceedings' because they do not relate to civil aspects of access to a child.[20] While a determination of paternity is covered under the Uniform Interstate Family Support Act,[21] the custody and visitation aspects of paternity cases are custody proceedings.[22] Cases involving the Hague Convention on the Civil Aspects of International Child Abduction are not included because custody of the child is not determined in such a proceeding.[23]

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[19] See *Zappitello v Moses*, 458 N.W.2d 784 (S.D. 1990); *G.B. v Arapahoe County Court*, 890 P.2d 1153 (Colo. 1995). The tremendous difficulty that can arise when protective order proceedings are not considered custody proceedings is demonstrated by the Curtis litigation. The Utah court granted custody to the mother following the parties' divorce. The father did not return the children after visitation and fled to Mississippi. Upon arrival he instituted a domestic abuse proceeding, alleging that the children were victims of abuse. Following an *ex parte* hearing the Mississippi trial court entered a temporary order restraining the mother from seeing the children. The father then requested that the injunction be made permanent and that custody be modified. The mother specially appeared and contested jurisdiction. The trial court eventually determined that the PKPA prevented it from modifying custody but held that the domestic abuse injunction against removing the children from the state could stand. This, of course, had the effect of modifying the Utah decree. Three years later the appellate courts of both Utah and Mississippi held that the trial court was incorrect, without jurisdiction, and ordered the children back to Utah. See *Curtis v Curtis*, 789 P.2d 747 (Utah App. 1990); *Curtis v Curtis*, 574 So.2d 24 (Miss. 1990).

[20] E.g., *In re M.L.S.*, 458 N.W.2d 541 (Wis. Ct. App. 1990)(juvenile delinquency petition not defective for omission of UCCJA pleading).

[21] UIFSA §701. The Uniform Family Support Act is another product of NCCUSL. Its purpose is to determine jurisdiction, applicable law, recognition and enforcement of maintenance determinations for children and spouses. It has been enacted in all 50 states of the United States.

[22] See *In re Frost*, 681 N.E.2d 1030 (Ill. App. Ct. 1997).

[23] Article 16 of the 1980 Hague Convention on the Civil Aspects of International Child Abduction provides that:

> After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of notice.

Even if the child is not to be returned under the Abduction Convention, it does not follow that the state to which the child has been abducted has jurisdiction to decide on the merits of rights of custody. See Article 7 of the 1996 Hague Children Convention. A full discussion of the relationship between the two Hague Conventions is beyond the scope of this particular article.

The UCCJEA's jurisdictional principles also apply to cases involving Indian tribes[24] and foreign countries.[25]

The section extending the UCCJEA to foreign countries provides that a court of the United States shall treat a foreign state as if it was a state of the United States for purposes of applying the jurisdictional rules and the cooperation principles of the Act.[26]

That section also provides for enforcement of foreign custody determinations if made under factual circumstances in substantial conformity with the jurisdictional standards of the UCCJEA.[27]

However, a court need not enforce a foreign country's child custody determination if the custody law of the foreign country violates fundamental principles of human rights.[28]

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[24] UCCJEA §104.

[25] UCCJEA §105.

[26] Many states adopted §23 of the UCCJA, which applied the general policies of that Act to foreign determinations and recognized and enforced them if they were made consistent with the UCCJA. However, four states never adopted this section. Indiana's provision which seemed to affirmatively require non-recognition was repealed in 1997. Ind. Code Ann. §31-1-11.6-25 repealed by P.L.1-1997, §157. In addition, §23 did not on its face apply to simultaneous proceedings issues. This resulted in considerable confusion in a number of international cases. Many states applied the jurisdictional rules to other countries. See, e.g., *Dincer v Dincer*, 701 A.2d 210 (Pa. 1997)(trial court should have deferred to Belgium as the 'home state' of the child); reversing lower court *Baumgartner v Baumgartner*, 691 So.2d 488 (Fla. Dist. Ct. App. 1997)(Florida enters domestic violence order and defers to pending proceeding in Germany); *Ivaldi v Ivaldi*, 685 A.2d 1319 (N.J. 1996)(simultaneous proceedings provisions apply to New Jersey/Morocco custody dispute; citing with approval an earlier draft of the UCCJEA). But see *Horiba v Horiba*, 950 P.2d 340 (Or. Ct. App. 1997)(Oregon should not defer to a pending Japanese proceeding since it is not a state under the UCCJA).

[27] Custody determinations from other countries will be enforced if they meet the jurisdictional standards of Article 2 and if the foreign country's custody law does not violate basic principles relating to the protection of human rights and fundamental freedoms. See e.g., *Hosain v Malik*, 671 A.2d 988 (Md. Ct. Spec. App. 1996)(enforcing Pakistan custody determination).

[28] It is the respondent's burden under the 1980 Hague Convention on the Civil Aspects of International Child Abduction to show by clear and convincing evidence that the section on fundamental human rights is applicable. See *David S. v Zamira S.*, 574 N.Y.S.2d 429 (N.Y. Fam. Ct. 1991); *Roszowski v Roszkowska*, 644 A.2d 1150 (N.J. Super. Ct. Ch. Div. 1993). The same burden should be applicable to a person invoking this section of the UCCJEA. The respondent must be given ample opportunity to present evidence to this effect. See *Noordin v Abdulla*, 947 P.2d 745 (Wash. Ct. App. 1997).

B. Original Jurisdiction

1. Home State Jurisdiction

Jurisdiction to make a child custody determination as an original matter is governed by Section 201 of the Uniform Child Custody Jurisdiction and Enforcement Act. That section provides for one primary jurisdiction and a number of subsidiary jurisdictions. Primary jurisdiction resides in the child's home state.[29] Home state is defined in Section 102(7) as the state in which a child has lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.[30]

Section 201 of the UCCJEA gives exclusive jurisdiction to the state that is the home state of the child.[31] It also provides that this 'home state' jurisdiction extends to cases where the state was the home state of the child within six months before the commencement of the proceeding and the child is absent from the state but a parent or person acting as a parent continues to live in the state.[32] Therefore,

[29] 'Home state' differs somewhat from the concept of 'habitual residence' as used in the 1996 Hague Children Convention and other Hague Conventions. In that Convention, Article 5 gives primary jurisdiction to the state of the child's habitual residence. In conformity with the general practice of the Hague Conference the term 'habitual residence' is not defined. For the most comprehensive article on the concept of habitual residence as used in multilateral conventions, see CLIVE E., 'The Concept of Habitual Residence' in *Juridical Review Part 3* (1997). The concept of habitual residence certainly does not have a set durational quality. In contrast, the term 'home state' is a precisely defined term in the UCCJEA.

[30] Questions relating to the temporary absence of a child from the state of its habitual residence were discussed during the negotiations of the 1996 Hague Children Convention. The discussion clearly indicated that temporary absences of a child for reasons of vacation or attending school would not change the child's habitual residence. See LAGARDE P., 'Explanatory Report on the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Minors' (Lagarde Report), Hague Conference of Private International Law: Permanent Bureau of the Conference, 1998, p. 553.

[31] Unlike Article 10 the 1996 Hague Children Convention there is no concurrent jurisdiction in the state where a divorce is granted. In the United States the divorce court only has jurisdiction to decide custody and access issues if it is the home state of the child, or otherwise meets the jurisdictional requirements of Section 201 of the UCCJEA.

[32] Section 102(13) defines a 'person acting as a parent' as a person, other than a parent, who: (A) has physical custody of the child or has had physical custody for a period of six consecutive months, including any temporary absence, within one year immediately before the commencement of a child-custody proceeding; and (B) has been awarded legal custody by a court or claims a right to legal custody under the law of this State.

if a parent leaves the home state of the child, the remaining parent, or person acting as a parent, has six months to file a custody proceeding in that state. If the remaining parent does so, then that state can exercise home state jurisdiction.[33] If such a proceeding is not filed by the left-behind parent and the child subsequently acquires a new home state, then the new home state is the only state that can exercise jurisdiction over the custody determination.

In the United States, jurisdiction attaches at the commencement of a proceeding.[34] If a state has jurisdiction at the time the proceeding was commenced, it does not lose jurisdiction if the child acquires a new home state prior to the conclusion of proceedings.[35]

2. Significant Connection Jurisdiction

If there is no home state,[36] then a state where the child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection, other than mere physical presence, and there is available in that state substantial evidence concerning the child's care, protection, training, and personal relationships, may assume jurisdiction.[37]

The Drafting Committee for the UCCJEA debated whether to further define the terms 'significant connections' and 'substantial evidence'. Ultimately it agreed that the terms should remain somewhat flexible. However, the Committee agreed

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[33] It should be noted at this point that the remaining person must be a parent or a person acting as a parent. The continued presence in the home state of a person who only claims visitation, or access, rights to the child is not sufficient to trigger this 'extended home state' jurisdiction.

[34] *In re A.E.H.*, 468 N.W.2d 190, 200 (Wis.1991); *Simpkins v Disney*, 610 A.2d 1062, 1064 (Pa. Super. Ct.1992); *In re D.S.K.*, 792 P.2d 118, 125 n. 6 (Utah Ct.App.1990); *Wanamaker v Scott*, 788 P.2d 712, 714 n. 3 (Alaska 1990); *Barnae v Barnae*, 943 P.2d 1036 (N.M. Ct. App. 1997).

[35] This differs considerably from the 1996 Hague Children Convention which provides in Article 5 that if the habitual residence of the child changes, even in the middle of a proceeding, jurisdiction transfers to the child's new habitual residence. A proposal by the United States, Irish, British and Australian delegations that would have provided that jurisdiction does not change during the course of a proceeding was rejected. See Hague Conference on Private International Law, 1996 Diplomatic Session, Working Doc. 25. However, if the proceedings requesting measures are still pending in front of the original forum, Article 13 of the Convention would require the state of the new habitual residence to abstain from exercising its jurisdiction while those matters are still pending. Whether this article will prove satisfactory in eliminating conflicts of jurisdiction remains to be seen.

[36] A 'significant connection' state may also exercise jurisdiction if the state that would have 'home state' jurisdiction decides that the significant connection state would be a more appropriate forum to exercise jurisdiction.

[37] UCCJEA §201(a)(2).

with the Reporter for the UCCJA, Professor Bodenhemier, in her comment to the UCCJA §3(a)(2) that 'there must be maximum rather than minimum contacts with the state'. For example in *Nistico v District Court*,[38] a two-year-old child lived in California with her mother since birth. The father filed a paternity proceeding in Colorado seeking custody of the child. The court rejected his contention that Colorado had jurisdiction because he and his relatives lived there. The presence of the father and his relatives is insufficient absent evidence that there is a strong relationship between Colorado and the child,[39] or between the child and his Colorado relatives.

The focus on 'maximum connections' should result in the disappearance of those cases that seem to require little in the way of connections before jurisdiction will be assumed.[40] It should also be noted that the significant connection jurisdiction provisions of the UCCJEA, like those of the UCCJA, do not require the court to weigh the connections of one state against those of another to find the state of the 'most significant connection'. A state either has significant connection jurisdiction or it does not. If more than one state could exercise significant connection jurisdiction,[41] the courts should utilize the provisions of Section 110 on judicial communication to determine which state should proceed. Upon a failure of communication the provisions of Section 206 on simultaneous proceedings will determine the appropriate forum.

In the determination of significant connection jurisdiction, the focus is not whether there is evidence of the future care for the child in the jurisdiction. Instead, the jurisdictional determination should be made by ascertaining whether there is sufficient evidence in the state for the court to make an informed custody

[38] 791 P.2d 1128 (Colo. 1990).

[39] The fact that the child formerly lived in the state with one parent does not mean that the original state is always a significant connection state so long as one parent lives there. When the child's relationship with the parent and the state deteriorates, jurisdiction is no longer permissible. See *In re Bozarth*, 538 N.E.2d 785 (Ill. App. Ct. 1989). The Washington father of a child born out of wedlock relinquished the child to his Illinois mother when the child was four months old. Four years later the father filed in Washington a paternity action seeking custody of the child. The Washington's court's award of custody to the father was not recognized in Illinois on the ground that the Washington court no longer had significant connection jurisdiction.

[40] See e.g., *Houtchens v Houtchens*, 488 A.2d 726 (R.I. 1985); *Steadman v Steadman*, 671 P.2d 808 (Wash. Ct. App.1983)(presence of supportive family members established significant connection jurisdiction).

[41] See also *In re Mobley*, 555 N.E.2d 323 (Ill. App. Ct. 1991)(presence of relatives, plus retaining Illinois as domicile when in the military); *Weinstein v Weinstein*, 408 N.E.2d 952 (Ill. App. Ct.1980); *Kean v Kean*, 577 S.E.2d 1152 (La. Ct. App. 1991)(both parents raised in Louisiana along with presence of relatives gives significant connections); *Gray v Gray*, 572 So.2d 341 (La. Ct. App. 1990)(presence of relatives and prior vacations in the state are sufficient, especially with a one year old child); contra, *Holman v Holman*, 396 N.E.2d 331 (1979)(relatives living in the state does not constitute significant connection).

determination. That evidence might relate to the past as well as to the present or future.

3. Other Subsidiary Jurisdictional Bases

The UCCJEA also provides for jurisdiction in a state that all states having home state or significant connection jurisdiction determine would be a more appropriate forum.[42] This determination would have to be made by all states with home state or significant connection jurisdiction. Jurisdiction would not exist under this provision simply because the home state determined that another state is a more appropriate place to hear the case if there is a state that could exercise significant connection jurisdiction.

Finally the UCCJEA retains the concept of jurisdiction by necessity as found in the UCCJA and in the PKPA.[43] This default jurisdiction only occurs if no other state would have jurisdiction under any other provision of the UCCJEA.[44]

C. Exclusive Continuing Jurisdiction

One of the most significant sections of the UCCJEA provides that the state which made the original custody determination retains jurisdiction over all aspects of that determination until the occurrence of one of two events.[45] First, continuing jurisdiction is lost when a court of the state that made the original custody

[42] UCCJEA §201(a)(3).

[43] UCCJEA, §201(a)(4).

[44] While this necessity or default basis of jurisdiction was retained, it probably will not be used. It is difficult to find a case where it was actually necessary to resort to it. In most cases significant connection jurisdiction would have been proper. A typical case is *McFaull v McFaull,* 560 So.2d 1013 (La. Ct. App. 1990). The parties were married in Leningrad in the Soviet Union in October, 1985. Since then the father resided in New Orleans, and the mother in Leningrad. They lived together in New Orleans from 26 June to 17 August 1987. The mother gave birth to the child in Leningrad on 6 February 1988. The father visited his wife and child in Leningrad for about nine months and the family lived together in New Orleans from February to May in 1989. They again lived together in New Orleans from 21 December 1989 until April 1990. The mother moved out on 1 April 1990 and the father filed for custody on 5 April. The trial court granted temporary custody to the father and the father utilized the writ to have the child removed from a Soviet airliner in New York. The Court of Appeals affirmed the trial court on the ground that no other state would have jurisdiction under the UCCJA. The court did not make a detailed inquiry, it merely assumed that the Soviet Union would not exercise jurisdiction substantially in accordance with the UCCJA. The concurring opinion pointed out that significant connection jurisdiction would be proper. It also noted that the UCCJA has international applications.

[45] UCCJEA, §202.

determination finds that neither the child, the child and one parent, nor the child and a person acting as a parent have a significant connection with it and that substantial evidence is no longer available in that state concerning the child's care, protection, training, and personal relationships. In other words, even if the child has acquired a new home state, the original decree state retains exclusive, continuing jurisdiction, so long as the general requisites of the 'substantial connection' jurisdiction provisions of section 201 are met.[46] If the relationship between the child and the person remaining in the state with exclusive, continuing jurisdiction becomes so attenuated that the court could no longer find significant connections and substantial evidence, jurisdiction would no longer exist. As long as one parent, or person acting as a parent, remains in the original decree state, that state is the sole determinant of whether jurisdiction continues. A party seeking to modify a custody determination must obtain an order from the original decree state stating that it no longer has jurisdiction.[47]

Second, jurisdiction is lost when a court of any state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the original state. If the child, the parents, and all persons acting as parents have all left the state which made the custody determination prior to the commencement of the modification proceeding, considerations of waste of resources dictate that a court in another state, as well as a court in the original decree state, can decide that the original state has lost exclusive, continuing jurisdiction. Exclusive, continuing jurisdiction is not reestablished if, after the child, the parents, and all persons acting as parents leave the state, the non-custodial parent returns.[48] The UCCJEA

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[46] There are numerous cases that make this point. Recent decisions include *Lewis v District Court*, 930 P.2d 770 (Nev. 1997); *McDow v McDow*, 908 P.2d 1049 (Alaska 1996)(Alaska cannot modify a Washington decree even though the child has lived in Alaska for two years; whether Washington still has continuing jurisdiction is a matter for Washington law); *Garrett v Garrett*, 477 S.E.2d 804 (Ga. 1996); *Wilson v Wilson*, 465 S.E.2d 44 (N.C. Ct. App. 1996); *In re Henry and Keppel*, 951 P.2d 135 (Or. 1997) reversing *In re Henry and Keppel*, 922 P.2d 712 (Or. Ct. App. 1996).

[47] This approach should eliminate cases in which there are conflicting decisions with regard to whether the original determination state has lost its continuing jurisdiction. Among recent cases with conflicting decrees are *In re A.B.*, 569 N.W.2d 103 (Iowa 1997). This approach also alleviates the problem found in several cases of whether the state that made the original child custody determination is bound by a determination of another state that it has lost jurisdiction, or whether the second state was without jurisdiction because it failed to find that the state that made the original determination still had continuing jurisdiction. For a recent case see *Ladurini v Hazzard*, 938 P.2d 1230 (Idaho 1997) Under the UCCJEA, when a party continues to reside in the original determination state, an order must be obtained from that state that it no longer has or wishes to exercise jurisdiction.

[48] Exclusive continuing jurisdiction is not revived when, after the court that made the original determination surrenders jurisdiction to a new home state, the parent and the child leave that state for a third state. In *Mulle v Young*, 1997 WL 764535 (Tenn.Ct.App. 1997)(unpublished; text in Westlaw), the Tennessee appellate court ruled that when the trial

provides that once a state has lost exclusive, continuing jurisdiction, it can modify its own determination only if it has jurisdiction under the standards of Section 201.[49] If another state acquires exclusive continuing jurisdiction under this section, then its orders cannot be modified even if the first state has once again become the home state of the child.

Section 203 of the UCCJEA on modification jurisdiction is the mirror image of the continuing jurisdiction provisions of Section 202. It provides that a state does not have jurisdiction to modify a custody determination of another state, unless that state no longer has continuing jurisdiction and the modification state would have jurisdiction under Section 201.[50]

D. Temporary Emergency Jurisdiction

The new jurisdiction rules provide for one temporary concurrent basis of jurisdiction and that is in the case of an emergency.[51] An emergency occurs when a child is abandoned in the state or when the child, a sibling of the child, or parent of the

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court relinquished jurisdiction to the new home state of Georgia, it was doing so only for the length of time that the mother and child resided there. When the mother and child moved to North Carolina it ruled that Tennessee's continuing jurisdiction reasserted itself. That ruling is inconsistent with this Act. Once a court relinquishes exclusive continuing jurisdiction, it does not reassert itself. Of course, North Carolina could defer to Tennessee as a more appropriate forum under Section 207.

[49] Even though a state may not have jurisdiction to modify its own custody determination, it may still enforce the determination until it is modified by some other state. See *Dyer v Surratt*, 466 S.E.2d 584 (Ga. 1996)(Georgia court may hold custodial parent in contempt of court for violating the visitation provisions of the custody determination even though it does not have jurisdiction to modify the determination).

[50] The provisions on continuing jurisdiction in the UCCJEA represent the most serious discrepancy between it and the 1996 Hague Children Convention. That Convention does not authorize any continuing jurisdiction in the original decree-granting state. Instead it provides that jurisdiction shifts when the child acquires a new habitual residence. Although, under Article 14 of the 1996 Hague Children Convention, the measure taken by the state of the child's original habitual residence remains in force until modified, there is nothing in the Convention to prevent the state of the child's new habitual residence from immediately modifying the original state's order. Both the Special Commission and the Diplomatic Commission soundly rejected all attempts by the United States to include a form of continuing jurisdiction in the 1996 Children Convention. See Working Document 25. This is of great concern to lawyers in the United States. Over 30 years of experience with interstate custody decisions in the United States has indicated that a failure to provide for clear rules on continuing jurisdiction results in inconsistent custody determinations and leads to increased parental kidnapping of children.

[51] UCCJEA, §204. The comparable provision of the 1996 Hague Children Convention is Article 11 which authorizes a state to take jurisdiction to take measures of protection in cases of 'urgency'.

child is threatened with mistreatment of abuse. The concurrent nature of the jurisdiction means that a court may take cognizance of the case to protect the child even though it can claim neither home state nor significant connection jurisdiction. The duties of states to recognize, enforce and not modify a custody determination of another state do not take precedence over the need to enter a temporary emergency order to protect the child.[52]

However, a custody determination made under the emergency jurisdiction provisions must be a temporary order.[53] The purpose of the emergency temporary order is to protect the child until the state that appropriately has jurisdiction under the original jurisdiction provisions or the continuing jurisdiction provisions is able to enter an order to resolve the emergency.

Under certain circumstances, however, an emergency custody determination may become a final custody determination. If there is no existing custody determination, and no custody proceeding is filed in a state with appropriate jurisdiction, an emergency custody determination made under these provisions becomes a final determination, if it so provides, when the state that issues the order becomes the home state of the child.[54]

Normally, however, there will either be a prior custody order in existence which is entitled to enforcement or there will be a proceeding which is pending in a state with appropriate jurisdiction. When this occurs the provisions of the UCCJEA allow the temporary order to remain in effect only so long as is necessary for the person who obtained the emergency determination to present a case and obtain an order from the state that would otherwise have jurisdiction. That time period must be specified in the emergency order.[55] If there is an existing order by a

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[52] E.g., *Curtis v Curtis*, 574 So.2d 24 (Miss. 1990); *In re D.S.K.*, 792 P.2d 118 (Utah Ct. App. 1990).

[53] E.g., *In re Van Kooten*, 487 S.E.2d 160 (N.C. Ct. App. 1997)(in a child abuse and neglect proceeding begun pursuant to emergency jurisdiction, trial court may enter a temporary order and then must contact the court in the children's home state; only if that state declines to exercise jurisdiction may the trial court enter permanent dispositional orders); *Sheila L. ex rel Ronald M.M. v Ronald P.M.*, 465 S.E.2d 210 (W.Va. 1995).

[54] Basically the principle is one of acquiescence. The left behind parent could have filed a custody proceeding within the six month extended home state provision. The failure to do so results in the temporary order becoming permanent. Considerations of waste of resources suggest that the parent who obtained the original custody order need not always return to court after establishing home state jurisdiction to obtain a permanent order. The same principle is found in the Article 7 of 1996 Children's Convention which provides that the state of the child's habitual residence retains its jurisdiction after a wrongful removal unless there has been acquiescence to the removal by all persons who had rights of custody in the original state.

[55] The Drafting Committee discussed at great length whether the Act should specify the length of time that a temporary emergency order could be in effect. Several intermediate drafts limited the time to 90 days. Some members thought the time period was too lengthy in that it could supersede a determination of a court that had jurisdiction under Sections

state with jurisdiction, that order need not be reconfirmed. The temporary emergency determination would lapse by its own terms at the end of the specified period or when an order is obtained from the court with appropriate jurisdiction. The court with appropriate jurisdiction may decide that the court that entered the emergency order is in a better position to address the safety of the person who obtained the emergency order, or the child, and decline jurisdiction under Section 207.[56] It should be noted that any hearing in the state with appropriate jurisdiction is subject to the provisions of Sections 111 and 112. These sections facilitate the presentation of testimony and evidence taken out of state. If there is a concern that the person obtaining the temporary emergency determination would be in danger upon returning to the state with appropriate jurisdiction, these provisions should be used.[57]

The section on emergency jurisdiction requires communication between the court of the state that is exercising emergency jurisdiction under this section and the court of another state that has appropriate jurisdiction.[58] The pleading rules of the UCCJEA require a person seeking a temporary emergency order to inform the court of any proceeding concerning the child that has been commenced elsewhere. The person commencing the custody proceeding in a state with appropriate

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201-203 for three months. Other members were concerned that in some states crowded dockets would prevent a court that had appropriate jurisdiction under Sections 201-203 from being able to enter an order within the 90-day period. The Drafting Committee ultimately decided not to specify a particular time and to leave it to the court that issued the temporary emergency custody determination, upon consultation with the court that would otherwise have jurisdiction under Sections 201-203, to determine the appropriate length of time. This will often be less than 90 days. See, e.g., *Magers v Magers*, 645 P.2d 1039 (Ok. Ct. Civ. App. 1982)(father given 20 days to file a petition in the appropriate Texas court); *In re Joseph D.*, 23 Cal.Rptr.2d 574 (Cal. Ct. App. 1993)(emergency order that extended for eleven months disapproved).

[56] E.g., *Marlow v Marlow*, 471 N.Y.S.2d 201 (N.Y. Sup.Ct. 1983)(New York holds that California is the more appropriate forum based on custodial mother's residence there for over six months and non-custodial father's abuse and instability); *Marriage of Coleman*, 493 N.W.2d 133 (Minn.Ct.App. 1992).

[57] Further protections are possible through 'safe-harbor' orders by the state with appropriate jurisdiction or combined orders from the state with emergency jurisdiction and the state with appropriate jurisdiction. See e.g., *Orchard v Orchard*, 686 N.E.2d 1230 (Mass. App. Ct. 1997). The home state of Michigan sought to obtain the presence of the mother to determine the merits of the custody dispute, entered orders which offered to pay her costs of transportation, provide for the safety of the parties through mutual restraining orders, arranged for Legal Aid to represent her and recognized her temporary custody which had been ordered by the Massachusetts court which issued the emergency order. See also *In re A.L.H.*, 630 A.2d 1288 (Vt. 1993)(Vermont sent child back to South Carolina based on entry of order in that state placing her in protective custody).

[58] E.g., *In re Joseph D.*, 23 Cal.Rptr.2d 574 (Cal. Ct. App. 1993); *Matter of Maureen S.*, 592 N.Y.S.2d 55 (N.Y. App.Div. 1992).

jurisdiction is required to inform the court about the temporary emergency proceeding.[59] These pleading requirements need to be strictly followed so that the courts are able to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order.

III. Abstention From Jurisdiction

Three sections of the Uniform Child Custody Jurisdiction and Enforcement Act speak to the question of when a state that has jurisdiction should refrain from exercising it.

A. Simultaneous Proceedings or *Lis Pendens*

The problem of two or more states having concurrent jurisdiction in child custody cases has always been a difficult one. Under the old Uniform Child Custody Jurisdiction Act the home state and the significant connection state had concurrent jurisdiction.[60] The same was true, under some interpretations, of the state that had originally entered the child custody determination and the new home state of the child. The concurrent jurisdiction problem has been significantly decreased under the UCCJEA. This occurs through the prioritization of home state jurisdiction over that of significant connection jurisdiction and through the devise of giving the original decree state exclusive continuing jurisdiction, so long as the requirements of Section 202 are met.

Nonetheless, there is still one situation where concurrent jurisdiction is possible. It occurs when there is no state that can exercise home state jurisdiction, or a state with exclusive continuing jurisdiction, and more than one state that can exercise significant connection jurisdiction. For those cases, the UCCJEA, in Section 206, retains the 'first in time' rule of the UCCJA. This section requires that before a court may proceed with a custody determination, it must find out from the pleadings and other documents that have been submitted whether a custody proceeding has already begun. If one has been commenced in a state that would otherwise have jurisdiction under the UCCJEA, it must communicate with that court.[61]

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[59] UCCJEA, §209.

[60] UCCJA §3.

[61] The procedure in this Act parallels that of the UCCJA in that it requires the court to stay the proceeding and communicate with the court that has jurisdiction under this Act. The requirements of stay and communication should be strictly adhered to in order to prevent conflicting custody determinations. See *Hickey v Baxter*, 461 So.2d 1364 (Fla. Dist. Ct. App. 1984)(trial court erred in not staying the proceedings and communicating with the Virginia court); *Karahalios v Karahalios*, 848 S.W.2d 457 (Ky. Ct. App. 1993)(custody

If the court that would otherwise have jurisdiction under the UCCJEA refuses to decline in favor of the forum, then the forum shall dismiss the case.

B. Forum *Non Conveniens*

The doctrine of forum *non conveniens* is firmly established in American jurisprudence, although not well known in Europe.[62] Simply put, if a state that would otherwise have jurisdiction determines that some other state would be a more appropriate forum to decide the case, it may decline jurisdiction in favor of that forum. This principle is firmly established in the UCCJEA. Both the sections on home state jurisdiction and exclusive continuing jurisdiction authorize the courts of those states to decide if another state would be a more appropriate forum, and if so, to decline jurisdiction in favor of that state.[63]

The principles governing the process of making the forum *non conveniens* decision is governed by Section 207. The suggestion that a court is an inconvenient forum may be made by any party to the proceeding or by the court on its own motion. When a suggestion of inconvenient forum is made, the parties will submit information on the following factors:

> (1) Whether domestic violence has occurred and is likely to continue in the future and which State could best protect the parties and the child;
> (2) The length of time the child has resided outside this State;
> (3) The distance between the court in this State and the court in the State that would assume jurisdiction;
> (4) The relative financial circumstances of the parties;

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decision vacated because trial court failed to communicate with Tennessee court); interest of L.C., 857 P.2d 1375 (Kan.Ct.App. 1993).

[62] A concept quite similar to forum *non conveniens* appears in Articles 8 and 9 of the 1996 Hague Children Convention. Article 8 authorizes the state of the child's habitual residence, if it thinks that another state would be in a better position to assess the best interests of the child, to request the other state to assume jurisdiction. Article 9 authorizes a state that is not the child's home residence, if it thinks it is in a better position to assess the best interests of the child, to request that the state of the child's habitual residence transfer the case to it.

[63] There are numerous cases where the court that made the original custody determination decides that the child's new home state is in a better position to determine whether the original determination should be modified. See, e.g., *Bosse v Superior Court*, 152 Cal.Rptr. 665 (Cal. Ct. App. 1979)(California court should decline to modify a California custody decree on the basis of inconvenient forum when child has lived with mother in Montana for two and one-half years); *Payne v Weker*, 917 S.W.2d 201 (Mo. Ct. App. 1996)(mother and child have lived in Maryland for six years).

> (5) Any agreement of the parties as to which State should assume jurisdiction;
> (6) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child;
> (7) The ability of the court of each State to decide the issue expeditiously and the procedures necessary to present the evidence; and
> (8) The familiarity of the court of each State with the facts and issues in the pending litigation.

Other factors not specifically mentioned may also be the basis of an inconvenient forum motion.

Although most of the factors are self-explanatory, several provisions require comment. Subparagraph (1) is concerned specifically with domestic violence and other matters affecting the health and safety of the parties. For this purpose, the court should determine whether the parties are located in different states because one party is a victim of domestic violence or child abuse. If domestic violence or child abuse has occurred, this factor authorizes the court to consider which state can best protect the victim from further violence or abuse.[64]

In applying subparagraph (3), courts should realize that distance concerns can be alleviated by applying the communication and cooperation provisions of Sections 111 and 112.[65]

In applying subsection (7) on expeditious resolution of the controversy, the court could consider the different procedural and evidentiary laws of the two states, as well as the flexibility of the court dockets. It also should consider the ability of a court to arrive at a solution to all the legal issues surrounding the family. If one state has jurisdiction to decide both the custody and support issues, it would be desirable to find that state to be the most convenient forum. The same is true when children of the same family live in different states. It would be inappropriate to require parents to have custody proceedings in several states when one state could resolve the custody of all the children.

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[64] *Swain v Vogt*, 614 N.Y.S.2d 780 (N.Y. App. Div. 1994)(New York, the state of continuing jurisdiction, defers to Maine even though the mother removed the child from New York in violation of a court order due to father's continuing abuse of her and the child); *In re Coleman*, 493 N.W.2d 133 (Minn. Ct. App. 1992).

[65] On the question of whether the parties have agreed on which court should assume jurisdiction, the court must determine that the forum selected is one which could assume jurisdiction under this Act. *Steckel v Blafas*, 549 So.2d 1211 (Fla. Dist. Ct. App. 1989)(clause should not be honored when the forum selected has lost jurisdiction); *Marriage of Hilliard*, 533 N.E.2d 543 (Ill. App. Ct. 1989)(parties may contract concerning forum as well as other subjects); but see *Marriage of Bueche*, 193 550 N.E.2d 48 (Ill. App. Ct. 1990)(suggesting, without rationale, that there is a difference between a forum selection clause, which is valid, and a retention of jurisdiction clause, which is not).

Before determining whether to decline or retain jurisdiction, the court may communicate, in accordance with Section 110, with a court of another state and exchange information pertinent to the assumption of jurisdiction by either court.

If a court determines it is an inconvenient forum, it may not simply dismiss the action. To do so would leave the case in limbo. Rather the court shall stay the case and direct the parties to file in the state that has been found to be the more convenient forum.[66] The court is also authorized to impose any other conditions it considers appropriate. This might include the issuance of temporary custody orders during the time necessary to commence a proceeding in the designated state, dismissing the case if the custody proceeding is not commenced in the other state or resuming jurisdiction if a court of the other state refuses to take the case.

C. Declining Jurisdiction because of Unreasonable Conduct

One of the major purposes of the UCCJEA is to discourage parents from kidnapping their children and taking them to another state is search of a forum which may be more favorable to them. Since there is no longer a multiplicity of jurisdictions which could take cognizance of a child custody proceeding, there is less of a concern that one parent will take the child to another jurisdiction in an attempt to find a more favorable forum. Most of the jurisdictional problems generated by abducting parents should be solved by the prioritization of home state in Section 201, the exclusive, continuing jurisdiction provisions of Section 202, and the ban on modification in Section 203. For example, if a parent takes the child from the home state and seeks an original custody determination elsewhere, the stay-at-home parent has six months to file a custody petition under the extended home state jurisdictional provision of Section 201, which will ensure that jurisdiction be retained in the home state. If a petitioner for a modification determination takes the child from the state that issued the original custody determination, another state cannot assume jurisdiction as long at the first state exercises exclusive, continuing jurisdiction.

Nonetheless, there are still a number of cases where parents, or their surrogates, act in a reprehensible manner, such as removing, secreting, retaining, or restraining the child. The UCCJEA, in Section 208, ensures that abducting parents will not receive an advantage for their unjustifiable conduct. If the conduct that creates the jurisdiction is unjustified, courts must decline to exercise jurisdiction that is inappropriately invoked by one of the parties.[67] For example, if one parent

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[66] Some states already require that when a court determines it is an inconvenient forum, it must specify what forum is more convenient. *Waller v Richardson*, 757 P.2d 1036 (Alaska 1988).

[67] *In re Carpenter*, 835 S.W.2d 760 (Tex. App. 1992). The 'unclean hands' section in the UCCJEA is only addressed to the conduct that creates jurisdiction. This Act, unlike the UCCJA, does not give the court discretion to decline jurisdiction because the parent has

abducts the child pre-decree and establishes a new home state, that state will decline to hear the case. There are exceptions. If the other party has acquiesced in the court's jurisdiction, the court may hear the case. Such acquiescence may occur by filing a pleading submitting to the jurisdiction, or by not filing in the court that would otherwise have jurisdiction under the UCCJEA. Similarly, if the court that would otherwise have jurisdiction under the UCCJEA determines that the state where the child has been taken is a more appropriate forum, the court may hear the case.

This provision of the UCCJEA applies to those situations where jurisdiction exists because of the unjustified conduct of the person seeking to invoke it. If, for example, a parent in the state with exclusive, continuing jurisdiction under Section 202 has either restrained the child from visiting with the other parent, or has retained the child after visitation, and seeks to modify the decree, this section in inapplicable. The conduct of restraining or retaining the child did not create jurisdiction. Jurisdiction existed under this Act without regard to the parent's conduct. Whether a court should decline to hear the parent's request to modify is a matter of local law.[68]

The focus in this section is on the unjustified conduct of the person who invokes the jurisdiction of the court. A technical illegality or wrong is insufficient to trigger its applicability. This is particularly important in cases involving domestic violence and child abuse. Domestic violence victims should not be charged with unjustifiable conduct for conduct that occurred in the process of fleeing domestic violence, even if their conduct is technically illegal. Thus, if a parent flees with a child to escape domestic violence and in the process violates a joint custody decree, the case should not be automatically dismissed under this section. An inquiry must be made into whether the flight was justified under the circumstances of the case. However, an abusive parent who seizes the child and flees to another state to establish jurisdiction has engaged in unjustifiable conduct and the new state must decline to exercise jurisdiction under this section.[69]

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engaged in 'reprehensible' conduct that is not related to jurisdiction. For example, in *Meier v Davignon*, 734 P.2d 807 (N.M. Ct.App 1987) the court suggested that changing the child's name without notifying the father and interfering with communication between the father and the child would qualify as 'similar reprehensible conduct'. Under this Act such conduct would not require a court to decline to exercise jurisdiction that was otherwise validly established.

[68] See e.g., *Smith-Helstrom v Yonker*, 544 N.W.2d 93 (Neb. 1996)(after father has retained the child after visitation the court hears father's petition to modify custody under its continuing jurisdiction and denies petition).

[69] The focus on unjustifiable conduct represents a continuation of the balancing process as developed in the case law under UCCJA §8. The court should balance the wrongfulness of the conduct of the parent that establishes jurisdiction against the reasons for the conduct of the parents. See *In re Thorensen*, 730 P.2d 1380 (Wash. Ct. App. 1987)(mother's flight to protect herself from father's physical and mental abuse counterbalanced any wrongfulness in her conduct); *Cole v Superior Court*, 218 Cal.Rptr. 905,908

This section of the UCCJEA also authorizes the court to fashion an appropriate remedy for the safety of the child and to prevent a repetition of the unjustified conduct. Thus, it would be appropriate for the court to notify the other parent and to provide for foster care for the child until the child is returned to the other parent. The court could also stay the proceeding and require that a custody proceeding be instituted in another state that would have jurisdiction under this Act. It should be noted that the court is not making a forum *non conveniens* analysis in this section. If the conduct is unjustifiable, it must decline jurisdiction. It may, however, retain jurisdiction until a custody proceeding is commenced in the appropriate tribunal if such retention is necessary to prevent a repetition of the wrongful conduct or to ensure the safety of the child. Attorney fees shall also be awarded to the left-behind parent unless it would be clearly inappropriate.

IV. Communication and Cooperation between Tribunals

The UCCJEA contains specific provisions providing for communication and cooperation between tribunals of different states. These provisions also apply in international child custody cases,[70] which should make the resolution of these cases much easier.

The communication provisions are contained in Section 110. It authorizes a court of one state to communicate with a court in another State concerning any proceeding arising under the UCCJEA. A court may allow the parties to participate in the communication. However, participation of the parties is not required. The busy schedules of judges often require that the communication be held at odd hours when the parties are not available. This will be especially true in international cases given the major time differences. If the parties are not able to

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(Cal. Ct. App. 1985)(husband's abuse of wife and step-daughter justify wife's removal of other children of the marriage and 'certainly negate any findings that she has unclean hands because she took them away'); *Marlow v Marlow*, 471 N.Y.S.2d 201 (N.Y. Sup. Ct. 1985)(mother's wrongful removal of children to California in violation of the parties settlement agreement is justified because of father's instability and spousal abuse); *Laskosky v Laskosky*, 504 So.2d 726 (Miss. 1987)(Mississippi properly declined jurisdiction because mother continued to violate Canadian temporary custody order to return with the child to Canada and there was no showing that there was any harm to the child).

[70] UCCJEA, §105(A). Domestic tribunals have been required to communicate with foreign tribunals under the UCCJA in some states. See *Stock v Stock*, 677 So.2d 1341 (Fla. Dist. Ct. App 1996)(Florida court required to communicate with Switzerland); *Superior Court v Plas*, 202 Cal.Rptr. 490 (Cal. Ct. App. 1984)(California court required to communicate with French court); *Mc v Mc*, 521 A.2d 381 (N.J.Super. Ct. 1986)(communications with Irish court).

participate in the communication, they must be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made. A record must be made of the communication unless the communication concerns such minor matters as schedules, calendars, court records, and similar matters. The parties must be informed promptly of the communication and granted access to the record. The cooperation provisions of the UCCJEA are Sections 111 and 112. Section 111 is concerned with taking testimony in another state. It provides that a party to a child custody proceeding may offer testimony of witnesses who are located in another state, including testimony of the parties and the child. The evidence may be by deposition or by any other means that are allowable in the state where the testimony is received. The court on its own motion may order that the testimony of a person be taken in another state and may prescribe the manner in which, and the terms upon which, the testimony is taken.

A court may also permit an individual residing in another state to be deposed or to testify by telephone, audiovisual means, or other electronic means before a designated court or at another location in that state. A court is required to cooperate with courts of other states in designating an appropriate location for the deposition or testimony.

Documentary evidence may be transmitted from courts in other states by technological means that do not produce an original writing and may not be excluded from evidence on an objection based on the means of transmission.

Section 112 lists other features of cooperation. It authorizes a court of one state to request the appropriate court of another state to:

> (1) Hold an evidentiary hearing;
> (2) Order a person to produce or give evidence pursuant to procedures of that state;
> (3) Order that an evaluation be made with respect to the custody of a child involved in a pending proceeding;
> (4) Forward to the court of this state a certified copy of the transcript of the record of the hearing, the evidence otherwise presented, and any evaluation prepared in compliance with the request; and
> (5) Order a party to a child-custody proceeding or any person having physical custody of the child to appear in the proceeding with or without the child.

A further subsection authorizes a court to comply with any of the above requests when made by a court of another states.

Travel and other necessary and reasonable expenses incurred because of the cooperation provisions may be assessed against the parties according to the law of the state where the proceeding is to occur.

Another provision of Section 112 requires a court to preserve the pleadings, orders, decrees, records of hearings, evaluations, and other pertinent records with respect to a child-custody proceeding until the child attains 18 years of age. Upon

an appropriate request by a court or law enforcement official of another State, the court shall forward a certified copy of those records.

V. Conclusion

The Uniform Child Custody Jurisdiction and Enforcement Act is a major step forward in allocating jurisdictional competency in child custody cases. When enacted by all states, it will clearly indicate which state has jurisdictional competency. This should further the policy that has been pursued by American law over the last 40 years: One state and only one state should have jurisdiction at any one time. The elimination of all concurrent jurisdictions, except for temporary emergency jurisdiction, will substantially reduce the number of instances where one parent abducts the child to another state in the hopes of receiving a more favorable custody determination. The result should be greater stability for children in an increasingly unstable world.

THE ITALIAN STATUTE ON PRIVATE INTERNATIONAL LAW OF 1995

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I. General Remarks

Long[1] the mirror of Mancini's principles,[2] Italian choice-of-law rules have recently been the object of a sweeping and innovative reform.[3]

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[1] Italy was one of the first countries to adopt a codified system of private international law rules in 1865, immediately after the foundation of the Italian State. Drafted under the influence of the well-known expert of private international law, Pasquale Stanislao Mancini, who was the Minister of Justice at that time, these rules were part of the general provisions of the first Italian Civil Code. When a new Civil Code was enacted in 1942, the existing conflicts rules were included with some minor modifications in the preliminary provisions of the new Code (Arts. 17-31). These rules were in force until 1995 when they were abrogated by the new Statute on Private International Law.

[2] MANCINI's contribution to the development of the theory of private international law has often been neglected in Italy. A reappraisal is largely the result of E. JAYME's well-known studies and now of his younger colleagues as well: NISHITANI Y., *Mancini und die Parteiautonomie im Internationalen Privatrecht*, Heidelberg 2000.

[3] Statute No. 218 of 31 May 1995, published in *Gazzetta Ufficiale*, *Supplemento Ordinario* No. 128 of 3 June1995. An English translation is published in 35 *I.L.M.* 760-782 (1996), with an Introductory Note by GIARDINA A. The reform provided the impulse for flourishing scholarly works, a significant development in a country where the 'special part' of private international law has often been neglected. The main reason for this gap can be seen in the fact that in Italy professors of public international law also lecture on private international law, as a result of which they traditionally give priority to general conflicts problems over special private law problems.

Among the books, there are general treatises, commentaries and shorter contributions (compendiums or introductions to the reform) including the following:

General treatises: BALLARINO T. *Diritto internazionale privato* (with the collaboration of BONOMI A.), Padova, 2nd ed. 1996; 3rd ed. 1999, 774 pp. (the 1st ed. of the textbook appeared in 1982); MOSCONI F., *Diritto internazionale privato e processuale*, t. I, *Parte generale e contratti*, Turin 1996, 196 pp. + appendix of texts; t. II, *Parte speciale*, 180 pp. + appendix.

Commentaries: A number of authors contributed to the first commentary (*Riforma del sistema italiano di diritto internazionale privato. Legge 31 maggio 1995, n. 218*) published in the quarterly *Rivista di diritto internazionale privato e processuale* (No 4/1995, pp. 905-1279) and reprinted as a separate book under the title *Commentario del nuovo diritto internazionale privato* a cura di POCAR F., TREVES T., CARBONE S.M., GIARDINA A., LUZZATTO R., MOSCONI F. e CLERICI R. in the series *Studi e pubblicazioni* of the *Rivista*. The second commentary, also a collective work of many distinguished authors under the direction of S. BARIATTI, was published in No 5-6/1996 of *Le nuove leggi civili commentate*, a bimonthly periodical covering every field of Italian legislation.

Introductory works: ANNIBALE S., *Riforma del sistema italiano di diritto internazionale privato*, Padova 1996, 356 pp.; MENGOZZI P., *La riforma del diritto internazionale privato italiano* (2th edit.), Napoli 1997, 185 pp. + appendix; IACCARINO U., *Appunti dalle lezioni di diritto internazionale privato*, Napoli 1997, 319 pp. + appendix; CARBONE S.M./IVALDI P., *Lezioni di diritto internazionale privato*, Padova 2000 (in the form of a case-book), 185 pp.;

The main reason for reforming the old system was to make Italian conflicts rules comply with some fundamental constitutional principles, in particular with the principle of equal treatment of men and women, enshrined in the Italian Constitution of 1948.[4] In addition, it was necessary to harmonize the conflicts system

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BOSCHIERO N., *Appunti sulla riforma del sistema italiano di diritto internazionale privato* (Torino 1996, 293 pp.), which only covers matters relating to the general part of PIL; and PICONE P., *La riforma italiana del diritto internazionale privato*, Padova 1998, 697 pp., a collection of the author's earlier publications, including those during the preparatory period of Statute No. 218.

Collective contributions: *La riforma del diritto internazionale privato italiano*, published by the *Società italiana di diritto internazionale*, Naples 1997, 261 pp., which contains the reports held at the first meeting of the Società (11-12 April 1996) and the valuable book *Convenzioni internazionali e legge di riforma del d.i.pr.*, ed. by SALERNO F., Padova 1997, 415 pp., which contains the proceedings of a conference on the reform held at Le Castella (Reggio Calabria) on 30-31 May 1996. A noteworthy volume prior to the reform is *La riforma del diritto internazionale privato e processuale. Raccolta in onore di E. Vitta* (Milan 1994, 465 pp.), which was launched on 23 May 1990, the date of a memorial service held in honor of Edoardo VITTA (1913-1988), the forefather of Statute No. 218.

The most significant texts and documents of the Reform's legislative history are collected (with a short introductory commentary) in F. POCAR, *Il nuovo diritto internazionale privato italiano*, Milan 1997, 243 pp.

Noteworthy foreign literature includes: No. 1/1996 of *Revue critique de droit international privé*, which contains the French text of the law along with commentaries by GIARDINA A, BALLARINO T., POCAR F. and STARACE V.; PESCE A., 'Die Reform des italienischen Internationalen Privat- und Verfahrensrechts', in *Recht der internationalen Wirtschaft* 1995, pp. 977-983; WALTER G., 'Reform des internationalen Zivilprozeßrechts in Italien', in *Zeitschrift für Zivilprozeß* 1996, pp. 1-28; KINDLER P., 'Internationale Zuständigkeit und anwendbares Recht im italienischen IPR-Gesetz von 1995', in *RabelsZ.* 1997, pp. 227-284; POCAR F., 'Das neue italienische Internationale Privatrecht', in *IPRax* 1997, pp. 145-161; BONOMI A., 'The Italian Statute on Private International Law', in *Int'l Journal of Legal Information* 1999, pp. 247-267; POCAR F./HONORATI C., 'Italy' (National Report), in SYMEONIDES S.C. (ed.), *Private International Law at the End of the 20th Century: Progress or Regress?*, XVth International Congress of Comparative Law, The Hague-London-Boston 2000, pp. 279-294.

[4] Whereas Art. 3(2) of the German Constitution guarantees equal rights for men and women, Art. 3 of the Italian Constitution guarantees equal rights for all Italians; Art. 29(2) guarantees equal rights for spouses except where the principle of family unity prevails. As a result of the latter reservation, the influence of constitutional principles on private international law in Italy was weaker than in Germany; this problem will be dealt with later: see BALLARINO T. (note 3), pp. 70-75. An academic debate took place and the Constitutional Court (1987) declared that Articles 18 and 20 were partially incompatible with the Constitution (see Decisions Nos. 71 and 477). As a result, rules were abrogated which gave preference, respectively, to the husband's national law in matters of personal relations between the spouses (mostly separation and divorce because Art. 19 on patrimonial relations between spouses was not brought to the Constitutional Court), and to the father's national law in respect of child-parent relations.

with international conventions ratified by Italy. As will be seen, the first of these tasks was accomplished by using neutral, non-discriminatory connecting factors, the second by making reference in the Statute itself to certain international conventions and by extending their application beyond their own scope *ratione materiae et personarum*.

Following a growing trend in recent PIL codifications,[5] the new Statute is not limited to choice-of-law rules, but also covers international procedure, i.e., jurisdiction to adjudicate, and the recognition and enforcement of foreign judgments. Until now these two subject matters had been regulated in a small number of rather scanty provisions of the Code of Civil Procedure.[6] Although the reform of the Code of Civil Procedure had been initiated a long time ago and resulted in extensive modification of the Italian civil procedure in 1990, it paid no attention to the problems of international procedure.

These three matters are extensively connected. It does not make sense to use the Italian choice-of-law rules to determine the law applicable to a certain issue if one is not certain that Italian courts will have jurisdiction to adjudicate that issue. As a matter of fact, if the action is brought before the courts of a foreign State, the courts of that State will apply their own conflicts rules. If these differ from the Italian rules, as if often the case, this can lead to the application of a different law and thus to a different decision in the particular dispute. In such case, it is important to determine whether the foreign judgment will be recognized and enforced in Italy. Generally speaking, a foreign judgment can only be recognized and enforced if the foreign country had jurisdiction. This requirement is derived from the Italian rule on jurisdiction,[7] as a result of which the rules on jurisdiction normally have a twofold effect.

Thus it appears to have been a wise decision to regulate all of these matters in one statute, as is illustrated by the Swiss Statute on PIL of 1987[8] and by other more or less recent PIL codifications.

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[5] See BALLARINO T., 'Le codificazioni recenti del diritto internazionale privato in Europa', in BROGGINI G. (ed.), *Il nuovo diritto internazionale privato in Svizzera*, Milano 1990, pp. 36-441, at pp. 428 *et seq.*, who regards the enactment of procedural provisions in PIL statutes as an essential feature of the most advanced codifications.

[6] Continental Europe's textbooks on private international law usually did not cover international procedure (a striking example is the great comparative treatise of E. RABEL). Nonetheless, several authors took a different approach; the most recent ones include G. KEGEL (in *International Encyclopaedia of Comparative Law*, Vol. III(1)(I)), who explains the emphasis increasingly given to international civil procedure with the lack of specialized textbooks on this topic.

[7] Art. 64(a) of Statute No 218, see *infra*, section IV.

[8] Federal Statute on Private International Law of 18 December 1987, entered into force on 1 January 1989. For an English translation see : BUCHER A./TSCHANZ P.-Y., *Private International Law and Arbitration: Switzerland. Basic Documents*, Basle 1996, pp. 1-46.

Some brief remarks will be made on each of the three subjects mentioned above.

II. Jurisdiction to Adjudicate

A. Criteria of International Jurisdiction

The new Statute has introduced some significant innovations in matters of jurisdiction.[9] In order to gain a better understanding of these innovations, it is necessary to briefly describe some main features of the former system, which had been greatly influenced by the conviction that judicial jurisdiction is an essential expression of State sovereignty.[10]

As a result of this dogma, Italian courts always had jurisdiction when the defendant was an Italian citizen, even if the case was totally unrelated to Italy.[11] Moreover, derogation from the jurisdiction of Italian courts was not permitted unless both parties were foreigners or one of them was an Italian citizen having his or her domicile abroad.[12] Finally, a plea of *lis alibi pendens* was barred,[13] as a result of which a lawsuit in Italy was not precluded by the existence of foreign proceedings on the same issue and between the same parties.

This parochial regime had already been abandoned by virtue of the Brussels and Lugano Conventions, which entered into force in Italy in 1971 and 1992, respectively. However, since these applied only within their own scope *ratione*

[9] See ATTARDI A., 'La nuova disciplina in tema di giurisdizione italiana e di riconoscimento delle sentenze straniere', in *Rivista di diritto civile* 1995, I, pp. 727-787; CAMPEIS G./DE PAULI A., *Il processo civile italiano e lo straniero*, 2nd ed., Milan 1996; BALENA G., 'I nuovi limiti della giurisdizione italiana secondo la legge 31 maggio 1995 n. 218', in *Foro it.* 1996, V, pp. 208-238.

[10] On the general principles of the former Italian system compared with foreign systems, see GIULIANO M., *La giurisdizione civile italiana e lo straniero*, 2nd ed., Milan 1970. For an even broader approach see VON MEHREN A., 'Adjudicatory Jurisdiction: General Theories Compared and Evaluated', in 63 *Boston Law Rev.* 1983, pp. 273-340. A valuable evaluation of the former system is given by LUZZATTO R., in *Riv. dir. int. priv. proc.* 1995, pp. 923-938.

[11] This was not expressly stated by the law, but could be inferred from the fact that the Code of Civil Procedure only regulated Italian jurisdiction when the defendant was a foreigner (Art. 4), thus showing that Italian courts always had jurisdiction when the defendant was Italian.

[12] Art. 2 of the Code of Civil Procedure.

[13] Art. 3 of the Code of Civil Procedure.

materiae et personarum, there was still a strong need to reform the jurisdiction rules with respect to States that are not party to these European Conventions.

The new Statute retains Italy's traditional distinction between international jurisdiction and the territorial jurisdiction of domestic courts, although international jurisdiction is established in certain categories of disputes by reference to domestic rules on territorial jurisdiction (Art. 3(2)). On the other hand, every nationalistic oriented solution has been abandoned. As a matter of fact, one of the most significant innovations is that nationality is no longer a general connecting factor for jurisdiction.

The *first general rule* (Art. 3 (1)) provides that Italian courts have jurisdiction when the defendant has his or her domicile or residence in Italy (*actor sequitur forum rei*), irrespective of citizenship.

Article 3(1) also specifies that Italian courts have jurisdiction 'over other matters specified by law'. Reference is made here: 1) to a set of articles in Title III of Statute No. 218 containing special jurisdiction rules for particular categories of disputes (e.g., divorce, kinship, adoption, protection of minors and adults, succession), and 2) to jurisdiction rules laid down in different statutes unaffected by the new Statute, such as those relating to patent law or the Code of Navigation.

It is important to note that citizenship still plays a role in some special jurisdiction rules in the fields of family law and succession. In these areas, the reach of Italian jurisdiction is sometimes exorbitant. For instance, there appears to be no compelling reason for an Italian court to have jurisdiction over divorce cases simply because one of the spouses is Italian,[14] when the other spouse is a foreign national and the couple has always been domiciled abroad. The same is true in succession disputes where the deceased is an Italian[15] domiciled abroad, the heirs are foreign nationals domiciled abroad, and all the property is located abroad.

In regard to such situations, it is to be regretted that the Italian Statute rejects the doctrine of *forum non conveniens*.[16] Whenever Italian courts have jurisdiction, they must hear the case and are not allowed to dismiss it, even if it entails only an insignificant connection with Italy.

On the other hand, exorbitant jurisdiction rules have been banned from the Italian legal system with respect to subject matters falling within the scope of the Brussels Convention (i.e., contractual and non-contractual obligations, property rights, companies, maintenance obligations etc.).[17] In these areas, the drafters of the

[14] See Art. 32 of the 1995 Statute.

[15] See Art. 50 of the 1995 Statute.

[16] The unique tribute to this rule is paid by Art. 5 of the new Statute, which provides that Italian courts shall not have jurisdiction over actions concerning rights *in rem* on immovables situated abroad.

[17] A remarkable book on the jurisdiction rules of the Brussels Convention (Titles I and II) is now available in Italian legal scholarship: MARI L., *Il diritto processuale civile della Convenzione di Bruxelles. I. Il sistema della competenza*, Padova 1999.

new Statute have made the audacious and successful decision to extend the reach of some rules of the Convention to disputes that are beyond its scope of application. This is the *second rule* set forth in Article 3(2) of Statute No. 218.[18]

This extension does not apply to the entire Convention, only to some of its jurisdiction rules, in particular those contained in sections 3, 4 and 5. These include the so-called 'special' jurisdiction rules of Articles 5 and 6 for contracts, maintenance, torts, trusts etc., as well as the special rules providing protection to some categories of weaker parties (insured persons and consumers, Articles 7 to 15). In the original system of the Convention, all these rules are applicable only if the defendant has his or her domicile in another contracting State. By virtue of the reference included in the Italian Statute, they are now applicable in Italy even if the defendant is domiciled in a non-contracting State.

Extending the scope of application of the Convention rules presents various advantages. On the one hand, it simplifies the task of Italian courts by allowing them to rely on the same set of rules, irrespective of the domicile of the parties. On the other hand, it eliminates all discrimination by putting parties domiciled inside and outside of the Europe Union on equal footing.

Of course, this solution also raises some questions. For instance, when applying the Convention in cases involving non-EU-Member States, will Italian courts be bound to the interpretation of the jurisdiction rules given by the European Court of Justice? Most commentators answer this question affirmatively.[19] It seems logical to assume that the reference to the Convention also includes the relevant interpretation by the Court of Justice.

Furthermore, would Italian courts - under the same circumstances – be allowed to raise a question of interpretation before the Court in Luxembourg? This question is more difficult to answer because it concerns not only the Italian legal system but also the competence of the Court of Justice, as well as its willingness to examine issues that are formally outside the scope of application of the Convention.[20]

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[18] In the future, the reference to the Brussels Convention in Art. 3(2) of the Italian Statute will have to be interpreted as referring to the new EC-Regulation, which should replace the Convention: see the Proposal for a Council Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, of 14 September 1999, COM (1999) 348 final, published in this *Yearbook*, pp. 301-327.

[19] See POCAR F., 'Le rôle des critères de compétence judiciaire de la Convention de Bruxelles dans le nouveau droit international privé italien', in *E pluribus unum. Liber amicorum Georges A. L. Droz*, The Hague 1996, pp. 357 *et seq.*, esp. p. 366; MARI L., 'Delimitazione della giurisdizione italiana mediante rinvio alla convenzione di Bruxelles del 1968 e competenza pregiudiziale della Corte di giustizia', in *Foro italiano* 1996, IV, at 370.

[20] See GAJA G., 'L'interpretazione di norme interne riproduttive della Convenzione di Bruxelles da parte della Corte di giustizia', in *Riv. dir. int.* 1995, p. 757; MARI L. (note 19), at 378.

In regard to matters not included in the scope of the Brussels Convention, the *third rule* of Article 3(2) (at the end) provides that the international jurisdiction of Italian courts shall also be determined by reference to the rules on territorial jurisdiction (*competenza territoriale*). This reference is likely to give rise to problems because the Code of Civil Procedure includes a very wide-framed regulation of territorial competence (Art. 18), according to which the judge of the plaintiff's residence has jurisdiction whenever the defendant has neither domicile nor residence in Italy. If applied to international litigation, this rule would mean that Italian courts would always have jurisdiction when the plaintiff resides in Italy. Thus the system of excessive jurisdiction that the new Statute intended to abolish would be recreated and even expanded. We submit therefore that Article 3(2) of Statute No. 218 should be interpreted as referring only to those rules of territorial competence that concern special matters (such as divorce, bankruptcy[21] etc.), but not to the general rule of Article 18 of the Code of Civil Procedure.

B. Jurisdiction Agreements

Another important innovation of the 1995 Statute is the much more liberal attitude towards jurisdiction agreements, even when they derogate from the jurisdiction of Italian courts.[22] On this point, however, instead of simply extending the rule of Article 17 of the Brussels Convention, the Italian legislator preferred to adopt a special rule. As specified in Article 4(2), the parties to a dispute can prorogate the jurisdiction of a foreign court and thus exclude the jurisdiction of Italian courts, provided that the action concerns alienable rights and, furthermore, that the agreement is evidenced in writing.

This rule will apply outside the scope of application of the Brussels and Lugano Conventions, i.e., when neither of the parties is domiciled in a contracting State, when the agreement prorogates the jurisdiction of the courts of a non-contracting State and, of course, in subject matters not covered by the Conventions.

Jurisdiction agreements are also allowed when they prorogate the jurisdiction of an Italian court, provided they are evidenced in writing. Furthermore, Italian courts can entertain the action when the defendant enters an appearance without pleading the lack of jurisdiction in its first statement or defense (Art. 4(1)). If the defendant fails to appear, the court must declare the lack of jurisdiction of its own motion (Art. 11).

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[21] See SALERNO F., 'Legge di riforma del diritto internazionale privato e giurisdizione fallimentare', in *Riv. dir. int. priv. proc.* 1998, pp. 1-50.

[22] Some features of the former approach are stressed by QUEIROLO I., *Gli accordi sulla competenza giurisdizionale tra diritto comunitario e diritto interno*, Padova 2000, pp. 97 *et seq.*

C. *Lis Pendens*

Finally, it is worth mentioning the new rule on *lis pendens* inspired by Article 21 of the Brussels and Lugano Conventions. According to Article 7 of the 1995 Statute, an Italian court shall stay its proceedings when a foreign court has first been seized with an action between the same parties, involving the same issue and the same cause of action.

