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The Troublesome Workings of the Judgments Convention of the European Economic Community

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I. INTRODUCTION

In international commercial transactions, there are few areas that are more complicated and time consuming than the recognition and enforcement of foreign judgments. Ad hoc attempts to rectify this situation have resulted in various bilateral and multilateral agreements, the latter typified by the Hague Convention.[1] These uncoordinated efforts to introduce harmony into the area

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1. For analysis of the Hague Convention, *see* Nadlemann & Reese. *The Tenth Session of the Hague Conference on Private International Law,* 13 AM. J. COMP. L. 612 (1964); Nadlemann & Von Mehren, *The Extraordinary Session of the Hague Conference on Private International Law,* 60 AM. J. INT'L L. 803 (1966); Nadlemann, *The Common Market Judgment Convention and a Hague Conference Recommendation: What Steps Next?* 82 HARV. L. REV. 1282 (1969); Nadlemann, *Recommendation Relating to the Convention on Recognition of Judgments,* 16 AM. J. COMP. L. 601 (1968).

have resulted in conflicts between the various conventions.[2] The founders of the European Communities recognized that the economic viability of a common market is dependent upon the free movement of goods, labor, services, and capital. The future development of the Community would be hindered if transnational legal claims arising from inter-Community economic activities were rendered uncertain by complicated and confusing national conflict of laws rules. Despite this need, the existing conflict of laws rules of many member states of the European Economic Community discriminated against nationals of other Common Market countries,[3] thus violating the fundamental rule of nondiscrimination contained in article seven of the European Economic Community Treaty.[4] Therefore, written into the Treaty was the order in article 220 that "member states shall go as far as is necessary to enter into negotiations with each other with a view to securing for the benefit of their nationals: . . . The simplification of formalities governing reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards."[5]

To carry out this mandate, the Community produced the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.[6] The Convention was signed by six members[7] on September 27, 1968, and came into effect on February 1, 1973.[8] A protocol[9] to the Convention became effective

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2. For discussion as to possible conflicts between Conventions, *see* Bellet, *L'elaboration d'une convention sur la reconnaissance des judgments dans le cadre du Marché Commun*, 92 JOURNAL DU DROIT INTERNATIONAL 833, 845 (1965).

3. For example, in France and the Federal Republic of Germany, foreign judgments are recognized and enforced only on the basis of reciprocity so that if there was no treaty guaranteeing reciprocity with another E.E.C. member state, the nationals of that country would not be able to have their judgments recognized or enforced in France or in the Federal Republic of Germany. *See* C. CIV. art. 14 (France); ZPO art. 328 (W. Ger.).

4. Art. 7 of the E.E.C. Treaty states: "Within the field of application of this Treaty—any discrimination on the grounds of nationality shall be prohibited." Treaty Establishing the European Economic Community, Nov. 23-Dec. 13, 1957, art. 7, 298 U.N.T.S. 17.

5. *Id.* art. 220.

6. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, *reprinted in* COMM. MKT. REP. (CCH) at ¶ 6003 [hereinafter cited as Convention].

7. Belgian, Federal Republic of Germany, France, Italy, Luxembourg, the Netherlands.

8. BULL. E. C. SUPP. 2/69. In 1964 the Committee negotiating the Draft Con-

on September 1, 1975. As a condition to membership, article three of the Accession Treaty required the three new members[10] of the E.E.C. "to enter into negotiations to make the necessary adjustments." This long deliberation eventually produced the Judgements Accession Convention for all nine members.[11] This article addresses those areas which have proved serious enough to warrant a referral by national courts to the European Court of Justice, as well as potential problem areas. Many of these problem areas have only recently come before the European Court because under the 1975 Protocol to the Convention, only superior and appellate national courts can refer questions regarding the Convention to the European Court of Justice.[12] Because of this fact and the effective date of the Protocol, the European Court has effectively been able to impose uniformity of interpretation only since late in 1976. Before these troublesome areas of the Convention can be discussed, however, a general overview of the Convention must be given, as most of the difficult areas of the Convention have their origins in the approach to the Convention taken by its drafters.

