Northwestern Journal of International Law & Business

Volume 3
Issue 1 *Spring*

Spring 1981

The Hague Conference and the Main Issues of Private International Law for the Eighties

George A.L. Droz

Adair Dyer

The Hague Conference and the Main Issues of Private International Law for the Eighties

*George A.L. Droz**
*and Adair Dyer***

The Hague Conference on Private International Law has attempted, since its revitalization in the 1950's, to unify the rules of private international law. The efforts of the Conference have in the past centered around the fields of civil procedure, conflict of laws, the international sale of goods, products liability and international family law. Messrs. Droz and Dyer review the history of the achievements of the Conference in these fields and reflect on the problems and opportunities the Conference will encounter in the 1980's.

I. Introduction and Historical Background

The Hague Conference on Private International Law is an intergovernmental organization established by treaty "to work for the progressive unification of the rules of private international law."[1]

Private international law, as the term is used at the Hague Conference, is concerned primarily with the conflict of laws, interpreted broadly to include not only choice of law, but also jurisdiction over cases with international elements and recognition of judgments. This usage originated with the French term *droit international privé*[2] which

* Secretary General, Hague Conference on Private International Law.
** First Secretary, Hague Conference on Private International Law.

The opinions expressed in this article are the personal opinions of the authors and should not be attributed to the Hague Conference on Private International Law or to its Permanent Bureau.

[1] Statute of the Hague Conference on Private International Law, July 15, 1955, 220 U.N.T.S. 123. The Parties as of Jan. 1, 1981 were: Argentina, Australia, Austria, Belgium, Canada, Czechoslovakia, Denmark, Egypt, Finland, France, Federal Republic of Germany, Greece, Ireland, Israel, Italy, Japan, Luxemburg, Netherlands, Norway, Portugual, Spain, Surinam, Sweden, Switzerland, Turkey, United Kingdom, United States, Venezuela, Yugoslavia.

[2] The leading French treatise in this field defines the subject of private international law as

also covers legally binding arrangements for international judicial co-operations, including such matters as the service of process abroad and the taking of evidence abroad, as well as the authentication of public documents for use abroad, the elimination of discrimination against foreigners in obtaining legal aid or providing security for court costs, and the handling of international applications for legal aid. This list is expandable as the need and facilities for international judicial co-operation increase, with the most recent addition being a provision for temporary safe-conduct extended to witnesses coming from abroad to testify in court proceedings. The question remains open as to whether the growing number of international treaties intended to unify the substantive legal rules of the States which join them, parallel to or as an extension of the domestic laws of those States in the same fields, create an entire new branch of private international law because of the need to determine their relationship and scope of application with respect to the domestic laws of such States.[3] Finally, there is the question of determining the jurisdiction of a legislative body: to what extent may a parliament, congress or legislature pass and enforce civil legislation which applies to activities and persons outside of the territory within which it acts?

The Hague Conference presently has twenty-nine Member States which, under the terms of the governing treaty, meet in full diplomatic session every four years. At the most recent plenary session, the Fourteenth Session (October, 1980), all twenty-nine Member States were represented and, in addition, seven non-Member States were represented by Observers.[4] Five other intergovernmental organizations and five non-governmental organizations also sent Observers.[5]

The Hague Conference has in the past normally sought to carry out its purpose by preparing international treaties dealing with specific fields of law, or with specific legal problems, within the framework of

"the totality of the rules applicable only to private persons in the relations of the international society." (translation by the authors) 1 H. BATIFFOL AND P. LAGARDE, DROIT INTERNATIONAL PRIVÉ 3 (7th ed. 1981). Nationality law and the status of aliens are included under the traditional French view.

[3] For a more extended argument in favor of including substantive treaty rules, see F. MAJOROS, LE DROIT INTERNATIONAL PRIVÉ 10-12 (2d ed. 1981).

[4] The countries represented by observers were: Brazil, the Holy See, Hungary, Monaco, Morocco, the Union of Soviet Socialist Republic and Uruguay.

[5] Intergovernmental organizations represented were: Commonwealth Secretariat, Council of Europe, European Economic Community, Organization of American States, United Nations Commission on International Trade Law (UNCITRAL); non-governmental organizations represented were: International Chamber of Commerce, International Federation of Women Lawyers, International Social Service, International Union of Bailiffs and Law Officers, International Union of Latin Notaries.

"private international law" as described in the first paragraph of this article.[6] The early treaties, prepared before the First World War, frequently would cover an entire field of law: *e.g.*, civil procedure,[7] marriage,[8] divorce,[9] guardianship of minors.[10] This ambitious approach brought on a number of ratifications among the continental European countries which were then Members of the Conference,[11] but the system began to break down under the combined strain arising from the comprehensive nature of the treaties and a worsening international situation in Europe.[12]

---

6 The history of the Conference began with its First Session, in 1893. Its principle publications are the ACTES ET DOCUMENTS of each Session, which contain records of the preparatory work, texts of the Conventions adopted and explanatory reports on those texts. These have been printed by the Netherlands Government Printing and Publishing Office. French was the sole official language of the Conference until 1964, when English was adopted as a second official language. A collection of official texts of the Conventions prepared by the Hague Conference on Private International Law after the Second World War has been published under the title RECUEIL DES CONVENTIONS DE LA HAYE [1951-1977] (hereinafter referred to as RECUEIL DES CONVENTIONS). References will be made to that work for all texts adopted during the period covered when not found in the regular treaty services. References for older Conventions, adopted at the first six Sessions of the Conference, will be made to the ACTES ET DOCUMENTS of the respective Sessions of the Conference at which they were adopted when not found in the regular treaty services. The volumes for the first six Sessions of the Conference are out of print and may not be obtainable at all law libraries; a microfiche edition has been prepared by the Conference and can be obtained from it on order from its Permanent Bureau at: Javastraat 2c, 2585 AM The Hague, Netherlands. References to the Convention adopted at the Conference's Fourteenth Session, in October 1980, will be made to the Final Act of that Session.

7 *See* note 16 and accompanying text *infra*.

8 Convention pour régler les conflits de lois en matière de mariage, *concluded* June 12, 1902, ACTES DE LA TROISIÈME SESSION DE LA CONFÉRENCE DE LA HAYE DE DROIT INT'L PRIVÉ 237 (1900); J. KOSTERS AND F. BELLEMANS, LES CONVENTIONS DE LA HAYE DE 1902 ET 1905 SUR DE DROIT INT'L PRIVÉ 3 (1921) (hereinafter referred to as Kosters/Bellemans).

9 Convention pour regler les conflits de lois et de jurisdictions en matière de divorce et de separation de corps, *concluded* June 12, 1902, ACTES DE LA TROISIÈME SESSION DE LA CONFÉRENCE DE LA HAYE DE DROIT INT'L PRIVÉ 239 (1900); Kosters/Bellemans, *supra* note 8 at 163.

10 Convention pour régler la tutelle des mineurs, *concluded* June 12, 1902, ACTES DE LA TROISIÈME SESSIONS DE LA CONFÉRENCE DE LA HAYE DE DROIT INT'L PRIVÉ 242 (1900); Kosters/Bellemans, *supra* note 8 at 705.

11 During the period from Aug. 1, 1904 to Sept. 15, 1905, the following countries ratified all three of the Conventions listed in the three preceding notes: Belgium, France, Germany, Hungary, Italy, Luxemburg, Netherlands, Portugal, Romania, Sweden, Switzerland. In addition, Spain ratified only the Convention pour régler la tutelle des mineurs on Aug. 28, 1904. *See* Kosters/Bellemans, *supra* note 8 at 9, 169 and 710.

12 France denounced all three treaties in 1914; Belgium denounced the treaties on marriage and divorce in 1919. Kosters/Bellemans, *supra* note 8 at 9, 169, 710. For the background to the problems see de Winter, *Nationality or Domicile?—The Present State of Affairs*, 128 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INT'L [hereinafter referred to as RECUEIL DES COURS] 378 (1969); Cassin, LA NOUVELLE CONCEPTION DU DOMICILE DANS LE RÈGLEMENT DES CONFLITS DE LOIS, 34 RECUEIL DES COURS 729 (1930); Dyer, *Report on the Conflict of Laws in Respect of Marriage and Recognition Abroad of Decisions in Respect of the Existence or Validity of Marriages*, 3

During the decade following the First World War the pendulum swung for a time in the direction of commercial law,[13] but the difficulties of the subjects and the visible deficiencies of the early work in family law[14] prevented the achievement of any more finished treaties. No sessions of the Conference were held during the 1930's, because of the deterioration of international relations. A draft on the law applicable to international sales of goods, however, survived from the earlier period and became a key feature of the Conference's revival in the 1950's.[15]

The modern history of the Conference began with its Seventh Session in 1951. That Session needed to produce some concrete achievements. The effectiveness of the old Convention on Civil Procedure[16] was plagued with problems of public international law. Two World Wars and numerous readjustments of territory, including the creation of new States, had occurred in Europe since its conclusion. The positions of the States differed on the effects of the hostilities. Some States held that hostilities between countries terminated treaty relations between those countries permanently; others held that treaty relations were merely suspended during the continuation of the hostilities and that the treaties went back into force automatically when the wars ended.[17] Although the Treaty of Versailles,[18] and the Treaty of Saint-Germain[19] and Trianon[20] after the First World War, had dealt specifi-

---

ACTES ET DOCUMENTS DE LA TREIZIÈME SESSION DE LA CONFÉRENCE DE LA HAYE DE DROIT INT'L PRIVÉ 14 (1978).

13 The Fifth Session of the Conference (1925), renewed a draft on bankruptcy prepared at the Fourth Session: PROJET RELATIF À LA FAILLITE, ACTES DE LA QUATRIÈME SESSION DE LA CONFÉRENCE DE LA HAYE DE DROIT INT'L PRIVÉ 222 (1904), ACTES DE LA CINQUIÈME SESSION DE LA CONFÉRENCE DE LA HAYE DE DROIT INT'L PRIVÉ 352 (1926). More significantly, the Fourth Commission of the Conference's Sixth Session (1928) prepared several alternative drafts and a REPORT ON THE LAW APPLICABLE TO CONTRACTS OF SALE; ACTES DE LA SIXIÈME SESSION DE LA CONFÉRENCE DE LA HAYE DE DROIT INT'L PRIVÉ 361, 364 (1928).

14 *See* de Winter, *supra* note 12 at 380; Cassin, *supra* note 12 at 731.

15 *See* notes 111 and 112 and accompanying text *infra*.

16 CONVENTION RELATIVE À LA PROCÈDURE CIVILE, July 12, 1905, ACTES DE LA QUATRIÈME SESSION DE LA CONFÉRENCE DE LA HAYE POUR LE DROIT INT'L PRIVÉ 205 (1904). This treaty was designed to replace a prior treaty dated Nov. 14, 1896 and an additional protocol signed May 22, 1897. For reasons which are indicated in the text of this Article, above, it is not possible to state with any certainty which States remain Parties to it. The 1905 Convention has been replaced by the Convention Relating to Civil Procedure, Mar. 1, 1954, 286 U.N.T.S. 267, governing the relations between those State Parties to the prior treaty which have ratified the latter treaty.

17 The positions are much more complicated than indicated in the text and cannot be treated at length in a general article such as this. *See generally* A. MCNAIR, THE LAW OF TREATIES (1961), *The Effects of War, esp.* 723-727; M. AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 138 (3d ed. 1977).

18 Treaty of Versailles, June 28, 1919, art. 282, III Redmond 3329, 2 Bevans 43.

19 Treaty of St. Germain, Sept. 10, 1919, art. 234, III Redmond 3149.

cally with the status of a number of treaties, including some of the Hague Conventions,[21] the coverage was not complete and the whole system had then been overturned again by the hostilities of World War II. Under the circumstances, it was decided to create a new treaty on civil procedure incorporating the old treaty of 1905—with very minor changes—and, therefore, solve the problem by creating an entirely new set of treaty relations.

The draft on the law applicable to international sales of goods formed the basis of a Convention on that subject,[22] with the question of what law applies to the transfer of ownerships and what effect should be given to agreements stipulating jurisdiction of a court over such sales, being left to a later session.[23]

Most importantly, from an institutional point of view, a treaty was drawn up in 1951 to make the Hague Conference a continuing organization, with a small permanent secretariat. That treaty[24] entered into force in July, 1955, and the Permanent Bureau of the Conference celebrated its first quarter of a century of activity in mid-1980, shortly before the Fourteenth Plenary Session.

In the past quarter of a century, the Hague Conference has prepared twenty-four international Conventions, fifteen of which have entered into force among three or more States.[25] The most widespread of

---

20 Treaty of Trianon, June 4, 1920, art. 217, III Redmond 3539.

21 Notably, the Convention of June 12, 1902; governing the guardianship of minors, *supra* note 10, which was expressly retained *in force* among the Contracting Parties who were also Parties to the post-World War I peace treaty in question. *See* A. N. MAKAROV, QUELLEN DES INTERNATIONALEN PRIVATRECHTS 625 (1960).

22 *See* note 113 *infra*.

23 Conventions on these subjects were adopted at the Conference's Eighth Session (1956). Convention sur la loi applicable au transfert de la propriété en case de vente à caractère international d'objets mobiliers corporels, *concluded* Apr. 15, 1958, ACTES DE LA HUITIÈME SESSION DE LA CONFÉRENCE DE LA HAYE DE DROIT INT'L PRIVÉ 340 (1957). Convention sur la compétence du contractuel en cas de vente à caractère international d'objets mobiliers corporels, *concluded* Apr. 15, 1958, *id.* at 344. Neither of these Conventions has *entered into force*.

24 *See* note 1 *supra*.

25 In addition to the Conventions in note 22 *supra*, these are: (1) Convention on the Law Applicable to Maintenance Obligations in Respect to Children*, *concluded* Oct. 24, 1956, ACTES DE LA HUITIÈME SESSION DE LA CONFÉRENCE DE LA HAYE DE DROIT INT'L PRIVÉ 348 (1957). (2) Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations in Respect to Children*, *concluded* Apr. 15, 1958, *id.* at 351. (3) Convention concernant la compétence des autorités et la loi applicable en matière de protection des mineurs*, *concluded* Oct. 5, 1961, note 92 *infra*. (4) Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions*, *concluded* Oct. 5, 1961, 3 ACTES ET DOCUMENTS DE LA NEUVIÈME SESSION DE LA CONFÉRENCE DE LA HAYE DE DROIT INT'L PRIVÉ 155 (1961). (5) Convention Abolishing the Requirement of Legalisation for Foreign Public Documents*, *concluded* Oct. 5, 1961, notes 26 and 207 *infra*. (6) Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions*, *concluded* Nov. 15, 1965, notes 93 and 209 *infra*. (7) Convention

these treaties[26] has twenty-eight State Parties, fifteen of which are Members of the Conference and thirteen of which are non-Members. None of these treaties has been denounced by any of the countries joining them.

During this time, the Hague Conference had expanded to worldwide, although not universal, status. The United Kingdom and Japan joined continental European countries in establishing a permanent organization.[27] Ireland, Israel, Egypt, Turkey, Greece and Yugoslavia followed. The United States became a member in 1964, and that year, at the Conference's Tenth Session, English was added to French as a second official language. Canada joined in 1968 and Australia in 1973. From South America, Argentina and Brazil[28] joined, followed by Surinam and Venezuela. At the most recent plenary session, the USSR, the

---

on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, *concluded* Nov. 15, 1965, note 33 *infra*. (8) Convention on the Choice of Court, *concluded* Nov. 25, 1965, 4 ACTES ET DOCUMENTS DE LA DIXIÈME SESSION DE LA CONFÉRENCE DE LA HAYE DE DROIT INT'L PRIVÉ 195 (1965). (9) Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commerical Matters*, *concluded* Feb. 1, 1971, notes 43 and 101-103 *infra*. (10) Supplementary Protocol to the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*, *concluded* Feb. 1, 1971, note 105 *infra*. (11) Convention on the Recognition of Divorces and Legal Separations*, *concluded* June 1, 1970, notes 43, 210 and 211 *infra*. (12) Convention on the Law Applicable to Traffic Accidents*, *concluded* May 4, 1971, notes 176 and 185 *infra*. (13) Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*, *concluded* Mar. 18, 1970, note 44 *infra*. (14) Convention Concerning the International Administration of Estates of Deceased Persons, *concluded* Oct. 2, 1973, 2 ACTES ET DOCUMENTS DE LA DOUZIÈME SESSION DE LA CONFÉRENCE DE LA HAYE DE DROIT INT'L PRIVÉ 273 (1974). (15) Convention on the Law Applicable to Products Liability*, *concluded* Oct. 2, 1973, notes 177 and 186 *infra*. (16) Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations*, *concluded* Oct. 2, 1973, notes 43 and 214 *infra*. (17) Convention on the Law Applicable to Maintenance Obligations*, *concluded* Oct. 2, 1973, note 214 *infra*. (18) Convention on the Law Applicable to Matrimonial Property Regimes, *concluded* Mar. 14, 1978, note 217 *infra*. (19) Convention on Celebration and Recognition of the Validity of Marriages, *concluded* Mar. 14, 1978, note 215 *infra*. (20) Convention on the Law Applicable to Agency, *concluded* Mar. 14, 1978, note 118 *infra*. (21) Convention on the Civil Aspects of International Child Abduction, *concluded* Oct. 25, 1980, note 225 *infra*. (22) Convention on International Access to Justice, *concluded* Oct. 25, 1980, note 76 *infra*. (* indicates the conventions which have *entered into force*).