The Italian Statute requires two further conditions that do not exist in the European Conventions. On one hand, the plea of *lis pendens* must have been raised by one of the parties since the court cannot stay the proceedings on its own motion. On the other hand, the Italian court must stay the proceedings only if it finds that the decision of the foreign court may be recognized in Italy. If this 'recognition prognosis' does not come true or if the foreign court declines jurisdiction, the Italian proceedings can continue at the request of one of the parties.

III. Choice-of-Law Rules

A. General Remarks

Since Italian choice-of-law rules are codified, the role of case law in the resolution of conflicts issues has traditionally been very limited, whereas in France the majority of choice-of-law rules have been elaborated by courts,[23] at least in the past.

Case-books such as ANCEL and LEQUETTE's *Grands arrêts de la jurisprudence française de droit international privé*[24] and leading cases quoted by the party's name such as *Bartholo*, *Ponnoucannemalle*, *Lizardi* etc. are unknown. Generally speaking, Italian decisions in conflicts cases do not announce new rules; they only interpret the existing provisions.[25]

Compared to the old system, the new Statute is much more detailed. Whereas only fifteen provisions were included in the introductory part of the Civil Code, Title III of the 1995 Statute contains more than forty articles dealing with the choice of law.

[23] France has built up its system of conflicts rules through court decisions on the basis of some laconic sentences of the Code Napoleon (Arts. 3 and 6).

[24] ANCEL B./LEQUETTE Y., 'Grands arrêts de la jurisprudence française de droit international privé', 3rd ed., Paris 1998.

[25] Notable exceptions are two judgments of the Constitutional Court that invalidated some discriminatory conflicts rules in the field of family law in 1987: see *supra*, note 4.

One can sense the influence of the Swiss PIL Act of 1987; however, the Italian Statute is less comprehensive and precise, sometimes looking like an incomplete replica of its model.[26]

Chapter I of the Italian Statute contains the general provisions on applicable law, while the other chapters are devoted to the various areas of law (capacity and rights of natural persons, companies, family relations, succession, property rights, contractual and non-contractual obligations) and, as we have seen, to international civil procedure.

1. General Provisions on the Choice of Law

a) Admission of Renvoi

From the viewpoint of Italian tradition, the first and most revolutionary of the general provisions is Article 13 which introduces *renvoi*.[27]

Under the former law, the *renvoi* doctrine was expressly rejected.[28] Once the court had determined the applicable law designated by the Italian choice-of-law rule, it only had to apply the substantive rules of that law in the particular case.

Now the task of the courts is much more complicated. If the applicable law is that of a foreign State, the Italian courts must determine whether the choice-of-law rules of the foreign law refer to the law of a different country. If this is the case, they will have to apply the *renvoi* in two instances: firstly, when the foreign law refers back to Italian law (*renvoi au premier degré*, *Rückverweisung*); and secondly, when the foreign choice-of-law rules designate the law of a third State (*renvoi au deuxième degré*, *Weiterverweisung*), provided that the law of this State 'accepts' this *renvoi*, i.e. considers itself applicable in the particular case.

In the first instance, the admission of *renvoi* has the merit of facilitating the decision to be taken in the case, since the court can apply the substantive rules of the forum; in the second instance, it promotes uniform decisions, which is one of the purposes of all private international law systems.

Some examples from the law of succession, the seminal field of *renvoi*, can illustrate the implementation of this rule. If a French citizen domiciled in Italy dies and an Italian court must decide how his movables are to be distributed, it would

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[26] The Swiss PIL Act contains 200 Articles. It should be noted, however, that it also covers international arbitration (Articles 176-194), which is regulated in Italy by Articles 806-831 of the Code of Civil Procedure, and international bankruptcy (Articles 166-175), a topic which has been completely ignored by the Italian lawmaker. See the current EC-Regulation No. 1346/2000 on insolvency proceedings, of 29 May 2000, in *OJ of the European Communities*, L 160, 30 June 2000, published in this *Yearbook*, pp. 241-264.

[27] This rule was not part of the draft proposed by the Government. It was included somewhat surprisingly in the text during the *travaux préparatoires.*

[28] Art. 30 of the preliminary provisions to the Civil Code.

apply Italian law since the Italian conflicts rule on succession designates the national law of the deceased,[29] i.e., French law, and this law refers back to Italy because this is the country of the deceased's last domicile. If the deceased had been domiciled in England, English law would have been applicable because the English conflicts rules on succession follow the principle of domicile.

Let us now suppose that the French citizen had immovable property located in England and Germany. According to French private international law, succession to immovables is governed by the *lex situs*. Since the same choice-of-law rule exists in England, we can say that English law 'accepts' this *renvoi.* Thus its substantive rules would apply to the immovable situated in England. On the contrary, a German court would not accept the *renvoi* designated by French law, because its conflicts rule submits the total succession to the national law of the deceased. Therefore, with respect to the immovable situated in Germany, the Italian court would not apply the *renvoi* but would apply French law, i.e. the law designated by the Italian Statute. This can lead to a scission (*Spaltung*) of the succession.[30]

Cases involving a third reference are deemed highly controversial. This is where the foreign conflicts rules lead to the law of a third State which then refers to another legal system that considers itself applicable (*renvoi au troisième degré*). For instance, a Swiss citizen domiciled in France dies, leaving immovable property in England. According to the Italian conflicts rules, Swiss law is applicable as the national law of the deceased; however, the Swiss statute (Art. 91(1)) refers to the law of domicile, i.e., French law. The latter submits immovable property to the *lex situs*, i.e., English law, which considers itself applicable. The wording of Article 13 provides no help at all in resolving the problem; however, in our opinion, English substantive law should apply because this solution would create uniformity.[31] On the other hand, many Italian commentators regard this 'double' *renvoi* as going too far and are of the opinion that it is not covered by Article 13 of the Italian Statute.[32]

Who are the 'champions' of *renvoi* at present? In Europe, Germany recognizes *renvoi* almost absolutely, the only condition being that it does not contradict the rationale of the choice-of-law rules of the forum.[33] In other recent codifications, *renvoi* is either rejected (e.g., in Quebec or Australia) or admitted only as a rare exception (Switzerland, Netherlands).[34] Italy is an exception in that *renvoi* is excluded only in some limited instances, which generally correspond to the criteria

[29] See *infra*, section III.B.4.

[30] See *infra*, section III.B.4.

[31] See BALLARINO T. (note 3), p. 251.

[32] PICONE P. (note 3), p. 157; POCAR F., *La riforma…* (note 3), p. 33; MUNARI F., in *Le nuove leggi civili commentate* 1996, pp. 1022 et seq.

[33] Art. 4 *Einführungsgesetz zum Bürgerlichen Gesetzbuch.*

[34] For a survey of the application of renvoi see MÄSCH G., 'Der Renvoi – Plädoyer für die Begrenzung einer überflüssigen Rechtsfigur', in *RabelsZ* 1997, pp. 285 *et seq.*

of *proximité*, as conceived by LAGARDE, or to the purpose of achieving a certain substantive result.[35]

b) Ascertaining the Contents of Foreign Law

Judges are required to ascertain the contents of foreign law *ex officio* (Art. 14). Although this principle has been advocated for many years by private international law scholars,[36] the courts had always been reluctant to accept it.

When ascertaining the contents of foreign law, the courts may use the instruments referred to in international conventions or seek assistance from the Ministry of Justice, experts or specialized institutions. Italian courts can also require the co-operation of the parties, but they cannot place the burden of proving foreign law on them, as Swiss courts can. It should be stressed, however, that Italy did not create a public entity with the institutional task of providing information on foreign law, as Switzerland did by creating the Swiss Institute of Comparative Law.[37]

2. General Features of Choice-of-Law Rules

The choice-of-law rules of the Italian Statute are mostly bilateral, 'jurisdiction-selecting' and rigid rules.

a) Bilateral Rules

The rules are bilateral because they can lead to the application of either the law of the forum or foreign law, without discriminating against the latter. Regarded as one of the great achievements of the Italian school of private international law under the influence of Mancini, the principle of extending equal treatment to the *lex fori* and to foreign law has been retained in the new system.

b) 'Jurisdiction-Selecting' and 'Functional' Approach

Most Italian conflicts rules can be regarded as jurisdiction-selecting rather than the result-selecting. In other words, the court should determine the applicable law

[35] LAGARDE P. 'Le principe de proximité', in *Recueil des cours*, Vol. 196, 1986-I, p. 53; see also BALLARINO T. (note 3), p. 264. On the '*renvoi in favorem*' see *infra*, section III.A.2*b*.

[36] BOSCHIERO N., in *Le nuove leggi civili commentate* 1996, p. 1037 (notes 3 and 4).

[37] For information on the Swiss Institute of Comparative Law, see its homepage at: http://www-isdc.unil.ch/

without taking into account the contents of the law designated by the conflicts rules. This approach has been paramount in the Continental school of private international law. As RAAPE pointed out, the choice-of-law process is a '*Sprung ins Dunkel*' (jump into the dark), and David CAVERS himself spoke of a 'blindfold test'.[38]

Only after determining the applicable law can the court refuse its application in the particular case if the result would be contrary to a fundamental principle of Italian law. The traditional function of *ordre public* has thus been reaffirmed. It is important to stress that Article 16 of the new Statute assures that *ordre public* has a concrete function. Instead of making an abstract evaluation of foreign legal rules, the courts need to examine in the particular case whether their application would lead to effects that are incompatible with public policy.

Article 17 expressly recognizes the existence of mandatory rules of the *lex fori* that must be applied in all cases, also when the choice-of-law rules designate a foreign law.[39] These rules require a different approach to conflicts issues. Here the judge does not have to determine the law applicable to a certain legal relationship, but to ask whether the object and purpose (in other words, the policy) of the domestic rule imposes its application in the particular case.[40] Statute No. 218 has confirmed the prevailing view held by Italian scholars and eventually expressed in some court decisions on the applicability of some provisions of Italian law, irrespective of any reference to a foreign law.

Unfortunately, the new Statute does not deal with the question whether the mandatory rules of a foreign state must be applied in some circumstances, even though they are not part of the law designated by the choice-of-law rules. This controversial matter is regulated in the field of contractual obligations by Article 7 of the Rome Convention on the law applicable to contractual obligations of 1980, which provides that:

> ' […] effect may be given to the mandatory rules of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application'.

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[38] See CAVERS D., 'A Critique of the Choice-of-Law Problem', 47 *Harvard L. Rev.* 1933-1934, pp. 173 *et seq.*

[39] In Italy they are called 'rules of mandatory application', in France 'lois de police' or 'lois d'application immédiate' and in Germany 'Eingriffsnormen'.

[40] This methodology is similar to the 'functional' policy-oriented approach adopted in the United States under the influence of Brainerd CURRIE's interest analysis; however, it is limited to cases where an important interest of the forum is at stake.

A similar rule is also found in Article 19 of the Swiss PIL Act.[41]

A second important exception to the traditional approach of selecting a jurisdiction is supplied by choice-of-law rules whose purpose is to achieve a particular substantive result that is the expression of a certain policy of the law of the forum. In such cases, policy considerations lead neither to the refusal of the application of foreign law nor to the mandatory application of some domestic rules, but influence the choice of the applicable law in order to ensure a certain result.

Two different techniques are used for this purpose: alternative connections and optional rules. Alternative connections are used to uphold the formal validity of certain acts (marriage, recognition of an illegitimate child, testamentary wills). Similarly, legitimacy and legitimation of children is governed, alternatively, by reference to the national laws of the child and its parents, whereby the law more favorable to the creation of a relation of kinship prevails.[42]

Optional rules are used in the field of torts, where the injured party is given the right of choice between different laws.[43] This device aims to protect the injured party seeking reparation.[44]

It is noteworthy that in all areas where the new Statute contains policy-oriented choice-of-law rules, it also makes an exception to the general rule on *renvoi*. As far as legitimacy and legitimation are concerned, *renvoi* must be applied only if it promotes the policy underlying the choice-of-law rule, i.e., if it leads to the application of a law that favors the establishment of the parental link (*renvoi in favorem*).[45] In cases involving non-contractual liability and the formal validity of acts, *renvoi* is not permitted at all.

Codification of the rule of mandatory application, on the one hand, and the introduction of some result-oriented choice-of-law rules, on the other hand, are expressions of the 'methodological pluralism'[46] that constitutes one of the distinguishing characteristics of private international law in Europe in the modern or rather post-modern era, as professors JAYME and BRILMAYER would put it. This syncretism is generally considered a sign of maturity.

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[41] For further details see BONOMI A., *Le norme imperative nel diritto internazionale privato*, Zurich (Schulthess) 1998; IDEM, 'Mandatory Rules in Private International Law', in this *Yearbook* 1999, pp. 215-247.

[42] PICONE P. (note 3), pp. 303 *et seq*.

[43] See *infra*, section III.B.7.

[44] DAVÍ A., *La responsabilità extracontrattuale nel nuovo diritto internazionale privato italiano*, Turin 1997, pp. 34 *et seq*.

[45] See VENTURI P., 'Sul cosiddetto invio *in favorem* nel sistema italiano di diritto internazionale privato', in *Riv. dir. int. priv. proc.* 1999, pp. 525-556; PICONE P. (note 3), pp. 318 *et seq*.

[46] BATIFFOL H., 'Le pluralisme des méthodes en droit international privé', in *Recueil des Cours*, Vol. 139, 1973-II, pp. 75-147.

c) Role of Citizenship as a Connecting Factor

In the cases mentioned above, policy considerations are relevant at the moment the choice of law is made. In all other fields, the rules of the Italian Statute are jurisdiction selecting. While some of them simply reaffirm well-established solutions already provided for in the old system (for instance, applicability of the *lex situs* in the field of rights *in rem*), there are also some major innovations.

In regard to natural persons, family relations and succession, i.e., in subject matters traditionally qualified as personal status or *Personalstatut*, the main connecting factor is still citizenship. The drafters of the Italian law did not want to abandon the principle of nationality, the most significant contribution of the Mancini school, or to renounce the applicability of Italian law to the millions of Italian citizens domiciled and resident abroad. From this point of view, the Italian Statute is closer to the German EGBGB, as reformed in 1986, than to the Swiss PIL Act of 1987.

This choice has been approved by most commentators. In the future, however, it could give rise to difficulties. This is because Italy has become a country of immigration and a considerable number of immigrants are nationals of Islamic countries where personal status is governed by Muslim law. As a result of the applicability of the law of nationality, Italian courts will be confronted with Muslim institutions that are often incompatible with fundamental principles of the Italian legal system, particularly the principle of non-discrimination on grounds of sex and religion. Until now, these issues have rarely been addressed in Italian courts;[47] however, the experience of other European countries shows that things may change.[48] It is important to note that, in France as well as in Germany, some authors favor increasing the use of domicile and habitual residence as connecting factors.[49]

Compared to the former legislation, the role of citizenship has been reduced in the Italian system of private international law. Although it is no longer a universal principle in the Italian conflicts system, nationality is still the most frequently used connecting factor. This is the result of several different factors.

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[47] See CAMPIGLIO C., 'Matrimonio poligamico e ripudio nell'esperienza giuridica dell'Occidente europeo', *Rivista di diritto internazionale privato e processuale* 1990, p. 852; PASTORE F., 'Famiglie immigrate e diritti occidentali: il diritto di famiglia musulmano in Francia e in Italia', *Rivista di diritto internazionale* 1993, p. 73.

[48] ALDEEB S./BONOMI A. (eds.), *Le droit musulman de la famille et des successions à l'épreuve des ordres juridiques occidentaux*, Publications of the Swiss Institute of Comparative Law, Vol. 37, Zurich 1999.

[49] In France: MONÉGER F., 'Les musulmans devant le juge français', in *Journal de droit international* 1994, p. 374; in Germany: BASEDOW J./DIEHL-LEISTNER B., in JAYME E./MANSEL H. P. (eds.) *Nation und Staat im Internationalen Privatrecht*, Heidelberg 1990, pp. 13-43.

Firstly, it should be noted that Italy is party to some international conventions that confine citizenship to a secondary role. This is the case with respect to the Hague Convention on the Protection of Children of 1961 and the Hague Convention on the Law Applicable to Maintenance Obligations of 1973, both of which give priority to the habitual residence of the minor and the creditor, respectively.

Secondly, the admission of *renvoi* also reduces the scope of application of the law of nationality whenever the latter refers to the law of a different country. This is often the case in the field of succession since many countries give priority to the law of the domicile of the deceased or, as far as immovable property is concerned, to the *lex rei sitae*.[50] In this area, one of the purposes of *renvoi* is to build a bridge between these different approaches. Accordingly, achieving a uniform solution is deemed to be more important than the policy underlying the choice-of-law rule of the forum.

Thirdly, the old choice-of-law rules relating to the personal and property relations between spouses (Art. 18 of the preliminary provisions to the Civil Code) have been dropped in favor of new provisions that adopt a neutral and flexible solution: If the spouses have different nationalities or multiple common nationalities, their relations are governed by the law of the State in which their matrimonial life is mainly located.

Finally, another exception to the application of the law of nationality results from the admission of party autonomy in certain areas. Whereas the old system recognized a choice of law by the parties only in the field of contracts, the new Statute extends this possibility to matrimonial property relations and succession as well. In both cases, the choice is restricted to certain laws having a close connection with the parties. With respect to their matrimonial property regime (Art. 30), the spouses are allowed to choose the law of the State of which at least one of them is a national or in which at least one of them has his or her residence. In the field of succession (Art. 46(2)), the testator can make a so-called *professio iuris* but only in favor of the law of his or her residence.

The latter choice is subject to a further limitation. If the testator is an Italian citizen, the choice of law has no effect on the right to the reserved part of the inheritance that Italian law confers on heirs resident in Italy at the moment of the death. This means that an Italian citizen residing in the United States can subject his succession to the law of that country; however, if he excludes his wife or any of his children residing in Italy from the succession, the excluded person(s) are entitled to that part of the estate designated by the Italian Civil Code.

The role of nationality is very limited in other areas of law. In the law of contracts, the law of the common nationality of the parties used to be the primary connecting factor in the former Italian system. According to this rule, the Italian courts had to apply Italian law to a contract concluded between two Italian citizens

[50] See sections III.A.1*a* and III.B.4.

resident abroad, even in the absence of any other connection with Italy. This rule was totally unjustified and has been abandoned as a result of the ratification of the Rome Convention on the Law Applicable to Contractual Obligations of 1980.[51]

In the area of torts, the law of the place of the accident usually applies; however, as will be seen below, the new Statute makes an exception if all the persons concerned are citizens of one State and are all residents of that State (Art. 62(2)).[52]

d) Lack of Flexibility of Most Choice-of-Law Rules

The third main characteristic of the Italian rules is their lack of flexibility, which some commentators regard as one of the major shortcomings of the Italian PIL system. As a matter of fact, the 1995 Statute rarely empowers the courts to determine the applicable law in a given situation by examining existing connections with different countries. The only open-ended choice-of-law rule included in the new Statute relates to the personal relations between spouses and their matrimonial property regime, which - as we have seen – are governed by the law of the country where their matrimonial life is mainly located.

Nonetheless, another important and well-known rule of this kind has made its way into the Italian system by virtue of the reference to the Rome Convention of 1980. Article 4 of the Convention provides that, in the absence of a choice of law by the parties, the contract is to be governed by the law of the country with which the situation is most closely connected.

Curiously enough, most Italian scholars defend a flexible interpretation of Article 4 of the Convention, arguing that the presumptive rule of the characteristic performance embodied in paragraph 2 is nothing more than a mere guideline having no special force compared to the general principle of the closest connection.[53] This interpretation is contrary to the prevailing trend in German and Dutch

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[51] See *infra*, section III.B.6.

[52] This rule has been inspired by two well-known decisions of common law jurisdictions: in *Babcock v Jackson* (1963), the Court of Appeals of New York applied the *lex fori* in a case where both parties were domiciled in New York, even though the car accident occurred in Ontario; in *Boys v Chaplin* (1969) the House of Lords applied English law to a car accident involving two English soldiers in Malta. These two cases are often cited as the expression of the tendency of the courts to give up rigid choice-of-law rules and search for more flexible solutions. Unfortunately, the drafters of the Italian Statute only took the concrete results of those decisions and crystallized them into a new hard-and-fast rule, thus giving priority to the predictability of the applicable law.

[53] See BARATTA R., *Il collegamento più stretto nel diritto internazionale privato dei contratti*, Milan 1991, pp. 172 *et seq*.; FRIGO M., in SACERDOTI G./FRIGO M., *La Convenzione di Roma sul diritto applicabile ai contratti internazionali*, 2nd ed., Milan 1994, pp. 24 *et seq*.; VILLANI U., *La Convenzione di Roma sulla legge applicabile ai contratti*, Bari 1997, pp. 100 *et seq*. Contra: BALLARINO T. (note 3), p. 606; BONOMI A. (note 41), pp. 29 *et seq*.

jurisprudence, where the application of the 'escape clause' in paragraph 5 is deemed justified only in exceptional cases.[54]

The rigidity of the Italian system also results from the fact that the 1995 Statute contains no general 'escape clause', as in Article 15 of the Swiss PIL Act, which permits a deviation from the ordinary conflicts rules 'if under all circumstances the case clearly has only a slight connection with the designated law and a much closer connection with another law'.[55]

In conclusion, it can be said that, from a comparative point of view, the Italian approach to conflicts problems is still relatively conservative. In Europe, the influence of what is known as the American 'conflict-of-laws revolution' has been limited, particularly as far as the Italian system is concerned.

B. Choice-of-Law Rules in Certain Areas of Law

1. Corporations

After having been a steadfast supporter of the *siège social* doctrine for more than a century, Italy now favors the law of the State of incorporation. Introduced in the final stage of the parliamentary procedure for the adoption of Statute No. 218, Article 25(1) states:

> 'Corporations, associations, foundations and any other bodies, both based on public or private structure, even though not having the characteristics of an association, shall be governed by the law of the State in which they are incorporated.'

Apparently focusing on nationality, the former law provided in Article 2505 of the Civil Code that companies incorporated abroad which have the seat of their administration or the main object of their enterprise in Italy shall be governed by Italian law, even in regard to the formal requirements of their constitutive act. Article 2509 added that corporations formed in Italy were still governed by Italian law even if the object of their activity (*l'oggetto della loro attività*) was located abroad. Since the purpose of this rule was only to establish criteria for the application of Italian law, it was not considered a true bilateral conflicts rule for determining the law applicable to the personal law of corporations. As a matter of fact, such a rule was applied each time a foreign company did business in Italy or was party to an 'Italian' contract.

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[54] *Bundesgerichtshof*, 27/28 January 1987, in *IPRax* 1988, p. 109; Hoge Raad, No. 14566 of 25 September 1992, in *Rechtspraak van de Week* 1992, p. 1013.

[55] VON OVERBECK A.E., 'The Fate of Two Remarkable Provisions of the Swiss Statute on Private International Law', in this *Yearbook* 1999, pp. 119-133.

The problem of developing a true conflicts rule was noticed less by the courts than the doctrine. In fact, the courts were confronted with conflicts problems only in a small number of corporation cases. With the exception of two series of cases, one created immediately after the war by nazionalizations in Eastern Europe and the other in the sixties as a result of the recognition of *Anstalten*, the courts usually dealt with problems relating to the personal law of a corporation within the framework of other questions.[56]

A peculiar product of Liechtenstein law, *Anstalten* are halfway between a foundation and a corporation. What is important is that they served as a haven for Italians for tax evasion purposes. In cases involving *Anstalten*, the Italian Supreme Court (*Corte di cassazione*) maintained that their personal law was determined by Article 16 of the preliminary provisions of the Civil Code. According to this rule, corporate bodies enjoy the same treatment as natural persons with respect to civil rights (i.e., they enjoy all the civil rights accorded to Italian legal persons, subject only to reciprocity).[57] By means of this device, foreign corporations are recognized as being formed in their legal system of origin.

In an attempt to clarify this matter, the Italian legislator followed Article 155 of the Swiss PIL Act almost literally in Article 25(2) by specifying that the law governing corporate bodies includes the following contents:[58]

> '[…]
> *a)* Legal nature;
> *b)* Trade or corporate name;
> *c)* Incorporation, transformation and dissolution;
> *d)* Capacity;
> *e)* Establishment, powers and operational modalities of the organs;
> *f)* Agency;
> *g)* Modalities to acquire or lose membership status in the corporation**,** as well as rights and obligations emanating therefrom;
> *h)* Liability for obligations undertaken by the entity; and
> *i)* Consequences resulting from a breach of law or of the Articles of incorporation.'

However, the dominance of the law of the State of incorporation is not undisputed. The final part of Article 25(1) reads as follows:

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[56] For instance, taxation, bankruptcy jurisdiction for companies transferred abroad, foreign nature of corporations in order to confirm Italian jurisdiction etc. See BALLARINO T., 'La società per azioni nella disciplina internazionalprivatistica', in COLOMBO G.E./ PORTALE G.B., *Trattato delle società per azioni*, Vol. IX, 1, Torino 1994, respectively at 60, 109, 173.

[57] BALLARINO T. (note 56), pp. 48-56.

[58] BENEDETTELLI M.V., in *Le nuove leggi civili commentate* 1996, pp. 1113-1120.

> 'Nevertheless, Italian law shall apply if the seat of the administration (*sede dell'amministrazione*) or the principal place of business (*l'oggetto principale*) of the corporation is situated in Italy.'

Tantamount to the U.S. practice of examining the law of the 'commercial domicile'[59] for all problems relating to 'pseudo-foreign corporations', this rule requires the corporate bodies concerned to comply with all formalities prescribed by Italian law for national corporations. At the same time, it enables them to act in the capacity of Italian corporations.

In this case it is not clear whether the corporation maintains its foreign personal law;[60] however, it can surely do business in Italy under the protection of Article 16(2) of the preliminary provisions of the Civil Code, which has not been abrogated by the reform. However, the very moment it does not comply with the formalities prescribed by Italian law, the officers who act on behalf of the corporation will be jointly and severally liable for the corporation's obligations (Art. 2508 of the Civil Code).

This regulation is surely unacceptable in view of the uncertainty caused by the clause requiring the 'italianization' of any corporation having its *oggetto sociale* in Italy.[61]

Article 25(3) contains rules for cases (not frequent) where the legal seat of a corporation is transferred abroad and where corporations having their seat in different States merge. In both cases, compliance with the laws of all States concerned is required.

2. Marriage and Divorce

Family matters are regulated in Title III, Chapter IV. Like all other substantive requirements for marriage, capacity to marry is governed by the national law of each spouse (Art. 27). However, if a foreigner wishes to contract marriage in Italy, some of the essential requirements of marriage under Italian law (e.g., some parental relations may not exist between the spouses and neither spouse can be married to another person at that time) are applicable as rules of mandatory application.[62]

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[59] Identified as the 'center of authority' or 'the actual seat of corporate government': see EHRENZWEIG A.E., *Treatise on the Conflict of Law*, St. Paul Minn. 1962, 412.

[60] Other cases of double nationality are merely apparent; see BENEDETTELLI M. (note 58), pp. 1124-1125.

[61] The term *oggetto sociale* is wider than the English term *principal place of business* and could thus require that a foreign corporation which is controlled for a short period of time by an Italian corporation be governed by Italian law: see BALLARINO T. (note 3), p. 365.

[62] See Art. 116(2) of the Civil Code, which has not been revised by Statute No. 218.

Sometimes, public policy can also play a role in this field. For instance, if the national law of the spouses or one of them prohibits celebration of the marriage because of different religions (as Muslim law does in certain cases), this rule cannot be applied in Italy as it violates the fundamental principle of non-discrimination on grounds of religion or race (Art. 3 of the Italian Constitution). Similarly, if the foreign applicable law permits the marriage of a person under 16, this marriage cannot be celebrated in Italy for reasons of public order.[63]

The personal and property effects of marriage (Arts. 29 and 30) are governed by the common national law of the spouses. If they have no common nationality, the law of the country where their matrimonial life is mainly located shall apply. In the majority of cases, this will be the law of the place where the spouses have their common residence. The view is held that the same criteria should apply when selecting the applicable law for both their personal and matrimonial property relations.[64]

As far as their matrimonial property regime is concerned, the spouses are permitted to choose the law of the State of which at least one of them is a national or in which one of them has his/her residence (Art. 30(1)). This choice of law must be evidenced in writing and can be agreed upon either at the time of marriage or during the marriage.

It is important to note that the law applicable to the property regime can change as a result of a choice of law made by the spouses during marriage or by a modification of the (objective) connecting factor, for example, if the spouses acquire (or lose) a common nationality or if they move to a different country. Although the new Statute contains no explicit provision on this issue, it seems that a change in the applicable law is retroactive in the sense that all property acquired by the spouses during the marriage (even before the change) will be governed by the new applicable law. However, *bona fide* third parties are protected.[65]

Divorce and legal separation are governed by the common national law of the spouses or by the law of the State where their matrimonial life is mainly located (Art. 31). However, the foreign applicable law will not be recognized if it does not allow divorce or separation at all. In this case, Italian law shall apply (Art. 31(2)).

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[63] The minimal age should be 16 years because the Italian Civil Code permits the marriage of a 16 year old minor, provided that there are serious reasons and a judicial authorization.

[64] See POCAR F., in *IPRax* 1997 (note 3), p. 154, and VIARENGO I., *Autonomia della volontà e rapporti patrimoniali tra coniugi nel diritto internazionale privato*, Padova 1997, pp. 64 *et seq.*

[65] See Art. 30(3) which provides that the property regime governed by a foreign law shall be enforceable against third parties 'only if they were informed about the foreign law, or if they ignored it by their own default'. A special rule exists for rights *in rem* in immovables.

Article 32 of Statute No. 218 sets forth a special jurisdiction rule in respect of divorce, legal separation and annulment of marriage by providing that Italian courts shall have jurisdiction not only in the cases under Article 3 of the Statute, but also if one of the spouses is Italian or the marriage was celebrated in Italy. Moreover, since Article 3(2) refers to the rules on territorial jurisdiction, Italian courts also have jurisdiction when the plaintiff has his or her residence in Italy. Thus, the scope of Italian jurisdiction is very broad in these matters.

It is important to note, however, that after 1 March 2001 the jurisdiction of Italian courts in matrimonial matters will also be governed by EC-Regulation No. 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses.[66] Pursuant to Article 7, the jurisdiction rules in Articles 2 to 6 of the Regulation are 'exclusive', i.e., their application is obligatory whenever the defendant is habitually resident in a Member State or is a national of a Member State (or has his/her domicile in the United Kingdom or in Ireland). In such cases, the court of a Member State must base jurisdiction on one of the grounds specified in the Regulation. Nevertheless, when no court of a Member State has jurisdiction under Articles 2 to 6 of the Regulation, jurisdiction shall be determined, in each Member State, by the law of that State (Art. 8).

The Regulation also governs the recognition of judgments rendered in a Member State (Art. 13 *et seq.*). These rules prevail over those of the Italian Statute.

3. Kinship and Adoption

The legitimacy of children is governed, alternatively, by the national laws of the child and his or her parents at the time of the child's birth. The law more favorable to the creation of a relation of kinship shall prevail (Art. 34(1)).[67]

Similar rules apply to legitimation by subsequent marriage and to the recognition of a child born out of wedlock. In cases of subsequent marriage, legitimation is governed either by the child's national law or by the national law of either parent at the time legitimation occurs.[68] Similarly, the recognition of a child born out of wedlock is governed either by the child's national law or by the national law of the person recognizing the child at the time recognition occurs.

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[66] The Regulation has been published in *OJ of the European Communities* L 160, 30 June 2000. See also in this *Yearbook* pp. 265-285. The text of the Regulation corresponds to that of the 'Brussels II' Convention of 28 May 1998; see JÄNTERÄ-JAREBORG M., 'Marriage Dissolution in an Integrated Europe', in this *Yearbook* 1999, pp. 1-36.

[67] PICONE P. (note 3), pp. 303 *et seq.* (first published in *Riv. dir. int.* 1997, pp. 277-350, under the title 'Le norme di conflitto alternative italiane in materia di filiazione').

[68] In the other cases, legitimation shall be governed by the national law of the parent requesting legitimation (Art. 34(2)).

These alternative connections are designed to favor the creation of a relation of kinship. As mentioned above, the policy of favoring *filiationis* also inspires the rule on *renvoi* with respect to kinship (Art. 13(3)), which must be applied if it leads to the application of a law allowing the establishment of the parental link (*renvoi in favorem*).

Strangely enough, there is no alternative connection for establishing the kinship of a child born out of wedlock. In the absence of an explicit rule, some Italian scholars conclude that there is a gap in the law and propose that the rule on legitimation or on the recognition of a child apply by analogy.[69] However, it seems that this issue is governed exclusively by the national law of the child.

The new Statute also contains rules on adoption. In this field, however, the private international regulation is mainly influenced by other sources, such as the substantive rules on the international adoption of minors[70] and the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption of 29 May 1993.[71]

An international adoption can take place in Italy when one or both of the adopters or the adoptee are Italian nationals or reside in Italy, or when the adoptee is a minor abandoned in Italy (Art. 40(1) of Statute No. 218). In principle, adoption is governed by the national law of the adopter or adopters, if common, or by the law of the State where their matrimonial life is mainly located at the time of the adoption (Art. 38(1)). Nonetheless, Italian law applies whenever the adoption confers the status of legitimacy on the minor adoptee. In this case, the rules of the Italian statute on the adoption of minors[72] are considered internationally mandatory.

As far as the recognition of a foreign adoption is concerned, the general rules on the recognition of foreign judgments (Art. 64 *et seq.*) are usually derogated from in favor of the special rules relating to the adoption of minors, which are now modeled on the Hague Convention of 1993. The principles of the Convention apply even when the adoption has been pronounced in a State that is not party to the Convention.

The role of international conventions is also very important with respect to the protection of minors and maintenance obligations. Articles 42 and 46 of Statute No. 218 provide that all cases involving these matters shall be governed by the Hague Convention on the Protection of Minors of 5 October 1961 and the Hague Convention on the Law Applicable to Maintenance Obligations of 2 October 1973. The provisions of the Conventions also apply in cases involving a non-contracting

[69] PICONE P. (note 3), p. 338 *et seq.*; CAMPIGLIO C., in *Riv. dir. int. priv. proc.* 1995, p. 1093.

[70] Statute No. 184 of 4 May 1983, as modified by Statute No. 476 of 31 December 1998, in implementation of the Hague Convention.

[71] The Convention is in force in Italy since 1 May 2000.

[72] See *supra*, note 70.

State. Accordingly, this is another example of the technique of applying an international convention beyond its subject-matter and personal scope.

Since 1995 Italy is also party to the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980, as well as the Convention of the Council of Europe on the Recognition and Enforcement of Decisions concerning the Custody of Children of 20 May 1980. On the contrary, it has not yet ratified the Hague Convention on the Protection of Children of 19 October 1996 and the new Hague Convention on the Protection of Adults of 13 January 2000.

EC-Regulation No. 1347/2000 of 29 May 2000 will also be important in this field as it governs jurisdiction (Arts. 3 and 4) and the recognition and enforcement of foreign judgments (Arts. 14 and 15(2)) in matters relating to parental responsibility for children.

4. Succession

Italian choice-of-law rules remain true to the principles of unity of succession and total application of the national law of the deceased. While the first principle is embodied in Article 46(1), the second is not expressly formulated, as was the case in former introductory provisions of the Civil Code. (where Art. 23 contained the wording 'wherever the property is situated'); however, the result is undoubtedly the same.

Two regulations, however, have been introduced which could jeopardize the effectiveness of the total submission of inheritance to the national law of the deceased: *firstly*, the general admission of *renvoi*;[73] and *secondly*, the power granted to the deceased (regardless of whether he or she is Italian or a foreigner) to submit his/her succession to the law of the State where he/she resides (Art. 46(2)).[74]

Renvoi could lead to the application of *lex domicilii* to succession, both intestate and testate, if the national law of the deceased adopts the principle of domicile. For example, the domicile of the deceased could be situated in Italy or in a third (or even fourth)[75] country that accepts *renvoi*. In intestate succession this could mean a change in the order of succession and sometimes may also entail the relevance of family relationships not recognized by the national law. In testate succession it could bring about the application of institutions unknown to the national law (like joint wills) or the selection of different persons to be entitled to the reserved part of the estate.

The acceptance of *renvoi* has also challenged the unity of succession. It is sufficient to imagine the case, not infrequent, where a French citizen domiciled in Italy leaves immovable property in France (or in a third country such as England).

[73] See *supra*, section. III.A.1*a*.

[74] See *supra*, section III.B.2*c*.

[75] See *supra*, section III.A.1*a*.

With the *renvoi* referring to French law, the succession will be split into two or even more parts. While Italian law will govern all facets of the succession regarding personal rights or property situated in Italy, French (or England) law will govern the immovables located in France (or in England).

The 'scission' system has shortcomings in respect of questions concerning liability, validity of a will, and equal treatment of heirs; on the other hand, it can be regarded as positive in that it complies with the principle of applying the law the most closely connected with the case.[76] Nonetheless, it cannot be applied in cases involving Italian nationals. The only way they can escape the application of Italian law is to make an express choice, in testamentary form, of the law of the State where they reside (this choice is final since no further *renvoi* is admitted). For the sake of protecting Italian relatives, Article 46(2) provides that the choice of law shall not affect the right to the reserved part of the estate conferred upon them by Italian law, provided they are resident in Italy at the time of the death.[77] Another more general limitation to the choice is that it is ineffective if, at the moment of death, the deceased was no longer resident in the State whose law he/she had chosen.

Chapter VII on succession includes other provisions concerning the law applicable to the capacity to dispose by will, the form of a will, the devolution of the estate to the State in the absence of heirs, as well as a comprehensive rule on jurisdiction (Art. 50) which considerably enlarges the reach of Italian courts in succession cases.

5. Property Rights

In Chapter VIII concerning property rights, Art. 51(1) provides that possession, property and other rights *in rem* in immovable and movable property shall be governed by the *lex situs*. The law of the place where the property is situated governs not only the contents and scope of property rights, but also their acquisition or loss, except in matters of succession and when the transfer of a right *in rem* depends on a family relation or a contract (Art. 51(2)).

The interpretation of this exception raises some questions. Notwithstanding the text of Article 51(2), it is submitted that even in the cases mentioned there, the *lex situs* should play a role in the protection of third parties by determining the way property rights are acquired (*modus acquirendi*), i.e., whether they are transferred automatically to the heirs, the spouse or purchaser, or if another element is required, such as the transfer of possession or some form of registration. The

[76] See, e.g., KEGEL G./SCHURIG K., *Internationales Privatrecht*, 8th ed., Munich 2000, p. 367.

[77] Some peculiar effects of this clause have already been stressed: see section III.A.2*c*.

requirements of the *lex situs* should be observed particularly when the transfer involves immovable property.

In regard to chattels, application of the *lex situs* can be complicated by displacement of the things from one country to another. In such cases, a right validly acquired under the law of the previous *situs* is recognized, with any adaptations necessary under the law of the new *situs*. On the contrary, if the right was not validly acquired under the law of the previous location, the set of facts established before the displacement will be evaluated under the law of the new *situs*.

An important exception to the application of the *lex situs* is made in cases involving property rights in goods in transit, which are governed by the law of the place of destination (Art. 52). It is to be regretted that the new Statute contains no specific rule on the recognition in Italy of foreign security interests in chattels, as a result of which some complicated issues are raised.[78]

Contrary to Swiss law,[79] the parties have no possibility to choose the law applicable to the transfer of rights *in rem*.

6. Contractual Obligations

The Italian Statute contains no special rules on contracts but only refers to the Rome Convention on the Law Applicable to Contractual Obligations of 19 June 1980. In force in Italy since 1991, this Convention is applicable *erga omnes*, i.e., its conflicts rules apply regardless of whether it is in force in the State whose law is designated by the Convention (Art. 2).

Article 57 of Statute No. 218 specifies that the Convention shall govern contractual obligations 'in all cases'. This means that the conflicts rules of the Convention apply even to matters that are excluded from its scope, provided they can be characterized as 'contractual obligations' in the sense of Italian PIL and they are not governed by other provisions of the Italian Statute. As a result, the rules of the Convention should apply, for instance, to agreements on jurisdiction, even though they are excluded from the scope of the Convention (Art. 1(2)(*d*)).

7. Torts

Since Italy has ratified neither the Hague Convention on the Law Applicable to Traffic Accidents of 4 May 1971 nor the Hague Convention on the Law Applicable

[78] See Art. 102(2) and (3) of the Swiss PIL Act concerning the effects in Switzerland of the retention of a title validly created abroad. On the effects of a retention of title see BONOMI A., 'La riserva della proprietà nel diritto internazionale privato', in *Riv. dir. int. priv. proc.* 1992, pp. 777-818, and Art. 4 of the current EC-Directive No. 35/2000, of 29 June 2000, in *OJ of the European Communities* L 200, 8 August 2000.

[79] See Art. 104 of the Swiss PIL Act.

to Product Liability of 2 October 1973, tortious liability is governed exclusively by the law of the State where the event occurred (*si è verificato*). This rule confirms the policy of the Italian lawmaker to deny the *lex fori* the right to control the civil consequences of a wrongful act committed abroad.

Article 62 settles in a pragmatic way the question raised under the former law as to whether the 'place where the fact occurred that leads to the [non-contractual] obligation' refers to the place of the dangerous act or the place of the injury.[80] To protect the injured party, a special provision contained in Article 62 now confers on him/her the right to request application of the law of the State where the wrongful act occurred. The request must respect the Italian procedural rules, in particular the statutory limitations.[81]

Another rule formulated in Article 62 provides that, if the tort concerns persons of the same nationality and they reside in the State of which they are nationals, then the law of that State shall apply. This solution is clearly inspired by the doctrine of the 'proper law of the tort'.[82]

As for the law applicable to product liability, Article 63 grants the injured party the right to choose between the law of the manufacturer's domicile and the law of the State where the product was purchased. However, the application of latter law is excluded if the manufacturer proves that the product was marketed in that State without its consent. Many commentators have criticized Article 63, arguing that proving the absence of consent can be a very difficult task. Whereas the Italian solution is considerably easier for the judge, the solution provided by the Hague Convention of 2 October 1973 seems more appropriate, since it excludes the application of the law of the place of injury and of the law of the State where the injured party habitually resides:

> 'if the person claimed to be liable establishes that he could not reasonably have foreseen that the product or his own products of the same type would be made available in that State through commercial channels'.

A special conflicts rule for unfair competition practices could have been included, as has been done in several recent private international law codifications.[83]

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[80] See FERRARI BRAVO L., 'Il luogo di commissione dell'illecito nel diritto internazionale privato', in *Rivista di diritto civile* 1961, pp. 80-113.

[81] BALLARINO T. (note 3), p. 723. In this sense, see current Art. 40(1) EGBGB, as revised by the Statute of 21 May 1999 on the conflict of laws relating to non-contractual obligations.

[82] See *supra*, note 52.

[83] This criticism by HONORATI C., *La legge applicabile alla concorrenza sleale*, Padova 1995, p. 152.

In this field, the fact that Art. 62 permits a choice between the law of the place of the injury and the law of the place of the wrongful act creates legal uncertainty, which is heightened by the general tendency of Italian and foreign[84] courts to apply the law of the forum favoring either the plaintiff or the defendant. This uncertainty could have been alleviated by including a special provision designating the law of the State on whose market the harmful event occurs, as provided by Article 136 of the Swiss PIL Act of 1987.[85]

8. Other Statutory Obligations

Article 61 contains a unique provision which provides that *negotiorum gestio*, unjust enrichment, payment of undue benefit and other statutory obligations shall be governed by the law of the State where the act giving rise to the obligation took place, if not provided otherwise by Statute No. 218.

In view of the numerous situations that could lead to the *mise-en-œuvre* of each of these legal configurations, a more detailed regulation would have been more satisfactory.[86] As a matter of fact, both *negotiorum gestio* and unjust enrichment are often closely related to another legal relationship, usually a contractual one. In such cases it seems convenient to invoke the exception clause of Article 61 and take action under the law governing the relationship.[87] The provision laid down by the recent German Statute of 21 May 1999 seems more appropriate in this respect.[88]

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[84] EHRENZWEIG A.A., *A Treatise on the Conflict of Laws*, St. Paul Minn. 1962, p. 560.

[85] In its well-known judgment of 30 June 1961, the German *Bundesgerichtshof* gave priority to the law of the place where the interests of the competitors actually collide: in *Entscheidungen des Bundesgerichtshofes in Zivilsachen*, Vol. 35, pp. 329 *et seq*.

[86] On this point see BALLARINO T. (note 3), p. 757.

[87] However, in regard to the *condictio indebiti*, this method could be barred by the reservation made by Italy to Art. 10(1)(*e*) of the Rome Convention on Contractual Obligations, which provides that the consequences of nullity of a contract shall be governed by the law applicable to the contract.

[88] On this topic see SONNENBERGER H.J., 'La loi allemande du 21 mai 1999 sur le droit international privé des obligations non contractuelles et des biens', in *Rev. crit. dr. int. pr.* 1999, pp. 647-668.

IV. Recognition and Enforcement of Foreign Judgments

The provisions of the new Statute on the recognition and enforcement of foreign judgments[89] have some innovative features. [90]

In this area, the system embodied in the Code of Civil Procedure of 1942 had already been influenced by some international treaties, in particular by the Brussels and Lugano Conventions.[91]

It is evident that the *régime* of the Brussels Convention could not be extended to judgments rendered in a non-contracting State, like Statute No. 218 has done in respect of jurisdiction. Outsider States are not bound to the uniform jurisdiction rules of the Convention and do not enjoy the mutual confidence existing between Member States of the EU. Thus stronger scrutiny of foreign judgments is

[89] In addition to the textbooks and commentaries cited in note 3, see BROGGINI G., 'Riconoscimento ed esecuzione delle sentenze civili straniere nel *ius commune* italiano', in *Riv. dir. int. priv. proc.* 1993, pp. 833-856; CONSOLO C., 'Evoluzioni nel riconoscimento delle sentenze straniere', in *Rivista trimestrale di diritto e procedura civile* 1997, pp. 575-628; BARIATTI S., 'Riflessioni sul riconoscimento delle sentenze civili e dei provvedimenti stranieri nel nuovo *ius commune* italiano', in *Collisio legum. Studi di diritto internazionale privato per G. Broggini*, Milan 1997, pp. 29-51; PICONE P., L'art. 65 della legge italiana di riforma del diritto internazionale privato e il riconoscimento delle sentenze straniere di divorzio, in *Riv. dir. int. priv. proc.* 2000, pp. 381-396.

[90] Due to the length of civil litigation in Italy, too few court decisions have been rendered to date to throw light on the problems caused by the transition to the new regulation. The vagueness of the new Statute's *droit transitoire* is likely to cause such problems. For instance, Art. 72 only provides that the new law shall apply to all proceedings instituted after the date of its entry into force. On this problem, see CARLEVARIS A., 'La disciplina intertemporale del riconoscimento delle sentenze straniere', in *Riv. dir. int.* 1997, pp. 740-761.

[91] The regime of recognition under these conventions is not very different from the 'full faith and credit' clause that governs the recognition of judgments in sister states in the United States. Judgments pronounced in other contracting States must be recognized quasi-automatically; recognition and enforcement can be refused only on very few and limited grounds, in particular: *a*) if the defendant did not have sufficient notice of the proceedings or a reasonable opportunity to organize his or her defense, *b*) if the foreign decision conflicts with a prior judgment concerning the same parties, or *c*) if it is contrary to public policy (Art. 27). What is particularly striking is that, in principle, recognition cannot be refused on the ground that the foreign court lacked jurisdiction. In order to understand this basic rule, one has to consider that the European Conventions not only regulate recognition and enforcement, but also include jurisdiction rules that have to be respected by the courts of all contracting States. If a judgment has been rendered in one of these States, there is a presumption that the uniform jurisdiction rules have been applied. It is therefore not necessary for the second forum to review the jurisdiction of the rendering court.

needed, even though the Italian lawmaker has endorsed the Convention's fundamental approach.

The general rule of Article 64 of the Italian Statute provides for 'automatic' recognition, i.e., recognition takes place 'without any further proceedings', provided the following requirements are fulfilled:

a) The foreign authority rendering the judgment had jurisdiction pursuant to the criteria of jurisdiction in force under Italian law;
b) Some essential guarantees for the defendant have been respected in the proceedings before the court of the State of origin, and the appearance of the parties before that court was regular;
c) If the judgment was rendered in default of appearance, the respondent should have been served with the documents instituting the proceedings;
d) The judgment was final under the law in force at the place where it was rendered;
e) The judgment does not conflict with any final judgment rendered by an Italian court; and
f) No proceedings initiated prior to the foreign proceedings are pending before an Italian court between the same parties and on the same issue.

This regulation replaces the former rules that required a specific *exequatur* procedure (usually called *delibazione*[92]) as a condition to give effect to foreign decisions. *Delibazione* was acquired in adversary proceedings before the Court of Appeals. The conditions for recognition were almost[93] the same as those now required by Statute No. 218; however, the fundamentals of the system have been changed as a result of the mechanism of automatic recognition. This has required some changes in the theoretical as well as the practical approach to foreign decisions.[94]

However, judicial proceedings are necessary whenever a foreign judgment has not been complied with or has been challenged.[95] During the proceedings, the

[92] Peculiar to the Italian language of the law, this term originated in the Code of Civil Procedure of 1865; it remained in use despite not being repeated in the Code of 1942.

[93] Letter *f* of Art. 64 brought about a significant change by requiring that, in order to grant recognition, 'no proceedings may be pending before an Italian court between the same parties and on the same issue as in the proceedings initiated before the foreign court'. Under the former rule (Art. 797(6)), recognition was denied even if the proceedings pending in Italy had been initiated *after commencement of the foreign proceedings*, but *before the foreign judgment became final.*

[94] See BALLARINO T. (note 3), pp. 174 *et seq*.

[95] The courts have almost unanimously agreed that the procedure must be conducted in the usual way, i.e., commencing with a writ of summons (*atto di citazione*) and after due hearing of the parties. Although they take place before the Court of Appeals, the

court must determine whether the foreign judgment fulfills the requirements for recognition. The same provision applies to the enforcement of the judgment; in both cases the term *exequatur* is currently used. An application for *exequatur* is submitted to the Court of Appeals of the district where enforcement is sought.

Since the purpose of an action for *exequatur* is merely to establish that the requirements specified in Article 64 have been fulfilled, the recognition is essentially declaratory in nature. This means that: *a)* the effect of the judgment is retroactive, i.e., it is declared effective from the moment it became final in its country of origin; *b)* the statute of limitation of the country of origin applies, not Italian law; and *c)* any person having an interest in *exequatur* has the right to initiate an action.

In all cases, the value of the foreign judgment is not impaired and the issues settled therein cannot be brought before an Italian court. If this happens, the foreign judgment could be set against the non-compliant party, like an estoppel *per rem iudicatam*. In this case, the court seized pronounces the recognition with effect in that proceedings only (Art. 64(3)), obviously after having established that the judgment fulfills the requirements specified in Article 64.[96]

In Italy, as elsewhere, a foreign judgment cannot be enforced without having been recognized in the form of an authoritative act of a domestic court.[97] On the contrary, judgments which are to be registered at the Civil Registrar's Office, such as divorces or marriage annulments, do not need to be submitted to enforcement proceedings in Italy.[98]

The Italian Ministry of the Interior has launched an initiative that is worthy of approval by passing an order (*circolare*)[99] obliging clerks of the Civil Registrar's

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proceedings are deemed to be in first instance. For other questions, see CARLEVARIS A., 'Il nuovo procedimento per accertare l'efficacia delle sentenze straneire e le prime difficoltà applicative', in *Riv. dir. int.* 1999, pp. 1005-1048.

[96] The first commentators maintain that the provision of Art. 64(3) is superfluous since foreign judgments are automatically recognized; see BARIATTI S., in *Riv. dir. int. priv. proc.* 1995, p. 1249; MARESCA M., in *Le nuove leggi civili commentate* 1996, p. 1483. We submit, however, that this rule is very useful because it makes clear that all courts, not only the Court of Appeals, are entitled to rule *incidenter* on the requirements for recognition.

[97] See WOLFF M., *Private International Law*, 2nd ed., Oxford 1950, p. 253: 'There can be no enforcement of a judgment without recognition, but there may be recognition without enforcement.'

[98] The same solution has now been adopted in Art. 14(2) of the EC-Regulation No. 1347/2000 of 29 May 2000 (see *supra*, note 66), according to which '[…] no special procedure shall be required for up-dating the civil-status records of a Member State on the basis of a judgment relating to divorce, legal separation or marriage annulment given in another Member State, and against which no further appeal lies under the law of that Member State.'

[99] Circolare n. 1/50/FG/29 of 7 January 1997; text in *Riv. dir. int. priv. proc.* 1997, p. 224.

Office to carry out the registration (or inscription or annotation) of a foreign decision at the request of the applicant, if the clerk holds that the foreign judgment fulfills the requirements for recognition specified in Statute No. 218. On the other hand, if the clerk has reason to doubt that the judgment fulfills the requirements, he/she must report the matter to the Office of the Public Attorney (*Procura della Repubblica*), which will then review the judgment and give final instructions to the Civil Registrar's Office.

Another procedure for the recognition of foreign judgments (or decisions of voluntary jurisdiction) is laid down in Articles 65 and 66. As specified in these provisions, decisions in matters of capacity, personal status and family relations will be recognized in Italy if they have been rendered by authorities of the State whose law is designated as applicable under Statute No. 218. Furthermore, decisions rendered by the authorities of another State will be recognized if they are effective under the law of the State whose law governs the status or family relations concerned.[100] In such cases, the requirements for recognition have been considerably simplified. Namely, the law requires only that the foreign decision must not be in conflict with the Italian public order and that the fundamental rights of defense have been respected.

The meaning of Articles 65 and 66 is twofold. On the one hand, the status of a person, as determined by his/her personal law, encompasses not only legislation enacted by that State, but also judicial decisions effective in that legal system, even ones originating in another State. This meaning of Articles 65 and 66 endorses the doctrine of recognition of duly acquired rights, which was already authoritative in Italy.

On the other hand, Articles 65 and 66 provide for the recognition of foreign decisions as such, thus raising the question of their compatibility with the general clause laid down in Article 64. This issue has sparked a heated debate. Some commentators are of the opinion that these provisions exclude the application of the general clause of Article 64 in the matters enumerated in Article 65 (capacity of persons, family relations, personality rights).[101] As a result, the recognition of foreign judgments would be barred unless they have been rendered or recognized in the State whose law governs the relationship concerned.[102]

It appears, however, that the majority of scholars take the opposite view, maintaining that it should always be possible to resort to Article 64 without limitation.[103] According to this view, the recognition of foreign judgments would be

[100] According to Art. 66, decisions of voluntary jurisdiction are also recognized when rendered by an authority having jurisdiction under Italian jurisdiction rules.

[101] See BARIATTI S. (note 89), p. 41 *et seq.*

[102] Due to the renouncement of the exclusivity of the law of nationality in personal status matters, the applicable law could be that of the State where the matrimonial life was mainly located (Art. 31).

[103] For references see BALLARINO T. (note 3), p. 173; PICONE P. (note 3), pp. 492 *et seq.*; IDEM (note 89), pp. 391-392.

possible by either the simplified procedure specified in Article 65 or by applying the general clause of Article 64 which sets forth tougher conditions but ensures the recognition of a foreign judgment that has been rendered in a State whose courts have jurisdiction under Italian law.

THE NEW PRIVATE INTERNATIONAL LAW RULES OF MACAO*

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* The Portuguese text of the new Macao Private International Law rules and an unofficial English translation by the author of this article are published in this *Yearbook* at pp 329-355.

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I. Introduction

Macao was a territory under Portuguese administration[2] from 1557 to 20 December 1999,[3] the date on which it became a Special Administrative Region of the People's Republic of China in accordance with the Joint Declaration of the Government of the Portuguese Republic and the Government of the People's Republic of China on the question of Macao, signed in Beijing on 13 April 1987.[4]

Within the broad autonomy recognized by the Joint Declaration in the field of law, several codes have been prepared on the basis of the corresponding Portuguese codes – the Civil Code of Macao, the Commercial Code of Macao, the Code of Civil Procedure of Macao, etc. – under the guidance of Dr. Jorge Noronha e Silveira, former Deputy Secretary of Justice of Macao and currently Assistant Professor of the Law Faculty of the University of Lisbon. All of these codes are published in the two official languages of the Territory of Macao: Chinese and Portuguese

Matters relating to private international law (PIL) are contained in Articles 13 - 62 of the Civil Code of Macao, which correspond, *mutatis mutandis*, to Articles 14 - 65 of the Portuguese Civil Code. The Macao provisions are found in Book I (General Part), Title I (Rules of law, their interpretation and application), Chapter III (Rights of non-residents and the conflict of laws). Chapter III is divided into Division I containing the general provisions (Articles 13 - 23) and Division II containing the choice of law rules (Articles 24 - 62). Division II is further divided into seven Subdivisions: 1) Scope and determination of the personal law (Articles 24 - 33); 2) The law applicable to transactions (Articles 34 - 39); 3) The law applicable to obligations (Articles 40 - 44); 4) The law applicable to property (Articles 45 - 47); 5) The law applicable to

[2] Article 5(4) of the Constitution of the Portuguese Republic of 2 April 1976 provided that, the Territory of Macao, 'under Portuguese administration', was governed by a 'statute appropriate to its special situation' (the corresponding provision after the fourth revision of the Constitution in 1997, Article 292(1) is no longer in force as of 20 December 1999); on the special constitutional situation of Macao, see MIRANDA J., *Manual de Direito Constitucional*, t. III, *Estrutura constitucional do Estado*, 3rd ed., Coimbra 1994, pp. 120-121, 249-251; for the period before 1976, see NORONHA E SILVEIRA J., *Subsídios para a história do Direito Constitucional de Macau (1820-1974)*, Macau 1991.

[3] On the long Portuguese presence in Macao see, e.g., PONS Ph., *Macao*, Paris 1999.

[4] On the Joint Declaration, which in fact is a treaty [MIRANDA J. (note 2), p. 250], see MOURA RAMOS R. M., 'A Declaração Conjunta Luso-Chinesa na perspectiva do Direito Internacional', in *Boletim da Faculdade de Direito [de Coimbra]* 1998, pp. 671-682.

family relations (Articles 48 - 57); 6) The law applicable to cohabitation without marriage (Article 58); and 7) The law applicable to succession (Articles 59 - 62).

Compared with the Portuguese Civil Code, the most important difference in the private international law provisions of the Macao Code is the addition of Subdivision VI on the law applicable to cohabitation without marriage, which is entirely new and has no counterpart in the Portuguese Civil Code.

Other differences occur either because some provisions are new and thus do not correspond to the model or because very significant changes have been made in the contents of the provisions, although the subject matter is the same as in the Portuguese Civil Code.

The Draft Civil Code of Macao (*Projecto de Código Civil de Macau*) was published in 1998. As far as the provisions on private international law are concerned, only minor drafting revisions were made thereafter in Articles 30(7), 56(1) and 58(1). The original draft of the provisions on private international law was prepared by Professor Isabel Magalhães Collaço[5] of the Law Faculty of the University of Lisbon.

The Civil Code of Macao was approved by Decree-Law No. 39/99/M of 3 August 1999 and should have entered into force on 1 October 1999; however, Decree-Law No. 48/99/M of 27 September 1999 postponed its entry into force until 1 November 1999.

Since the principal aim of the present contribution is to present the new private international law provisions of Macao, only the main aspects of the General Part and the Special Part will be dealt with in sections II and III. Some broad conclusions are drawn at the end. The official Portuguese text of the relevant provisions of the Civil Code of Macao and an English translation prepared by the author on the basis of the Portuguese text are found in the section on Texts, Materials and Recent Developments of this Yearbook.

II. General Part

The provisions comprising the General Part (Articles 13 – 23) were drafted on the basis of the corresponding provisions of the Portuguese Civil Code. A comparison of the provisions shows that the Macao provisions contain some innovations (A). In addition, differences arise as a result of the basic fact that Macao is not a sovereign country, but a Territory with a special status within the People's Republic of China (B), and as a result of the search for simplicity (C).

[5] See the 'Breve nota justificativa' by Dr. Luís Miguel Urbano, coordinator of the project of the Civil Code of Macao, in *Código Civil – Versão Portuguesa*, Macau 1999, p. XVI.

A. Innovations

The main innovation is found in Article 21 on *rules of immediate application*, which has no counterpart in the Portuguese Civil Code (*1*). In this context one should also mention the solution provided in Article 18 for problems of *composite legal orders* (*2*).

1. Rules of Immediate Application

Article 21 provides that '[the] rules of the law of Macao whose application is mandatory by virtue of their specific object and purpose shall prevail over [the] provisions of the law outside Macao designated in the next Division', i.e., by the choice of law rules. The use of the English expression *rules of immediate application* (instead of *mandatory rules*) reflects the present author's intention to return to the original 'creator' of this expression, the Greek Professor Phocion Francescakis, who used it for the first time in French (*règles d'application immédiate*) in 1958.[6]

Indeed, these rules are the 'mandatory rules' of Article 7 of the Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980.[7] In fact, however, they correspond only to the second paragraph of this article, i.e., to the mandatory rules of the law of the forum. Unlike Article 7(1) of the Rome Convention, Article 21 of the Macao provisions does not deal with the mandatory rules of a law other than the *lex fori*.

The Portuguese expression *normas de aplicação imediata* has been used by several authors in Portugal, sometimes in conjunction with other equivalent expressions.[8] The intent, however, is to refer to the same category of rules as those mentioned in Article 7 of the Rome Convention.

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[6] FRANCESCAKIS Ph., *La théorie du renvoi et les conflits de systèmes en droit international privé*, Paris 1958, pp. 11 *et seq.*

[7] *Official Journal of the European Communities*, L 266, 9 October 1980, p. 1.