The Convention is a revolutionary development in the area of recognition of foreign judgments, with serious implications for the E.E.C. member states, as well as for nations having commercial interests in western Europe. The scope of the Convention is greater than the mere reciprocal recognition and enforcement of judgments normally accomplished through bilateral or multilateral treaties. The Convention is unique in that applications of jurisdiction are predetermined. Thus, the Convention applies to "civil and commercial matters, whatever the nature of the court

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vention submitted to all interested parties a Preliminary Draft and a Report published in BULL. E. C. SUPP. 12/72. This publication details the "legislative history" of the Convention and is helpful in ascertaining the Drafters' intentions for some of the more difficult provisions in the Convention.

9. 21 O.J. EUR. COMM. (No. L304) 97 (1978).

10. Denmark, Ireland, United Kingdom.

11. 21 O.J. EUR. COMM. (No. L304) 1 (1978) [hereinafter cited as Judgments Accession Convention].

12. This is rather unfortunate as courts of first instance, especially in Belgium, have rendered inconsistent interpretations of the Convention and endangered its uniformity of application. The Belgian courts have given contradictory rulings as to how the Convention affects exclusive sales agreements. *See* Jenard Report ch. 3, Head III BULL. E. C. SUPP. 12/72.

or tribunal."[13] With few exceptions, the courts of member states recognize the judgments of other Common Market countries. A highly controversial aspect of the Convention is the prohibition of the exercise of exorbitant jurisdiction by a member state against residents of other convention states.[14] This provision, however, does not extend to non-member countries.[15] Thus, for example, a United States company with assets in Germany but none in France, could be sued by a French national in France under article fourteen of the French Civil Code which entitled a French national to sue any non-national in French courts based solely on the nationality of the plaintiff. Under the Convention the German courts, absent bilateral treaty provisions to the contrary, must recognize and enforce the judgment of the French court against the assets of the United States company in Germany. Convention supporters have responded with two arguments to United States criticism of the Convention's use of jurisdictionally improper forums[16] against non-Community states. First, supporters argue that the Convention's aim to eliminate discrimination between enforcement of member states' judgments is parallel to the full faith and credit clause of the United States Constitution.[17] Second, they point out that the United States has its own form of exorbitant jurisdiction on its assertion of jurisdiction over foreign defendants temporarily present in the forum.[18] Under the full faith and credit provisions of the United States Constitution the other forty-nine jurisdictions have to recognize and enforce a default judgment rendered on the basis of transient jurisdiction. The drafters of the Convention recognized the disruptive effect the broad application of exorbitant jurisdiction would have on commercial relations with non-member countries whose corporations and nationals have enormous interests in the E.E.C. such as

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13. Convention, *supra* note 6, at art. I(1).

14. *Id.* art. 3.

15. *Id.* art. 4.

16. *See* Nadlemann, *Jurisdictionally Improper Fora in Treaties on Recognition of Judgments: The Common Market Draft*, 67 COLUM. L. REV. 995 (1967); Carl, *The Common Market Judgment Convention—Its Threat and Challenge to Americans*, 8 INT'L LAW. 446 (1974).

17. U.S. CONST. art. IV, § 1.

18. *See* Bartlett, *Full Faith and Credit Comes to the Common Market: An Analysis of the Provisions of the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters*, 24 INT'L & COMP. L.Q. 44, 55-56 (1975).

the United States, Japan, and Canada. Article 59 of the Convention allows non-Convention states to negotiate treaties with individual member countries which oblige the latter not to recognize or enforce judgments based on the exercise of exorbitant jurisdiction.[19] The United States is currently negotiating such a draft convention with the United Kingdom.[20]

The drafting Committee of Experts attempted to minimize the impact of the Convention on national rules of jurisdiction by choosing the "*compétence directe*" approach when drafting the Convention, instead of imposing indirect rules which would affect only the recognizing court. This approach emphasizes the role of the rendering court because the rendering court must review its jurisdiction on the basis of the Draft. Thus, only the rendering court decides whether the case involves a "civil or commercial" matter to which the Draft applies. Conversely, the recognizing court is bound to recognize decisions from other member countries subject only to expressly enumerated exceptions.[21] Article 29 stipulates that "[u]nder no circumstances may a foreign judgment be reviewed as to its substance."[22]

II. Domicile as an Exclusive Basis for Jurisdiction

One of the fundamental aims of the Convention was to eliminate conflicting jurisdictional criteria utilized by the member states[23] by mandating an exclusive basis of jurisdiction. Article

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19. There were questions as to whether the Convention violated the terms of the Hague Draft Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, *reprinted in* 15 Am. J. Comp. L. at 361 (1966-67). The E.E.C. requested that their Convention be included in the Hague Convention and that the Judgments Convention be allowed to vary from the exact terms of the Hague Convention. Non-E.E.C. member states attempted to use their potential veto power to get the E.E.C. to compromise by including, *inter alia*, Article 59 of the 1968 Convention. For the analysis of this and other compromise negotiations *see* Nadlemann, *The Recommendation Relating to the Convention on Recognition of Judgments*, 16 Am. J. Comp. L. 601 (1968).

