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The Draft U.K./U.S. Judgments Convention: A British Viewpoint

*P.M. North**

The United States and the United Kingdom are presently completing negotiations on an accord that will provide for the reciprocal recognition and enforcement of civil judgments. The negotiations have been the subject of considerable debate, the sharpest criticism being expressed by British exporters who fear that recognition of United States judgments in the United Kingdom will subject them to increased antitrust and products liability claims. Through an analysis of the proposed agreement against the existing statutory and common law rules, Commissioner North addresses these criticisms. He concludes that the additional burden of American judgments on English defendants created by the agreement does not justify the present degree of opposition to it.

On January 22, 1972, the Treaty of Accession to the European Economic Community¹ was signed in Brussels on behalf of the six original Member States² and of the three new Member States.³ Undoubtedly that was a momentous occasion for the nine States involved, especially for the three new members of the European Economic Community (EEC). Certainly, it was to have profound political, economic, and legal effects within the United Kingdom. For example, lawyers and legislators in the United Kingdom have had to come to terms with major inroads into the sovereignty of Parliament resulting from the treaty obligations requiring the U.K. to give effect to EEC legislation. Judges are faced with the problems of applying, and interpreting, an increasing amount of so-called English law of foreign origin.⁴ This not only involves legislation in the form of directives, regulations, and con-

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¹ 15 J.O. COMM. EUR. (No. L 73) (1972).

² The original member states are Belgium, Federal Republic of Germany, France, Italy, Luxembourg, and the Netherlands.

³ The United Kingdom, Denmark, and Ireland.

⁴ Dagtoglou, *The English Judges and European Community Laws*, 37 CAMBRIDGE L.J. 76 (1978).

ventions, but also binding decisions of the European Court of Justice in Luxembourg.⁵ This process has been described by Lord Denning M.R. in a characteristically memorable way:

The first and fundamental point is that the Treaty concerns only those matters which have a European element, that is to say, matters which affect people or property in the nine countries of the common market besides ourselves. The Treaty does not touch any of the matters which concern solely England and the people in it. These are still governed by English law. They are not affected by the Treaty. But when we come to matters with a European element, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back, [*sic*] Parliament has decreed that the Treaty is henceforward to be part of our law. It is equal in force to any statute.⁶

The American reader may wonder at the significance to him of the tide of EEC law flowing up the Thames.⁷ Nevertheless, part of the flotsam to be found floating on this tide is the draft U.K./U.S. Convention for the Reciprocal Recognition and Enforcement of Judgements in Civil and Commercial Matters.⁸ This flotsam is certain to flow across the Atlantic and then up the Mississippi, or up the St. Lawrence seaway to the Great Lakes. The genesis of this draft Convention is to be found, as implied above, in the Act of Accession by the new Member States to the original EEC Treaties which was annexed to the 1972 Treaty of Accession.⁹ Under article 3(2) of the Act of Accession, the new Member States undertook to accede to the convention provided for in article 220 of the EEC Treaty, *i.e.*, the Treaty of Rome.¹⁰ One of these is the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters.¹¹ This Convention came into force among the six original Member States of the EEC in 1973. However, the new Member States were given until October 1978 to finalize their accession to it.¹² In order to better understand how this accord on jurisdiction

⁵ See Dagoglou, *supra* note 4.

⁶ *Bulmer Ltd. v. Bollinger, S.A.*, [1974] A.C. 401, 418.

⁷ See Nadelmann, *Clouds over International Efforts to Unify Rules of Conflict of Laws*, 41 LAW AND CONTEMP. PROB. 54, 58-62 (1977).

⁸ DRAFT CONVENTION PROVIDING FOR THE RECIPROCAL RECOGNITION AND ENFORCEMENT OF JUDGEMENTS IN CIVIL MATTERS, CMND. No. 6771 (1977) [hereinafter cited as U.K./U.S. DRAFT CONVENTION].

⁹ Note 1 *supra*.

¹⁰ Treaty Instituting the European Economic Community, *done* March 25, 1957, 298 U.N.T.S. 11.

¹¹ The Convention on the Jurisdiction of Courts and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, *done* September 27, 1968, 15 J.O. COMM. EUR. (No. L 299) (1972) [hereinafter cited as Convention on Jurisdiction of Courts].

¹² The Convention on the Accession of the new Member States to the 1968 Convention was signed in Luxembourg in October, 1978, 21 J.O. COMM. EUR. (No. L 304) (1978).

and recognition of foreign judgments affects the United States and led to the draft U.K./U.S. Convention,¹³ a brief account of it is necessary.

The 1968 Convention provides rules as to jurisdiction in civil and commercial matters and the basic rule¹⁴ is that a person domiciled in an EEC State¹⁵ shall be sued in the courts of that State. To that basic rule there are a considerable number of exceptions, such as a provision¹⁶ that a person domiciled in an EEC State may also be sued in another Member State in a tort action if that is the place of the harm. There are also additional grounds of jurisdiction in insurance matters,¹⁷ consumer contract claims,¹⁸ and in certain cases a choice of forum is permitted.¹⁹ Exceptionally exclusive grounds of jurisdiction are laid down irrespective of domicile in such matters as claims concerning rights in rem in immovable property or the validity of patents, trademarks and the like.²⁰ The essential pattern, however, of the jurisdictional rules of the Convention is that they apply only to defendants domiciled in an EEC State. The corollary of this is that the Member States are free to provide whatever differing jurisdictional rules they like in cases falling outside the provisions of the Convention. So, for example, French courts may continue to assume jurisdiction on the basis that the plaintiff is a French national²¹ provided the defendant is not domiciled elsewhere in the EEC.

When one turns to the recognition provisions of the Convention,²² the general scheme is that all judgments of a Member State shall be recognized elsewhere in the EEC, whether or not judgment in the original State was assumed on the basis of the jurisdictional provisions of the Convention. Thus, a judgment in a Member State against a person domiciled in a country outside the EEC must, in principle, be recognized elsewhere in the EEC no matter how exorbitant the original grounds of jurisdiction. Let us return to, and develop, the French example just given.