[8] See, e.g., BAPTISTA MACHADO J., *Âmbito de eficácia e âmbito de competência das leis (Limites das leis e conflitos de leis)*, Coimbra 1970, p. 279; FERRER CORREIA A., *Lições de Direito Internacional Privado*, Coimbra 1973, mimeographed, p. 24; MOURA RAMOS R. M., *Direito Internacional Privado e Constituição – Introdução a uma análise das suas relações*, Coimbra 1980, p. 112 *et seq.*; MARQUES DOS SANTOS A., *As normas de aplicação imediata no Direito Internacional Privado – Esboço de uma teoria geral*, 2 vols., Coimbra 1991, *passim*; LIMA PINHEIRO L., *Joint venture – Contrato de empreendimento comum em Direito Internacional Privado*, Lisboa 1998, p. 770; BRITO M. H., *A representação nos contratos internacionais – Um contributo para o estudo do princípio da coerência em direito internacional privado*, Coimbra 1999, p. 698. See also, e.g., SIEHR K., 'False Conflicts, 'lois d'application immédiate' und andere 'Neuentdeckungen' im IPR – Zu gewissen Eigengesetzlichkeiten kollisionsrechtlicher Systeme', in *Festschrift für Ulrich Drobnig zum siebzigsten Geburtstag*, Tübingen 1998, p. 448; BONOMI A., *Le norme imperative nel diritto internazionale privato – Considerazioni sulla Convenzione europea sulla legge applicabile alle*

2. Composite Legal Orders

Compared with Article 20 of the Portuguese Civil Code, on which it is based, Article 18 of the Civil Code of Macao is much simpler. Instead of establishing criteria for determining which law of the composite legal order shall apply or distinguishing between the territorial or personal character of the co-existing systems of law, it applies in all cases the solution provided by the composite legal order itself or, if necessary, the more flexible solution given by the guideline of the closest connection. Moreover, this solution will be adopted only in cases where the applicable law has not been determined. Otherwise the latter criterion shall apply and, in such case, the composite legal order shall be deemed to be a unitary one.

B. Specificity of the Territory of Macao in Relation to Sovereign Countries

Since Macao is not a sovereign country, but a Territory with a special status within the People's Republic of China, the Civil Code of Macao cannot, in principle, make use of the concept of *nationality* (*1*) and it cannot mention, properly speaking, any *foreign* law (*2*).

1. Disregarding, in Principle, the Concept of Nationality

Dealing with the legal status of *non-residents*, Article 13 of the Civil Code of Macao provides that non-residents shall enjoy the same civil rights as residents of Macao, unless provided otherwise by law. This provision corresponds to Article 14 of the Portuguese Civil Code which regulates the legal status of *foreigners*. Since it does not make sense, at least in principle, to speak of foreigners in Macao,[9] the corresponding concept in this context is non-resident, as opposed to residents of Macao.

2. Use of the Concept of Law Outside Macao Instead of Foreign Law

Articles 15, 20 and 22 of the Civil Code of Macao, which refer to a law other than the *lex fori*, contain the public policy clause and deal with the interpretation and ascertainment of the applicable law, use the expression *law outside Macao*, whereas

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obbligazioni contrattuali del 19 giugno 1980 nonché sulle leggi italiana e svizzera di diritto internazionale privato, Zürich 1998, p. 138.

See also Article 17 of the Italian Law of Private International Law of 31 May 1995 (*Legge 31 maggio 1995, n. 218. Riforma del sistema italiano di diritto internazionale privato*) which contains a provision on *rules of necessary application* (*norme di applicazione necessaria*), which has certainly influenced the drafting of Article 21 of the Civil Code of Macao.

[9] See, however, *infra*, the text corresponding to note 38.

the concept of *foreign law* is used in the corresponding provisions of the Portuguese Civil Code (Articles 16, 22 and 23). As indicated above, it does not make sense to speak of *foreign law* in a Territory where the notion of nationality cannot be used.

C. The Search for Simplicity

The rules set forth in the General Part of PIL of the Civil Code of Macao adopt in general the same legal solutions (*1*) as the corresponding provisions of the Portuguese Civil Code; however, sometimes the solutions are simpler and more flexible (*2*).

1. Solutions that Correspond to Those of the Portuguese Civil Code

In this context, one can mention the articles dealing with *characterization* (*a)*, *evasion of law* (*b)*, *interpretation and ascertainment of the applicable law* (*c)* and *acts performed on board* (*d).*

a) Characterization

Article 14 of the Civil Code of Macao provides that '[t]he reference to a law shall comprise only those rules that correspond in content and function, as defined by that law, with the legal category referred to in the choice of law rule'.

This rule exactly reproduces the doctrine of characterization adopted by Article 15 of the Portuguese Civil Code which implies that a choice of law rule does not refer to all the substantive rules of the particular legal system, but only to those which correspond in content and function to the legal category referred to in the choice of law rule designating that law. Accordingly, if the choice of law rule of Article 45 of the Civil Code of Macao provides that law X shall govern matters relating to *real rights*, this means that only the substantive rules of X relating to real rights shall apply for this purpose, not those dealing with obligations, capacity, succession to the estates of deceased persons, etc.[10]

[10] On the Portuguese legal theory of characterization, see, e.g., among the Portuguese authors, MAGALHÃES COLLAÇO I., *Da qualificação em Direito Internacional Privado*, Lisboa 1964; FERRER CORREIA A., 'Das Problem der Qualifikation nach dem portugiesischen internationalen Privatrecht', in *Zeitschrift für Rechtsvergleichung* 1970, pp. 114-135; BAPTISTA MACHADO J., *Lições de Direito Internacional Privado*, 2nd edition, Coimbra 1982, pp. 102 *et seq.*, *maxime* pp. 121 *et seq.*; MARQUES DOS SANTOS A., 'Le statut des biens culturels en droit international privé', in *Estudos de Direito Internacional Privado e de Direito Processual Civil Internacional*, Coimbra 1998, pp. 190-191.

See also non-Portuguese authors such as GARCÍA VELASCO I., *Concepción del Derecho Internacional Privado en el Nuevo Código Civil Portugués*, Salamanca 1971, pp. 113-132; GRUNDMANN S., *Qualifikation gegen die Sachnorm – Deutsch-portugiesische Beiträge zur Autonomie des internationalen Privatrechts*, München 1985, *maxime* pp. 49 *et seq.*, 95 *et seq.*

b) Evasion of Law

Article 19 of the Civil Code of Macao, which reproduces *ipsis verbis* Article 21 of the Portuguese Civil Code, provides that '[w]hen applying choice of law rules, any situations of fact or of law created with the fraudulent intent of avoiding application of the otherwise applicable law shall be deemed irrelevant'.

In my opinion, this text prevents both *fraus legis fori* and *fraus legis exterioris*, thus ensuring that the principle of equality applies with respect to all applicable laws, i.e., with respect to the law of the forum and any other applicable law.[11]

c) Interpretation and Ascertainment of the Applicable Law

With the exception of the use of the concept of a law outside Macao instead of foreign law, Article 22 of the Civil Code of Macao corresponds exactly to Article 23 of the Portuguese Civil Code. Thus it follows that a *law outside Macao* is deemed to be a *law* and not simply a *fact*, as a result of which it can be ascertained and applied *ex officio* by the courts of Macao.[12] Moreover, a law outside Macao shall be construed *lege causae* according to its own standards and not according to those of the *lex fori*. The subsidiary applicable law is not the *lex fori*, but, for instance, the law designated by Article 30(5) instead of Article 30(1). Article 341(3) of the Civil Code of Macao[13] provides that 'the court shall apply the current rules of the law of Macao' *only* 'if it is impossible to determine the content of the applicable law', i.e., *both* the primary *and* subsidiary applicable law.[14]

d) Acts Performed on Board

Article 23 of the Civil Code of Macao, which corresponds almost word for word to Article 24 of the Portuguese Civil Code, provides that '[a]cts performed on board vessels or aircraft outside a port or aerodrome shall be governed by the law of the place of their registration, whenever the territorial law is applicable' and that '[m]ilitary vessels and aircraft shall be deemed to be part of the territory of the country or Territory to which they belong'. The *territorial law* to which reference is made seems to be the law applicable by means of a concrete spatial connecting factor, such as the *lex situs* (Article 45) or the *lex loci celebrationis* (Article 49), etc. Accordingly, if a marriage is celebrated on the high seas on board a vessel registered in Livorno

[11] See, e.g., FERRER CORREIA A., (note 8), pp. 581-587; BAPTISTA MACHADO J. (note 10), pp. 273-286.

[12] See Article 341(1), second sentence, and (2) of the Civil Code of Macao in Texts, Materials and Recent Developments; these correspond, *mutatis mutandis*, to the same provisions of Article 348 of the Portuguese Civil Code.

[13] *Ibidem*.

[14] See, e.g., FERRER CORREIA A., (note 8), pp. 589-600; BAPTISTA MACHADO J. (note 10), pp. 242-251, with reference to the Portuguese provisions.

(Italy), the law applicable to the formalities of the marriage is Italian law by virtue of Articles 49(1) and 23 of the Civil Code of Macao. In such case, *renvoi* does not occur.[15] [16]

2. The Adoption of Simple and Flexible Solutions

In this regard, one can mention the articles dealing with matters such as *renvoi* (*a)*, *composite legal orders* (*b)*, and *public policy* (*c)*.

a) Renvoi

Although the provisions governing *renvoi* in Articles 15, 16 and 17 of the Civil Code of Macao are modeled on Articles 16, 17, 18 and 19 of the Portuguese Civil Code, they are in fact much simpler.

Article 15 lays down the so-called general principle of reference to a law outside Macao, which, in principle, is adverse to *renvoi*: 'The reference of a choice of law rule to a law outside Macao shall determine only the application of the internal rules of law of that law', which are deemed to be 'only substantive rules, while the choice of law rules are excluded'.

Since Article 15 applies 'unless provided otherwise', this means that it is necessary to ascertain whether paragraph 1 of Article 16 on transmission – or paragraph 2 on remission – is applicable. If so, Article 15, which contains a subsidiary principle, shall not apply.

The *renvoi* prescribed in Article 16 favors *Entscheidungseinklang* (Savigny), *uniformity of allocations* (Wengler) or *harmonia de julgados* (Ferrer Correia), i.e., it strives for international harmony in the sense that the case should be resolved in the same manner regardless of the country whose courts make the ruling and which law applies. This system of *renvoi* thus differs from the classical theory of single *renvoi* adopted, for example, by French courts, and from the English foreign court theory (or doctrine of double or total *renvoi*). Instead it takes account of the sense of the reference by the law outside Macao to another law – a third law or the *lex fori* – in order to accept or refuse the *renvoi*.

This very formal scheme is then mitigated by Article 17, which rejects *renvoi* either to obtain a certain substantive result (to avoid rendering 'a transaction invalid or ineffective that would be valid or effective under the rule of law designated in Article 15, or a status illegitimate that would otherwise be legitimate') or to clarify the

[15] The *lex loci celebrationis* mentioned in Article 49 of the Civil Code of Macao is not friendly to *renvoi* [it is a *renvoifeindliche Anknüpfung* – see FERRER CORREIA A., (note 8), pp. 425-426]; there can never be a case of *renvoi* since Article 28 of the Italian Law of Private International Law of 31 May 1995 (note 8) also designates the *lex loci celebrationis* in this case.

[16] See also, in England, NORTH P.M./FAWCETT J.J., *Cheshire and North's Private International Law*, 12th ed., reprint, London 1998, p. 585.

sense of the designation of the substantive law by the parties. It follows that there is no *renvoi* 'if the parties have designated the law in cases where such designation is permitted', for example, as specified in Articles 32, 40 or 61(a).[17]

These solutions are much simpler than those of the Portuguese Civil Code,[18] which has a special – and somewhat complicated – restrictive system of *renvoi* in matters governed by the personal law (Articles 17(2) and (3) and 18(2)), which was fortunately eliminated in the Civil Code of Macao.

b) Composite Legal Orders

See *supra* at II. A. *2.*; a mere reference to Article 18 suffices in the present context.

c) Public Policy

With the exception of the use of 'a law outside Macao' instead of 'a foreign law' (*supra* at II. B. *2)*, Article 20 of the Civil Code of Macao corresponds for the most part to Article 22 of the Portuguese Civil Code.[19] There are, however, two important differences: On the one hand, while the Portuguese provision deals with 'the *international* public policy of the *Portuguese State'* (*ordem pública internacional do Estado Português*), the corresponding Macao provision only mentions 'public policy', for the same reasons mentioned above. On the other hand, the sense of the wording '*manifestly* incompatible with public policy' differs from that of the Portuguese formulation 'an offence against the fundamental principles of the international public policy of the Portuguese State'. The provision of the Civil Code of Macao is more restrictive than the Portuguese one, as far as the operation of public policy is concerned (because of the adverb *manifestly*) and, at the same time, more flexible, because it is not confined to '*fundamental principles* of public policy'.

[17] This corresponds to the solution adopted in Article 13(2)(a) of the Italian Law of PIL (note 8) and in Article 15 of the Rome Convention (note 7).

[18] On the current system of *renvoi* in Portugal, see FERRER CORREIA A., 'La question du renvoi dans le nouveau code civil portugais', in *Boletim da Faculdade de Direito [de Coimbra]* 1966, pp. 245-283. It should also be noted that, in matters relating to *formal validity*, the Civil Code of Macao follows the solutions of the Portuguese Civil Code in Articles 36(2) and 65(1), *in fine*, by applying the *renvoi* doctrine with the single aim of *favor negotii* or *favor validitatis* (Articles 35(2) and 62(1), *in fine*).

[19] On the Portuguese legal doctrine of public policy, see, recently, MOURA RAMOS R. M., 'L'ordre public international en droit portugais', in *Boletim da Faculdade de Direito [de Coimbra]* 1998, pp. 45-62.

III. Special Part

As mentioned above, Division II of Part II contains seven Subdivisions specifying choice of law rules in Articles 24 to 62 (see *supra*, Part I).

A. Scope and Determination of the Personal Law

In regard to natural persons, Article 24 provides that their status and capacity, family relations and matters of succession to the estates of deceased persons are governed by the personal law of the respective subject. As for legal persons, the personal law governs in particular the capacity of the legal person; the formation, operation and authority of its organs; the manner of acquiring and relinquishing the position of partner and the corresponding rights and duties thereof; the liability of the legal person towards third parties, as well as the liability of its organs and their members; and the transformation, dissolution and extinction of the legal person (Article 31(2)).

Article 30 provides that the personal law of a natural person is the law of his or her habitual residence,[20] while the personal law of a legal person is 'the law of the place where the principal and effective seat of its administration is situated' (Article 31(1)).[21] With respect to international legal persons, this law applies only subsidiarily in cases where the applicable law has not been designated in the convention that created them, or in the respective memorandum and articles of association (Article 32).

The beginning and termination of legal personality and the personality rights of natural persons are governed, in principle, by the personal law (Articles 25 and 26). Article 27 establishes an exception that is somewhat similar to that of Article 11 of the

[20] On the impossibility of using the concepts of *foreigners* and *nationals* in Macao in the field of civil rights, see *supra* II., B., *1.*; moreover, Dr. Luís Miguel Urbano (note 5), p. XVII, justifies the impossibility of adopting the criterion of nationality from the Portuguese Civil Code of 1966 in matters of personal status with the fact that Macao 'is not a sovereign state' and that there is no 'autonomous nationality' of Macao.

See, however, the important provision of paragraph 6 of Article 30 (notwithstanding the exception in paragraph 7): '[...] transactions concluded in the country of the declarant's nationality in compliance with the law of that country shall be recognized in Macao, if that law regards itself as applicable.' This reproduces, *mutatis mutandis*, the doctrine of Article 31(2) of the Portuguese Civil Code (former Article 31(3) in Macao, by virtue of the Decree-Law No. 32/91/M of 6 May 1991) and thus establishes in Macao the relevance of the doctrine of *vested rights* of Portuguese PIL. On this topic, see MOURA RAMOS R. M., 'Dos direitos adquiridos em Direito Internacional Privado', in *Das relações privadas internacionais – Estudos de Direito Internacional Privado*, Coimbra 1995, pp. 11-48.

[21] Paragraphs 3 and 4 of Article 31 have recourse to the cumulative application of different personal laws in cases where the seat of the legal person is transferred from one legal order to another or there is a merger between entities governed by different personal laws.

Rome Convention[22] or to the *Lizardi* doctrine of French case law.[23] This solution is applicable, *mutatis mutandis*, to legal persons by virtue of Article 33. Article 28 resolves the problem of *conflit mobile* with respect to majority or emancipation,[24] while Article 25(2) adopts the technique of *adjustment* (*adaptation*, *adaptación*, *adattamento*, *aggiustamento*, *Anpassung*, *Angleichung*, *adaptação*) to resolve a contradiction between two concurring personal laws.[25] Article 26(2) contains a discriminatory rule parallel to the one in Article 27(2) of the Portuguese Civil Code[26] on the rights of foreigners (*Fremdenrecht)*. Article 29 provides that '[g]uardianship and analogous institutions for the protection of incapacitated persons shall be governed by the personal law of the incapacitated person'.

B. The Law Applicable to Transactions

Articles 34 to 39 designate the applicable law with respect to declarations intended to have legal effect, the form of the declaration, agency by operation of law, authority to represent legal persons, agency, and prescription and limitation of actions. The solutions provided therein closely follow those of Articles 35 to 40 of the Portuguese Civil Code.[27]

C. The Law Applicable to Obligations

As specified in Article 40, obligations arising from transactions, i.e., voluntary obligations, are governed primarily 'by the law designated or referred to by the parties' (i.e., by an express or implicit choice of law), however with the subjective limitation that the choice of law must satisfy 'a serious interest of the declarants', or, alternatively, the objective requirement that the law chosen by the parties be 'connected with one of the elements of the transaction relevant in the field of conflict

[22] See note 7.

[23] See MAYER P., *Droit international privé*, 6th ed., Paris 1998, pp. 339-340.

[24] See LIMA PINHEIRO L., *Direito Internacional Privado – Parte Especial (Direito de Conflitos)*, Coimbra 1999, pp. 51-52, with reference to the corresponding provision of Article 29 of the Portuguese Civil Code.

[25] See MARQUES DOS SANTOS A., 'Breves considerações sobre a adaptação em Direito Internacional Privado', in *Estudos de Direito Internacional Privado e de Direito Processual Civil Internacional* (note 10), pp. 117 *et seq.*, with reference to the corresponding provision of Article 26(2) of the Portuguese Civil Code.

[26] See, with a different opinion, LIMA PINHEIRO L. (note 24), pp. 42-43.

[27] See BAPTISTA MACHADO J. (note 10), pp. 351-357; LIMA PINHEIRO L. (note 24), pp. 139-161, with reference to the corresponding provisions of the Portuguese Civil Code.

of laws rules', i.e., with one of the connecting factors used in the Civil Code of Macao (habitual residence, seat of the legal person, *locus rei sitae*, *locus delicti*, etc.).

This article reproduces almost *ipsis verbis* Article 41 of the Portuguese Civil Code, which restricts the choice of law by the parties much more than Article 3 of the Rome Convention,[28] now the main provision in Portuguese PIL in the field of contractual obligations.

On the contrary, Article 41 is very different from its counterpart in the Portuguese Civil Code (Article 42), which refers to different laws, in a somewhat intricate and even old-fashioned manner. According to the Macao provision, 'in the absence of a designation of the applicable law, the law of the place most closely connected with the transaction shall apply' in all cases. This solution corresponds, in principle, to that of Article 4(1) of the Rome Convention.[29]

Articles 42 and 43 govern *negotiorum gestio* and unjust enrichment in the same way as Articles 43 and 44 of the Portuguese Civil Code.[30]

Article 44 on non-contractual liability follows the wording of Article 45 of the Portuguese Civil Code very closely; however, for the reasons mentioned above,[31] the phrases 'law of the place', 'the place subject to that law' and 'the legal order designated as applicable by the preceding paragraphs' are used in the Macao provisions instead of 'law of the State', 'in that country' and 'local State' (*Estado local*), respectively.

The main idea underlying this provision is the application of the *lex loci delicti commissi*,[32] which, in this context, is 'the law of the place where the principal conduct causing the injury occurred' or, 'if the liability is due to an omission, the law of the place where the liable person should have acted'. These laws apply without distinction to 'non-contractual liability resulting from a tort, putting others at risk or from any lawful conduct' (paragraph 1).

Paragraph 2 refers instead to the 'law of the place where the injury was inflicted' if the injurious party is held liable under that law 'but not under the law of the place where the conduct causing the damage occurred', 'provided the injurious party should have foreseen that his or her act or omission could cause injury at a place subject to that law'. However, it is unclear by which law this foreseeability should be ascertained.

Paragraph 3 designates the law most closely connected with the particular situation in question: 'If the injurious party and the injured person have the same habitual residence and are by chance abroad, the law of the common residence shall

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[28] See note 7.

[29] *Ibidem.*

[30] See BAPTISTA MACHADO J. (note 10), pp. 366-367; LIMA PINHEIRO L. (note 24), pp. 221-226, with reference to the corresponding provisions of the Portuguese Civil Code.

[31] See *supra*, section II. B. *1.* and note 20.

[32] See BAPTISTA MACHADO J. (note 10), pp. 367 *et seq.*, with reference to Article 45 of the Portuguese Civil Code.

apply.' The theory of mandatory rules makes the application of this law 'subject to the provisions of the legal order designated as applicable by the preceding paragraphs that shall apply without distinction to all persons'.[33]

When adopting the solution in paragraph 3, the legislator may have taken account of the solution in the well-known case *Babcock v Jackson* of 1963.[34]

D. The Law Applicable to Property

Article 45 corresponds, with slight differences, to Article 46 of the Portuguese Civil Code. While paragraph 1 on real rights adopts the classical conflicts rule of *lex rei sitae* (or *lex situs*) with respect to possession, ownership and other real rights, paragraph 2 contains a special solution 'concerning the acquisition or transfer of real rights in things in transit', which specifies that such things 'shall be deemed to be situated at the place of destination'. Paragraph 3, which also establishes a special rule, provides that '[t]he acquisition or transfer of rights in means of transportation that are subject to registration shall be governed by the law of the place where they were registered'. Inspired by the principle of *Näherberechtigung* (in Portuguese, *maior proximidade* or 'greater proximity'), Article 46 provides that 'the capacity to acquire or transfer real rights in immovable property shall also be governed' by the *lex situs*, however, only if 'that law thus provides'. Accordingly, there is a conditional reference (*bedingte Verweisung*) to rules of private international law of a law outside Macao.[35] This solution is the same as the one adopted in Article 47 of the Portuguese Civil Code.

Article 47, which differs from its counterpart in Article 48 of the Portuguese Civil Code,[36] provides that 'copyright and related rights, as well as industrial property rights, shall be governed by the law of the place where their protection is requested'; however, this is 'subject to provisions contained in special legislation' of either domestic or international origin.

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[33] See MARQUES DOS SANTOS A. (note 8), p. 856, note 2725, and p. 898, note 2833, with reference to the corresponding provision of Article 45(3) of the Portuguese Civil Code.

[34] Court of Appeals of New York, 9 May 1963, 191 N.E. 2d 279: see MARQUES DOS SANTOS A. (note 8), pp. 107 *et seq.*, note 358.

[35] On these concepts, see KEGEL G./SCHURIG K., *Internationales Privatrecht*, 8th ed., München 2000, pp. 366-367; as far as Article 47 of the Portuguese Civil Code is concerned, see FERRER CORREIA A., *Direito Internacional Privado – Alguns problemas*, Coimbra 1985, pp. 118-119, and (note 8), p. 48, and BAPTISTA MACHADO J. (note 10), p. 378. For another case of a *bedingte Verweisung* in Macao PIL, see *supra*, note 20, *in fine*.

[36] On this provision, see BAPTISTA MACHADO J. (note 10), pp. 381-392; LIMA PINHEIRO L. (note 24), pp. 253-261.

E. The Law Applicable to Family Relations

There are some important differences between Subdivision V and the corresponding Subdivision of the Portuguese Civil Code. First of all, Article 49 of the Civil Code of Macao has dropped the odd provision of Article 51(3) of the Portuguese Civil Code which recognizes the validity of a canonical marriage of one (or two) Portuguese nationals celebrated abroad even in a country that does not accept this kind of marriage, such as France.[37] There are also significant differences in Article 53 on divorce and Article 54 on the establishment of parent-child relationships. The remaining provisions are similar to those of the Portuguese Civil Code, except that, for the reasons already mentioned, the connecting factor is not nationality, which is found only in Article 49(2) of the Macao provisions.

Thus, the capacity to contract marriage and to enter into marriage contracts is governed by the personal law of each future spouse; the same law applies when determining 'the effects of the lack of consent and vices of consent by the parties' (Article 48). Article 49 provides that the formalities of marriage shall be governed by the *lex loci celebrationis* (paragraph 1); however, two foreigners in Macao may celebrate their marriage before the respective consular agents in the form prescribed by the law of the nationality of either party (paragraph 2). As an exception, in this case, the aim of the *favor validitatis* or *favor matrimonii* enables application of the law of the nationality[38] of either of the two foreigners. In this context, foreigners seem to be individuals having a nationality other than Chinese. Contrary to Article 51(1) of the Portuguese Civil Code, no reciprocity is required for a consular marriage in Macao.

As prescribed by Article 50, the relations between spouses shall be governed by the law of their common habitual residence (paragraph 1), or if the spouses do not have the same habitual residence, by the law of the place with which their family life is most closely connected (paragraph 2).

Pursuant to Article 51, the substance and effects of a prenuptial contract and of the matrimonial property regime are governed by the law of the common habitual residence of the future spouses at the time of the celebration of the marriage (paragraph 1) or, subsidiarily, by the law of the first marital residence (paragraph 2).

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[37] For a very strong criticism of this provision, which is considered unconstitutional, see MARQUES DOS SANTOS A., 'Constituição e Direito Internacional Privado – O estranho caso do artigo 51.º, n.º 3, do Código Civil', in MIRANDA J. (ed.), *Perspectivas Constitucionais – Nos 20 anos da Constituição de 1976*, Vol. III, Coimbra 1998, pp. 367-390, and 'Citoyens et fidèles dans les pays de l'Union Européenne – Rapport portugais', in *Cittadini e fedeli nei paesi dell'Unione Europea/Citizens and Believers in the Countries of the European Union*, Milano 1999, pp. 275-276; see also, in this context, HÖRSTER H. E., 'A conveniência da revogação dos artigos 1589.º, n.º 2, e 51.º, n.º 3, do Código Civil – Algumas reflexões', in *Juris et De jure – Nos 20 anos da Faculdade de Direito da UCP – Porto*, Porto 1998, pp. 85 *et seq.*

[38] See *supra*, note 20, *in fine*, another case of the exceptional relevance of the *national* law (i.e., the law of *nationality*) in Macao PIL.

Paragraph 3 recognizes, under certain conditions, the choice of one of the matrimonial property regimes admitted by the Civil Code of Macao (Article 1579 *et seq.*).

Article 52 provides that postnuptial contracts and modifications to the matrimonial property regime shall be governed by the law designated in Article 50 (paragraph 1) and prescribes that '[i]n no case shall the new contract be retroactive to the disadvantage of a third party' (paragraph 2).

As far as divorce is concerned, Article 53 merely refers to Article 50. Taking account of situations where the applicable law has changed during the marriage, paragraph 2 of Article 55 of the Portuguese Civil Code also refers to the former law that was applicable at the time the fact occurred that has been invoked as the ground for divorce, thus making it more difficult to obtain a divorce in cases of a *conflit mobile*. On the contrary, the Civil Code of Macao is characterized by the idea of *favor divortii*. This interpretation is reinforced by the fact that there is no choice of law rule for the separation of spouses, whereas Article 55 of the Portuguese Civil Code deals with both separation and divorce. In any case, it seems that separation should also be governed by the law designated in Article 53.

Article 54 provides that '[t]he establishment of a parent-child relationship shall be governed by the personal law of the parent at the time the relationship is established'. This provision corresponds to paragraph 1 of Article 56 of the Portuguese Civil Code, which contains two additional paragraphs regulating situations where the issue relates to the child of a married woman. There are no counterparts in the Macao provisions for such situations.

Article 55 designates the same law as the corresponding provision in Article 57 of the Portuguese Civil Code: 'Parent-child relations shall be governed by the law of the common habitual residence of the parents and, in the absence of such residence, by the personal law of the child' (paragraph 1). 'If the parent-child relationship is established in relation to only one parent, the personal law of that parent shall apply; if one of the parents is deceased, the personal law of the survivor shall apply' (paragraph 2).

Article 56 on adoptive parent-child relationships follows, *mutatis mutandis*, the solutions of Article 60 of the Portuguese Civil Code, with the notable exception of paragraph 3, which does not exist in the Portuguese Civil Code. Paragraph 1 provides that '[t]he establishment of an adoptive parent-child relationship shall be governed by the personal law of the adopter, subject to the provisions of paragraphs 2 and 3'.

Regulating situations where the adopters are husband and wife or the adoptee is the child of the adopter's spouse, paragraph 2 provides that in such situations the establishment of an adoptive parent-child relationship shall be governed by 'the law of the common habitual residence of the spouses […] and, in the absence of such residence, [by] the law of the place most closely connected with the family life of the adopters…'.

Paragraph 3 regulates situations where the adopters are cohabiting without marriage or the adoptee is the child of the adopter's cohabitee. In such situations, 'the provisions of the preceding paragraph shall apply, as appropriate'. Paragraph 4 provides that '[t]he relations between the adopter and the adoptee and between the

adoptee and his or her family of origin shall be governed by the personal law of the adopter; in cases regulated by paragraphs 2 and 3, the provisions of the preceding article shall apply'.

Article 57, the final provision of this Subdivision, establishes the cumulative application of two laws: 'If the personal law of the child to be acknowledged or adopted requires the consent of the child as a prerequisite for the acknowledgment of parentage or for adoption, this requirement shall be satisfied'. Thus the law designated in Article 57 is applied cumulatively with the law designated in Articles 54 or 56.

F. The Law Applicable to Cohabitation without Marriage

Subdivision VI on the law applicable to cohabitation without marriage is completely new in comparison with the Portuguese provisions on private international law. As specified by Article 58, '[t]he conditions and effects of cohabitation without marriage shall be governed by the law of the common habitual residence of the cohabitees' (paragraph 1) or subsidiarily by 'the law of the place most closely connected with the facts of the case' (paragraph 2).

It should be noted that the provision on cohabitation without marriage is included neither in the Subdivision on family relations nor in the Subdivision on contractual relations, as advocated by some authors.[39]

G. The Law Applicable to Succession

The last Subdivision of the Special Part of the Macao provisions on private international law (Articles 59 to 62) corresponds, with minor differences, to Articles 62 to 65 of the Portuguese Civil Code.

As provided by Article 59, '[s]uccession to the estate of a deceased person shall be governed by the personal law of the deceased at the time of his or her death; the same law also specifies the powers of the person(s) entitled to administer the estate and those of the executor of the will'. The reference to the time of death removes any doubt as to which personal law of the deceased shall apply (cf. Article 30).

Article 60, which deals with the capacity to dispose of property upon death, provides in paragraph 1 that '[t]he capacity to make, modify or revoke a disposition of property upon death shall be governed by the personal law of the deceased at the time the declaration was made; the same law also applies with respect to specific formal requirements for certain dispositions because of the declarant's age'. Paragraph 2 adds that '[a] person who acquires a new personal law after having made a disposition retains the capacity necessary to revoke the disposition under the previous law', thus

[39] See, e.g., SÁNCHEZ LORENZO S., 'Las parejas no casadas en Derecho Internacional Privado', in *REDI* 1989, pp. 487-531.

providing a solution to a *conflit mobile*, similar to the one in Article 28 with respect to majority or emancipation.[40]

It should be noted that the law designated in Article 60(1) ('the personal law of the deceased at the time the declaration was made') is not the same as the one in Article 59 ('the personal law of the deceased at the time of his or her death').

Article 61 provides for the possibility of a choice of law in the field of succession[41] by prescribing that 'the interpretation of the respective provisions and dispositions' (a) shall be governed by the personal law of the deceased at the time the declaration was made, '*unless there is an express or implied reference to another law'*. 'The lack of consent and vices of consent' (b) are governed by the same law, as is '[t]he admissibility of joint wills and agreements as to succession, the latter of which are subject to the provisions of Articles 51 and 52' (c). It should be noted that joint wills are not admissible under the substantive law of Macao (Article 2018, which corresponds to Article 2181 of the Portuguese Civil Code). Thus this can be regarded as an example of the autonomy of private international law vis-à-vis substantive law.[42]

Finally, similar to Article 35, Article 62 contains an alternative choice of law rule with the aim of promoting *favor validitatis* or *favor negotii*, here *maxime favor testamenti.* Paragraph 1 reads: 'Dispositions of property upon death, as well as their revocation or modification, shall be deemed formally valid if they satisfy the requirements of the law of the place where the act was performed or those of the personal law of the deceased at the time the declaration was made or at the time of death, or the requirements of the law referred to by the choice of law rule of the local law.' If the requirements of any of the four laws designated here are satisfied, this suffices to ensure the formal validity of the disposition. The fourth law is determined by a special kind of *renvoi*, as was already mentioned.[43]

Parallel, *mutatis mutandis*, to Article 35(1) and (2), *in fine*, on the form of declarations in general, paragraph 2 of Article 62 establishes a limitation to the alternative character of the rule: '[…] if the personal law of the deceased at the time the declaration was made requires a specific form, the non-observance of which renders the declaration void or ineffective, such requirement shall be satisfied, even in cases where the act was performed outside Macao'.

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[40] See, *supra*, the text corresponding to note 24.

[41] See, *supra*, the text corresponding to note 17.

[42] See FERRER CORREIA A., 'O princípio da autonomia do direito internacional privado no sistema jurídico português', in *Temas de Direito Comercial e Direito Internacional Privado*, Coimbra 1989, pp. 465 *et seq.* [on the relationships between Article 64(c) and Article 2181 of the Portuguese Civil Code].

[43] See, *supra*, note 18, *in fine*.

This paragraph applies, among others,[44] to cases falling under Article 2054 of the Civil Code of Macao (which corresponds to Article 2223 of the Portuguese Civil Code). Article 2054 provides that 'a will made outside Macao by an habitual resident of Macao in compliance with the applicable law at that place shall have no effect in Macao unless a solemn form has been observed in its making or approval'. As far as Article 2223 of the Portuguese Civil Code is concerned, the 'solemn form' seems to be a written form,[45] thus ensuring the validity of holograph wills and excluding testaments made only orally.

IV. Conclusion

At the time the Chapter on private international law of the Portuguese Civil Code entered into force on 1 June 1967, it was considered one of the best codifications of private international law.[46]

Although the Chapter on PIL of the Civil Code of Macao of 1999 is based on the corresponding Chapter of the Portuguese Civil Code, it has improved the solutions of the Portuguese Code in several important aspects by adopting some new provisions (e.g., Articles 21, 33 and 58 have no counterparts in the Portuguese Civil Code) and simplifying the original Portuguese provisions (e.g., Articles 15, 16, 18, 41, 47, 49, 53).

In addition, a great effort has been made to find new and original solutions (e.g., Article 30), while some obsolete and/or complicated provisions (e.g., Articles 16, 41) have been eliminated.

May this article and the translation of the provisions of the Portuguese official text into English contribute to improving the knowledge outside Macao of the new private international law rules of this Special Administrative Region of the People's Republic of China.[47]

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[44] See MARQUES DOS SANTOS A., 'Testamento público', in *Estudos de Direito Internacional Privado e de Direito Processual Civil Internacional* (note 10), pp. 212 *et seq.*, with reference to the provision of Article 65(2) of the Portuguese Civil Code, which corresponds to Article 62(2) of the Civil Code of Macao; see also MORRIS J.H.C., *The Conflict of Laws*, 3rd ed., London 1984, pp. 395-396.

[45] In this sense, BAPTISTA MACHADO J. (note 10), p. 451; for a different view, see LIMA PINHEIRO L. (note 24), pp. 153-154.

[46] See, e.g., FERNÁNDEZ ROZAS J. C./SÁNCHEZ LORENZO S., *Curso de Derecho Internacional Privado*, 2nd ed., Madrid 1993, p. 188: '*un considerable nivel de perfección técnica*' ['a considerable level of technical perfection'].

[47] It should be added that several Hague Conventions to which Portugal is Party have been extended to Macao, e.g., *Convention du 24 octobre 1956 sur la loi applicable aux obligations alimentaires envers les enfants*, *Convention du 15 avril 1958 concernant la reconnaissance et l'exécution des décisions en matière d'obligations alimentaires envers les enfants*,

Convention du 5 octobre 1961 concernant la compétence des autorités et la loi applicable en matière de protection des mineurs [these Conventions have only a French original text], Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents, Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations, Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. On the latter convention, see, e.g., MARQUES DOS SANTOS A., *Direito Internacional Privado – Colectânea de textos legislativos de fonte interna e internacional*, Coimbra 1999, p. 1021; the information on the remaining conventions cited here is taken from various issues of the Portuguese Official Journal *Diário da República*.

ARBITRATION IN BRAZIL: THE EARLY EXPERIENCE

Welber BARRAL* & Tatiana LACERDA PRAZERES**

I. Introduction

Although the first Brazilian Constitution (1824) provided for arbitration, it was never an effective means of dispute resolution. The credibility and thus effectiveness of arbitration were impaired by its own regulation throughout Brazilian legal history.

As in the other Latin American countries, the previous arbitration regime in Brazil[1] imposed several obstacles by: (a) authorizing a broad range of grounds for attacking the validity of an arbitral award; (b) permitting ordinary courts to intervene in the arbitral proceedings prior to, during and following the rendering of an

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[1] Arbitration rules were initially laid down by the Commercial Code (1850) and later in the Code of Civil Procedure (1939), reformed in 1973.

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award, (c) rejecting the 'competence-competence' doctrine, and (d) requiring rigid formalities in the arbitral proceedings.[2] Apart from these factors, it is important to mention the inability to guarantee the effectiveness of the arbitration clause and the need for the 'double recognition' of international awards (i.e., an arbitral award had to be recognized by the national courts where it had been rendered before being recognized by Brazilian courts).

More than 150 years after the enactment of the first Brazilian arbitration provisions, innovative rules of arbitration have finally been adopted.[3] The need for a formula to guarantee the effectiveness of arbitration had become urgent: The malfunctioning of Brazilian courts and the liberalization of trade in the 1990s increased the demand for alternative methods of dispute resolution.[4] As a result, the Arbitration Act has been received very well by the business community.

Since the Arbitration Act entered into force, Brazilian courts have decided some cases involving the validity of arbitral clauses and arbitral awards. These cases are relevant for this study in that they reveal how the courts have interpreted the innovative provisions of the Arbitration Act. Generally speaking, these decisions show that Brazilian courts are willing to accept the innovations.

It should be stressed, however, that it is not possible – for methodological reasons – to infer from the cases analyzed here that arbitration in Brazil is effective or successful. In fact, recourse to the courts generally occurs when the parties disagree on the findings in the arbitral award and the losing party fails to comply with the decision. Since arbitration is essentially a substitute for intervention by ordinary courts, arbitration matters adjudicated by the courts are not the best examples to use to present a model of arbitration. While the arbitration cases satisfactorily resolved by ad hoc arbitral tribunals or other institutions recently created in Brazil should not be disregarded, the number of such cases is unknown to Brazilian courts. In the absence of accurate data on successful arbitration cases over the past three years, this study deals with cases where arbitration did not succeed in resolving the disputes between the contracting parties.

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[2] LAYTON R., 'Changing attitudes toward dispute resolution in Latin America', in 10 *Journal of International Arbitration* 1993, pp. 123-141, at 129.

[3] Law 9.307, reprinted in *Diário Oficial da União* 186 (1996), hereinafter Arbitration Act. A version in English may be found at *I.L.M.* (1997). For an early analysis of this Act, see BARRAL W./CARDOSO F. 'Arbitration in Brazil: the 1996 Act', in *Mealey's Int'l Arb. Report* 1998, pp. 01-16; LEE J. 'Le nouveau régime de l'arbitrage au Brésil', in *Revue de l'Arbitrage* 1997, pp. 199-310.

[4] As a foreign commentator observed: '[T]he reputation of the Brazilian courts for efficiency and integrity in discharging their official functions has been badly tarnished in recent years. The rapid growth of the population and the economy has overcrowded court dockets [...]. Brazilian civil procedure offers seemingly endless opportunities for delay; loopholes and possibilities for filing additional appeals abound.': ROSENN K. 'Brazil's legal culture', in *Florida Int'l Law J.* 1984, p. 35.

Therefore, the objective of this brief study is to acquaint foreign readers with the current state of arbitration in Brazil. Above all, it focuses on the court interpretation of the main innovations introduced by the 1996 Act, which has succeeded in incorporating modern international standards of arbitration into the Brazilian legal system.

To present a clear picture of current arbitration in Brazil, this article deals with: (i) the main innovations introduced by the 1996 Act; (ii) the court interpretation of the legal innovations relating mainly to international arbitration; (iii) the analysis of the 1996 Act by the Brazilian Constitutional Court; and (iii) some remarks about this early period of experimentation.

II. The 1996 Arbitration Act

The 1996 Act brought about important modifications in the legal provisions on arbitration in Brazil: (a) it grants specific performance to an arbitration agreement; (b) like court judgments, the enforcement of foreign arbitral awards no longer requires that the award be first recognized by an ordinary court; (c) court intervention in the arbitral process is usually not possible; (d) arbitrators are allowed to determine the scope of their own jurisdiction (according to the competence-competence doctrine); (e) rigid formalities are no longer required in the arbitral procedure and the parties are free to agree on the procedural rules to be applied; (f) the parties are free to determine the law governing the substantive issues of the dispute; and (g) court proceedings initiated in violation of an arbitration agreement may be dismissed.[5]

The Act defines the objective and subjective limits of arbitration after providing that (i) only persons with legal capacity may resort to arbitration and (ii) only matters relating to available property rights (*direitos patrimoniais disponíveis*) may be resolved by arbitration.[6] Furthermore, it should be noted that arbitration in Brazil is not limited exclusively to commercial issues.

In addition, it is important to note that the parties are free to choose the rules governing the arbitration, provided they do not violate Brazilian public policy.[7] Thus the parties may specify that the award shall be based on the general principles of law, commercial practices and rules of international of trade. Arbitration *ex aequo et bono* may also be expressly chosen by the parties.[8]

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[5] BARRAL W./CARDOSO F. (note 3), p. 2.

[6] Arbitration Act, Art. 1.

[7] Arbitration Act, Art. 2 (1).

[8] Arbitration Act, Art. 2.

One of the most important innovations of the Arbitration Act is the creation of the arbitration agreement, which encompasses both the arbitration clause (*cláusula compromissória*) and the submission agreement (*compromisso*). Maintaining the distinction between these agreements typical of Latin American legal systems, Brazilian law regards the arbitration clause as the agreement of the parties to submit future disputes which may arise to arbitration, whereas the submission agreement is not signed until a particular dispute arises. In the submission agreement, the parties clearly identify the issue(s) at stake, define the competence of the arbitrators, and designate the applicable procedural rules. Consequently, the arbitration clause refers to future disputes, the submission agreement to existing disputes.

However, under the new Act, both agreements have the effect of forcing the parties to submit to arbitration, as a result of which the existence of any of these agreements denies the parties the right of recourse to ordinary courts. Thus it follows that the generic arbitration clause is sufficient to require the parties to submit future disputes to arbitration. The requirement of specific performance of the arbitration agreement represents significant progress towards guaranteeing the effectiveness of arbitration.

Under the former provisions on arbitration, the mere existence of an arbitral clause was insufficient to require the parties to submit to arbitration when a dispute arose; only the submission agreement could prevent them from instituting ordinary court proceedings. Similarly, in international arbitration cases, according to the prevailing court practice prior to the 1996 Act, the existence of an arbitral clause did not necessarily require the parties to submit to arbitration,[9] although Brazil had ratified international agreements recognizing arbitration clauses as binding.

Following global trends in dispute resolution and complying with the treaties ratified by Brazil, the 1996 Act prescribes the specific performance of the arbitration clause by requiring the parties to submit to arbitration and by providing for only one option in the event of court intervention, i.e., ordinary courts must require the parties to submit to arbitration.[10] In recent court practice, this

[9] In that sense, the prevailing view of the Brazilian Supreme Court (STF) prior to 1996 is expressed as follows in Supremo Tribunal Federal, 2 June 1967, Appeal 5869-6-SP per Luiz Gallotti J.: 'An arbitration clause (*pacto de compromittendo*) does not yet constitute a requirement for submission to an arbitral tribunal, but rather the obligation to consider it. It is a contractual obligation that can be waived by negotiation. As a private agreement, it *does not oust the jurisdiction of the competent court if a party claims it*' [emphasis added].

[10] Arbitration Act, Art. 7. This problematic provision provides that, in the absence of a submission agreement and where the parties fail to reach agreement, the party requesting arbitration may request an ordinary court to appoint an arbitral tribunal.

innovation seems to have been accepted, as can be seen in the decisions rendered after the Arbitration Act entered into force.[11]

The 1996 Act does not impose formal procedural requirements. Accordingly, the arbitral tribunal will apply the procedural rules chosen by the parties or those of the chosen arbitral institution, if the parties opt for institutional arbitration. In the case of ad hoc arbitration, the parties are to appoint one or more arbitrators (always an odd number), who may be 'any person in a civil capacity having the parties' trust'. The arbitrators are required by law to conduct the proceeding with impartiality, independence, competence and discretion, and are civilly and criminally responsible in the event of misconduct.[12] The arbitral decision shall be expressed in a written document and is not subject to review or approval by the judiciary.[13] The 1996 Act provides for specific cases where an arbitral award is null or void[14] and, in such cases, authorizes the aggrieved party to request the courts to declare the decision null and void.

With respect to international arbitration, the Act expressly provides for enforcement of the decision in compliance with the international agreements in force in Brazil and, as a second ground, in compliance with the 1996 Act. In other words, the Arbitration Act recognizes the prevalence of international treaties on the enforcement of awards. As of February 2000,[15] Brazil has ratified the Geneva Protocol (1923)[16] and the Panama Convention (1975).[17]

Another important innovation is the power to dismiss an award that has been recognized by the ordinary courts of the State where it was rendered. As specified by the 1996 Act, the enforcement of a foreign award in Brazil is subject only to recognition by the Supreme Federal Court (*Supremo Tribunal Federal*, STF).[18] Such recognition can be challenged only in very limited circumstances,[19]

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[11] In that sense, the following decision: 'Arbitral tribunal – execution – export contract – alleged existence of arbitration clause or submission agreement – impossibility of ruling by ordinary court – dismissal of the case without judgment on merits – interpretation of Articles 4 and 9 of the 9.307/96 Act, and Articles 267, VII and 301, IX of the Code of Civil Procedure', Tribunal de Alçada de Minas Gerais, 3rd Chamber, 3 June 1998, Appeal 254.852-9, per Jurema Marins J.

[12] Arbitration Act, Art. 13.

[13] Arbitration Act, Art. 18.

[14] Cf. Arbitration Act, Art. 25.

[15] Unfortunately, due to influence of the Calvo Clause Doctrine, Brazil has not yet ratified the New York Convention; however, as a result of a recent project in the Brazilian Senate, the New York Convention should soon be ratified.

[16] Geneva Protocol on Arbitration Clauses of 1923, Decree 21.187 of 22 March 1932.

[17] Inter-American Convention on International Commercial Arbitration of 1975, Decree 1.902 of 09 May 1996.

[18] Arbitration Act, Art. 35.

for example, if such dispute is not arbitrable under Brazilian law, or if the decision violates Brazilian public policy.

III. Approach to Arbitration in Brazilian Courts

This section analyzes some recent court decisions regarding the innovative aspects of arbitration.[20] The effectiveness of arbitration in Brazil depends, to a certain extent, on the Brazilian courts, since their interpretation of such innovations will have an important impact on the future use of arbitration. After adoption of the 1996 Act, there was a general fear among scholars and practitioners that the Brazilian judiciary would restrict the applicability of the Arbitration Act. It is too early to predict whether there are any grounds for such fear.

In view of the short period of time since the entry into force of the Act and the small number of court decisions on the matter, this article can only be regarded as an indication of some trends. Otherwise, as in other civil law countries, court decisions in Brazil do not create binding precedents. The only exceptions are manifestations of the Supreme Federal Court on the interpretation of constitutional issues, which carry some compulsory weight.[21] Nonetheless, initial decisions on a new matter – even those by ordinary courts – are quite influential on future judgments.[22]

A. Validity of the Arbitration Agreement

As regards the validity of the agreement, there are some decisions that guarantee the binding nature of the arbitration clause (thus dispensing of the need for a submission agreement). As was previously remarked, requiring the specific performance of the arbitration clause is one of the most significant innovations of the

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[19] Arbitration Act, Art. 38. This article roughly repeats Article 5 of the New York Convention.

[20] For a comparative analysis of court intervention in arbitration, see FOX W.F. Jr, *International Commercial Agreements*, Kluwer 1992 (esp. Chap. 8) and REDFERN A./ HUNTER M. *Law and practice of international commercial arbitration*, London 1991 (esp. Chap 6:3).

[21] Federal Constitution, Art. 102. The possibility of binding precedents will be reinforced by the forthcoming judicial reform.

[22] It should be noted that many arbitration cases recently submitted to the Brazilian courts concern the intertemporal conflict of laws. Although these cases have been quite common, their occurrence is temporary and thus such decisions are not analyzed in this article.

1996 Act. Construing the relevant provision literally, a Minas Gerais Court held that a party is not permitted to initiate proceedings before an ordinary court in cases where an arbitration clause has been signed and the other contracting party still desires the matter to be resolved by arbitration.[23]

Despite the clarity of this provision,[24] a recent decision of a Sao Paulo Court was still influenced by the court decisions prior to the 1996 Act. In its decision, the Court maintained that the 'mere [sic] arbitration clause does not constitute the institution of the arbitral tribunal and does not prevent the interested parties from pleading their rights before ordinary courts'.[25]

This decision is not only clearly mistaken, but also decidedly improper as it affects one of the main innovations of the Arbitration Act. The binding nature of the arbitration agreement is intended to guarantee that, as in any modern arbitration law, the agreement of the parties to submit any dispute to private resolution shall be honored. Thus it is essential that no party be permitted to unilaterally withdraw its commitment.

B. Principle of the Second Degree of Jurisdiction

In another decision, the application of the Arbitration Act was denied on the ground that the insistence on the binding nature of the arbitration agreement would violate the implicit constitutional principle that guarantees every individual the right to judicial appeal (principle of the second degree of jurisdiction). Citing this argument, a decision of the Minas Gerais Court held that the arbitral tribunal would represent a violation of this principle.[26]

However, this reasoning has since been declared unfounded. Taking a stand on the matter, Justice Sepúlveda Pertence of the STF maintained that the fact that an arbitral award precludes the possibility of judicial appeal cannot be deemed an adequate ground for declaring the binding effect of an arbitration agreement unconstitutional. Justice Pertence refers to a STF precedent on the matter,[27] where the Constitutional Court decided that a clause precluding appeal, as is typical of arbitration, does not imply the violation of any constitutional right. Although this

[23] Tribunal de Alçada de Minas Gerais, 3 June 1998 (note 11).

[24] Arbitration Act, Art. 7.

[25] Segundo Tribunal de Alçada Civil de Sao Paulo, 15 December 1997, Appeal 479.936, per Renato Sartorelli J.

[26] Tribunal de Alçada de Minas Gerais, 3rd Chamber, 24 February 1999, Appeal 0262252-4.

[27] Supremo Tribunal Federal, Full Court, 14 November 1973, Appeal 52.181-GB, per Bilac Pinto J.

precedent had been established under a previous Constitution, Justice Pertence maintained that this position should prevail.[28]

C. Interim Measures of Protection During Arbitral Proceedings

Another controversial matter is whether the granting of interim measures should be permitted during arbitral proceedings. The new Act stipulates that the arbitrator shall decide whether such interim measure is pertinent to the case. Requests for interim measures should be filed with the judge having original competence to hear the case.

The first decision addressing this issue was rendered by a conservative Sao Paulo Court. In its decision the Court ruled that, although an arbitral tribunal had already been established (in the U.S.), the party could resort to Brazilian courts to request a preliminary injunction, although the matter related to a dispute submitted to a foreign arbitral tribunal.[29] This is a surprising decision as it completely ignores the Arbitration Act. The Court argued as follows: Since the arbitral award had not yet been recognized by the foreign courts, any party could request that its rights or interim measures relevant to the dispute be granted by the Brazilian courts having jurisdiction over the matter.

This reasoning is clearly mistaken if one keeps in mind that the new Arbitration Act expressly provides that a foreign arbitral award need only be recognized by the STF in order to be enforceable in Brazil. Moreover, in regard to international arbitration cases – as this case clearly is – the Panama Convention[30] provides that the existence of an arbitration clause ousts the jurisdiction of ordinary courts. This was not even considered in the decision.

IV. International Arbitration

A. International Agreements

Prior to the 1996 Act, the application of international agreements concerning arbitration in Brazil was highly controversial in court decisions. The Geneva Protocol of 1923 and the Panama Convention of 1975, both ratified by Brazil, provide for the binding nature of arbitration agreements in international contracts. As noted

[28] Supremo Tribunal Federal, Appeal 5206-Espanha, p. 38.

[29] Tribunal de Justiça de Sao Paulo, 7th Chamber, 2 September 1998, Appeal. 089.522-4/8-00 and Appeal 089.522-4/0-01, per Des. Júlio Vidal J. Cf. RT 759/226, Jan. 1999.

[30] Cf. Panama Convention, Art. 1.

earlier, court decisions prior to 1996 recognized the binding nature of arbitration only if a submission agreement had been signed. The 1996 Act put an end to this debate, establishing the binding nature of the arbitration clause in conformity with international agreements and current practices abroad.

Although this innovation has been endlessly applauded in scholarly works, a decision on international arbitration after the 1996 Act entered into force, once again by the Sao Paulo Court, declares the new provision invalid. In the decision it is argued that the fact that the 1973 Brazilian Code of Civil Procedure (CPC) was adopted after the Geneva Protocol implies that it would have 'revoked' the provisions of the Geneva Protocol.

This decision ignores the basic principles of international law. As a matter of fact, the sphere of application of the Geneva Protocol (international arbitration) remained unaffected by the subsequently adopted Brazilian procedural law (relating to domestic arbitration). Even if such 'revocation' were possible, the Panama Convention ratified in 1996 – hence after the 1973 CPC – would then be the legal rule in force and thus applicable to the specific case which involves an American and a Brazilian company. Therefore, the arbitration agreement should still have been considered mandatory. In addition, the decision should be overruled on the grounds of another argument as well, i.e., the provision of the Arbitration Act forcing parties to submit to arbitration if an arbitration clause had been previously signed, be it international or domestic arbitration. However, the Arbitration Act was not even mentioned in this decision.

In another strange decision in an international arbitration case, the Sao Paulo Court held that 'differences between the contracting parties' rendered the arbitration 'unworkable' 'due to Brazilian legal obstacles and difficulties argued by one of the parties'. The party's request for a court hearing in the matter was granted.[31] The court's ruling does not clearly indicate the legal obstacles to arbitration. It should be pointed out, however, that 'difficulties argued by one of the parties' do not normally constitute valid grounds for hindering the formation of an arbitral tribunal. According to the judge, 'the matter [...] should be heard, and the mere and simple argument that arbitration had been agreed upon by the parties does not serve as an obstacle to this procedure'.[32]

Even more surprising is the reasoning of another concurring judge, who argued that the arbitration clause in itself would not suffice to form the arbitral tribunal and that the court request would remain a viable option to the parties because a submission agreement did not exist. The judge cited an article by Jürgen Samtleben (published prior to the 1996 Act), where he observed that Brazil had only ratified the Protocol of Geneva and that its 'validity in the national sphere

[31] Tribunal de Justiça de Sao Paulo. 7th Chamber, 2 September 1998 (note 29).

[32] Tribunal de Justiça de Sao Paulo, 6th Chamber, 14 August 1997, Appeal 51.559-4, per Des. Luzia Lopes J.

remains doubtful'. In fact, prior to ratification of the Panama Convention in 1996 and enactment of the Arbitration Act, these considerations could have been accepted. However, in view of the fact that the decision was rendered in August 1997, it was obviously contrary to the legal provisions in force at the time.

In theory, the existence of such unusual decisions can perhaps be explained by the lack of information available to the courts on the validity of 'new' norms. Furthermore, the superior courts have taken a different stand.

Despite the fact that Brazil has not yet ratified the 1958 New York Convention, the main characteristics of the Brazilian Arbitration Act are well in keeping with modern arbitration principles. In fact, since the adoption of the 1996 Act, there is no reason why the Brazilian Government should not ratify the most important treaty on arbitration. The ratification of the New York Convention can be expected in the near future. A step in this direction was taken by the Senate, which approved the Convention in January 2000.

B. Recognition of Foreign Awards

Another relevant innovation of the 1996 Act is the elimination of the 'double judicial recognition' required in international arbitration cases. It is therefore no longer necessary for an arbitral award to be recognized by the courts from the country where the arbitral award was rendered. According to the new Act, recognition by the STF is the only requirement for the enforcement of a foreign award in Brazil.

Prior to the new Act, 'double recognition' was required, regardless of the award's origin. This Byzantine practice was developed in STF case law in the late 1960s as a result of a literal interpretation of the Brazilian Constitution. In fact, the relevant article stated that the STF has competence to 'recognize foreign decisions',[33] but foreign awards were not mentioned. This narrow interpretation of the constitutional text resulted in the practice of requiring 'double recognition': The foreign party to an arbitration requesting enforcement in Brazil had to have the award recognized by the ordinary courts of the country where the award was rendered, and the foreign court decision would then be recognized by the STF.

The cases submitted to the STF after enactment of the Arbitration Act confirm that 'double recognition' is no longer deemed a requirement. Following this trend, in SEC 5206-Spain,[34] Justice Sepúlveda Pertence voted for the recognition of the arbitral award rendered in Spain, regardless of the fact that the award had not been recognized by Spanish courts.

[33] Brazilian Constitution, Art. 102.

[34] Supremo Tribunal Federal, Appeal 5.206-EP, per Sepúlveda Pertence J. (without a final decision).

Similarly, in SEC 5573-France,[35] Justice Carlos Velloso ordered the applicant to prove the existence of the arbitration clause (a requirement stipulated by the Act), in order to proceed with the recognition of the foreign arbitration award. No document evidencing recognition of the arbitral award by the French courts was requested. In December 1999, Justice Maurício Corrêa pointed out expressly in a recognition case[36] that, under the terms of the Arbitration Act, a foreign award can be recognized without having been recognized by the courts of the country where the award was rendered. These precedents should eliminate any future reference to the former requirement of 'double recognition'.

Despite these decisions, another decision by the Sao Paulo Court followed a different and unfortunate path, showing that the absence of recognition by the foreign courts could still prove to be an obstacle to the enforcement of a foreign award in Brazil,[37] even after enactment of the Arbitration Act. It is expected, however, that the STF jurisprudence and the unambiguous wording of the Act will result in the setting aside of such decisions.

Accordingly, the early precedents on the recognition of foreign awards are in keeping with the principle that the STF's power of review is limited to verification of the legal requirements. This principle was already followed in the Court's earlier practice.[38] Hence, recent decisions do not report on the merits of the foreign award.[39]

C. Summons by Postal Mail

With respect to the formalities for summoning parties to appear before the arbitral tribunal, it should be noted that recent court precedents literally follow the legal provision specifying that a summons by postal mail is sufficient and binding on the summoned party, thus rendering the rogatory letter unnecessary.

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[35] Supremo Tribunal Federal, Appeal 5.573-FR, per Carlos Velloso J. (without a final decision).

[36] Supremo Tribunal Federal, 1 December 1999, Appeal 5.847-RU, per Maurício Corrêa J.

[37] Tribunal de Justiça de Sao Paulo. 7th Chamber, 2 September 1998 (note 29).

[38] In that sense, the following decision: 'In regard to the recognition of foreign decisions, the STF has no jurisdiction to analyze the merits of the dispute because this falls in the competence of the judge who rendered the judgment for which recognition has been requested.' Supremo Tribunal Federal, 9 March 1995, Appeal 3.897-GB, per Néri da Silveira J.

[39] Cf. Supremo Tribunal Federal, Appeal 5.573-FR, per Carlos Velloso J. (pending final decision). In this case, Justice Carlos Velloso remarked that 'the defendant wants to discuss the merits of the award, which is not allowed under Brazilian law'.

In this sense, case SEC 5.847-United Kingdom[40] represents an important precedent by the Constitutional Court. In another case, Justice Celso de Mello maintains that a summons sent by registered mail inviting a Brazilian party to appear before a foreign tribunal does not offend national public policy.[41]

V. The Supreme Federal Court

Although other cases involving the new Arbitration Act have already been reviewed by the STF, a case that is still pending is dealt with here, mainly because of its fundamental importance for the future of arbitration in Brazil. In fact, this case involves the constitutionality of one of the most significant innovations of the 1996 Act.

The case concerns the request for the recognition of a foreign arbitral award rendered in Spain involving a Brazilian exporter and a Swiss company. The latter requested recognition in order to have the award enforced in Brazil.[42]

The initial request was presented to the STF before 1996. An initial question regarding the earlier recognition of the award by the Spanish courts was later dismissed with the entry into force of the Arbitration Act, which was applied immediately in all pending cases. Then another complex question was raised *incidenter tantum* by a STF justice, this time touching upon the constitutionality of the Arbitration Act itself. To date, only one of the eleven STF justices (Sepulveda Pertence) has delivered his opinion in the case. In his view, recognition of the award should be granted; however, some provisions of the 1996 Act should be declared unconstitutional.

In procedural terms, the Justice's initiative to discuss this aspect of the law is in itself quite controversial, especially when one takes account of the past practice in regard to constitutional control in Brazil. The constitutionality of a specific federal act had never been questioned in previous STF rulings when such issue had not been raised by one of the parties and did not affect the merits of the case under consideration. In Brazil, it is even more surprising that an incidental issue would be attributed any effect beyond the limits of the case. There is no precedent in Brazilian legal history of an *erga omnes* declaration of unconstitutionality when the issue was raised incidentally.

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[40] Supremo Tribunal Federal, 1 December 1999, Appeal 5.847-RU, per Maurício Corrêa J.

[41] Supremo Tribunal Federal, Appeal 5.778-EU, per Celso de Mello J. (pending final decision).

[42] Supremo Tribunal Federal, Appeal 5.206-EP (MBV x Resil).

But what does Justice Pertence deem unconstitutional? As he indicates in his opinion, a constitutional principle renders the provision unconstitutional that makes it mandatory for the parties to resort to arbitration, even in cases where there is only an arbitration clause.[43] The 1996 Act allows the party desiring arbitration to request the court to require the other party to conclude a submission agreement, if this party had agreed to insert an arbitration clause and then refused to resort to arbitration when the dispute arose. As Justice Pertence puts it, this provision violates the constitutional principle according to which the law cannot deny a party the right to have a case considered by the judiciary.[44] In his reasons he states that a party cannot renounce judicial tutelage before it knows the exact limits of a dispute. Since the party cannot previously know which issues could be relevant in a dispute arising from the contract, the general renouncement of future judicial protection would be unconstitutional.[45] In other words, Justice Pertence objects to the specific performance of the arbitration clause.