20. Draft Convention for the Reciprocal Recognition and Enforcement of Judgments in Civil Matters, Oct. 26, 1976, U.S.-U.K. (initialled but not yet in force), *reprinted in* 16 Int'l Legal Materials at 71 (1977).

21. Hay, *The Common Market Preliminary Draft Convention on the Recognition and Enforcement of Judgments—Some Considerations of Policy and Interpretation*, 16 Am. J. Comp. L. 149, 158-59 (1968).

22. Convention, *supra* note 6, at art. 29.

23. The greatest conflict would be between the English common law procedural rules which allow jurisdiction on the basis of proper service of process,

two lays down the fundamental jurisdiction requirement that a person domiciled in a member state can only be sued in that state.[24] Article three then limits to those factors enumerated in articles five to sixteen of the Convention the rendering court's determination of whether the jurisdictional criteria have been met. The Convention limits the exercise of exorbitant jurisdiction.[25] Article five permits in limited circumstances the exercise of special jurisdiction whereby a defendant may be sued in courts other than those of the defendant's domicile. A plaintiff may choose the forum in the case of multiple defendants, however, the jurisdiction chosen must be the domicile of one of the multiple defendants.[26] Articles seven through fifteen provide exclusive jurisdictional rules for claims involving insurance contracts.

The Convention permits jurisdictional bases other than domicile in certain cases. Courts of jurisdictions in which no party is domiciled may adjudicate certain limited causes of action such as proceedings in which in rem rights or tenancies in immovable property are disputed. In such cases, the courts of the state in which the property is situated have exclusive jurisdiction.[27] Individuals may insert exclusive jurisdiction clauses in their contracts by mutual consent but subject to the strict requirements of article seventeen.[28] The courts of a contracting state have jurisdiction over any defendant who makes an appearance except if the appearance is only to contest jurisdiction or if another court has ex-

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whereas the courts of the civil law systems require sufficient established criteria connecting the dispute to the jurisdiction of the courts concerned. *See* Graveson, *Comparative Aspects of General Principles of Private International Law,* 2 RECUEIL DES COURS, 115 (1963).

24. Subject to the exceptions in articles 16, 17, & 18. *See* notes 27-29 *infra* and accompanying text.

25. Convention, *supra* note 6, at art. 4. *See also* text accompanying notes 4-8 *supra.*

26. *Id.* art. 6.

27. *Id.* art. 16.

28. The Committee of Experts' intentions in drafting article 17 were twofold:

> The Committee's concern was to not impede commercial practice, yet to neutralize the effects of clauses which might pass unnoticed. Such clauses are therefore be taken into consideration only if they are the subject of an agreement which implies the consent of the parties. Thus clauses in printed forms for business correspondence or in invoices have no legal force if they are not agreed to by the party against whom they operate. 12 BULL. EUR. COMM. 63 (SUPP. 7/972).

clusive jurisdiction under article sixteen.[29] Article twenty-one provides for the lis pendens situation in which in proceedings involving the same cause of action between the same parties in courts of different contracting states, any of the courts may decline jurisdiction in favor of the court first seized of the action. A court, however, can stay its proceedings if a party contests jurisdiction of the court first seized.[30] The Convention's drafters chose domicile as the normal basis jurisdiction after consideration of several alternatives.[31] Before the Convention, many agreements that attempted to harmonize conflict of laws rules used the nationality of the parties concerned as a criterion for establishing the applicability of such treaties' rules of jurisdiction. That consideration proved impractical because of the extremely diverse and complex rules which determine a party's nationality.[32] By es-

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29. Convention, *supra* note 6, at art. 18.

30. Article 22 states:

> Where related actions are brought in the courts of different contracting States, any court other than the court first seized may, while the action is pending, at first instance stay its proceedings.
>
> A court other than the court first seized may also on application of one of the parties, decline jurisdiction if the law of that court permits the consolidation of related actions and the court first seized has jurisdiction over both actions.
>
> For the purposes of this Article, actions deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from the separate proceedings.