[26] Convention Abolishing the Requirement of Legislation for Foreign Public Documents, Oct. 5, 1961, 5 EXEC. REP. NO. 96-17, 96th Cong., 1st Sess. (1980); 527 U.N.T.S. 189; 2 ACTES ET DOCUMENTS DE LA NEUVIÈME SESSION DE LA CONFÉRENCE DE LA HAYE DE DROIT INT'L PRIVÉ 167 (1961); RECUEIL DES CONVENTIONS [1951-1977] 57. The United States deposited its instrument of accession to the treaty on Dec. 24, 1980, and it will *enter into force* for the United States on Oct. 15, 1981.

[27] A Permanent Bureau, which presently consists of four lawyers and a total staff of ten people, was set up to perform the functions of a secretariat. Each country which joins the Conference designates a National Organ to handle communications with the Permanent Bureau. *See* Statute of the Hague Conference, note 1 *supra*, arts. 4, 5 and 6.

[28] Regrettably, Brazil withdrew in 1978, for unexplained reasons. No other State has withdrawn from the permanent organization established after World War II.

Vatican City, Morocco, Hungary, Uruguay and Brazil were represented by Observers.

The accepted techniques now include recommendations, as well as treaties. Model forms have been developed to assist in the practical use of the treaties. Meetings have been held to find more efficient means of using existing treaties.

The subject matter encompassed by private international law, because of its scope, has put some strain on the constitutional structure of the Conference as a membership organization, but the Conference has not waited to be overtaken by events. At its Fourteenth Session, in October, 1980, the Conference adopted a decision on the wider opening of the Conference by which non-Member States will be invited to participate in the work of the Conference, with the right to vote where, by the nature of the subject treated, it is thought that such participation is necessary.[29] This decision applies to topics in the field of international trade law, for example the international sale of goods, where the interest in the work taken by the Conference extends far beyond the confines of its present membership. Needless to say, the decision referred to above also envisages cooperation with the interested coordinating organization in the field, the United Nations Commission on International Trade Law (UNCITRAL). On a particular subject, such as leasing, the decision may call for cooperation with the International Institute for the Unification of Private Law (UNIDROIT). It is not presently contemplated that a formal widening of this type will be employed for topics in the family law field, where the particular nature of the systems in different countries poses more fundamental, as well as more emotional problems; however, through liaison with such organizations as the Commonwealth Secretariat, information is being widely disseminated on the possibility and practicability of accession to Hague Conventions in this field and others by States which do not at this time seek membership in the Conference.

The Hague Conventions in the field of civil procedure are already well-known in many States which are not Members of the Conference, and in fact these Conventions have until this time attracted the largest number of accessions by non-Member States.[30] Because these Conven-

---

29 Final Act of the Fourteenth Session of the Hague Conference on Private International Law, *signed* Oct. 25, 1980, at 37; 19 INT'L LEG. MAT. 1501, 1517 [hereinafter referred to as Final Act].

30 For example, the Convention relating to Civil Procedure, Mar. 1, 1954, notes 16 and 31 *supra*, has received accessions from the following States which are not Members of the Hague Conference: Hungary, Lebanon, Morocco, Poland, Romania, the U.S.S.R., and the Vatican City. Singapore and Barbados have acceded to the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, note 44 *infra*. *See also* note 26 and accompanying

tions, which are used to assist in the conduct of transnational litigation, are not limited to specific fields of law but apply broadly in "civil and commercial matters," we will begin our discussion of the Hague Conference's work and its prospects during the next decade with a review of international problems of civil procedure.

II. International Problems of Civil Procedure

The Convention of March 1, 1954 relating to Civil Procedure,[31] like its predecessor the 1905 Convention on Civil Procedure,[32] contains chapters dealing with service of process abroad, taking of evidence abroad, and the free availability of copies or extracts of public documents as well as providing for non-discriminatory treatment in the granting of legal aid and in imposing requirements of security for costs. The provisions for service of process and taking of evidence internationally still depend on the traditional diplomatic process and all questions or disputes concerning the failure to serve process or obtain evidence are to be handled through diplomatic channels.

The 1954 Convention, like the 1905 Convention, has never been ratified by any of the states of the common-law world, having been designed primarily along continental European procedural concepts, and by the beginning of the 1960's it became apparent that the increasing needs of transnational litigation could not be met through traditional diplomatic means. A complete revision of the chapter on service of process was undertaken resulting in a brand new Convention[33] covering this subject alone, under which administrative procedures were established to replace diplomatic channels under normal circumstances and the needs of common-law systems of civil procedure were taken into account. It is perhaps not entirely a coincidence that the United States formally entered the Hague Conference on Private International Law as a Member on the eve of the completion of this Convention, in which United States representatives took an active part.

A. Service of Process: Improving Notice Given to the Defendant

The authors of this article will not undertake here a complete description of the functioning of the Convention on Service of Process

text *supra*, concerning the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, which is also essentially concerned with civil procedure.

31 286 U.N.T.S. 267.

32 *See* note 16 *supra*.

33 Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965. 20 U.S.T. 361, T.I.A.S. No. 6638.

Abroad.[34] Its principal features have been discussed in other places and its functioning was the subject of a meeting held at The Hague in November, 1977, the reports of which have been published.[35] Suffice it to say here that the Convention was found to operate smoothly and effectively to achieve the service of process internationally and its return. In this way, it fulfills an important service for lawyers who, in commencing litigation on behalf of their clients, have the technical task of obtaining service in proper form, since it allows such service to be made in countries which are Parties to the Convention quickly and surely and at minimal or no costs.

For the United States, the Department of Justice is the Central Authority designated under the Convention to serve and return process originating from abroad[36] and requests for service are routinely received by the U.S. Marshals, following which they are returned to their country of origin. One of the useful innovations of the 1965 Convention was to institute a set of required standard forms for use in applying for service under the Convention and obtaining return of service.

The work done by the Hague Conference on Private International Law is frequently related to work on the harmonization of domestic laws and on law reform done in other bodies. In 1979, the Secretary General of the Council of Europe, acting on a Recommendation from a Committee of Experts studying problems of access of justice in different States, proposed that the Conference undertake a study with a view to improving the notice given to defendants served abroad in legal proceedings.[37] The model form entitled *Summary of the Document to be Served*[38] which is obligatory in requests for service directed to Central Authorities under the 1965 Convention, is not required for other methods of service which are permissible under that Convention unless the State where service is to be made has specifically objected to the particular means of service.[39] For the most part, this refers then to service by mail, but it also covers the occasional practice of forwarding process

---

34 *See* note 33 *supra*.

35 17 INT'L LEG. MAT. 312.

36 The United States Department of Justice instructions for serving foreign judicial documents in the United States and processing requests for serving American judicial documents abroad appear at 16 INT'L LEG. MAT. 1331.

37 Letter dated Oct. 31, 1979, from the Secretary General of the Council of Europe to the Secretary General of the Hague Conference, *to be published* in 4 ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION.

38 8 Martindale-Hubbell Law Directory 4545 (1981).

39 Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *supra* note 33, art. 10.

directly to a lawyer or a professional process-server in the country where the defendant is located.

The Conference took this problem under study in 1980 and, determining that there was no need for a binding Convention on this subject, prepared a Form of Notice to accompany judicial documents to be sent or served abroad.[40] This new Form of Notice incorporates all the required elements of the model form prescribed under the 1965 Convention, but a warning and several additional elements have been added in order to increase the likelihood that the defendant will realize the importance of the event, understand that his legal rights may be impaired if he does not act, and be aware of the possible need to seek legal counsel, if necessary through legal aid facilities in his country or in the country where the process originated. The Commission preparing this notice took into account the work on international legal aid which was done by the Conference in 1980, the results of which were embodied in the Convention of October 25, 1980 on International Access to Justice.[41] The improved notice has been recommended for use when obtaining service through Central Authorities under the Hague Convention of 1965, as well as when other permissible means—such as mail or lawyer-to-lawyer service—are being used.

For the moment, the active work of the Hague Conference in the area of service of process has come to rest. The 1965 Convention works well, as was indicated by the Special Commission which reviewed its operation in 1977. The new recommended form of notice has yet to prove itself in practice, but the Conference has undertaken to review periodically the effectiveness of the operation, not only of the Conventions on international judicial cooperation, but also of recommendations of this type.[42] The fact is that several Conventions on recognition and enforcement of judgments, prepared within the Hague Conference, have special provisions[43] intended to assure that recognition will not be given to default judgments unless the defendant had adequate and timely notice, may from time to time put the spotlight on the effective-

---

40 Final Act, *supra* note 29, at 41. 19 INT'L LEG. MAT. at 1519.

41 *Id.* at 12; 19 INT'L LEG. MAT. at 1505.

42 *Id.* at 44; 19 INT'L LEG. MAT. at 1522.

43 Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations, Oct. 2, 1973, RECUEIL DES CONVENTIONS [1951-1977] 203, 205, art. 6; Convention on the Recognition of Divorces and Legal Separations, June 1, 1970, RECUEIL DES CONVENTIONS [1951-1977] 129, 131, art. 8; Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Feb. 1, 1971, RECUEIL DES CONVENTIONS [1951-1977] 107, 109, art. 6.

ness of the notice given under the international procedures set out in the Conference's Conventions and Recommendations.

B. Taking of Evidence: Curbing Excessive Discovery Practices

The successful revisions and renovation of the provisions of the 1954 Convention on Civil Procedure dealing with service of process led to a similar, but even more ambitious project, concerning its provisions on the taking of evidence abroad. The final text of the Convention[44] on this subject was prepared in 1968 and the American delegate, Mr. Philip Amram, served as Rapporteur of the Commission and wrote the explanatory report[45] on the Convention.

Once again, the device of designation of a receiving administrative authority to carry out requests within each Contracting State was used, this time, in order to avoid the cumbersome, and for the most part voluntary, procedures for taking of evidence through diplomatic channels.[46] In addition, procedures for taking of evidence in common-law States varied from continental European practice even more sharply than had been the case with service of process, and an entirely new chapter on the taking of evidence by commissioners had to be brought in to meet the needs of common-law systems.[47]

The results have been impressive and the number of States belonging to this Convention continues to increase.[48] This Convention also lends itself to a systematic review of its operation by the administrators who serve as Central Authorities to carry out requests for evidence, and a meeting for that purpose was held at The Hague in June, 1978.[49] The

---

44 Convention on the Taking of Evidence Abroad in Civil or Commerical Matters, Mar. 18, 1970; 23 U.S.T. 2444, T.I.A.S. No. 7444.

45 4 ACTES ET DOCUMENTS DE LA ONZIÈME SESSION DE LA CONFÉRENCE DE LA HAYE DE DROIT INT'L PRIVÉ 202 (1970).

46 Stein, *Depositions in Foreign Jurisdictions: "Innocence Abroad,"* 7 LITIGATION (No. 3) 14, 16 (1981); Hergen, *How To Practice Family Law in Europe When You're Not European*, 3 FAMILY ADVOCATE (No. 4) 24, 43 (1981).

47 Convention on Taking of Evidence Abroad in Civil or Commercial Matters, *supra* note 44. *See also* art. 9 of that Convention. The effort to build a bridge between the common law and civil law systems has had an impact on the domestic law of some States. For example, France, which had no procedures for or experience in cross-examination, provided for this possibility when it adopted its new code of civil procedure. N.C.P.C., art. 739. *See* L. Chatin, RECUEIL PRATIQUE DE CONVENTIONS SUR L'ENTRAIDE JUDICIAIRE INTERNATIONALE EN MATIÈRE CIVILE, COMMERCIALE ET ADMINISTRATIVE (Paris, Ministry of Justice, 2d ed., 1978) at 937-940. A French judge may even be designated by an American court to serve as a commissioner.

48 The Parties currently are: Czechoslovakia, Denmark, Finland, France, Federal Republic of Germany, Israel, Luxemburg, Norway, Portugal, Singapore, Sweden, United Kingdom, United States. Barbados recently deposited its instrument of accession, and the Netherlands has ratified the Convention, effective June 7, 1981.

49 For the report of this meeting *see* 17 INT'L LEG. MAT. 1425. *See generally Problems in*

Convention was found generally to work well. However, one of the reservations which had been included at the time of negotiation of the treaty was found to be troublesome, at least on the theoretical level. This is the reservation of Article 23—included at the request of the British delegation—which allows a State to refuse requests for "pre-trial discovery of documents as known in Common-Law countries." In fact, this reservation was aimed at the broad "fishing expedition" type of discovery practice which had grown up in the United States. Even common-law systems such as Britain tend to be strict in requiring documents which are sought to be described specifically, and to refuse to require parties or witnesses to answer to questions asking them to disclose the existence and indentity of any and all unspecified documents which might be relevant to issues in the case. However, the language of the reservation was broad enough that if applied literally, it might have impeded the necessary progress of litigation. The United Kingdom, when it ratified the Evidence Convention, limited the scope of its reservation under Article 23 by issuing the following declaration:

> In accordance with Article 23, Her Majesty's Government declares that the United Kingdom will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents. Her Majesty's Government further declares that Her Majesty's Government understands "Letter of Request issued for the purpose of obtaining pre-trial discovery of documents" for the purpose of the foregoing Declaration as including any Letter of Request which requires a person:
>
> a. to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power; or
>
> b. to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be, or to be likely to be, in his possession, custody or power.[50]

Using the procedure permitted under the treaty, the United Kingdom has subsequently extended the application of the Convention to a number of the territories for which it handles foreign relations, employing in each case the same reservation and declaration.[51] In addition, the Republic of Singapore when it, acceded to the Evidence Convention in 1978, made a declaration with regard to the scope of the reserva-

Transnational Litigation, multimedia package (5 tapes, 285 pp. printed matter in binder/album) prepared by Condyne from workshop sponsored by American Bar Association Sections of International Law and Litigation, Washington, D.C., Apr. 16, 1980.

50 8 Martindale-Hubbell Law Directory 4562 (1981).

51 The territories are: the Cayman Islands, the Falkland Islands and Dependencies, Gibraltar, Hong Kong, the Isle of Man and the Sovereign Base Areas of Akrotiri and Dhekelia on the Island of Cyprus.

tion under Article 23 in terms exactly the same as those of the British declaration.[52]

The meeting of administrators held at The Hague in June, 1978, referred to above, included an exchange of views on this point and the result so far is that all of the Scandinavian countries, which had made unlimited declarations under Article 23, during the course of 1980 deposited declarations limiting their reservations along much the same lines as the previous British declaration.[53]

In principle, there should be no problem with specific requests for pre-trial discovery of documents. The legal systems of all of the continental countries provide for the development of documentary evidence in the context of their normal civil proceedings which, unlike the common law trial that is concentrated in one continuous time period, tend to be stretched out over an extended period of time, with recurrent hearings at which various documents may be identified and parties or witnesses may be required to produce them.[54] The difficulty with the American approach is not so much that it involves production of documents for discovery before trial, but that the requests for discovery are frequently very broad and not specific in reference to the documents which are to be produced. It was felt that this procedure is abused in the United States, pre-trial discovery of documents being used as a means of harassment or as a way of casting a broad fishing net for any and all documents which might bolster a weak case or provide a basis for an additional claim. This abuse has been recognized within the United States and efforts are currently being made to bring needed restraint to the pre-trial discovery process at both the federal and state levels.[55]

The abuse of discovery for purposes of harassment should not be confused with the very particular problems which arise in the area of U.S. antitrust law enforcement. Efforts by U.S. authorities to obtain evidence from foreign companies or from subsidiaries of American companies operating abroad for use in determining whether violations of American antitrust laws have occurred abroad have been going on

---

52 8 Martindale-Hubbell Law Directory 4562 (1981).

53 *Id.* at 4559 (Denmark) and 4562 (Sweden). Finland and Norway filed similar declarations which will be included in the corresponding annotations of the 1982 edition of Martindale-Hubbell.