An action is brought in France by a French national against a

¹³ For a detailed analysis of the Convention, see G. DROZ, *COMPETENCE JUDICIAIRE ET EFFETS DES JUGEMENTS DANS LE MARCHÉ COMMUN* (Etude de la Convention de Bruxelles du 27 Septembre 1968) (1972).

¹⁴ Convention on Jurisdiction of Courts, *supra* note 11, art. 2.

¹⁵ It is generally for each Member State to define domicile for itself. *Id.* arts. 52-53.

¹⁶ *Id.* art. 5(3).

¹⁷ *Id.* arts. 7-12A.

¹⁸ *Id.* arts. 13-15.

¹⁹ *Id.* art. 17.

²⁰ *Id.* art. 16.

²¹ C. CIV. arts. 14-15.

²² Convention on Jurisdiction of Courts, *supra* note 11, arts. 26, 30.

United States company with assets in the U.S. and the U.K. The company has no connection with France or assets there, and the action is based on a breach of contract elsewhere. Judgment in that action would not be recognized at common law in England because the French court would not be regarded as having an internationally valid basis of jurisdiction over the defendant.²³ Nor would the judgment be recognized in England under a bilateral recognition convention concluded between the United Kingdom and France²⁴ within the terms of the Foreign Judgements (Reciprocal Enforcement) Act of 1933.²⁵ It would also seem to be unlikely that such a judgment would be recognized in the U.S.²⁶ Furthermore, the English courts would not have taken jurisdiction over a claim by the French plaintiff against the American corporate defendant if the defendant was not doing business in the United Kingdom and there was no English connection other than having assets there. However, once the EEC Convention comes into force in the United Kingdom, all will be changed. Although the English courts will continue to have no jurisdiction over such a case, they will be required to recognize and enforce the French judgment in England notwithstanding its internationally exorbitant nature. In that way, the English assets of the defendant company become available to the French plaintiff, and the tide of EEC law can be seen to have crossed the Atlantic.

The international repercussions of the EEC Convention have caused concern in, for example, the United States²⁷ and Australia,²⁸ but they were not unforeseen by the drafters of the EEC Convention. The difficulty is intended to be met by article 59:²⁹

This Convention shall not prevent a Contracting State from assuming, in a convention on the recognition and enforcement of judgements, an obligation towards a third State not to recognise judgements given in other Contracting States against defendants domiciled or habitually resident in the third State where, in cases provided for in Article 4, the judgement could only be founded on a ground of jurisdiction specified in the second paragraph of Article 3.³⁰

²³ P.M. NORTH, CHESHIRE'S PRIVATE INTERNATIONAL LAW 632-47 (9th ed. 1974).

²⁴ *Id.* at 667-72.

²⁵ 23 & 24 Geo. 5, c. 13 (1933).

²⁶ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 92, Comment e (1971).

²⁷ *See, e.g.*, Nadelmann, *supra* note 7, at 58-62.

²⁸ Pryles and Trindade, *The Common Market (E.E.C.) Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters—Possible Impact upon Australian Citizens*, 48 *Aus. L.J.* 185, 192-95 (1974).

²⁹ U.S./U.K. DRAFT CONVENTION, *supra* note 8.

³⁰ *Id.* The cases provided for in article 4 are those in which the defendant is domiciled outside a Member State. The grounds of jurisdiction listed in article 3 are the main "exorbitant"

What this means in practice is that, if the United States and the United Kingdom conclude a bilateral convention within the terms of article 59, the United Kingdom would deny recognition to the French judgment in the earlier example. Here, therefore, are the origins of the draft U.K./U.S. Judgments Convention with which this article is primarily concerned.³¹ It is undoubtedly true that a bilateral convention on recognition and enforcement of judgments such as one following the pattern of the Foreign Judgements (Reciprocal Enforcement) Act of 1933,³² has much, from a United Kingdom standpoint, to commend it in its own right. Indeed, there has been recent English judicial encouragement for some form of bilateral convention.³³ Nevertheless the major impetus for the present negotiations between the United States and the United Kingdom is the need for such a convention in order to shelter American defendants behind the protection afforded by article 59 of the EEC Convention.

Negotiations on the U.K./U.S. Judgments Convention were carried on simultaneously with the United Kingdom's negotiations on accession to the EEC Convention. The bilateral negotiations resulted in a draft Convention being initialled by officials from the United Kingdom and the United States in October 1976.³⁴ This draft did not bind the two States, and it was published in the United Kingdom in April 1977³⁵ to enable consideration to be given to it by all interested parties. Very considerable interest, and at times anxiety, has been shown in the draft Convention on both sides of the Atlantic. Indeed, the opposition in the United Kingdom to the draft Convention from various interested groups, especially the insurance industry, led to the announcement by the Attorney General in Parliament in June 1978 that "further negotiations on it are probable."³⁶ Probability became reality in September 1978 when further negotiations took place.

It is not intended here to provide a detailed analysis of the provisions of the draft Convention in its present published form. That has been done already by commentators in both the United States³⁷ and

grounds of jurisdiction in the Member States, including articles 14 and 15 of the French Code Civil used in the earlier example.

³¹ See BUS. WEEK, Feb. 21, 1977, at 50.

³² 23 & 24 Geo. 5, c. 13 (1933).

³³ *Perry v. Zisis*, [1977] 1 Lloyd's List L.R. 607, 614, 617.

³⁴ U.K./U.S. DRAFT CONVENTION, *supra* note 8.

³⁵ *Id.*

³⁶ 952 PARL. DEB. H.C. 321 (1978).

³⁷ Hay and Walker, *The Proposed Recognition-of-Judgements Convention between the United States and the United Kingdom*, 11 TEX. INT'L L.J. 421 (1976) (commenting on an earlier draft);

the United Kingdom.³⁸ My purpose is to examine some of the problems that the Convention has been thought to pose when viewed through British eyes; but, to that end, it is necessary to describe in outline at least the salient features of the Convention.