Id. art. 22.

31. The Committee of Experts, while acknowledging that the concept of domicile was not without its difficulties, felt that virtually insurmountable difficulties could result if nationality rather than domicile were chosen as the jurisdictional basis. The Committee gave as an example the problems posed by dual nationality. BULL. E. C. SUPP. 12/72, 26.

32. For an analysis of the impracticability of the nationality criterion *see generally* Batiffol, *Une evolution possible de la conception du statul personnel dans l'Europ Continentale,* in 20TH CENTURY COMPARATIVE AND CONFLICTS LAW, at 295, 297 (1961); Mann, *The Seventh Report of the Private International Law Committee on Domicile,* 12 INT'L & COMP. L.Q. 1326 (1963); Nadlemann, *Nationality versus Domicile,* 17 AM. J. COMP. L. 418 (1969). One writer has posed the virtual impossibility of ascertaining the nationality of a defaulting minor married woman born in England as the illegitimate child of a German mother and now married to a Frenchman. Hay, *supra* note 21, at 164. The author states that the wife in the hypothetical would be "sujet mixte." According to English law (*jus soli*) she is a British subject; according to German *jus sanguinis,* she has German nationality; under German law, an illegitimate child furthermore

tablishing domicile as the basic criterion for in personam jurisdiction, the Convention makes the precise legal definition of domicile crucial to the Convention's success.

The concept of domicile is one of the most important determinants of the law which governs an individual in the Anglo-American conflicts of laws system.[33] The concept was developed by the British imperial system under which the privilege of being a British subject was bestowed upon peoples of many different nationalities belonging to extremely diverse legal systems. Moreover, there was a vast migration between different parts of the Empire. Under these circumstances a conflict of laws system based on nationality is unworkable.[34] Thus, the British conflict of laws rules embodied the principle that the personal law of an individual depends primarily on his domicile.[35] A domicile of origin attaches to an individual at birth which can later be changed to a domicile of choice or a domicile of dependency.[36]

In contrast to the Anglo-American conflict of laws rules which were evolved by the courts, most continental European conflict of

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shares the nationality of the mother. Under French law she automatically acquired French nationality upon her marriage, but under German law did not therefore lose her German citizenship unless she officially assented to such an effect. *Id.* at 164 n.85.

33. *See* Graveson, *supra* note 23, at 59-72; Cowen & Mendes da Costa, *The Unity of Domicile*, 78 L.Q. REV. 62 (1962); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 29 (1971).

34. Likewise, domicile as a determinant of an individual's personal law and as a basis for jurisdiction was a necessity in the United States conflict of laws system. This was due not only to the different legal systems of each state but also because it would have been unthinkable in the late 19th century to make the personal law of the millions of European emigrants dependent on the national laws of countries they had left permanently in order to settle in the United States and acquire United States citizenship. For the present day situation, *see* Weintraub, *An Inquiry into the Utility of "Domicile" as a Concept in Conflicts Analysis*, 63 MICH. L. REV. 961 (1965).

35. For a comparative study of the Common Law determinants of personal law in the conflict of laws system, *see* Graveson, *supra* note 23, at 59-72.

36. As opposed to determining the personal law of an individual, the basic criteria for the British courts in exercising in personam jurisdiction is due service of process under Order 11 of the Rules of the Supreme Court. For a detailed study of the British rules on jurisdiction, *see* H. READ, RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN THE COMMON LAW UNITS OF THE BRITISH COMMONWEALTH (1938). *See also* English Common Law Procedure Act, 1852, 15 & 16 Vict., c 76, §§ 18, 19 at 447-48, now incorporated in Order 11 of the Rules of the Supreme Court.

laws rules were imposed statutorily in the early 19th Century as part of an attempt to impose uniform codes of law areas on their countries which had formerly been independent provinces or sovereign states. The paramount nature of the ideals of statehood and national identity led to the system under which the personal law of an individual was governed by that person's nationality.[37]