54 *See generally* A. VON MEHREN and J. GORDLEY, THE CIVIL LAW SYSTEM (2d ed. 1977) 152.

55 *See* Hufstedler and Nejelaki, *A.B.A. Action Commission Challenges Litigation Cost and Delay*, 66 A.B.A.J. 965 (Aug. 1980); Rosenberg, *Discovery Abuse*, 7 LITIGATION (No. 3) 8 (1981). At the state level, the Texas Supreme Court adopted changes in its Rules of Civil Procedure, effective Jan. 1, 1981, limiting the number of answers to interrogatories which may be required. Rule 168, *as amended* 43 Tex. B.J. 772 (Sept. 1980).

since shortly after the Second World War. Countries such as the United Kingdom have a long history of resisting efforts to obtain information for this purpose[56] from companies headquartered on their territory, or even branches or subsidiaries of American companies located there. The well-known *Westinghouse Uranium* case,[57] decided by the House of Lords in 1978, and its aftermath have brought on legislation passed for defensive purposes, not only in the United Kingdom[58] but also in France.[59]

The Hague Evidence Convention is intended for use in civil or commerical matters and, therefore, is not available in a strictly criminal proceeding. It is not unknown, however, for legal proceedings to have mixed aspects of both civil and criminal law, and, of course, this is frequent in the field of U.S. antitrust law. Two recent related court decisions[60] handed down in West Germany by the Higher Regional Court acting on petitions for review of decisions made by the Ministry of Justice in Bavaria acting as a Central Authority under the Hague Convention (such decisions being classified as "administrative judicial acts regulating individual matters of the law of civil procedure")[61] struck a careful balance on this point. ITT sought evidence from German companies to bolster its defensive claims of patent misuse and violations of the antitrust laws against an American company which was suing ITT for patent infringement in the United States District Court in Roanoke, Virginia. Obviously, the evidence which would support such a defense might also provide the basis for criminal antitrust action against the German companies in question, under the prevailing views in the Department of Justice concerning the extra-territorial reach of

56 Investigations by the Commission of The European Communities may in time give rise to analogous problems. *See* Jacobs, *Jurisdiction and Enforcement in EEC Competition Cases*, in ENTERPRISE LAW OF THE 80's 204-09 (1980).

57 Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp. [1978] 1 All E.R. 434 (H.L. 1977). *See* 13 INT'L LAW. 3 *et seq.* (1979), for a series of articles on obtaining foreign discovery and evidence for use in litigation in the United States.

58 Protection of Trading Interests Act, 1980, ch. 34.

59 LOI No. 80-538 DU 16 JUILLET 1980 RELATIVE À LA COMMUNICATION DE DOCUMENTS ET RENSEIGNEMENTS D'ORDRE ECONOMIQUE, COMMERCIAL OU TECHNIQUE À DES PERSONNES PHYSIQUES OU MORALES ÉTRANGÈRES, [1980] J.O. 1799.

60 Order of the 9th Civil Division, OBERLANDESGERICHT, Munich, issued Oct. 31, 1980, *certified* Nov. 3, 1980; Order of the 9th Civil Division, OBERLANDESGERICHT, Munich, issued Nov. 27, 1980, *certified* Dec. 1, 1980. These proceedings were initiated in accordance with para. 23, EGGNG against the decision of the Bavarian Ministry of Justice of June 2, 1980, GZ. 9341 E-Ia-403/80 concerning the request for judicial assistance of the U.S. District Court for the Western District of Virginia, Roanoke, Virginia of Dec. 17, 1979, for its civil proceeding No. 76-0144, Corning Glass Works v. Int'l Telephone and Telegraph Corp.

61 Order of Nov. 27, 1980, *supra* note 60, at 5.

U.S. antitrust laws.[62] No claim of privilege under the Fifth Amendment of the United States Constitution had been made,[63] however, which distinguished this case from the *Westinghouse* case, where such claims had been made and the Department of Justice, in support of a pending grand jury investigation, had granted immunity to the witnesses whose testimony and documents were sought.[64] The German court found that mixed criminal and civil proceedings were known in German procedure and that the fact that treble-damage claims in antitrust were involved was not sufficient to bar the taking of evidence under the Hague Convention.[65]

Another important aspect of the West German court's holding involved the scope of the reservations made by the Federal Republic of Germany under Article 23 of the Hague Convention. That reservation was couched in unlimited terms; however, the request forwarded from the U.S. District Court in Roanoke, Virginia, specified that the documents and testimony were wanted for use at the trial of the case. Nonetheless, the German court found that the request was within the framework of pre-trial discovery as practiced in the United States and refused the request for discovery of documents, while allowing the request for answers by the witnesses to written interrogatories to go forward. The court, however, noted that under the Implementing Act by which the Hague Evidence Convention was brought into force in the

---

62 *See* Antitrust Guide for International Operations (U.S. Department of Justice, Antitrust Div., Jan. 26, 1977, *revised* Mar. 1, 1977), *reprinted as* Appendix No. 2 to PERSPECTIVES ON THE EXTRATERRITORIAL APPLICATION OF U.S. ANTITRUST AND OTHER LAWS 184 (1979).

63 Order of Oct. 31, 1980, *supra* note 60, at 4, referring to para. of art. 11 of the Convention on the Taking of Evidence Abroad in Civil or Commercial Cases, *supra* note 44. Art. 11 of this Convention reads as follows:

> In the execution of a Letter of Request the person concerned may refuse to give evidence in so far as he has a privilege or duty to refuse to give the evidence—
> a) under the law of the State of execution, or
> b) under the law of the State of origin, and the privilege or duty has been specified in the Letter, or, at the instance of the requested authority, has been otherwise confirmed to that authority by the requesting attorney.
>
> A Contracting State may declare that, in addition, it will respect privileges and duties existing under the law of States other than the State of origin and the State of execution, to the extent specified in that declaration.

The petitioner's assertion recited in the order is that no claim of privilege was made by the witnesses under German law, *i.e.*, para. of art. 11. Since no claim of privilege under American law is mentioned in the opinions of the court or in the attached documents, we assume that no privilege was asserted under parb. of art. 11.

64 Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp., *supra* note 57. For a discussion of the procedures in this case *see* Merhige, *The Westinghouse Uranium Case: Problems Encountered in Seeking Foreign Discovery and Evidence*, 13 INT'L LAW. 19 (1979) and Collins, *Opportunities for and Obstacles to Obtaining Evidence in England for Use in Litigation in the United States*, 13 INT'L LAW. 27 (1979).

65 Order of Nov. 27, 1980, *supra* note 60, at 7.

Federal Republic of Germany, regulations might be issued which would allow pre-trial discovery of documents under certain conditions, but no such regulations had been issued.[66]

One hopes that the West German authorities will soon issue regulations which limit the scope of the reservation made by the Federal Republic under Article 23 along the same line as the British and Scandinavian declarations. The issue of extraterritorial enforcement of antitrust laws is a separate and very concrete issue among a number of countries and it should not be allowed to poison the entire process of discovery of specific documents for use at trial in normal civil litigation.

If the requests are too broad, they may be struck down under declarations of the British and Scandinavian types for lack of specificity. If the proceedings which form the backdrop for the request take on a predominantly penal cast, then appropriate action can be taken—as was done in the *Westinghouse Uranium* case[67]—to refuse enforcement of the request for evidence, either because it is in aid of a criminal investigation carried on by public authorities or because it constitutes an infringement on the sovereignty or security of the requested State, by reason of the effort by one State to enforce its penal laws on the territory of another State.

One hopes that action will be instituted at the political level to resolve the difficulties which have arisen in connection with the so-called "extraterritorial" application of competition laws.[68] International conventions which are designed to aid courts and litigants in all kinds of civil or commercial cases should not be used as weapons in the essentially political battle over international antitrust policies.

C. Proof of Documents: Abolishing "Legalization"

The so-called "legalization" of a document, which consists of a chain of authentications attesting to the authenticity of the signature on the document, the capacity in which the person signing it was acting and the identity of the seal or stamp if any which it bears, is a slow and costly procedure.[69] To produce a public document such as a judgment, a marriage certificate or a patent abroad may therefore require inordi-

---

66 Order of Oct. 31, 1980, *supra* note 60, at 5.

67 Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp., *supra* note 57.

68 The Int'l Chamber of Commerce held a very useful conference on this subject at its offices in Paris on Mar. 11-12, 1981.

69 *See* Amram, *Towards Easier Legalization of Foreign Public Documents*, 60 A.B.A.J. 310 (1974).

nate time and expense on the part of practicing lawyers, the cost of which will utlimately be borne by their clients.

The British Government recognized this problem as early as the 1950's and proposed to the Council of Europe that an international convention be prepared to simplify this process.[70] The subject was referred to the Hague Conference on Private International Law as the specialized body in this field[71] and the Convention Abolishing the Requirement of Legalization for Foreign Public Documents[72] was drawn up at the Conference's Ninth Session in 1960.

This Convention was signed and took its date on October 5, 1961. Presently twenty-eight countries[73] have ratified or acceded to it; the United States, for which the Convention will enter into force on October 15, 1981, will be the twenty-ninth party to this Convention.

The Convention has no political aspects and is purely technical in nature. It abolishes the chain of authentications which make up the traditional legalization by replacing them with a single form for authentication, which is called an *apostille*. Countries joining the treaty notify the depository, the Netherlands Government, as to which of their authorities are authorized to issue the *apostille*, and undertake that those authorities will keep a register or card-index recording the certificates issued and will verify at the request of any interested person whether the particulars in the certificate correspond with those in the register or card-index.

The usefulness of this Convention lies in its simplicity. Its popularity is attested by the fact that thirteen countries which are not Members of the Hague Conference on Private International Law have nonetheless acceded to it.[74] Other countries which have not taken the formal steps of acceding to the Convention even so, in lieu of requiring the traditional formalities of "legalization," request the "Hague Convention certificate" for public documents originating in countries which are Parties to the Convention.

In the United States the implementation of the Convention posed problems because of the federal system. Arrangements must be made for certifying public documents issued by officials of each of the fifty states for use abroad and, on the other hand, courts and administrative

---

70 *Id.* at 310.

71 *Id.*

72 *See* note 26 *supra*.

73 *See* 19 INT'L LEG. MAT. 1102-1103.

74 These are: the Bahamas, Botswana, Cyprus, Fiji, Hungary, Lesotho, Liechtenstein, Malawi, Malta, Mauritus, the Seychelles, Swaziland and Tonga.

authorities of the fifty states must be alerted to the fact that they must accept documents coming from Convention countries abroad as being authentic if they are accompanied by the *apostille*. This process was begun with a speech by the responsible State Department official before the annual meeting of the National Association of Secretaries of State in the summer of 1980,[75] so that one hopes that the Convention will be familiar to all authorities concerned with its use (in particular, the 400 Federal District Clerks, plus one public official in each of the fifty states) before its date of entry into force for the United States.

It should be pointed out that where a document has been signed by a private individual or a corporate official and an acknowledgement or an affidavit taken by a notary public is attached thereto, a Hague Convention *apostille* affixed to the document serves to certify the authenticity of the signature and the capacity and seal of the notary public, not the signature or capacity of the person who executed the instrument itself. This distinction is somewhat esoteric and should normally have no practical effect, since once the authenticity of the notary public's signature and his capacity as a public official is established, his certification regarding the acknowledgement or affidavit should not usually be questioned.

D. Access to Justice: Legal Aid, Security for Costs, and Safe-Conduct for Witnesses

Having discussed above the three Hague Conventions which the United States has ratified or acceded to, we pass now into the realm of the speculative. The newest Hague Convention in the field of civil procedure[76] was drawn up at the Conference's Fourteenth Session in October, 1980, and was signed immediately by three countries, but has not yet been ratified or entered into force.

The Convention on International Access to Justice constitutes the third and final leg in the revision of the 1954 Convention on Civil Procedure. Rather than being limited to a single topic, such as service of process or taking of evidence abroad, it includes provisions on a variety of matters. However, its core consists of legal aid, which is treated on two levels.

---

[75] Talk by Peter H. Pfund, Assistant Legal Adviser for Private International Law, Department of State, to the National Conference of the National Association of Secretaries of State, Atlantic City, Aug. 27, 1980.

[76] Convention on International Access to Justice, Oct. 25, 1980; Final Act, *supra* note 29, at 12; 19 INT'L LEG. MAT. at 1505. The Federal Republic of Germany, France, Greece and Luxemburg have signed it.

Some provisions are designed to assure equal protection of the laws by granting aliens the same rights to legal aid as are available for citizens.[77] Another set of provisions establishes the administrative facilities for making application for legal aid in a foreign country, through the use of a Central Authority in the country of residence of the applicant to receive and forward the application to a corresponding authority in the country where the legal aid is needed.[78] The increasing mobility of people—even those of very limited means—will make this facility very important in the future. The Convention is very detailed and has model forms attached to it, which must be used by applicants.[79] A procedure for amending the model form, without going through the long and burdensome process of amending the treaty itself, is provided within the Convention.[80]

A corollary of improved access to legal aid in international relations is relief from being required to give security for cost. Requirements for security for costs have often been applied against foreigners in discriminatory fashion.[81] A part of the reason for this is of course, that it may be more difficult to satisfy a judgment against the foreigner for costs in the event that he loses his case and has costs awarded against him. The situation is complicated further by the fact that some countries include lawyers' fees as an element of costs and routinely award them to the winning party, while in other systems an award of attorneys' fees is exceptional and limited to certain types of cases.

Relief from giving security for costs in the Convention is balanced out by a procedure for an expedited international enforcement of orders for costs. When the Convention has entered into force, a plaintiff in one Contracting State may sue in another Contracting State without providing security for costs, but if he loses, the authorities of his State undertake to obtain execution on the order for costs rapidly and without red tape.[82] The system therefore is designed to improve the facili-

---

77 *Id.* arts. 1 and 2.

78 *Id.* arts. 3-13.

79 *Id.*, Final Act *supra* note 29, at 21-33; 19 INT'L LEG. MAT. at 1510.

80 *Id.* art. 30.

81 The situation was already recognized at the Second Session of the Hague Conference. *See* ACTES DE LA DEUZIÈME SESSION DE LA CONFÉRENCE DE LA HAYE DE DROIT INT'L PRIVÉ 103 (1894). The provisions on this point contained in successive Hague Conventions on Civil Procedure (Convention relative à la procedure civile, *signed* July 12, 1905, *supra* note 16, arts. 17-19; Convention relative à la procédure civile, *signed* Mar. 1, 1954, *supra* note 16, arts. 17-19) have undoubtedly done much to reduce the scope of the problem. However, they have not yet been ratified by any common law country.

82 Convention on International Access to Justice, *supra* note 76, arts. 14-17.

ties for suing internationally with a minimum of procedural and financial obstacles.

Mention should be made of the new provisions in the Convention[83] which treats the problem of safe-conduct for witnesses coming from abroad. Unlike the chapters on legal aid and security for costs, which existed in the 1954 Convention even though the new Convention has greatly changed and broadened their provisions,[84] safe-conduct for witnesses was not dealt with in the 1954 Convention; a proposal by the Swiss delegation led to its inclusion. Now a witness subpoenaed to come from one Convention country and testify in another will be granted freedom from arrest in connection with any criminal proceedings for a period of seven days before his testimony is scheduled to begin, continuing until seven days after he completes his testimony.[85] This safe-conduct does not, of course, apply to arrest for any criminal offences which he may commit during his stay in the country where he is testifying.

Continuing the tradition of the 1954 Convention, arrest and detention are barred in all Convention countries,[86] where they are to be used in order to collect or enforce a debt. This provision probably would not be interpreted to bar the use of criminal contempt proceedings for collection of child support or alimony as practiced in the common-law countries. Although until now no common-law country has joined the 1954 Convention on Civil Procedure[87] or its predecessor, the 1905 Convention, provisions of French and Belgian law, under which criminal prosecutions may be pursued for desertion of one's family (abandon de famille) on the basis of failure to pay child support, have not been considered to be covered by these Conventions.

E. Bringing Transnational Litigation to an End: Recognition and Enforcement of Judgments

The recognition and enforcement of foreign judgments involves what is known in continental European terminology as *compétence indirecte* (indirect jurisdiction). This is the principal component of a decision to recognize and—where appropriate—to enforce a foreign judgment, i.e., the determination that the foreign court had jurisdiction

---

83 *Id.* art. 20.

84 Convention relative à la procédure civile, Mar. 1, 1954, *supra* note 16, ch. IV, *Legal Aid*, arts. 20-24, ch. III, *Cautio Judicatum Solvi*, arts. 17-19.