Basing his argument on contrary reasoning, the Attorney General of the Republic maintains that the principle of the inability to exclude judicial intervention requires that 'the law shall not exclude from judicial control any violation or threat of violation of a right'. This does not mean that the parties concerned are not permitted to exclude issues or disputes from judicial control. Nor does it oblige citizens concerned to always take their claims to court. If the substantive issues of a dispute can be lawfully negotiated by the parties, the renouncement of one's fundamental right to take court action by agreeing to resort to arbitration cannot be regarded as a violation of the Constitution.[46]

However, Justice Pertence points out that, at the time the arbitration clause is agreed upon, disputes are future, uncertain and indefinite. Committing oneself to a compulsory renouncement of taking action in ordinary courts would not be possible in such case because this would amount to a general renouncement of the constitutional guarantee of access to the ordinary courts – which would be incompatible with the constitutional principle. For the same reason, resorting to judicial intervention to force the reluctant party to submit to arbitration is equivalent to endorsing arbitration without mutual consent.

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[43] Arbitration Act, Art. 6 and related articles (Arts. 7, 41 and 42). On the other hand, it is important to note that, in Justice Pertence's opinion, the submission agreement complies with the Constitutional guarantees. Supremo Tribunal Federal, Appeal 5206-EP, p. 31.

[44] Art. 5 (XXXV) of the Brazilian Federal Constitution reads: 'The law shall not exclude any violation or threat of violation of a right from being considered by the judiciary.'

[45] Supremo Tribunal Federal, Appeal 5206-EP, Justice Sepúlveda Pertence's vote, p. 35.

[46] Procuradoria Geral da República, Parecer n. 8.062 of 17.03.1997, Procurador Geraldo Brindeiro, p. 4.

To a foreign practitioner, this arcane debate over metaphysical constitutional concepts may seem strange and not in keeping with the pragmatic views that should characterize arbitration. Unfortunately, this kind of debate is not uncommon to the Brazilian formalistic tradition. It goes without saying that the position adopted by Justice Pertence could have severe consequences for arbitration practice in Brazil.

In fact, the binding nature of the arbitration clause is one of the main progressive characteristics of the Arbitration Act that makes it substantively different from the previous legal regime of arbitration in Brazil. The effectiveness of arbitration depends to a large extent on the inability of the parties to take action in ordinary courts. Otherwise, the essence of and trust in this alternative method of dispute resolution will be lost.

Even on its own terrain, the theoretical position taken by Justice Pertence can be criticized. Such renouncement of judiciary intervention can be deemed neither general nor indefinite. The parties renounce only their right to judicial appeal in disputes arising from the particular contract into which the arbitration clause has been incorporated. The method of dispute resolution has already been limited by the contract in such a way that the parties acknowledge the limitations of arbitral jurisdiction even before a dispute arises.

The constitutionality of the arbitral tribunal can also be proven by the fact that only cases involving available property rights (*direitos patrimoniais disponíveis*) can be submitted to arbitration. Therefore, parties do not renounce their constitutional right to avail themselves of the jurisdiction of ordinary courts (which would not be legally possible), but to public tutelage over private rights in a specific dispute. To maintain the opposite would be to infer that negotiations are unconstitutional, which is based on the same principle. In short, one should not confuse the renouncement of an available right with the renouncement of the jurisdiction of ordinary courts.

Moreover, it is important to note that, in the other few arbitration cases reviewed by the STF, the Court's position was firmly favorable to the 1996 Act. This can be evidenced, for instance, in the judgment in SEC 5.847-United Kingdom,[47] where the foreign court recognition of the award rendered abroad was considered unnecessary in accordance with Article 35 of the Arbitration Act. In addition, in Justice Celso de Melo's opinion in SE 5.778-USA,[48] the fact that the summons was sent by registered mail (in compliance with Art. 30 of the Act) in this international arbitration case is not regarded as a violation of domestic public policy.

[47] Supremo Tribunal Federal, 1 December 1999 (note 40).

[48] Supremo Tribunal Federal, Appeal 5.778-EU, per Celso de Mello J. (pending decision).

Nevertheless, in view of the importance of the specific performance of the arbitration agreement for the credibility of arbitration in Brazil, anxiety is evident among scholars as a result of the decision in SEC 5.206. As mentioned above, the case places doubt on the constitutionality of what is considered the main innovation of the 1996 Act. However, a long debate can be expected in this case, and a final position on the matter will not be reached in the near future.

VI. Final Remarks

This article is an attempt to present the views on arbitration expressed by Brazilian courts in recent decisions relating to the 1996 Arbitration Act, which has achieved considerable progress as far as the substantive rules governing this alternative method of dispute resolution are concerned.

Rather astonishingly, the article presents some clearly mistaken decisions. Some of these are based on old norms, others on the failure to comply with the new Act or with the international agreements in force in Brazil. On the other hand, there are several decisions that endorse the legislative evolution and thus favor making arbitration in Brazil more effective.

Consequently, one cannot talk about a uniform approach of the courts to arbitration in the first three years after the 1996 Arbitration Act entered into force. Most probably, the harmonization of dissenting opinions will not begin until these cases reach the Superior Tribunal of Justice (STJ), the federal superior court competent to review appeals in cases involving violations of international treaty obligations or federal laws by ordinary courts.[49] This makes the outlook promising, above all because the STJ has laid down important precedents recognizing the specific performance of the arbitration clause and the validity of international agreements.[50]

Despite the STF's uncertain position on the constitutionality of the specific performance of the arbitration clause, the recent evolution of arbitration in Brazil may be accepted as a fact. Moreover, the growing number of court cases involving arbitration is proof that this method of dispute resolution is increasingly being used in private arbitral institutions, as was noted before. Consequently, the fact that most of the cases discussed here have been decided by Sao Paulo courts reflects

[49] Brazilian Constitution, Art. 105 (III).

[50] The leading case on this matter is Resp. 616, decided in 1996 by the STJ, which ruled that an arbitration clause, *per se*, is sufficient to ensure the obligation of the arbitral tribunal in international arbitration cases, in accordance with the international treaty (Geneva Protocol) in force in Brazil. This case is all the more remarkable because it was decided before the Arbitration Act entered into force: Superior Tribunal de Justiça, 24 April 1996, Resp 616-RJ, per Gueiros Leite J.

the increased use of arbitration in that state where a large percentage of Brazilian businesses is located.

Apart from that, recent reports reveal an increasing amount of activity at arbitral institutions,[51] as well as ADR course offerings and seminars for lawyers, scholars and entrepreneurs. Despite the absence of reliable statistics, these reports are generally enthusiastic about the cases resolved by arbitration in Brazil.

One should not expect more than this slow evolution. Indeed, the increased use of arbitration in Brazil will depend not only on reliable and clear legal provisions but also on arbitration-friendly court decisions that do not constitute an obstacle to private dispute resolution.

[51] See, e.g., CARMONA C., 'A Arbitragem no Brasil no terceiro ano de vigência da Lei 9.307/96', in 5 *Incijur* 2000.

NEWS FROM THE HAGUE

THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

WORK IN PROGRESS (1999-2000)*

Hans VAN LOON**

* For an earlier review, see this *Yearbook*, Vol. I (1999), pp. 205-214.

** Secretary General of the Hague Conference on private international law

Yearbook of Private International Law, Volume 2 (2000), pp. 169-178

I. Convention on the International Protection of Adults[1]

Meeting at the Peace Palace from 20 September to X October 1999, a Special Commission of the Hague Conference on Private International Law with diplomatic character drew up a new international convention for the protection in cross-border situations of adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests. The *Convention on the International Protection of Adults*, first signed by the Netherlands on 13 January 2000 and hence bearing that date, was the major contribution of the Hague Conference to the year designated by the General Assembly of the United Nations as the International Year of Older Persons. The new Convention reflects and applies in a practical way the principles of independence, care, self-fulfilment and dignity of older persons. However, the Convention applies not only to the elderly but also to all vulnerable adults.

After carefully defining its scope (Chapter I), the Convention provides for clear rules specifying which national authorities are competent to take any necessary protective measures (Chapter II). It ensures the recognition and enforcement of such measures in other States (Chapter IV). It determines which law should be applied in deciding on appropriate measures, taking into account in particular the wishes of the adult. It specifies who may represent the adult and with what powers. Where an adult has made advance arrangements for his/her care and representation in the event of incapacity, the Convention resolves the question of the validity of these arrangements in the new country of residence (Chapter III).

As is the case in several other recent Hague Conventions, the new Convention contains provisions concerning co-operation between States designed to enhance the protection of incapacitated adults. The system of co-operation, which is flexible and enables the use of existing channels, includes information exchange, the facilitation of agreed solutions in contested cases, and the location of missing adults (Chapter V).

II. Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters

On 30 October 1999, the Special Commission created for that purpose completed a preliminary draft Convention on jurisdiction and foreign judgments in civil and

[1] The English text of the new Convention is published in this *Yearbook*, pp. 205-221.

commercial matters.[2] This preliminary draft Convention and the Explanatory Report, drawn up by Peter Nygh (Australia) and Fausto Pocar (Italy), have been sent to the Governments for observations.

In response to the Special Commission's proposal that the issues of electronic commerce and intellectual property be examined in greater detail, a group of experts on electronic commerce convened in Ottawa from 28 February to 1 March 2000 (see *infra*, section III). An experts meeting will be held in collaboration with WIPO early in 2001 to address intellectual property issues.

Following the October meeting, several Governments indicated that the negotiations had now reached a critical phase and that more time was needed. The Special Commission on general affairs and policy of the Conference, which met from 8-12 May 2000 (see *infra*, section IV), reached consensus to the effect that it would be premature to hold a Diplomatic Session in 2000 and that additional time and effort should be expended to achieve a worldwide Convention. It proposed that the Diplomatic Session be divided into two sessions: the first to be held in June 2001, the second in late 2001 or early 2002. The first session will seek to achieve consensus on certain issues and binding decisions would only be taken to the extent that such consensus or near consensus is reached. The second session will proceed in the normal way for Diplomatic Sessions.

III. Internet and Electronic Commerce

A. The Geneva Round Table

From 2 to 4 September 1999, the Permanent Bureau organized a Round Table in collaboration with the University of Geneva on issues of private international law raised by electronic commerce and the Internet. All Member States of the Conference were invited to take part, as well as the international and non-governmental organizations active in this field. Seven working commissions met to discuss particular topics: contracts, torts, choice of court and choice of law, the law applicable to data protection, service of documents abroad, taking of evidence abroad, resolution of disputes online and procedural standards, as well as group actions. A summary of the discussions and recommendations of the Geneva Round Table can be found in Preliminary Document No. 7 for the attention of the Special Commission on general affairs and policy of the Conference: 'Electronic data interchange, Internet and electronic commerce', drawn up by Catherine Kessedjian, Deputy Secretary General.

[2] The English text of the preliminary draft Convention is published in this *Yearbook*, pp. 223-240.

B. Expert Group Meeting in Ottawa

From 28 February to 1 March 2000, a group of experts met at the invitation of the Government of Canada in Ottawa to discuss the issues of electronic commerce and international jurisdictional competence.

All Member States of the Conference were invited to participate, along with the intergovernmental and non-governmental organizations active in this field, and a number of *ad hoc* experts. The debates focused on the preliminary draft Convention on jurisdiction and foreign judgments in civil and commercial matters (see *supra*, section II). Among the preliminary conclusions of this meeting we note the following:

1. In view of the anticipated upsurge of electronic commerce in the immediate future, it would be unwise to exclude it from the substantive scope of the Convention.
2. Article 4 of the preliminary draft of the Convention satisfactorily covers choice of court clauses concluded electronically (which bears out the conclusions of the Geneva Round Table).
3. Many experts expressed the view that article 6 (on contracts between businesses, 'B2B contracts') should be supplemented by a clause dealing with contracts concluded and performed entirely online (confirming the Geneva Round Table). Although several proposals were discussed, no consensus was reached.
4. As for article 7 (contracts concluded between a consumer and a business, 'B2C contracts'), there was no consensus on possible changes to the wording, but it was agreed that article 7(1)(*b*) cannot work in the context of electronic commerce. Some experts also agreed with the proposal emanating from the Geneva Round Table that the text should be supplemented by a clause enabling recognition of a choice of court clause if its validity is admitted by the State in which the consumer habitually resides.

C. Planned Joint Meeting between the OECD, the Hague Conference and the ICC

In view of the special difficulties raised by disputes between businesses and consumers, the Permanent Bureau has taken an interest in alternative methods of dispute resolution, not as an ideal substitute for the rules of jurisdictional competence for cases brought to national courts, but as an additional feature in a consistent system which includes at the same time prevention, alternative methods of resolution and a default rule for the jurisdiction of courts.

For the purpose of exploring these various avenues, the OECD, the Hague Conference and the ICC have undertaken to work together. Initially, this collaboration is taking the form of a joint seminar to be held in The Hague in

December 2000, at the invitation of the Dutch Government. Depending on the conclusions reached at this seminar, the role of the Hague Conference could be to engage in the preparation, together with other organizations, of a model for online dispute resolution.

D. Other Work

A comprehensive overview of the work of other international organizations and of other work undertaken by the Hague Conference is presented in the document 'Electronic Data Interchange, Internet and Electronic Commerce', drawn up by Catherine Kessedjian, referred to above, also accessible on the website of the Hague Conference at ftp://hcch.net/doc/gen_pd7e.doc.

IV. Special Commission on General Affairs and Policy of the Conference of May 2000

The Special Commission on general affairs and policy of the Conference, which met from 8-12 May 2000, had a heavy work programme but managed to complete its agenda within the four days available to it. The meeting was chaired by Ms Monique Jametti Greiner, Expert of Switzerland; Mr Xu Hong, Expert of China, was elected Vice-Chairman. In preparation for the meeting the Permanent Bureau drew up various documents.

As indicated above, the Special Commission took an important decision on the timing and organization of the Nineteenth Session of the Hague Conference. Moreover, it decided to recommend that the following be included as priority topics in the Conference's agenda for future work:

1. The drawing up of a new comprehensive Convention on maintenance obligations, which would improve the existing Hague Conventions on this matter and include rules on judicial and administrative co-operation;
2. The question of the law applicable to the taking of securities as collateral. In world financial services markets it is now commonplace for persons to take or give interest in securities (collateral) through book entries with intermediaries. The exposures involved are extremely large – for example, each day hundreds of billions of dollars or euros of securities are provided as collateral under arrangements involving a cross-border element. It is therefore of the utmost importance to know which law must be satisfied to ensure that financial institutions obtain a good interest. In view of the urgency of the matter, it was decided that a working group be held prior to the Diplomatic Conference to prepare this topic.

The Special Commission also recommended to the Nineteenth Session that the following topics be retained in the Conference's agenda for future work:

1. questions of private international law raised by the information society, including electronic commerce, and, without priority:
2. the conflict of jurisdictions, applicable law and international judicial and administrative co-operation in respect of civil liability for environmental damage,[3]
3. jurisdiction, and recognition and enforcement of decisions in matters of succession upon death,
4. jurisdiction, applicable law, and recognition and enforcement of judgments in respect of unmarried couples,[4]
5. the law applicable to unfair competition,[5] and
6. the law applicable to assignment of receivables.

The Special Commission also recommended:

- that prior to the Diplomatic Session, in March 2001, a fourth Special Commission be convened to study the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. The Permanent Bureau will prepare a report for the Special Commission on the desirability and potential usefulness of a protocol to the Convention that would, in a more satisfactory and detailed manner than Article 21 of that Convention, provide for the effective exercise of access/contact between children and their custodial and non-custodial parents in the context of international child abductions and parent relocations, and as an alternative to return requests;
- that after the Session, a Special Commission be convened to study the operation of the Conventions on civil procedure, and on international judi-

[3] See the important study by Christophe BERNASCONI: 'Civil Liability Resulting from Transfrontier Environmental Damage: A Case for the Hague Conference?' (Prel. Doc. No 8 for the attention of the Special Commission of May 2000 on general affairs and policy of the Conference, also accessible on the website of the Hague Conference at: http://hcch.net/doc/gen_pd8e.doc).

[4] See 'Private International Law Aspects of Cohabitation Outside Marriage and Registered Partnerships', drawn up by the Permanent Bureau (Prel. Doc. No 9 for the attention of the Special Commission of May 2000 on general affairs and policy of the Conference, also accessible on the website of the Hague Conference at: ftp://hcch.net/doc/gen_pd9e.doc).

[5] See 'Note on Conflicts of Laws on the Question of Unfair Competition: Review and Update', drawn up by the Permanent Bureau (Prel. Doc. No 5 for the attention of the Special Commission of May 2000 on general affairs and policy of the Conference, also accessible on the website of the Hague Conference at: ftp://hcch.net/doc/gen_pd5e.doc).

cial and administrative co-operation in the light, inter alia, of the impact of electronic commerce on these Conventions, in particular:

- the *Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*,
- the *Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*,
- the *Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents*.

Finally, the Special Commission recommended that the Special Commission on general affairs and policy of the Conference be convened more often, *i.e.* in principle every two years, while allowing the Permanent Bureau the flexibility to convene additional meetings of the Special Commission, if necessary. The Special Commission should also have authority conferred upon it to take decisions whenever it meets.

V. www.incadat.com

On 9 May 2000, during the meeting of the Special Commission on general affairs and policy of the Conference, an electronic database of case law relating to the 1980 Hague Child Abduction Convention was launched.

The International Child Abduction Database (INCADAT) was established by the Permanent Bureau of the Hague Conference with the object of making accessible many of the leading judicial decisions taken by national courts around the world in respect of the 1980 Hague Convention. INCADAT will be of value to judges, Central Authorities, legal practitioners, researchers, the media and others interested in this important and rapidly developing branch of law. It is hoped that INCADAT will contribute to the uniform interpretation of the 1980 Hague Convention, to widespread use of the best practices under it and to the development of mutual understanding among the States Parties, which is essential for its effective operation.

A demonstration was given to the Special Commission by Mr Peter McEleavy (barrister and legal consultant to INCADAT) and Ms Marion Ely (attorney and legal manager INCADAT). An address was also given by Ms Mary Banotti, MEP, European Parliament President's Mediator for Transnationally Abducted Children.

VI. Second Seminar for Judges on International Child Protection, June 2000

From 3 to 6 June 2000, the Hague Conference organized, for the second time, a Judges' Seminar on International Protection of Children. Twelve judges from France, twelve from Germany, seven from Italy and six from the Netherlands engaged in intensive discussions on the application of international instruments concerned with the protection of children, in particular the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*.

At the close of the Seminar, the judges unanimously adopted the following conclusions:

> '1. The Seminar has been an important event in establishing mutual understanding, respect and trust between the Judges from the different countries – factors which are essential to the effective operation of the international instruments concerned with the protection of children, and in particular the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*.
> 2. The format of the Seminar, involving intensive discussions among judges from four jurisdictions around a number of practical cases, has been a success and is a model for such seminars in the future. Differences of approach, where they exist, have been revealed and the way has been opened to greater consistency in interpretation and practice under the Conventions.
> 3. The Judges participating in the Seminar will endeavour to inform their colleagues in their respective jurisdictions about the seminar and its outcome, and will in particular make available information about the International Child Abduction Database (www.incadat.com) and about the Special Commission on the practical operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, which is to be held at The Hague in March 2001.
> 4. It is recognised that, in cases involving the international protection of children, considerable advantages are to be gained from a concentration of jurisdiction in a limited number of courts/ tribunals. These advantages include the accumulation of experience among the Judges and practitioners concerned and the development of greater mutual confidence between legal systems.
> 5. The need for more effective methods of international judicial co-operation in respect of child protection is emphasised, as well as the necessity for direct communication between Judges in different jurisdictions in certain cases. The idea of the appointment

> of liaison Judges in the different jurisdictions, to act as channels of communication in international cases, is supported. Further exploration of the administrative and legal aspects of this concept should be carried out. The continued development of an international network of Judges in the field of international child protection to promote personal contacts and the exchange of information is also supported.'

The Seminar was followed by a visit of the German Minister of Justice to the Permanent Bureau on 6 June 2000.

VII. Membership of the Hague Conference

On 20 September 1999, Peru was admitted as a Member of the Hague Conference. Its membership will become effective upon acceptance of the Statute.

During the first half of the year 2000, South Africa, the Hashemite Kingdom of Jordan, Belarus, Lithuania and Georgia applied for membership. Several other States have indicated to the Permanent Bureau that they are actively considering applying for membership.

VIII. Relations with Other International Organizations

The Conference continued to participate actively in the work of UNCITRAL, *inter alia*, on receivables financing, and in the work of Unidroit aimed at an international Convention on international interests in mobile equipment. The Permanent Bureau will also continue to follow, and where possible to contribute to the work of regional organizations. This applies, for example, to the Organization of American States, which has requested the Permanent Bureau to assist in its work on civil liability for environmental damage. It also applies to the Council of Europe, where the Permanent Bureau continues to follow the work, among other things, in the field of international contacts between parents and children. A member of the Permanent Bureau also had a meeting with the Registrar of the European Court of Human Rights.

The relations between the Hague Conference and the European Union are being closely monitored by both organizations in the light of the new legal situation created by the Amsterdam Treaty (Article 65, in particular) which bestows competencies in the field of private international law on the European Community. The matter was discussed at the Special Commission meeting in May, as was the

possibility for the Community to become a Party to future Hague Conventions and, indeed, to the Statute of the Organization. Following the May meeting, a delegation of the Standing Government Committee on Private International Law and the Permanent Bureau gave a presentation to the Committee on Legal Affairs and the Internal Market of the European Parliament.

The Permanent Bureau has continued and further intensified its liaison with many non-governmental organizations of professionals and interest groups, including the International Bar Association, the International Union of Latin Notaries, the international Union of Sheriff Officers and Judicial Officers, the International Law Association, and many organizations active in the field of electronic commerce.

FORUM*

THE MATRIMONIAL PROPERTY REGIME IN PRIVATE INTERNATIONAL LAW**

Maria del Pilar DIAGO DIAGO***

* This section contains summaries of books recently published by young authors in languages other than English.

** This article summarizes some of the ideas expressed in Maria del Pilar DIAGO DIAGO's book *Pactos o Capitulaciones Matrimoniales en Derecho Internacional Privado*, Zaragoza (El Justicia de Aragón) 1999 (pp. 524).

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I. General Considerations

A. Relevance of the Subject from the Perspective of Private International Law

There is no doubt that the matrimonial regime is a classic subject of private international law.[1] There are numerous analyses of the topic and it has also been a matter of constant concern in the work of the Hague Conference,[2] which has prepared a Convention on the subject.[3] Nevertheless, it is necessary to deal with current problems and the particular context in which they occur.

Today mixed marriages are more frequent than ever, and they lead to multicultural families. However, a foreign element arises not only as a result of the different nationality of spouses; it is now common for spouses of the same nationality to live abroad, move to another place, and even have separate residences. Another possibility is that they acquire property abroad.

There are several factors that contribute to this social and legal phenomenon. On the one hand, advances in transportation and methods of communication are often cited as the primary reason, and indeed they are significant factors contributing to the internationalization of human relationships. In addition, however, there is another important phenomenon that has left its mark on the end of the century and will doubtless play a significant role in this one. We are referring to migratory movements.

Europe in general is one of the most important centres in the world for the reception of emigrants. It is interesting to note that countries which were once a source of emigration, like Spain,[4] have now become targets for immigrants. This not only results in an increase in mixed marriages but has also led to a new kind of problem. A large part of the emigrant population comes from countries with Islamic law,[5] which sometimes has insurmountable differences with the laws of the

[1] AUDINET dealt with the subject as early as 1932: AUDINET E., 'Les conflits de lois relatifs aux effets patrimoniaux du mariage', in *Recueil des Cours*, Vol. 40, 1932-II, pp. 239 *et seq*. It was later analyzed by DROZ G., 'Les régimes matrimoniaux de droit international privé', in *Recueil des Cours*, Vol. 143, 1974-III, pp. 1 *et seq*.

[2] The Hague Conference has shown a great interest in the family in general. See AGUILAR BENÍTEZ DE LUGO M., 'La familia en los Convenios de la Conferencia de La Haya de Derecho Internacional Privado', in *REDI* 1993, pp. 7-37.

[3] Convention on the law applicable to matrimonial regimes of 14 March 1978, which has been ratified only by France, Luxembourg and the Netherlands.

[4] It is estimated that around 800,000 foreigners live in Spain and more than a million and a half Spaniards live abroad. Reports published by Caritas Diocesana and the Ministry of Social Affairs 1998. BARBADILLO GRIÑÁN P., *Extranjería, racismo y xenofobia en la España contemporánea. La evolución de los setenta a los noventa*, Madrid 1997.

[5] BORRÁS RODRÍGUEZ A., 'La sociedad europea multicultural: la integración del mundo árabe', in *El islam jurídico y Europa*, Barcelona 1998, pp. 163-243.

receiving countries. It is at this point that private international law is essential as a means of maintaining a balance between the necessity to protect cultural identity and at the same time integrate such people into society within the framework of what has been called post-modern private international law.[6]

There is, however, another factor that is frequently forgotten but forms part of the legal situation dealt with here, namely the principle on which all legislation in our cultural area is based, i.e., the principle of equality. Although a large number of mixed marriages existed earlier, it was relatively simple to determine the applicable law because of the assumed superiority of man over woman: When a woman married a foreign spouse, she acquired his nationality. The basic connection was thus the common nationality of the spouses. However, even if the habitual residence was used, this presented no real difficulty because it coincided with the family home. Many legal systems did not recognize the possibility of concluding a marriage contract and in others such possibility existed only before entering into marriage.

Female emancipation has complicated this subject as women no longer lose their nationality upon marriage and nothing prevents them from having a different residence from that of their spouse. We should add here that the concept of party autonomy has found an important feeding ground as far as this subject is concerned.[7] It is precisely the Hague Convention of 1978 that set the trend for other legal frameworks to introduce this concept.[8]

All this has forced different States to modify their laws in an attempt to find new formulas that suit present needs. Consequently, the legal panorama is very diverse; positive law has offered different solutions and conventional solutions have not been as successful as expected.[9]

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[6] JAYME E., 'Identité culturelle et intégration: le droit international privé postmoderne', in *Recueil des Cours*, Vol. 251, 1995, pp. 9-268.

[7] For an analysis of the previous Spanish system, see GONZÁLEZ CAMPOS J.D., 'Relaciones entre los cónyuges y régimen económico matrimonial, in *Derecho Internacional privado. Parte especial*, Oviedo 1989, pp. 173-200.

[8] For example, the solutions introduced by the German law of 1986 (Art. 15(2) EGBGB) or the Japanese *Horei* (Art. 15); see VON OVERBECK A.E., 'La contribution de la Conférence de La Haye au développement du droit international privé', in *Recueil des Cours*, Vol. 233, 1992-II, pp. 9-98.

[9] STRUYCKEN A.V.M., 'Régimes matrimoniaux – Banc d'essai de la codification internationale du droit international privé', in *E pluribus unum. Liber amicorum George A.L. Droz on the progressive unification of private international law*, The Hague - Boston (etc.) 1996, pp. 445-459.

B. Possibility of Controlling Private International Law Aspects of the Matrimonial Property Regime by Contract

One of the most relevant manifestations of party autonomy is found in this subject matter. In fact, when a marriage takes place, the spouses have the possibility to regulate their property regime by agreeing on the rules most convenient for them. But the concept of party autonomy also extends to the international framework in that they are able to designate which law shall apply. At this point, the spouses are able to enter into any contract admissible under the law chosen by them.

This possibility, which is present to a greater or lesser degree in practically all European legal systems: Swiss, German, Italian, Spanish, etc., has obvious advantages. It is the spouses themselves who determine how their property regime is to be regulated; they do so by designating the applicable law and, if necessary, by concluding contracts permitted under that law. The choice will depend on their material interests and, in general, the spouses will designate the law that most favourably regulates the financial aspects of their life together.

Nevertheless, in reality there are few marriage contracts that include a choice-of-law clause, a phenomenon that to a greater or lesser extent is also present in civil law. There are two main reasons for this. In the first place, spouses or future spouses receive very little or no information about the possibility of concluding a contract on such matters. Unaware of the convenience of this kind of contract, they conclude none. Moreover, it is not uncommon for spouses to be unaware of the nature of their matrimonial property regime. In the second place, as this study will show, legislation frequently provides partial and confusing regulations that leave many practical questions unanswered.

II. The Marriage Contract as a Legal Category

A. Content and Different Qualifications

As mentioned above, a marriage contract enables spouses to regulate their financial relations; this is the basic and essential content of marriage contracts, regardless of the legal system in which they are concluded. However, notwithstanding this fundamental content, it is very difficult to precisely define the content of matrimonial regimes, i.e., of financial relations.

As VON OVERBECK has pointed out, what really exists is a 'grey area'[10] consisting of questions that border on other subject matters and could thus be included or not in the content of a matrimonial property regime. Nevertheless, as

[10] VON OVERBECK A.E., 'Explanatory Report', in HAGUE CONFERENCE OF PRIVATE INTERNATIONAL LAW, *Proceedings of the Thirteenth Session,*Vol. II, The Hague 1978.

was done during the preparatory work for the Hague Convention,[11] it is worthwhile to establish the negative limits of this content, i.e., to identify matters which, although they may be related to the concept of matrimonial property, will be excluded from its scope and regulated by independent laws.

This is what happens in regard to the obligation to support a spouse by providing basic necessities. Undoubtedly this subject is closely related to matrimonial property; however, it is sufficiently independent to have its own regulations and standards:[12] The Hague Convention of 1973 is of universal application and regulates the law applicable to maintenance obligations. It should not be forgotten that the right to maintenance is not dependent on the will of the spouses, but is a statutory obligation. In Spanish law, for example, it is regarded as an obligation arising from marriage (Art. 1362(1) of the Civil Code, hereinafter: CC), which can be waived only under certain circumstances depending on the assets of the spouses (Art. 1318 CC). This does not depend on the property regime chosen by the spouses as it is a mandatory rule.[13]

Another subject that is closely related to the matrimonial property regime is the question of succession. It is obvious that it would be convenient to have some correspondence between the laws of matrimonial property and of succession; consider the dependence between inheritance rights and the surviving spouse's contribution to the marital union.[14] It happens that Spanish private international law unifies the law applicable to these two subjects, as a result of which the law governing the effects of marriage also regulates the rights of the surviving spouse (Art. 9(8) CC).

However, it is also evident that these two matters differ. The typical content of a marriage contract cannot include succession agreements because such agreements apply only if the marriage is dissolved by death, whereas a marriage contract governs the financial relations of the spouses during marriage. For this reason, the Hague Convention of 1978 excludes inheritance rights of the surviving spouse from its scope.[15]

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[11] Art. 1 of the Convention.

[12] The judgment of the Court of Justice of the European Community, of 27 February 1997 in case C-220/95 is highly significant in *exequatur* matters.

[13] AMORÓS GUARDIOLA M., 'De las capitulaciones matrimoniales' in *Comentarios a las reformas del Derecho de famili*a, Vol. II, Madrid 1984, pp. 1515-1570, esp. pp. 1526-1527.

[14] ZABALO ESCUDERO E., *La situación jurídica del cónyuge viudo*, Pamplona 1993; BOUZA VIDAL N., *Problemas de adaptación en Derecho Internacional privado e interregional*, Madrid 1977.

[15] VON OVERBECK A.E. (note 8), p. 151; PÉREZ VERA E., 'El anteproyecto de Convenio sobre ley aplicable a los regímenes matrimoniales de la Conferencia de La Haya de Derecho Internacional privado', in *Anuario de Estudios sociales y jurídicos* (Granada Social School) 1976, pp. 203-209, esp. pp. 214-215.

Although, as mentioned above, it is difficult for comparative lawyers to precisely define the content of matrimonial regimes, there is another important dichotomy when it comes to qualifying marriage contracts. Under the Spanish CC, for example, marriage qualifies as a contract; however, when it comes to identifying the applicable law in terms of private international law, matrimonial regimes are included in the same category with the effects of marriage. Article 15 of the German EGBGB also specifies that the matrimonial regime is governed by the law applicable to the general effects of marriage. Similarly, the Italian law on private international law of 1995 provides that the financial relations between spouses are governed by the law applicable to their personal relations (art. 30).

Nevertheless, other systems favour a different qualification. Marriage is also considered to be a contract, but there are regulations that are independent of the general effects of marriage. Article 48 of the Swiss Law on Private International Law refers to the law applicable to the effects of marriage, whereas Articles 52 and 54 refer to the law applicable to the matrimonial property regime, whether the spouses designate the applicable law or not. The same is true in the Hague Convention where matrimonial relations are regulated as indicated in this section, i.e., independently of the general or personal effects of marriage.

Therefore, the qualification of a contract differs in that it may be independent from or dependent on the general effects of marriage. In any case, different qualifications would lead to the application of different laws, but this result can be avoided by a choice of law made by the spouses.

B. Parties to a Marriage Contract

When dealing with this subject, one must begin with the general premise that there is no matrimonial property regime without marriage. In fact, the matrimonial regime governs the financial relations between spouses and therefore presupposes the existence of a marriage. This is very important because it leads to another conclusion: There is no marriage without a matrimonial regime. Therefore, even if the spouses have neither designated the applicable law nor concluded a contract on the subject, their matrimonial property regime is governed by legal rules that are part of every internal system. It is the task of private international law to determine which law governs this regime in the absence of a marriage contract.

This leads to the conclusion that the typical subjects of marriage contracts are spouses, although there is one exception worth mentioning. In most legal systems the future spouses can conclude such a contract before the marriage is solemnized.[16] However, since the purpose of marriage contracts is to regulate the financial relations of the future spouses, they are only effective after the marriage ceremony has taken place and are therefore directly subordinate to marriage.

[16] Art. 1326 Spanish Civil Code, Art. 1395 French Civil Code, Art. 1391 Belgian Civil Code.

This raises the question whether unmarried couples are also permitted to designate the law applicable to their property regime.[17] In other words, are the members of a free union of any kind, either homosexual or heterosexual, able to conclude a marriage contract regulating private international law aspects of their relationship?

The answer is negative. It follows from the preceding paragraphs that only spouses may conclude such contracts by virtue of their marital status. All provisions of private international law clearly define the scope of such contracts and the definition always includes a reference to marriage: the Hague Convention uses the terms *marriage contract* and *contrat de mariage*, German legislation *güterrechtliche Wirkungen der Ehe* (art. 15 EGBG), Swiss law *régime matrimonial* (art. 51 *et seq.* of the Swiss PIL Statute), Italian law *rapporti patrimoniali tra coniugi* (art. 30 of the Italian PIL Statute) and Spanish law *los pactos o capitulaciones matrimoniales* (art. 9(3) CC). This does not mean, however, that unmarried couples are prevented from concluding contracts that regulate the financial relations arising from their union. This is accepted in the internal legal systems of most western countries. Sometimes it is based on the principle of freedom to contract and at other times the possibility is specifically provided for by law. In view of the problem of proof associated with this type of relationship, there are now records in which such unions can be registered.[18] In this regard, one should mention the laws of the Scandinavian countries.[19]

On the other hand, there have been recent legislative changes that provide a legal framework for free unions, albeit a partial one. One example is the French Law on Civil Solidarity Agreements (PACS) of 13 October 1999.[20] Legislation in Spanish autonomous regions has also introduced legislative models. For example, the Catalan law on stable unions provides that the members of a stable homosexual or heterosexual relationship may regulate the financial relations arising from their union,[21] and the Law of Aragón relating to stable unmarried couples provides that a

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[17] SÁNCHEZ LORENZO S., 'Las parejas no casadas ante el Derecho Internacional privado' in *REDI* 1989 pp. 487-531; LÁZARO GONZÁLEZ I., *Las uniones de hecho en el Derecho Internacional Privado español*, Madrid 1999; GAUTIER P.Y., *L'union libre en droit international privé (étude de droit positif et prospectif)*, Paris 1986; IDEM, 'Les couples internationaux de concubins', in *Rev. crit. dr. int. pr*. 1991, pp. 525-539; STRIEWE P., *Ausländisches und Internationales Privatrecht der nichtehelichen Lebensgemeinschaft*, Cologne/Berlin/Munich 1986.

[18] ŠARČEVIĆ P., 'Private International Law Aspects of Legally Regulated Forms of Non-Marital Cohabitation and Registered Partnerships', in this *Yearbook* 1999, pp. 37-41.

[19] For example, in Swedish law: Act 1987:232 on the common home of de facto co-habitants, Act 1987:813 on homosexual co-habitants, Act on registration of de facto couples of 23 June 1994; see also the Danish statute on civil register of couples of 7 June 1989.

[20] Assemblée nationale, Session ordinaire, 13 October 1999.

[21] Act 19/1998 of 15 July, *Official State Bulletin* (*BOE*) of 19 August 1998 (Articles 3 and 22).

regime defined in a notarized document will have the same validity as a marriage contract if the couple later marries, if this effect is expressly provided in the document.[22]

Nevertheless, none of these laws includes a reference to private international law. Thus the question remains unresolved as to whether a clause designating the law governing the content of the contract can be inserted into contracts regulating the financial relations of members of a free union. In this sense, the first law with a conflicts rule relating to de facto unions is the Yugoslav Law of Private International Law of 15 July 1982 (Art. 39).[23] It expressly provides that the financial relations of persons who freely cohabit are governed by the law of the State of which they are nationals, and failing this, by the law of the State where they establish their common residence. At the same time, contractual financial relations will be governed by the law applicable to the financial relations at the time the contract was concluded.

Nevertheless, such provisions are an exception. Therefore, the problem is to determine the applicable law and to ascertain whether that law recognizes a choice of law in such circumstances and which conditions apply. However, aside from this complex question, it is clear that private international law rules relating to marriage contracts cannot be applied, unless express provisions provide otherwise. As a result, the members of de facto marriages are forced to look for solutions in other fields, most probably in the law of contracts.

C. Capacity of the Parties

In order to conclude a marriage contract, the parties must have capacity. This raises the question which law governs the capacity to enter into a marriage contract. Before going into detail, it is interesting to note that there are very few conflicts between the applicable laws in respect of this matter. European legal systems are based on the axiom *habilis ad nuptias, habilis ad pacta nuptiala*, as a result of which limitations to capacity focus on minors and persons of unsound mind. Other definitions are similar.

Here one must distinguish between two different positions. In countries where capacity in general is closely linked to the capacity to conclude marriage contracts, the applicable law will be the personal law of each of the spouses. Article 49 of the Portuguese Civil Code provides that the capacity to conclude contracts and to marry is governed by the personal law of each spouse. The

[22] Law 6/1999 of 26 March, *Official Bulletin of Aragón* (*BOA*) of 6 April 1999 (first additional rule).

[23] ŠARČEVIĆ P., 'The New Yugoslav Private International Law Act', in 33 *Am. J. Comp. L.* 1985, pp. 283-296, esp. p. 333; CIGOJ S., 'Note à la loi du 15 juillet 1982 sur les solutions des conflits de lois avec les dispositions des autres États dans le domaine des certains rapports', in *Rev. crit. dr. int. pr.* 1983, p. 380.

Rumanian law of 22 September 1992 (Art. 21)[24] refers to the national law of each of the spouses, as does the Spanish CC (Art. 9(1)).

There are countries, however, whose laws are based on different premises. In particular, the capacity to establish a matrimonial property regime falls within the framework of special capacities which are governed by the law applicable to the type of subject matter in question. Therefore, the capacity of spouses will be governed by the law applicable to their matrimonial property regime. Swiss doctrine adopts this position. Accordingly, Article 35 of the Swiss PIL Act concerning the capacity to exercise civil rights will not apply. Instead, the law chosen by the parties to govern their matrimonial property regime will determine the capacity of the spouses.[25]

In view of these traditionally divergent positions, it is easy to understand why the Hague Convention did not include capacity in its scope of application.[26]

In addition, there is a more complex intermediate position that commences with the premise that the personal law of each of the spouses is applicable. However, in the event that such law prevents either of the spouses from concluding the contract, the law governing the matrimonial regime will apply if the spouses have capacity according to that law; it will apply, however, only in regard to the general capacity to enter into contracts.[27] The objective of this interpretation is to permit the spouses to regulate their family finances by avoiding the application of a personal law that considers them incapable in this respect.

Finally, we must refer to the important role played by public policy in this context. The law that governs capacity will not apply if it is contrary to public policy. Therefore, if the relevant rule of the applicable law defines capacity on the basis of political, sexual or religious factors, it will be rejected as being contrary to international public policy.

Although discrimination based on gender has been removed from all European legal systems, the same cannot be said of Islamic law and the gender distinctions that are characteristic of Muslim society in general.[28] For this reason, the capacity of women is restricted; however, a provision that limits a woman's capacity because of gender will be excluded for reasons of public policy.

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[24] CAPATINA O., 'La réforme du droit international privé roumain', in *Rev crit. dr. int. pr.* 1994, pp. 172-195.

[25] BUCHER A., *Droit International privé suisse. Tome II: personnes, famille, succession*s, Basle 1992, pp. 170-197; see also WIEDERKEHR G. *Conflits de lois en matière de régime matrimonial*, Paris 1967, p. 239.

[26] VON OVERBECK A.E. (note 8), p. 356.

[27] ABARCA JUNCO P., 'Los efectos del matrimonio', in PÉREZ BEVIÁ E. (and others), *Derecho Internacional privado* (UNED*)*, Vol. 2, Madrid 1996, pp. 113-124, esp. p. 122.

[28] ALDEEB S./BONOMI A. (ed), *Le droit musulman de la famille et des successions à l'épreuve des ordres juridiques occidentaux*, Zürich 1999.

D. Form of the Marriage Contract

It is generally accepted that contracts regulating matrimonial property must comply with certain formal requirements. In Germany, for example, the spouses' designation of the applicable law must be made before a notary public (Art. 14(4)); France (Art. 1394) and Portugal (Art. 1728) require notarized documents and Spain requires public documents (Art. 1327). This emphasizes the importance attributed to the marriage contract in various jurisdictions. Similarly, one should not overlook the importance of third parties being informed about the law governing the matrimonial regime of spouses with whom they are contracting. This justifies the need to add publicity to the formal requirements above.

However, some legal systems introduce special provisions providing that the formal requirements be determined by the law governing the contents of the contract or by the law of the place where the contract is concluded.[29] Others have no special provision, thus resulting in the application of the general rule on the form of legal transactions. This is the case in Spanish law (Art. 11 CC), which also refers to the common nationality of the spouses.

There is another peculiarity of the Spanish system, that is its preference for the law governing the content of the contract if that law requires a certain form.[30] This is not a worthless precautionary measure. Namely, if the applicable provision does not require a specific form, this would mean that the contract would have to be declared valid without being solemnized in any way. This could give rise to serious problems, for instance, if an oral agreement would be considered valid according to the applicable law.

In fact, the lack of such provisions is probably due to the fact that the majority of legal systems specify formal requirements. Hence, such problem would normally not arise. However, Italian law (Art. 30(1))[31] and the Hague Convention contain provisions that attempt to ensure that the contract complies with minimal formal requirements. In particular, the Convention contains two provisions of material private international law providing that the contract or the designation of the applicable law must be in writing, dated and signed by both spouses (Articles 12 and 13).

Another provision of practical interest is found in Article 9 of the Hague Convention which regulates situations where the law applicable to the matrimonial

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[29] German, Swiss and Italian legislation.

[30] GONZÁLEZ CAMPOS J.D./ GARCIMARTÍN ALFÉREZ F., 'Comentario al artículo 11', in *Comentarios al Código Civil y Compilaciones forales*, T. 1, Vol. 2, Madrid 1995, pp. 796-842.

[31] This rule has caused problems of interpretation, see BALLARINO T., *Diritto Internazionale Privato*, 3rd ed. (with the collaboration of BONOMI A.), Padova 1999, pp. 425-433; VIARENGO I., *Autonomia della volontà e rapporti patrimoniali tra coniugi nel diritto internazionale privato*, Padova 1996, pp. 216-218; CLERICI R., in *Riv. dir. int. priv. proc.* 1995, pp. 1061-1971, esp. p. 1065.

property regime requires publicity or registration of the regime. In such cases the Convention provides that the Contracting State may stipulate that 'any requirements of publicity or registration specified by that law' must be complied with in order for a spouse to rely upon that law against a third party. This provision takes account of the situation in reality. Although an agreement on the applicable law is valid if the applicable law so rules, in practice it will be of little use if it does not comply with the formal legislative requirements for the protection of third parties. Undoubtedly the best solution is to respect the formal requirements specified by the law of the country where the contract is to be effective.[32]

III. Law Applicable to the Matrimonial Property Regime and Mutability Scenarios

A. Law Applicable to the Matrimonial Property Regime

1. Party Autonomy as a Basis for Legislative Solutions

The origin of the theoretical postulation of the principle of party autonomy has been linked to family law issues relating to property law and in particular to matrimonial regimes. In this regard it suffices to mention the *Consilium* LIII and DUMOULIN's[33] theoretical formulation of the idea of party autonomy, as well as the significance of voluntary consent in marriage contracts recognized by VOËT.[34]

Therefore, it is not surprising that the concept of party autonomy also appears in private international law manifested in the ability to designate the law applicable to a matrimonial property regime with foreign element. In fact, the concept of free will in such matters dates back to 1490 when a marriage contract was signed between a man from Béarn (an ancient province of the south of France) and a woman from Aragon. Apparently, families had a great deal of freedom to conclude contracts on the occasion of the marriage of their children. In this case, the

[32] DE VLAKENER R./BARNICHEL. L., 'Le mariage et ses effets patrimoniaux en droit international privé', in *Les relations contractuelles internationales. Le rôle du notaire*, Apeldoorn 1995, pp. 97-123, esp. pp. 116-117.

[33] Charles DUMOULIN (1500-1566); see LAINÉ A., *Introduction au droit international privé*, Vol. I, Paris 1888-1892.

[34] Jean VOËT (1647-1714) *Commentarii ad Pandectas* XXIII, Title II, No. 85 *et seq.*; see ORTIZ DE LA TORRE T., *Derecho Internacional Privado*, Vol. I, *Introducción, historia doctrinal y codificación*, Madrid 1992.

law of Aragon was chosen to govern their relations and have jurisdiction over possible disputes.[35]

This brings to mind developments in contemporary private international law that were instrumental in introducing the concept of party autonomy into matters where it previously had little influence, particularly in testamentary and family laws.[36] Most current legal systems have incorporated this principle into their provisions on matrimonial property by granting spouses the freedom to designate the law applicable to their matrimonial regime.

However, freedom of choice is usually not introduced without limitations. In this regard, the spouses may exercise their autonomy; however, their choice of law is restricted to those laws with which they have objective connections. Hence, this freedom is an expression of proximity. In addition, there are relevant external limitations, including mandatory rules, public order and legal fraud.

As for the first limitation, it is evident that the will of the spouses cannot prevent the application of mandatory rules that reflect the basic values of the system to which they belong. This has two consequences. On the one hand, when a law is designated as applicable and the contract is signed under the protection of that law, the mandatory rules of the designated law must be respected. On the other hand, this includes only those rules designated as mandatory by the forum itself. This is particularly significant in the case of the primary regime (*régime primaire*), as it usually contains mandatory rules relating to economic matters, the application of which could limit the will of the spouses: Their contracts should take account of the mandatory rules of the *régime primaire* and the fact that the choice of certain legal systems could be prevented.[37]

The second limitation has already been mentioned: international public policy.[38] This prevents a foreign law from being applied whenever it is contrary to

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[35] DELGADO ECHEVERRÍA J., 'Unos capítulos matrimoniales tensinos de 1490', in *Revista de Derecho civil aragonés* 1997, pp. 11 *et seq*.

[36] Many authors mention this, see: CARLIER J.-Y., *Autonomie de la volonté et statut personnel*, Bruxelles 1992; GANNAGÉ P., 'La penétration de l'autonomie de la volonté dans le droit international privé de la famille', in *Rev. crit. dr. int. pr*. 1992, pp. 425-454; HENRICH D., 'Die Rechtswahl im deutschen internationalen Familienrecht' in *Conflict and integration. Comparative law in the world today*, Tokyo 1988 pp. 561-575; VON OVERBECK A.E., 'L'irrésistible extension de l'autonomie en droit international privé', in *Nouveaux itinéraires en droit. Hommage à François Rigaux*, Bruxelles 1993, pp. 619-636.

[37] WIEDERKEHR G., 'Problèmes d'actualité en matière de droit international privé des régimes matrimoniaux', in *Travaux du Comité français de droit international privé*, 1986-1987, 1987-1988, pp. 223-235; WATTÉ N., 'La loi du régime primaire de couples mixtes est-elle définitivement déterminée?', in *Revue générale de droit civil* 1994, pp. 127-133.

[38] See in general *L'ordre public, Concept et applications. Les conférences du centre de droit privé et de droit économique*, Vol. III, Brussels 1995; BUCHER A., 'L'ordre public et le but social des lois en droit international privé', in *Recueil des Cours*, Vol. 239, 1993-II, pp. 9-116.

the basic principles of the law of the forum. The public policy aspect is particularly important in respect of conflicts between civilisations, in which cases it becomes a protective system that may converge with the system applied by the European Convention on Human Rights.[39]

In fact, these two control mechanisms have the same purpose, i.e., to protect human rights and fundamental freedoms, however, with different dynamics. The system negotiated under the Convention specifies that any party to a contract may file a claim against another party for failing to comply with the rules of the Convention (Art. 24). Since none of the Contracting States of the Convention may violate human rights, they may not apply any provision of a foreign law that would constitute a violation of the rules of the Convention.

This mechanism also applies in the field of private international law: International public policy will not permit any provision to be applied that violates human rights, which are deemed to constitute part of international law. However, the defence mechanism of public policy, i.e., how human rights are defended, can be much more complicated. On certain occasions, there may be a degree of flexibility in the way fundamental rights are observed, thus leading to what has been called 'attenuated effects' of public policy. One example is repudiation. The preservation of the cultural identity of Moroccans living in France is the objective of the French-Moroccan Convention of 10 August 1981,[40] thus making it difficult for public policy to rule out repudiation.

Accordingly, there are two control systems that can overlap but also lead to different results. From the viewpoint of private international law, this question is important enough to introduce a specific public policy clause to defend fundamental rights.[41] This should function on the basis of a direct evaluation of the circumstances in each specific case, thus requiring the system to be flexible. However, it should specify the conditions of *déclenchement* of the exception.

The last limitation of party autonomy is *fraus legis*. This will certainly not be common in the types of situations considered here, mainly because the spouses have the possibility to designate the applicable law. Nonetheless, in view of the

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[39] MAYER P., 'La Convention européenne des droits de l'homme et l'application des normes étrangères', in *Rev. crit. dr. int. pr.* 1991 pp. 651-665; COHEN D., 'La Convention européenne des droit de l'homme et le droit international privé français', in *Rev. crit. dr. int. pr.* 1989, pp. 451-483.

[40] See MONÉGER F., 'La Convention franco-marocaine du 10 août 1981 relative au statut des personnes et de la famille et à la coopération judiciaire', in *Rev. crit. dr. int. pr.* 1984, pp. 29 *et seq.* and 267 *et seq.;* IDEM**,** 'Vers la fin de la reconnaissance des répudiations musulmanes par le juge français?', in *Clunet* 1992, pp. 347-355.

[41] ROMAIN J.-F., 'L'ordre public et les droits de l'homme', in *L'ordre public, Concept et applications,* Bruxelles 1995, pp. 5-61; HAMMJE P., 'Droit fondamentaux et ordre public', in *Rev. crit. dr. int. pr.* 1997, pp. 1-31; LAGARDE P., 'La théorie de l'ordre public international face à la polygamie et à la répudiation', in *Nouveaux itinéraires en droit. Hommage à François Rigaux,* Brussels 1993, pp. 262-282.

limits of this choice, the spouses could intentionally manipulate the conditions in which the law is to be applied, thus provoking the application of a different law.[42] Such fraudulent conduct would obviously be contrary to the spirit of justice in that it violates the principle of equality before the law. Such conduct is subject to sanction,[43] which would consist in the application of the law that would apply in the absence of the fraud. In any case, it would be very difficult to prove that fraud was intended.

2. Objective Connecting Factors

Most legal systems introduce the principle of freedom of choice, but this principle is sometimes tempered by the principle of proximity. In this case, the parties can only choose between the legal systems of certain States indicated by certain connecting factors. This is the case in regard to the Hague Convention, Swiss law, the Italian and Spanish systems, and even more so the Russian Family Code of 1995.

On the other hand, there are countries where the concept of party autonomy does not come into play. Some jurisdictions of non-western countries offer a single connecting factor to determine the law applicable to the matrimonial property regime, primarily the national law of the male spouse. Other countries provide hierarchical connections that prevent the concept of party autonomy from being applied, for example, Rumanian law and Portuguese law. It should, however, be noted that the Portuguese Civil Code recognizes party autonomy in one specific scenario; where the set of connecting factors leads to the application of a foreign law and one of the spouses habitually resides in Portugal, the spouses can choose one of the regimes specified in Article 53(3) of the Civil Code.

There is one characteristic common to all these systems. Whether party autonomy is accepted with limitations or is simply excluded, the law applicable to the matrimonial property regime will always have objective connections with the couple. It is the connections that reveal the objectivity: residence, nationality, closest connection, and even the national law of the husband.

[42] LA PRADELLE M. G., 'Communication', in *Travaux du Comité français de droit international privé* 1971-1973 pp. 117-133; FERNÁNDEZ ROZAS J.C/ SÁNCHEZ LORENZO S., *Curso de Derecho Internacional Privado*, Madrid 1999, pp. 198-200.

[43] CARLIER J.-Y. (note 36), p. 374.

a) Nationality

The principle of nationality, as once defined by MANCINI,[44] was said to have disappeared; however, it has been significantly revitalized in recent years after the discovery that it serves as an appropriate principle for promoting the protection of cultural identity.

As mentioned above, our present society is increasingly characterized by multicultural factors. Conflicts between civilisations are particularly evident where groups of immigrants have come from the Muslim world; the intrinsic characteristics of that civilisation are reflected in its laws and are certainly distant from western ideas. Problems frequently arise, and in view of the tremendous cultural differences, assimilation is extremely difficult.[45]

In this context, an attempt at integration is particularly important and does not necessarily imply assimilation in the sense of absorption by the dominant culture. Integration is intended to respect cultural identity[46] and include minorities in the activities and objectives of public authorities.[47] As was already mentioned, private international law promotes respect for ethnic minorities and guarantees a certain degree of cultural autonomy.[48] It is in this framework that the use of nationality as a connecting factor can help achieve these objectives.

It is clear that nationality is ideal for regulating questions relating to institutions that are either unknown in the West or have implications in the civilisation of origin that are unrelated to our legal concepts. Since other connecting factors offer no better solution, the principle of nationality is experiencing a process of revitalization in various legal systems with respect to the matrimonial property regime.

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[44] MANCINI P. S., 'La nazionalità come fondamento del diritto delle genti', (lecture given in the University of Turin on 22 January 1851, translation by CARRERA DIAZ M., *Sobre la nacionalidad*, Madrid 1985*).*

[45] ALDEEB ABU-SAHLIEH S., 'Musulmans en terre européenne. Conflit entre foi et droit', in *Aktuelle Juristische Praxis* 1996, pp. 42-53; IDEM, 'Conflits entre droit religieux et droit étatique chez les musulmans dans les pays musulmans et en Europe', in *Revue international de droit comparé* 1997, pp. 813-834; IDEM, 'Mariages mixtes entre suisses et étrangers musulmans. Enjeux de normes légales conflictuelles', in *Revue de l'etat civil* 1996, pp. 238-256.

[46] The Ministers of Culture of the European Union held a series of debates in Lisbon to 'defend and promote cultural diversity in Europe', March-April 2000.

[47] JAYME E., 'Diritto di famiglia: società multiculturale e nuovi svluppi del diritto internazionale privato', in *Riv. dr. int. priv. proc*. 1993, pp. 295-304; D'HONT-VAN OPDENBOSCH P., 'Le statut personnel des musulmans en Belgique', in *Le statut personnel des musulmans. Droit comparé et droit international privé*', Brussels 1992, pp. 5 *et seq*.

[48] SALERNO F., 'Sulla tutela internazionale dell'identità culturale delle minoranze straniere', in *Riv. dir. int*. 1990, pp. 257 et *seq*.

Due to the present context in which it is being used, the criterion of nationality has taken on some new characteristics. The main one concerns the introduction of the principle of equality in different legal systems and consequently the disappearance of the national law of the male spouse. Justified by the need to maintain family unity, this discrimination was also present when the applicable law was the law of the common nationality of spouses. As a matter of fact, according to the legislation on nationality referred to above, the law of the common nationality of spouses was often the national law of the husband.

The next characteristic of this connecting factor is a direct consequence of the previous one. Since discrimination on the basis of gender has been eliminated, the couple may designate the law of the nationality of either spouse, as is specified in the various systems. Therefore, the spouses of mixed marriages have more laws from which they can chose.

b) Habitual Residence

The connecting factor of habitual residence is related to nationality.[49] Moreover, it follows the same pattern we saw in the analysis of nationality above.[50] In addition to the emigration from Islamic countries, there is also a significant amount of migration between countries with the same cultural background. Here it suffices to mention the large number of people who move to another country upon retirement. This, for example, is a very common phenomenon in Spain.

In such cases, there is not only integration but also assimilation, often as a natural result.[51] For the most part, significant differences do not exist between the legal systems of the country of origin and the country of destination. In view of

[49] LOUSSOUARN Y., 'La dualité des principes de nationalité et de domicile en droit international privé', in INSTITUTE OF INTERNATIONAL LAW, *Annuaire*, Vol. 62, T. 1, Session of Cairo 1987 pp. 295-238; DE WINTER L.J., 'Nationality or domicile. The present state of affairs', in *Recueil des Cours*, Vol. 128, 1969-III, pp. 347-503.

[50] In fact, the law of the place of residence has been introduced to fill the vacuum created when the national law of the husband was eliminated as discriminatory, see SÁNCHEZ LORENZO S., 'Postmodernismo y Derecho Internacional privado', in *REDI* 1994, pp. 557-585; IDEM, 'Postmodernismo e integración en el Derecho Internacional', in *Cursos de Derecho Internacional de Vitoria Gasteiz*, Madrid 1996 pp. 149-173; JAYME E. (note 6), pp. 152-153.

[51] A policy for the integration of immigrants would be highly favourable to the adoption of domicile as the connecting factor, see VAN HECKE G., 'Principes et méthodes de solution de conflits de lois', in *Recueil des Cours* 1969, pp. 399-569; DÉPREZ J., 'Droit international privé et conflits de civilisations. Aspects méthodologiques', in *Recueil des Cours*, Vol. 211, 1988-IV, pp. 9-371.

this, the most adequate connecting factor is the country of habitual residence,[52] which normally does not give rise to serious legal differences.

This connecting factor enables flexibility and as such is a reflection of present day reality. Namely, the spouses are not obliged to live together. For this reason, the habitual residence of either spouse is accepted, thus increasing the number of laws from which the spouses can choose when they have different places of residence. Otherwise, the habitual residence is deemed to be the place where the spouse or spouses usually live with a certain degree of regularity. In fact, this is a *de facto* situation that must be analyzed in each case regardless of the legal system in question.[53]

The arguments presented until now must not be understood in absolute terms. Although the connections of habitual residence and nationality are effective in the circumstances described, this is not always the case. It is difficult to generalize; thus it is possible that people from Islamic countries would prefer the application of the law of the country of their residence, or that people from closely related cultural backgrounds would favour the application of the law of their nationality. On the other hand, it is true that the application of nationality alone would be a clear case of supporting multicultural pluralism, whereas the application of habitual residence alone could break cultural links.

For this reason, it is important to again emphasise the significance of party autonomy in connection with this subject, which in this case can be limited to the choice between the nationality or residence of either or of both spouses.[54] From this point of view, it is the will of the spouses that dominates, allowing them to take account of their own interests when determining which law best regulates their matrimonial property regime.

c) Other Connecting Factors: Application of the Law Governing the Effects of Marriage

Making use of a special legislative technique, Article 9(3) of the Spanish CC provides that:

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[52] ESPINAR VICENTE J.M., 'El concepto de la residencia habitual en el sistema español de Derecho Internacional privado', in *Revista de Derecho Privado* 1980, pp. 2-27.

[53] MASMEJAN D., *La localisation des personnes physiques en droit international privé. Etude comparée des notions de domicile, de résidence habituelle et d'établissement, en droit suisse, français, allemand, anglais, américan et dans les Conventions de La Haye*, Geneva 1994.

[54] CARLIER J.-Y, 'De Schengen à Dublin en passant par Maastricht: nouveaux itinéraries dans la circulation des personnes, leur incidence su rôle du droit international privé de la famille', in *Nouveaux itinéraires en droit. Hommage à François Rigaux*, Brussels 1993, pp. 131-151.

> '[…] settlements or contracts which define, modify or replace the matrimonial property regime shall be valid if they comply with either the law applicable to the effects of the marriage, the law of nationality or the law of the habitual residence of either spouse at the time the contract is concluded.'

The last two connections are not unusual, whereas the first one is a novelty. The fact that spouses are permitted to subject their property regime to the law governing the effects of their marriage may seem surprising since this law governs the property relations even if the parties make no choice and sign no marriage contract.

Confusion arises from the fact that this provision touches upon two basic aspects of freedom: material and conflicts. It does not allow the parties to designate the law applicable to their property relations, but to conclude a marriage contract according to one of the laws mentioned in that provision. Making use of their material freedom, the parties may conclude a contract which is valid as long as it complies with the law applicable to the effects of the marriage.

It is true that other systems refer to the law applicable to the effects of marriage; however, only as a basic criterion in the absence of a choice of law. Italian law provides that property relations will be governed by the law applicable to their personal relations, but the spouses have the right to designate the applicable law from the laws admissible under that provision (Art. 30). Similarly, German law subjects matrimonial property to the law governing the general effects of marriage, while giving the spouses the opportunity to designate the law to govern their matrimonial property (Art. 15). In general, all these systems are based on the idea of party autonomy in the field of private international law, thus recognizing the parties' right to make a choice of law, while leaving material freedom to the applicable law. It would be better if this were also the case in the Spanish system.[55]

d) The Law of the Situs of Immovable Property

Another connecting factor used is the place where immovable property is situated. This is the case in the Hague Convention and in German law.