The Convention does not affect the grounds on which courts in the two countries may take jurisdiction. Its purpose is to lay down the circumstances in which the courts in one country will recognize and enforce judgments given in the other. The Convention applies to all judgments given in civil and commercial matters but there are two sets of exclusions. The first gives an indication of that which falls outside "civil and commercial matters,"³⁹ so that matters of family law,⁴⁰ status and capacity,⁴¹ maintenance claims⁴² and matters of succession⁴³ are excluded, as are bankruptcy and winding-up matters,⁴⁴ questions of social security,⁴⁵ and the judicial administration of estates.⁴⁶ The secondary category⁴⁷ of exclusions relates to particular categories or aspects of judgments in civil and commercial matters which are not to be enforceable. These include not only interlocutory matters⁴⁸ and judgments for the disclosure of evidence,⁴⁹ but also judgments "to the extent that they are for punitive or multiple damages"⁵⁰ and claims for taxes, customs duties, and the like.⁵¹

Even if a judgment falls within the Convention, it may be denied recognition on a number of grounds,⁵² some well-known at common law, such as the judgment being contrary to public policy⁵³ or having been obtained by fraud or without due notice having been given to the

Smit, *The Proposed United States—United Kingdom Convention on Recognition and Enforcement of Judgements: A Prototype for the Future?*, 17 VA. J. INT'L L. 443 (1977).

³⁸ Mathers, *The UK/US Civil Judgements Convention-I*, 127 NEW L.J. 777, 819 (1977); North, *Insurance and Foreign Judgements*, 128 NEW L.J. 315 (1978).

³⁹ U.K./U.S. DRAFT CONVENTION, *supra* note 8, art. 2(3).

⁴⁰ *Id.* art. 2(3)(b).

⁴¹ *Id.* art. 2(3)(a).

⁴² *Id.* art. 2(3)(c).

⁴³ *Id.* art. 2(3)(d).

⁴⁴ *Id.* art. 2(3)(e).

⁴⁵ *Id.* art. 2(3)(f).

⁴⁶ *Id.* art. 2(3)(g).

⁴⁷ *Id.* art. 2(2). This category of judgments is excluded except for purposes of article 18, discussed *infra* at text accompanying note 83.

⁴⁸ *Id.* art. 2(2)(c).

⁴⁹ *Id.* art. 2(2)(d).

⁵⁰ *Id.* art. 2(2)(b).

⁵¹ *Id.* art. 2(2)(a).

⁵² *Id.* arts. 7-8.

⁵³ *Id.* art. 7(a).

defendant.⁵⁴ There are a number of other grounds of non-recognition such as where the judgment is inconsistent with one in, or required to be recognized in, "the court addressed"⁵⁵ (the court where recognition is sought), where the respondent enjoys immunity in the court addressed,⁵⁶ where the judgment to be enforced is for a sum of money which exceeds a statutory limit under the law of the court addressed which applies under that court's rules of private international law,⁵⁷ or where the court addressed would have applied its own law to the case and the judgment would disregard mandatory provisions of that law.⁵⁸ Some further limitations on recognition may be seen in that a judgment will be denied recognition unless it has "binding effect" in the "territory of origin,"⁵⁹ *i.e.*, in the law district where originally granted. Further, recognition may be deferred if the judgment is subject to review in the court of origin and if the court addressed is satisfied that review has been or will be sought.⁶⁰ Nor is recognition required if, by reason of the subject matter or by the terms of a trust instrument, exclusive jurisdiction lies, under the law of the court addressed, in a court other than that of the territory of origin,⁶¹ or if the original proceedings were brought in violation of an agreement by the parties to submit to another court.⁶²

Once these hurdles are surmounted, the foreign judgment will be recognized if it satisfies one of a number of varied jurisdictional criteria.⁶³ In many ways these are the heart of the Convention. Some of the grounds are similar to those which, in the United Kingdom at least, exist under the common law rules on recognition of foreign judgments while others are more novel. Some of the grounds are general; others relate to particular types of claims.

The general grounds are as follows: where the person against whom the judgment is sought to be enforced was the plaintiff in the foreign proceedings;⁶⁴ where the habitual residence or principal place of business or place of incorporation of the defendant is within the ju-

⁵⁴ *Id.* art. 7(b).

⁵⁵ *Id.* art. 7(c)(i).

⁵⁶ *Id.* art. 7(d).

⁵⁷ *Id.* art. 8(c).

⁵⁸ *Id.* art. 8(d).

⁵⁹ *Id.* art. 4(1)(b).

⁶⁰ *Id.* art. 5(1).

⁶¹ *Id.* art. 6(a), (c).

⁶² *Id.* art. 6(b).

⁶³ *Id.* arts. 10-11.

⁶⁴ *Id.* art. 10(a).

risdiction of the foreign court;⁶⁵ where the defendant had a branch within the jurisdiction and the proceedings relate to business done through that branch;⁶⁶ where there exists an agreement in writing to submit to the jurisdiction;⁶⁷ and where an agent has been appointed to receive service within the jurisdiction in relation to proceedings concerning business conducted within the jurisdiction.⁶⁸

So far as the special grounds of jurisdiction are concerned, they may be summarized as follows: where the action is to determine rights of ownership or possession over movable or immovable property, the fact that the property was situated in the jurisdiction;⁶⁹ where the action concerns a trust, the fact that the trust's principal place of administration was within that territory or that the trust instrument provided that the court should have jurisdiction;⁷⁰ where, in a contractual claim, the parties reside or have their place of business within the jurisdiction and the contractual obligation was to be performed there;⁷¹ where, in the case of a contract to supply goods or services, the contract was preceded by advertising in, or directed to, the territory of origin and the parties contemplated that the goods were to be used or the services performed in that jurisdiction;⁷² where, in an action for damages for personal injury or damage to property, the acts occasioning the injury substantially occurred and the damage was suffered in the Contracting State (the United States or the United Kingdom) and either the injury or the damage occurred in the territory of origin (the individual American State or part of the United Kingdom whose judgment is in issue).⁷³

So far as all these grounds of jurisdiction are concerned, the court addressed shall not be bound by any conclusions reached by the court of origin,⁷⁴ *i.e.*, conclusions of law reached from findings of fact, such as where the defendant was habitually resident. However, the court addressed shall be bound by findings of fact made in the court of origin unless the respondent establishes they were incorrect, and if the defendant appeared in the court of origin and failed to challenge the jurisdiction, he cannot contest such findings in the court addressed.⁷⁵

⁶⁵ *Id.* art. 10(b).

⁶⁶ *Id.* art. 10(c).

⁶⁷ *Id.* art. 10(d).