In view of this historical background, the question arises how this common law concept of domicile entered the Convention, which was written by civil lawyers, at a time when the European Community did not include any common law country. It appears that the committee of experts who drafted the Convention decided to follow the international trend enunciated by the Hague Conference, which recognized domicile as the basis for the exercise of jurisdiction by national courts.[38] Domicile as a civil law concept, however, meant habitual residence and was distinct from the British concept. The drafters incorporated the concept of domicile as a basis of jurisdiction under article 52, but left to the courts of each state to interpret its meaning according to their domestic law. Article 52 qualifies this rule in two ways. First, if a party is domiciled in another contracting state, the court must apply the law of that state. There is a possibility that a renvoi problem may rise from this requirement because the conflict of laws rules of the state to whom the reference concerning domicile is made may return the matter to the referring state's rules which include the Convention rules. These rules would require the referring state to send the questions of domicile back to the referred state's conflicts rules. This is a classic *circulus inextricabilis* renvoi problem.[39] There is an urgent need for the European Court

37. For a detailed description of the civil law criteria for determining the personal law of individuals, *see* 1 E. RABEL, CONFLICTS OF LAWS: A COMPARATIVE STUDY 119 (2d ed. 1958-1964); Graveson, *supra* note 23 at 59-72. For a comparison of the Common Law and Civil Law bases for jurisdiction, *see id.*

38. *See* Hague Conference Draft Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, *supra* note 19, at art. 10(1). For discussion concerning the reasons behind the international trend towards recognizing domicile as the proper basic jurisdiction criteria, see Mann, *supra* note 32.

39. It is interesting to note that drafters of some multilateral conventions felt that utilizing "domicile" as a basis for determining an individual's personal law would avoid renvoi problems. The Seventh Session of the Hague Conference of Private International Law proposed a draft convention in which renvoi problems would be solved by giving preference to the law of the domicile. Article 1 of the Draft Convention provides that when the state where the person con-

to clarify the effect of article 52. The second qualification is that article 52(3) provides that the courts shall determine the domicile of a party in accordance with the law of the party's state if, under that law, the domicile depends on that of another person or corporation. Under this provision, the seat of a corporation or other legal persons shall be treated as its domicile. The courts of each member state must apply their own rules of private international law to determine where the seat of an authority is. These provisions establish corporation's domicile as the place in the European Community where their registered office is situated even though it may be controlled by persons outside the Common Market.[40] Thus, under article 52, each member state must determine domicile according to its internal laws and use the appropriate term in its legislation implementing the Convention. As one writer has pointed out, however, the use of the concept of "domicile" to harmonize the conflict of laws rules of the member states is not free from difficulty because of differences in the national

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cerned is domiciled prescribes the application of the law of his nationality, but the state of which such person is a citizen prescribes the application of the law of his domicile; each contracting state shall apply the provisions of the internal law of his domicile. Article 5 defined domicile as the place where the person habitually resides—unless the domicile of such person depends on the domicile of another person or on the seat of some public body.

For further discussion on problems of renvoi, see J. FALCONBRIDGE, ESSAYS ON THE CONFLICTS OF LAWS 137 *et seq.* (2d ed. 1954); Castel, *Conflits de regles de rattachement—Renvoi—Pret Insuraire—Loi du contrat—Qualifications,* 39 CAN. BAR REV. 93 (1961); Graverson, *Le renvoi dans le droit anglais actuel,* 57 REV. CRIT. DE DROIT INT'L PRIVE' 259 (1968); Griswold, *Renvoi Revisited,* 51 HARV. L. REV. 1165 (1938). In the United States, writers have been extremely hostile to the whole concept of renvoi. *See* W. COOK, THE LOGICAL AND LEGAL BASES OF CONFLICT OF LAWS ch. 9 (1942); E. LORENZEN, SELECTED ARTICLES ON THE CONFLICT OF LAWS 19-79 (1947); 1 A. EHRENZWEIG, PRIVATE INTERNATIONAL LAW 142 (1967). United States courts have rarely applied renvoi theories, but RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 8(2) (1971) states that renvoi exists whenever "the objective of the particular choice-of-law rule is that the forum reach the same result on the very facts involved as would the courts of another state." *See also* Richards v. United States, 369 U.S. 1 (1962).