The former is based on the principle that the property regime is indivisible; nonetheless, it permits it to be divided by allowing the spouses to designate the law of the place where immovable property is situated.[56] German law also grants the

[55] AMORES CONRADI M.A, 'Efectos del matrimonio', in *Derecho Internacional privado. Parte especial*, Madrid 1995 p. 341; AGUILAR BENÍTEZ DE LUGO M., 'Los efectos del matrimonio', in *Lecciones de Derecho Civil internacional*, Madrid 1996, pp. 146-171.

[56] LOUSSOUARN Y., 'La Convention de La Haye sur la loi applicable aux régimes matrimoniales', in *Clunet* 1979, pp. 5-20; BATIFFOL H., 'La Treizième session de la

spouses the right to designate the law of the place where immovable property is situated.[57] The greatest advantage of this connection is that is tends to make relations with third parties easier; however, it leads to a degree of fragmentation that can cause problems if the regime is terminated. Moreover, this solution is not uniform in comparative law.

B. Mutability Scenario

A marriage may go through various stages that could affect the law(s) designated by the spouses to govern their property regime. One of the spouses, or both, could change nationality or residence. The law selected by the parties could change, or the parties themselves could decide to change their regime.

This brings us to the dynamic aspect of this subject, i.e., mutability. This may refer to the choice of law or to material law. In the first case, it is called conflict (or abstract) mutability, and in the second, material mutability.[58] These categories can in turn be divided into two sub-categories: voluntary conflict mutability brought about by a new choice of law by the spouses, and automatic conflict mutability or *conflit mobile*, if the change occurs in the circumstances determining the applicable law. In regard to material mutability, it can be voluntary if the spouses decide to change one of the aspects of their contract or legal material mutability if the material content of the law changes.

Analyzing conflict mutability, it can be said that the first sub-category is a direct result of the reception of the concept of party autonomy. Since the spouses are permitted to make a choice of law, it follows that if they desire to change their choice in the future, they should be allowed to do so. All they will need to do is to designate a new applicable law in accordance with the formal requirements of the applicable law. In this context it should be noted that some legal systems do not permit a mere reference to a foreign law, but require the content of the relevant provisions to be specified.[59] The effects of such a change are noticeable when the regime is terminated. Automatic conflict mutability (or mobile conflict) gives rise to more problems. This is a classic question[60] that has been taken into account in

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Conférence de la Haye de droit international privé', in *Rev. crit. dr. int. priv.* 1977 pp. 451-484.

[57] STURM F., 'Personnes, famille et successions dans la loi du 25 juillet 1986 portant réforme du droit international privé allemand', in *Rev. crit. dr. int. pr.* 1987, pp. 33-75.

[58] CARLIER J.-Y. (note 36), pp. 336-345.

[59] Art. 1389 Belgium CC. The idea is to prevent a Belgian spouse who has married a foreigner from adopting a regime with which he or she is unfamiliar. See RIGAUX F., 'Le conflit mobile en droit international privé', in *Recueil des Cours*, Vol. 117, 1966-I, pp. 329-444, esp. p. 334, note 12, and Art. 1409 of the German Civil Code (BGB).

[60] RIGAUX F. (note 59); PILLET A., 'La théorie générale des droits acquis', in *Recueil des Cours*, Vol. 8, 1925-III, pp. 489-538; CIGOJ S., 'Les droits acquis, les conflits móbiles et

recent legisative changes on the subject, as a result of which its effects have been minimized or eliminated altogether.

This is the case in Spanish law (Art. 9(2) and (3) CC) and German law (Art. 15 EGBGB). Both avoid the problem of a mobile conflict by specifying that the connecting factors at the time of the marriage shall apply, although the spouses have the right to make a new choice of law. This generates legal security; however, it could also give rise to statism or even solutions that are no longer adequate as a result of changed circumstances. This problem, however, can be resolved by the parties themselves: At all times they have the right to designate the law most closely connected with their married life, taking account of the new circumstances.[61] Article 9(3) of the Spanish CC permits spouses to make any stipulation, modification or replacement in accordance with the connecting factors at the time the contract is concluded.[62]

Swiss private international law, however, is based on the principles of automatic conflict mutability and retroactivity of the applicable law.[63] If the spouses change their residence, the law of the place of their new residence is applicable and can even be applied retroactively to the date of the marriage, thus making it easier to liquidate the property regime. The spouses, however, may exclude retroactivity in writing and even decide that the change of residence shall have no effect on the applicable law, in which case the will of the spouses is respected entirely (Art. 55 of the Swiss PIL Statute).

The Hague Convention of 1978 contains a combination of these two solutions. Mutability of the applicable law is accepted, but without retroactive effect, and the will of the spouses is respected. If the spouses have neither designated the applicable law nor concluded a marriage contract, the law of the State of their new habitual residence shall become applicable if the new habitual residence is established in the State of which both spouses are nationals or if that habitual residence has endured at least 10 years (Art. 7). The change of applicable law shall have effect only for the future (Art. 8). Nevertheless, if the spouses designate the

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la rétroactivité à la lumière des Conventions de La Haye', in *Rev. crit. dr. int. pr*. 1978, pp. 1-30; BATIFFOL H., 'Conflits mobiles et droit transitoire', in *Mélanges Paul Roubier*, Paris 1961, pp. 39-52; IDEM, *Choix d'articles rassemblés par ses amis*, Paris 1976, pp. 189-198; ROUBIER P., 'Les conflits de lois dans le temps en droit international privé', in *Rev. crit. dr. int. pr*. 1931, pp. 38-86.

[61] Solution mentioned by WATTÉ N., 'Les régimes matrimoniaux, les conflits de lois dans l'espace et dans le temps', in *Revue critique juridique belge* 1994, pp. 676-732, esp. p. 700.

[62] BOUZA VIDAL N. (note 14), p. 123.

[63] VON OVERBECK A.E./ROSSEL E., 'Le conflit mobile et le droit transitoire en matière de régimes matrimoniaux selon la loi fédérale sur le droit international privé', in *Semaine judiciaire* 1990, pp. 265-282; VON OVERBECK A.E., 'Les régimes matrimoniaux et les successions dans le nouveau droit international privé suisse', in *Le nouveau droit international privé suisse*, Lausanne 1988, pp. 59-78.

applicable law under the terms laid down in the Convention, the contract is automatically subject to immutability and may be altered only by the will of the spouses.

From the analysis of these three solutions it follows that, regardless of whether the solution is based on mutability or immutability, it is important that the spouses may exercise their freedom of choice to attenuate its effects. Such principles can lead to extreme consequences. For instance, mutability can cause considerable difficulty when the regime is liquidated, especially if the change has occurred in merely transient situations. On the other hand, immutability can lead to the petrification of the legal solution, although the ties between the situation and the applicable law no longer exist. However, these results can be mitigated by the effect of the will of the spouses. To summarize: A mobile conflict can be avoided by the spouses exercising their freedom of choice. Furthermore, whenever a change in the habitual residence (or nationality) produces a change in the applicable law, this will not occur automatically but only as a result of the will of the spouses.

IV. Third Parties and Their Protection: the Search for Legal Security

A. Necessary Adoption of Protective Clauses

The importance of the role of party autonomy has been mentioned several times in this article. The spouses may agree on the type of matrimonial property regime, designate the applicable law and change their choice of law. However, this freedom requires a counterweight to harmonize the relations of the spouses with third parties.

Third parties[64] who enter into legal relationships with the spouses are obviously interested in knowing which law governs their matrimonial property regime. If the spouses change the applicable law and/or alter their property regime, for example, from community to separate property, this will be of interest to a third party with whom one of the spouses incurred a debt during the original regime. It could be that the purpose of such a change is to avoid actions brought by creditors,

[64] A third party is a person who, based on a legal relationship established with the spouse, has a real or personal claim against him/her/them. Thus the definition is not limited to the purchaser in the Law on the Registration of Property. See LACRUZ BERDEJO J.L., 'Los regímenes económicos del matrimonio y la publicidad registral', in *Revista Crítica de Derecho Inmobiliario* 1963, pp. 593-608; MORA MATEO J.E., 'Publicidad del cambio de régimen económico matrimonial mediante capitulaciones', in *Revista General de Derecho* 1997, pp. 10317-10351.

if the borrowing spouse ends up with less property. This interest will also arise when a third party enters into a contract based on apparent financial solvency that turns out to be fictitious.

Attempting to re-establish legal security, some legal systems have introduced appropriate mechanisms to protect third parties.[65] Others, including Spanish law, still provide no adequate solution. Before analyzing these mechanisms, it is helpful to mention the consequences that can arise when there are no protective clauses for third parties.

In the absence of a special provision, the solution should be found in the substantive rules of the applicable law on the protection of third parties.[66] Since one must take account of the specific circumstances, this could lead to serious problems. Moreover, it can occur that the applicable law provides no protection at all, thus resulting in the complete lack of protection. The Spanish CC contains a rule on material protection (Art. 1317); however, it is applicable only if the spouses have designated Spanish law as applicable. As a result of an erroneous interpretation of this article, there is no similar rule for private international law.[67]

The protective system should have two main objectives. First, the third party should know with certainty which law governs the property regime of the person with whom he is concluding a contract, and secondly, he should be assured that he would not suffer damages by any later changes in the regime. The second objective, which implies immediate protection, is explicitly mentioned in the Portuguese CC (Art. 54(2)) and the Rumanian PIL Statute (Art. 21), both of which provide that a new contract shall not be retroactive to the disadvantage of a third party. In other words, a new contract has no retroactive effect that could damage the interests of third parties.

There is a second group of heterogeneous clauses that attempts to satisfy the first objective by stipulating conditions that must be met in order for the spouse(s) to be able to rely on the law applicable to the matrimonial property regime (new or old) against a third party. These requirements all favour the third party; if they are not met, the property regime cannot be invoked against the third party, who is protected because of his/her good faith. The Italian PIL Statute of 1995 (Art. 30(3)) introduces such a clause, which, however, gives rise to certain problems of interpretation. The Hague Convention of 1978 (Articles 8 and 9), the Swiss PIL

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[65] VON OVERBECK A.E., 'Les questions générales du droit international privé à la lumière des codifications et projets récents', in *Recueil des Cours*, Vol. 176, 1982-III, pp. 7-248, esp. p. 80.

[66] AMORES CONRADI M.A., 'Article 9 sections 2 and 3', in *Comentarios al Código Civil y Compilaciones forales*, T. 1, Vol 2, Madrid 1995, pp. 181-205; IDEM, (note 55) p. 342.

[67] BORRÁS RODRÍGUEZ A., 'No discriminación por razón de sexo: Derecho Internacional privado español', in *Anuario de Derecho Civil* 1991, pp. 233-249; IDEM, 'Non discrimination à raison du sexe et modification du droit international privé espagnol', in *Rev. crit. dr. int. pr.* 1991 pp. 626-634.

Act (Art. 57) and the German EGBGB (Art. 16) all include provisions that, in different ways, extend global protection to third parties.

Since each of these provisions has its good points, it would be interesting to incorporate their positive aspects into one provision that could be adopted by systems that lack such protection, for example, Spanish law. Assurance should be provided in good faith that a change in the choice of law would not adversely affect third parties. This is important especially in cases where the law applicable to the matrimonial property regime provides no such protection.

The conditions should also be clearly defined. The first condition would be adequate publicity. It would be sufficient to require that the regime be inscribed in the register of the State where the spouse habitually resides and that it is effective regardless of the nationality of the third party concerned. As we shall see in the next section, this is very difficult because the methods of publicity adopted by States are different and their effects limited. The second condition presumes that the third party either knew or should have known of the contract or law applicable to the matrimonial property regime of the spouse at the time the third party entered into the legal relation with that spouse. This condition is met when the spouses supply that information or such knowledge is acquired by other direct means.

If these conditions are not met, the law of the habitual residence of the spouse should be deemed applicable. The intention is to provide the solution most favourable for the third party, as is done in Swiss law.[68] When foreign elements come into play, it is clearly easier to discover the place of the spouse's residence than his or her specific matrimonial regime. Therefore, if the relevant register contains no reference to a marriage contract and the third party was unaware of them, the provisions of the law of the State of the spouse's habitual residence shall be deemed effective. This is a clear and simple way of protecting third parties. Difficulties arise, however, when this is put into practice, especially the guarantee provided by publicity.

At present, the provisions providing protection to third parties are so different that they create insecurity, especially when the protective clauses approved by each State are applied only by domestic courts. In fact, as far as relations with third parties are concerned, there will be different rules depending on the place where the events take place. During the preparation of the Convention, this complex problem was identified and attempts were made to achieve unification by proposing a solution that obliges the different States to take necessary steps to ensure that both the spouses and the third parties are sufficiently informed.[69] In addition to the objective of this solution, another interesting aspect is the fact that the legal systems involved would not be required to modify their own

[68] VON OVERBECK A.E. (note 65) p. 69.

[69] VON OVERBECK A.E. (note 8), p. 352; REVILLARD M.-L., 'La Convention de La Haye du 14 de mars 1978 sur la loi applicable aux régimes matrimoniaux', in *Répertoire du Notariat Defrénois* 1992, pp. 257 *et seq.*, No. 43.

provisions of private international law on the matrimonial property regime. All that is required is to provide a means of ensuring that the persons concerned know the effects of these different laws. This in itself is deemed sufficient protection to guarantee legal security.

B. Publicity of the Matrimonial Property Regime as a Necessary Measure to Protect the Rights of Third Parties

As we have just seen, the spouse(s) may rely on the applicable law against third parties only if the property regime had been made public or registered. Therefore, it is important to have good publicity mechanisms. Nevertheless, there is a surprising lack of precision in the publicity systems provided by different countries, which is bound to have an effect on private international law, including the subject matter dealt with here.

Unfortunately, most legal systems contain no special provisions, as a result of which the internal rules are applied, although they are notoriously inadequate for international situations. France, Italy and Spain make use of existing registers to cover publicity needs,[70] whereas Switzerland and Holland have special registers for marriage contracts. However, in regard to the latter countries, the mere existence of a special register does not imply that extending protection to third parties is based on inscriptions in the register.

An exception is found in Germany[71] where the protection of third parties under Article 16 EGBGB becomes effective if the property regime is governed by the laws of a foreign State and if one of the spouses has his or her habitual residence or carries out a professional activity in Germany. In such cases a special internal system for the protection of third parties applies (Art. 1412 BGB). The practical results are as follows: In order for a spouse to be able to object to claims of a third party who has entered into a legal relation with one of them, the marriage contract must be registered at the relevant court, or the third party must have been informed about the contract at the time the legal relation was initiated.[72]

This system would be incomplete and non-functional if there were no Register of Matrimonial Property Regimes (*Güterrechtsregister)* accessible to the public. The Register includes entries on matrimonial property, modifications of the

[70] MALAURIE P., 'Espagne, France, Italie, Portugal', in *Les relations contractuelles internationales. Le rôle du notaire*, Apeldoorm 1995, pp. 455-466. In regard to Spain, see RODRÍGUEZ GAYÁN E., *Derecho Registral civil internacional*, Madrid 1995.

[71] REVILLARD M.-L., *Droit international privé et pratique notariale*, 4th ed., Paris 1998.

[72] For an analysis of German law and limitations on the right to dispose of property under §§ 1365 and 1369 BGB, see SCHOTTEN G., 'Alemania', in *Problemas notariales a nivel internacional*, Würzburg 1995, pp. 1-22.

regime, and foreign property regimes, based on either settlement or contract.[73] Nevertheless, this system is not ideal to cope with all the problems that arise. In fact, it appears that the Register is hardly used. As in other countries, not many marriage contracts are concluded, and even less are inscribed in the public Register. As a result, third parties rarely consult the Register as they presume that German law will apply, which is usually the case.[74]

Despite these functional defects, this seems to be the most complete system for protecting third parties. A future solution will probably be along the same lines. The existence of a special Register clearly has many advantages. Inscription would be initiated at the time of marriage, even if no contract was concluded. This would be particularly important in systems like the Spanish one, where, due to interregional[75] factors, spouses from different places often have no knowledge of their own marriage regime. The basis for registration would be residence or professional activity in the country where registration takes place.

However, regardless of the system established, reliable sources of information should be made available to the spouses and third parties. This takes us back to what was said at the beginning of this article. Spouses will not conclude marriage contracts, change them or designate the applicable law if they are unaware of such possibility. On the other hand, they should also be informed about the importance of registering the marriage contract and of the consequences for failing to do so. Third parties should also receive information on publicity, informing them how the system works and which Register they must consult. The Hague Conference was aware of these questions and included a statement in the final notes[76] on the need to provide effective information; third parties, however, are not mentioned in this context. A prerequisite for the validity of a marriage contract is the involvement of a notary public.

This in itself implies his participation in supplying relevant information. Since he will also participate in their legal transactions, he would be able to inform the third party about the existence of the marriage contract, warn him about possible consequences and make sure the third party knows which sources of information are available to him.[77] Consequently, the notary public is a professional person in a significant position to supply the essential information in such cases.

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[73] On the facts that may be inscribed in the German Register, see *Münchener Rechts-Lexikon*, Vol. 2, Munich 1987, p. 312.

[74] On this subject see SCHOTTEN G, 'Der Schutz des Rechtsverkehrs im Internationalen Privatrecht', in *Deutsche Notar-Zeitschrift* 1994, pp. 670-769; KANZELEITER R., in *Münchener Kommentar*, 3rd ed., Vol. 7, *Familienrecht I*, Munich 1993, pp. 766-769.

[75] BORRÁS RODRÍGUEZ A., 'Les ordres plurilégislatifs dans le droit international privé', in *Recueil des Cours*, Vol. 249, 1994-V, pp. 145-368.

[76] VON OVERBECK A.E. (note 8), pp. 353-354.

[77] On the Spanish notarial practice, see GIMENO Y GÓMEZ LAFUENTE J.L., 'La publicidad de las capitulaciones en Derecho Internacional Privado', in *Revista Crítica de Derecho Inmobiliario* 1979, pp. 668-786.

TEXTS, MATERIALS AND RECENT DEVELOPMENTS

HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

CONVENTION ON THE INTERNATIONAL PROTECTION OF ADULTS*

The States signatory to the present Convention,

Considering the need to provide for the protection in international situations of adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests,

Wishing to avoid conflicts between their legal systems in respect of jurisdiction, applicable law, recognition and enforcement of measures for the protection of adults,

Recalling the importance of international co-operation for the protection of adults,

Affirming that the interests of the adult and respect for his or her dignity and autonomy are to be primary considerations,

Have agreed on the following provisions -

* The text of the Convention is published on the website of the Hague Conference at: http://www.hcch.net/ The Convention has been signed by The Netherlands and officially bears the date of that signature – 13 January 2000.

CHAPTER I
SCOPE OF THE CONVENTION

Article 1

1. This Convention applies to the protection in international situations of adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests.
2. Its objects are -
   a) to determine the State whose authorities have jurisdiction to take measures directed to the protection of the person or property of the adult;
   b) to determine which law is to be applied by such authorities in exercising their jurisdiction;
   c) to determine the law applicable to representation of the adult;
   d) to provide for the recognition and enforcement of such measures of protection in all Contracting States;
   e) to establish such co-operation between the authorities of the Contracting States as may be necessary in order to achieve the purposes of this Convention.

Article 2

1. For the purposes of this Convention, an adult is a person who has reached the age of 18 years.
2. The Convention applies also to measures in respect of an adult who had not reached the age of 18 years at the time the measures were taken.

Article 3

The measures referred to in Article 1 may deal in particular with -
   a) the determination of incapacity and the institution of a protective regime;
   b) the placing of the adult under the protection of a judicial or administrative authority;
   c) guardianship, curatorship and analogous institutions;
   d) the designation and functions of any person or body having charge of the adult's person or property, representing or assisting the adult;
   e) the placement of the adult in an establishment or other place where protection can be provided;
   f) the administration, conservation or disposal of the adult's property;
   g) the authorisation of a specific intervention for the protection of the person or property of the adult.

Article 4

1. The Convention does not apply to -
   a) maintenance obligations;
   b) the formation, annulment and dissolution of marriage or any similar relationship, as well as legal separation;
   c) property regimes in respect of marriage or any similar relationship;
   d) trusts or succession;
   e) social security;
   f) public measures of a general nature in matters of health;
   g) measures taken in respect of a person as a result of penal offences committed by that person;
   h) decisions on the right of asylum and on immigration;
   i) measures directed solely to public safety.
2. Paragraph 1 does not affect, in respect of the matters referred to therein, the entitlement of a person to act as the representative of the adult.

CHAPTER II
JURISDICTION

Article 5

1. The judicial or administrative authorities of the Contracting State of the habitual residence of the adult have jurisdiction to take measures directed to the protection of the adult's person or property.
2. In case of a change of the adult's habitual residence to another Contracting State, the authorities of the State of the new habitual residence have jurisdiction.

Article 6

1. For adults who are refugees and those who, due to disturbances occurring in their country, are internationally displaced, the authorities of the Contracting State on the territory of which these adults are present as a result of their displacement have the jurisdiction provided for in Article 5, paragraph 1.
2. The provisions of the preceding paragraph also apply to adults whose habitual residence cannot be established.

Article 7

1. Except for adults who are refugees or who, due to disturbances occurring in their State of nationality, are internationally displaced, the authorities of a Contracting State of which the adult is a national have jurisdiction to take measures for the protection of the person or property of the adult if they consider that they are in a better position to assess the interests of the adult, and after advising the authorities having jurisdiction under Article 5 or Article 6, paragraph 2.
2. This jurisdiction shall not be exercised if the authorities having jurisdiction under Article 5, Article 6, paragraph 2, or Article 8 have informed the authorities of the State of which the adult is a national that they have taken the measures required by the situation or have decided that no measures should be taken or that proceedings are pending before them.
3. The measures taken under paragraph 1 shall lapse as soon as the authorities having jurisdiction under Article 5, Article 6, paragraph 2, or Article 8 have taken measures required by the situation or have decided that no measures are to be taken. These authorities shall inform accordingly the authorities which have taken measures in accordance with paragraph 1.

Article 8

1. The authorities of a Contracting State having jurisdiction under Article 5 or Article 6, if they consider that such is in the interests of the adult, may, on their own motion or on an application by the authority of another Contracting State, request the authorities of one of the States mentioned in paragraph 2 to take measures for the protection of the person or property of the adult. The request may relate to all or some aspects of such protection.
2. The Contracting States whose authorities may be addressed as provided in the preceding paragraph are -
   a) a State of which the adult is a national;
   b) the State of the preceding habitual residence of the adult;
   c) a State in which property of the adult is located;
   d) the State whose authorities have been chosen in writing by the adult to take measures directed to his or her protection;
   e) the State of the habitual residence of a person close to the adult prepared to undertake his or her protection;
   f) the State in whose territory the adult is present, with regard to the protection of the person of the adult.
3. In case the authority designated pursuant to the preceding paragraphs does not accept its jurisdiction, the authorities of the Contracting State having jurisdiction under Article 5 or Article 6 retain jurisdiction.

Article 9

The authorities of a Contracting State where property of the adult is situated have jurisdiction to take measures of protection concerning that property, to the extent that such measures are compatible with those taken by the authorities having jurisdiction under Articles 5 to 8.

Article 10

1. In all cases of urgency, the authorities of any Contracting State in whose territory the adult or property belonging to the adult is present have jurisdiction to take any necessary measures of protection.
2. The measures taken under the preceding paragraph with regard to an adult habitually resident in a Contracting State shall lapse as soon as the authorities which have jurisdiction under Articles 5 to 9 have taken the measures required by the situation.
3. The measures taken under paragraph 1 with regard to an adult who is habitually resident in a non-Contracting State shall lapse in each Contracting State as soon as measures required by the situation and taken by the authorities of another State are recognised in the Contracting State in question.
4. The authorities which have taken measures under paragraph 1 shall, if possible, inform the authorities of the Contracting State of the habitual residence of the adult of the measures taken.

Article 11

1. By way of exception, the authorities of a Contracting State in whose territory the adult is present have jurisdiction to take measures of a temporary character for the protection of the person of the adult which have a territorial effect limited to the State in question, in so far as such measures are compatible with those already taken by the authorities which have jurisdiction under Articles 5 to 8, and after advising the authorities having jurisdiction under Article 5.
2. The measures taken under the preceding paragraph with regard to an adult habitually resident in a Contracting State shall lapse as soon as the authorities which have jurisdiction under Articles 5 to 8 have taken a decision in respect of the measures of protection which may be required by the situation.

Article 12

Subject to Article 7, paragraph 3, the measures taken in application of Articles 5 to 9 remain in force according to their terms, even if a change of circumstances has eliminated the basis upon which jurisdiction was founded, so long as the

authorities which have jurisdiction under the Convention have not modified, replaced or terminated such measures.

CHAPTER III
APPLICABLE LAW

Article 13

1. In exercising their jurisdiction under the provisions of Chapter II, the authorities of the Contracting States shall apply their own law.
2. However, in so far as the protection of the person or the property of the adult requires, they may exceptionally apply or take into consideration the law of another State with which the situation has a substantial connection.

Article 14

Where a measure taken in one Contracting State is implemented in another Contracting State, the conditions of its implementation are governed by the law of that other State.

Article 15

1. The existence, extent, modification and extinction of powers of representation granted by an adult, either under an agreement or by a unilateral act, to be exercised when such adult is not in a position to protect his or her interests, are governed by the law of the State of the adult's habitual residence at the time of the agreement or act, unless one of the laws mentioned in paragraph 2 has been designated expressly in writing.
2. The States whose laws may be designated are -
   a) a State of which the adult is a national;
   b) the State of a former habitual residence of the adult;
   c) a State in which property of the adult is located, with respect to that property.
3. The manner of exercise of such powers of representation is governed by the law of the State in which they are exercised.

Article 16

Where powers of representation referred to in Article 15 are not exercised in a manner sufficient to guarantee the protection of the person or property of the adult, they may be withdrawn or modified by measures taken by an authority having jurisdiction under the Convention. Where such powers of representation are withdrawn or modified, the law referred to in Article 15 should be taken into consideration to the extent possible.

Article 17

1. The validity of a transaction entered into between a third party and another person who would be entitled to act as the adult's representative under the law of the State where the transaction was concluded cannot be contested, and the third party cannot be held liable, on the sole ground that the other person was not entitled to act as the adult's representative under the law designated by the provisions of this Chapter, unless the third party knew or should have known that such capacity was governed by the latter law.
2. The preceding paragraph applies only if the transaction was entered into between persons present on the territory of the same State.

Article 18

The provisions of this Chapter apply even if the law designated by them is the law of a non-Contracting State.

Article 19

In this Chapter the term 'law' means the law in force in a State other than its choice of law rules.

Article 20

This Chapter does not prevent the application of those provisions of the law of the State in which the adult is to be protected where the application of such provisions is mandatory whatever law would otherwise be applicable.

Article 21

The application of the law designated by the provisions of this Chapter can be refused only if this application would be manifestly contrary to public policy.

CHAPTER IV
RECOGNITION AND ENFORCEMENT

Article 22

1. The measures taken by the authorities of a Contracting State shall be recognised by operation of law in all other Contracting States.
2. Recognition may however be refused -
   a) if the measure was taken by an authority whose jurisdiction was not based on, or was not in accordance with, one of the grounds provided for by the provisions of Chapter II;
   b) if the measure was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, without the adult having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the requested State;
   c) if such recognition is manifestly contrary to public policy of the requested State, or conflicts with a provision of the law of that State which is mandatory whatever law would otherwise be applicable;
   d) if the measure is incompatible with a later measure taken in a non-Contracting State which would have had jurisdiction under Articles 5 to 9, where this later measure fulfils the requirements for recognition in the requested State;
   e) if the procedure provided in Article 33 has not been complied with.

Article 23

Without prejudice to Article 22, paragraph 1, any interested person may request from the competent authorities of a Contracting State that they decide on the recognition or non-recognition of a measure taken in another Contracting State. The procedure is governed by the law of the requested State.

Article 24

The authority of the requested State is bound by the findings of fact on which the authority of the State where the measure was taken based its jurisdiction.

Article 25

1. If measures taken in one Contracting State and enforceable there require enforcement in another Contracting State, they shall, upon request by an interested party, be declared enforceable or registered for the purpose of

enforcement in that other State according to the procedure provided in the law of the latter State.

2. Each Contracting State shall apply to the declaration of enforceability or registration a simple and rapid procedure.
3. The declaration of enforceability or registration may be refused only for one of the reasons set out in Article 22, paragraph 2.

Article 26

Without prejudice to such review as is necessary in the application of the preceding Articles, there shall be no review of the merits of the measure taken.

Article 27

Measures taken in one Contracting State and declared enforceable, or registered for the purpose of enforcement, in another Contracting State shall be enforced in the latter State as if they had been taken by the authorities of that State. Enforcement takes place in accordance with the law of the requested State to the extent provided by such law.

CHAPTER V
CO-OPERATION

Article 28

1. A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention on such authorities.
2. Federal States, States with more than one system of law or States having autonomous territorial units shall be free to appoint more than one Central Authority and to specify the territorial or personal extent of their functions. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which any communication may be addressed for transmission to the appropriate Central Authority within that State.

Article 29

1. Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their States to achieve the purposes of the Convention.
2. They shall, in connection with the application of the Convention, take appropriate steps to provide information as to the laws of, and services available in, their States relating to the protection of adults.

Article 30

The Central Authority of a Contracting State, either directly or through public authorities or other bodies, shall take all appropriate steps to -

a) facilitate communications, by every means, between the competent authorities in situations to which the Convention applies;
b) provide, on the request of a competent authority of another Contracting State, assistance in discovering the whereabouts of an adult where it appears that the adult may be present and in need of protection within the territory of the requested State.

Article 31

The competent authorities of a Contracting State may encourage, either directly or through other bodies, the use of mediation, conciliation or similar means to achieve agreed solutions for the protection of the person or property of the adult in situations to which the Convention applies.

Article 32

1. Where a measure of protection is contemplated, the competent authorities under the Convention, if the situation of the adult so requires, may request any authority of another Contracting State which has information relevant to the protection of the adult to communicate such information.
2. A Contracting State may declare that requests under paragraph 1 shall be communicated to its authorities only through its Central Authority.
3. The competent authorities of a Contracting State may request the authorities of another Contracting State to assist in the implementation of measures of protection taken under this Convention.

Article 33

1. If an authority having jurisdiction under Articles 5 to 8 contemplates the placement of the adult in an establishment or other place where protection can

be provided, and if such placement is to take place in another Contracting State, it shall first consult with the Central Authority or other competent authority of the latter State. To that effect it shall transmit a report on the adult together with the reasons for the proposed placement.

2. The decision on the placement may not be made in the requesting State if the Central Authority or other competent authority of the requested State indicates its opposition within a reasonable time.

Article 34

In any case where the adult is exposed to a serious danger, the competent authorities of the Contracting State where measures for the protection of the adult have been taken or are under consideration, if they are informed that the adult's residence has changed to, or that the adult is present in, another State, shall inform the authorities of that other State about the danger involved and the measures taken or under consideration.

Article 35

An authority shall not request or transmit any information under this Chapter if to do so would, in its opinion, be likely to place the adult's person or property in danger, or constitute a serious threat to the liberty or life of a member of the adult's family.

Article 36

1. Without prejudice to the possibility of imposing reasonable charges for the provision of services, Central Authorities and other public authorities of Contracting States shall bear their own costs in applying the provisions of this Chapter.
2. Any Contracting State may enter into agreements with one or more other Contracting States concerning the allocation of charges.

Article 37

Any Contracting State may enter into agreements with one or more other Contracting States with a view to improving the application of this Chapter in their mutual relations. The States which have concluded such an agreement shall transmit a copy to the depositary of the Convention.

CHAPTER VI
GENERAL PROVISIONS

Article 38

1. The authorities of the Contracting State where a measure of protection has been taken or a power of representation confirmed may deliver to the person entrusted with protection of the adult's person or property, on request, a certificate indicating the capacity in which that person is entitled to act and the powers conferred.
2. The capacity and powers indicated in the certificate are presumed to be vested in that person as of the date of the certificate, in the absence of proof to the contrary.
3. Each Contracting State shall designate the authorities competent to draw up the certificate.

Article 39

Personal data gathered or transmitted under the Convention shall be used only for the purposes for which they were gathered or transmitted.

Article 40

The authorities to whom information is transmitted shall ensure its confidentiality, in accordance with the law of their State.

Article 41

All documents forwarded or delivered under this Convention shall be exempt from legalisation or any analogous formality.

Article 42

Each Contracting State may designate the authorities to which requests under Article 8 and Article 33 are to be addressed.

Article 43

1. The designations referred to in Article 28 and Article 42 shall be communicated to the Permanent Bureau of the Hague Conference on Private International Law not later than the date of the deposit of the instrument of

ratification, acceptance or approval of the Convention or of accession thereto. Any modifications thereof shall also be communicated to the Permanent Bureau.

2. The declaration referred to in Article 32, paragraph 2, shall be made to the depositary of the Convention.

Article 44

A Contracting State in which different systems of law or sets of rules of law apply to the protection of the person or property of the adult shall not be bound to apply the rules of the Convention to conflicts solely between such different systems or sets of rules of law.

Article 45

In relation to a State in which two or more systems of law or sets of rules of law with regard to any matter dealt with in this Convention apply in different territorial units -

a) any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit;
b) any reference to the presence of the adult in that State shall be construed as referring to presence in a territorial unit;
c) any reference to the location of property of the adult in that State shall be construed as referring to location of property of the adult in a territorial unit;
d) any reference to the State of which the adult is a national shall be construed as referring to the territorial unit designated by the law of that State or, in the absence of relevant rules, to the territorial unit with which the adult has the closest connection;
e) any reference to the State whose authorities have been chosen by the adult shall be construed
   - as referring to the territorial unit if the adult has chosen the authorities of this territorial unit;
   - as referring to the territorial unit with which the adult has the closest connection if the adult has chosen the authorities of the State without specifying a particular territorial unit within the State;
f) any reference to the law of a State with which the situation has a substantial connection shall be construed as referring to the law of a territorial unit with which the situation has a substantial connection;
g) any reference to the law or procedure or authority of the State in which a measure has been taken shall be construed as referring to the law or

procedure in force in such territorial unit or authority of the territorial unit in which such measure was taken;

h) any reference to the law or procedure or authority of the requested State shall be construed as referring to the law or procedure in force in such territorial unit or authority of the territorial unit in which recognition or enforcement is sought;

i) any reference to the State where a measure of protection is to be implemented shall be construed as referring to the territorial unit where the measure is to be implemented;

j) any reference to bodies or authorities of that State, other than Central Authorities, shall be construed as referring to those authorised to act in the relevant territorial unit.

Article 46

For the purpose of identifying the applicable law under Chapter III, in relation to a State which comprises two or more territorial units each of which has its own system of law or set of rules of law in respect of matters covered by this Convention, the following rules apply -

a) if there are rules in force in such a State identifying which territorial unit's law is applicable, the law of that unit applies;

b) in the absence of such rules, the law of the relevant territorial unit as defined in Article 45 applies.

Article 47

For the purpose of identifying the applicable law under Chapter III, in relation to a State which has two or more systems of law or sets of rules of law applicable to different categories of persons in respect of matters covered by this Convention, the following rules apply -

a) if there are rules in force in such a State identifying which among such laws applies, that law applies;

b) in the absence of such rules, the law of the system or the set of rules of law with which the adult has the closest connection applies.

Article 48

In relations between the Contracting States this Convention replaces the *Convention concernant l'interdiction et les mesures de protection analogues*, signed at The Hague 17 July 1905.

Article 49

1. The Convention does not affect any other international instrument to which Contracting States are Parties and which contains provisions on matters governed by this Convention, unless a contrary declaration is made by the States Parties to such instrument.
2. This Convention does not affect the possibility for one or more Contracting States to conclude agreements which contain, in respect of adults habitually resident in any of the States Parties to such agreements, provisions on matters governed by this Convention.
3. Agreements to be concluded by one or more Contracting States on matters within the scope of this Convention do not affect, in the relationship of such States with other Contracting States, the application of the provisions of this Convention.
4. The preceding paragraphs also apply to uniform laws based on special ties of a regional or other nature between the States concerned.

Article 50

1. The Convention shall apply to measures only if they are taken in a State after the Convention has entered into force for that State.
2. The Convention shall apply to the recognition and enforcement of measures taken after its entry into force as between the State where the measures have been taken and the requested State.
3. The Convention shall apply from the time of its entry into force in a Contracting State to powers of representation previously granted under conditions corresponding to those set out in Article 15.

Article 51

1. Any communication sent to the Central Authority or to another authority of a Contracting State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the other State or, where that is not feasible, a translation into French or English.
2. However, a Contracting State may, by making a reservation in accordance with Article 56, object to the use of either French or English, but not both.

Article 52

The Secretary General of the Hague Conference on Private International Law shall at regular intervals convoke a Special Commission in order to review the practical operation of the Convention.

CHAPTER VII
FINAL CLAUSES

Article 53

1. The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law on 2 October 1999.
2. It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.

Article 54

1. Any other State may accede to the Convention after it has entered into force in accordance with Article 57, paragraph 1.
2. The instrument of accession shall be deposited with the depositary.
3. Such accession shall have effect only as regards the relations between the acceding State and those Contracting States which have not raised an objection to its accession in the six months after the receipt of the notification referred to in sub-paragraph b) of Article 59. Such an objection may also be raised by States at the time when they ratify, accept or approve the Convention after an accession. Any such objection shall be notified to the depositary.

Article 55

1. If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that the Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.
2. Any such declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.

3. If a State makes no declaration under this Article, the Convention is to extend to all territorial units of that State.

Article 56

1. Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 55, make the reservation provided for in Article 51, paragraph 2. No other reservation shall be permitted.
2. Any State may at any time withdraw the reservation it has made. The withdrawal shall be notified to the depositary.
   3. The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

Article 57

1. The Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the third instrument of ratification, acceptance or approval referred to in Article 53.
2. Thereafter the Convention shall enter into force -
   a) for each State ratifying, accepting or approving it subsequently, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance, approval or accession;
   b) for each State acceding, on the first day of the month following the expiration of three months after the expiration of the period of six months provided in Article 54, paragraph 3;
   c) for a territorial unit to which the Convention has been extended in conformity with Article 55, on the first day of the month following the expiration of three months after the notification referred to in that Article.

Article 58

1. A State Party to the Convention may denounce it by a notification in writing addressed to the depositary. The denunciation may be limited to certain territorial units to which the Convention applies.
2. The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period.

Article 59

The depositary shall notify the States Members of the Hague Conference on Private International Law and the States which have acceded in accordance with Article 54 of the following -

a) the signatures, ratifications, acceptances and approvals referred to in Article 53;
b) the accessions and objections raised to accessions referred to in Article 54;
c) the date on which the Convention enters into force in accordance with Article 57;
d) the declarations referred to in Article 32, paragraph 2, and Article 55;
e) the agreements referred to in Article 37;
f) the reservation referred to in Article 51, paragraph 2, and the withdrawal referred to in Article 56, paragraph 2;
g) the denunciations referred to in Article 58.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on [……..], in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law on 2 October 1999.

HAGUE CONFERENCE ON
PRIVATE INTERNATIONAL LAW

PRELIMINARY DRAFT CONVENTION ON JURISDICTION AND FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS[*] [1]

amended version (new numbering of articles),
adopted by the Special Commission
on 30 October 1999

CHAPTER I
SCOPE OF THE CONVENTION

Article 1
Substantive scope

1. The Convention applies to civil and commercial matters. It shall not extend in particular to revenue, customs or administrative matters.
2. The Convention does not apply to -
   a) the status and legal capacity of natural persons;
   b) maintenance obligations;
   c) matrimonial property regimes and other rights and obligations arising out of marriage or similar relationships;
   d) wills and succession;
   e) insolvency, composition or analogous proceedings;
   f) social security;
   g) arbitration and proceedings related thereto;
   h) admiralty or maritime matters.
3. A dispute is not excluded from the scope of the Convention by the mere fact that a government, a governmental agency or any other person acting for the State is a party thereto.
4. Nothing in this Convention affects the privileges and immunities of sovereign States or of entities of sovereign States, or of international organisations.

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[*] The text of the preliminary draft is published on the website of the Hague Conference, at: http://www.hcch.net/

[1] The Special Commission has considered whether the provisions of the preliminary draft Convention meet the needs of e-commerce. This matter will be further examined by a group of specialists in this field who will meet early in the year 2000. [back to article 1]

Article 2
Territorial scope

1. The provisions of Chapter II shall apply in the courts of a Contracting State unless all the parties are habitually resident in that State. However, even if all the parties are habitually resident in that State -
   a) Article 4 shall apply if they have agreed that a court or courts of another Contracting State have jurisdiction to determine the dispute;
   b) Article 12, regarding exclusive jurisdiction, shall apply;
   c) Articles 21 and 22 shall apply where the court is required to determine whether to decline jurisdiction or suspend its proceedings on the grounds that the dispute ought to be determined in the courts of another Contracting State.
2. The provisions of Chapter III apply to the recognition and enforcement in a Contracting State of a judgment rendered in another Contracting State.

CHAPTER II
JURISDICTION

Article 3
Defendant's forum

1. Subject to the provisions of the Convention, a defendant may be sued in the courts of the State where that defendant is habitually resident.
2. For the purposes of the Convention, an entity or person other than a natural person shall be considered to be habitually resident in the State -
   a) where it has its statutory seat,
   b) under whose law it was incorporated or formed,
   c) where it has its central administration, or
   d) where it has its principal place of business.

Article 4
Choice of court

1. If the parties have agreed that a court or courts of a Contracting State shall have jurisdiction to settle any dispute which has arisen or may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, and that jurisdiction shall be exclusive unless the parties have agreed otherwise. Where an agreement having exclusive effect designates a court or courts of a non-Contracting State, courts in Contracting

States shall decline jurisdiction or suspend proceedings unless the court or courts chosen have themselves declined jurisdiction.

2. An agreement within the meaning of paragraph 1 shall be valid as to form, if it was entered into or confirmed -
   a) in writing;
   b) by any other means of communication which renders information accessible so as to be usable for subsequent reference;
   c) in accordance with a usage which is regularly observed by the parties;
   d) in accordance with a usage of which the parties were or ought to have been aware and which is regularly observed by parties to contracts of the same nature in the particular trade or commerce concerned.
3. Agreements conferring jurisdiction and similar clauses in trust instruments shall be without effect if they conflict with the provisions of Article 7, 8 or 12.

Article 5
Appearance by the defendant

1. Subject to Article 12, a court has jurisdiction if the defendant proceeds on the merits without contesting jurisdiction.
2. The defendant has the right to contest jurisdiction no later than at the time of the first defence on the merits.

Article 6
Contracts

A plaintiff may bring an action in contract in the courts of a State in which -
   a) in matters relating to the supply of goods, the goods were supplied in whole or in part;
   b) in matters relating to the provision of services, the services were provided in whole or in part;
   c) in matters relating both to the supply of goods and the provision of services, performance of the principal obligation took place in whole or in part.

Article 7
Contracts concluded by consumers

1. A plaintiff who concluded a contract for a purpose which is outside its trade or profession, hereafter designated as the consumer, may bring a claim in the courts of the State in which it is habitually resident, if
   a) the conclusion of the contract on which the claim is based is related to trade or professional activities that the defendant has engaged in or

directed to that State, in particular in soliciting business through means of publicity, and

b) the consumer has taken the steps necessary for the conclusion of the contract in that State.

2. A claim against the consumer may only be brought by a person who entered into the contract in the course of its trade or profession before the courts of the State of the habitual residence of the consumer.
3. The parties to a contract within the meaning of paragraph 1 may, by an agreement which conforms with the requirements of Article 4, make a choice of court -
   a) if such agreement is entered into after the dispute has arisen, or
   b) to the extent only that it allows the consumer to bring proceedings in another court.

Article 8
Individual contracts of employment

1. In matters relating to individual contracts of employment -
   a) an employee may bring an action against the employer,
      i) in the courts of the State in which the employee habitually carries out his work or in the courts of the last State in which he did so, or
      ii) if the employee does not or did not habitually carry out his work in any one State, in the courts of the State in which the business that engaged the employee is or was situated;
   b) a claim against an employee may be brought by the employer only,
      i) in the courts of the State where the employee is habitually resident, or
      ii) in the courts of the State in which the employee habitually carries out his work.
2. The parties to a contract within the meaning of paragraph 1 may, by an agreement which conforms with the requirements of Article 4, make a choice of court -
   a) if such agreement is entered into after the dispute has arisen, or
   b) to the extent only that it allows the employee to bring proceedings in courts other than those indicated in this Article or in Article 3 of the Convention.

Article 9
Branches [and regular commercial activity]

A plaintiff may bring an action in the courts of a State in which a branch, agency or any other establishment of the defendant is situated, [or where the defendant has carried on regular commercial activity by other means,] provided that the dispute

relates directly to the activity of that branch, agency or establishment [or to that regular commercial activity].

Article 10
Torts or delicts

1. A plaintiff may bring an action in tort or delict in the courts of the State -
   a) in which the act or omission that caused injury occurred, or
   b) in which the injury arose, unless the defendant establishes that the person claimed to be responsible could not reasonably have foreseen that the act or omission could result in an injury of the same nature in that State.
2. Paragraph 1 b) shall not apply to injury caused by anti-trust violations, in particular price-fixing or monopolisation, or conspiracy to inflict economic loss.
3. A plaintiff may also bring an action in accordance with paragraph 1 when the act or omission, or the injury may occur.
4. If an action is brought in the courts of a State only on the basis that the injury arose or may occur there, those courts shall have jurisdiction only in respect of the injury that occurred or may occur in that State, unless the injured person has his or her habitual residence in that State.

Article 11
Trusts

1. In proceedings concerning the validity, construction, effects, administration or variation of a trust created voluntarily and evidenced in writing, the courts of a Contracting State designated in the trust instrument for this purpose shall have exclusive jurisdiction. Where the trust instrument designates a court or courts of a non-Contracting State, courts in Contracting States shall decline jurisdiction or suspend proceedings unless the court or courts chosen have themselves declined jurisdiction.
2. In the absence of such designation, proceedings may be brought before the courts of a State -
   a) in which is situated the principal place of administration of the trust;
   b) whose law is applicable to the trust;
   c) with which the trust has the closest connection for the purpose of the proceedings.

Article 12
Exclusive jurisdiction

1. In proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, the courts of the Contracting State in which the property is situated have exclusive jurisdiction, unless in proceedings which have as their object tenancies of immovable property, the tenant is habitually resident in a different State.
2. In proceedings which have as their object the validity, nullity, or dissolution of a legal person, or the validity or nullity of the decisions of its organs, the courts of a Contracting State whose law governs the legal person have exclusive jurisdiction.
3. In proceedings which have as their object the validity or nullity of entries in public registers, the courts of the Contracting State in which the register is kept have exclusive jurisdiction.
4. In proceedings which have as their object the registration, validity, [or] nullity[, or revocation or infringement,] of patents, trade marks, designs or other similar rights required to be deposited or registered, the courts of the Contracting State in which the deposit or registration has been applied for, has taken place or, under the terms of an international convention, is deemed to have taken place, have exclusive jurisdiction. This shall not apply to copyright or any neighbouring rights, even though registration or deposit of such rights is possible.

[5. In relation to proceedings which have as their object the infringement of patents, the preceding paragraph does not exclude the jurisdiction of any other court under the Convention or under the national law of a Contracting State.]

[6. The previous paragraphs shall not apply when the matters referred to therein arise as incidental questions.]

Article 13
Provisional and protective measures

1. A court having jurisdiction under Articles 3 to 12 to determine the merits of the case has jurisdiction to order any provisional or protective measures.
2. The courts of a State in which property is located have jurisdiction to order any provisional or protective measures in respect of that property.
3. A court of a Contracting State not having jurisdiction under paragraphs 1 or 2 may order provisional or protective measures, provided that -
   a) their enforcement is limited to the territory of that State, and
   b) their purpose is to protect on an interim basis a claim on the merits which is pending or to be brought by the requesting party.

Article 14
Multiple defendants

1. A plaintiff bringing an action against a defendant in a court of the State in which that defendant is habitually resident may also proceed in that court against other defendants not habitually resident in that State if -
   a) the claims against the defendant habitually resident in that State and the other defendants are so closely connected that they should be adjudicated together to avoid a serious risk of inconsistent judgments, and
   b) as to each defendant not habitually resident in that State, there is a substantial connection between that State and the dispute involving that defendant.
2. Paragraph 1 shall not apply to a codefendant invoking an exclusive choice of court clause agreed with the plaintiff and conforming with Article 4.

Article 15
Counter-claims

A court which has jurisdiction to determine a claim under the provisions of the Convention shall also have jurisdiction to determine a counter-claim arising out of the transaction or occurrence on which the original claim is based.

Article 16
Third party claims

1. A court which has jurisdiction to determine a claim under the provisions of the Convention shall also have jurisdiction to determine a claim by a defendant against a third party for indemnity or contribution in respect of the claim against that defendant to the extent that such an action is permitted by national law, provided that there is a substantial connection between that State and the dispute involving that third party.
2. Paragraph 1 shall not apply to a third party invoking an exclusive choice of court clause agreed with the defendant and conforming with Article 4.

Article 17
Jurisdiction based on national law

Subject to Articles 4, 5, 7, 8, 12 and 13, the Convention does not prevent the application by Contracting States of rules of jurisdiction under national law, provided that this is not prohibited under Article 18.

Article 18
Prohibited grounds of jurisdiction

1. Where the defendant is habitually resident in a Contracting State, the application of a rule of jurisdiction provided for under the national law of a Contracting State is prohibited if there is no substantial connection between that State and the dispute.
2. In particular, jurisdiction shall not be exercised by the courts of a Contracting State on the basis solely of one or more of the following -
   a) the presence or the seizure in that State of property belonging to the defendant, except where the dispute is directly related to that property;
   b) the nationality of the plaintiff;
   c) the nationality of the defendant;
   d) the domicile, habitual or temporary residence, or presence of the plaintiff in that State;
   e) the carrying on of commercial or other activities by the defendant in that State, except where the dispute is directly related to those activities;
   f) the service of a writ upon the defendant in that State;
   g) the unilateral designation of the forum by the plaintiff;
   h) proceedings in that State for declaration of enforceability or registration or for the enforcement of a judgment, except where the dispute is directly related to such proceedings;
   i) the temporary residence or presence of the defendant in that State;
   j) the signing in that State of the contract from which the dispute arises.
3. Nothing in this Article shall prevent a court in a Contracting State from exercising jurisdiction under national law in an action [seeking relief] [claiming damages] in respect of conduct which constitutes -

   [Variant One:
   [a) genocide, a crime against humanity or a war crime[, as defined in the Statute of the International Criminal Court]; or]
   [b) a serious crime against a natural person under international law; or]
   [c) a grave violation against a natural person of non-derogable fundamental rights established under international law, such as torture, slavery, forced labour and disappeared persons].
   [Sub-paragraphs [b) and] c) above apply only if the party seeking relief is exposed to a risk of a denial of justice because proceedings in another State are not possible or cannot reasonably be required.]

   Variant Two:
   a serious crime under international law, provided that this State has established its criminal jurisdiction over that crime in accordance with an international treaty to which it is a party and that the claim is for civil compensatory damages for death or serious bodily injury arising from that crime.]

Article 19
Authority of the court seised

Where the defendant does not enter an appearance, the court shall verify whether Article 18 prohibits it from exercising jurisdiction if -

a) national law so requires; or
b) the plaintiff so requests; or
[c) the defendant so requests, even after judgment is entered in accordance with procedures established under national law; or]
[d) the document which instituted the proceedings or an equivalent document was served on the defendant in another Contracting State.] or
[d) it appears from the documents filed by the plaintiff that the defendant's address is in another Contracting State.]

Article 20

1. The court shall stay the proceedings so long as it is not established that the document which instituted the proceedings or an equivalent document, including the essential elements of the claim, was notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence, or that all necessary steps have been taken to that effect.

[2. Paragraph 1 shall not affect the use of international instruments concerning the service abroad of judicial and extrajudicial documents in civil or commercial matters, in accordance with the law of the forum.]

[3. Paragraph 1 shall not apply, in case of urgency, to any provisional or protective measures.]

Article 21
Lis pendens

1. When the same parties are engaged in proceedings in courts of different Contracting States and when such proceedings are based on the same causes of action, irrespective of the relief sought, the court second seised shall suspend the proceedings if the court first seised has jurisdiction and is expected to render a judgment capable of being recognised under the Convention in the State of the court second seised, unless the latter has exclusive jurisdiction under Article 4 or 12.
2. The court second seised shall decline jurisdiction as soon as it is presented with a judgment rendered by the court first seised that complies with the requirements for recognition or enforcement under the Convention.
3. Upon application of a party, the court second seised may proceed with the case if the plaintiff in the court first seised has failed to take the necessary steps to

bring the proceedings to a decision on the merits or if that court has not rendered such a decision within a reasonable time.

4. The provisions of the preceding paragraphs apply to the court second seised even in a case where the jurisdiction of that court is based on the national law of that State in accordance with Article 17.
5. For the purpose of this Article, a court shall be deemed to be seised -
   a) when the document instituting the proceedings or an equivalent document is lodged with the court, or
   b) if such document has to be served before being lodged with the court, when it is received by the authority responsible for service or served on the defendant.

   [As appropriate, universal time is applicable.]
6. If in the action before the court first seised the plaintiff seeks a determination that it has no obligation to the defendant, and if an action seeking substantive relief is brought in the court second seised -
   a) the provisions of paragraphs 1 to 5 above shall not apply to the court second seised, and
   b) the court first seised shall suspend the proceedings at the request of a party if the court second seised is expected to render a decision capable of being recognised under the Convention.
7. This Article shall not apply if the court first seised, on application by a party, determines that the court second seised isclearly more appropriate to resolve the dispute, under the conditions specified in Article 22.

Article 22
Exceptional circumstances for declining jurisdiction

1. In exceptional circumstances, when the jurisdiction of the court seised is not founded on an exclusive choice of court agreement valid under Article 4, or on Article 7, 8 or 12, the court may, on application by a party, suspend its proceedings if in that case it is clearly inappropriate for that court to exercise jurisdiction and if a court of another State has jurisdiction and is clearly more appropriate to resolve the dispute. Such application must be made no later than at the time of the first defence on the merits.
2. The court shall take into account, in particular -
   a) any inconvenience to the parties in view of their habitual residence;
   b) the nature and location of the evidence, including documents and witnesses, and the procedures for obtaining such evidence;
   c) applicable limitation or prescription periods;
   d) the possibility of obtaining recognition and enforcement of any decision on the merits.
3. In deciding whether to suspend the proceedings, a court shall not discriminate on the basis of the nationality or habitual residence of the parties.

4. If the court decides to suspend its proceedings under paragraph 1, it may order the defendant to provide security sufficient to satisfy any decision of the other court on the merits. However, it shall make such an order if the other court has jurisdiction only under Article 17, unless the defendant establishes that sufficient assets exist in the State of that other court or in another State where the court's decision could be enforced.
5. When the court has suspended its proceedings under paragraph 1,
   a) it shall decline to exercise jurisdiction if the court of the other State exercises jurisdiction, or if the plaintiff does not bring the proceedings in that State within the time specified by the court, or
   b) it shall proceed with the case if the court of the other State decides not to exercise jurisdiction.

CHAPTER III
RECOGNITION AND ENFORCEMENT

Article 23
Definition of 'judgment'

For the purposes of this Chapter, 'judgment' means -

a) any decision given by a court, whatever it may be called, including a decree or order, as well as the determination of costs or expenses by an officer of the court, provided that it relates to a decision which may be recognised or enforced under the Convention;
b) decisions ordering provisional or protective measures in accordance with Article 13, paragraph 1.

Article 24
Judgments excluded from Chapter III

This Chapter shall not apply to judgments based on a ground of jurisdiction provided for by national law in accordance with Article 17.

Article 25
Judgments to be recognised or enforced

1. A judgment based on a ground of jurisdiction provided for in Articles 3 to 13, or which is consistent with any such ground, shall be recognised or enforced under this Chapter.

2. In order to be recognised, a judgment referred to in paragraph 1 must have the effect of res judicata in the State of origin.
3. In order to be enforceable, a judgment referred to in paragraph 1 must be enforceable in the State of origin.
4. However, recognition or enforcement may be postponed if the judgment is the subject of review in the State of origin or if the time limit for seeking a review has not expired.

Article 26
Judgments not to be recognised or enforced

A judgment based on a ground of jurisdiction which conflicts with Articles 4, 5, 7, 8 or 12, or whose application is prohibited by virtue of Article 18, shall not be recognised or enforced.

Article 27
Verification of jurisdiction

1. The court addressed shall verify the jurisdiction of the court of origin.
2. In verifying the jurisdiction of the court of origin, the court addressed shall be bound by the findings of fact on which the court of origin based its jurisdiction, unless the judgment was given by default.
3. Recognition or enforcement of a judgment may not be refused on the ground that the court addressed considers that the court of origin should have declined jurisdiction in accordance with Article 22.

Article 28
Grounds for refusal of recognition or enforcement

1. Recognition or enforcement of a judgment may be refused if -
   a) proceedings between the same parties and having the same subject matter are pending before a court of the State addressed, if first seised in accordance with Article 21;
   b) the judgment is inconsistent with a judgment rendered, either in the State addressed or in another State, provided that in the latter case the judgment is capable of being recognised or enforced in the State addressed;
   c) the judgment results from proceedings incompatible with fundamental principles of procedure of the State addressed, including the right of each party to be heard by an impartial and independent court;
   d) the document which instituted the proceedings or an equivalent document, including the essential elements of the claim, was not notified to the

defendant in sufficient time and in such a way as to enable him to arrange for his defence;

e) the judgment was obtained by fraud in connection with a matter of procedure;

f) recognition or enforcement would be manifestly incompatible with the public policy of the State addressed.

2. Without prejudice to such review as is necessary for the purpose of application of the provisions of this Chapter, there shall be no review of the merits of the judgment rendered by the court of origin.

Article 29
Documents to be produced

1. The party seeking recognition or applying for enforcement shall produce -
   a) a complete and certified copy of the judgment;
   b) if the judgment was rendered by default, the original or a certified copy of a document establishing that the document which instituted the proceedings or an equivalent document was notified to the defaulting party;
   c) all documents required to establish that the judgment is *res judicata* in the State of origin or, as the case may be, is enforceable in that State;
   d) if the court addressed so requires, a translation of the documents referred to above, made by a person qualified to do so.
2. No legalisation or similar formality may be required.
3. If the terms of the judgment do not permit the court addressed to verify whether the conditions of this Chapter have been complied with, that court may require the production of any other necessary documents.

Article 30
Procedure

The procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment, are governed by the law of the State addressed so far as the Convention does not provide otherwise. The court addressed shall act expeditiously.

Article 31
Costs of proceedings

No security, bond or deposit, however described, to guarantee the payment of costs or expenses shall be required by reason only that the applicant is a national of, or has its habitual residence in, another Contracting State.

Article 32
Legal aid

Natural persons habitually resident in a Contracting State shall be entitled, in proceedings for recognition or enforcement, to legal aid under the same conditions as apply to persons habitually resident in the requested State.

Article 33
Damages

1. In so far as a judgment awards non-compensatory, including exemplary or punitive, damages, it shall be recognised at least to the extent that similar or comparable damages could have been awarded in the State addressed.
2. a) Where the debtor, after proceedings in which the creditor has the opportunity to be heard, satisfies the court addressed that in the circumstances, including those existing in the State of origin, grossly excessive damages have been awarded, recognition may be limited to a lesser amount.
   b) In no event shall the court addressed recognise the judgment in an amount less than that which could have been awarded in the State addressed in the same circumstances, including those existing in the State of origin.
3. In applying paragraph 1 or 2, the court addressed shall take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings.

Article 34
Severability

If the judgment contains elements which are severable, one or more of them may be separately recognised, declared enforceable, registered for enforcement, or enforced.

Article 35
Authentic instruments

1. Each Contracting State may declare that it will enforce, subject to reciprocity, authentic instruments formally drawn up or registered and enforceable in another Contracting State.
2. The authentic instrument must have been authenticated by a public authority or a delegate of a public authority and the authentication must relate to both the signature and the content of the document.

[3. The provisions concerning recognition and enforcement provided for in this Chapter shall apply as appropriate.]

Article 36
Settlements

Settlements to which a court has given its authority shall be recognised, declared enforceable or registered for enforcement in the State addressed under the same conditions as judgments falling within the Convention, so far as those conditions apply to settlements.

CHAPTER IV
GENERAL PROVISIONS

Article 37
Relationship with other conventions

[See annex]

Article 38
Uniform interpretation

1. In the interpretation of the Convention, regard is to be had to its international character and to the need to promote uniformity in its application.
2. The courts of each Contracting State shall, when applying and interpreting the Convention, take due account of the case law of other Contracting States.

[Article 39

1. Each Contracting State shall, at the request of the Secretary General of the Hague Conference on Private International Law, send to the Permanent Bureau at regular intervals copies of any significant decisions taken in applying the Convention and, as appropriate, other relevant information.
2. The Secretary General of the Hague Conference on Private International Law shall at regular intervals convene a Special Commission to review the operation of the Convention.
3. The Commission may make recommendations on the application or interpretation of the Convention and may propose modifications or revisions of the Convention or the addition of protocols.]

[Article 40

1. Upon a joint request of the parties to a dispute in which the interpretation of the Convention is at issue, or of a court of a Contracting State, the Permanent Bureau of the Hague Conference on Private International Law shall assist in the establishment of a committee of experts to make recommendations to such parties or such court.

[2. The Secretary General of the Hague Conference on Private International Law shall, as soon as possible, convene a Special Commission to draw up an optional protocol setting out rules governing the composition and procedures of the committee of experts.]]

Article 41
Federal clause

ANNEX [back to article 38]

Article 37
Relationship with other conventions

Proposal 1

1. The Convention does not affect any international instrument to which Contracting States are or become Parties and which contains provisions on matters governed by the Convention, unless a contrary declaration is made by the States Parties to such instrument.
2. However, the Convention prevails over such instruments to the extent that they provide for fora not authorized under the provisions of Article 18 of the Convention.
3. The preceding paragraphs also apply to uniform laws based on special ties of a regional or other nature between the States concerned and to instruments adopted by a community of States.