⁶⁸ *Id.* art. 10(e).

⁶⁹ *Id.* art. 10(h).

⁷⁰ *Id.* art. 10(i).

⁷¹ *Id.* art. 10(g).

⁷² *Id.* art. 10(f).

⁷³ *Id.* art. 10(j).

⁷⁴ *Id.* art. 12.

⁷⁵ *Id.*

The provisions of the Convention do not prevent the recognition of a judgment under the general law of the state addressed.⁷⁶ For instance, a court in the United Kingdom could recognize a United States judgment given in jurisdictional circumstances falling outside the Convention if that was permitted at common law, e.g., submission to the jurisdiction. But, of course, such grounds of recognition could be abolished either at the time of implementation of the Convention or at any time thereafter.

If a judgment satisfies all of the jurisdictional and other criteria for recognition, the procedures for recognition and enforcement are as laid down in articles 14-16 of the Convention. Simply put, the Convention requires the production of a copy of the foreign judgment,⁷⁷ documentary evidence as to the notice given to the defendant⁷⁸ and the grounds on which jurisdiction was assumed,⁷⁹ and a statement of the grounds relied upon to establish jurisdiction under the Convention.⁸⁰ No special procedure is required for recognition. For enforcement the following procedures are to be followed. An American judgment will be registered in the United Kingdom by application to a court of competent jurisdiction,⁸¹ *i.e.*, in the appropriate part of the United Kingdom. Enforcement in the United States of a judgment from a United Kingdom court will involve application being made to the appropriate court exercising judgment in the territory where enforcement is sought, and enforcement is to be by the simplest and most rapid method provided in that jurisdiction for the enforcement of non-local judgments.⁸²

The final provision of the draft Convention to which reference ought to be made in this brief survey of its contents is article 18 under the head of "recognition and enforcement of third State judgments." This relates to one of the justifications, from the U.S. point of view, for having such a Convention. Subject to other treaty obligations, a judgment of a third state given against a national, domiciliary, or resident of one Contracting State, *i.e.*, the U.S. or the U.K., shall be denied recognition and enforcement by the other Contracting State if it would not have been recognized or enforced had it been given against a person similarly connected with the state addressed.⁸³ It is this provision

⁷⁶ *Id.* art. 3, discussed further *infra* at text accompanying notes 143-44.

⁷⁷ *Id.* art. 15(2)(a).

⁷⁸ *Id.* art. 15(2)(b).

⁷⁹ *Id.* art. 2(c).

⁸⁰ *Id.* art. 15(2)(c).

⁸¹ *Id.* art. 16(2).

⁸² *Id.* art. 16(1).

⁸³ *Id.* art. 18(1)(a).

which ties in with article 59 of the EEC Convention⁸⁴ so that, in the earlier example,⁸⁵ a judgment by a French court, assuming jurisdiction on the basis of the plaintiff's French nationality, against a company domiciled in some part of the United States will be denied recognition in England under article 18 of the draft Convention because such judgment would be denied recognition had the defendant company been domiciled in some part of the United Kingdom.

What sort of reception has this draft Convention received? The fact that there is a need for it at all, in terms of the EEC Convention, has been the subject of sharp criticism in the United States. The EEC Convention has been castigated as discriminating against the United States with the corollary that "this discrimination is indefensible on any ground."⁸⁶ Indeed, it has been said of the effect of the original EEC Convention that:

The Six of the Common Market—or persons for them—found it proper to challenge the rest of the world. No legal issue exists; the complaint is considered justified by commentators. The challenge should be taken up. The Six could be invited to agree on submission of the matter to the International Court of Justice. The test would be 'due process of law', a concept which has general standing.⁸⁷

On the other hand, the draft U.K./U.S. Convention has been welcomed in the United States on the wider ground that it will "assure much needed uniformity in the recognition and enforcement of English judgments in the United States."⁸⁸ But even this welcome for the draft Convention has not been wholly uncritical. A general criticism is that the Convention is too detailed and that it would have been better to have had a less specific Convention—one that did not provide detailed solutions to problems which have not yet arisen, with general principles which would leave room for future development.⁸⁹ American commentators have also made detailed criticisms of the provisions of the draft Convention, such as whether the exclusion of various types of judgment from the Convention can be justified.⁹⁰

While some commentators in the United Kingdom have guardedly welcomed the draft Convention,⁹¹ the general reaction has been hostile.

⁸⁴ Discussed *supra* at text accompanying notes 27-33.

⁸⁵ *Supra* at text accompanying notes 21-26.

⁸⁶ Smit, *supra* note 37, at 468.

⁸⁷ Nadelmann, *supra* note 7, at 61.

⁸⁸ Hay and Walker, *supra* note 37, at 449.

⁸⁹ Smit, *supra* note 37, at 445-46, 468.

⁹⁰ *Id.* at 448-53. See also Hay and Walker, *supra* note 37, at 425-26.

⁹¹ *E.g.*, North, *supra* note 38; Clark, THE POST MAGAZINE & INS. MONITOR, May 25, 1978, at 1364-65.

Indeed, it has been described as “an act of sheer folly.”⁹² The hostility has come both from lawyers⁹³ and from commercial men.⁹⁴ Their criticisms have been both general and particular but have been made from a standpoint very different from that of the American criticism. The main attack has been on the ground that the Convention is one which the United States is anxious to conclude because of the impact of the EEC Convention but that it is one which has few, if any, advantages for the United Kingdom and, indeed, contains major trading disadvantages. Hence come such comments as:

The commercial and economic effects on those manufacturers who export to the United States cannot be over-estimated and it seems likely that this could lead to many manufacturers withdrawing altogether from the American market. Thus the effect of this Convention will be very advantageous indeed to the U.S.A. and one cannot see anything but a great disadvantage for this country and its overseas trade. One has only to look at the comparative size of the population and the vast difference in the respective legal systems to wonder why it is necessary to put this legislation into effect. In most relevant cases this will result in what amounts to an abrogation of our legal system in favour of one containing so many features that are totally abhorrent to us.⁹⁵

Similar strongly worded opposition to the draft Convention has come from lawyers:

We know of no-one who has been able to identify any *substantial* advantage that will accrue to the U.K. from the proposed Convention. It is a Treaty which confers benefits of a major nature on the U.S. without any corresponding benefit to the U.K. If there is to be a Treaty . . . it is imperative first that it eliminates certain important difficulties with which U.K. manufacturers and suppliers are at present faced and second that any extension of common law procedures should only be considered where no disadvantages to the U.K. will flow from it.⁹⁶

Furthermore, the criticisms of the draft Convention have not been limited to those which have appeared in the general press and in legal and other professional journals. It is clear that representations have been made to the United Kingdom government by a wide range of firms and trade associations, and there have been discussions between the United Kingdom government and representatives of the insurance industry

⁹² Payne, *J. CHARTERED INS. INST.*, April 1978 at 57, 59.