85 Convention on International Access to Justice, *supra* note 76, art. 20.

86 *Id.* art. 19.

87 *See* note 16 *supra*.

over the person of the defendant and the subject matter of the suit at the time of the commencement of proceedings.

A distinction is drawn in the European terminology between *compétence indirecte*,[88] which will support recognition and enforcement of a foreign judgment, and *compétence directe*, which consists of the conditions under which courts will assume jurisdiction of cases which are brought before them for decision on the merits.[89] *Compétence indirecte* need not be grounded necessarily on the elements of jurisdiction which would lead a court to take jurisdiction under its own domestic law to decide a similar case on the merits.[90] Some American writers have discussed "jurisdiction in the international sense,"[91] which is used to cover all situations in which a forum is prepared to entertain litigation involving nondomestic elements, even if other States will not recognize the judgment. The need for cooperation and restraint in assuming such jurisdiction is clear, however, particularly where recognition or enforcement must be sought abroad.

Only twice in its modern history has the Hague Conference on Private International Law endeavored in a treaty to establish among different States common agreement on assuming jurisdiction over cases (*compétence directe*) in the absence of a choice of court agreement between the parties. Both of these were treaties involving children, where a serious effort was made in the interest of children to reach agreement on grounds for jurisdiction, the applicable law and recognition of judgments all in a single international instrument. Both Conventions, one on protection of minors,[92] the other on adoption,[93] have been somewhat disappointing in the number of States joining them and the scope of application of their provisions. They will not be discussed in detail, but will be mentioned again in the section of this article which treats family law.

---

88 *See* 1 E. BARTIN, PRINCIPALES DE DROIT INTERNATIONAL PRIVÉ 317 (1930). *See also* G. DELAUME, AMERICAN-FRENCH PRIVATE INTERNATIONAL LAW 160 (2d ed. 1961); D. HOLLEAUX, COMPÉTENCE DE JUDGE ÉTRANGER ET RECONNAISSANCE DES JUDGEMENTS 1 (1970).

89 Bartin, *id.* *See also* H. BAUER, COMPÉTENCE JUDICIAIRE INTERNATIONALE DES TRIBUNAUX FRANCAIS ET ALLEMANDS 1 (1965).

90 The distinctions made by theorists are too subtle to discuss in more detail here. *See generally* Holleaux, *supra* note 88, at 2-60.

91 *E.g.*, A. VON MEHREN & D. TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS, 589 (1965).

92 Convention concernant la compétence des autorités et la loi applicable en matière de protection des mineurs, Oct. 5, 1961. 4 ACTES ET DOCUMENTS DE LA NEUVIÈME SESSION DE LA CONFÉRENCE DE LA HAYE DE DROIT INT'L PRIVÉ 213 (1961). RECUEIL DES CONVENTIONS [1951-1977] 42.

93 Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions, Nov. 15, 1965, 2 ACTES ET DOCUMENTS DE LA DIXIÈME SESSION DE LA CONFÉRENCE DE LA HAYE DE DROIT INT'L PRIVÉ 399 (1965), RECUEIL DES CONVENTIONS [1951-1977] 65.

The experience gained during the first decade following the Conference's resumption convinced its Members that a treaty establishing common grounds for the assumption of jurisdiction by courts for civil and commercial cases—other than those involving children's protection and status—could not be successfully achieved within the Conference's membership group, particularly since the geographical range of that group was rapidly expanding. Thus, the Conference undertook, at the request of the Council of Europe,[94] to prepare a treaty which would be limited to recognition and enforcement of foreign judgments in civil and commercial matters, other than questions of personal status or family relationships and some other matters which were deemed to be too complicated or too delicate, such as decisions in bankruptcy and judgments involving claims for nuclear damage. The forum for the negotiation of this general Convention on Recognition and Enforcement of Judgments was broadened somewhat (since the Observer for the Council of Europe was in a way a surrogate for the several members of the Council who were not members of the Hague Conference), and it took the form of an Extraordinary Session dealing only with this subject. The organization of the Extraordinary Session of the Conference had been contemplated when the Conference's statute was drawn up, but in the quarter century since the statute entered into force this has been the only subject dealt with in Extraordinary Session.[95]

The work of the 1966 Extraordinary Session had behind it a number of historical elements. First, there was the effort which had been made at the Fifth Session of the Conference in 1925 to prepare a convention on recognition and enforcement of judicial decisions. That effort had resulted in a draft[96] which was not intended to be a multilateral convention, but was to serve as a basis for the conclusion of bilateral conventions between States, or perhaps at the most a convention among a small group of States. The draft, however, already contained in its embryonic form the skeleton of what has now become familiar to us in the form of modern treaties on recognition and enforcement of judgments. We discuss the main elements of this form below.

In general, it was limited to civil and commercial judgments handed down in a Contracting State. Recognition was subjected to a

---

94 *See* ACTES ET DOCUMENTS DE LA SESSION EXTRAORDINAIRE DE LA CONFÉRENCE DE LA HAYE DE DROIT INT'L PRIVÉ 162 (1969).

95 The Conference's Fourteenth Session contemplated the possibility that an Extraordinary Session would be used for the revision of the Convention of June 15, 1955 on the law applicable to international sales of goods. *See* Final Act, *supra* note 29, at 38; 19 INT'L LEG. MAT. at 1517.

96 ACTES DE LA CINQUIÈME SESSION DE LA CONFÉRENCE DE LA HAYE DE DROIT INT'L PRIVÉ 344 (1926).

limitative list of four conditions. First, the rules of international judicial jurisdiction (*compétence judiciaire internationale*) accepted under the law of the State where the decision was to be recognized did not exclude jurisdiction on the part of the State where the judgment was rendered. This condition is certainly the key to the reasoning under which the draft was not to serve as a multilateral treaty itself, but only as a basis for bilateral or regional treaties. The concept of "international judicial jurisdiction" could differ very much from State to State, and only in a bilateral—or at least in a very limited, multi-State context—could one accurately predict the content of this concept in the other Contracting States. As will be seen, in the post-World War II Conventions, this generalized condition has been replaced by a "laundry list" of grounds for jurisdiction which leads to recognition of a judgment on the part of a Contracting State.

Second, recognition of the decision must not be contrary to public policy or the principles of public law of the State where recognition of the decision was sought. This condition survives in modern treaties in more limited phraseology: that the recognition of the decision not be "manifestly incompatible with" the public policy (*ordre public*) of the State where recognition is sought.[97] However, principles of "public law" continue to reappear on the scene in various forms,[98] and we have probably not seen the last of this famous distinction in connection with recognition and enforcement of judgments.[99]

Third, a matter must be res judicata under the law of the State where the decision was rendered. Res judicata here is only an approximate translation of the French phrase *passe en force de chose jugée*, and the modern terminology is in terms that the decision be "no longer subject to ordinary forms of review" in the State where it was rendered.[100]

---

[97] *See* Convention on the Recognition of Divorces and Legal Separations, June 1, 1970, note 210 *infra*, art. 10; Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations, Oct. 2, 1973, note 214 *infra*, art. 5(1).

[98] *E.g.*, Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, note 225 *infra*, art. 20. This Convention does not provide for recognition and enforcement of judgments as such, but rather for the prompt return of children who have been removed or retained away from their custodian. No "public policy" clause was included, but art. 20 provides that the return of the child may be refused "if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."

[99] The Convention of September 27, 1968, on jurisdiction and enforcement in civil and commercial matters, *as amended* by the Convention of Accession of October 9, 1978, of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland, Article 27, 21 O.J. EUR. COMM. (No. L 304) 84 (1978) [hereinafter referred to as the Brussels Convention] repeats the traditional public policy exception.

[100] *E.g.*, Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Feb. 1, 1971, note 101 *infra*, art. 4(2); Convention on the Recognition and

However, alterations in terminology have not solved all of the problems of dealing with the requirement of finality as a condition for recognition of a judgment. Indeed, the requirement of finality is at the heart of the problem of recognition of a judgment since the essential policy question underlying recognition practice is whether to rule that litigation on the merits has stopped, leaving only the procedures for giving effect to recognition of the judgment to unfold.

Fourth, default judgments were set apart, it being required that the party be declared in violation of the law of the country where the judgment was rendered and with the provisions of treaties in force between the Contracting States. This provision survives in a number of modern treaties on recognition and enforcement of judgments, but in the form of a "due process of law" provision, which generally provides that the defaulting party must have been duly served with notice of the suit and that under the circumstances he was not deprived of an adequate opportunity to present his case.[101]

Provisions of modern treaties generally incorporate the rule of the 1925 draft that the law of the requested State generally governs the jurisdiction and the procedure in respect of the request for recognition and enforcement.[102] Modern treaties follow the 1925 draft in setting out a list of the documents which must be produced by the party who seeks recognition and enforcement of a foreign judgment.[103]

Unlike the 1925 draft, arbitration decisions are now generally dealt with in conventions which are separate from those dealing with recognition and enforcement of judgments.[104] Judicial decisions based on a settlement, however, are still included—as they were in 1925. The provision that the Convention applies regardless of the nationalities of the parties is retained in the new treaties, as in the draft of 1925.

This brief historical analysis of the 1925 Hague draft is necessary because, although that draft had some bilateral antecedents, the great expansion of bilateral treaty networks on the recognition and enforce-

---

Enforcement of Decisions Relating to Maintenance Obligations, Oct. 2, 1973, note 214 *infra*, art. 4(2), but subject to the second full para. of art. 4.

101 *E.g.*, Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commerical Matters, Feb. 1, 1971, art. 6, ACTES ET DOCUMENTS DE LA SESSION EXTRAORDINAIRE DE LA CONFÉRENCE DE LA HAYE DE DROIT INT'L PRIVÉ 348, 350 (1969), RECUEIL DES CONVENTIONS [1951-1977] 107, 109. Cyprus and the Netherlands have ratified the Convention, but it has not yet entered into force between them for lack of a supplementary agreement. *See* note 105 *infra*. *Cf.* Brussels Convention, *supra* note 99, at art. 27(2).

102 *Id.* art. 14. *Cf.* Brussels Convention, *supra* note 99, art. 33.

103 *Id.* art. 13. *Cf.* Brussels Convention, *supra* note 99, arts. 46 and 47.

104 *E.g.*, United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997.

ment of judgments began shortly thereafter and continues to the present. The elements of those treaties are well-known and for the most part find their roots in the 1925 draft.

The Convention prepared at the Extraordinary Session of the Hague Conference in 1966 has not yet succeeded in replacing the networks of bilateral treaties, although it did serve to update the analysis of the problems connected with such treaties—most particularly in facilitating the identification of the so-called "exorbitant" grounds for jurisdiction.[105] The process based on that analysis has found its most concrete application in the Brussels Convention of 1968[106] which has, in the framework of the European Communities already overtaken and replaced a number of bilateral treaties.

The choice of approaches for negotiating treaties on the recognition and enforcement of judgments remains open, depending in large part on the current state of international relations. Two efforts by the Hague Conference to reach a general multilateral Convention (1925 and 1966) have fallen short of that objective. In 1925, a text was reached which was only intended to serve as a basis for bilateral conventions. In 1966, a multilateral Convention was achieved, but only at the price of requiring a Supplementary Agreement for the "bilateralization" of the relationships thereunder, as a condition for its entry into force between any two Contracting States.

Both the 1925 text and the 1966 Convention have served as models for separate bilateral treaties[107]—and this process goes on. Bilateral negotiations, since they do not involve as broad a variance in principles of jurisdiction, seem superficially easier to bring to a successful result. But they lack the objective character of the broader negotiations, focussing more narrowly on two systems, and they are subject to sometimes dramatic comparisons and conflicts which can destroy the results of

---

105 These are set out in art. 4 of the Supplementary Protocol to the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Feb. 1, 1971, ACTES ET DOCUMENTS DE LA SESSION EXTRAORDINAIRE DE LA CONFÉRENCE DE LA HAYE DE DROIT INT'L PRIVÉ 494 (1969), RECUEIL DES CONVENTIONS [1951-1977] 125. The Convention itself only *enters into force* between two ratifying States when they have concluded a bilateral Supplementary Agreement under arts. 21-23. *See* note 101 *supra*.

106 *See* note 109 *infra*.

107 *See generally* the post-1925 bilateral treaties published in the Council of Europe publication, THE PRACTICAL GUIDE TO THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDICIAL DECISIONS IN CIVIL OR COMMERCIAL LAW PART II, SECTION II: *Bilateral agreements* (1975). *See also* L. CHATIN, RECUEIL PRATIQUE DE CONVENTIONS SUR L'ENTRAIDE JUDICIARE INT'L EN MATIÈRE CIVILE, COMMERCIALE ET ADMINISTRATIVE, Part One: *Accords bilateraux* (Paris, Ministry of Justice, 2d ed., 1978).

long and hard labor.[108]

The multilateral texts have thus far served mainly to bring the fruits of objective analysis on a broader scale to the aid of bilateral—or even regional negotiations. Yet the need for intercontinental treaty arrangements for the recognition and enforcement of judgments persists, even increases. Western Europe has its system in place, and the number of participants is growing.[109] North America—and indeed the whole Western Hemisphere—should take another look at the only existing worldwide instrument.

III. Conflict of Commercial Laws

A. International Sales of Goods

When the Conference took up its work again in 1955, aside from the 1905 Convention on Civil Procedure,[110] which needed to be revived, the most important and promising project in sight was based on

---

108 As an example, take the history of the bilateral Convention negotiated between the United States and the United Kingdom, *text initialled* Oct. 26, 1976, *reprinted in* 16 Int'l Leg. Mat. at 71 (1977). *See* Hay and Walker, *The Proposed Recognition of Judgments Convention Between the United States and the United Kingdom*, 11 Tex. Int'l L.J. 421 (1976); Smit, *The Proposed United States/United Kingdom Convention on Recognition and Enforcement of Judgments: A Prototype for the Future?* 17 Virg. J. Int'l L. 443 (1977); North, *The Draft United Kingdom/United States Judgments Convention: A British Viewpoint*, 1 Nw. J. Int'l L. & Bus. 219 (1979).

109 The Convention September 27, 1968 on Jurisdiction and Enforcement of Judgments in Civil or Commerical Matters *entered into force* among the original six countries of the European Economic Community (EEC) (Belgium, France, Federal Republic of Germany, Italy, Luxemburg and the Netherlands) on Feb. 1, 1973, 21 O.J. Eur. Comm. (No. L 304) 36 (1978). The Convention of Accession of Oct. 9, 1978 of the Kingdoms of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, and to the Protocol on its interpretation by the Court of Justice, 21 O.J. Eur. Comm. (No. L 304) 1 (1978), provides for three new members of the EEC to join this treaty, *as amended*, 21 O.J. Eur. Comm. (No. L 304) 77 (1978). It has not yet *entered into force* for these three States. Greece joined the EEC as its tenth member Jan. 1, 1981. Article 59 of this treaty permits an EEC State to enter into conventions on the recognition and enforcement of judgments with third States whereby it assumes an obligation towards such third State not to recognize judgments given in other EEC States against defendants domiciled or habitually resident in such third States when jurisdiction has been founded on one of several specified grounds. The Supplementary Protocol to the Hague Convention, *see* note 105 *supra*, provides a vehicle by which third States might agree with EEC States to exclude the grounds specified in art. 59 of the EEC Convention. It should take on greater interest for non-European States as the EEC expands its membership. *See* Droz, Compétence judiciaire et effets des jugements dans le Marché commun 439-448 (1972). One might note that the Nordic States have entered into a treaty which, in art. 2, contains provisions essentially similar to those of the Supplementary Protocol to the Hague Convention. Treaty between Finland, Denmark, Iceland, Norway and Sweden on the Recognition and Enforcement of Judgments in Civil and Commerical Matters, Copenhagen, Oct. 11, 1977 (English translation provided by the courtesy of the Ministry of Justice of Finland).

110 *See* note 16 *supra*.

a draft Convention[111] prepared twenty years earlier on the conflict of laws for sales of tangible goods. The Conference had the good fortune that the professor who had prepared the explanatory report[112] on that earlier draft for the Special Commission which drafted it was available to serve as chairman of the Commission on sales of goods at the Seventh Session. The result was a Convention which was signed more than twenty-five years ago and which remains in force for eight continental European States, including all four Scandinavian States. Due to the relatively small number of State Parties and the length of time since the latest ratification (eight years), the Conference decided at its Fourteenth Session to revise the 1955 Convention on International Sales of Goods.[113] Thus, some discussion of its features will be useful in understanding the issues which will arise in the course of its revision.