Proposal 2

1. a) In this Article, the Brussels Convention [as amended], Regulation […] of the European Union, and the Lugano Convention [as amended] shall be collectively referred to as 'the European instruments'.
   b) A State party to either of the above Conventions or a Member State of the European Union to which the above Regulation applies shall be collectively referred to as 'European instrument States'.
2. Subject to the following provisions [of this Article], a European instrument State shall apply the European instruments, and not the Convention, whenever the European instruments are applicable according to their terms.
3. Except where the provisions of the European instruments on -
   a) exclusive jurisdiction;
   b) prorogation of jurisdiction;
   c) lis pendens and related actions;
   d) protective jurisdiction for consumers or employees;

   are applicable, a European instrument State shall apply Articles 3, 5 to 11, 14 to 16 and 18 of the Convention whenever the defendant is not domiciled in a European instrument State.
4. Even if the defendant is domiciled in a European instrument State, a court of such a State shall apply -
   a) Article 4 of the Convention whenever the court chosen is not in a European instrument State;
   b) Article 12 of the Convention whenever the court with exclusive jurisdiction under that provision is not in a European instrument State; and
   c) Articles 21 and 22 of this Convention whenever the court in whose favour the proceedings are stayed or jurisdiction is declined is not a court of a European instrument State.

Note: Another provision will be needed for other conventions and instruments.

Proposal 3

5. Judgments of courts of a Contracting State to this Convention based on jurisdiction granted under the terms of adifferent international convention ('other Convention') shall be recognised and enforced in courts of Contracting States to this Convention which are also Contracting States to the other Convention. This provision shall not apply if, by reservation under Article …, a Contracting State chooses -
   a) not to be governed by this provision, or
   b) not to be governed by this provision as to certain designated other conventions.

COUNCIL REGULATION (EC) No. 1346/2000
of 29 May 2000
ON INSOLVENCY PROCEEDINGS*

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 61(c) and 67(1) thereof,
Having regard to the initiative of the Federal Republic of Germany and the Republic of Finland,
Having regard to the opinion of the European Parliament,[1]
Having regard to the opinion of the Economic and Social Committee,[2]

Whereas:

(1) The European Union has set out the aim of establishing an area of freedom, security and justice.

(2) The proper functioning of the internal market requires that cross-border insolvency proceedings should operate efficiently and effectively and this Regulation needs to be adopted in order to achieve this objective which comes within the scope of judicial cooperation in civil matters within the meaning of Article 65 of the Treaty.

(3) The activities of undertakings have more and more cross-border effects and are therefore increasingly being regulated by Community law. While the insolvency of such undertakings also affects the proper functioning of the internal market, there is a need for a Community act requiring coordination of the measures to be taken regarding an insolvent debtor's assets.

(4) It is necessary for the proper functioning of the internal market to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position (forum shopping).

(5) These objectives cannot be achieved to a sufficient degree at national level and action at Community level is therefore justified.

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* This text is published in *Official Journal of the European Communities*, L 160, 30 June 2000, p. 1 *et seq*.

[1] Opinion delivered on 2 March 2000 (not yet published in the *Official Journal*).

[2] Opinion delivered on 26 January 2000 (not yet published in the *Official Journal*).

(6) In accordance with the principle of proportionality this Regulation should be confined to provisions governing jurisdiction for opening insolvency proceedings and judgments which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings. In addition, this Regulation should contain provisions regarding the recognition of those judgments and the applicable law which also satisfy that principle.

(7) Insolvency proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings are excluded from the scope of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters,[3] as amended by the Conventions on Accession to this Convention.[4]

(8) In order to achieve the aim of improving the efficiency and effectiveness of insolvency proceedings having cross-border effects, it is necessary, and appropriate, that the provisions on jurisdiction, recognition and applicable law in this area should be contained in a Community law measure which is binding and directly applicable in Member States.

(9) This Regulation should apply to insolvency proceedings, whether the debtor is a natural person or a legal person, a trader or an individual. The insolvency proceedings to which this Regulation applies are listed in the Annexes. Insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings holding funds or securities for third parties and collective investment undertakings should be excluded from the scope of this Regulation. Such undertakings should not be covered by this Regulation since they are subject to special arrangements and, to some extent, the national supervisory authorities have extremely wide-ranging powers of intervention.

(10) Insolvency proceedings do not necessarily involve the intervention of a judicial authority; the expression 'court' in this Regulation should be given a broad meaning and include a person or body empowered by national law to open insolvency proceedings. In order for this Regulation to apply, proceedings (comprising acts and formalities set down in law) should not only have to comply with the provisions of this Regulation, but they should also be officially recognised and legally effective in the Member State in which the insolvency proceedings are opened and should be collective insolvency proceedings which entail the partial or total divestment of the debtor and the appointment of a liquidator.

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[3] *OJ* L 299, 31.12.1972, p. 32.

[4] *OJ* L 204, 2.8.1975, p. 28; *OJ* L 304, 30.10.1978, p. 1; *OJ* L 388, 31.12.1982, p. 1; *OJ* L 285, 3.10.1989, p. 1; *OJ* C 15, 15.1.1997, p. 1.

(11) This Regulation acknowledges the fact that as a result of widely differing substantive laws it is not practical to introduce insolvency proceedings with universal scope in the entire Community. The application without exception of the law of the State of opening of proceedings would, against this background, frequently lead to difficulties. This applies, for example, to the widely differing laws on security interests to be found in the Community. Furthermore, the preferential rights enjoyed by some creditors in the insolvency proceedings are, in some cases, completely different. This Regulation should take account of this in two different ways. On the one hand, provision should be made for special rules on applicable law in the case of particularly significant rights and legal relationships (e.g. rights in rem and contracts of employment). On the other hand, national proceedings covering only assets situated in the State of opening should also be allowed alongside main insolvency proceedings with universal scope.

(12) This Regulation enables the main insolvency proceedings to be opened in the Member State where the debtor has the centre of his main interests. These proceedings have universal scope and aim at encompassing all the debtor's assets. To protect the diversity of interests, this Regulation permits secondary proceedings to be opened to run in parallel with the main proceedings. Secondary proceedings may be opened in the Member State where the debtor has an establishment. The effects of secondary proceedings are limited to the assets located in that State. Mandatory rules of coordination with the main proceedings satisfy the need for unity in the Community.

(13) The 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.

(14) This Regulation applies only to proceedings where the centre of the debtor's main interests is located in the Community.

(15) The rules of jurisdiction set out in this Regulation establish only international jurisdiction, that is to say, they designate the Member State the courts of which may open insolvency proceedings. Territorial jurisdiction within that Member State must be established by the national law of the Member State concerned.

(16) The court having jurisdiction to open the main insolvency proceedings should be enabled to order provisional and protective measures from the time of the request to open proceedings. Preservation measures both prior to and after the commencement of the insolvency proceedings are very important to guarantee the effectiveness of the insolvency proceedings. In that connection this Regulation should afford different possibilities. On the one hand, the court competent for the main insolvency proceedings should be able also to order

provisional protective measures covering assets situated in the territory of other Member States. On the other hand, a liquidator temporarily appointed prior to the opening of the main insolvency proceedings should be able, in the Member States in which an establishment belonging to the debtor is to be found, to apply for the preservation measures which are possible under the law of those States.

(17) Prior to the opening of the main insolvency proceedings, the right to request the opening of insolvency proceedings in the Member State where the debtor has an establishment should be limited to local creditors and creditors of the local establishment or to cases where main proceedings cannot be opened under the law of the Member State where the debtor has the centre of his main interest. The reason for this restriction is that cases where territorial insolvency proceedings are requested before the main insolvency proceedings are intended to be limited to what is absolutely necessary. If the main insolvency proceedings are opened, the territorial proceedings become secondary.

(18) Following the opening of the main insolvency proceedings, the right to request the opening of insolvency proceedings in a Member State where the debtor has an establishment is not restricted by this Regulation. The liquidator in the main proceedings or any other person empowered under the national law of that Member State may request the opening of secondary insolvency proceedings.

(19) Secondary insolvency proceedings may serve different purposes, besides the protection of local interests.
Cases may arise where the estate of the debtor is too complex to administer as a unit or where differences in the legal systems concerned are so great that difficulties may arise from the extension of effects deriving from the law of the State of the opening to the other States where the assets are located. For this reason the liquidator in the main proceedings may request the opening of secondary proceedings when the efficient administration of the estate so requires.

(20) Main insolvency proceedings and secondary proceedings can, however, contribute to the effective realisation of the total assets only if all the concurrent proceedings pending are coordinated. The main condition here is that the various liquidators must cooperate closely, in particular by exchanging a sufficient amount of information. In order to ensure the dominant role of the main insolvency proceedings, the liquidator in such proceedings should be given several possibilities for intervening in secondary insolvency proceedings which are pending at the same time. For example, he should be able to propose a restructuring plan or composition or apply for realisation of the assets in the secondary insolvency proceedings to be suspended.

(21) Every creditor, who has his habitual residence, domicile or registered office in the Community, should have the right to lodge his claims in each of the insolvency proceedings pending in the Community relating to the debtor's assets. This should also apply to tax authorities and social insurance institutions. However, in order to ensure equal treatment of creditors, the distribution of proceeds must be coordinated. Every creditor should be able to keep what he has received in the course of insolvency proceedings but should be entitled only to participate in the distribution of total assets in other proceedings if creditors with the same standing have obtained the same proportion of their claims.

(22) This Regulation should provide for immediate recognition of judgments concerning the opening, conduct and closure of insolvency proceedings which come within its scope and of judgments handed down in direct connection with such insolvency proceedings. Automatic recognition should therefore mean that the effects attributed to the proceedings by the law of the State in which the proceedings were opened extend to all other Member States. Recognition of judgments delivered by the courts of the Member States should be based on the principle of mutual trust. To that end, grounds for non-recognition should be reduced to the minimum necessary.
This is also the basis on which any dispute should be resolved where the courts of two Member States both claim competence to open the main insolvency proceedings. The decision of the first court to open proceedings should be recognised in the other Member States without those Member States having the power to scrutinise the court's decision.

(23) This Regulation should set out, for the matters covered by it, uniform rules on conflict of laws which replace, within their scope of application, national rules of private international law. Unless otherwise stated, the law of the Member State of the opening of the proceedings should be applicable (lex concursus). This rule on conflict of laws should be valid both for the main proceedings and for local proceedings; the lex concursus determines all the effects of the insolvency proceedings, both procedural and substantive, on the persons and legal relations concerned. It governs all the conditions for the opening, conduct and closure of the insolvency proceedings.

(24) Automatic recognition of insolvency proceedings to which the law of the opening State normally applies may interfere with the rules under which transactions are carried out in other Member States. To protect legitimate expectations and the certainty of transactions in Member States other than that in which proceedings are opened, provisions should be made for a number of exceptions to the general rule.

(25) There is a particular need for a special reference diverging from the law of the opening State in the case of rights in rem, since these are of considerable importance for the granting of credit. The basis, validity and extent of such a right in rem should therefore normally be determined according to the lex situs and not be affected by the opening of insolvency proceedings. The proprietor of the right in rem should therefore be able to continue to assert his right to segregation or separate settlement of the collateral security. Where assets are subject to rights in rem under the lex situs in one Member State but the main proceedings are being carried out in another Member State, the liquidator in the main proceedings should be able to request the opening of secondary proceedings in the jurisdiction where the rights in rem arise if the debtor has an establishment there. If a secondary proceeding is not opened, the surplus on sale of the asset covered by rights in rem must be paid to the liquidator in the main proceedings.

(26) If a set-off is not permitted under the law of the opening State, a creditor should nevertheless be entitled to the set-off if it is possible under the law applicable to the claim of the insolvent debtor. In this way, set-off will acquire a kind of guarantee function based on legal provisions on which the creditor concerned can rely at the time when the claim arises.

(27) There is also a need for special protection in the case of payment systems and financial markets. This applies for example to the position-closing agreements and netting agreements to be found in such systems as well as to the sale of securities and to the guarantees provided for such transactions as governed in particular by Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems.[5] For such transactions, the only law which is material should thus be that applicable to the system or market concerned. This provision is intended to prevent the possibility of mechanisms for the payment and settlement of transactions provided for in the payment and set-off systems or on the regulated financial markets of the Member States being altered in the case of insolvency of a business partner. Directive 98/26/EC contains special provisions which should take precedence over the general rules in this Regulation.

(28) In order to protect employees and jobs, the effects of insolvency proceedings on the continuation or termination of employment and on the rights and obligations of all parties to such employment must be determined by the law applicable to the agreement in accordance with the general rules on conflict of law. Any other insolvency-law questions, such as whether the employees'

[5] *OJ* L 166, 11.6.1998, p. 45.

claims are protected by preferential rights and what status such preferential rights may have, should be determined by the law of the opening State.

(29) For business considerations, the main content of the decision opening the proceedings should be published in the other Member States at the request of the liquidator. If there is an establishment in the Member State concerned, there may be a requirement that publication is compulsory. In neither case, however, should publication be a prior condition for recognition of the foreign proceedings.

(30) It may be the case that some of the persons concerned are not in fact aware that proceedings have been opened and act in good faith in a way that conflicts with the new situation. In order to protect such persons who make a payment to the debtor because they are unaware that foreign proceedings have been opened when they should in fact have made the payment to the foreign liquidator, it should be provided that such a payment is to have a debt-discharging effect.

(31) This Regulation should include Annexes relating to the organisation of insolvency proceedings. As these Annexes relate exclusively to the legislation of Member States, there are specific and substantiated reasons for the Council to reserve the right to amend these Annexes in order to take account of any amendments to the domestic law of the Member States.

(32) The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community, have given notice of their wish to take part in the adoption and application of this Regulation.

(33) Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, is not participating in the adoption of this Regulation, and is therefore not bound by it nor subject to its application,

HAS ADOPTED THIS REGULATION:

CHAPTER I
GENERAL PROVISIONS

Article 1
Scope

1. This Regulation shall apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator.
2. This Regulation shall not apply to insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings which provide services involving the holding of funds or securities for third parties, or to collective investment undertakings.

Article 2
Definitions

For the purposes of this Regulation:

(a) 'insolvency proceedings' shall mean the collective proceedings referred to in Article 1(1). These proceedings are listed in Annex A;

(b) 'liquidator' shall mean any person or body whose function is to administer or liquidate assets of which the debtor has been divested or to supervise the administration of his affairs. Those persons and bodies are listed in Annex C;

(c) 'winding-up proceedings' shall mean insolvency proceedings within the meaning of point (a) involving realising the assets of the debtor, including where the proceedings have been closed by a composition or other measure terminating the insolvency, or closed by reason of the insufficiency of the assets. Those proceedings are listed in Annex B;

(d) 'court' shall mean the judicial body or any other competent body of a Member State empowered to open insolvency proceedings or to take decisions in the course of such proceedings;

(e) 'judgment' in relation to the opening of insolvency proceedings or the appointment of a liquidator shall include the decision of any court empowered to open such proceedings or to appoint a liquidator;

(f) 'the time of the opening of proceedings' shall mean the time at which the judgment opening proceedings becomes effective, whether it is a final judgment or not;

(g) 'the Member State in which assets are situated' shall mean, in the case of:
- tangible property, the Member State within the territory of which the property is situated,
- property and rights ownership of or entitlement to which must be entered in a public register, the Member State under the authority of which the register is kept,

- claims, the Member State within the territory of which the third party required to meet them has the centre of his main interests, as determined in Article 3(1);

(h) 'establishment' shall mean any place of operations where the debtor carries out a non-transitory economic activity with human means and goods.

Article 3
International jurisdiction

1. The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.
2. Where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.
3. Where insolvency proceedings have been opened under paragraph 1, any proceedings opened subsequently under paragraph 2 shall be secondary proceedings. These latter proceedings must be winding-up proceedings.
4. Territorial insolvency proceedings referred to in paragraph 2 may be opened prior to the opening of main insolvency proceedings in accordance with paragraph 1 only:
   (a) where insolvency proceedings under paragraph 1 cannot be opened because of the conditions laid down by the law of the Member State within the territory of which the centre of the debtor's main interests is situated; or
   (b) where the opening of territorial insolvency proceedings is requested by a creditor who has his domicile, habitual residence or registered office in the Member State within the territory of which the establishment is situated, or whose claim arises from the operation of that establishment.

Article 4
Law applicable

1. Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State

within the territory of which such proceedings are opened, hereafter referred to as the 'State of the opening of proceedings'.

2. The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. It shall determine in particular:
   (a) against which debtors insolvency proceedings may be brought on account of their capacity;
   (b) the assets which form part of the estate and the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings;
   (c) the respective powers of the debtor and the liquidator;
   (d) the conditions under which set-offs may be invoked;
   (e) the effects of insolvency proceedings on current contracts to which the debtor is party;
   (f) the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of lawsuits pending;
   (g) the claims which are to be lodged against the debtor's estate and the treatment of claims arising after the opening of insolvency proceedings;
   (h) the rules governing the lodging, verification and admission of claims;
   (i) the rules governing the distribution of proceeds from the realisation of assets, the ranking of claims and the rights of creditors who have obtained partial satisfaction after the opening of insolvency proceedings by virtue of a right in rem or through a set-off;
   (j) the conditions for and the effects of closure of insolvency proceedings, in particular by composition;
   (k) creditors' rights after the closure of insolvency proceedings;
   (l) who is to bear the costs and expenses incurred in the insolvency proceedings;
   (m) the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors.

Article 5
Third parties' rights in rem

1. The opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets - both specific assets and collections of indefinite assets as a whole which change from time to time - belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings.
2. The rights referred to in paragraph 1 shall in particular mean:

(a) the right to dispose of assets or have them disposed of and to obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a lien or a mortgage;
(b) the exclusive right to have a claim met, in particular a right guaranteed by a lien in respect of the claim or by assignment of the claim by way of a guarantee;
(c) the right to demand the assets from, and/or to require restitution by, anyone having possession or use of them contrary to the wishes of the party so entitled;
(d) a right in rem to the beneficial use of assets.

3. The right, recorded in a public register and enforceable against third parties, under which a right in rem within the meaning of paragraph 1 may be obtained, shall be considered a right in rem.
4. Paragraph 1 shall not preclude actions for voidness, voidability or unenforceability as referred to in Article 4(2)(m).

Article 6
Set-off

1. The opening of insolvency proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of the debtor, where such a set-off is permitted by the law applicable to the insolvent debtor's claim.
2. Paragraph 1 shall not preclude actions for voidness, voidability or unenforceability as referred to in Article 4(2)(m).

Article 7
Reservation of title

1. The opening of insolvency proceedings against the purchaser of an asset shall not affect the seller's rights based on a reservation of title where at the time of the opening of proceedings the asset is situated within the territory of a Member State other than the State of opening of proceedings.
2. The opening of insolvency proceedings against the seller of an asset, after delivery of the asset, shall not constitute grounds for rescinding or terminating the sale and shall not prevent the purchaser from acquiring title where at the time of the opening of proceedings the asset sold is situated within the territory of a Member State other than the State of the opening of proceedings.
3. Paragraphs 1 and 2 shall not preclude actions for voidness, voidability or unenforceability as referred to in Article 4(2)(m).

Article 8
Contracts relating to immoveable property

The effects of insolvency proceedings on a contract conferring the right to acquire or make use of immoveable property shall be governed solely by the law of the Member State within the territory of which the immoveable property is situated.

Article 9
Payment systems and financial markets

1. Without prejudice to Article 5, the effects of insolvency proceedings on the rights and obligations of the parties to a payment or settlement system or to a financial market shall be governed solely by the law of the Member State applicable to that system or market.
2. Paragraph 1 shall not preclude any action for voidness, voidability or unenforceability which may be taken to set aside payments or transactions under the law applicable to the relevant payment system or financial market.

Article 10
Contracts of employment

The effects of insolvency proceedings on employment contracts and relationships shall be governed solely by the law of the Member State applicable to the contract of employment.

Article 11
Effects on rights subject to registration

The effects of insolvency proceedings on the rights of the debtor in immoveable property, a ship or an aircraft subject to registration in a public register shall be determined by the law of the Member State under the authority of which the register is kept.

Article 12
Community patents and trade marks

For the purposes of this Regulation, a Community patent, a Community trade mark or any other similar right established by Community law may be included only in the proceedings referred to in Article 3(1).

Article 13
Detrimental acts

Article 4(2)(m) shall not apply where the person who benefited from an act detrimental to all the creditors provides proof that:

- the said act is subject to the law of a Member State other than that of the State of the opening of proceedings, and
- that law does not allow any means of challenging that act in the relevant case.

Article 14
Protection of third-party purchasers

Where, by an act concluded after the opening of insolvency proceedings, the debtor disposes, for consideration, of:

- an immoveable asset, or
- a ship or an aircraft subject to registration in a public register, or
- securities whose existence presupposes registration in a register laid down by law, the validity of that act shall be governed by the law of the State within the territory of which the immoveable asset is situated or under the authority of which the register is kept.

Article 15
Effects of insolvency proceedings on lawsuits pending

The effects of insolvency proceedings on a lawsuit pending concerning an asset or a right of which the debtor has been divested shall be governed solely by the law of the Member State in which that lawsuit is pending.

CHAPTER II
RECOGNITION OF INSOLVENCY PROCEEDINGS

Article 16
Principle

1. Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings.

This rule shall also apply where, on account of his capacity, insolvency proceedings cannot be brought against the debtor in other Member States.

2. Recognition of the proceedings referred to in Article 3(1) shall not preclude the opening of the proceedings referred to in Article 3(2) by a court in another Member State. The latter proceedings shall be secondary insolvency proceedings within the meaning of Chapter III.

Article 17
Effects of recognition

1. The judgment opening the proceedings referred to in Article 3(1) shall, with no further formalities, produce the same effects in any other Member State as under this law of the State of the opening of proceedings, unless this Regulation provides otherwise and as long as no proceedings referred to in Article 3(2) are opened in that other Member State.
2. The effects of the proceedings referred to in Article 3(2) may not be challenged in other Member States. Any restriction of the creditors' rights, in particular a stay or discharge, shall produce effects vis-à-vis assets situated within the territory of another Member State only in the case of those creditors who have given their consent.

Article 18
Powers of the liquidator

1. The liquidator appointed by a court which has jurisdiction pursuant to Article 3(1) may exercise all the powers conferred on him by the law of the State of the opening of proceedings in another Member State, as long as no other insolvency proceedings have been opened there nor any preservation measure to the contrary has been taken there further to a request for the opening of insolvency proceedings in that State. He may in particular remove the debtor's assets from the territory of the Member State in which they are situated, subject to Articles 5 and 7.
2. The liquidator appointed by a court which has jurisdiction pursuant to Article 3(2) may in any other Member State claim through the courts or out of court that moveable property was removed from the territory of the State of the opening of proceedings to the territory of that other Member State after the opening of the insolvency proceedings. He may also bring any action to set aside which is in the interests of the creditors.
3. In exercising his powers, the liquidator shall comply with the law of the Member State within the territory of which he intends to take action, in particular with regard to procedures for the realisation of assets. Those powers

may not include coercive measures or the right to rule on legal proceedings or disputes.

Article 19
Proof of the liquidator's appointment

The liquidator's appointment shall be evidenced by a certified copy of the original decision appointing him or by any other certificate issued by the court which has jurisdiction.
A translation into the official language or one of the official languages of the Member State within the territory of which he intends to act may be required. No legalisation or other similar formality shall be required.

Article 20
Return and imputation

1. A creditor who, after the opening of the proceedings referred to in Article 3(1) obtains by any means, in particular through enforcement, total or partial satisfaction of his claim on the assets belonging to the debtor situated within the territory of another Member State, shall return what he has obtained to the liquidator, subject to Articles 5 and 7.
2. In order to ensure equal treatment of creditors a creditor who has, in the course of insolvency proceedings, obtained a dividend on his claim shall share in distributions made in other proceedings only where creditors of the same ranking or category have, in those other proceedings, obtained an equivalent dividend.

Article 21
Publication

1. The liquidator may request that notice of the judgment opening insolvency proceedings and, where appropriate, the decision appointing him, be published in any other Member State in accordance with the publication procedures provided for in that State. Such publication shall also specify the liquidator appointed and whether the jurisdiction rule applied is that pursuant to Article 3(1) or Article 3(2).
2. However, any Member State within the territory of which the debtor has an establishment may require mandatory publication. In such cases, the liquidator or any authority empowered to that effect in the Member State where the proceedings referred to in Article 3(1) are opened shall take all necessary measures to ensure such publication.

Article 22
Registration in a public register

1. The liquidator may request that the judgment opening the proceedings referred to in Article 3(1) be registered in the land register, the trade register and any other public register kept in the other Member States.
2. However, any Member State may require mandatory registration. In such cases, the liquidator or any authority empowered to that effect in the Member State where the proceedings referred to in Article 3(1) have been opened shall take all necessary measures to ensure such registration.

Article 23
Costs

The costs of the publication and registration provided for in Articles 21 and 22 shall be regarded as costs and expenses incurred in the proceedings.

Article 24
Honouring of an obligation to a debtor

1. Where an obligation has been honoured in a Member State for the benefit of a debtor who is subject to insolvency proceedings opened in another Member State, when it should have been honoured for the benefit of the liquidator in those proceedings, the person honouring the obligation shall be deemed to have discharged it if he was unaware of the opening of proceedings.
2. Where such an obligation is honoured before the publication provided for in Article 21 has been effected, the person honouring the obligation shall be presumed, in the absence of proof to the contrary, to have been unaware of the opening of insolvency proceedings; where the obligation is honoured after such publication has been effected, the person honouring the obligation shall be presumed, in the absence of proof to the contrary, to have been aware of the opening of proceedings.

Article 25
Recognition and enforceability of other judgments

1. Judgments handed down by a court whose judgment concerning the opening of proceedings is recognised in accordance with Article 16 and which concern the course and closure of insolvency proceedings, and compositions approved by that court shall also be recognised with no further formalities. Such judgments shall be enforced in accordance with Articles 31 to 51, with the exception of Article 34(2), of the Brussels Convention on Jurisdiction and the

Enforcement of Judgments in Civil and Commercial Matters, as amended by the Conventions of Accession to this Convention.

The first subparagraph shall also apply to judgments deriving directly from the insolvency proceedings and which are closely linked with them, even if they were handed down by another court.

The first subparagraph shall also apply to judgments relating to preservation measures taken after the request for the opening of insolvency proceedings.

2. The recognition and enforcement of judgments other than those referred to in paragraph 1 shall be governed by the Convention referred to in paragraph 1, provided that that Convention is applicable.
3. The Member States shall not be obliged to recognise or enforce a judgment referred to in paragraph 1 which might result in a limitation of personal freedom or postal secrecy.

Article 26[6]
Public policy

Any Member State may refuse to recognise insolvency proceedings opened in another Member State or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual.

CHAPTER III
SECONDARY INSOLVENCY PROCEEDINGS

Article 27
Opening of proceedings

The opening of the proceedings referred to in Article 3(1) by a court of a Member State and which is recognised in another Member State (main proceedings) shall permit the opening in that other Member State, a court of which has jurisdiction pursuant to Article 3(2), of secondary insolvency proceedings without the debtor's insolvency being examined in that other State. These latter proceedings must be among the proceedings listed in Annex B. Their effects shall be restricted to the assets of the debtor situated within the territory of that other Member State.

[6] Note the Declaration by Portugal concerning the application of Articles 26 and 37 (*OJ* C 183, 30.6.2000, p. 1).

Article 28
Applicable law

Save as otherwise provided in this Regulation, the law applicable to secondary proceedings shall be that of the Member State within the territory of which the secondary proceedings are opened.

Article 29
Right to request the opening of proceedings

The opening of secondary proceedings may be requested by:

(a) the liquidator in the main proceedings;
(b) any other person or authority empowered to request the opening of insolvency proceedings under the law of the Member State within the territory of which the opening of secondary proceedings is requested.

Article 30
Advance payment of costs and expenses

Where the law of the Member State in which the opening of secondary proceedings is requested requires that the debtor's assets be sufficient to cover in whole or in part the costs and expenses of the proceedings, the court may, when it receives such a request, require the applicant to make an advance payment of costs or to provide appropriate security.

Article 31
Duty to cooperate and communicate information

1. Subject to the rules restricting the communication of information, the liquidator in the main proceedings and the liquidators in the secondary proceedings shall be duty bound to communicate information to each other. They shall immediately communicate any information which may be relevant to the other proceedings, in particular the progress made in lodging and verifying claims and all measures aimed at terminating the proceedings.
2. Subject to the rules applicable to each of the proceedings, the liquidator in the main proceedings and the liquidators in the secondary proceedings shall be duty bound to cooperate with each other.
3. The liquidator in the secondary proceedings shall give the liquidator in the main proceedings an early opportunity of submitting proposals on the liquidation or use of the assets in the secondary proceedings.

Article 32
Exercise of creditors' rights

1. Any creditor may lodge his claim in the main proceedings and in any secondary proceedings.
2. The liquidators in the main and any secondary proceedings shall lodge in other proceedings claims which have already been lodged in the proceedings for which they were appointed, provided that the interests of creditors in the latter proceedings are served thereby, subject to the right of creditors to oppose that or to withdraw the lodgement of their claims where the law applicable so provides.
3. The liquidator in the main or secondary proceedings shall be empowered to participate in other proceedings on the same basis as a creditor, in particular by attending creditors' meetings.

Article 33
Stay of liquidation

1. The court, which opened the secondary proceedings, shall stay the process of liquidation in whole or in part on receipt of a request from the liquidator in the main proceedings, provided that in that event it may require the liquidator in the main proceedings to take any suitable measure to guarantee the interests of the creditors in the secondary proceedings and of individual classes of creditors. Such a request from the liquidator may be rejected only if it is manifestly of no interest to the creditors in the main proceedings. Such a stay of the process of liquidation may be ordered for up to three months. It may be continued or renewed for similar periods.
2. The court referred to in paragraph 1 shall terminate the stay of the process of liquidation:
   - at the request of the liquidator in the main proceedings,
   - of its own motion, at the request of a creditor or at the request of the liquidator in the secondary proceedings if that measure no longer appears justified, in particular, by the interests of creditors in the main proceedings or in the secondary proceedings.

Article 34
Measures ending secondary insolvency proceedings

1. Where the law applicable to secondary proceedings allows for such proceedings to be closed without liquidation by a rescue plan, a composition or a comparable measure, the liquidator in the main proceedings shall be empowered to propose such a measure himself.

Closure of the secondary proceedings by a measure referred to in the first subparagraph shall not become final without the consent of the liquidator in the main proceedings; failing his agreement, however, it may become final if the financial interests of the creditors in the main proceedings are not affected by the measure proposed.

2. Any restriction of creditors' rights arising from a measure referred to in paragraph 1 which is proposed in secondary proceedings, such as a stay of payment or discharge of debt, may not have effect in respect of the debtor's assets not covered by those proceedings without the consent of all the creditors having an interest.
3. During a stay of the process of liquidation ordered pursuant to Article 33, only the liquidator in the main proceedings or the debtor, with the former's consent, may propose measures laid down in paragraph 1 of this Article in the secondary proceedings; no other proposal for such a measure shall be put to the vote or approved.

Article 35
Assets remaining in the secondary proceedings

If by the liquidation of assets in the secondary proceedings it is possible to meet all claims allowed under those proceedings, the liquidator appointed in those proceedings shall immediately transfer any assets remaining to the liquidator in the main proceedings.

Article 36
Subsequent opening of the main proceedings

Where the proceedings referred to in Article 3(1) are opened following the opening of the proceedings referred to in Article 3(2) in another Member State, Articles 31 to 35 shall apply to those opened first, in so far as the progress of those proceedings so permits.

Article 37[7]
Conversion of earlier proceedings

The liquidator in the main proceedings may request that proceedings listed in Annex A previously opened in another Member State be converted into winding-up proceedings if this proves to be in the interests of the creditors in the main proceedings.

[7] Note the Declaration by Portugal concerning the application of Articles 26 and 37 (*OJ* C 183, 30.6.2000, p. 1).

The court with jurisdiction under Article 3(2) shall order conversion into one of the proceedings listed in Annex B.

Article 38
Preservation measures

Where the court of a Member State which has jurisdiction pursuant to Article 3(1) appoints a temporary administrator in order to ensure the preservation of the debtor's assets, that temporary administrator shall be empowered to request any measures to secure and preserve any of the debtor's assets situated in another Member State, provided for under the law of that State, for the period between the request for the opening of insolvency proceedings and the judgment opening the proceedings.

CHAPTER IV
PROVISION OF INFORMATION FOR CREDITORS AND LODGEMENT OF THEIR CLAIMS

Article 39
Right to lodge claims

Any creditor who has his habitual residence, domicile or registered office in a Member State other than the State of the opening of proceedings, including the tax authorities and social security authorities of Member States, shall have the right to lodge claims in the insolvency proceedings in writing.

Article 40

Duty to inform creditors

1. As soon as insolvency proceedings are opened in a Member State, the court of that State having jurisdiction or the liquidator appointed by it shall immediately inform known creditors who have their habitual residences, domiciles or registered offices in the other Member States.
2. That information, provided by an individual notice, shall in particular include time limits, the penalties laid down in regard to those time limits, the body or authority empowered to accept the lodgement of claims and the other measures laid down. Such notice shall also indicate whether creditors whose claims are preferential or secured in rem need lodge their claims.

Article 41
Content of the lodgement of a claim

A creditor shall send copies of supporting documents, if any, and shall indicate the nature of the claim, the date on which it arose and its amount, as well as whether he alleges preference, security in rem or a reservation of title in respect of the claim and what assets are covered by the guarantee he is invoking.

Article 42
Languages

1. The information provided for in Article 40 shall be provided in the official language or one of the official languages of the State of the opening of proceedings. For that purpose a form shall be used bearing the heading 'Invitation to lodge a claim. Time limits to be observed' in all the official languages of the institutions of the European Union.
2. Any creditor who has his habitual residence, domicile or registered office in a Member State other than the State of the opening of proceedings may lodge his claim in the official language or one of the official languages of that other State. In that event, however, the lodgement of his claim shall bear the heading 'Lodgement of claim' in the official language or one of the official languages of the State of the opening of proceedings. In addition, he may be required to provide a translation into the official language or one of the official languages of the State of the opening of proceedings.

CHAPTER V
TRANSITIONAL AND FINAL PROVISIONS

Article 43
Applicability in time

The provisions of this Regulation shall apply only to insolvency proceedings opened after its entry into force.
Acts done by a debtor before the entry into force of this Regulation shall continue to be governed by the law which was applicable to them at the time they were done.

Article 44
Relationship to Conventions

1. After its entry into force, this Regulation replaces, in respect of the matters referred to therein, in the relations between Member States, the Conventions concluded between two or more Member States, in particular:
   (a) the Convention between Belgium and France on Jurisdiction and the Validity and Enforcement of Judgments, Arbitration Awards and Authentic Instruments, signed at Paris on 8 July 1899;
   (b) the Convention between Belgium and Austria on Bankruptcy, Winding-up, Arrangements, Compositions and Suspension of Payments (with Additional Protocol of 13 June 1973), signed at Brussels on 16 July 1969;
   (c) the Convention between Belgium and the Netherlands on Territorial Jurisdiction, Bankruptcy and the Validity and Enforcement of Judgments, Arbitration Awards and Authentic Instruments, signed at Brussels on 28 March 1925;
   (d) the Treaty between Germany and Austria on Bankruptcy, Winding-up, Arrangements and Compositions, signed at Vienna on 25 May 1979;
   (e) the Convention between France and Austria on Jurisdiction, Recognition and Enforcement of Judgments on Bankruptcy, signed at Vienna on 27 February 1979;
   (f) the Convention between France and Italy on the Enforcement of Judgments in Civil and Commercial Matters, signed at Rome on 3 June 1930;
   (g) the Convention between Italy and Austria on Bankruptcy, Winding-up, Arrangements and Compositions, signed at Rome on 12 July 1977;
   (h) the Convention between the Kingdom of the Netherlands and the Federal Republic of Germany on the Mutual Recognition and Enforcement of Judgments and other Enforceable Instruments in Civil and Commercial Matters, signed at The Hague on 30 August 1962;
   (i) the Convention between the United Kingdom and the Kingdom of Belgium providing for the Reciprocal Enforcement of Judgments in Civil and Commercial Matters, with Protocol, signed at Brussels on 2 May 1934;
   (j) the Convention between Denmark, Finland, Norway, Sweden and Iceland on Bankruptcy, signed at Copenhagen on 7 November 1933;
   (k) the European Convention on Certain International Aspects of Bankruptcy, signed at Istanbul on 5 June 1990.
2. The Conventions referred to in paragraph 1 shall continue to have effect with regard to proceedings opened before the entry into force of this Regulation.
3. This Regulation shall not apply:
   (a) in any Member State, to the extent that it is irreconcilable with the obligations arising in relation to bankruptcy from a convention concluded

by that State with one or more third countries before the entry into force of this Regulation;

(b) in the United Kingdom of Great Britain and Northern Ireland, to the extent that is irreconcilable with the obligations arising in relation to bankruptcy and the winding-up of insolvent companies from any arrangements with the Commonwealth existing at the time this Regulation enters into force.

Article 45
Amendment of the Annexes

The Council, acting by qualified majority on the initiative of one of its members or on a proposal from the Commission, may amend the Annexes.

Article 46
Reports

No later than 1 June 2012, and every five years thereafter, the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Regulation.
The report shall be accompanied if need be by a proposal for adaptation of this Regulation.

Article 47

Entry into force

This Regulation shall enter into force on 31 May 2002.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

Done at Brussels […]

[Annexes omitted]

COUNCIL REGULATION (EC) No. 1347/2000 of 29 May 2000
ON JURISDICTION AND THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN MATRIMONIAL MATTERS AND IN MATTERS OF PARENTAL RESPONSIBILITY FOR CHILDREN OF BOTH SPOUSES[*]

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and Article 67(1) thereof,
Having regard to the proposal from the Commission,[1]
Having regard to the Opinion of the European Parliament,[2]
Having regard to the Opinion of the Economic and Social Committee,[3]

Whereas:

(1) The Member States have set themselves the objective of maintaining and developing the Union as an area of freedom, security and justice, in which the free movement of persons is assured. To establish such an area, the Community is to adopt, among others, the measures in the field of judicial cooperation in civil matters needed for the proper functioning of the internal market.

(2) The proper functioning of the internal market entails the need to improve and simplify the free movement of judgments in civil matters.

(3) This is a subject now falling within the ambit of Article 65 of the Treaty.

(4) Differences between certain national rules governing jurisdiction and enforcement hamper the free movement of persons and the sound operation of the internal market. There are accordingly grounds for enacting provisions to unify the rules of conflict of jurisdiction in matrimonial matters and in matters

[*] The text of the Regulation is published in *Official Journal of the European Communities*, L 160, 30 June 2000, p. 23 *et seq*.

[1] *OJ* C 247, 31.8.1999, p. 1.

[2] Opinion delivered on 17 November 1999 (not yet published in the *Official Journal*).

[3] *OJ* C 368, 20.12.1999, p. 23.

of parental responsibility so as to simplify the formalities for rapid and automatic recognition and enforcement of judgments.

(5) In accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty, the objectives of this Regulation cannot be sufficiently achieved by the Member States and can therefore be better achieved by the Community. This Regulation does not go beyond what is necessary for that purpose.

(6) The Council, by Act[4] dated 28 May 1998, drew up a Convention on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and recommended it for adoption by the Member States in accordance with their respective constitutional rules. Continuity in the results of the negotiations for conclusion of the Convention should be ensured. The content of this Regulation is substantially taken over from the Convention, but this Regulation contains a number of new provisions not in the Convention in order to secure consistency with certain provisions of the proposed regulation on jurisdiction and the recognition of judgments in civil and commercial matters.

(7) In order to attain the objective of free movement of judgments in matrimonial matters and in matters of parental responsibility within the Community, it is necessary and appropriate that the cross-border recognition of jurisdiction and judgments in relation to the dissolution of matrimonial ties and to parental responsibility for the children of both spouses be governed by a mandatory, and directly applicable, Community legal instrument.

(8) The measures laid down in this Regulation should be consistent and uniform, to enable people to move as widely as possible. Accordingly, it should also apply to nationals of non-member States whose links with the territory of a Member State are sufficiently close, in keeping with the grounds of jurisdiction laid down in the Regulation.

(9) The scope of this Regulation should cover civil proceedings and non-judicial proceedings occurring in matrimonial matters in certain States, and exclude purely religious procedures. It should therefore be provided that the reference to 'courts' includes all the authorities, judicial or otherwise, with jurisdiction in matrimonial matters.

[4] *OJ* C 221, 16.7.1998, p. 1. On the same day as the Convention was drawn up, the Council took note of the explanatory report to the Convention, as prepared by Prof. Alegría Borrás. This explanatory report is set out on page 27 of the aforementioned Official Journal.

(10) This Regulation should be confined to proceedings relating to divorce, legal separation or marriage annulment. The recognition of divorce and annulment rulings affects only the dissolution of matrimonial ties; despite the fact that they may be interrelated, the Regulation does not affect issues such as the fault of the spouses, property consequences of the marriage, the maintenance obligation or any other ancillary measures.

(11) This Regulation covers parental responsibility for children of both spouses on issues that are closely linked to proceedings for divorce, legal separation or marriage annulment.

(12) The grounds for jurisdiction accepted in this Regulation are based on the rule that there must be a real link between the party concerned and the Member State exercising jurisdiction; the decision to include certain grounds corresponds to the fact that they exist in different national legal systems and are accepted by the other Member States.

(13) One of the risks to be considered in relation to the protection of the children of both spouses in a marital crisis is that one of the parents will take the child to another country. The fundamental interests of the children must therefore be protected, in accordance with, in particular, the Hague Convention of 25 October 1980 on the Civil Aspects of the International Abduction of Children. The lawful habitual residence is accordingly maintained as the grounds of jurisdiction in cases where, because the child has been moved or has not been returned without lawful reason, there has been a de facto change in the habitual residence.

(14) This Regulation does not prevent the courts of a Member State from taking provisional, including protective, measures, in urgent cases, with regard to persons or property situated in that State.

(15) The word 'judgment' refers only to decisions that lead to divorce, legal separation or marriage annulment. Those documents which have been formally drawn up or registered as authentic instruments and are enforceable in one Member State are treated as equivalent to such 'judgments'.

(16) The recognition and enforcement of judgments given in a Member State are based on the principle of mutual trust. The grounds for non-recognition are kept to the minimum required. Those proceedings should incorporate provisions to ensure observance of public policy in the State addressed and to safeguard the rights of the defence and those of the parties, including the individual rights of any child involved, and so as to withhold recognition of irreconcilable judgments.

(17) The State addressed should review neither the jurisdiction of the State of origin nor the findings of fact.

(18) No procedures may be required for the updating of civil-status documents in one Member State on the basis of a final judgment given in another Member State.

(19) The Convention concluded by the Nordic States in 1931 should be capable of application within the limits set by this Regulation.

(20) Spain, Italy and Portugal had concluded Concordats before the matters covered by this Regulation were brought within the ambit of the Treaty: It is necessary to ensure that these States do not breach their international commitments in relation to the Holy See.

(21) The Member States should remain free to agree among themselves on practical measures for the application of the Regulation as long as no Community measures have been taken to that end.

(22) Annexes I to III relating to the courts and redress procedures should be amended by the Commission on the basis of amendments transmitted by the Member State concerned. Amendments to Annexes IV and V should be adopted in accordance with Council Decision 1999/468/EC of 28 June laying down the procedures for the exercise of implementing powers conferred on the Commission.[1]

(23) No later than five years after the date of the entry into force of this Regulation, the Commission is to review its application and propose such amendments as may appear necessary.

(24) The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of United Kingdom and Ireland annexed to the Treaty on the European Union and the Treaty establishing the European Community, have given notice of their wish to take part in the adoption of this Regulation.

(25) Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on the European Union and the Treaty establishing the European Community, is not participating in the adoption of this Regulation, and is therefore not bound by it nor subject to its application.

[1] *OJ* L 184, 17.7.1999, p. 23.

HAS ADOPTED THIS REGULATION:

CHAPTER I
SCOPE

Article 1

1. This Regulation shall apply to:
   (a) civil proceedings relating to divorce, legal separation or marriage annulment;
   (b) civil proceedings relating to parental responsibility for the children of both spouses on the occasion of the matrimonial proceedings referred to in (a).
2. Other proceedings officially recognised in a Member State shall be regarded as equivalent to judicial proceedings. The term 'court' shall cover all the authorities with jurisdiction in these matters in the Member States.

CHAPTER II
JURISDICTION

SECTION 1
GENERAL PROVISIONS

Article 2
Divorce, legal separation and marriage annulment

1. In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State:
   (a) in whose territory:
   – the spouses are habitually resident, or
   – the spouses were last habitually resident, in so far as one of them still resides there, or
   – the respondent is habitually resident, or
   – in the event of a joint application, either of the spouses is habitually resident, or
   – the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or

– the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in tha case of the United Kingdom and Ireland, has his 'domicile' there;

(b) of nationality of both spouses or, in the case of the United Kingdom and Ireland, of the 'domicile' of both spouses.

2. For the purpose of this Regulation, 'domicile' shall have the same meaning as it has under the legal systems of the United Kingdom and Ireland.

Article 3
Parental responsibility

1. The Courts of a Member State exercising jurisdiction by virtue of Article 2 on an application for divorce, legal separation or marriage annulment shall have jurisdiction in a matter relating to parental responsibility over a child of both spouses where the child is habitually resident in that Member State.
2. Where the child is not habitually resident in the Member State referred to in paragraph 1, the courts of that State shall have jurisdiction in such a matter if the child is habitually resident in one of the Member States and:
   (a) at least one of the spouses has parental responsibility in relation to the child, and
   (b) the jurisdiction of the courts has been accepted by the spouses and is in the best interests of the child.
3. The jurisdiction conferred by paragraphs 1 and 2 shall cease as soon as:
   (a) the judgment allowing or refusing the application for divorce, legal separation or marriage annulment has become final, or
   (b) in those cases where proceedings in relation to parental responsibility are still pending on the date referred to in (a), a judgment in these proceedings has become final, or
   (c) the proceedings referred to in (a) and (b) have come to an end for another reason.

Article 4
Child abduction

The courts with jurisdiction within the meaning of Article 3 shall exercise their jurisdiction in conformity with the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, and in particular Articles 3 and 16 thereof.

Article 5
Counterclaim

The court in which proceedings are pending on the basis of Articles 2 to 4 shall also have jurisdiction to examine a counterclaim, in so far as the latter comes within the scope of this Regulation.

Article 6
Conversion of legal separation into divorce

Without prejudice to Article 2, a court of a Member State which has given a judgment on a legal separation shall also have jurisdiction for converting that judgment into a divorce, if the law of that Member State so provides.

Article 7
Exclusive nature of jurisdiction under Articles 2 to 6

A spouse who:

(a) is habitually resident in the territory of a Member State; or
(b) is a national of a Member State or, in the case of the United Kingdom and Ireland, has his or her 'domicile' in the territory of one of the latter Member States,

may be sued in another Member State only in accordance with Articles 2 to 6.

Article 8

Residual jurisdiction

1. Where no court of a Member State has jurisdiction pursuant to Articles 2 to 6, jurisdiction shall be determined, in each Member State, by the laws of that State.
2. As against a respondent who is not habitually resident and is not either a national of a Member State or, in the case of the United Kingdom and Ireland, does not have his 'domicile' within the territory of one of the latter Member States, any national of a Member State who is habitually resident within the territory of another Member State may, like the nationals of that State, avail himself of the rules of jurisdiction applicable in that State.

SECTION 2
EXAMINATION AS TO JURISDICTION AND ADMISSIBILITY

Article 9
Examination as to jurisdiction

Where a court of a Member State is seised of a case over which it has no jurisdiction under this Regulation and over which a court of another Member State has jurisdiction by virtue of this Regulation, it shall declare of its own motion that it has no jurisdiction.

Article 10
Examination as to admissibility

1. Where a respondent habitually resident in a State other than the Member State where the action was brought does not enter an appearance, the court with jurisdiction shall stay the proceedings so long as it is not shown that the respondent has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end.
2. Article 19 of the Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters,[1] shall apply instead of the provisions of paragraph 1 of this Article if the document instituting the proceedings or an equivalent document had to be transmitted from one Member State to another pursuant to that Regulation.
3. Where the provisions of Council Regulation (EC) No 1348/2000 are not applicable, Article 15 of the Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial matters shall apply if the document instituting the proceedings or an equivalent document had to be transmitted abroad pursuant to that Convention.

[1] See p. 37 of this *Official Journal*.

SECTION 3
LIS PENDENS AND DEPENDENT ACTIONS

Article 11

1. Where proceedings involving the same cause of action and between the same parties are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.
2. Where proceedings not involving the same cause of action and between the same parties are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.
3. Where the jurisdiction of the court first seised is established, the court second seised shall decline jurisdiction in favour of that court.
   In that case, the party who brought the relevant action before the court second seised may bring that action before the court first seised.
4. For the purpose of this Article, a court shall be deemed to be seised:
   (a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the applicant has not subsequently failed to take the steps he was required to take to have service effected on the respondent; or
   (b) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the applicant has not subsequently failed to take steps he was required to take to have the document lodged with the court

SECTION 4
PROVISIONAL, INCLUDING PROTECTIVE, MEASURES

Article 12

In urgent cases, the provisions of this Regulation shall not prevent the courts of a Member State from taking such provisional, including protective, measures in respect of persons or assets in that State as may be available under the law of that Member State, even if, under this Regulation, the court of another Member State has jurisdiction as to the substance of the matter.

CHAPTER III
RECOGNITION AND ENFORCEMENT

Article 13
Meaning of 'judgment'

1. For the purposes of this Regulation, 'judgment' means a divorce, legal separation or marriage annulment pronounced by a court of a Member State, as well as a judgment relating to the parental responsibility of the spouses given on the occasion of such matrimonial proceedings, whatever the judgment may be called, including a decree, order or decision.
2. The provisions of this Chapter shall also apply to the determination of the amount of costs and expenses of proceedings under this Regulation and to the enforcement of any order concerning such costs and expenses.
3. For the purposes of implementing this Regulation, documents which have been formally drawn up or registered as authentic instruments and are enforceable in one Member State and also settlements which have been approved by a court in the course of proceedings and are enforceable in the Member State in which they were concluded shall be recognised and declared enforceable under the same conditions as the judgments referred to in paragraph 1.

SECTION 1
RECOGNITION

Article 14
Recognition of a judgment

1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.
2. In particular, and without prejudice to paragraph 3, no special procedure shall be required for up-dating the civil-status records of a Member State on the basis of a judgment relating to divorce, legal separation or marriage annulment given in another Member State, and against which no further appeal lies under the law of that Member State.
3. Any interested party may, in accordance with the procedures provided for in Sections 2 and 3 of this Chapter, apply for a decision that the judgment be or not be recognised.
4. Where the recognition of a judgment is raised as an incidental question in a court of a Member State, that court may determine that issue.

Article 15
Grounds of non-recognition

1. A judgment relating to a divorce, legal separation or marriage annulment shall not be recognised:
   (a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought;
   (b) where it was given in default of appearance, if the respondent was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable the respondent to arrange for his or her defence unless it is determined that the respondent has accepted the judgment unequivocally;
   (c) if it is irreconcilable with a judgment given in proceedings between the same parties in the Member State in which recognition is sought; or
   (d) if it is irreconcilable with an earlier judgment given in another Member State or in a non-member State between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.
2. A judgment relating to the parental responsibility of the spouses given on the occasion of matrimonial proceedings as referred to in Article 13 shall not be recognised:
   (a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought taking into account the best interests of the child;
   (b) if it was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought;
   (c) where it was given in default of appearance if the person in default was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable that person to arrange for his or her defence unless it is determined that such person has accepted the judgment unequivocally;
   (d) on the request of any person claiming that the judgment infringes his or her parental responsibility, if it was given without such person having been given an opportunity to be heard;
   (e) if it is irreconcilable with a later judgment relating to parental responsibility given in the Member State in which recognition is sought; or
   (f) if it is irreconcilable with a later judgment relating to parental responsibility given in another Member State or in the non-member State of the habitual residence of the child provided that the later judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.

Article 16
Agreement with third States

A court of a Member State may, on the basis of an agreement on the recognition and enforcement of judgments, not recognise a judgment given in another Member State where, in cases provided for in Article 8, the judgment could only be founded on grounds of jurisdiction other than those specified in Articles 2 to 7.

Article 17
Prohibition of review of jurisdiction of court of origin

The jurisdiction of the court of the Member State of origin may not be reviewed. The test of public policy referred to in Article 15(1)(a) and (2)(a) may not be applied to the rules relating to jurisdiction set out in Articles 2 to 8.

Article 18
Differences in applicable law

The recognition of a judgment relating to a divorce, legal separation or a marriage annulment may not be refused because the law of the Member State in which such recognition is sought would not allow divorce, legal separation or marriage annulment on the same facts.

Article 19
Non-review as to substance

Under no circumstances may a judgment be reviewed as to its substance.

Article 20
Stay of proceedings

1. A court of a Member State in which recognition is sought of a judgment given in another Member State may stay the proceedings if an ordinary appeal against the judgment has been lodged.
2. A court of a Member State in which recognition is sought of a judgment given in England and Wales, in Scotland or in Northern Ireland may stay the proceedings if enforcement is suspended in the Member State of origin by reason of an appeal.

SECTION 2
ENFORCEMENT

Article 21
Enforceable judgments

1. A judgment on the exercise of parental responsibility in respect of a child of both parties given in a Member State which is enforceable in that Member State and has been served shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there.
2. However, in the United Kingdom, such a judgment shall be enforced in England and Wales, in Scotland or in Northern Ireland when, on the application of any interested party, it has been registered for enforcement in that part of the United Kingdom.

Article 22
Jurisdiction of local courts

1. An application for a declaration of enforceability shall be submitted to the court appearing in the list in Annex 1.
2. The local jurisdiction shall be determined by reference to the place of the habitual residence of the person against whom enforcement is sought or by reference to the habitual residence of any child to whom the application relates.

   Where neither of the places referred to in the first subparagraph can be found in the Member State where enforcement is sought, the local jurisdiction shall be determined by reference to the place of enforcement.
3. In relation to procedures referred to in Article 14(3), the local jurisdiction shall be determined by the internal law of the Member State in which proceedings for recognition or non-recognition are brought.

Article 23
Procedure for enforcement

1. The procedure for making the application shall be governed by the law of the Member State in which enforcement is sought.
2. The applicant must give an address for service within the area of jurisdiction of the court applied to. However, if the law of the Member State in which enforcement is sought does not provide for the furnishing of such an address, the applicant shall appoint a representative *ad litem*.
3. The documents referred to in Articles 33 and 34 shall be attached to the application.

Article 24
Decision of the court

1. The court applied to shall give its decision without delay. The person against whom enforcement is sought shall not at this stage of the proceedings be entitled to make any submissions on the application.
2. The application may be refused only for one of the reasons specified in Articles 15, 16 and 17.
3. Under no circumstances may a judgment be reviewed as to its substance.

Article 25
Notice of the decision

The appropriate officer of the court shall without delay bring to the notice of the applicant the decision given on the application in accordance with the procedure laid down by the law of the Member State in which enforcement is sought.

Article 26
Appeal against the enforcement decision

1. The decision on the application for a declaration of enforceability may be appealed against by either party.
2. The appeal shall be lodged with the court appearing in the list in Annex II.
3. The appeal shall be dealt with in accordance with the rules governing procedure in contradictory matters.
4. If the appeal is brought by the applicant for a declaration of enforceability, the party against whom enforcement is sought shall be summoned to appear before the appellate court. If such a person fails to appear, the provision of Article 10 shall apply.
5. An appeal against a declaration of enforceability must be lodged within one month of service thereof. If the party against whom enforcement is sought is habitually resident in a Member State other than that in which the declaration of enforceability was given, the time for appealing shall be two months and shall run from the date of service, either on him or at his residence. No extension of time may be granted on account of distance.

Article 27
Courts of appeal and means of contest

The judgment given on appeal may be contested only by the proceedings referred to in Annex III.

Article 28
Stay of proceedings

1. The court with which the appeal is lodged under Articles 26 or 27 may, on the application of the part against whom enforcement is sought, stay the proceedings if an ordinary appeal has been lodged in the Member State of origin or if the time for such appeal has not yet expired. In the latter case, the court may specify the time within which an appeal is to be lodged.
2. Where the judgment was given in Ireland or in the United Kingdom, any form of appeal available in the Member State of origin shall be treated as an ordinary appeal for the purposes of paragraph 1.

Article 29
Partial enforcement

1. Where a judgment has been given in respect of several matters and enforcement cannot be authorised for all of them, the court shall authorise enforcement for one or more of them.
2. An applicant may request partial enforcement of a judgment.

Article 30
Legal aid

An applicant who, in the Member State of origin, has benefited from complete or partial legal aid or exemption from costs or expenses shall be entitled, in the procedures provided for in Articles 22 to 25, to benefit from the most favourable legal aid or the most extensive exemption from costs and expenses provided for by the law of the Member State addressed.

Article 31
Security, bond or deposit

No security, bond or deposit, however described, shall be required of a party who in one Member State applies for enforcement of a judgment given in another Member State on the following grounds:

(a) that he or she is not habitually resident in the Member State in which enforcement is sought; or
(b) that he or she is either a foreign national or, where enforcement is sought in either the United Kingdom or Ireland, does not have his or her 'domicile' in either of those Member States.

SECTION 3
COMMON PROVISIONS

Article 32
Documents

1. A party seeking or contesting recognition or applying for a declaration of enforceability shall produce:
   (a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity; and
   (b) a certificate referred to in Article 33.
2. In addition, in the case of a judgment given in default, the party seeking recognition or applying for enforcement shall produce:
   (a) the original or certified true copy of the document which establishes that the defaulting party was served with the document instituting the proceedings or with an equivalent document; or
   (b) any document indicating that the defendant has accepted the judgment unequivocally.

Article 33
Other documents

The competent court or authority of a Member State where a judgment was given shall issue, at the request of any interested party, a certificate using the standard form in Annex IV (judgments in matrimonial matters) or Annex V (judgments on parental responsibility).

Article 34
Absence of documents

1. If the documents specified in Article 32(1)(b) or (2) are not produced, the court may specify a time for their production, accept equivalent documents or, if it considers that it has sufficient information before it, dispense with their production.
2. If the Court so requires, a translation of such documents shall be furnished. The translation shall be certified by a person qualified to do so in one of the Member States.

Article 35
Legalisation or other similar formality

No legalisation or other similar formality shall be required in respect of the documents referred to in Articles 32, 33 and 34(2) or in respect of a document appointing a representative *ad litem*.

CHAPTER IV
GENERAL PROVISIONS

Article 36
Relation with other instruments

1. Subject to the provisions of Articles 38, 42 and paragraph 2 of this Article, this Regulation shall, for the Member States, supersede conventions existing at the time of entry into force of this Regulation which have been concluded between two or more Member States and relate to matters governed by this Regulation.
2. (a) Finland and Sweden shall have the option of declaring that the Convention of 6 February 1931 between Denmark, Finland, Iceland, Norway and Sweden comprising international private law provisions on marriage, adoption and guardianship, together with the Final Protocol thereto, will apply, in whole or in part, in their mutual relations, in place of the rules of this Regulation. Such declarations shall be annexed to this Regulation and published in the *Official Journal of the European Communities*. They may be withdrawn, in whole or in part, at any moment by the said Member States.
   (b) The principle of non-discrimination on the grounds of nationality between citizens of the Union shall be respected.
   (c) The rules of jurisdiction in any future agreement to be concluded between the Member States referred to in subparagraph (a) which relate to matters governed by this Regulation shall be in line with those laid down in this Regulation.
   (d) Judgments handed down in any of the Nordic States which have made the declaration provided for in subparagraph (a) under a forum of jurisdiction corresponding to one of those laid down in Chapter II, shall be recognised and enforced in the other Member States under the rules laid down in Chapter III.
3. Member States shall send to the Commission:
   (a) a copy of the agreements and uniform laws implementing these agreements referred to in paragraphs 2(a) and (c);
   (b) any denunciations of, or amendments to, those agreements or uniform laws.

Article 37
Relation with certain multilateral conventions

In relations between the Member States, this Regulation shall take precedence over the following Conventions in so far as they concern matters governed by this Regulation:

- the Hague Convention of 5 October 1961 concerning the Powers of Authorities and the Law Applicable in respect of the Protection of Minors,
- the Luxembourg Convention of 8 September 1967 on the Recognition of Decisions Relating to the Validity of Marriages,
- the Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations,
- the European Convention of 20 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children,
- the Hague Convention of 19 October 1996 on Jurisdiction, Applicable law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, provided that the child concerned is habitually resident in a Member State.

Article 38
Extent of effects

1. The agreements and conventions referred to in Articles 36(1) and 37 shall continue to have effect in relation to matters to which this Regulation does not apply.
2. They shall continue to have effect in respect of judgments given and documents formally drawn up or registered as authentic before the entry into force of this Regulation.

Article 39
Agreements between Member States

1. Two or more Member States may conclude agreements or arrangements to amplify this Regulation or to facilitate its application.
   Member States shall send to the Commission:
   (a) a copy of the draft agreements; and
   (b) any denunciations of, or amendments to, these agreements.
2. In no circumstances may the agreements or arrangements derogate from Chapters II or III.

Article 40
Treaties with the Holy See

1. This Regulation shall apply without prejudice to the International Treaty (Concordat) between the Holy See and Portugal, signed at the Vatican City on 7 May 1940.
2. Any decision as to the invalidity of a marriage taken under the Treaty referred to in paragraph 1 shall be recognised in the Member States on the conditions laid down in Chapter III.
3. The provisions laid down in paragraphs 1 and 2 shall also apply to the following international treaties (Concordats) with the Holy See:
   – *Concordato lateranense* of 11 February 1929 between Italy and the Holy See, modified by the agreement, with additional Protocol signed in Rome on 18 February 1984;
   – Agreement between the Holy See and Spain on legal affairs of 3 January 1979.
4. Recognition of the decisions provided for in paragraph 2 may, in Italy or Spain, be subject to the same procedures and the same checks as are applicable to decisions of the ecclesiastical courts handed down in accordance with the international treaties concluded with the Holy See referred in paragraph 3.
5. Member States shall send to the Commission:
   (a) a copy of the Treaties referred to in paragraphs 1 and 3;
   (b) any denunciations of or amendments to those Treaties.

Article 41

Member States with two or more legal systems

With regard to a Member State in which two or more systems of law or sets of rules concerning matters governed by this Regulation apply in different territorial units:

(a) any reference to habitual residence in that Member State shall refer to habitual residence in a territorial unit;
(b) any reference to nationality, or in the case of the United Kingdom 'domicile', shall refer to the territorial unit designated by the law of that State;
(c) any reference to the authority of a Member State having received an application for divorce or legal separation or for marriage annulment shall refer to the authority of a territorial unit which has received such an application;
(d) any reference to the rules of the requested Member State shall refer to the rules of the territorial unit in which jurisdiction, recognition or enforcement is invoked.