⁹³ *E.g.*, Memorandum submitted by a Joint Working Party of the Senate of the Inns of Court and the Bar and The Law Society to the Lord Chancellor's Office (June 1978) [hereinafter cited as Joint Working Party Memorandum]; 25 *GUARDIAN GAZETTE* 202 (1978).

⁹⁴ Payne, *POLICY*, July 1977 at 566, 576; Robertson, *POL'Y HOLDER INS. J.*, May 26, 1978 at 972.

⁹⁵ Payne, *supra* note 94, at 566, 572.

⁹⁶ Joint Working Party Memorandum, *supra* note 93.

and others.⁹⁷

All of this constitutes a picture of great anxiety and concern over the draft Convention in the United Kingdom. Indeed, there is powerful opposition to the implementation of the draft Convention in its published form, hence the further negotiations last autumn. Some of the criticism is over-stated and fails to set the draft Convention against the background of the present law, while other criticisms point to real difficulties that the Convention might pose for British exporters in the field of products liability.

One thing that has to be made clear from the outset, and which is forgotten at times in the United Kingdom criticism, is that judgments from courts in the U.S.A. are recognized in the United Kingdom under the common law rules for the recognition of foreign judgments.⁹⁸ The impact of the draft Convention has to be assessed on the basis of how many more United States judgments will be recognized in the United Kingdom. Here there are factors to be weighed on both sides of the scales.

Judgments are recognized in the United Kingdom already, but only if separate proceedings are taken on the judgment against the judgment debtor in the courts in the United Kingdom.⁹⁹ Under the Convention, recognition and enforcement will be by the apparently easier process of registration. What is questionable is whether the fact that an action at common law has to be taken on the judgment is a serious deterrent in cases where large sums of money are in issue, especially when the judgment creditor may apply for summary judgment¹⁰⁰ on the ground that the debtor has no defense.¹⁰¹ Nevertheless, enforcement may in theory be easier under the draft Convention, and the very existence of such a Convention could encourage enforcement.

Various types of judgments in civil and commercial matters are excluded from the draft Convention.¹⁰² Several of these merely mirror exceptions which are generally accepted at common law, such as judgments for taxes. One important exception in the Convention concerns the exclusion of judgments "to the extent that they are for punitive or multiple damages."¹⁰³ In the United Kingdom, foreign judgments

⁹⁷ 952 PARL. DEB. H.C. 321 (1978).

⁹⁸ P.M. NORTH, *supra* note 23, at 629-78.

⁹⁹ *Id.* at 632.

¹⁰⁰ SUP. CT. PRAC. ORD. 14.

¹⁰¹ Grant v. Easton, 13 Q.B.D. 302 (1883). See also DICEY AND MORRIS, CONFLICT OF LAWS 988-89 (9th ed. 1973).

¹⁰² *Supra* at text accompanying notes 39-51.

¹⁰³ U.K./U.S. DRAFT CONVENTION, *supra* note 8, art. 2(2)(b).

which are of a penal nature are not enforced,¹⁰⁴ but it has been suggested very recently that this nonenforceability does not apply to foreign judgments for exemplary damages which may well be recognized in the United Kingdom.¹⁰⁵ That suggests that the draft Convention provides an exception to recognition not found at common law and one which is of major significance given the anxieties expressed in the United Kingdom over recognition of U.S. products liability judgments which often contain a high degree of exemplary damages.¹⁰⁶ The exclusion of judgments for multiple damages is most obviously aimed at treble damage awards in the United States in antitrust cases.¹⁰⁷ While this is welcomed in the United Kingdom, there is a wider concern over judgments in antitrust cases. The English courts have recently had to consider, at the highest level, the implications in England of American antitrust proceedings against United Kingdom multinational companies,¹⁰⁸ and the prospect of antitrust actions in the United States against British companies has led to the criticism that the exception for multiple damages is too narrow. It has been argued, therefore, that all judgments in antitrust matters should be excluded from the Convention—an argument which is not unaffected by the passing by Congress of the Antitrust Improvement Act of 1976.¹⁰⁹

While detailed criticism has been made of a number of the provisions of the draft Convention,¹¹⁰ the other *major* areas of difficulty are the questions of the survival of common law rules of recognition¹¹¹ and the Convention's own jurisdictional rules.¹¹² Article 3 states that the Convention shall not prevent the recognition in the court addressed of a judgment of a court of the territory of origin if that judgment would

¹⁰⁴ *Huntington v. Attrill*, [1893] A.C. 150. See also Foreign Judgements (Reciprocal Enforcement) Act, 1933, 23 & 24 Geo. 5, c. 13, § 1.

¹⁰⁵ *S.A. Consortium General Textiles v. Sun and Sand Agencies Ltd.* [1978] Q.B. 279, 299-300.

¹⁰⁶ Cf. *Smit*, *supra* note 37, at 499, who opposes the inclusion of this exception in the draft convention.

¹⁰⁷ See also *Desforge v. West St. Paul*, 231 Minn. 205, 42 N.W.2d 633 (1950) (trespass to land).

¹⁰⁸ *Re Westinghouse Uranium Contract*, [1978] A.C. 547. It should be pointed out that judgments for disclosure of evidence are not enforceable under the draft Convention, art. 2(2)(d).

¹⁰⁹ 15 U.S.C. §§ 1311-1314 (1976).