The principal virtue of the 1955 Convention on International Sales of Goods is its simplicity. In six substantive articles, it covers the ground of a classic compromise. Article 1 sets out in detail by categories the types of sales of goods to which the Convention applies. For example, it applies to documentary sales of goods and sales of goods to be manufactured or produced for which the supplier obligates himself to furnish the raw materials necessary for manufacture or production. On the other hand, it does not apply to sales ordered or authorized by judicial authorities. The draft is silent on what constitutes an *international* sale; it merely indicates that a declaration of the parties concerning the applicable law, or the jurisdiction of a judge or an arbiter, is not by itself sufficient to give a sale *international* character within the meaning of the first article of the Convention.

Article 2 accepts without reservation the principle of party autonomy, by which the contracting parties may designate the law which will govern their contract.[114] It provides as a matter of construction that when a country's law is designated it is the internal[115] law of that coun-

---

111 Conflicts de lois en matière de vente d'objects mobilier corporels (1931), DOCUMENTS RELATIFS À LA SEPTIÉME SESSION DE LA CONFÉRENCE DE LA HAYE DE DROIT INT'L PRIVÉ 4 (1952).

112 *Id.* at 5, prepared by Professor Julliot de la Morandière, Faculty of Law of Paris.

113 Convention on the Law Applicable to International Sales of Goods, June 15, 1955, 510 U.N.T.S. 149.

114 This Principle is also accepted in § 1-105 of the Uniform Commerical Code, but with the limitation that the country, the law of which is chosen by the parties to be applicable to the sale, must bear a "reasonable relation" to the transaction. This general provision of the UCC on conflict of laws is applicable to art. 2 of the UCC on Sales. The principle of party autonomy for sales is broadly contested at this time by developing countries in particular.

115 This specification is not made by the UCC, except of course that when the UCC as adopted by a particular state is applicable, it clearly is also the internal, *i.e.*, domestic law of that State. For further discussion of this concept, *see* text accompanying notes 125-145 *infra*.

try which governs the sale. The designation of the applicable law must be set out in an express clause or it must arise unambiguously from the provisions of the contract.

Article 2 goes even further in providing that the conditions concerning the consent of the parties to the law which is declared applicable are governed by that law. This provision has been subjected to the criticism that it is circular—in that the validity of the consent to application of the law is governed by that very law. Though this seems to be a just criticism from a theoretical point of view, in practice, one must always, however, find that a "designation" of the applicable law has been made by the parties. The case of a seller in a country where silence is equivalent to consent sending a contract containing a clause designating his country's law as being applicable, to a buyer in a country which requires an affirmative expression of consent, does not cause a problem in practice. There normally must be a "designation" of the applicable law by the parties which results in a law which has been declared applicable, before the conditions for consent can come into play.[116] Other more troublesome cases, not merely touching the manner of expression of consent but going to the very heart of consent, such as fraud or duress, will usually be sanctioned by nullity of the contract under any system. For systems which do not sanction fraud or duress with nullity of the contract, there is finally the escape of the public policy clause (article 5).[117]

The future of this simple but circular system of dealing with the problem of consent will be very much in question when the work of revision of the 1955 Sales Convention is taken up. The latest Convention of the Hague Conference dealing with a type of contract contains no provisions concerning the consent of the parties to the applicable law.[118] In contrast, the EEC Convention on the Law Applicable to Contractual Obligations[119] has expanded and complicated its provisions concerning consent to the applicable law. The capacity of the parties and the form of the contract were excluded from the coverage of the 1955 Convention.[120] The provisions of the EEC Convention concerning consent have been broken down among material validity, for-

116 *Cf.* Convention on the law applicable to contractual obligations, note 119 *infra*, art. 8.

117 *See* text accompanying notes 129-133 *infra*.

118 *See* art. 5 of the Convention on the Law Applicable to Agency, Mar. 14, 1978, 4 ACTES ET DOCUMENTS DE LA TREIZIÉME SESSION DE LA CONFÉRENCE DE LA HAYE DE DROIT INT'L PRIVÉ 371, 372 (1979), RECUEIL DES CONVENTIONS [1951-1977] 253.

119 Signed in Rome on June 19, 1980 by all EEC Members except Denmark and the United Kingdom, 23 O.J. EUR. COMM. (No. 266) 1 (1980).

120 *Id.* art. 5.

mal validity, and incapacity.[121] This increase in complexity casts doubt on the possibility of once again reaching a simple and straightforward solution.

Article 3 of the 1955 Convention on International Sales of Goods is the heart of the treaty. It indicates the law which will govern the sale in the absence of agreement by the parties as to which law will be applicable. In other words, it determines the law which will be objectively applicable when no law is subjectively applicable by reason of agreement by the parties under Article 2.

The chosen system looks in the first place to the internal law of the country where the seller has his habitual residence at the time when he receives the order. If the order is received by a branch establishment of the seller, the sale is governed by the internal law of the country where that establishment is located.

The rules thus established by the first paragraph of Article 3 incorporate in treaty form the ideas of Professor Adolf Schnitzer, who sought to determine for each type of contract the "characteristic" performance (*charakteristische Leistung*)[122] under that contract. Once the characteristic performance was identified, then it was the domicile or habitual residence of the person who had the duty to perform—not the nationality of such person, nor the place where such performance was to be carried out—that governed the transaction as a whole. The underlying assumption of the Hague Convention is that the sellers' performance is the one which is characteristic of the sales contract.

Two subsidiary points should be made. First, according to the treaty, it is not the concept of domicile, but rather the concept of "habitual residence" which is employed to supply the objective connecting factor. Historically, the term domicile has been used in many countries in very different senses, which would, of course, cause serious differences of characterization under a binding international treaty. The criterion of "habitual residence", which had been used for subsidiary or peripheral purposes in some of the earlier Hague Conventions,[123] was for the first time found at the heart of a Hague Convention.

Second, the criteria for domicile or "habitual residence" cause some difficulties when the seller is an incorporated body or other legal entity. There is a classic division among legal systems, even on the continent of Europe, in the way in which they characterize domicile as

---

121 *Id.* art. 8 (material validity), art. 9 (formal validity) and art. 11 (incapacity).

122 *See* 2 A. SCHNITZER, HANDBUCH DES INTERNATIONALEN PRIVATRECHTS at 639 (4th ed. 1958).

123 *See generally*, Cavers, *Habitual Residence: A Useful Concept?* 21 AM. U.L. REV. 475 (1972).

it applies to a corporation, some finding the domicile to be at the place where the company has been incorporated; others finding the domicile to be where the company has its principal place of business.[124] The new criterion of "habitual residence" which was adopted in the 1955 Convention would seem, by its factual nature and by its lack of historic legal gloss as a term of art, to fall rather on the factual side, i.e. the place where the company has its principal place of business. However, this criterion becomes less important in the context of the Sales Convention since, when the order has been received at a branch establishment of the seller, the sale is governed by the internal law of the country where that establishment is located (Article 3, second paragraph). A subsidiary rule applies under Article 3 when the order is received in the country where the buyer has his habitual residence or a branch establishment which has made the order, and the person receiving it there is the seller or his agent, representative or commercial traveller. A further special rule is made for open markets and auctions, the sale being governed by the internal law of the country where the open market is located or where the auction is held.

One final comment should be made as to the content and purpose of the reference to the "internal" law in Articles 2 and 3 of the 1955 Convention. This reference is intended to exclude application of the principle of *renvoi*. In other words, one looks to the domestic law of the state indicated, ignoring its conflict of laws rules, which might give a further reference to another state. The development—since the 1955 Convention was drafted—of certain other treaties providing for uniform rules applying to international sales of goods, further complicates this situation. If a country has adopted the Uniform Law on International Sales of Goods,[125] prepared by an ad hoc diplomatic conference at The Hague in 1964, or the recent Convention on International Sales of Goods,[126] prepared by the United Nations Commission on International Trade Law (UNCITRAL), and one needs to look to the "internal" or domestic law of that country regarding sales of goods,[127] the question remains whether this refers to the law governing internal sales

124 *See* G. DROZ, PRATIQUE DE LA CONVENTION DE BRUXELLES DU 27 SEPTEMBRE 1968, at 57 (1973).

125 1 RECORDS OF THE DIPLOMATIC CONFERENCE ON THE UNIFICATION OF LAW GOVERNING THE INTERNATIONAL SALE OF GOODS 336 (1966).

126 United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980; U.N. Doc. A/CONF. 97/18 (1980); 19 INT'L LEG. MAT. 671. *See generally* Honnold, *The Draft Convention on Contracts for the International Sales of Goods: An Overview*, 27 AM. J. COMP. L. 223, 223-345 (1979).

127 *But cf.* text accompanying note 153 *infra* (UNCITRAL Convention on the Substantive Law of Negotiable Instruments).

within that country or to the uniform law of that country applying to certain international sales of goods. The appearance of this question, which had not been posed at the time of the 1955 Hague Convention, is one of the reasons why the Conference has now decided to proceed with the revision of its 1955 Convention.[128]

Article 4 provides a subsidiary rule to the effect that the internal law of the country where the goods are to be inspected will govern the form and the period of time in which the inspection and any notices concerning it should take place, as well as any measures to be taken in case of refusal of the goods.

Article 5 provides that the Convention will not apply to capacity of the parties, form of the contract, transfer of ownership (with the exception that the obligations of the parties concerning the risk fall under the law which governs by virtue of the Convention), or effects of the sale with regard to all persons other than the parties.

Article 6 of the 1955 Convention provides that in any of the Contracting States the application of the law determined by the Convention may be set aside for reasons of public policy. The official text being in French only, it should be pointed out here that the French term *ordre public*[129] indicates a concept which is variable from country to country and which generally is applied much more broadly in the courts of the countries of continental Europe than is the more narrow concept of public policy in the courts of the United Kingdom[130] or the United States.[131] This clause is intended to be an escape valve for those cases in which the courts of Contracting States find it intolerable under their systems of law to apply the particular law indicated by the Convention.[132]

Subsequent Conventions on the applicable law prepared at the Hague Conference tightened this clause so that the law applicable under the Convention could be set aside only if its application was "manifestly incompatible" with the public policy of the state to which the court or authority belonged. When English became a second official language and the treaties were drawn up in both languages, each being of equal authenticity, the difference between *public policy* and *ordre public* was recognized: the practice has been followed in the Eng-

128 *See also* 4 ACTES ET DOCUMENTS DE LA TREIZIÉME SESSION DE LA CONFÉRENCE DE LA HAYE DE DROIT INT'L PRIVÉ at 38-39 (1979).

129 *See generally* P. LAGARDE, RECHERCHES SUR L'ORDRE PUBLIC EN DROIT INTERNATIONAL PRIVÉ (Bibliotheque de droit privé tame XV, 1959).

130 *See* A. ANTON, PRIVATE INTERNATIONAL LAW 88 (1967).

131 *See* 1 A. EHRENZWEIG, PRIVATE INTERNATIONAL LAW 155 (1967).

132 *Cf. id.* at 153-160 (describes court reliance on *ordre public* in other contexts).

lish text of putting the French phrase *ordre public* in parentheses after the English words *public policy* to indicate that the English term is to be taken in a broader sense than would be normal in common law systems. Attempts to change this practice and to find English terminology which would more exactly reflect the content of the French term *ordre public* have so far been unsuccessful.[133]

Article 7 of the 1955 Convention simply provides that the Contracting States agree to introduce the provisions of Articles 1-6 of the Convention into the national law of their respective countries. This is a bow to the constitutional systems of some countries, under which international treaties concluded by those countries are not considered to be self-executing. The practice of including an express clause for this purpose has not been followed in later treaties, since it has been found to be unnecessary. Countries such as the United Kingdom, where treaties are not self-executing and only come into effect through an Act of Parliament, can be expected to pass the implementing legislation before they complete the formal ratification procedures contained in the final clauses of the treaty. In fact, in the United Kingdom, recent practice has been to put the implementing legislation in force for several years before ratifying the treaty in question.[134]

We have gone into considerable historical textual detail about a treaty which is a quarter of a century old. The upcoming revision of the 1955 Convention on International Sales of Goods, however, will be the occasion for re-examination of this very simple and straightforward treaty which was prepared in draft form fifty years ago.

It is not clear whether this simplicity can be retained. Intervening complications have come up, including consumer sales laws. This rising tide of consumer sales laws led to the preparation, at the Fourteenth Session of the Conference in 1980, of a text which may form an independent Convention in the future, or may be incorporated into the revised text of the 1955 Convention.[135] As mentioned earlier, this intervening period has also seen the emergence of two international Conventions[136] on the substantive rules of international sales of goods,

133 *See* 4 ACTES ET DOCUMENTS DE LA TREIZIÉME SESSION DE LA CONFÉRENCE DE LA HAYE DE DROIT INT'L PRIVÉ 349-51 (1979).

134 *E.g.*, Recognition of Foreign Divorces and Separations Act 1971, which preceded by two years the ratification by the United Kingdom of the Convention on the Recognition of Divorces and Foreign Separations, *concluded* June 1, 1970, RECUEIL DES CONVENTIONS [1951-1977] 129. Likewise, the Adoption Act 1968, which preceded by *ten* years the ratification by the United Kingdom of the Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions, *concluded* Nov. 15, 1965, RECUEIL DES CONVENTIONS [1951-1977] 65.

135 Final Act, *supra* note 29, at 34; 19 INT'L LEG. MAT. at 1516.

136 *See* notes 125 and 126 *supra*.

which provide a third element in the legal structure, standing somewhere between purely domestic law and the rules of conflict of laws. Finally, a new treaty has been signed by seven States of the European Economic Community which treats in a general way the conflict of laws for contractual obligations.[137] That Convention in its broad features is compatible with the Hague Convention of 1955 on international sales of goods. It adopts the general principle of party autonomy. It incorporates Professor Schnitzer's concept of the characteristic performance and looks to the habitual residence of the person having the obligation for that performance. If one can still conclude that the seller's performance is the "characteristic" performance under a contract for the international sales of goods, then the broad outlines of the 1955 Convention may still be acceptable.[138]

But, other complications have arisen. Aside from breaking down the parties' consent to the applicable law into its component parts, the EEC Convention[139] contains a general escape for cases where the law of a country other than that designated by the primary rule of the Convention has a closer connection with the case.[140] In addition, a controversial provision has been included regarding the effects of "mandatory rules"[141] of other countries which goes beyond the classic public policy clause of the Hague Conventions. The road to continued simplicity will not be straight or easy.[142]

B. Negotiable Instruments

The subject of the law applicable to negotiable instruments came into the future work program of the Convention in 1968, on the sugges-

---

137 *See* note 119 and accompanying text *supra*.

138 However, the decision by the Conference's Fourteenth Session to revise the Sales Convention to include participation by non-Member States may greatly increase the representation of developing countries in that process, which could challenge the traditional views of the "characteristic" performance in contracts of sale. *See* Final Act, *supra* note 29, at 37-38; 19 INT'L LEG. MAT. at 1517. *Cf.* United Nations International Code of Conduct on the Transfer of Technology, Draft of May 6, 1980; U.N. Doc. TD/CODE TOT/25, 19 INT'L LEG. MAT. at 773, 794, 806-812 (contains different proposals concerning the law to be applied in the settlement of disputes, including one which focuses on the law of the acquiring country).

139 Convention on the Law Applicable to Contractual Obligations, *supra* note 119.

140 *Id.* art. 4(5).

141 *Id.* art. 7.

142 It is not possible to give more detail at this time concerning the issues which will arise during the revision of the 1955 Convention on the Law Applicable to International Sales of Goods. A member of the Permanent Bureau of the Hague Conference on Private International Law is presently working on a report which will identify and discuss anticipated issues. That report will be distributed to the Governments of the Member States of the Hague Conference and to those Members of UNCITRAL which do not belong to the Hague Conference early in 1982.

tion of the United States delegation.[143] The Eleventh Session of the Conference placed negotiable instruments in the list of topics having second priority;[144] none of the other topics included in the Eleventh Session's list remain on the future work program of the Conference, all of those projects having been either completed or stricken from the list. Even now negotiable instruments remain in a place of secondary priority behind the revision of the 1955 Convention on Sales of Goods.[145]

Why has a subject of such importance remained on the list for so many years without being carried forward into the concrete work program of the Conference? The answer lies partly in the history of the subject matter itself and partly in the current activity of another international organization.

When the subject was first proposed, the work of other international organizations was mentioned.[146] The early work in this field had been performed not in the Hague Conference on Private International Law, but rather by a diplomatic conference sponsored by the League of Nations. That conference resulted in the preparation of two Conventions, one on the unification of substantive rules of negotiable instruments[147] and the other on the settlement of certain conflicts of laws.[148] Those Conventions were limited to bills of exchange and promissory notes, checks being dealt with in two separate Conventions[149] resulting from a later conference.