CHAPTER V
TRANSITIONAL PROVISIONS

Article 42

1. The provisions of this Regulation shall apply only to legal proceedings instituted, to documents formally drawn up or registered as authentic instruments and to settlements which have been approved by a court in the course of proceedings after its entry into force.
2. Judgments given after the date of entry into force of this Regulation in proceedings instituted before that date shall be recognised and enforced in accordance with the provisions of Chapter III if jurisdiction was founded on rules which accorded with those provided for either in Chapter II of this Regulation or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted.

CHAPTER VI
FINAL PROVISIONS

Article 43
Review

No later than 1 March 2006, and every five years thereafter, the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Regulation, and in particular Articles 36, 39 and 40(2) thereof. The report shall be accompanied if need be by proposals for adaptations.

Article 44
Amendment of lists of courts and redress procedures

1. Member States shall notify the Commission of the texts amending the lists of courts and redress procedures set out in Annexes I to III. The Commission shall adapt the Annexes concerned accordingly.
2. The updating or making of technical amendments to the standard forms set out in Annexes IV and V shall be adopted in accordance with the advisory procedure set out in Article 45(2).

Article 45

1. The Commission shall be assisted by a committee.
2. Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468 EC shall aplly.
3. The committee shall adopt its rules of procedure.

Article 46
Entry into force

This Regulation shall enter into force on 1 March 2001.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels […]

[Annexes omitted]

COUNCIL REGULATION (EC) No. 1348/2000 of 29 May 2000
ON THE SERVICE IN THE MEMBER STATES OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS*

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and Article 67(1) thereof,
Having regard to the proposal from the Commission,[1]
Having regard to the opinion of the European Parliament,[2]
Having regard to the opinion of the Economic and Social Committee,[3]

Whereas:

(1) The Union has set itself the objective of maintaining and developing the Union as an area of freedom, security and justice, in which the free movement of persons is assured. To establish such an area, the Community is to adopt, among others, the measures relating to judicial cooperation in civil matters needed for the proper functioning of the internal market.

(2) The proper functioning of the internal market entails the need to improve and expedite the transmission of judicial and extrajudicial documents in civil or commercial matters for service between the Member States.

(3) This is a subject now falling within the ambit of Article 65 of the Treaty.

(4) In accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty, the objectives of this Regulation cannot be sufficiently achieved by the Member States and can therefore be better achieved by the Community. This Regulation does not go beyond what is necessary to achieve those objectives.

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* The text of the Regulation is published in *Official Journal of the European Communities*, L 160, 30 June 2000, p. 37 *et seq*.

[1] *OJ* C 247 E, 31.8.1999, p. 11.

[2] Opinion of 17 November 1999 (not yet published in the *Official Journal*)

[3] *OJ* C 368, 20.12.1999, p. 47

(5) The Council, by an Act dated 26 May 1997,[4] drew up a Convention on the service in the Member States of the European Union of judicial and extrajudicial documents in civil or commercial matters and recommended it for adoption by the Member States in accordance with their respective constitutional rules. That Convention has not entered into force. Continuity in the results of the negotiations for conclusion of the Convention should be ensured. The main content of this Regulation is substantially taken over from it.

(6) Efficiency and speed in judicial procedures in civil matters means that the transmission of judicial and extrajudicial documents is to be made direct and by rapid means between local bodies designated by the Member States. However, the Member States may indicate their intention of designating only one transmitting or receiving agency or one agency to perform both functions for a period of five years. This designation may, however, be renewed every five years.

(7) Speed in transmission warrants the use of all appropriate means, provided that certain conditions as to the legibility and reliability of the document received are observed. Security in transmission requires that the document to be transmitted be accompanied by a pre-printed form, to be completed in the language of the place where service is to be effected, or in another language accepted by the Member State in question.

(8) To secure the effectiveness of this Regulation, the possibility of refusing service of documents is confined to exceptional situations.

(9) Speed of transmission warrants documents being served within days of reception of the document. However, if service has not been effected after one month has elapsed, the receiving agency should inform the transmitting agency. The expiry of this period should not imply that the request be returned to the transmitting agency where it is clear that service is feasible within a reasonable period.

(10) For the protection of the addressee's interests, service should be effected in the official language or one of the official languages of the place where it is to be effected or in another language of the originating Member State which the addressee understands.

(11) Given the differences between the Member States as regards their rules of procedure, the material date for the purposes of service varies from one

[4] *OJ* C 261, 27.8.1997, p.1. On the same day as the Convention was drawn up the Council took note of the explanatory report on the Convention which is set out on page 26 of the aforementioned *Official Journal*.

Member State to another. Having regard to such situations and the possible difficulties that may arise, this Regulation should provide for a system where it is the law of the receiving Member State which determines the date of service. However, if the relevant documents in the context of proceedings to be brought or pending in the Member State of origin are to be served within a specified period, the date to be taken into consideration with respect to the applicant shall be that determined according to the law of the Member State of origin. A Member State is, however, authorised to derogate from the aforementioned provisions for a transitional period of five years, for appropriate reasons. Such a derogation may be renewed by a Member State at five-year intervals due to reasons related to its legal system.

(12) This Regulation prevails over the provisions contained in bilateral or multilateral agreements or arrangements having the same scope, concluded by the Member States, and in particular the Protocol annexed to the Brussels Convention of 27 September 1968[1] and the Hague Convention of 15 November 1965 in relations between the Member States party thereto. This Regulation does not preclude Member States from maintaining or concluding agreements or arrangements to expedite or simplify the transmission of documents, provided that they are compatible with the Regulation.

(13) The information transmitted pursuant to this Regulation should enjoy suitable protection. This matter falls within the scope of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data,[2] and of Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector.[3]

(14) The measures necessary for the implementation of this Regulation should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission.[4]

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[1] Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (*OJ* L 299, 13.12.1972, p.32; consolidated version, *OJ* C 27, 26.1.1998, p.1).

[2] *OJ* L 281, 23.11.1995, p. 31.

[3] *OJ* L 24, 30.1.1998, p. 1.

[4] *OJ* L 184, 17.7.1999, p.23.

(15) These measures also include drawing up and updating the manual using appropriate modern means.

(16) No later than three years after the date of entry into force of this Regulation, the Commission should review its application and propose such amendments as may appear necessary.

(17) United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community, have given notice of their wish to take part in the adoption and application of this Regulation.

(18) Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, is not participating in the adoption of this Regulation, and is therefore not bound by it nor subject to its application,

HAS ADOPTED THIS REGULATION:

CHAPTER I
GENERAL PROVISIONS

Article 1
Scope

1. This Regulation shall apply in civil and commercial matters where a judicial or extrajudicial document has to be transmitted from one Member State to another for service there.
2. This Regulation shall not apply where the address of the person to be served with the document is not known.

Article 2
Transmitting and receiving agencies

1. Each Member State shall designate the public officers, authorities or other persons, hereinafter referred to as 'transmitting agencies', competent for the transmission of judicial or extrajudicial documents to be served in another Member State.

2. Each Member State shall designate the public officers, authorities or other persons, hereinafter referred to as 'receiving agencies', competent for the receipt of judicial or extrajudicial documents from another Member State.
3. A Member State may designate one transmitting agency and one receiving agency or one agency to perform both functions. A federal State, a State in which several legal systems apply or a State with autonomous territorial units shall be free to designate more than one such agency. The designation shall have effect for a period of five years and may be renewed at five-year intervals.
4. Each Member State shall provide the Commission with the following information:
   (a) the names and addresses of the receiving agencies referred to in paragraphs 2 and 3;
   (b) the geographical areas in which they have jurisdiction;
   (c) the means of receipt of documents available to them; and
   (d) the languages that may be used for the completion of the standard form in the Annex.

Member States shall notify the Commission of any subsequent modification of such information.

Article 3
Central body

Each Member State shall designate a central body responsible for:
   (a) supplying information to the transmitting agencies;
   (b) seeking solutions to any difficulties which may arise during transmission of documents for service;
   (c) forwarding, in exceptional cases, at the request of a transmitting agency, a request for service to the competent receiving agency.

A federal State, a State in which several legal systems apply or a State with autonomous territorial units shall be free to designate more than one central body.

CHAPTER II
JUDICIAL DOCUMENTS

SECTION 1
TRANSMISSION AND SERVICE OF JUDICIAL DOCUMENTS

Article 4
Transmission of documents

1. Judicial documents shall be transmitted directly and as soon as possible between the agencies designated on the basis of Article 2.
2. Transmission of documents, requests, confirmations, receipts, certificates and any other papers between transmitting agencies and receiving agencies may be carried out by any appropriate means, provided that the content of the document received is true and faithful to that of the document forwarded and that all information in it is easily legible.
3. The document to be transmitted shall be accompanied by a request drawn up using the standard form in the Annex. The form shall be completed in the official language of the Member State addressed or, if there are several official languages in that Member State, the official language or one of the official languages of the place where service is to be effected, or in another language which that Member State has indicated it can accept. Each Member State shall indicate the official language or languages of the European Union other than its own which is or are acceptable to it for completion of the form.
4. The documents and all papers that are transmitted shall be exempted from legalisation or any equivalent formality.
5. When the transmitting agency wishes a copy of the document to be returned together with the certificate referred to in Article 10, it shall send the document in duplicate.

Article 5
Translation of documents

1. The applicant shall be advised by the transmitting agency to which he or she forwards the document for transmission that the addressee may refuse to accept it if it is not in one of the languages provided for in Article 8.
2. The applicant shall bear any costs of translation prior to the transmission of the document, without prejudice to any possible subsequent decision by the court or competent authority on liability for such costs.

Article 6

Receipt of documents by receiving agency

1. On receipt of a document, a receiving agency shall, as soon as possible and in any event within seven days of receipt, send a receipt to the transmitting agency by the swiftest possible means of transmission using the standard form in the Annex.
2. Where the request for service cannot be fulfilled on the basis of the information or documents transmitted, the receiving agency shall contact the transmitting agency by the swiftest possible means in order to secure the missing information or documents.
3. If the request for service is manifestly outside the scope of this Regulation or if non-compliance with the formal conditions required makes service impossible, the request and the documents transmitted shall be returned, on receipt, to the transmitting agency, together with the notice of return in the standard form in the Annex.
4. A receiving agency receiving a document for service but not having territorial jurisdiction to serve it shall forward it, as well as the request, to the receiving agency having territorial jurisdiction in the same Member State if the request complies with the conditions laid down in Article 4(3) and shall inform the transmitting agency accordingly, using the standard form in the Annex. That receiving agency shall inform the transmitting agency when it receives the document, in the manner provided for in paragraph 1.

Article 7
Service of documents

1. The receiving agency shall itself serve the document or have it served, either in accordance with the law of the Member State addressed or by a particular form requested by the transmitting agency, unless such a method is incompatible with the law of that Member State.
2. All steps required for service of the document shall be effected as soon as possible. In any event, if it has not been possible to effect service within one month of receipt, the receiving agency shall inform the transmitting agency by means of the certificate in the standard form in the Annex, which shall be drawn up under the conditions referred to in Article 10(2). The period shall be calculated in accordance with the law of the Member State addressed.

Article 8
Refusal to accept a document

1. The receiving agency shall inform the addressee that he or she may refuse to accept the document to be served if it is in a language other than either of the following languages:
   (a) the official language of the Member State addressed or, if there are several official languages in that Member State, the official language or one of the official languages of the place where service is to be effected; or
   (b) a language of the Member State of transmission which the addressee understands.
2. Where the receiving agency is informed that the addressee refuses to accept the document in accordance with paragraph 1, it shall immediately inform the transmitting agency by means of the certificate provided for in Article 10 and return the request and the documents of which a translation is requested.

Article 9
Date of service

1. Without prejudice to Article 8, the date of service of a document pursuant to Article 7 shall be the date on which it is served in accordance with the law of the Member State addressed.
2. However, where a document shall be served within a particular period in the context of proceedings to be brought or pending in the Member State of origin, the date to be taken into account with respect to the applicant shall be that fixed by the law of that Member State.
3. A Member State shall be authorised to derogate from the provisions of paragraphs 1 and 2 for a transitional period of five years, for appropriate reasons.
   This transitional period may be renewed by a Member State at five-yearly intervals due to reasons related to its legal system. That Member State shall inform the Commission of the content of such a derogation and the circumstances of the case.

Article 10
Certificate of service and copy of the document served

1. When the formalities concerning the service of the document have been completed, a certificate of completion of those formalities shall be drawn up in the standard form in the Annex and addressed to the transmitting agency, together with, where Article 4(5) applies, a copy of the document served.
2. The certificate shall be completed in the official language or one of the official languages of the Member State of origin or in another language which the

Member State of origin has indicated that it can accept. Each Member State shall indicate the official language or languages of the European Union other than its own which is or are acceptable to it for completion of the form.

Article 11
Costs of service

1. The service of judicial documents coming from a Member State shall not give rise to any payment or reimbursement of taxes or costs for services rendered by the Member State addressed.
2. The applicant shall pay or reimburse the costs occasioned by:
   (a) the employment of a judicial officer or of a person competent under the law of the Member State addressed;
   (b) the use of a particular method of service.

SECTION 2
OTHER MEANS OF TRANSMISSION AND SERVICE OF JUDICIAL DOCUMENTS

Article 12
Transmission by consular or diplomatic channels

Each Member State shall be free, in exceptional circumstances, to use consular or diplomatic channels to forward judicial documents, for the purpose of service, to those agencies of another Member State which are designated pursuant to Article 2 or 3.

Article 13
Service by diplomatic or consular agents

1. Each Member State shall be free to effect service of judicial documents on persons residing in another Member State, without application of any compulsion, directly through its diplomatic or consular agents.
2. Any Member State may make it known, in accordance with Article 23(1), that it is opposed to such service within its territory, unless the documents are to be served on nationals of the Member State in which the documents originate.

Article 14
Service by post

1. Each Member State shall be free to effect service of judicial documents directly by post to persons residing in another Member State.
2. Any Member State may specify, in accordance with Article 23(1), the conditions under which it will accept service of judicial documents by post.

Article 15
Direct service

1. This Regulation shall not interfere with the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the Member State addressed.
2. Any Member State may make it known, in accordance with Article 23(1), that it is opposed to the service of judicial documents in its territory pursuant to paragraph 1.

CHAPTER III
EXTRAJUDICIAL DOCUMENTS

Article 16
Transmission

Extrajudicial documents may be transmitted for service in another Member State in accordance with the provisions of this Regulation.

CHAPTER IV
FINAL PROVISIONS

Article 17
Implementing rules

The measures necessary for the implementation of this Regulation relating to the matters referred to below shall be adopted in accordance with the advisory procedure referred to in Article 18(2):

(a) drawing up and annually updating a manual containing the information provided by Member States in accordance with Article 2(4);
(b) drawing up a glossary in the official languages of the European Union of documents which may be served under this Regulation;
(c) updating or making technical amendments to the standard form set out in the Annex.

Article 18
Committee

1. The Commission shall be assisted by a committee.
2. Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468/EC shall apply.
3. The Committee shall adopt its rules of procedure.

Article 19
Defendant not entering an appearance

1. Where a writ of summons or an equivalent document has had to be transmitted to another Member State for the purpose of service, under the provisions of this Regulation, and the defendant has not appeared, judgment shall not be given until it is established that:
   (a) the document was served by a method prescribed by the internal law of the Member State addressed for the service of documents in domestic actions upon persons who are within its territory; or
   (b) the document was actually delivered to the defendant or to his residence by another method provided for by this Regulation;

   and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.
2. Each Member State shall be free to make it known, in accordance with Article 23(1), that the judge, notwithstanding the provisions of paragraph 1, may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled:
   (a) the document was transmitted by one of the methods provided for in this Regulation;
   (b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document;
   (c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities or bodies of the Member State addressed.

3. Notwithstanding paragraphs 1 and 2, the judge may order, in case of urgency, any provisional or protective measures.
4. When a writ of summons or an equivalent document has had to be transmitted to another Member State for the purpose of service, under the provisions of this Regulation, and a judgment has been entered against a defendant who has not appeared, the judge shall have the power to relieve the defendant from the effects of the expiration of the time for appeal from the judgment if the following conditions are fulfilled:
   (a) the defendant, without any fault on his part, did not have knowledge of the document in sufficient time to defend, or knowledge of the judgment in sufficient time to appeal; and
   (b) the defendant has disclosed a prima facie defence to the action on the merits.

   An application for relief may be filed only within a reasonable time after the defendant has knowledge of the judgment.

   Each Member State may make it known, in accordance with Article 23(1), that such application will not be entertained if it is filed after the expiration of a time to be stated by it in that communication, but which shall in no case be less than one year following the date of the judgment.
5. Paragraph 4 shall not apply to judgments concerning status or capacity of persons.

Article 20
Relationship with agreements or arrangements to which Member States are parties

1. This Regulation shall, in relation to matters to which it applies, prevail over other provisions contained in bilateral or multilateral agreements or arrangements concluded by the Member States, and in particular Article IV of the Protocol to the Brussels Convention of 1968 and the Hague Convention of 15 November 1965.
2. This Regulation shall not preclude individual member States from maintaining or concluding agreements or arrangements to expedite further or simplify the transmission of documents, provided that they are compatible with this Regulation.
3. Member States shall send to the Commission:
   (a) a copy of the agreements or arrangements referred to in paragraph 2 concluded between the Member States as well as drafts of such agreements or arrangements which they intend to adopt; and
   (b) any denunciation of, or amendments to, these agreements or arrangements.

Article 21
Legal aid

This Regulation shall not affect the application of Article 23 of the Convention on Civil Procedure of 17 July 1905, Article 24 of the Convention on Civil Procedure of 1 March 1954 or Article 13 of the Convention on International Access to Justice of 25 October 1980 between the Member States parties to these Conventions.

Article 22
Protection of information transmitted

1. Information, including in particular personal data, transmitted under this Regulation shall be used by the receiving agency only for the purpose for which it was transmitted.
2. Receiving agencies shall ensure the confidentiality of such information, in accordance with their national law.
3. Paragraphs 1 and 2 shall not affect national laws enabling data subjects to be informed of the use made of information transmitted under this Regulation.
4. This Regulation shall be without prejudice to Directives 95/46/EC and 97/66/EC.

Article 23
Communication and publication

1. Member States shall communicate to the Commission the information referred to in Articles 2, 3, 4, 9, 10, 13, 14, 15, 17(a) and 19.
2. The Commission shall publish in the *Official Journal of the European Communities* the information referred to in paragraph 1.

Article 24
Review

No later than 1 June 2004, and every five years thereafter, the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Regulation, paying special attention to the effectiveness of the bodies designated pursuant to Article 2 and to the practical application of point (c) of Article 3 and Article 9. The report shall be accompanied if need be by proposals for adaptations of this Regulation in line with the evolution of notification systems.

Article 25
Entry into force

This Regulation shall enter into force on 31 May 2001.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

Done at Brussels […]

[Annexes omitted]

PROPOSAL FOR A COUNCIL REGULATION (EC)
ON JURISDICTION AND THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS*

(COM(1999) 348 FINAL, presented by the Commission on 14 September 1999)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) thereof,
Having regard to the proposal from the Commission,[1]
Having regard to the Opinion of the European Parliament,[2]
Having regard to the Opinion of the Economic and Social Committee,[3]

Whereas:

(1) The Union has set itself the objective of maintaining and developing an area of freedom, security and justice, in which the free movement of persons is assured. In order to establish progressively such an area, the Community is to adopt, amongst other things, the measures relating to judicial cooperation in civil matters needed for the sound operation of the internal market.

(2) Differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market. Provisions to unify the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities for rapid and simple recognition and enforcement of judgments are essential.

(3) This area is within the field of judicial cooperation in civil matters within the meaning of Article 65 of the Treaty.

(4) In accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty, the objectives of this Regulation cannot be sufficiently achieved by the Member States and can therefore only be achieved by the Community. This Regulation confines itself to the minimum required in

* The text of the Proposal is accessible on the website of the European Union at: http://europa.eu.int/eur-lex/ The text of the Explanatory Memorandum preceding the Proposal has been omitted.

[1] *OJ* […]

[2] *OJ* […]

[3] *OJ* […]

order to achieve those objectives and does not go beyond what is necessary for that purpose.

(5) On 27 September 1968 the Member States, acting under Article 293, fourth indent, of the EC Treaty, concluded the Brussels Convention on jurisdiction and enforcement of judgments in civil and commercial matters ('the Brussels Convention').[4] Work has been undertaken for the revision of that Convention, which is part of the *acquis communautaire* and has been extended to all the new Member States, and the Council has approved the content of the revised text. Continuity in the results achieved in that revision should be ensured.

(6) In order to attain the objective of free movement of judgments in civil and commercial matters, it is necessary and appropriate that the rules governing jurisdiction and the recognition and enforcement of judgments be governed by a Community legal instrument which is binding and directly applicable.

(7) The scope of this Regulation must cover all the main civil and commercial matters. The matters excluded from its scope must be as limited as possible.

(8) There must be a link between proceedings to which this Regulation applies and the territory of the Member States bound by this Regulation. Common rules should accordingly apply, in principle, when the defendant is domiciled in one of those Member States.

(9) A defendant domiciled in a third country may be subject to the rules of conflict of jurisdiction applicable in the territory of the State of the court seised, and a defendant domiciled in a Member State not bound by this Regulation must remain subject to the Brussels Convention. For the purposes of the free movement of judgments, judgments given on the basis of these rules must be recognised and enforced throughout the Community in accordance with this Regulation.

(10) The rules of jurisdiction must be highly predictable and founded on the principle jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction.

[4] See consolidated text in *OJ* C 27, 26.1.1998, p. 1.

(11) In addition to the defendant's domicile, there should be alternative grounds of jurisdiction in view of the close link between the court and the action or in order to facilitate the sound administration of justice.

(12) In relation to insurance, employment and consumer contracts, the weaker party should be protected and there should be an exception from the general rule allowing that party in appropriate cases to bring the action in the courts for his domicile.

(13) Account must be taken of the growing development of the new communication technologies, particularly in relation to consumers; whereas, in particular, electronic commerce in goods or services by a means accessible in another Member State constitutes an activity directed to that State. Where that other State is the State of the consumer's domicile, the consumer must be able to enjoy the protection available to him when he enters into a consumer contract by electronic means from his domicile.

(14) The autonomy of the parties to a contract other than an employment, insurance or consumer contract to determine the courts having jurisdiction must be respected. Contractual clauses electing jurisdiction between parties with unequal negotiating strength must, however, be regulated.

(15) The necessary flexibility must be provided for in the general rules of this Regulation in order to take account of the specific procedural rules of certain Member States. Certain provisions of the Protocol annexed to the Brussels Convention should be incorporated in this Regulation.

(16) In the interests of the harmonious administration of justice in the Community, it is necessary to ensure that irreconcilable judgments will not be given in two Member States which have jurisdiction. There must be a clear and automatic mechanism for resolving cases of lis pendens and related actions and, to obviate problems flowing from national differences as to the determination of the date on which a case is regarded as pending, that date should be defined autonomously.

(17) Mutual trust in the administration of justice in the Community justifies judgments given in a Member State being recognised automatically without the need for any procedure except in cases of dispute.

(18) By virtue of the same principle of mutual trust, the procedure for enforcement in one Member State of a judgment given in another must be efficient and rapid. To that end, the declaration that a judgment is enforceable must be issued virtually automatically after purely formal checks of the documents

supplied, without there being any possibility of automatically raising any of the grounds for non-enforcement provided for by this Regulation.

(19) However, respect for the rights of the defence means that the defendant must be able to seek redress, in an adversarial procedure, against the judgment given if he believes one of the grounds for non-recognition to be present. Redress procedures must also be available to the claimant where his application for a declaration of enforceability has been rejected.

(20) Continuity between the Brussels Convention and this Regulation must be ensured, and transitional provisions should be laid down to that end. The same need for continuity applies as regards the interpretation of the Brussels Convention by the Court of Justice of the European Community[5] and the 1971 Protocol must remain applicable to cases already pending when this Regulation enters into force.

(21) In accordance with Articles 1 and 2 of the Protocols on the position of the United Kingdom and Ireland and the position of Denmark,[6] those Member States are not taking part in the adoption of this Regulation. This Regulation is accordingly not binding on the United Kingdom, Ireland or Denmark and is not applicable to them.

(22) Since the Brussels Convention remains in force in relations between the Member States that are bound by this Regulation and those that are not, there must be clear rules governing the relationship between this Regulation and the Brussels Convention.

(23) Likewise for the sake of consistency, this Regulation should not affect rules governing jurisdiction and the recognition of judgments contained in specific Community instruments.

(24) Respect for international commitments entered into by the Member States means that this Regulation should not affect conventions relating to specific matters to which the Member States are parties.

(25) No later than five years after the date of the entry into force of this Regulation, the Commission must review its application and propose such amendments as may appear necessary,

[5] See consolidated text in *OJ* C 27, 26.1.1998, p. 1 and p. 28.

[6] *OJ* C 340, 10.11.1997, p. 99 and p. 101.

HAS ADOPTED THIS REGULATION:

CHAPTER I
SCOPE

Article 1

This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.

This Regulation shall not apply to:

(1) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession;
(2) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;
(3) social security;
(4) arbitration.

CHAPTER II
JURISDICTION

SECTION 1
GENERAL PROVISIONS

Article 2

Subject to the provisions of this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.

Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that Member State.

The domicile of a company or legal person shall be determined in accordance with Article 57.

The expression 'Member State' means, unless otherwise provided, a Member State bound by this Regulation.

Article 3

Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7.
In particular the national rules of jurisdiction listed in Annex I shall not be applicable as against them.

Article 4

If the defendant is domiciled in a third country, the jurisdiction of the courts of each Member State shall, subject to the provisions of Articles 22 and 23, be determined by the law of that Member State. As against such a defendant, any person domiciled in a Member State may, whatever his nationality, avail himself in that Member State of the rules of jurisdiction there in force, and in particular those specified in Annex I, in the same way as the nationals of that Member State.
If the defendant is domiciled in a Member State not bound by this Regulation, jurisdiction shall be governed by the Brussels Convention in the version in force in that Member State.

SECTION 2
SPECIAL JURISDICTION

Article 5

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

(1) (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;
    (b) unless otherwise agreed, the place of performance of the obligation in question shall be:
        - in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered;
        - in the case of the provision of services, the place in a Member State where under the contract the services were provided or should have been provided;
    (c) if point (b) does not apply, then point (a) applies;
(2) in matters relating to maintenance, in the courts for the place where the maintenance creditor is domiciled or habitually resident or, if the matter is ancillary to proceedings concerning the status of a person, in the court which, according to its own law, has jurisdiction to entertain those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties;

(3) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or there is a risk of it occurring;

(4) as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the court seised of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings.

Without prejudice to more favourable national provisions, persons domiciled in a Member State who are prosecuted in a criminal court of a Member State of which they do not have the nationality for an offence committed involuntarily may be defended by persons empowered so to act, even if they do not enter an appearance in person. However, the court seised may order the defendant to appear in person; if he does not enter an appearance, recognition or enforcement of the judgment given on the civil action without the person concerned having the possibility of arranging for his defence may be refused in the other Member States;

(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;

(6) as regards a dispute concerning the payment of remuneration claimed in respect of the salvage of a cargo or freight, in the court under the authority of which the cargo or freight in question:

(a) has been arrested to secure such payment, or

(b) could have been so arrested, but bail or other security has been given.

The first subparagraph shall apply only if it is claimed that the defendant has an interest in the cargo or freight or had such an interest at the time of salvage.

Article 6

A person domiciled in a Member State may also be sued:

(1) where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided that the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings;

(2) as a third party in an action on a warranty or guarantee or in any other third-party proceedings, in the court seised of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case.

The jurisdiction conferred by the first subparagraph shall not be available in Germany or in Austria. A person domiciled in another Member State may be sued in the courts:

- of Germany, pursuant to Articles 68, 72, 73 and 74 of the Code of Civil Procedure (Zivilprozessordnung) concerning third-party notices,

- of Austria, pursuant to Article 21 of the Code of Civil Procedure (Zivilprozessordnung) concerning third-party notices;

(3) on a counter-claim arising from the same contract or facts on which the original claim was based, in the court in which the original claim is pending;

(4) in matters relating to a contract, if the action may be combined with an action against the same defendant in matters relating to rights in rem in immovable property, in the court of the Member State in which the property is situated.

Article 7

Where by virtue of this Regulation a court of a Member State has jurisdiction in actions relating to liability from the use or operation of a ship, that court, or any other court substituted for this purpose by the internal law of that Member State, shall also have jurisdiction over claims for limitation of such liability.

SECTION 3
JURISDICTION IN MATTERS RELATING TO INSURANCE

Article 8

In matters relating to insurance, jurisdiction shall be determined by this Section, without prejudice to Article 4 and Article 5(5).

Article 9

An insurer domiciled in a Member State may be sued:

(1) in the courts of the Member State where he is domiciled, or

(2) in another Member State, in the case of actions brought by the policy-holder, the insured or a beneficiary, in the courts for the place where the plaintiff is domiciled, or

(3) if he is a co-insurer, in the courts of a Member State in which proceedings are brought against the leading insurer.

An insurer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.

Article 10

In respect of liability insurance or insurance of immovable property, the insurer may be sued in the courts for the place where the harmful event occurred. The same applies if movable and immovable property are covered by the same insurance policy and both are adversely affected by the same contingency.

Article 11

In respect of liability insurance, the insurer may, if the law of the court permits it, be joined in proceedings which the injured party had brought against the insured.
The provisions of Articles 8, 9 and 10 shall apply to actions brought by the injured party directly against the insurer, where such direct actions are permitted.
If the law governing such direct actions provides that the policy-holder or the insured may be joined as a party to the action, the court seised by virtue of the second subparagraph shall have jurisdiction over them.
The jurisdiction conferred by this Article shall not be available in Germany or in Austria. A person domiciled in another Member State may be sued in the courts:

- of Germany, pursuant to Articles 68, 72, 73 and 74 of the Code of Civil Procedure (Zivilprozessordnung) concerning third-party notices,
- of Austria, as provided by Article 21 of the Code of Civil Procedure (Zivilprozessordnung) concerning third-party notices.

Article 12

Without prejudice to the provisions of the third paragraph of Article 11, an insurer may bring proceedings only in the courts of the Member State in which the defendant is domiciled, irrespective of whether he is the policy-holder, the insured or a beneficiary.
The provisions of this Section shall not affect the right to bring a counterclaim in the court in which, in accordance with this Section, the original claim is pending.

Article 13

The provisions of this Section may be departed from only by an agreement on jurisdiction:

(1) which is entered into after the dispute has arisen, or
(2) which allows the policy-holder, the insured or a beneficiary to bring proceedings in courts other than those indicated in this Section, or
(3) which is concluded between a policy-holder and an insurer, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which has the effect of conferring jurisdiction on the

courts of that Member State even if the harmful event were to occur abroad, provided that such an agreement is not contrary to the law of that Member State, or

(4) which is concluded with a policy-holder who is not domiciled in a Member State, except in so far as the insurance is compulsory or relates to immovable property in a Member State, or

(5) which relates to a contract of insurance in so far as it covers one or more of the risks set out in Article 14.

Article 14

The risks referred to in point 5 of Article 13 are the 'large risks' within the meaning of Article 5(d) of Council Directive 73/239/EEC[7] and any risk or interest connected therewith.

SECTION 4
JURISDICTION OVER CONSUMER CONTRACTS

Article 15

In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 4 and Article 5(5), if:

(1) it is a contract for the sale of goods on instalment credit terms; or

(2) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or

(3) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several countries including that Member State, and the contract falls within the scope of such activities.

Where a consumer enters into a contract with a party who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.

This section shall not apply to a contract of transport other than a contract which, for an inclusive price, provides for a combination of travel and accommodation.

[7] *OJ* L 228, 16.8.1973, p. 3.

Article 16

A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or in the courts for the place where the consumer is domiciled.
Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled.
The first and second paragraphs shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.

Article 17

The provisions of this Section may be departed from only by an agreement:
(1) which is entered into after the dispute has arisen; or
(2) which allows the consumer to bring proceedings in courts other than those indicated in this Section;or
(3) which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which confers jurisdiction on the courts of that Member State, provided that such an agreement is not contrary to the law of that Member State.

SECTION 5
JURISDICTION OVER INDIVIDUAL CONTRACTS OF EMPLOYMENT

Article 18

In matters relating to individual contracts of employment, jurisdiction shall be determined by this Section, without prejudice to Article 4 and Article 5(5).
Where an employee enters into an individual contract of employment with an employer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, the employer shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.

Article 19

An employer domiciled in a Member State may be sued:
(1) in the courts of the Member State where he is domiciled; or
(2) in another Member State:

- (a) in the courts for the place where the employee habitually carries out his work or in the courts for the last place where he did so, or
- (b) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.

Article 20

An employer may bring proceedings only in the courts of the Member State in which the employee is domiciled.
The provisions of this Section shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.

Article 21

The provisions of this Section may be departed from only by an agreement on jurisdiction which is entered into after the dispute has arisen, or which allows the employee to bring proceedings in courts other than those indicated in this Section.

SECTION 6
EXCLUSIVE JURISDICTION

Article 22

The following courts shall have exclusive jurisdiction, regardless of domicile:
(1) in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated;
However, in proceedings which have as their object tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months, the courts of the Member State in which the defendant is domiciled shall also have jurisdiction, provided that the tenant is a natural person and that the landlord and the tenant are domiciled in the same Member State;
(2) in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or of the decisions of their organs, the courts of the Member State in which the company, legal person or association has its seat. In order to determine that seat, the court shall apply its rules of private international law;

(3) in proceedings which have as their object the validity of entries in public registers, the courts of the Member State in which the register is kept;
(4) in proceedings concerned with the registration or validity of patents, trade marks, designs and models, or other similar rights required to be deposited or registered, the courts of the Member State in which the deposit or registration has been applied for, has taken place or is under the terms of an international convention deemed to have taken place;
Without prejudice to the powers of the European Patent Office under the Convention on the grant of European patents signed at Munich on 5 October 1973, the courts of each Member State shall have sole jurisdiction, irrespective of domicile, over the registration and validity of a European patent granted by that State;
(5) in proceedings concerned with the enforcement of judgments, the courts of the Member State in which the judgment has been or is to be enforced.

SECTION 7
PROROGATION OF JURISDICTION

Article 23

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:
(a) in writing or evidenced in writing; or
(b) in a form which accords with practices which the parties have established between themselves; or
(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.
Any communication by electronic means which can provide a durable record of the agreement shall be deemed to be in writing.
Where an agreement conferring jurisdiction is concluded by parties, none of whom is domiciled in a Member State, the courts of other Member States shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction.
Agreements conferring jurisdiction shall have no legal force if they are contrary to the provisions of Articles 13 and 17 or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 22.

Article 24

Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 22.

SECTION 8
EXAMINATION AS TO JURISDICTION AND ADMISSIBILITY

Article 25

Where a court of a Member State is seised of a claim which is principally concerned with a matter over which the courts of another Member State have exclusive jurisdiction by virtue of Article 22, it shall declare of its own motion that it has no jurisdiction.

Article 26

Where a defendant domiciled in one Member State is sued in a court of another Member State and does not enter an appearance, the court shall declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from the provisions of this Regulation.

The court shall stay the proceedings so long as it is not shown that the defendant has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end.

National provisions transposing Council Directive [.../EC on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters][8] shall apply in place of the second paragraph if the document instituting the proceedings or an equivalent document had to be transmitted to another Member State in accordance with those provisions.

Until such time as national provisions transposing the Directive referred to in the third paragraph enter into force, the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters shall apply if the document instituting the proceedings or an equivalent document had to be transmitted to another Member State in accordance with that Convention.

[8] *OJ* […]

SECTION 9
LIS PENDENS - RELATED ACTIONS

Article 27

Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.
Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

Article 28

Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.
Where these actions are pending at first instance, any court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.
For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

Article 29

Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court.

Article 30

For the purposes of this Section, a court shall be deemed to be seised:

- (1) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have service effected on the defendant, or
- (2) if the document has to be served before being lodged with the court at the time when it is received by the authority responsible for service, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have the document lodged with the court.

SECTION 10
PROVISIONAL, INCLUDING PROTECTIVE, MEASURES

Article 31

Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter.

CHAPTER III
RECOGNITION AND ENFORCEMENT

Article 32

For the purposes of this Regulation, 'judgment' means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court.
In Sweden, in summary proceedings for an injunction to pay (betalningsföreläggande) and assistance (handräckning), the words 'judge', 'court' and 'tribunal' shall include the public enforcement service (kronofogdemyndighet).

SECTION 1
RECOGNITION

Article 33

A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.
Any interested party who raises the recognition of a judgment as the principal issue in a dispute may, in accordance with the procedures provided for in Sections 2 and 3 of this Chapter, apply for a decision that the judgment is recognised.
If an incidental question of recognition is raised in a court of a Member State, that court shall have jurisdiction to rule on the existence of one of the grounds for non-recognition provided for by Artices 41 and 42.

SECTION 2
ENFORCEMENT

Article 34

A judgment given in a Member State and enforceable in that State shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there.

Article 35

The application shall be submitted to the court or competent authority appearing in the list in Annex II.
The local jurisdiction shall be determined by reference to the place of domicile of the party against whom enforcement is sought or to the place of enforcement.

Article 36

The procedure for making the application shall be governed by the law of the Member State in which enforcement is sought.
The applicant must give an address for service of process within the area of jurisdiction of the court or competent authority applied to. However, if the law of the Member State in which enforcement is sought does not provide for the furnishing of such an address, the applicant shall appoint a representative ad litem.
The second paragraph shall not apply where the competent authority is an administrative authority.
The documents referred to in Article 50 shall be attached to the application.

Article 37

The judgment shall be declared enforceable immediately on completion of the formalities provided for in Article 50 without any review of the grounds of non-enforcement set out in Articles 41 and 42. The party against whom enforcement is sought shall not at this stage of the proceedings be entitled to make any submissions on the application.

Article 38

The decision on the application for a declaration of enforceability shall forthwith be brought to the notice of the applicant in accordance with the procedure laid down by the law of the Member State in which enforcement is sought.

The declaration of enforceability shall be served on the party against whom enforcement is sought, accompanied by the judgment, if not already served on that party.

Article 39

The decision on the application for a declaration of enforceability may be appealed against by either party.
The appeal shall be lodged with the court appearing in the list in Annex III.
The appeal shall be dealt with in accordance with the rules governing procedure in adversarial proceedings.
If the party against whom enforcement is sought fails to appear before the court before which the appeal has been brought, Article 26 shall apply even where the party against whom enforcement is sought is not domiciled in any of the Member States.
An appeal against the declaration of enforceability must be lodged within one month of service thereof.
If the party against whom enforcement is sought is domiciled in a Member State other than that in which the declaration of enforceability was given, the period for appealing shall be two months and shall run from the date of service, either on him in person or at his residence. No extension of time may be granted on account of distance.

Article 40

The judgment given on the appeal may be contested only by the proceedings referred to in Annex IV.

Article 41

The court with which an appeal is lodged under Article 39 or Article 40 shall give its decision without delay. It shall refuse or revoke a declaration of enforceability only on one of the following grounds:

(1) if the declaration of enforceability is manifestly contrary to public policy in the Member State addressed;
(2) where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;
(3) if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State addressed;

(4) if it is irreconcilable with an earlier judgment given in another Member State or in a third country involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed. Under no circumstances may the judgment of the Member State of origin be reviewed as to its substance.

Article 42

The court with which an appeal is lodged under Article 39 or Article 40 shall refuse or revoke a declaration of enforceability if the provisions of Sections 3, 4 and 6 of Chapter II have been infringed.
In its examination of the grounds of jurisdiction referred to in the first paragraph, the court with which the appeal is lodged shall be bound by the findings of fact on which the court of the Member State of origin based its jurisdiction.
Without prejudice to the first paragraph, the jurisdiction of the court of the Member State of origin may not be reviewed; the public-policy consideration referred to in Article 41(1) shall not affect the rules relating to jurisdiction.

Article 43

The court with which an appeal is lodged under Article 39 or Article 40 may, on the application of the party against whom enforcement is sought, stay the proceedings if an ordinary appeal has been lodged against the judgment in the Member State of origin or if the time for such an appeal has not yet expired; in the latter case, the court may specify the time within which such an appeal is to be lodged.
That court may also make enforcement conditional on the provision of such security as it shall determine.

Article 44

When a judgment must be declared enforceable in accordance with this Regulation, the applicant may avail himself of provisional, including protective, measures in accordance with the law of the Member State addressed without a declaration of enforceability under Article 37 being required.
The declaration of enforceability shall carry with it the power to proceed to any protective measures.
During the time specified for an appeal pursuant to the fifth paragraph of Article 39 against the declaration of enforceability and until any such appeal has been determined, no measures of enforcement may be taken other than protective measures against the property of the party against whom enforcement is sought.

Article 45

Where a judgment has been given in the Member State of origin in respect of several matters and the declaration of enforceability cannot be given for all of them, the court or the competent authority shall give it for one or more of them.
An applicant may request a declaration of enforceability limited to parts of a judgment.

Article 46

A foreign judgment which orders a periodic payment by way of a penalty shall be enforceable in the Member State in which enforcement is sought only if the amount of the payment has been finally determined by the courts of the Member State of origin.

Article 47

An applicant who, in the State of origin, has benefited from complete or partial legal aid or exemption from costs or expenses, shall be entitled, in the procedure provided for in this Section, to benefit from the most favourable legal aid or the most extensive exemption from costs or expenses provided for by the law of the Member State addressed.

Article 48

No security, bond or deposit, however described, shall be required of a party who in one Member State applies for enforcement of a judgment given in another Member State on the ground that he is a foreign national or that he is not domiciled or resident in the Member State in which enforcement is sought.

Article 49

In proceedings for the issue of a declaration of enforceability, no charge, duty or fee calculated by reference to the value of the matter at issue may be levied in the Member State in which enforcement is sought.

SECTION 3
COMMON PROVISIONS

Article 50

A party seeking recognition or applying for a declaration of enforceability of a judgment shall produce a copy of the judgment which satisfies the conditions necessary to establish its authenticity.
A party applying for a declaration of enforceability of a judgment shall also produce the certificate referred to in Article 51, without prejudice to Article 52.

Article 51

The court or competent authority of a Member State where the judgment was given shall issue, at the request of any interested party, a certificate using the standard form in Annex V.

Article 52

If the certificate provided for by Article 51 is not produced, the competent court or authority may specify a time for its production or accept equivalent documents or, if it considers that it has sufficient information before it, dispense with production thereof.
If the court or competent authority so requires, a translation of the documents shall be produced; the translation shall be certified by a person qualified to do so in one of the Member States.

Article 53

No legalisation or other similar formality shall be required in respect of the documents referred to in Article 50, or in respect of a document appointing a representative ad litem.

CHAPTER IV
AUTHENTIC INSTRUMENTS AND COURT SETTLEMENTS

Article 54

A document which has been formally drawn up or registered as an authentic instrument and is enforceable in one Member State shall, in another Member State, be declared enforceable there, on application made in accordance with the procedures provided for in Article 34 to 49. The court with which an appeal is lodged under Article 39 or 40 shall refuse or revoke a declaration of enforceability only if enforcement of the instrument is contrary to public policy in the Member State addressed.

The instrument produced must satisfy the conditions necessary to establish its authenticity in the Member State of origin.

Section 3 of Title III shall apply as appropriate.

The competent authority of a Member State where an authentic instrument was drawn up or registered shall issue, at the request of any interested party, a certificate using the standard form in Annex VI.

Article 55

A settlement which has been approved by a court in the course of proceedings and is enforceable in the Member State in which it was concluded shall be enforceable in the State addressed under the same conditions as authentic instruments. The competent court or authority of a Member State in which a court settlement was approved shall issue, at the request of any interested party, a certificate using the standard form in Annex V.

Arrangements relating to maintenance obligations concluded before administrative authorities or authenticated by them shall also be regarded as authentic instruments within the meaning of the first paragraph of Article 54.

CHAPTER V
GENERAL PROVISIONS

Article 56

In order to determine whether a party is domiciled in the Member State whose courts are seised of a matter, the court shall apply its internal law. If a party is not domiciled in the Member State whose courts are seised of the matter, then, in order

to determine whether the party is domiciled in another Member State, the court shall apply the law of the latter Member State.

Article 57

For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its statutory seat, central administration, or principal place of business.

CHAPTER VI
TRANSITIONAL PROVISIONS

Article 58

This Regulation shall apply only to legal proceedings instituted and to documents formally drawn up or registered as authentic instruments after its entry into force.
However, judgments given after the date of entry into force of this Regulation in proceedings instituted before that date shall be recognised and enforced in accordance with the provisions of Chapter III if jurisdiction was founded upon rules which accorded with those provided for either in Chapter II, or in the Brussels Convention or in a convention concluded between the State of origin and the State addressed which was in force when the proceedings were instituted.

CHAPTER VII
RELATIONS WITH OTHER INSTRUMENTS

Article 59

This Regulation shall not prejudice the application of provisions governing jurisdiction and the recognition and enforcement of judgments in specific matters which are contained in Community instruments or in national legislation harmonised pursuant to such instruments.

Article 60

This Regulation shall, as between the Member States, supersede the Brussels Convention of 1968.

However, the Brussels Convention shall always be applicable:

(1) where the defendant is domiciled in a Member State not bound by this Regulation and Articles 16 and 17 of the Brussels Convention confer jurisdiction on the courts of that State;

(2) in matters of lis pendens and related actions as referred to in Articles 21 and 22 of the Brussels Convention, where claims are made in a Member State not dound by this Regulation and a Member State that is so bound.

Judgments given in a Member State, whether or not bound by this Regulation, by a court which based its jurisdiction on the Brussels Convention shall be recognised and enforced in the Member States bound by this Regulation in accordance with Chapter III of this Regulation.

Article 61

Subject to Article 58, second paragraph, and Articles 62 and 63, this Regulation shall, as between Member States, supersede the following conventions and treaty concluded between two or more of them:

- the Convention between Belgium and France on jurisdiction and the validity and enforcement of judgments, arbitration awards and authentic instruments, signed at Paris on 8 July 1899,
- the Convention between Belgium and the Netherlands on jurisdiction, bankruptcy, and the validity and enforcement of judgments, arbitration awards and authentic instruments, signed at Brussels on 28 March 1925,
- the Convention between France and Italy on the enforcement of judgments in civil and commercial matters, signed at Rome on 3 June 1930,
- the Convention between Germany and Italy on the recognition and enforcement of judgments in civil and commercial matters, signed at Rome on 9 March 1936,
- the Convention between Belgium and Austria on the reciprocal recognition and enforcement of judgments and authentic instruments relating to maintenance obligations, signed at Vienna on 25 October 1957,
- the Convention between Germany and Belgium on the mutual recognition and enforcement of judgments, arbitration awards and authentic instruments in civil and commercial matters, signed at Bonn on 30 June 1958,
- the Convention between the Netherlands and Italy on the recognition and enforcement of judgments in civil and commercial matters, signed at Rome on 17 April 1959,
- the Convention between Germany and Austria on the reciprocal recognition and enforcement of judgments, settlements and authentic instruments in civil and commercial matters, signed at Vienna on 6 June 1959,
- the Convention between Belgium and Austria on the reciprocal recognition and enforcement of judgments, arbitral awards and authentic instruments in civil and commercial matters, signed at Vienna on 16 June 1959,

- the Convention between Greece and Germany for the reciprocal recognition and enforcement of judgments, settlements and authentic instruments in civil and commercial matters, signed in Athens on 4 November 1961,
- the Convention between Belium and Italy on the recognition and enforcement of judgments and other enforceable instruments in civil and commercial matters, signed at Rome on 6 April 1962,
- the Convention between the Netherlands and Germany on the mutual recognition and enforcement of judgments and other enforceable instruments in civil and commercial matters, signed at The Hague on 30 August 1962,
- the Convention between the Netherlands and Austria on the reciprocal recognition and enforcement of judgments and authentic instruments in civil and commercial matters, signed at The Hague on 6 February 1963,
- the Convention between France and Austria on the recognition and enforcement of judgments and authentic instruments in civil and commercial matters, signed at Vienna on 15 July 1966,
- the Convention between Spain and France on the recognition and enforcement of judgment arbitration awards in civil and commercial matters, signed at Paris on 28 May 1969,
- the Convention between Luxembourg and Austria on the recognition and enforcement of judgments and authentic instruments in civil and commercial matters, signed at Luxembourg on 29 July 1971,
- the Convention between Italy and Austria on the recognition and enforcement of judgments in civil and commercial matters, of judicial settlements and of authentic instruments, signed at Rome on 16 November 1971,
- the Convention between Spain and Italy regarding legal aid and the recognition and enforcement of judgments in civil and commercial matters, signed at Madrid on 22 May 1973,
- the Convention between Finland, Iceland, Norway, Sweden and Denmark on the recognition and enforcement of judgments in civil matters, signed at Copenhagen on 11 October 1977,

  - the Convention between Austria and Sweden on the recognition and enforcement of judgments in civil matters, signed at Stockholm on 16 September 1982,
- the Convention between Spain and the Federal Republic of Germany on the recognition and enforcement of judgments, settlements and enforceable authentic instruments in civil and commercial matters, signed at Bonn on 14 November 1983,
- the Convention between Austria and Spain on the recognition and enforcement of judgments, settlements and enforceable authentic instruments in civil and commercial matters, signed at Vienna on 17 February 1984,

- the Convention between Finland and Austria on the recognition and enforcement of judgments in civil matters, signed at Vienna on 17 November 1986, and
- the Treaty between Belgium, the Netherlands and Luxembourg in jurisdiction, bankruptcy, and the validity and enforcement of judgments, arbitration awards and authentic instruments, signed at Brussels on 24 November 1961, in so far as it is in force.

Article 62

The Treaty and the conventions referred to in Article 61 shall continue to have effect in relation to matters to which this Regulation does not apply.
They shall continue to have effect in respect of judgments given and documents formally drawn up or registered as authentic instruments before the entry into force of this Regulation.

Article 63

This Regulation shall not affect any conventions to which the Member States are parties and which in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments. Those conventions are the following:

- Convention on the grant of European patents, signed at Munich on 5 October 1973;
- Warsaw Convention of …

With a view to its uniform interpretation, the first paragraph shall be applied in the following manner:

(1) this Regulation shall not prevent a court of a Member State which is a party to a convention on a particular matter from assuming jurisdiction in accordance with that convention, even where the defendant is domiciled in another Member State which is not a party to that convention. The court hearing the action shall, in any event, apply Article 26 of this Regulation;
(2) judgments given in a Member State by a court in the exercise of jurisdiction provided for in a convention on a particular matter shall be recognised and enforced in the other Member States in accordance with this Regulation.

Where a convention on a particular matter to which both the Member State of origin and the Member State addressed are parties lays down conditions for the recognition or enforcement of judgments, those conditions shall apply. In any event, the provisions of this Regulation which concern the procedure for recognition and enforcement of judgments may be applied.

Article 64

This Regulation shall not affect agreements by which Member States undertook prior to the entry into force of this Regulation pursuant to Article 59 of the Brussels Convention, not to recognise judgments given, in particular in other Contracting States to that Convention, against defendants domiciled or habitually resident in a third country where, in cases provided for in Article 4 of that Convention, the judgment could only be founded on a ground of jurisdiction specified in the second paragraph of Article 3 of that Convention.

CHAPTER VIII
FINAL PROVISIONS

Article 65

No later than five years after the entry into force of this Regulation, the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Regulation. The report shall be accompanied, if need be, by proposals for adaptations to this Regulation.

Article 66

The Member States shall notify the Commission of the texts of their legislative provisions amending either the provisions of their legislation listed in Annex I or the courts or competent authorities indicated in Annexes II and III. The Commission shall adapt the annexes concerned accordingly.

Article 67

This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Communities.
This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels […]

[Annexes omitted]

CÓDIGO CIVIL DE MACAU

LIVRO I
PARTE GERAL

TÍTULO I
Das leis, sua interpretação e aplicação

[…]

CAPÍTULO III
Direitos dos não residentes e conflitos de leis

SECÇÃO I
DISPOSIÇÕES GERAIS

Artigo 13.º
(Condição jurídica dos não-residentes)

Os não-residentes são equiparados aos residentes em Macau quanto ao gozo de direitos civis, salvo disposição legal em contrário.

Artigo 14.º
(Qualificação)

A competência atribuída a uma lei abrange somente as normas que, pelo seu conteúdo e pela função que têm nessa lei, integram o regime do instituto visado na regra de conflitos.

Artigo 15.º
(Referência a lei exterior a Macau. Princípio geral)

1. A referência das normas de conflitos a qualquer lei exterior a Macau determina apenas, na falta de preceito em contrário, a aplicação do direito interno dessa lei.
2. Para efeitos do presente capítulo, entende-se por direito interno o direito material, com exclusão das normas de conflitos.

Artigo 16.º
(Reenvio)

1. Se, porém, o direito de conflitos da lei referida pela norma de conflitos de Macau remeter para outra legislação e esta se considerar competente para regular o caso, é o direito interno desta legislação que deve ser aplicado.

2. Se o direito de conflitos da lei designada pela norma de conflitos devolver para o direito interno de Macau, é este o direito aplicável.

Artigo 17.º
(Casos em que não é admitido o reenvio)

1. Cessa o disposto no artigo anterior, quando da sua aplicação resulte a invalidade ou ineficácia de um negócio jurídico que seria válido ou eficaz segundo a regra fixada no artigo 15.º, ou a ilegitimidade de um estado que de outro modo seria legítimo.
2. Cessa igualmente o disposto no artigo anterior, se a lei tiver sido designada pelos interessados, nos casos em que a designação é permitida.

Artigo 18.º
(Ordenamentos jurídicos plurilegislativos)

1. Se for declarado competente um ordenamento em que coexistam vários sistemas normativos, de base territorial ou pessoal, sem que seja designado o sistema normativo aplicável, a lei competente determina-se de acordo com os critérios utilizados naquele ordenamento.
2. Se tais critérios não puderem ser individualizados, aplica-se o sistema normativo com o qual a situação se achar mais estreitamente conexa.

Artigo 19.º
(Fraude à lei)

Na aplicação das normas de conflitos são irrelevantes as situações de facto ou de direito criadas com o intuito fraudulento de evitar a aplicabilidade da lei que, noutras circunstâncias, seria competente.

Artigo 20.º
(Ordem pública)

1. Não são aplicáveis os preceitos da lei exterior a Macau indicados pela norma de conflitos, quando essa aplicação for manifestamente incompatível com a ordem pública.
2. São aplicáveis, neste caso, as normas mais apropriadas da legislação externa competente, ou, subsidiariamente, as regras do direito interno de Macau.

Artigo 21.º
(Normas de aplicação imediata)

As normas da lei de Macau que pelo seu objecto e fim específicos devam ser imperativamente aplicadas prevalecem sobre os preceitos da lei exterior designada nos termos da secção seguinte.

Artigo 22.º
(Interpretação e averiguação do direito aplicável)

1. A lei exterior a Macau declarada aplicável é interpretada dentro do sistema a que pertence e de acordo com as regras interpretativas nele fixadas.
2. Na impossibilidade de averiguar o conteúdo dessa lei, recorrer-se-á à lei que for subsidiariamente competente, devendo adoptar-se igual procedimento sempre que não for possível determinar os elementos de facto ou de direito de que dependa a designação da lei aplicável[1].

Artigo 23.º
(Actos realizados a bordo)

1. Aos actos realizados a bordo de navios ou aeronaves, fora dos portos ou aeródromos, é aplicável a lei do lugar da respectiva matrícula, sempre que for competente a lei territorial.
2. Os navios e aeronaves militares consideram-se como parte do território do país ou Território a que pertencem.

[1] Cf. igualmente o artigo 341.º do Código Civil de Macau:

'Artigo 341.º (Direito consuetudinário ou exterior ao território de Macau)

1. Àquele que invocar direito consuetudinário ou direito exterior ao território de Macau compete fazer a prova da sua existência e conteúdo; mas o tribunal deve procurar, oficiosamente, obter o respectivo conhecimento.
2. O conhecimento oficioso incumbe também ao tribunal, sempre qu este tenha de decidir com base no direito consuetudinário ou no direito exterior ao território de Macau e nenhuma das partes o tenha invocado, ou a parte contrária tenha reconhecido a sua existência e conteúdo ou não haja deduzido oposição.
3. Na impossibilidade de determinar o conteúdo do direito aplicável, o tribunal recorrerá às regras do direito comum de Macau.'

SECÇÃO II
NORMAS DE CONFLITOS

SUBSECÇÃO I
Âmbito e determinação da lei pessoal

Artigo 24.º
(Âmbito da lei pessoal)

O estado dos indivíduos, a capacidade das pessoas, as relações de família e as sucessões por morte são regulados pela lei pessoal dos respectivos sujeitos, salvas as restrições estabelecidas na presente secção.

Artigo 25.º
(Início e termo da personalidade jurídica)

1. O início e termo da personalidade jurídica são fixados igualmente pela lei pessoal de cada indivíduo.
2. Quando certo efeito jurídico depender da sobrevivência de uma a outra pessoa e estas tiverem leis pessoais diferentes, se as presunções de sobrevivência dessas leis forem inconciliáveis, é aplicável o disposto no n.º 2 do artigo 65.º.[2]

Artigo 26.º
(Direitos de personalidade)

1. Aos direitos de personalidade, no que respeita à sua existência e tutela e às restrições impostas ao seu exercício, é também aplicável a lei pessoal.
2. Em Macau, o não-residente não goza, porém, de qualquer forma de tutela juridica que não seja reconhecida na lei local.

Artigo 27.º
(Desvios quanto às consequências da incapacidade)

1. O negócio jurídico celebrado em Macau por pessoa que seja incapaz segundo a lei pessoal competente não pode ser anulado com fundamento na incapacidade, no caso de a lei interna de Macau, se fosse aplicável, considerar essa pessoa como capaz.

[2] Artigo 65.º: '[...] 2. Quando certo efeito jurídico depender da sobrevivência de uma a outra pessoa, presume-se, em caso de dúvida, que uma e outra faleceram ao mesmo tempo.'

2. Esta excepção cessa, quando a outra parte tinha conhecimento da incapacidade, ou quando o negócio jurídico for unilateral, pertencer ao domínio do direito da família ou das sucessões ou respeitar à disposição de imóveis situados fora do território de Macau.
3. Se o negócio jurídico for celebrado pelo incapaz fora de Macau, será observada a lei vigente no lugar da celebração que consagrar regras idênticas às fixadas nos números anteriores.

Artigo 28.º
(Maioridade ou emancipação)

A mudança da lei pessoal não prejudica a maioridade ou emancipação adquirida segundo a lei pessoal anterior.

Artigo 29.º
(Tutela e institutos análogos)

À tutela e institutos análogos de protecção aos incapazes é aplicável a lei pessoal do incapaz.

Artigo 30.º
(Determinação da lei pessoal)

1. A lei pessoal é a da residência habitual do indivíduo.
2. Considera-se residência habitual o lugar onde o indivíduo tem o centro efectivo e estável da sua vida pessoal.
3. Para efeitos dos números anteriores, a residência habitual em Macau não depende de qualquer formalidade administrativa, mas presume-se residente habitual no território de Macau aquele que tenha direito à titularidade do bilhete de identidade de residente de Macau.
4. Na hipótese de o indivíduo ter mais de uma residência habitual, sendo uma delas em Macau, a lei pessoal é a do território de Macau.
5. Na falta de residência habitual, a lei pessoal do indivíduo é a lei do lugar com o qual a sua vida pessoal se ache mais estreitamente conexa.
6. São, porém, reconhecidos em Macau os negócios jurídicos celebrados no país da nacionalidade do declarante, em conformidade com a lei desse país, desde que esta se considere competente.
7. Cessa o disposto no número anterior, se o declarante for nacional de país em que coexistam diferentes sistemas legislativos e nesse país tiver a sua residência habitual, contanto que a lei da sua residência habitual se considere competente para regular a relação.

Artigo 31.º
(Pessoas colectivas)

1. A pessoa colectiva tem como lei pessoal a lei do lugar onde se encontra situada a sede principal e efectiva da sua administração.
2. À lei pessoal compete especialmente regular: a capacidade da pessoa colectiva; a constituição, funcionamento e competência dos seus órgãos; os modos de aquisição e perda da qualidade de associado e os correspondentes direitos e deveres; a responsabilidade da pessoa colectiva, bem como a dos respectivos órgãos e titulares, perante terceiros; a transformação, dissolução e extinção da pessoa colectiva.
3. A transferência da sede da pessoa colectiva para um lugar sujeito a um ordenamento jurídico distinto não extingue a personalidade jurídica desta, se nisso convierem as leis de uma e outra sede.
4. A fusão de entidades com lei pessoal diferente é apreciada em face de ambas as leis pessoais.

Artigo 32.º
(Pessoas colectivas internacionais)

A lei pessoal das pessoas colectivas constituídas por convenção internacional é a designada na convenção que as criou ou nos respectivos estatutos e, na falta de designação, a do lugar onde estiver a sede principal.

Artigo 33.º
(Desvios quanto às consequências da incapacidade das pessoas colectivas)

É aplicável às pessoas colectivas, quando a analogia o justifique, o disposto no artigo 27.º.

SUBSECÇÃO II
Lei reguladora dos negócios jurídicos

Artigo 34.º
(Declaração negocial)

1. A perfeição, interpretação e integração da declaração negocial são reguladas pela lei aplicável à substância do negócio, a qual é igualmente aplicável à falta e vícios da vontade.

2. O valor de um comportamento como declaração negocial é determinado pela lei da residência habitual comum do declarante e do destinatário e, na falta desta, pela lei do lugar onde o comportamento se verificou.
3. O valor do silêncio como meio declaratório é igualmente determinado pela lei da residência habitual comum e, na falta desta, pela lei do lugar onde a proposta foi recebida.

Artigo 35.º
(Forma da declaração)

1. A forma da declaração negocial é regulada pela lei aplicável à substÔncia do negócio; é, porém, suficiente a observância da lei em vigor no lugar em que é feita a declaração, salvo se a lei reguladora da substância do negócio exigir, sob pena de nulidade ou ineficácia, a observância de determinada forma, ainda que o negócio seja celebrado no exterior.
2. A declaração negocial é ainda formalmente válida se, em vez da forma prescrita na lei local, tiver sido observada a forma prescrita pelo ordenamento jurídico para que remete a norma de conflitos daquela lei, sem prejuízo do disposto na última parte do número anterior.