¹¹⁰ See, e.g., Joint Working Party Memorandum, *supra* note 93, where it is suggested that further consideration be given to such matters as the definition of interlocutory judgments in article 2(2)(c), the drafting of article 5(2), and whether provision should be made in article 7 for effect to be given to a set-off or counterclaim, and that the Convention should not be applied to non-money judgments, such as reinstatement of plant, contribution by way of services, or a judgment requiring divestment of assets. It may well be, however, that this last point is adequately covered by the discretion in article 15(1) to refuse enforcement of an order for forms of relief other than the payment of money.

¹¹¹ U.K./U.S. DRAFT CONVENTION, *supra* note 8, art. 3.

¹¹² *Id.* art. 10.

otherwise be recognized under the law of the court addressed. So, if an English court would recognize a New York judgment under common law rules not included in the Convention, as where the defendant is regarded as having submitted to the jurisdiction of the New York court, that judgment would still be recognized in England by reason of article 3 *provided that English common law remained unchanged.*

There is considerable conflict of opinion as to the effect of article 3 on recognition in the United Kingdom which hinges on the words emphasized immediately above. As has been said, English courts will recognize foreign judgments if the defendant submitted or agreed to submit to the jurisdiction of the foreign court.¹¹³ Furthermore, a recent, and criticized,¹¹⁴ decision of the Court of Appeal¹¹⁵ has made it clear that an appearance made solely for the purpose of inviting the court to exercise its discretion not to exert jurisdiction that it has under its own local law constitutes submission. The court left open whether an appearance solely to protest against the jurisdiction of the court amounts to submission thereto, but it had no doubt that a conditional appearance with an application to set aside an order for service out of the jurisdiction does constitute voluntary submission.¹¹⁶ If the principle of submission continued to apply to the recognition of American judgments in the United Kingdom after the draft Convention was implemented, it is true that the jurisdictional bases for the recognition of foreign judgments in the United Kingdom would have been widened.

If, on the other hand, recognition of American judgments was restricted, in cases falling within the draft Convention, to the recognition rules there provided, a major difficulty now faced by United Kingdom defendants would be overcome. As I have indicated elsewhere,¹¹⁷ an English exporter with assets in say, New York, is faced with a dilemma if the proceedings, to which he believes he has a good defense, are brought against him in New York under jurisdictional circumstances falling outside the rules of the draft Convention. He must choose between defending the proceedings in New York, which will amount in English eyes to submission, or letting the proceedings go by default, in which case a default judgment will be met out of his New York assets.

¹¹³ DICEY AND MORRIS, *CONFLICT OF LAWS* 996-1000 (9th ed. 1973).

¹¹⁴ See, e.g., Collins, *Harris v. Taylor Revived*, 92 L.Q. REV. 268, 280-87 (1976); Solomons, *Enforcement of Foreign Judgements: Jurisdiction of Foreign Court*, 25 INT'L AND COMP. L.Q. 665 (1976); cf. Collier, *Foreign Judgement-Enforcement at Common Law-Submission to Foreign Court in Absence of Pleading to the Merits*, 34 CAMBRIDGE L.J. 219 (1975).

¹¹⁵ *Henry v. Geoprosco Int'l Ltd.*, [1976] Q.B. 726.

¹¹⁶ *Id.* at 748.

¹¹⁷ North, *supra* note 38, at 316.

The resolution of this dilemma lies in article 3. If the United Kingdom implements the Convention and leaves the common law rules untouched, the dilemma remains. If, however, the United Kingdom implements the Convention and, at the same time, disapplies the common law rule based on submission to cases covered by the Convention—and article 3 would permit this—the dilemma disappears and a major source of criticism of the recognition rules also disappears. Some paragraphs of article 10 of the draft Convention would then amount to an addition to the bases of recognition, while abolition of submission as a basis would constitute a major subtraction. It must be noted that this is not an inevitable result of the Convention as drafted, but rather a possible consequence of the way in which it might be implemented in the United Kingdom.¹¹⁸

Let us now turn to article 10 of the draft Convention which contains the main list of jurisdictional connecting factors in the court of origin which will justify recognition in the court addressed. It is at these bases, and the way in which they are likely to operate in relation to United Kingdom recognition of American products liability claims, that the full blast of English criticism has been directed. These jurisdictional bases, and the criticisms of them, need to be examined against the background of the existing law as to recognition. Two questions need to be asked: 1) how far will the grounds of jurisdiction in the Convention make recognition easier in the United Kingdom than it is now, and 2) is the scope of the rule contained in the draft Convention clear and unambiguous?

The general grounds of jurisdiction in article 10 follow very much the pattern of the English common law recognition rules. There can be very little objection to recognizing a foreign judgment where the person against whom recognition is sought brought the original proceedings.¹¹⁹ This adds nothing to the common law, being a case of submission *par excellence*. Recognition based on the habitual residence of the defendant in the territory of origin at the time of the original proceedings¹²⁰ is like, but narrower than, the common law rule of recognition based on residence, or even mere presence, in the foreign jurisdiction. Such a narrowing of the common law rules is similarly to be found in the case of a defendant who is not a natural person, for then the appropriate connecting factor is that he had a principal place of business in the territory of origin or, if unincorporated, had his headquarters there.

¹¹⁸ See Joint Working Party Memorandum, *supra* note 93, ¶ 14.

¹¹⁹ U.K./U.S. DRAFT CONVENTION, *supra* note 8, art. 10(a).

¹²⁰ *Id.* art. 10(b).

The common law rule merely requires the corporate defendant to carry on business in the foreign country at a definite and reasonably permanent place.¹²¹ So far as definition is concerned, habitual residence is increasingly well-known as an international connecting factor and may be defined by an exchange of notes between the United Kingdom and the United States,¹²² and it is equally suggested that the identification of a "place of business" should cause little difficulty. Article 10 goes on to provide that the court of origin had jurisdiction if the defendant had "a branch or other establishment" in the territory of origin and the proceedings were in respect to a transaction or occurrence arising from business done through that establishment. This is, again, similar to an existing jurisdictional rule: namely, that found in section 4(2)(a)(v) of the Foreign Judgements (Reciprocal Enforcement) Act of 1933.¹²³ While that statute does not apply to the recognition in the United Kingdom of American judgments, it is a reasonable jurisdictional ground and one which has caused no difficulty in practice. The use of the phrase "branch or other establishment" is novel, but it is a novelty which stems from the EEC Convention¹²⁴ and one to which the United Kingdom courts at least are going to have to become accustomed.