The four Geneva Conventions had not achieved uniformity, either for substantive rules or conflict rules. None of the states with common law systems had adopted any of these Conventions. Of the states with civil law systems, some which had adopted the substantive law Conventions had not adopted the conflicts Conventions and vice versa. More than thirty-five years had passed and a new effort was needed to bridge the gap between common law and civil law countries.

---

143 1 ACTES ET DOCUMENTS DE LA ONZIÈME SESSION DE LA CONFÉRENCE DE LA HAYE DE DROIT INT'L PRIVÉ 47, 105 (1971).

144 *Id.* at 47. The Eleventh Session recommended consideration of eight topics, two with priority, six with lesser priority.

145 Final Act, *supra* note 29, at 38; 19 INT'L LEG. MAT. at 1517.

146 *Id.* The United States delegate, who proposed the subject at The Hague, Kurt Nadelmann, noted that UNCITRAL had commenced an inquiry into the field of negotiable instruments, starting with unification of the substantive law.

147 Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes, June 7, 1930, 143 L.N.T.S. 259.

148 Convention for the Settlement of Certain Conflicts of Laws in Connection with Bills of Exchange and Promissory Notes, June 7, 1930, 143 L.N.T.S. 319.

149 Convention Providing a Uniform Law for Cheques, Mar. 19, 1931, 143 L.N.T.S. 357. Convention for the.Settlement of Certain Conflicts of Laws in Connection with Checks, Mar. 19, 1931, 143 L.N.T.S. 409.

The United Nations Commission on International Trade Law (UNCITRAL), created in 1966,[150] had already begun an inquiry into the field of negotiable instruments,[151] and the Hague Conference was represented by an observer in the work of the United Nations body. Cooperation between the organizations was envisaged. That cooperation has continued and even intensified through the years, but the work of UNCITRAL on the substantive law of negotiable instruments still has not been completed. Early ideas that work at the Hague Conference on the conflict of laws could coincide with UNCITRAL's work on the substantive rules have not been practicable. Each time that the question has been closely examined, the conclusion has been reached that conflict rules prepared by the Hague Conference must take into account the nature of the UNCITRAL Convention and any substantive rules contained therein, thus leading to the conclusion that concrete work on the Hague Convention in this field must not start before the final shape of UNCITRAL's results is known.[152]

As it is now shaping up, the UNCITRAL Convention[153] would provide for a new, optional bill of exchange which would bear its own international rules of law, independent of the domestic law of the various countries which might be connected with the transaction. Such a bill of exchange would come into existence only by express agreement between the parties to create an instrument governed by the UNCITRAL rules. Thus, those rules would not fully replace domestic law, even for international bills of exchange, but would only create an optional system parallel to the domestic rules which would otherwise apply to instruments having an international context. This new element, a sort of "third track", poses technical problems in handling conflicts of laws. Traditionally, the choice has been among the purely domestic laws of the states connected with the transaction. Now, in addition to the inherent difficulties of the field of negotiable instruments—which is complicated by highly technical electronic developments in the manner

150 G.A. Res. 2205 (XXI), 21 U.N. GAOR, Supp. (No. 16), U.N. Doc. A/6316 (Dec. 17, 1966).

151 *See* Vis, *Unification of the Law of Negotiable Instruments: The Legislative Process*, 27 AM. J. COMP. L. 507 (1979).

152 *See* 1 ACTES ET DOCUMENTS DE LA DOUZIÈME SESSION DE LA CONFÉRENCE DE LA HAYE DE DROIT INT'L PRIVÉ 93 (1974), remarks of Mr. Rognlien, delegate of Norway; 1 ACTES ET DOCUMENTS DE LA TREIZIÉME SESSION DE LA CONFÉRENCE DE LA HAYE DE DROIT INT'L PRIVÉ 164 (1978), remarks of Mr. Kearney, delegate of the United States; Final Act, *supra* note 29, at 38.

153 *See* Penney, *The Draft Convention on International Bills of Exchange and International Promissory Notes: Formal Requisites*, 27 AM. J. COMP. L. 515 (1979) (rule on negotiable instruments); Guest, *Instruments Denominated in a Foreign Currency*, 27 AM. J. COMP. L. 533, 535 (1979) (rule on currency of payments); Vis, *Forged Indorsements*, 27 AM. J. COMP. L. 547, 553-61 (1979) (rule on forged indorsements).

and means of payment, the flow of information and the form of the instruments themselves—an additional category of rules of law among which to exercise the choice of law is to be created. All of this will constitute a major challenge for the procedures which have been developed by the Hague Conference over the last quarter of a century for the preparation of multilateral treaties in the field of conflict of laws.

Intergovernmental organizations pose a number of additional problems. First, the Geneva Conventions, prepared under the auspices of the League of Nations, include certain provisions[154] for their possible revision. The League of Nations expired and the United Nations Organization is not considered its legal successor; however, the United Nations has undertaken to provide some of the "secretariat functions" having to do with those treaties, in particular those of acting as depository under the Conventions.[155] UNCITRAL has undertaken its work on the substantive law of negotiable instruments without formally inquiring into the question of whether the procedures for revision provided in the Geneva Conventions should be followed or in some way approximated. The Secretary General of the Hague Conference on Private International Law, late in 1979, wrote the Legal Counsel of the United Nations to ask whether he saw any obstacle to revision, by the Conference, of the Geneva Conventions on the conflict of laws for negotiable instruments. The response[156] indicated that no legal obstacle existed, but technical questions concerning the form and manner of cooperation between the Hague Conference and UNCITRAL remain.

The Geneva Convention on Conflict of Laws for Bills of Exchange and Promissory Notes[157] provides for different laws to be applicable to several aspects of the transaction creating a negotiable instrument. Capacity of a party is in principle governed by that party's national law, but a party is bound if his signature was given in a state where he would have the requisite capacity under its internal law (Article 2). The form of any contract of the place where it was signed, but subsequent contracts made in other places are not necessarily invalidated by the original defect by form, and countries may also provide that such

154 *E.g.*, Convention for the Settlement of Certain Conflicts of Laws in Connection with Bills of Exchange and Promissory Notes, *supra* note 148.

155 Letter of the Under Secretary General, Legal Counsel of the United Nations, to the Deputy Secretary General of the Hague Conference on Private International Law, (Nov. 28, 1979), *published as* Addendum I to Preliminary Document No. 3 of Nov. 1979 for the attention of the Special Commission on Miscellany, Hague Conference on Private International Law.

156 *Id.*

157 Convention for the Settlement of Certain Conflicts of Laws in Connection with Bills of Exchange and Promissory Notes, *supra* note 148.

contracts made abroad by their nationals are valid if made in the form prescribed by their laws (Article 3).

The effects of the obligations of the acceptor of a bill of exchange or the maker of a promissory note are governed by the law of the place where those instruments are payable, but the effects of the signatures of other parties are governed by the laws of the respective countries in which they were signed (Article 4). The time limits for the exercise of rights of recourse are governed for all signatories by the law of the place where the instrument was created (Article 5). Several more technical questions are governed by different laws (Articles 6, 7, 8 and 9). It should be noted that party autonomy (designation of the applicable law or laws by agreement of the parties) is completely excluded.[158]

The Geneva Convention on checks follows much the same pattern, but some different or additional rules regarding applicable law have been included.

It can be seen from the foregoing brief review of the provisions of the Geneva Conventions that many difficult issues will arise in negotiation for their revision, starting with the question of whether separate Conventions should be maintained for bills of exchange and promissory notes and for checks, or whether all should be covered by the same Convention. The advent of electronic transfers and new forms of instruments during the fifty years since the Geneva Conventions were drafted raises the specter of a host of new issues which did not play a part in the earlier deliberations.

There is sharp contrast between the rigid rules of the Geneva Conventions (made even more rigid by their total exclusion of party autonomy) and the flexibility of Section 1-105 of the Uniform Commercial Code as it applies to Article 3 (Commercial Paper). The UCC[159] embraces party autonomy in this context, allowing the parties to choose the law of any state or nation to which the transaction "bears a reasonable relation" to govern their rights and duties. Failing agreement between the parties, the UCC applies to transactions "bearing an appropriate relation" to the state which had adopted it. If a diplomatic conference held under the auspices of the Hague Conference were to depart from the Geneva Conventions, accepting party autonomy, then the main challenge would be to find more specific connecting factors

---

158 This will conflict with the provisions of the UNCITRAL draft providing for a special form of instrument which, when the parties so indicate in the instrument, will be governed by the United Nations Convention. *See* Penny, *The Draft Convention on International Bills of Exchange & International Promissory Notes: Formal Requisites*, 27 AM. J. COMP. L. 515, 528-31 (1979).

159 U.C.C. § 1-105 (1972 version), *See* note 114 *supra*.

for determining what would constitute a "reasonable" relation for purposes of the exercise of such autonomy or an "appropriate" relation for purposes of finding the objectively applicable law.

It is not yet possible to accurately predict the form and the timing of the Conference's future work on negotiable instruments. The Fourteenth Session in October, 1980, decided to take under consideration the preparation of a Convention on the law applicable to negotiable instruments as a subject to be included in the agenda of a future session, leaving to the Secretary General the responsibility of apprising the Governments of the Member States of a proposal to initiate work at an intergovernmental level at the appropriate time in the light of certain specified circumstances.[160] One very relevant circumstance is the state of progress of the work undertaken within UNCITRAL. Another relevant circumstance affecting the timing is the fact that the Conference had declared that Article 40 of the Vienna Convention on the Law of Treaties, which recognizes the right of every state to participate in the revision of Conventions to which it is a party, will be applied.[161] Thus, the practical arrangements for work on revision of the Geneva Conventions will have to take into account the fact that countries which are parties to the Geneva Conventions but not Members of the Hague Conference will be invited to participate in the work.

The Fourteenth Session included the revision of the Sales Convention of 1955 with priority in the agenda of the Conference, but as to negotiable instruments only indicated that it should be considered for inclusion in the agenda of a future session. The Fourteenth Session intended to test in the work on the Sales Convention the new decision which it had reached to open more widely the Conference's work in the field of international trade in order to reach a broader audience throughout the world. Since the Hague Conference has not yet held a diplomatic meeting with all of the 150 states of the world invited, it seemed prudent to attempt this process with the revision of the Sales Convention and then determine whether the same procedure would be appropriate for revision of the Geneva Conventions on negotiable instruments. Thus, the point at which the concrete issues of the private international law of negotiable instruments will be reached depends, first, on the timing and results of UNCITRAL's work on the substantive law, second, on the opinions of the states parties to the Geneva Conventions who will be able to participate in the decision on whether or not to revise those Conventions and finally on the practicalities of

160 Final Act, *supra* note 29, at 38; 19 INT'L LEG. MAT. at 1517.
161 *Id.* at 37; 19 INT'L LEG. MAT. at 1517.

opening the Hague Conference to all states of the world (which would create the possibility of multiplying its normal representation by five) as those practicalities are determined in the test case of the revision of the Sales Convention.[162]

C. Licensing Agreements and Know-how

The possible preparation by the Hague Conference of a Convention on the law applicable to licensing agreements and know-how was first proposed in 1972 during the Conference's Twelfth Session. It was then included in the secondary list of possible topics for future work.[163] The need for work in this field was examined more carefully in 1976, when a short feasibility study[164] was prepared by the Permanent Bureau and submitted to the Conference's Thirteenth Session. The subject was retained on the list of possible topics, with the indication that any work should be carried on in liasion with other international organizations which were interested in this field, in particular the World Intellectual Property Organization (WIPO).[165]

In 1977, the Permanent Bureau entered into contract with the Secretariat of WIPO, sending one of its members to participate in a meeting of consultants working on a guide for licensing agreements being prepared by WIPO,[166] and also during that year the Permanent Bureau participated in a meeting of the Licensing Executive's Society.[167] In addition, the Permanent Bureau, without participating in the preparatory meetings or the diplomatic conferences, has followed with interest the work of the United Nations Commission on Trade and Development (UNCTAD) on a Code of Conduct for the Transfer of Technol-

---

162 As of early July, 1981, the practicalities of the Sales Convention "test case" are rapidly taking concrete form. A general framework for the financing and procedures for an Extraordinary Session of the Hague Conference to revise the 1955 Convention with all states invited to participate, was established by a Special Commission which met at The Hague, June 15-16, 1981. The same Special Commission established a general timetable for the preparatory meetings, in which all Member States of UNCITRAL, which are not members of the Hague Conference will be invited to participate, with full voting rights alongside Conference Members. UNCITRAL was informed of these developments at its 14th Session, June 19-26, 1981, and it has encouraged its Members to participate. Further details are not in the public domain at this time.

163 1 ACTES ET DOCUMENTS DE LA DOUZIÈME SESSION DE LA HAYE DE DROIT INT'L PRIVÉ 50 (1974).

164 *Note on licensing agreements and know-how*, 1 ACTES ET DOCUMENTS DE LA TREIZIÈME SESSIONS DE LA HAYE DE DROIT INT'L PRIVÉ 111 (1978).

165 1 ACTES ET DOCUMENTS DE LA TREIZIEME SESSIONS DE LA HAYE DE DROIT INT'L PRIVÉ 36 (1978).

166 The meeting was part of the preparatory work which resulted in publication of WIPO's LICENSING GUIDE FOR DEVELOPING COUNTRIES (1977).

167 London, June 1-3, 1977. The theme was "Licensing in a Changing World".

ogy, the most recent draft of which[168] issued from a meeting held under the auspices of the United Nations in 1980. That draft contains a number of controversial competing proposals[169] for provisions concerning the settlement of disputes and the applicable law. The UNCTAD conference has also remained deadlocked over whether the proposed code of conduct for the transfer of technology should be voluntary or mandatory. If the UNCTAD code were ultimately to be adopted as a mandatory instrument incorporating rules for the law applicable to the transfer of technology agreements, the opportunity for work by the Hague Conference on the more restricted subject of the law applicable to licensing agreements and know-how might become moot in the face of a general instrument covering the same problems. The Hague Conference, therefore, has maintained the subject on its list, but continues to keep it in the background pending the conclusion of UNCTAD's efforts in the broader field of transfer of technology.

One interesting note was that the United States, prior to the Fourteenth Session of the Conference, proposed work on standard clauses for designations of the applicable law in licensing and know-how agreements,[170] as well as in turn-key agreements and other agreements involving transfer of technology. Although the Conference has never prepared standard forms for contracts, it has prepared standard forms for other types of documents, either to be incorporated in a treaty[171] or recommended for use in connection with a treaty.[172] If work on standard clauses for designating the law applicable to transfer of technology agreements were to go forward within the Conference, this would provide a challenge to develop innovative procedures—going beyond those which have been tested in the Conference's other fields of work.

D. New International Economic Order: Its Impact and Its Links with the Wider Opening of the Conference

Although the Hague Conference on Private International Law has

168 Draft International Code of Conduct on the Transfer of Technology, *supra* note 138, 19 INT'L LEG. MAT. at 773 (1980).

169 19 INT'L LEG. MAT. at 806-812 (1980).

170 *See* Report on the Results of the Special Commission Meeting on Miscellany, held at The Hague Feb. 4-8, 1980, at 21, *to be published* in 1 ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION DE LA CONFÉRENCE DE LA HAYE DE DROIT INT'L PRIVÉ.

171 *E.g., Request for Service Abroad of Judicial or Extrajudicial Documents*, incorporated in the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *supra* note 33.

172 *E.g., Model for Letters of Request recommended for use in applying the Hague Convention of 18 Mar. 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*, 8 Martindale-Hubbel Law Directory 4564 (1981).

its origin and its traditional base on the continent of Western Europe and the majority of its Member States can be classified as economically developed countries, the calls over the last several years for a "new international economic order" have not left it unmoved. In fact, although the Conference is both theoretically and practically open to membership by any state which has a functioning legal system, some measure of development in both the economic and the legal systems of a country are needed before it can benefit fully from participation in the Conference's work. Regrettably, the scarcity of trained lawyers and available funds for attending meetings in Western Europe reduce the opportunity for many developing countries to participate actively in the Conference's work.

Under the circumstances, a combination of approaches has been utilized. First, liaison with other international organizations having broad membership among the lesser developed countries provides an avenue for the communication of information on the existing Hague Conventions and the Conference's future work program. The same liaison provides feedback to the Conference concerning the needs and views of lesser developed countries. Cooperation liaison along these lines has succeeded over a number of years with the Asian-African Legal Consultative Committee, the Commonwealth Secretariat and the Organization of American States.