Artigo 36.º
(Representação legal)

A representação legal está sujeita à lei reguladora da relação jurídica de que nasce o poder representativo.

Artigo 37.º
(Representação orgânica)

A representação da pessoa colectiva por intermédio dos seus órgãos é regulada pela respectiva lei pessoal.

Artigo 38.º
(Representação voluntária)

1. A representação voluntária é regulada, quanto à existência, extensão, modificação, efeitos e extinção dos poderes representativos, pela lei do lugar onde os poderes são exercidos.
2. Porém, se o representante exercer os poderes representativos em país ou Território diferente daquele que o representado indicou e o facto for conhecido do

terceiro com quem contrate, é aplicável a lei da residência habitual do representado.

3. Se o representante exercer profissionalmente a representação e o facto for conhecido do terceiro contratante, é aplicável a lei do do domicílio profissional.
4. Quando a representação se refira à disposição ou administração de bens imóveis, é aplicável a lei do lugar da situação desses bens.

Artigo 39.º
(Prescrição e caducidade)

A prescrição e a caducidade são reguladas pela lei aplicável ao direito a que uma ou outra se refere.

SUBSECÇÃO III
Lei reguladora das obrigações

Artigo 40.º
(Obrigações provenientes de negócios jurídicos)

1. As obrigações provenientes de negócio jurídico, assim como a própria substância dele, são reguladas pela lei que os respectivos sujeitos tiverem designado ou houverem tido em vista.
2. A designação ou referência das partes só pode, todavia, recair sobre lei cuja aplicabilidade corresponda a um interesse sério dos declarantes ou esteja em conexão com algum dos elementos do negócio jurídico atendíveis no domínio do direito de conflitos.

Artigo 41.º
(Critério supletivo)

Na falta de determinação da lei competente, aplica-se a lei do lugar com o qual o negócio jurídico se ache mais estreitamente conexo.

Artigo 42.º
(Gestão de negócios)

À gestão de negócios é aplicável a lei do lugar em que decorre a principal actividade do gestor.

Artigo 43.º
(Enriquecimento sem causa)

O enriquecimento sem causa é regulado pela lei com base na qual se verificou a transferência do valor patrimonial a favor do enriquecido.

Artigo 44.º
(Responsabilidade extracontratual)

1. A responsabilidade extracontratual fundada, quer em acto ilícito, quer no risco ou em qualquer conduta lícita, é regulada pela lei do lugar onde decorreu a principal actividade causadora do prejuízo; em caso de responsabilidade por omissãoo, é aplicável a lei do lugar onde o responsável deveria ter agido.
2. Se a lei do lugar onde se produziu o efeito lesivo considerar responsável o agente, mas não o considerar como tal a lei do lugar onde decorreu a sua actividade, é aplicável a primeira lei, desde que o agente devesse prever a produção de um dano, em lugar sujeito àquela lei, como consequência do seu acto ou omissão.
3. Se, porém, o agente e o lesado tiverem a mesma residência habitual e se encontrarem ocasionalmente no exterior, a lei aplicável será a da residência comum, sem prejuízo das disposições do ordenamento jurídico designado nos termos dos números anteriores que devam ser aplicadas indistintamente a todas as pessoas.

SUBSECÇÃO IV
Lei reguladora das coisas

Artigo 45.º
(Direitos reais)

1. O regime da posse, propriedade e demais direitos reais é definido pela lei do lugar em cujo território as coisas se encontrem situadas.
2. Em tudo quanto respeita à constituição ou transferência de direitos reais sobre coisas em trânsito, são estas havidas como situadas no lugar do destino.
3. A constituição e transferência de direitos sobre os meios de transporte submetidos a um regime de matrícula são reguladas pela lei do lugar onde a matrícula tiver sido efectuada.

Artigo 46.º
(Capacidade para constituir direitos reais sobre coisas imóveis ou dispor deles)

É igualmente definida pela lei da situação da coisa a capacidade para constituir direitos reais sobre coisas imóveis ou para dispor deles, desde que essa lei assim o determine; de contrário, é aplicável a lei pessoal.

Artigo 47.º
(Propriedade intelectual)

Sem prejuízo do disposto em legislação especial, os direitos de autor e os direitos conexos, bem como a propriedade industrial, são regulados pela lei do lugar onde se reclama a sua protecção.

SUBSECÇÃO V
Lei reguladora das relações de família

Artigo 48.º
(Capacidade para contrair casamento ou celebrar convenções matrimoniais)

A capacidade para contrair casamento ou celebrar convenção matrimonial é regulada, em relação a cada nubente, pela respectiva lei pessoal, à qual compete ainda definir o regime da falta e dos vícios da vontade dos contraentes.

Artigo 49.º
(Forma do casamento)

1. A forma do casamento é regulada pela lei do lugar em que o acto é celebrado, sem prejuízo do disposto no número seguinte.
2. O casamento de dois estrangeiros em Macau pode ser celebrado segundo a forma prescrita na lei nacional de qualquer dos contraentes, perante os respectivos agentes consulares.

Artigo 50.º
(Relações entre os cônjuges)

1. Salvo o disposto no artigo seguinte, as relações entre os cônjuges são reguladas pela lei da sua residência habitual comum.

2. Não tendo os cônjuges a mesma residência habitual, é aplicável a lei do lugar com o qual a vida familiar se ache mais estreitamente conexa.

Artigo 51.º
(Convenções antenupciais e regime de bens)

1. A substância e efeitos das convenções antenupciais e do regime de bens, legal ou convencional, são definidos pela lei da residência habitual dos nubentes ao tempo da celebração do casamento.
2. Não tendo os nubentes a mesma residência habitual, é aplicável a lei da primeira residência conjugal.
3. Se a lei aplicável for outra que não a de Macau e um dos nubentes tiver a sua residência habitual no território de Macau, pode ser convencionado um dos regimes admitidos neste Código.

Artigo 52.º
(Convenções pós-nupciais e modificações do regime de bens)

1. A admissibilidade, substância e efeitos das convenções pós-nupciais e das modificações feitas pelos cônjuges ao regime de bens, legal ou convencional, são reguladas pela lei competente nos termos do artigo 50.º.
2. A nova convenção em caso nenhum terá efeito retroactivo em prejuízo de terceiro.

Artigo 53.º
(Divórcio)

Ao divórcio é aplicável o disposto no artigo 50.º.

Artigo 54.º
(Constituição da filiação)

À constituição da filiação é aplicável a lei pessoal do progenitor à data do estabelecimento da relação.

Artigo 55.º
(Relações entre pais e filhos)

1. As relações entre pais e filhos são reguladas pela lei da residência habitual comum dos pais e, na falta desta, pela lei pessoal do filho.

2. Se a filiação apenas se achar estabelecida relativamente a um dos progenitores, aplica-se a lei pessoal deste; se um dos progenitores tiver falecido, é competente a lei pessoal do sobrevivo.

Artigo 56.º
(Filiação adoptiva)

1. À constituição da filiação adoptiva é aplicável a lei pessoal do adoptante, sem prejuízo do disposto nos n.os 2 e 3.
2. Se a adopção for realizada por marido e mulher ou o adoptando for filho do cônjuge do adoptante, é competente a lei da residência habitual comum dos cônjuges e, na falta desta, a lei do lugar com o qual a vida familiar dos adoptantes se ache mais estreitamente conexa.
3. Se a adopção for realizada por duas pessoas que vivam em união de facto ou o adoptando for filho do unido de facto do adoptante, é aplicável, com as necessárias adaptações, o disposto no número anterior.
4. As relações entre adoptante e adoptado, e entre este e a família de origem, estão sujeitas à lei pessoal do adoptante; nos casos previstos nos n.os 2 e 3 é aplicável o disposto no artigo anterior.

Artigo 57.º
(Requisitos especiais da perfilhação ou adopção)

Se, como requisito da perfilhação ou adopção, a lei pessoal do perfilhando ou adoptando exigir o consentimento deste, será a exigência respeitada.

SUBSECÇÃO VI
Lei reguladora da união de facto

Artigo 58.º
(Lei competente)

1. Os pressupostos e os efeitos da união de facto são regulados pela lei da residência habitual comum dos unidos de facto.
2. Na falta de residência habitual comum, é aplicável a lei do lugar com o qual a situação se ache mais estreitamente conexa.

SUBSECÇÃO VII
Lei reguladora das sucessões

Artigo 59.º
(Lei competente)

A sucessão por morte é regulada pela lei pessoal do autor da sucessão ao tempo do falecimento deste, competindo-lhe também definir os poderes do administrador da herança e do executor testamentário.

Artigo 60.º
(Capacidade de disposição)

1. A capacidade para fazer, modificar ou revogar uma disposição por morte, bem como as exigências de forma especial das disposições por virtude da idade do disponente, são reguladas pela lei pessoal do autor ao tempo da declaração.
2. Aquele que, depois de ter feito a disposição, adquirir nova lei pessoal conserva a capacidade necessária para revogar a disposição nos termos da lei anterior.

Artigo 61.º
(Interpretação das disposições; falta e vícios da vontade)

É a lei pessoal do autor da herança ao tempo da declaração que regula:
a) A interpretação das respectivas cláusulas e disposições, salvo se houver referência expressa ou implícita a outra lei;
b) A falta e vícios da vontade;
c) A admissibilidade de testamentos de mão comum ou de pactos sucessórios, sem prejuízo, quanto a estes, do disposto nos artigos 51.º e 52.º.

Artigo 62.º
(Forma)

1. As disposições por morte, bem como a sua revogação ou modificação, são válidas, quanto à forma, se corresponderem às prescrições da lei do lugar onde o acto for celebrado, ou às da lei pessoal do autor da herança, quer no momento da declaração, quer no momento da morte, ou ainda às prescrições da lei para que remeta a norma de conflitos da lei local.
2. Se, porém, a lei pessoal do autor da herança no momento da declaração exigir, sob pena de nulidade ou ineficácia, a observância de determinada forma, ainda que o acto seja praticado no exterior, será a exigência respeitada.

CIVIL CODE OF MACAO[3]

BOOK I
General Part

TITLE I
Rules of law, their interpretation and application

[…]

CHAPTER III
Rights of non-residents and the conflict of laws

DIVISION I
GENERAL PROVISIONS

Article 13
(Legal status of non-residents)

Non-residents shall enjoy the same civil rights as residents of Macao, unless provided otherwise by law.

Article 14
(Characterization)

The reference to a law shall comprise only those rules that correspond in content and function, as defined by that law, with the legal category referred to in the choice of law rule.

Article 15
(Reference to a law outside Macao. General principle)

1. The reference of a choice of law rule to a law outside Macao shall determine only the application of the internal rules of law of that law, unless provided otherwise.
2. For the purpose of this Chapter, internal rules of law are deemed to be only substantive rules, while the choice of law rules are excluded.

[3] English translation of the Portuguese original by Prof. António Marques dos Santos.

Article 16
(Renvoi)

1. However, if the conflict of laws rules of the law designated by the choice of law rules of Macao refer to another law and that law considers itself applicable with respect to the particular issue, the internal rules of law of that law shall apply.
2. If the conflict of laws rules of the law designated by the choice of law rules refer back to the internal rules of law of Macao, the latter shall apply.

Article 17
(Cases where renvoi *is inadmissible)*

1. The provisions of the preceding article shall not apply if their application would render a transaction invalid or ineffective that would be valid or effective under the rule of the law designated in Article 15, or a status illegitimate that would otherwise be legitimate.
2. The provisions of the preceding article shall also not apply if the parties have designated the law in cases where such designation is permitted.

Article 18
(Composite legal orders)

1. If a legal order with different co-existing systems of law (territorial or personal) is applicable but the applicable system of law has not been determined, the applicable law shall be determined by the criteria used in that legal order.
2. If such criteria cannot be established, the system of law most closely connected with the facts of the case shall apply.

Article 19
(Evasion of law)

When applying choice of law rules, any situations of fact or of law created with the fraudulent intent of avoiding application of the otherwise applicable law shall be deemed irrelevant.

Article 20
(Public policy)

1. Rules of law of the law outside Macao indicated by the choice of law rules shall not apply if such application would be manifestly incompatible with public policy.

2. In such cases, more appropriate rules of the applicable law outside Macao shall apply, or subsidiarily the rules of the internal law of Macao.

Article 21
(Rules of immediate application)

Rules of the law of Macao whose application is mandatory by virtue of their specific object and purpose shall prevail over provisions of the law outside Macao designated in the next Division.

Article 22
(Interpretation and ascertainment of the applicable law)

1. The law outside Macao designated as applicable shall be interpreted within its legal system and in accordance with the rules of interpretation adopted by that system.
2. If it is impossible to ascertain the content of that law, the subsidiary applicable law shall apply, and the same procedure shall be followed whenever it proves impossible to determine the factual or legal elements, on which the designation of the applicable law is based.[4]

Article 23
(Acts performed on board)

1. Acts performed on board vessels or aircraft outside a port or aerodrome shall be governed by the law of the place of their registration, whenever the territorial law is applicable.
2. Military vessels and aircraft shall be deemed to be part of the territory of the country or Territory to which they belong.

[4] See also Article 341 of the Civil Code of Macao which reads as follows:

'Article 341 (Customary law or law outside the territory of Macao)

1. If a person invokes any customary law or law outside the territory of Macao, he or she shall prove its existence and content; however, the court must attempt, on its own motion, to take judicial notice thereof.
2. The court must also, on its own motion, take judicial notice whenever it adjudicates on the basis of customary law or a law outside the territory of Macao and none of the parties has invoked it, or the opposite party has recognized its existence or has not taken a position against it.
3. If it is impossible to determine the content of the applicable law, the court shall apply the current rules of the internal law of Macao.'

DIVISION II
CHOICE OF LAW RULES

SUBDIVISION I
Scope and determination of the personal law

Article 24
(Scope of the personal law)

The status and capacity of natural persons, family relations and succession to the estates of deceased persons shall be governed by the personal law of the respective subject, without prejudice to the restrictions in this Division.

Article 25
(Beginning and termination of legal personality)

1. The beginning and the termination of legal personality are also determined by the personal law of the natural person.
2. Where a legal effect depends on one person surviving another and their status is determined by different personal laws, paragraph 2 of Article 65[5] shall apply if the presumptions of survival of these laws are irreconcilable.

Article 26
(Personality rights)

1. As regards their existence, protection and restrictions of usage, personality rights are also governed by the personal law.
2. In Macao, however, non-residents shall not enjoy any form of legal protection not recognized by the local law.

Article 27
(Exceptions with respect to the effects of incapacity)

1. Transactions concluded in Macao by a person who lacks legal capacity under the applicable personal law shall not be annulled on the ground of such incapacity, if the person would be considered capable under the internal law of Macao, if it were applicable.

[5] Paragraph 2 of Article 65 reads: 'Where a legal effect depends on one person surviving another, in case of doubt, it is presumed that their deaths occurred at the same time.'

2. This exception no longer exists if the other party was aware of the incapacity or if the transaction is unilateral, pertains to family law or to the law of succession or deals with the transfer of immovables situated outside the territory of Macao.
3. If the person without legal capacity concludes the transaction outside Macao, the law of the place where the transaction is concluded shall apply, provided it contains rules identical to those laid down in the preceding paragraphs.

Article 28
(Majority or emancipation)

If a person's personal law changes, this shall not be an obstacle to the majority or emancipation acquired under the previous personal law.

Article 29
(Guardianship and analogous institutions)

Guardianship and analogous institutions for the protection of incapacitated persons shall be governed by the personal law of the incapacitated person.

Article 30
(Determining the personal law)

1. The personal law of a natural person shall be the law of his or her habitual residence.
2. The habitual residence of a natural person shall be deemed the place where he or she has established the effective and stable center of his/her personal life.
3. For the purpose of the preceding paragraphs, habitual residence in Macao does not depend on any administrative formality; it is presumed, however, that a natural person entitled to obtain the identity card of a resident of Macao is a habitual resident in the territory of Macao.
4. If a natural person has more than one habitual residence, one of which is in Macao, his or her personal law shall be the law of the territory of Macao.
5. In the absence of a habitual residence, the personal law of a natural person shall be the law of the place most closely connected with his or her personal life.
6. However, transactions concluded in the country of the declarant's nationality in compliance with the law of that country shall be recognized in Macao, if that law regards itself applicable.
7. The provision of the preceding paragraph shall not apply if the declarant is the national of a country with different co-existing systems of law and has his or her habitual residence in that country, if the law of his or her habitual residence regards itself applicable with respect to the particular relationship.

Article 31
(Legal persons)

1. The personal law of a legal person shall be the law of the place where the principal and effective seat of its administration is situated.
2. The personal law governs in particular: the capacity of the legal person; the formation, operation and authority of its organs; the manner in which the position of partner is acquired and relinquished and the corresponding rights and duties; the liability of the legal person toward third parties, as well as that of its organs and their members; the transformation, dissolution and extinction of the legal person.
3. If the seat of the legal person is transferred to a place that is subject to a different legal order, its legal personality shall not be extinguished, provided the laws of both seats agree thereon.
4. A merger between entities governed by different personal laws shall be assessed on the basis of both personal laws.

Article 32
(International legal persons)

The personal law of a legal person established on the basis of an international convention shall be the law designated in the convention that created it or in the respective memorandum and articles of association, and in the absence of such designation, the law of the place of its principal seat.

Article 33
(Exceptions with respect to the effects of the incapacity of legal persons)

The provisions of Article 27 shall apply to legal persons if such application is justified by analogy.

SUBDIVISION II
The law applicable to transactions (*negócios jurídicos*)

Article 34
(Declarations intended to have legal effect)

1. The effectiveness, interpretation and gap-filling of a declaration intended to have legal effect shall be governed by the law applicable to the substance of the transaction, which also applies to the lack of consent and vices of consent.

2. Whether a conduct amounts to a declaration intended to have legal effect shall be governed by the law of the common habitual residence of the declarant and the acceptor and, in the absence of such residence, by the law of the place where the conduct took place.
3. Whether silence amounts to a declaration shall also be determined by the law of the common habitual residence and, in the absence of such residence, by the law of the place where the offer was received.

Article 35
(Form of the declaration)

1. The form of a declaration intended to have legal effect shall be governed by the law applicable to the substance of the transaction; however, observance of the law of the place where the declaration was made suffices, unless the law governing the substance of the transaction requires a specific form, the non-observance of which renders the transaction void or ineffective, even if it was concluded outside Macao.
2. The declaration intended to have legal effect shall still be formally valid if, instead of satisfying the formal requirements of the local law, it satisfies those of the legal order referred to by the choice of law rule of the local law, subject to the last part of the preceding paragraph.

Article 36
(Agency by operation of law)

Agency by operation of law shall be governed by the law applicable to the legal relationship from which the agent derives his or her authority.

Article 37
(Authority to represent legal persons)

The authority of the organs of a legal person to represent it shall be governed by the personal law of the legal person.

Article 38
(Agency)

1. Agency shall be governed by the law of the place where the agent exercises his or her authority, with respect to the existence and extent of the agent's authority, its modification, effects and termination.

2. However, if the agent exercises his or her authority in a country or Territory different from that specified by the principal and the third party with whom he or she enters into a contract is aware of this, the law of the habitual residence of the principal shall apply.
3. If the agent acts in a professional capacity and the third party with whom he or she enters into a contract is aware of this, the law of the place of the agent's business establishment shall apply.
4. Where agency deals with the transfer or administration of immovables, the law of the place where the immovables are situated shall apply.

Article 39
(Prescription and limitation of actions)

Prescription and limitation of actions shall be governed by the law applicable to the right to which each relates.

SUBDIVISION III
The law applicable to obligations

Article 40
(Obligations arising from transactions)

1. Obligations arising from a transaction and the substance of the transaction shall be governed by the law designated or referred to by the parties.
2. However, the parties may only designate or refer to a law, the application of which satisfies a serious interest of the declarants or is connected with one of the elements of the transaction having relevance in the field of conflict of laws rules.

Article 41
(Subsidiary connecting factor)

In the absence of a designation of the applicable law, the law of the place most closely connected with the transaction shall apply.

Article 42
(Handling of other people's affairs [negotiorum gestio]*)*

The handling of other people's affairs shall be governed by the law of the place where the principal activity of the person handling the affairs takes place.

Article 43
(Unjust enrichment)

Unjust enrichment shall be governed by the law on the basis of which the assets were transferred to the benefit of the enriched person.

Article 44
(Non-contractual liability)

1. Non-contractual liability resulting from a tort, putting others at risk or from any lawful conduct shall be governed by the law of the place where the principal conduct causing the injury occurred; if the liability is due to an omission, the law of the place where the liable person should have acted shall apply.
2. If the injurious party is held liable under the law of the place where the injury was inflicted but not under the law of the place where the conduct causing the damage occurred, the former law shall apply, provided the injurious party should have foreseen that his or her act or omission could cause injury at a place subject to that law.
3. However, if the injurious party and the injured person have the same habitual residence and are by chance abroad, the law of the common residence shall apply, subject to the provisions of the legal order designated as applicable by the preceding paragraphs that shall apply without distinction to all persons.

SUBDIVISION IV
The law applicable to property

Article 45
(Real rights)

1. Possession, ownership and other real rights shall be governed by the law of the place where the property is situated.
2. In all matters concerning the acquisition or transfer of real rights in things in transit, the latter shall be deemed to be situated at the place of destination.
3. The acquisition or transfer of rights in means of transportation that are subject to registration shall be governed by the law of the place where they were registered.

Article 46
(Capacity to acquire or transfer real rights in immovable property)

The capacity to acquire or transfer real rights in immovable property shall also be governed by the law of the place where the property is situated if that law thus provides; otherwise the personal law shall apply.

Article 47
(Intellectual property rights)

Copyright and related rights, as well as industrial property rights, shall be governed by the law of the place where their protection is requested, subject to provisions contained in special legislation.

SUBDIVISION V
The law applicable to family relations

Article 48
(Capacity to marry or enter into marriage contracts)

The capacity to marry or enter into a marriage contract shall be governed by the personal law of each party in relation to that party; the same law applies to determining the effects of the lack of consent and vices of consent by the parties.

Article 49
(Formalities of marriage)

1. The formalities of marriage shall be governed by the law of the place where the marriage is celebrated, subject to the provisions of the next paragraph.
2. A marriage between two foreigners in Macao may be celebrated before the respective consular agents in the form prescribed by the law of the nationality of either party.

Article 50
(Relations between spouses)

1. The relations between spouses shall be governed by the law of their common habitual residence, unless provided otherwise in the following article.
2. If the spouses do not have the same habitual residence, the law of the place with which their family life is most closely connected shall apply.

Article 51
(Prenuptial contracts and matrimonial property regimes)

1. The substance and effects of a prenuptial contract and of the matrimonial property regime, effective either by operation of law or by agreement, shall be governed by the law of the habitual residence of the parties at the time of the celebration of the marriage.
2. If the parties do not have the same habitual residence, the law of the first marital residence shall apply.
3. If the applicable law is a law other than that of Macao and one of the parties has his or her habitual residence in the territory of Macao, one of the matrimonial property regimes admissible under this Code may be chosen.

Article 52
(Postnuptial contracts and modifications to matrimonial property regimes)

1. The admissibility, the substance and effects of a postnuptial contract and of the modifications made by spouses to a matrimonial property regime, effective either by operation of law or by agreement, shall be governed by the law designated in Article 50.
2. In no case shall the new contract be retroactive to the disadvantage of a third party.

Article 53
(Divorce)

Divorce shall be governed by the provisions of Article 50.

Article 54
(Establishment of parent-child relationships)

The establishment of a parent-child relationship shall be governed by the personal law of the parent at the time the relationship is established.

Article 55
(Relations between parents and children)

1. Parent-child relations shall be governed by the law of the common habitual residence of the parents and, in the absence of such residence, by the personal law of the child.

2. If the parent-child relationship is established in relation to only one parent, the personal law of that parent shall apply; if one of the parents is deceased, the personal law of the survivor shall apply.

Article 56
(Adoptive parent-child relationships)

1. The establishment of an adoptive parent-child relationship shall be governed by the personal law of the adopter, subject to the provisions of paragraphs 2 and 3.
2. If the adopters are husband and wife or if the adoptee is the child of the adopter's spouse, the law of the common habitual residence of the spouses shall apply and, in the absence of such residence, the law of the place most closely connected with the family life of the adopters shall apply.
3. If the adopters are cohabiting without marriage or if the adoptee is the child of the adopter's cohabitee, the provisions of the preceding paragraph shall apply, as appropriate.
4. The relations between the adopter and the adoptee and between the adoptee and his or her family of origin shall be governed by the personal law of the adopter; in cases regulated by paragraphs 2 and 3, the provisions of the preceding article shall apply.

Article 57
(Special requirements for the acknowledgment of parentage or adoption)

If the personal law of the child to be acknowledged or adopted requires the consent of the child as a prerequisite for the acknowledgement of parentage or for adoption, this requirement shall be satisfied.

SUBDIVISION VI
The law applicable to cohabitation without marriage

Article 58
(The applicable law)

1. The conditions and effects of cohabitation without marriage shall be governed by the law of the common habitual residence of the cohabitees.
2. In the absence of a common habitual residence, the law of the place most closely connected with the facts of the case shall apply.

SUBDIVISION VII
The law applicable to succession

Article 59
(The applicable law)

Succession to the estate of a deceased person shall be governed by the personal law of the deceased at the time of his or her death; the same law also specifies the powers of the person(s) entitled to administer the estate and those of the executor of the will.

Article 60
(Capacity to dispose of property upon death)

1. The capacity to make, modify or revoke a disposition of property upon death shall be governed by the personal law of the deceased at the time the declaration was made; the same law also applies with respect to specific formal requirements for certain dispositions because of the declarant's age.
2. A person who acquires a new personal law after having made a disposition retains the capacity necessary to revoke the disposition under the previous law.

Article 61
(Interpretation of dispositions; lack of consent and vices of consent)

The personal law of the deceased at the time the declaration was made shall govern:

a) The interpretation of the respective provisions and dispositions, unless there is an express or implied reference to another law;
b) The lack of consent and vices of consent;
c) The admissibility of joint wills and agreements as to succession, the latter of which are subject to the provisions of Articles 51 and 52.

Article 62
(Form)

1. Dispositions of property upon death, as well as their revocation or modification, shall be deemed formally valid if they satisfy the requirements of the law of the place where the act was performed or those of the personal law of the deceased at the time the declaration was made or at the time of death, or the requirements of the law referred to by the choice of law rule of the local law.
2. However, if the personal law of the deceased at the time the declaration was made requires a specific form, the non-observance of which renders the

declaration void or ineffective, such requirement shall be satisfied, even in cases where the act was performed outside Macao.

UNIFORM COMPUTER INFORMATION TRANSACTIONS ACT[*]

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it approved and recommended for enactment in all the states at its annual conference meeting in its 108 year in Denver, Colorado
23-30 July 1999

PART 1

GENERAL PROVISIONS

[SUBPART A. SHORT TITLE AND DEFINITIONS]

[…]

[SUBPART B. GENERAL SCOPE AND TERMS]

SECTION 103
SCOPE; EXCLUSIONS

(a) This [Act] applies to computer information transactions.
(b) Except for subject matter excluded in subsection (d) and as otherwise provided in Section 104, if a computer information transaction includes subject matter other than computer information or subject matter excluded under subsection (d), the following rules apply:
    (1) If a transaction includes computer information and goods, this [Act] applies to the part of the transaction involving computer information, informational rights in it, and creation or modification of it. However, if a copy of a computer program is contained in and sold or leased as part of goods, this [Act] applies to the copy and the computer program only if:
    (A) the goods are a computer or computer peripheral; or
    (B) giving the buyer or lessee of the goods access to or use of the program is ordinarily a material purpose of transactions in goods of the type sold or leased.

[*] Available on the website: http://www.ucitaonline.com/

(2) In all other cases, this [Act] applies to the entire transaction if the computer information and informational rights, or access to them, is the primary subject matter, but otherwise applies only to the part of the transaction involving computer information, informational rights in it, and creation or modification of it.

(c) To the extent of a conflict between this [Act] and [Article 9 of the Uniform Commercial Code], [Article 9] governs.

(d) This [Act] does not apply to:

(1) a financial services transaction;

(2) an agreement to create, perform or perform in, include information in, acquire, use, distribute, modify, reproduce, have access to, adapt, make available, transmit, license, or display:

(A) audio or visual programming that is provided by broadcast, satellite, or cable as defined or used in the Federal Communications Act and related regulations as they existed on July 1, 1999, or by similar methods of delivering that programming; or

(B) a motion picture, sound recording, musical work, or phonorecord as defined or used in Title 17 of the United States Code as of July 1, 1999, or an enhanced sound recording.

(3) a compulsory license; or

(4) a contract of employment of an individual, other than an individual hired as an independent contractor to create or modify computer information, unless the independent contractor is a freelancer in the news reporting industry as that term is commonly understood in that industry;

(5) a contract that does not require that information be furnished as computer information or a contract in which, under the agreement, the form of the information as computer information is otherwise insignificant with respect to the primary subject matter of the part of the transaction pertaining to the information; or

(6) subject matter within the scope of [Article 3, 4, 4A, 5, [6,] 7, or 8 of the Uniform Commercial Code].

(e) As used in subsection (d)(2)(B), 'enhanced sound recording' means a separately identifiable product or service the dominant character of which consists of recorded sounds but which includes (i) statements or instructions whose purpose is to allow or control the perception, reproduction, or communication of those sounds or (ii) other information so long as recorded sounds constitute the dominant character of the product or service despite the inclusion of the other information.

[…]

SECTION 109
CHOICE OF LAW

(a) The parties in their agreement may choose the applicable law. However, the choice is not enforceable in a consumer contract to the extent it would vary a rule that may not be varied by agreement under the law of the jurisdiction whose law would apply under subsections (b) and (c) in the absence of the agreement.
(b) In the absence of an enforceable agreement on choice of law, the following rules determine which jurisdiction's law governs in all respects for purposes of contract law:
    (1) An access contract or a contract providing for electronic delivery of a copy is governed by the law of the jurisdiction in which the licensor was located when the agreement was entered into.
    (2) A consumer contract that requires delivery of a copy on a tangible medium is governed by the law of the jurisdiction in which the copy is or should have been delivered to the consumer.
    (3) In all other cases, the contract is governed by the law of the jurisdiction having the most significant relationship to the transaction.
(c) In cases governed by subsection (b), if the jurisdiction whose law governs is outside the United States, the law of that jurisdiction governs only if it provides substantially similar protections and rights to a party not located in that jurisdiction as are provided under this [Act]. Otherwise, the law of the State that has the most significant relationship to the transaction governs.
(d) For purposes of this section, a party is located at its place of business if it has one place of business, at its chief executive office if it has more than one place of business, or at its place of incorporation or primary registration if it does not have a physical place of business. Otherwise, a party is located at its primary residence.

SECTION 110
CONTRACTUAL CHOICE OF FORUM

(a) The parties in their agreement may choose an exclusive judicial forum unless the choice is unreasonable and unjust.
(b) A judicial forum specified in an agreement is not exclusive unless the agreement expressly so provides.

[…]

BOOK REVIEWS

Luigi MARI, *Il diritto processuale civile della Convenzione di Bruxelles, I. Il sistema della competenza*, Padova (Cedam) 1999, pp. XXV-824.

The long-awaited treatise by Professor Luigi Mari on the European Community Convention on Jurisdiction and the Enforcement of Judgments (hereinafter: the Convention) is remarkable both for its theoretical foundations and methodological approach. Though limited to the rules of jurisdiction, it portrays the Convention as a special and autonomous legal order that plays a very important role in the daily legal practice of the European Community. A second volume on the recognition and enforcement of judgments is due to follow; however, it seems that, in order to get to the core of the Convention's system, priority should be given to the direct jurisdictional approach over the indirect approach confined to recognition and enforcement.

The starting point is the acknowledgment of the Convention's importance for the development of the European Union. As Professor Mari points out, the Convention cannot be compared to any of the former international conventions on civil procedure: Its aims go beyond the traditional purposes of these acts and it amounts to the creation of a 'European legal territory'. The same cannot be said of the Lugano Convention – the related treaty concluded among the EFTA member States and with each of the EC member States – which follows the traditional conventions on civil procedure.

The entirely new approach of the Convention becomes particularly evident when it is compared with the Italian rules on jurisdiction existing at the time the Convention entered into force. These rules, which have eventually been changed to apply even to cases not falling within the scope of the Convention, were paramount in defending what could be regarded as the national interest of Italy. The jurisdiction of Italian courts, for instance, depended on the nationality of the defendant; the existence of some particular relation to Italy was required only when the defendant was a foreigner. Formulated in very abstract language and excluding the principle of *forum non conveniens*, the rules on jurisdiction very frequently resulted in cases of excessive jurisdiction. An attitude of distrust towards agreements on jurisdiction gave the final touch to this wholly nationally oriented system.

As the author stresses, the new approach embodied in the Brussels Convention (p. 171) rejects all national interests and establishes a procedural order that truly promotes legal security and abolishes, *inter alia*, every exorbitant head of jurisdiction.

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The conceptual framework of the book can be regarded as an outspoken affirmation that the Convention is part of EC law. The author accurately discloses the reasons supporting his point of view; however, he does not conceal the arguments for the opposite solution. The primacy of the Convention over municipal law is only a secondary consequence of his stand on the matter.

As an autonomous and independent legal order, the Convention requires that its criteria of application be accurately reviewed. The traditional analysis of its contents (civil and commercial matters) with the explicit exclusions (capacity of persons, wills and succession, bankruptcy, social security, arbitration etc.) is only part of the more general question concerning its relation to municipal rules of jurisdiction. The Convention masters the problem (p. 130) by establishing some connecting factors that can be summarized as follows: *a)* circumstances relating to the dispute submitted to the court; *b)* the defendant's domicile; *c)* the parties' will. The existence of one of these factors brings about, on the one hand, the application of the Convention, and, on the other, the setting aside of the municipal rules. Once effected, this choice is exclusive (p. 138); the Convention's system excludes any other municipal or internationally recognized statute on jurisdiction.

The fourth and most interesting part for pratictioners contains an exhaustive analysis of the different heads of jurisdiction dealt with in Title II of the Convention. At the end it also discusses issues such as examination as to jurisdiction, *lis pendens* and provisional measures.

The method adopted by Professor Mari is essentially, if not exclusively, based on a scrutiny of the jurisprudence of the European Court of Justice. It is not, however, a restatement of the interpretation given by the Court to the broadly formulated rules of the Convention: The Convention's system is revisited in a theoretical discussion of fundamental concepts of civil and procedural law.

As an example let us take the famed Article. 5 (1), which establishes where a person domiciled in a Contracting State can be sued in matters relating to contracts.

According to a general method proclaimed by the Court and confirmed with respect to contractual obligations by the decision in *Peters v Z.N.A.V.* (case 34/82), the notion of contractual matters must be defined independently so as to ensure that the application of the Convention will not be affected by eventual differences between the national legal systems and, furthermore, that national legislation will be precluded from unilaterally affecting its meaning. This raises the question whether there is any rationale in the Court's jurisprudence and, if so, how could it be justified in legal theory?

From the point of view of legal theory, two different approaches are possible: one based on an autonomous legal concept of contract, and the other on the characterization of different types of obligations arising from the underlying legal provisions (p. 258). In the jurisprudence of the European Court we find a repertory of statements such as (p. 263): *a*) contract does not have the same meaning as in a given municipal law; *b*) a reference to contract amounts to an affirmation of the principle of relativity of contractual effects; *c*) contract covers

obligations that are not necessarily classified as contractual according to the applicable law; *d*) contract is equivalent to an autonomous notion of contractual liability as opposed to tortious liability.

The Court's ruling provides a clue for an initial preliminary conclusion: The Community concept of contract is wider than the commonly accepted definition. Progress can be made by singling out the Court's statement that the expression 'contractual matters' only covers cases involving a 'freely stipulated obligation of one party towards another one', and, furthermore, by taking account of the sphere of liability instead of the sources of the obligation (p. 281). This makes the content of the concept 'matters relating to a contract' synonymous to 'failure to perform', thus drawing a clear distinction between contractual matters and extracontractual obligations, the essential element of which is the existence of damages suffered regardless of any non-performance of an obligation (p. 282).

This argument provides a rationale for certain solutions upheld by the Court in cases such as *Réunion européenne* (case 51/97). Whereas abandoning the unity of the place of performance turns out to be relevant when ascertaining the applicable law after resolving the jurisdictional approach, it does not create particular problems, as we know, in the field of private international law (p. 288).

Another significant issue in contractual obligations concerns the meaning of 'courts for the place of performance of the obligation in question' (Article 5(1)). Approving the ruling of the Court, according to which 'obligation' in the meaning of this article is deemed to be the one sued by the plaintiff, the author points out the advantages of this solution, explaining the Court's awareness of problems raised by complex relations.

His main interest, however, is in the operation of the well-known rule providing that the place of performance must be determined by the law governing the obligation under the conflicts rule of the *lex fori*. Although general acceptance of the Rome Convention on the Law Applicable to Contractual Obligations (1980) contributes to a uniform solution for determining the applicable law, problems still arise as a result of the flexibility of the *rattachement objectif* employed therein. As Professor Mari notes, the Court is also aware of these difficulties.

Another widely discussed problem dealt with in the book is jurisdiction in matters relating to torts.

The search for an autonomous interpretation of Article 5 (3), which allocates jurisdiction to the 'courts of the place where the harmful event occurred' led the Court to the well-known 'rule of ubiquity' (*Mines de Potasse d'Alsace*, case 21/76).

As Professor Mari submits, this solution is neither an unconditional advantage for the weaker party, nor an open door for forum shopping. The text of the decision discloses a debate on issues that are strictly technical in nature; if the solution followed by the Court was mere ubiquity, this was only because of the clearcut nature of that case. When confronted in later cases with more complicated issues involving multiple or dissociated harmful events, the Court reformulated the

rule of its decision in *Mines de Potasse*, taking account of the particular circumstances of each case.

In addition to being a very useful aid to understanding the Brussels Convention and the operation of the legal principles embodied therein, Professor Mari's book also contains some analyses that are of unquestionable value for legal thinking. At the end the author pays tribute to the role played by the Court in shaping the Convention's system. Accordingly, he does not conceal his scepticism with respect to the proposed modifications of the Brussels text (which have been adopted in the meantime) and its transformation into a EC regulation (Preface, p. IX).

Tito BALLARINO

Yuko NISHITANI, *Mancini und die Parteiautonomie im internationalen Privatrecht — Eine Untersuchung auf der Grundlage der neu zutage gekommenen kollisionsrechtlichen Vorlesungen Mancinis*, Heidelberg (C.Winter-Verlag) 2000, pp. 536.

Submitted to the University of Heidelberg, Germany, as a doctoral thesis in 1997, this dissertation received the Lucia-und-Rolf-Serick-Preis 1998, the award for the best doctoral thesis of 1998 presented by the 'Institut für ausländisches und internationales Privat- und Wirtschaftsrecht' of that University.

The author analyzes the formation and development of the principle of 'party autonomy' as well as its role in private international law, focusing on MANCINI's doctrine, but also scrutinizing some unsettled questions.

The study of the historical development of party autonomy is of interest for the following reason. Nowadays party autonomy is consolidated and recognized worldwide in its original field of private international law, namely the law of contractual obligations (cf. the Rome Convention of 1980), even though some limitations are deemed necessary in light of both the State's interests and the protection of weaker parties. At the same time, party autonomy is penetrating into other fields of private international law, such as the law of movables, tort law, family and succession law (see the German EGBGB, the Swiss and the Italian PIL Statute). In view of the expanding role of party autonomy, it is important to reconsider its meaning and legitimacy in present and future private international law by carrying out an historical and theoretical analysis. The author focuses her analysis especially on MANCINI's doctrine, since some scholars like GUTZWILLER, GIULIANO and others recognize him as the theoretical forerunner of party autonomy in modern private international law.

Until now MANCINI's contribution to the conflict of laws has been almost exclusively examined from the viewpoint of the principle of nationality and his attempt to promote international unification of conflicts rules by various countries. NISHITANI's book extends the inquiry to the law of obligations on the basis of valuable notes and manuscripts written by MANCINI that were recently discovered by the author. Used by MANCINI for his lectures in 1852, 1854/55, 1862 and 1874/75, these materials provide insight into the state of MANCINI's research at the time of the Italian legislation on private international law legislation, which he prepared himself in 1865 (Disposizioni preliminari del Codice civile).

The contents of this book is divided into five parts. In the first part on the basic concept of party autonomy, the author clarifies its philosophical background, definition and function. The second part deals with MANCINI's doctrine of international law. MANCINI'S statement that 'nations', not 'states' had to be regarded as the 'monade' of public international law and their mutual liberty and

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independence recognized and respected was applied to the conflict of laws and led to the triple principle of 'nationality', 'liberty', and 'sovereignty and political independence'. The first principle implies that the law of nationality should be applied to family and succession relations; the second principle suggests that liberty should be respected in the law of obligations and goods; and the third principle leads to the territorial application of the law of *ordre public* and public law. The process by which MANCINI's system is formed is analyzed on the basis of his notes and manuscripts used for his lectures.

The third part focuses on the principle of 'liberty'. After examining the theories of MANCINI's forerunners, the author turns to the role of party autonomy in his system, suggesting that MANCINI had already recognized the modern concept of party autonomy, but founded it on 'private autonomy' that can only be exercised within the limits of positive internal rules. He failed anyway to provide a theory of 'party autonomy' that gives parties the ability to make the law of one State applicable, including its mandatory rules. As a consequence, MANCINI recognized party autonomy only in contract law, excluding it from other fields such as the law of succession. Moreover, the concept of party autonomy propagated by the Italian school of private international law was immediately criticized in France, Germany and even in Italy at the end of the nineteenth and the beginning of the twentieth century. According to critics, it gave the parties excessive power, similar to that of a lawmaker, allowing them to avoid mandatory rules of the forum. In fact, this criticism was groundless as it confused the limitation of 'private autonomy' in internal law with the freedom of parties to choose the applicable law of a State (including its mandatory rules) as a choice-of-law rule. Anyway, we had to wait until the 1930s before a proper theory of party autonomy could be incorporated into the doctrine of private international law.

In the fourth part of her book, the author examines the meaning and role of party autonomy in current private international law, especially in the German system. She attempts to legitimize party autonomy in a positive way as a guarantee of the freedom and self-determination of individuals in choice-of-law rules. The fifth part contains a summary and outlook for the future. MANCINI'S valuable notes and manuscripts are printed in the appendix of the book, which contains about 160 pages.

Tito BALLARINO

Frank VISCHER/Lucius HUBER/David OSER, *Internationales Vertragsrecht*, 2nd revised ed., Stämpfli (Berne) 2000, pp. XLIII-713.

Private international law has a new look. The physiognomy of the discipline has remarkably changed as a result of numerous new national codifications of conflict of laws rules and various international conventions and other attempts undertaken in the eighties and nineties to harmonize the substantive rules on contracts. Meanwhile there are many commentaries by author with first hand expereience on the newly codified rules. However, systematic treatises with a dogmatic presentation of the newly emerged principles were lacking until now, both in international family law and the law of international contracts.

The revised edition of Vischer's *Internationales Vertragsrecht* generously fills the gap, at least with respect to international contract law. In the first edition of this treatise, published in 1962, the theory of the law governing international contracts was presented in basically four chapters: (1) choice of law by the parties, (2) the law applicable in the absence of a choice of law by the parties (= principle of characteristic performance), (3) special topics relating to the law of contracts (meeting of the minds, form, capacity, mandatory rules, currency and mode of payment), and (4) specific issues of the international law of contracts (contract and agency, contract and assignment, contract and set-off, contract and prescription).

As regards these four main topics, the basic structure has been retained in the second edition. However, due to the multitude of legislative activities between 1962 and 1999 and the case law produced during that period, it became necessary to divide the topic of characteristic performance (or objective determination of the relevant connecting factors) into three different chapters. As a result, Chapter 3 now deals exclusively with the general theory of the characteristic performance and its limits, and two new chapters have been added (Chapters 4 and 5), which focus on the concrete application of the principle of characteristic performance in different types of contracts.

In Chapter 4, Vischer *et al*. deal with contracts for which the principle of characteristic performance can serve as an ordinary objective connecting factor. This group mainly includes the contract types mentioned in Article 117(3) of the Swiss Private International Law Act (PILA) relating to sales, services and guaranties. To these Vischer adds contracts not expressly mentioned in Article 117(3) but which could have easily been added to this provision, such as contracts on international leasing, factoring, franchising or transportation, as well as international insurance contracts, contracts on the merchandising of intellectual property rights and international contracts relating to company law, such as partnership agreements, merger transactions or joint ventures.

On the other hand, Chapter 5 is devoted to contracts in which the protection of the weaker party plays an important role also in determining the possible

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connecting factors. Consumer contracts and labor contracts are used here as model examples.

Chapter 6 on special topics relating to contracts (formerly Chapter 4) and Chapter 7 on specific issues of general contract law (formerly Chapter 5) have remained unchanged as far as their structure is concerned. However, in view of the extensive legal developments since 1962, a significant amount of new material had to be incorporated.

This is especially true in regard to *currency* issues (Chapter 7 § 5). In this context, private international law deals in particular with the respective influence of the *lex monetae* and the *lex contractus* on contractual debts. In Europe, this issue has taken on special importance as the transition from the national currencies (Franc, D-Mark, Lira etc.) to the Euro is awaited; the new edition gives clear guidance with respect to such modifications (p. 447). According to Vischer, the *lex monetae* could determine the exchange rate, whereas the *lex contractus* would determine how this influences any contractual modifications and the contractual debt.

A more detailed presentation was also required with respect to the increasing influence of foreign public law on contractual relations between private parties. In legal theory this phenomenon is known as *lois d'application immédiate* or the influence of foreign mandatory rules on contractual relations. This subject matter has had a prominent position in Vischer's scholarly work for a long time. The latest developments are concisely reported in Chapter 6 under § 5.

Chapter 8, which is entirely new, deals with agreements on the prorogation of jurisdiction and on arbitration. Both topics are thoroughly researched and clearly presented. The part on the prorogation of jurisdiction commences with the relevant rule of the PILA (Article 5), then moves quickly to Article 17 of the Brussels and Lugano Conventions; the doctrine and especially the case law of the European Court are also taken into account. As for arbitration agreements, the starting point is again the PILA (Articles 177 and 178), followed by a discussion of well-known international instruments, namely the New York Convention of 1958 and the Washington CIRDI Convention of 1965, both of which are binding on Switzerland.

It was necessary to incorporate all these elements in order to present a complete picture of modern international contract law. As a result, the new edition contains a wide variety of information and documentation. By not confining themselves to the relevant conflicts rules of the Swiss PILA, the authors are able to cover numerous new topics, thus making it possible to include many of the recently promulgated international instruments. In this sense, the book consistently takes account of the solutions contained in the (EU) Rome Convention of 1980 on international contracts. In addition, reference is frequently made to other international conventions and instruments of UNIDROIT and UNCITRAL. Moreover, in many cases the references are not limited to instruments containing conflicts rules, such as the (EU) Rome Convention of 1980 and The Hague Sales Conventions of 1955 and 1986, but also include numerous instruments introducing harmonized substantive rules. Thus, adequate coverage is given to the rules on

sales contracts of the Vienna Sales Convention of 1980 and as to the provisions on leasing (p. 291) and factoring (p. 299), the recent UNIDROIT (Ottawa) Conventions of 1988 on International Financial Leasing and International Factoring have been taken into consideration. Two other important international instruments -- the UNIDROIT Principles of International Commercial Contracts of 1994 and the (Lando) Principles of European Contract Law -- are also given adequate attention. Furthermore, the new edition also deals with the different conventions on international transportation (CMR, CIM, CIV), international insurance contracts and international instruments on intellectual property.

With all these new materials, the second edition of *Internationales Vertragsrecht* certainly contains a wealth of documentation and legal argumentation. Nonetheless, from an intellectual and dogmatic point of view, the most fascinating part of the book remains as before the first two chapters dealing with theories on party autonomy (Chapter 2) and the concept of the characteristic performance (Chapter 3). As regards these two topics, the book is simple yet complete, clear-cut yet filled with variety. In each chapter, three basic ideas -- the international element, a meeting of the minds and an interpretation of the limits and extent of the parties' intentions – can still be regarded as the pillars of the whole theory, which in itself is filled with various elements, yet remains clear-cut and simple in its basics.

The Swiss and European theory of private international law has a renewed masterpiece at its disposal.

Paul VOLKEN

Lawrence COLLINS (general editor, with specialist editors), *Dicey & Morris on the Conflict of Laws*, 13th ed., London (Sweet & Maxwell) London 2000, volumes I and II, pp. ccxxx-1622-LXXI.

This publication belongs to the selective group of books that sets standards in its particular field. The new edition deserves special recognition, as this remarkable book is now over a century old. The first edition written by A.V. Dicey dates back to 1896. During the long life of this scholarly work, only four persons have been privileged to sign the book in the capacity of author or general editor. Lawrence Collins assumed the general editorship beginning with the eleventh edition and has been assisted by specialist editors Adrian Briggs, Jonathan Hill, J.D. McClean and C.G.H. Morse in the thirteenth edition.

Having become a trademark for private international law, *Dicey & Morris* is well known by all lawyers familiar with private international law. Like myself, most of them have it on their bookshelf of favorite books, keeping it close at hand to enable frequent consultation. Like a well-written statute, *Dicey* & *Morris* enumerate a list of clearly defined and concise rules, part of which are indeed statutory rules. The excellent organization of the book also merits praise. The exhaustive table of statutes (xxii-ixix), table of cases (ixxi-ccxii), and table of statutory instruments (ccxiii-ccxxiv) make it a perfect reference book. Moreover, each volume contains an excellent and well-elaborated index (I-LXXI).

What distinguishes this scholarly work from similar or less ambitious ones? In my opinion, it is the clarity of the text and meticulous manner in which the problems are analyzed and the arguments presented. Whereas Chapter I deals with the nature and scope of the conflict of laws, Chapter II discusses characterization and the incidental question. After elaborating the problem of characterization in what can be regarded as a typical Dicey & Morris manner, it is concluded that:

> 'Characterisation has been made needlessly difficult by writers (and judges) who have created a conflict problem within a conflict problem by insisting that characterisation itself involves a choice of law, that is to say that any court faced with a characterisation problem must first decide what law should be applied to decide the matter. Once this idea is rejected, the way lies open for the courts to seek commonsense solutions based on practical considerations' (p.45).

Starting with Chapter IV, the rules are defined in simple and clear language, followed by elaborate comments that logically lead the reader to the solution of particular issues. Where appropriate, the conclusions are written with a *de lege*

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ferenda attitude. For example, the comments on Rule No. 1 on *renvoi* conclude with the statement: '[T]here is no case which prevents the Court of Appeal (still less the House of Lords) from reviewing the whole problem, and it is submitted that such a review is long overdue' (p. 79). However, the fact that the same conclusion can already be found in the ninth edition published in 1973 (I did not check earlier editions), raises the question as to the real influence of legal scholarship if such an authority as Dicey & Morris has not been able to move the Court of Appeal or the House of Lords to clarify the particular issue. The comments are not the last word but are followed by Rule illustrations presented in the form of simplified hypothetical cases. From a didactical point of view, this is an excellent approach as it enhances reader comprehension by illustrating how each rule operates in practice.

A brief comparison of the thirteenth and ninth editions reveals a number of major changes that have been introduced over the years. Just to mention one example: the order of the Rules and consequently of the subject matter has changed. For instance, the proof of foreign law rule was cited as Rule 205 (nearly at the end) in the 1973 edition (p. 1124), whereas it is now Rule 18 (p.221), although the content of the rule has not changed. This is definitely a better place as today the proof of foreign law is regarded as an important issue belonging to the general part of private international law. In particular, the growing importance of the conflicts of jurisdiction for the conflict of laws in general has left its mark on the various editions of the book. In the new edition the general editor points out (xv-xvi) that, in comparison with other issues, questions of jurisdiction and foreign judgments 'now take up twice the amount of space' than was the case 50 years ago. Of course, this is due to the influence of the European Court and the role of its case law in interpreting the Brussels Convention. Finally, a glance at the table of contents shows that the editors are constantly striving to improve the organization of the book. Moreover, cumulative annual supplements are published in which all sections of the book are updated.

The thirteenth edition of *Dicey and Morris* is a must for experts of private international law and an excellent reference work for all those who deal with private international law matters. This scholarly work is much more than a commentary on English private international law. Its significance goes far beyond the borders of Great Britain and of the common law countries for that matter. Having attained global recognition as a standard work, it is an essential tool for understanding the theory and practice of the conflict of laws worldwide. Some might view the price (£ 250) as a reason not to purchase the latest edition. While this might be true for students, it is surely not for practitioners. These two volumes deserve a place in all comparative law libraries and it is difficult to imagine a good law library without them.

Petar ŠARČEVIĆ

BOOKS RECEIVED

BASEDOW Jürgen/MEIER Isaak (*et al.*, eds.), *Private Law in the International Arena: From National Conflict Rules towards Harmonization and Unification, Liber Amicorum Kurt Siehr*, The Hague (T.M.C. Asser Press) 2000, pp. XXV-910.

BEAUMONT Paul R., *The Hague Convention on international child abduction*, Oxford (Oxford University Press) 1999, pp. XXXV-332.

BERGER Klaus Peter, *The creeping codification of the* lex mercatoria, The Hague-Boston (Kluwer Law International) 1999, pp. XXVIII-376.

BLESSING Marc, *Introduction to arbitration: Swiss and international perspectives*, Basle (Helbing & Lichtenhahn) 1999, pp. 319.

BURGSTALLER Alfred (ed.), *Internationales Zivilverfahrensrecht*, Wien (Orac) 2000, pp. XXVI-788.

CANO BAZAGA Elena, *La litispendencia comunitaria*, Madrid (Eurolex) 1997, pp. 288.

CARBONE Sergio M./IVALDI Paola, *Lezioni di diritto internazionale privato*, Padova (Cedam) 2000.

CARBONNEAU Thomas E. (ed.), *Lex Mercatoria and arbitration: a discussion of the new law merchant*, Deventer (Kluwer Law International) 1998, pp. XXV-296.

CELLE Pierangelo, *I contratti di assicurazione grandi rischi nel diritto internazionale privato*, Cedam (Padova) 2000.

COIPEL-CORDONNIER Nathalie, *Les conventions d'arbitrage et d'élection de for en droit international privé*, Paris (L.G.D.J.) 1999.

COLLIER John Greenwood/LOWE Vaughan, *The settlement of disputes in international law: institutions and Procedures*, Oxford [etc.] (Oxford University Press) 1999, pp. XXVIII-395.

COLLINS Lawrence (general editor, with specialist editors), *Dicey and Morris on The Conflict of Laws*, 13th ed., London (Sweet & Maxwell) 2000, volumes I and II, pp. ccxxx-1622-LXXI.

CUNIBERTI Gilles, *Les mesures conservatoires portant sur des biens situés à l'étranger*, Paris (L.G.D.J.) 2000, pp. 409.

CZERNICH Dietmar/HEISS Helmut. (eds.), *EVÜ – Das Europäische Schuldvertragsübereinkommen. Kommentar*, Wien (Orac) 1999, pp. XX-355.

DANCKWERTS Rolf, *Persönlichkeitsrechtsverletzungen im deutschen, schweizerischen und US-amerikanischen internationalen Privatrecht: ein Plädoyer für das Personalstatut*, Berlin (A. Spitz) 1999, pp. 243.

DIAGO DIAGO M. Pilar, *Pactos o Capitulaciones Matrimoniales en Derecho Internacional Privado*, Zaragoza (El Justicia de Aragón) 1999, pp. 524

DILOY Christel, *Le contrat d'agence commerciale en droit international*, Paris (L.G.D.J.) 2000, pp. XIV-491.

DJALALI Jasmin, *Internationale Joint Ventures: erläutert am Beispiel schweizerisch-iranischer Gemeinschaftsunternehmen*, Bern (Stämpfli) 1999, pp. LIX-282.

ESTEBAN DE LA ROSA Gloria, *El acogimiento internacional de menores: Régimen jurídico*, Albolote, Granada (Ed. Comares) 2000, pp. XIX-383.

FENTIMAN Richard (et al.), *L'espace judiciaire européen en matières civile et commerciale = The European judicialarea in civil and commercial matters*, Bruxelles (Bruylant) 1999, pp. VI-350.

FERRARI Franco, *International sale of goods: applicability and applications of the United Nations Convention on contracts for the international sale of goods*, Basle-Geneva [etc.] (Helbing & Lichtenhahn); Brussels (Bruylant) 1999, pp. XIV-269.

FERRERI Silvia, *Il giudice italiano e l'interpretazione del contratto internazionale*, Padova (Cedam) 2000, pp. X-540.

FONT SEGURA Albert, *La protección internacional del secreto empresarial*, Madrid (Eurolex) 1999, pp. 355.

FORLATI Laura/ZAGATO Lauso, *Cultura e innovazione nel rapporto tra ordinamenti*, Milano (Giuffré) 2000, pp. XXX-352.

GARCIA RODRIGUEZ Isabel, *La celebración del matrimonio religioso no católico*, Madrid (Tecnos) 1999, pp. 320.

GONZÁLEZ BEILFUSS Cristina, *El trust: la institución angloamericana y el derecho internacional privado español*, Barcelona (Bosch) 1997, pp. 164.

GUTMANN Daniel, *Droit international privé*, Paris (Dalloz) 1999, pp. 287.

ISLAM M. Rafiqul, *International trade law*, Sydney (LBC Information Services) 1999, pp. XIV-532.

JIMÉNEZ BLANCO Pilar, *El derecho aplicable a la protección internacional de las patentes*, Granada (Editorial Comares) 1998, pp. XXIV-462.

KASSER Amédée/NOVIER Mercedes/SCHLOSSER Ralph, *Propriété intellectuelle. Recueil de textes nationaux et internationaux*, Zurich (Schulthess) 2000, pp. VII-1203.

KAYE Peter, *Law of the European judgments convention*, Little London Chichester (B. Rose), 1999, 5 volumes.

KEGEL Gerhard/SCHURIG Klaus, *Internationales Privatrecht*, 8th ed., Munich (Beck) 2000, pp. 367.

KLAUSER Alexander, *EuGVÜ und EVÜ: Europäisches Gerichtsstands- und Vollstreckungsübereinkommen Europäisches Schuldvertragsübereinkommen: mit Lugano-Übereinkommen und Novellen zum IPRG und KSchG*, Wien (Manz) 1999, pp. 314.

LAZIC Vesna, *Insolvency proceedings and commercial arbitration*, The Hague [etc.] (Kluwer Law International) 1998, pp. XIII-381.

MARI Luigi, *Il diritto processuale civile della Convenzione di Bruxelles, I. Il sistema della competenza*, Milano (Cedam) 1999, pp. XXV-824.

MINGERS Gabriele, *Der Auskunftsanspruch im internationalen Unterhaltsrecht*, Frankfurt a.M. [etc.] (Verl. für Standesamtswesen) 1998, pp. XXIII-124.

NOBEL Peter (ed.), *Internationales Gesellschaftsrecht*, Bern (Stämpfli) 2000, pp. 95.

NISHITANI Yuko, *Mancini und die Parteiautonomie im Internationalen Privatrecht*, Heidelberg (C. Winter) 2000, pp. 536.

OTHENIN-GIRARD Simon, *La réserve d'ordre public en droit international privé suisse: personnes – famille – successions*, Zürich (Schulthess) 1999, pp. XXXV-644.

PALAO MORENO Guillermo, *Los grupos de empresas multinacionales y el contrato individual de trabajo*, Madrid 2000, pp. 311.

PLASSMEIER Guido, *Kollisionsrechtliche Probleme internationaler Franchisesysteme*, Osnabrück (Rasch) 1999, pp. 175.

QUEIROLO Ilaria, *Gli accordi sulla competenza giurisdizionale tra diritto comunitario e diritto interno*, Padova (Cedam) 2000.

REDFERN Alan, *Law and practice of international commercial arbitration*, 3rd ed., London (Sweet and Maxwell) 1999, pp. LI-664.

REDFERN Alan/HUNTER Martin, *Law and Practice of International Commercial Arbitration*, 3rd ed., London (Sweet & Maxwell) 1999, pp. LI-664.

RITTERHOFF Ann-Christin, *Parteiautonomie im internationalen Sachenrecht: Entwicklung eines Vorschlags insbesondere für das deutsche Kollisionsrecht unter vergleichender Berücksichtigung des englischen Kollisionsrechts*, Berlin (Duncker & Humblot) 1999, pp. 354.

RODRÍGUEZ GAYÁN Eloy Miguel, *Los contratos internacionales de 'fletamento' y de transporte marítimo*, Madrid (Eurolex) 1999, pp. 181.

RUTGERS Jacobien W., *International reservation of title clauses: a study of Dutch, French and German private international law in the light of European law*, The Hague (T.M.C. Asser) 1999, pp. XI-233.

SALERNO Francesco, *La Convenzione di Bruxelles del 1968 e la sua revisione*, Padova (Cedam) 2000.

SPÜHLER Karl (ed.), *Vorsorgliche Massnahmen aus internationaler Sicht*, Zurich (Schulthess) 2000, pp. 155.

SYMEONIDES C. Symeon (ed.), *Private International Law at the End of the 20th Century: Progress or Regress?/Le droit international privé à la fin du Xxe*

siècle: progrès ou recul?, XVth International Congress of Comparative Law, The Hague-London-Boston (Kluwer) 2000, pp. XI-454.

VISCHER Frank/HUBER Lucius/OSER David, *Internationales Vertragsrecht*, 2nd ed., Bern (Stämpfli) 2000, pp. XLIII-713.

VON HOFFMANN Bernd (ed.), *European private international la*w, Nijmegen (Ars Aequi Libri) 1998, pp. 194.

VON ZIEGLER Alexander (et al., eds.), *Transfer of ownership in international trade*, London [etc.] (Kluwer Law International) 1999, pp. VII-437.

WALTER Gerhard/WALTHER Fridolin M.R., *International litigation: past experiences and future perspectives*, (Swiss papers on European integration, No. 25), Bern (Stämpfli); Zürich (Schulthess) 2000, pp. 75.

WOLF Ronald Charles, *A guide to international joint ventures with sample clauses*, 2nd ed. London [etc.] (Kluwer Law International) 1999, pp. XIV-271.

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