An agreement in writing or an oral agreement confirmed in writing to submit to the jurisdiction of the court¹²⁵ is a narrower ground than the common law one of submission. There is, however, a possibility that the requirement of writing, or written confirmation, may cause difficulty as it has in the interpretation of the EEC Convention by the European Court,¹²⁶ and one would hope for an amendment of this heading of jurisdiction along the same lines as the amendment now made to the EEC Convention.¹²⁷

The final ground of jurisdiction is that of the appointment of, or legal duty to appoint, an agent to receive service within the territory of origin in relation to proceedings concerning business conducted there.¹²⁸ This is the general ground that has attracted most criticism in the United Kingdom, though it should not be forgotten that article 10 has not escaped criticism in the United States, but that criticism has

¹²¹ *Littauer Glove Corp. v. F.W. Millington Ltd.*, [1928] 44 T.L.R. 746.

¹²² U.K./U.S. DRAFT CONVENTION, *supra* note 8, art. 22.

¹²³ See DICEY AND MORRIS, *supra* note 101, at 1002.

¹²⁴ U.K./U.S. DRAFT CONVENTION, *supra* note 8, art. 5(5).

¹²⁵ *Id.* art. 10(d).

¹²⁶ *Colzani v. Rüwa* [1976] E.C.R. 1831; *Galleries Segoura v. Banakdarian* [1976] E.C.R. 1851.

¹²⁷ See Convention on Jurisdiction of Courts, *supra* note 11, art. 17(1), as amended by the 1978 Accession Convention, 21 J.O. COMM. EUR. (No. L 304) (1978).

¹²⁸ U.K./U.S. DRAFT CONVENTION, *supra* note 8, art. 10(e).

been for being too narrow, rather than too broad, in its effects.¹²⁹ The criticism of this general ground is directed primarily at jurisdiction being founded, internationally, on a legal duty to appoint an agent. British exporters to the United States often find themselves under a legal duty, by state law, to appoint agents to receive service, and there is a fear in the United Kingdom that the Convention would encourage this practice. On the other hand, actual appointment of an agent to receive process, whether because of a legal duty to do so or otherwise, would appear to be an obvious and reasonable case of voluntary submission such as to justify assumption of jurisdiction.

It is, however, the special "grounds of jurisdiction" where criticism has been the strongest and, in particular, those which could relate to products liability claims.¹³⁰ The first of these is article 10(f):

[I]n the case of a contract to supply goods or services the conclusion of the contract was preceded by an invitation to treat made by advertisement or otherwise either in or specifically directed to the territory of origin and the use of the goods or the performance of the services was in the contemplation of the parties to the contract to occur in whole or in substantial part in that territory.¹³¹

There is a provision in the E.E.C. Convention¹³² which covers much of the same ground but which is far more limited in scope in that it only applies to certain classes of consumer contract. The criticism of article 10(f) that has been voiced is that it is too wide in scope. It is not in terms restricted to contractual claims. If it were, it would indeed be likely to arouse the anxieties of United Kingdom exporting producers and their insurers.¹³³ While it can be argued that it is not even necessary that there be a contract between plaintiff and defendant in order to bring a case within this heading, so long as there is a contract with someone, there does seem to be justification for a jurisdiction at least founded on the substance of article 10(f). A major step in any renegotiation would be to restrict it to contractual claims. Arguably, it might also be restricted to actions by consumers. Then if the plaintiff takes all the steps necessary for the conclusion of the contract in his own state in response to an invitation to negotiate made there, by advertising or otherwise, it is legitimate for the courts of that state to assume jurisdiction over his contractual claim. It is suggested that this is a legitimate

¹²⁹ Smit, *supra* note 37, at 459-62.

¹³⁰ There has been little opposition to article 10(h), jurisdiction over immovables and tangible movables based on the situs of the property, and article 10(i), jurisdiction over trusts based on the trust's principal place of administration.

¹³¹ U.K./U.S. DRAFT CONVENTION, *supra* note 8.

¹³² Convention on Jurisdiction of Courts, *supra* note 11, art. 13.

¹³³ North, *supra* note 38, at 316-17.

ground in terms of consumer protection and not one which ought unreasonably to worry United Kingdom exporters.

Article 10(g) is, in terms, restricted to contractual claims, and it applies to those cases where the parties resided, or had a place of business, in the territory of origin at the time the contract was concluded and the obligation in issue was to be wholly or mainly performed there. This does not amount to much in the way of extension of the common law jurisdictional rule based on residence. It is different in that the relevant date for the residence is the date of contract and not of the proceedings, but it is qualified by the other significant requirements of the residence of *both* parties in the territory of origin and the need for the obligation to be performed there. The latter criterion may be novel in terms of the common law, but again, it is one with which the United Kingdom lawyers at least will have to become familiar in the EEC Convention.¹³⁴

The one remaining ground of jurisdiction and the one most relevant to the fear of products liability judgments being enforceable in the United Kingdom is article 10(j) which provides for jurisdiction where in the case of an action to recover damages for physical injuries to the person or for damage to tangible property, the acts or omissions that occasioned the injury or damage substantially occurred, and the injury or damage was suffered, in the Contracting State in which the court of origin was exercising jurisdiction, and either those acts or omissions substantially occurred or that injury or damage was suffered in the territory of origin.¹³⁵

The effect of this can best be illustrated by one example from a British viewpoint. An English company exports machinery to the United States to be assembled there. The company's employees in New York put the machinery together in a negligent manner, and when the machinery is used in Illinois, the plaintiff is injured there. A judgment of an Illinois court would fall for recognition in England by reason of article 10(j). This is because the act or omission causing the injury occurred and the injury was suffered in the contracting state, i.e., the United States, and the injury was suffered in Illinois, the territory of origin.

At common law, there is no specific ground of recognition based on the commission of a tort, or of any element thereof, within the jurisdiction. However, article 10(j) is only of significance in those cases where the defendant does not have a sufficient business nexus with the territory of origin so as to satisfy the general heads of jurisdiction of

¹³⁴ Convention on Jurisdiction of Courts, *supra* note 11, art. 5(1).