Liaison with the United Nations Commission on International Trade Law, on the other hand, has thus far merely consisted of exchanging observers and documentation, including information on current and future projects in the field of international trade law. However, in connection with UNCITRAL's work on negotiable instruments the Conference's participation has gone further to include attendance at small working groups and even drafting committee activity. UNCITRAL's designated role as a "coordinating" agency in the field of international trade law makes it a natural vehicle for the communication of information on the Conference's work in this field to a broader audience—and correspondingly for feedback of opinions and information from those states which participate in UNCITRAL to the Conference. Thus, observers from the Conference have also attended the meetings of the working group on the "new international economic order", founded by UNCITRAL in January, 1979.

As has been noted above in connection with the discussion of the revision of the Hague Sales Convention of 1955[173] and the Geneva

[173] *See* note 138 *supra*.

Conventions on negotiable instruments,[174] the Conference has broadened participation by non-Member States, particularly in the field of international trade law. The structure of cooperation between UNCITRAL and the Conference for this purpose has not yet been fully designed—much less erected—but it seems clear that the desire is there on both sides to avoid the overlapping of functions and projects,[175] in order that states connected with UNCITRAL will receive information concerning the work that the Hague Conference has undertaken in its specialized fields and that opinions and information will be solicited from those states in order to provide appropriate balance for the Conference's work. While no final decision has been made, it is entirely possible that the Hague Conference, when it seeks to revise its 1955 Convention on the Law Applicable to International Sales of Goods, will hold under its auspices, with the Netherlands Government as the host, a diplomatic conference to which all states of the world will be invited. Such a conference would pose an enormous challenge to the resources of what has remained a small permanent staff. Theoretically, the number of participating states could be multiplied by five, although the practical considerations of cost and the availability of a liaison through observers from regional or other specialized organizations would most likely hold the multiple down to two and one-half. Since the Conference is the only specialized organization working on the problems of private international law on a worldwide basis, even a doubling of the number of participating states for such a conference should serve to enlighten many new states on the importance of private international law and of the possibilities for benefiting from work in this field on a broad multilateral basis.

IV. A Digression into Tort Law: Traffic Accidents and Products Liability

In purely numerical terms the conflicts of laws for torts has not loomed very large in the Conference's work. None of the conferences held before the First World War or during the 1920's took up any subjects of tort law, which was still an underdeveloped topic—particularly on the continent of Europe. Of the twenty-seven Conventions prepared since the Conference renewed its work following World War II, only two of those Conventions deal specifically with torts, these being the

174 *See* text accompanying notes 159-162 *supra*.

175 *See* letter to the Deputy Secretary of the Hague Conference, notes 155-56 and accompanying text *supra*.

Convention on the Law Applicable to Traffic Accidents[176] and the Convention on the Law Applicable to Products Liability.[177] Neither the Thirteenth Session (1976) nor the most recent session of the Conference held in October, 1980, dealt specifically with tort law. The Convention on the Civil Aspects of Child Abduction,[178] while it was directed primarily against the family tort of abduction of a child by one of its parents, treats primarily procedures for return of the child, rather than the assessment of any damages. The Convention on International Access to Justice[179] provides for international applications for legal aid which may be useful to parties in a personal injury suit, but which are applicable also in other civil and commercial matters.

The revolution in conflicts of laws, which has overturned traditional rules for the conflicts of laws in the United States, began some twenty years ago with a series of decisions in personal injury and wrongful death suits.[180] The Hague Conference has not mounted a broad attack on the subject because of the same uncertainty that has led American courts, while moving to set aside the traditional rule of *lex locus delicti*, to hesitate before formulating comprehensive new conflict rules for tort cases.[181] The problem was perceived in the early 1960's and, after discussions held at the Tenth Session of the Conference in 1964, a proposal was adopted to study the possibility of including on the agenda of the Eleventh Session or a following session "the assumption of jurisdiction and the applicable law in torts (delicts and quasi-delicts)".[182] These subjects had been proposed by the United Kingdom delegation.[183] It was recognized from the beginning that this was potentially a very broad subject and that it would probably have to be limited.

The Permanent Bureau of the Conference proceeded to study the

---

176 *Concluded* May 4, 1971, 4 ACTES ET DOCUMENTS DE LA ONZIÈME SESSION DE LA HAYE DE DROIT INT'L PRIVÉ 191 (1970); RECUEIL DES CONVENTIONS [1951-1977] 193.

177 3 ACTES ET DOCUMENTS DE LA DOUZIÈME SESSION DE LA HAYE DE DROIT INT'L PRIVÉ 246 (1974) (concluded Oct. 2, 1973).

178 Final Act, *supra* note 29, at 2, 19 INT'L LEG. MAT. at 1501.

179 Final Act, *supra* note 29, at 12, 19 INT'L LEG. MAT. at 1505.

180 Beginning with Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526 (1961), and Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279 (1963), these developments have led to extensive—and sometimes chaotic—case law.

181 For a recent summation of the case law, *see* Gutierrez v. Collins, 583 S.W.2d 312 (1979), where the Texas Supreme Court expressly adopted the approach taken in the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971).

182 1 ACTES ET DOCUMENTS DE LA DIXIÈME SESSION DE LA HAYE DE DROIT INT'L PRIVÉ 78 (1965).

183 *Id.* at 89.

feasibility and desirability of preparing a Convention in this field.[184] The idea of having a Convention which would govern the assumption of jurisdiction over these questions was quickly set aside, as was the idea of a general convention on the law applicable to torts.[185] However, because of a more pressing need, the Conference prepared a Convention on the Law Applicable to Traffic Accidents.[186] That Convention, completed at the Eleventh Session in 1968, reflected the beginning of an evolution in thinking. While taking the internal law of the state where the accident occurred as the law which is in principle applicable (Article 3), the Convention made a number of exceptions involving a grouping of contracts according to the specific types of parties injured or goods damaged. The scope of the coverage of the applicable law was extensive; it even included rules of prescription and limitation, and a specific provision directed towards the right of direct action against the insurer of the person liable (Article 9). As is the custom in conventions on the applicable law, a general exception was provided for cases where the application of any of the laws declared applicable by the Convention would be "manifestly contrary" to public policy (Article 10). The Convention is not reciprocal in its nature and its rules will be applied even if the applicable law is not that of the Contracting State (Article 11).

The success of the Eleventh Session in reaching agreement on the treaty for traffic accidents led the Conference to include the subject of the law applicable to products liability in its agenda for the Twelfth Session. A Convention on this subject[187] was also successfully completed and, as was the case with the Convention on traffic accidents, it has *entered into force* among a number of countries[188] on the continent of Europe. The nature of the subject lent itself to different treatment, since the act complained of has often taken place in a different state from that where the damage occurs or is detected. The applicable law is that of the place of injury but only if that place has another specified contact with the situation (Article 4). The law of the state of the habit-

184 B. Dutoit, *Mémorandum relatif aux actes illicites en droit international privé*, in 3 ACTES ET DOCUMENTS DE LA ONZIÈME SESSION DE LA CONFÉRENCE DE LA HAYE DE DROIT INT'L PRIVÉ 9 (1970).

185 *See generally Conclusions of the Special Commission on Torts*, 3 ACTES ET DOCUMENTS DE LA ONZIÈME SESSION DE LA CONFÉRENCE DE LA HAYE DE DROIT INT'L PRIVÉ 57 (1970).

186 Convention on the Law Applicable to Traffic Accidents, *supra* note 176. The States Parties as of Mar. 1, 1981 were Austria, Belgium, Czechoslovakia, France, Luxemburg, the Netherlands and Yugoslavia.

187 Convention on the Law Applicable to Products Liability, *supra* note 177.

188 As of Mar. 1, 1981, this included France, the Netherlands, Norway and Yugoslavia. Belgium, Italy, Luxemburg and Portugal have signed the Convention, but have not yet ratified it.

ual residence of the person directly suffering damage replaces the *lex locus delicti* as the applicable law, if at least one other specified contact exists in that state (Article 5).

At the Twelfth Session of the Conference, the United States delegation proposed that one of the topics for future consideration be the law applicable to contracts and torts.[189] A working group within the European Economic Community was preparing a draft Convention on the law applicable to contractual and "non-contractual" obligations, the latter phrase being intended generally to cover the field of torts—which in continental European practice is usually classified under the general heading of obligations. Some of the EEC countries contested the American proposal, but it was agreed that a questionnaire would be sent to Member States inquiring into the desirability of pursuing such a project.[190] The responses to the questionnaire were mixed,[191] and prior to the Thirteenth Session a Special Commission meeting was organized to consider this question—as well as other questions about the future work program and a number of issues concerning the technical aspects of conventions prepared by the Hague Conference. That meeting also reached no resolution of the issue on contracts and torts, remitting the question to the Fourteenth Session together with an agreed statement concerning the procedure to be used if the Fourteenth Session were to decide to proceed with the project.[192]

At the Thirteenth Session, in the Fourth Commission which deals with future work, the issue was closely contested. In the meantime, the Working Group within the European Economic Community had decided to go ahead with a Convention on contractual obligations only, leaving non-contractual obligations to be dealt with possibly in a separate Convention which would be prepared later. At the Fourteenth Session, the proposal of the United States delegation was correspondingly pared down to the core subject of the law applicable to contracts[193] when the proposal went to a vote. The result was a tie. Under the Conference's procedures, a second vote had to be taken, and on the second vote one of the delegations which had abstained joined the vote against the proposal, thereby defeating it.[194] The European Communi-

189 1 ACTES ET DOCUMENTS DE LA DOUZIÈME SESSION DE LA HAYE DE DROIT INT'L PRIVE 86 (1974).

190 *Id.* at 50.

191 *See* 1 ACTES ET DOCUMENTS DE LA TREIZIÈME SESSION DE LA HAYE DE DROIT INT'L PRIVE 55-78 (1978).

192 *Id.* at 90.

193 *Id.* at 159.

194 *Id.* at 163.

ties proceeded with their work on a Convention on the law applicable to contractual obligations, which was completed in the spring of 1980 and was signed by seven countries of the Community on June 19, 1980.[195] The preparation of a Convention on the law applicable to non-contractual obligations remains under study within the EEC, but no draft has yet been prepared.

In regard to torts, one might say that the Conference has never abandoned the view which it took in the 1960's that a general convention was not possible or feasible and that only specific fields of torts should be treated by conventions—and then only when a pressing need was felt. The broad approaches developed by American conflicts theorists[196] are difficult to translate into international treaties. Some structure of rules must be developed, or it is not worthwhile making a treaty. While the *lex locus delicti* has outlived its usefulness as a sole and all-encompassing rule, no clear set of principles generally applicable to torts has appeared which can be incorporated in an international treaty.[197]

---

195 Convention on the Law Applicable to Contractual Obligations, *supra* note 119. The subject of the law applicable to contractual obligations was reconsidered by the Conference at its Fourteenth Session. The Conference instructed the Permanent Bureau to undertake a feasibility study on this subject and, if possible, submit the results to the Governments of the Member States before the Fifteenth Session, so that a decision to proceed with the work might be taken by a Special Commission on General Matters and Policy of the Conference. Final Act, *supra* note 29, at 38; 19 INT'L LEG. MAT. at 1517-18. Questions involving tort law are not on the agenda adopted by the Fourteenth Session.

196 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971).

197 Since this section has already been labelled as a "digression", perhaps the authors may be excused for taking a further "frolic and detour" before returning to the main road. Tort law and family law, which involve human emotions and relations, seem to spark the humor of delegates more than the purely technical subjects.

Now humor, of course, frequently appears in the discussions at the table, as well as flashes of wit, and the Hague Conference cultivates an atmosphere of informality, particularly at the preparatory meetings of legal experts, which lends itself to spontaneous humor. But humor in a written form is more dangerous at an international conference because of the broad possibilities of misunderstanding in the translations across cultures, and it can be very hazardous to the health of international organizations.

We note, however, that at the Eleventh Session, where the Traffic Accidents and Divorce Conventions were prepared, a spurious printed document was circulated under the title "Torts committed by the Special Commission", in which legal experts of worldwide reputation commingled and confused fantastic conflict rules for torts and family problems.

Once again, at the Twelfth Session, the phantom struck, when both products liability and alimony were on the docket. Under the cover of the very confidential number "007", the foibles and fallacies of delegates, as well as members of the Conference's Permanent Bureau, were exposed. Perhaps the most characteristically for a subject in which terms such as "*lex loci delicti*" had long assumed the status of ritual terminology, the over-use of Latin expressions came in for its share of the fun.

The Conference survived these torts (and hopefully all applicable statutes of limitations have now run on them), but no similar hoaxes were produced at the Sessions of 1976 and 1980. It may be that the Conference will have to wait for a new topic in the field of tort law—such as invasion of privacy—before the phantom of written humor will strike again.

V. Problems of International Families

A. Summary of Past Accomplishments and Assessment of Progress to Date

We cannot complete our discussion of the Hague Conference and the main issues of private international law for the 1980's without some mention of the problems of international families, although for the first time in a quarter of a century the Conference has no family law topic on its agenda for future work. This fact stands as a tribute to the efficacy of the Conference's program which was begun in the mid-fifties to revise and modernize the old series of Hague family law Conventions prepared before the First World War. But the ultimate activity has swept much more broadly than the scope of the Conventions which made up that series.[198]

The results beginning with the Conference's Eighth Session in 1956 have been that, out of twenty-four Conventions[199] adopted by the Conference, ten have been on strictly family law subjects and two more have dealt respectively with the law applicable to the validity of wills and to the international administration of the estates of deceased persons, both falling primarily within the realm of family concerns.

The early series treated family law by taking on its general concepts: a general Convention on marriage,[200] a Convention on divorce,[201] and one on guardianship of minors.[202]

The social conditions in the aftermath of the Second World War did not permit the preparation of treaties covering such broad and facile classifications. The main criterion, with the millions of displaced persons of the late 1940's and early 1950's giving way to the mass commercial and touristic displacements of persons of the 1960's and 1970's, was to be the pressing social need. These latter developments, which show every indication of accelerating during the 1980's, are bringing problems of international family law more and more to the door of the average practitioner.[203] In particular, the large numbers of families moving abroad for definite or indefinite tours of commercial activity make the family problems of employees a growing subject of concern for multinational corporations and their counsel. No more than a mul-

198 *See* notes 8-11 *supra*.

199 Recueil des Conventions [1951-1977], Nos. IV, V and VIII-XXVII.

200 Convention pour régler les conflicts de lois en matière de manage, *supra* note 8.

201 Convention pour régler les conflicts de lois et de jurisdictions en matière de divorce et de seperation de corps, *supra* note 9.

202 Convention pour régler la tutelle des mineurs, *supra* note 10.

203 *See* Dyer, *Suddenly Your Practice Is International*, 3 Fam. Advocate 32 (Fall, 1980) at 32.

tinational concern may ignore the special nature of the tax problems with which its employees sent abroad are faced, can it afford to ignore the special stress that accentuates family problems and the complicated legal context for those problems which are created when those same employees move abroad.

We shall not attempt in this article, which is mainly directed toward the future, to write a full history of the past work in this field. For the moment, the work on strictly family problems has come to rest, although the preparation of a Convention on the international validity and recognition of trusts, which is contemplated for the Conference's Fifteenth Session in 1984,[204] will probably concentrate on *inter vivos* and testamentary trusts of the type which normally develop within a family estate planning context. A few notes about the highpoints of the previous generation's work seem, however, to be called for.

The first problem considered in the mid-1950's was to provide means for determining the law applicable to child support claims on the international level and rules for the recognition and enforcement of child support judgments. That work, which was designed to meet pressing needs, resulted in two very successful Conventions[205] adopted at the Conference's Eighth Session, which are still broadly in force. They parallel and are complementary to a United Nations Convention[206] from the same period which provides for intergovernmental cooperation in the establishment and the collection of such claims. Regrettably, the United States has not to date joined any of these three Conventions.

In the late 1950's, spurred on by the decision of the International Court of Justice in the so-called *Boll Case (Netherlands v. Sweden)*,[207] the Conference revised and replaced its old Convention on guardianship of minors and expanded its coverage to include all types of "protective measures" taken in regard to the person or the property of the minor. The new Convention,[208] prepared at the Ninth Session, remains

204 *See* Final Act, *supra* note 29, at 38; 19 INT'L LEG. MAT. at 1517.

205 Convention sur la loi applicable aux obligations alimentaires envers les enfants, *concluded* Oct. 24, 1956, RECUEIL DES CONVENTIONS [1951-1977] 32; and Convention concernant la reconnaissance et l'exécution des décisions en matière d'obligations alimentaires envers les enfants, *id.* at 36. *See* A. Anton, *supra* note 130.