¹³⁵ U.K./U.S. DRAFT CONVENTION, *supra* note 8.

article 10. At first sight, the likelihood of article 10(j) resulting in English exporters being exposed to an increased number of U.S. products liability claims enforced in England is slight, for the act or omission on which the action is based must have substantially occurred in the United States. If a product is defective, this is usually attributable to its manufacture, and that will have taken place in England. No doubt cases of misconduct in the United States could occur, as in the example given earlier of the export of machinery to be assembled abroad, but even then only if the improper assembly in the United States is by the exporter.

One particular situation has, however, given rise to a good deal of alarm and that relates to inadequate warnings. If goods are exported from England to the U.S.A. and they fail to display what, in the U.S.A., is regarded as an adequate warning (for example, as to their proper use) it is certainly arguable that the failure to warn occurs in the U.S.A.¹³⁶ The anxiety of English manufacturers and their insurers¹³⁷ is exacerbated by the judicial attitude of some courts in the U.S.A. as to the wide range of circumstances where there has been a failure to warn of the dangers of a product.¹³⁸

A further possible danger seen in England¹³⁹ is that American courts may interpret the phrase "the acts or omissions that occasioned the injury or damage" as including a sale or resale in the United States of goods manufactured in England, i.e., putting the article into the stream of commerce. This is a fear which ignores article 12 of the draft Convention for the court addressed, i.e., the English court in such a case is not bound by any conclusions reached by the court of origin relevant to the application of article 10. While the English court is usually bound by findings of fact, a finding as to where an act or omission substantially occurred is a conclusion of law rather than a finding of fact.

There is no doubt that opposition in England to the present draft of the U.K./U.S. Convention is well organized, articulate, and, so far as there have now been further negotiations, effective. Whether it is wholly justified is another matter. It is clear that, in some respects, the Convention will have the effect that American judgments will be more readily recognized in the United Kingdom; in other respects, and perhaps to a lesser degree, they will cease to be recognized. The additional

¹³⁶ *Distillers Co. (Biochemicals) v. Thompson*, [1971] A.C. 458.

¹³⁷ See Payne, *supra* note 92, at 57.

¹³⁸ Owles, *Complexities of U.S. Product Liability*, 128 *New L.J.* 1014 (1978).

¹³⁹ Joint Working Party Memorandum, *supra* note 93, ¶ 50.

burden on English defendants of American judgments not being recognized here cannot be said to justify the weight of opposition there has been to this draft Convention. There are other reasons for it. The draft Convention seems to have concentrated the minds of manufacturers and insurers on the possibility of U.S. judgments being enforced here in products liability cases in a way that the present common law rules never did. This is not really surprising because the possibility of change invites comment and discussion. However, many of the criticisms of the draft Convention which have been put forward seem just as relevant to the present common law rules on recognition, e.g., the high level of damage awards, including exemplary damages. If, under the present law, English manufacturers were regularly subjected to actions in the English courts for the enforcement against them of American judgments, then any extension of that situation would obviously cause anxiety, but there is no evidence that this is what does happen or that the anxieties voiced over the Convention's rules have been voiced over similar common law rules.

A further reason for anxiety seems to be that a variety of bodies have recommended either in the United Kingdom context,¹⁴⁰ or in a wider European context,¹⁴¹ that some form of strict products liability should be introduced. There is a fear on the part of manufacturers that this will lead to a "claims explosion" in the United Kingdom, even though the legal background of American products liability is very different.¹⁴² The possibility of the introduction of strict products liability in the United Kingdom is a very live issue at the moment, and this has focused attention on the development of products liability law in the United States, and thus on the possibility of such American judgments being enforced in the United Kingdom.

Not everyone is opposed to the draft Convention, for it has been said that "the interests of both insurers and the public would best be served by ratification of the Convention and subsequent implementation."¹⁴³ Furthermore, the opposition to it is concentrated in the field of products liability. This opposition ignores the advantages that may

¹⁴⁰ REPORT OF THE LAW COMMISSIONS ON LIABILITY FOR DEFECTIVE PRODUCTS (Law Com. No. 82) (1977); REPORT OF THE COMMISSION ON CIVIL LIABILITY AND COMPENSATION FOR PERSONAL INJURY, CMD. NO. 7054-I, 255-74 (1978).

¹⁴¹ Council of Europe Convention on Products Liability in Regard to Personal Injury and Death (1977); *Proposal for a Council Directive Relating to the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products*, BULL. EUR. COMM. (Supp. 1976).

¹⁴² North, *supra* note 38, at 318.

¹⁴³ Clark, *supra* note 91, at 1364.

come to English plaintiffs who may wish to enforce judgments in the United States, especially in the majority of states which have not adopted the Uniform Money Judgements Recognition Act.¹⁴⁴ It ignores the wide international justification for mutual recognition of judgments in all commercial fields, not just products liability. Indeed, it was this which prompted Roskill L.J. to comment:

There is, therefore, no provision between our two countries for reciprocal enforcement. Some of us, I hope it is not out of place to say, have long regretted this, and this case is perhaps a good illustration . . . of how the difficulties which have arisen could have been avoided if [the Foreign Judgements (Reciprocal Enforcement) Act] applied between this country and the United States.¹⁴⁵

Nevertheless, there seems little doubt that, without significant amendment, at least in so far as products liability claims and the level of damages for which such judgments may be enforced are concerned, there will be continued vigorous opposition in the United Kingdom to the implementation of this draft Convention.

Addendum

As this article on the draft U.K./U.S. Judgments Convention was going to press, an amended article 8A became publicly available. This amendment, which follows, resulted from a meeting between representatives of the United States and the United Kingdom in September 1978, to deal with objections to the proposed Convention by the British insurance industry.

Where the respondent established that the amount awarded by the court of origin is greatly in excess of the amount, including costs, that would have been awarded on the basis of the findings of law and fact established in the court of origin, had the assessment of that amount been a matter for the court addressed that court may, to the extent then permitted by the law generally applicable in that court to the recognition and enforcement of foreign judgments, recognize and enforce the judgment in a lesser amount.

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¹⁴⁴ Hay and Walker, *supra* note 37, at 449.

¹⁴⁵ Perry v. Zissis, [1977] 1 Lloyd's List L.R. 607, 614, 617.