206 Convention on the Recovery Abroad of Maintenance, June 30, 1956, 268 U.N.T.S. 32. *See* De Hart, *Child Support Enforcement Reaching Across International Boundaries*, 2 FAM. ADVOCATE 26 (Fall, 1979).

207 [1958] I.C.J. 55.

208 Convention concernant la compètence des autoriès et la loi applicable en matière de protection des mineurs, *supra* note 92.

in force in a number of continental European countries,[209] but has not yet been ratified by any common law country.

At its Tenth Session, the Conference left the domain of its old treaty series to consider a topic which had begun to present many pressing problems on the international level—the adoption of children. An ambitious treaty covering assumption of jurisdiction and the applicable law and recognition of decrees in adoption cases was prepared but did not meet with immediate success; it finally came into force fourteen years later, gaining a new lease on life.[210]

At its Eleventh Session the Conference returned to the subject of divorce, which had been dealt with in a general Convention of its pre-World War I series. Having learned from the work on adoption how difficult it was to produce a treaty covering all phases of the procedures for creation of a family status, the Conference abandoned the idea of establishing uniform conditions for assuming jurisdiction in divorce cases or agreeing on the law which would be applicable in such cases and instead concentrated its efforts on the most pressing social needs: recognition of divorces and legal separations. The resulting treaty[211] was notable in that it included a substantive provision[212] ascribing a particular effect to "recognition" of a divorce decree: that the state which was obliged to recognize a divorce under the Convention might not preclude either spouse from remarrying on the ground that the law of another state did not recognize that divorce. This rather curious provision was inspired by the fact that at least one state, having found that it "recognized" certain divorces between its own citizens and foreign nationals, still refused to allow those foreign nationals to remarry because the states of their nationality did not recognize those divorces.

At the Twelfth Session, the Conference began to prepare a Convention on the law applicable to alimony and other support obligations for adults[213] and a corresponding Convention on recognition and en-

---

209 Austria, France, Federal Republic of Germany, Luxemburg, the Netherlands, Portugal and Switzerland.

210 Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions, Nov. 15, 1965, *supra* note 93. This Convention *entered into force* between Austria, Switzerland and the United Kingdom on Oct. 23, 1978. *Id.*

211 Convention on the Recognition of Divorces and Legal Separations, *concluded* June 1, 1970; RECUEIL DES CONVENTIONS [1951-1977] 129. As of Mar. 1, 1981, the parties were Czechoslovakia, Denmark, Egypt, Finland, Norway, Sweden, Switzerland and the United Kingdom. *Id.*

212 *Id.* art. 11. *See also* Bellet & Goldman, *Explanatory Report*, 5 FAM. L.Q. 321, 359 (1971).

213 Draft Convention on the Law Applicable to Certain Maintenance Obligations in Respect to Adult Creditors, 4 ACTES ET DOCUMENTS DE LA DOUZIEME SESSION DE LA CONFÉRENCE DE LA HAYE DE DROIT INT'L PRIVÉ 88 (1975).

forcement of decisions concerning such obligations.[214] These were to complement the child support treaties of the 1950's, but the project led in fact to revision and modernization of the child support Conventions within the framework of the new Conventions covering maintenance obligations of adults. These new Conventions[215] are now in force among a number of European countries.

At its Thirteenth Session, the Conference prepared a Convention to revise and replace the old Convention on the conflicts of laws on marriage. Given that three-quarters of a century had passed since the drafting of the earlier treaty, the new Convention[216] was understandably very different in its scope and approach to the subject. That Convention has been signed by five countries[217] but has not yet entered into force. At the same time, the Conference prepared a Convention on the Law Applicable to Matrimonial Property Regimes,[218] in an effort to bridge the difference between common law and civil law approaches to marital property. It should be noted that a similar division exists internally within the United States, since eight states of the western and southwestern regions of the United States have community property systems based on Spanish or French antecedents, and the evolution of recent years has been toward the creation of various forms of new marital property rights in those states of the United States which traditionally follow the English common law approach. This Convention has been ratified by one country[219] and signed by two others[220] but has not yet entered into force.

On the proposal made by Canada in January, 1976, the Conference's Thirteenth Session decided to prepare a treaty dealing with a very special problem of family law which had become increasingly acute in the 1960's and the 1970's because of improved international transportation facilities, reduced border formalities, and widespread in-

214 Draft Convention on the Recognition and Enforcement of Decisions Relating to Certain Maintenance Obligations in Respect to Adult Creditors, *id.* at 91.

215 Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations, *concluded* Oct. 2, 1973, RECUEIL DES CONVENTIONS [1951-1977] 203. As of Mar. 1, 1981, the Parties were Czechoslovakia, France, the Netherlands, Norway, Portugal, Sweden, Switzerland and the United Kingdom. *Id.* Convention on the Law Applicable to Maintenance Obligations, Oct. 2, 1973, RECUEIL DES CONVENTIONS [1951-1977] 219. As of Mar. 1, 1981, the Parties were France, the Netherlands, Portugal and Switzerland. *Id.*

216 Convention on Celebration and Recognition of the Validity of Marriages, Mar. 14, 1978, 3 ACTES ET DOCUMENTS DE LA TREIZIÈME SESSION DE LA HAYE DE DROIT INT'L PRIVE 243 (1979).

217 These countries are Australia, Egypt, Finland, Luxemburg and Portugal.

218 Convention on the Law Applicable to Matrimonial Property Regimes, Mar. 14, 1978, 2 ACTES ET DOCUMENTS DE LA TREIZIÈME SESSION DE LA HAYE DE DROIT INT'L PRIVÉ 319 (1978).

219 France is the only nation to have ratified this provision.

220 Austria and Portugal have signed this proposal.

termarriage among persons of different nationalities due to increased tourist and commercial travel. This is the problem of child abduction, usually by one parent at the expense of the child and the other parent. We will explain below the nature and the results of the work undertaken by the Conference in this area.

B. International Child Abduction by Parents: A Special Case

There is, of course, nothing new about the idea that the parents of the child may fall out with each other but still both want the custody—or at least the possession—of the child. If the parents are of a different nationality, each may expect to stand a better chance in the courts of that parent's home country and, may attempt to remove the child if he is located elsewhere. The same principle works between states in a federal system, since a man from Texas, for example, may think that he will be more likely to get custody from a Texas court than from the courts in his wife's home state of California.[221]

In some cases, the removal is by force or by fraud—even hired thugs have represented a parent or grandparent in kidnapping a child and spiriting the child abroad. Under some circumstances, no kidnapping or secret removal is necessary, since the trustful or unsuspecting custodian may allow the child to go abroad for visitation, from which the child does not return.

Until the international abduction of children by parents, first referred to as "legal kidnapping," was brought to the attention of the Hague Conference, the efforts carried on internationally with respect to the custody of children had been centered on recognition and enforcement of custody decisions. The Hague Convention of 1961 on the Protection of Minors[222] deals with jurisdiction to determine custody and with the law applicable in making such determinations, as well as providing that the resulting decisions will be "recognized". However, it had been impossible to reach agreement on enforcement of the resulting decisions.[223] The results have been unsatisfactory in cases of re-

---

221 This expectation is being reduced within the United States by the widespread adoption of the Uniform Child Custody Jurisdiction Act. *See* Bodenheimer, *Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction under the UCCJA*, 14 FAM. L.Q. 203 (1981). The passage of the Federal Parental Kidnapping Act of 1980, H.R. 8406, 96th Cong., 2d Sess. (1980), signed by President Carter on Dec. 28, 1980, will serve even further to reduce these problems on the interstate level.

222 *See* note 92 *supra*.

223 Article 7 of the Convention provides for "recognition" of measures taken pursuant to the Convention in all Contracting States, but leaves enforcement measures to the internal law of the state where enforcement is sought, or to other international Conventions. *Id.*

moval of children from one country to another or of retention of a child after the end of a legal period of visitation abroad.

The Council of Europe, therefore, undertook to complete the 1961 Hague Convention within its more restricted circle of states by preparing a Convention on the Recognition and Enforcement of Custody Decisions and a complementary Convention on an international tribunal to resolve conflicting custody decisions. While the Canadian Government was making progress in identifying and analyzing the specific phenomenon of parental child abduction, it was one of the Swiss delegates who participated in meetings both at The Hague and Strasbourg who made a breakthrough in the latter part of 1976 in the search for an appropriate preventive and remedial mechanism. Mr. Walter Baechler produced at Strasbourg in September, 1976, a precise proposal for a third Convention, independent of those already drafted on recognition and enforcement of custody decisions and on an international tribunal, providing for the immediate "restoration" of custody in child abduction and retention cases. The Hague Conference, meeting in general session the following month and having before it a note prepared by its secretariat on the subject,[224] decided to go ahead with an independent Convention on this special topic. This was done with the full agreement of the countries participating in the Council of Europe's work, it being recognized that the Hague Conference had a much broader geographic scope and that inter-continental abductions were not insubstantial in number. In fact, the ready availability of inter-continental flights and the general reduction in border formalities made it possible for the parent taking the child to be thousands of miles away within a few hours.

We shall not try to recount here the full history of work on "legal kidnapping". While the Council of Europe chose to combine provisions on child abduction with those on recognition and enforcement of custody decisions in a single Convention,[225] postponing indefinitely the proposal for a Convention to set up an international tribunal, the Hague Conference elected to seek a single independent Convention limited to child abduction and visitation problems. Cooperation and assistance on the sociological aspects of these problems were lent to the Conference by International Social Service, a non-governmental organization with branches in many countries in the world, which aids

224 Note on legal kidnapping, 1 ACTES ET DOCUMENTS DE LA TREIZIÈME SESSION DE LA HAYE DE DROIT INT'L PRIVÉ 121 (1978).

225 European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children, May 20 1980, Europ. T.S. Doc. No. 105.

people with international family problems. The normal cycle of the Hague Conference was pursued and, after two preparatory Special Commission meetings, a final text was reached at the Fourteenth Session in October, 1980.[226] Interest in the project had been so great that instead of postponing by one year the opening of the Convention—as had been the normal practice in the past—the Netherlands Government, as depositary, agreed, on request from the Member States, to open the Convention immediately for signature, whereupon it was signed by Canada, France, Greece and Switzerland. Many other countries which participated actively in the work, including the United States,[227] are studying carefully the possibilities for ratification of this new treaty.

Never before has the Hague Conference prepared a treaty on a topic raising such strong emotions. The approach taken was revolutionary, departing completely from the traditional pattern of treaties providing for the recognition and enforcement of judgments. Thus, a carefully fashioned tool has been placed at the disposal of lawyers and governmental authorites to fight a very specific modern phenomenon—the abduction of children by parents.

C. Trusts Based on English Equitable Remedies Meet Civil-law Rules on Gifts and Distribution of Estates

The Conference's Fourteenth Session did not include in the agenda for future work any strictly family law subjects. However, it decided "to include with priority in the agenda of work of the Fifteenth Session the question of the international validity and recognition of trusts."[228] Separately, and without priority, the Fourteenth Session decided to include in the agenda of the future work of the Conference "the elaboration of a Convention on the law applicable to decedents' estates".[229]

Problems of the law applicable to decedents' estates—and particularly the difference in conflicts rules between common law countries and civil law countries, as well as among civil law countries themselves—had been long recognized. The Hague Conference performed

226 Convention on the Civil Aspects of International Child Abduction, FINAL ACT, *supra* note 29 at 2; 19 INT'L LEG. MAT. at 1501.

227 The House of Delegates of the American Bar Association, at its meeting held in Houston, Texas, on Feb. 9-10, 1980, adopted a resolution urging ratification of the Convention by the United States (Report No. 103, Child Abduction Convention). Letter from F.W. McCalpin to Alexander M. Haig (Mar. 3, 1981).

228 FINAL ACT, *supra* note 29 at 38; 19 INT'L LEG. MAT. at 1517.

229 *Id.*

some studies on this subject in the 1960's,[230] but decided to leave aside for the moment choice of law questions for decedents' estates and concentrate on more practical administrative problems. Thus, the Conference's Twelfth Session prepared the Convention of October 2, 1973, concerning the International Administration of the Estates of Deceased Persons.[231]

Questions of the international validity and recognition of trusts of the common law variety have been much less thoroughly explored, having only recently come to the forefront. Again, the easy and rapid displacement of people has made an old problem much more acute. More than twenty years of the Common Market, during which many Americans, in particular, have moved to countries within the Market to establish and maintain their companies' presence there, and more recently the entry of the United Kingdom into the Common Market, have meant that large numbers of British and American citizens are residing in civil law countries but have established family trusts of the common law variety, either *inter vivos* or in their wills. The death of such a person residing in a civil law country poses difficult problems of estate adminstration and settlement. For example, will a trust established in England or the United States be recognized, even though the trust as an institution is unknown in the country where the decedent resided? If this question is generally answered in the affirmative, will the same answer be true if it is an *inter vivos* trust established in contradiction to the rules of the civil law country concerning donations which cut into the shares of the decedent's estate reserved for his children? These problems and others are being regularly faced by notaries in the countries on the continent of Western Europe and, conversely, by lawyers in the United States and solicitors in England dealing with aspects of the same estates.[232]

These were the practical interests on both sides of the Atlantic which led to adoption of the trust topic as a priority matter. This subject is in the early stages of research under the Conference's usual procedures for preparation of a treaty, with a view to completion of a final text at the Fifteenth Session in 1984. The more general question of the

230 *See* Droz, *Preliminary Investigation into Some Problems Arising in the Law of Succession*, 2 ACTES ET DOCUMENTS DE LA DOUZIÈME SESSION DE LA CONFÉRENCE DE LA HAYE DE DROIT INT'L PRIVÉ 7 (1974); Questionnaire and Commentary on Private International Law Concerning Succession, *id.* at 27; *Réponses des Gouvernements au Questionnaire sur le droit international privé des successions*, *id.* at 67.

231 *Id.* at 273; RECUEIL DES CONVENTIONS [1951-1977] 171.

232 *See generally* D. DREYER, LE TRUST EN DROIT SUISSE (Etudes suisses de droit int'l Band 21, 1981).

law applicable to decedents' estates has been studied before and is not now under active research. However, it is hoped that work on a treaty in this field may be feasible, at least for the law applicable to movable property; the differences among the countries on the law to be applied to immovable property (real estate) are so great that serious negotiations on that phase of the subject may not occur for quite some time.

The preparatory work on trusts is expected to follow very closely the normal procedure which the Conference has developed over the past thirty years for the preparation of international conventions. Some details regarding those preparations dealing with the Hague Conference's role in the development of private international law will be given below.

VI. The Role of the Hague Conference in the Unification of Private International Law

Aside from the four-year cycle of activities which was established for the Conference by its Statute in the mid-1950's, the Conference's techniques and procedures for the preparation of multilateral treaties have developed into a system through trial and error. Several years ago, the United Nations Organization[233] undertook a review of the multilateral treaty-making process, both within and without the United Nations system. Responding to the request of the United Nations' Legal Counsel for information concerning the techniques and procedures used by the Hague Conference, the Permanent Bureau for the first time undertook a full review and analysis of its practices. The resulting document—which was submitted to the Legal Counsel of the United Nations in January of 1979—has in turn found its response within the report of the United Nations' Secretary General.[234] That report, based upon responses to the Legal Counsel, used as examples of "highly structured procedures" designed to produce treaty instruments the procedures of the International Labour Organization and the Hague Conference on Private International Law.[235]

The document prepared by the Permanent Bureau of the Conference[236] describes the system and the personnel of the Conference at a particular time. The Conference's role and its structure, however, are

233 G.A. Res. 32/48, 32 U.N. GAOR, Supp. (No. 45), U.N. Doc. A/32 (Dec. 8, 1977).

234 Review of the Multilateral Treaty-Making Process, U.N. Doc. A/35/312 (Aug. 27, 1980).

235 *Id.* at 10-12. The Secretary General's Report was brought up before the General Assembly of the United Nations, resulting in a resolution adopted on December 15, 1980, requesting wide distribution of the Report and further comments from Governments and international intergovernmental organizations by July 31, 1981. G.A. Res. 35/162, U.N. Doc. A/RES/35/162, (Jan. 28, 1981).

236 A copy of this document is on file at the offices of the Northwestern Journal of International Law & Business.

constantly evolving and changes have occurred since the above document was prepared. In particular, the decisions made by the Fourteenth Session, in October, 1980, on the wider openings of the Conference[237] and on the agenda for future work[238] lead it towards universality. The success of the work program for the 1980's will determine whether the Hague Conference on Private International Law can outgrow its European origins to become a truly worldwide organization.

237 Final Act, *supra* note 29, at 37; 19 INT'L LEG. MAT. at 1517.
238 *Id.* at 38; 19 INT'L LEG. MAT. at 1518.