40. Most of the E.E.C. member states have ratified the 1956 Hague Convention on the Recognition of the Legal Personality of Foreign Companies, Associations and Foundations which proposed the principle that the legal personality of such entities conferred by the law of a contracting state in which it had its registered office, should be recognized by all other contracting states. While Great Britain has not yet ratified this convention, British law approximates the provisions in the Hague Convention.

law definition of the term.[41]

III. Meaning of "Civil and Commercial Matters"

Article one states that the Convention applies to all "civil and commercial matters." Actions involving labor law are included within the Convention as are civil proceedings brought before criminal courts and decisions regarding jurisdiction and the recognition and enforcement of judgments given by criminal courts in such proceedings. The Convention also applies to civil and commercial matters brought before administrative tribunals and actions. The Convention expressly exempts the following issues from its provisions: (1) The status and the legal capacity of natural persons,[42] (2) rights in property arising out of a matrimonial

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41. Hay, *supra* note 21, at 164-65 (1968). For example, French law defines as the place of principal establishment, C. Civ. art. 102, allowing a *domicile elu* for certain procedural purposes, C. Civ. art. 111. German law, however, unlike French law, permits multiple domiciles, BGB art. 7, but does not allow the *domicile elu,* BGB art. 157. Italy allows both a general and special domicile, C. C. art. 43 (1942), the former being akin to the French notion of *principal establissement.* Dutch law situates the domicile of an individual at the place of residence, B.W. art. 11, while under Belgian law domicile depends on the location which is entered in the register of population, C. Judiciare art. 36. The domicile rules of Luxembourg are virtually identical to those of the French. It has been suggested that the interpretational problems posed by these differences are more apparent than real since most of the problems arising from them can be resolved under the "lis pendens" provisions of article twenty-one.

Hay also points out that the seemingly troublesome allowance of multiple domiciles would not often result in a conflict of jurisdiction. For example, a German judge could find that a defendant was domiciled both in Germany and France. This conclusion would only lead to the result that the German court has jurisdiction; that court would not dismiss the case merely because of the French court's concurrent jurisdiction. Meanwhile the French courts could find that the defendant has its "principal establissement" in Germany and so conclude they lack jurisdiction. The French courts would not have to assert jurisdiction on the ground that "some German-law notion of multiple domicile would recognize jurisdiction in French courts." The learned writer points out, however, that the remaining areas of conflict are the cases in which litigation is pending in several fora, each having jurisdiction under the Convention. Hay concludes, however, that since these cases may arise from any combination of the Convention's bases of jurisdiction, this presents a weak argument against the choice of the domicile criterion as a jurisdictional basis. Hay, *supra* note 21, at 165 n.93.

42. Status and legal capacity issues were excluded because national internal and conflict of laws rules in these areas are so extremely diverse that a rendering court would have a virtually impossible task in deciding jurisdictional questions, while recognizing courts in certain circumstances could be forced to use the "or-

relationship, (3) wills and succession, (4) bankruptcy proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings,[43] (5) social security, (6) arbitration[44] and (7) revenue, customs or administrative measures.[45]

Unfortunately, other than the listed exceptions to article one, the Convention does not elucidate the extent and scope of the concept of "civil and commercial matters." This omission endangered the uniform application of the Convention in the E.E.C. because it leaves open the way for national courts to give conflicting interpretations of this crucial jurisdictional parameter.[46] The European Court recognized this danger and attempted to remedy the situation in *Firma LTU GmbH & Co., K.G. v. Eurocontrol.*[47] In this case Eurocontrol, the European Organization for the Safety of Air Navigation, is composed of representatives from Denmark and Italy.[48] Eurocontrol brought proceedings in Brussels against a German air transport firm for the value of air safety services performed by the plaintiff. The Tribunal de Commerce of Brussels declared that it had jurisdiction over the commercial dispute, and ordered LTU to pay the sum plus interest. Subsequent appeals by LTU in Belgian courts failed. An action for enforcement of the judgment under the Convention was brought in Germany and the German court ordered enforcement. On appeal, the enforcement order was annulled on the grounds that the judgment of the Belgian court had been served.

Eurocontrol appealed to the German Supreme Federal Court which annulled the appellate division and sent the issue back to

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dre public" exception in Article 27(1). BULL. E. C. SUPP. 12/72, 20.

43. The Separate Draft Bankruptcy Convention of the E.E.C. was intended to regulate judgments in the bankruptcy area due to the special and highly technical nature of bankruptcy adjudication. The official English version was published in 1974, European Doc. No. 3.327/1/XIV/70.E.

44. This exception has the potential of becoming quite important. The European Convention on International Commercial Arbitration of 1961 deals with this area. If the Judgments Convention as applied becomes unpopular with businessmen of the E.E.C., an arbitration clause could find its way into many more contracts negotiated in E.E.C. countries.

45. These exceptions were added by the Judgments Accession Convention.

46. *See* Jenard Report, *supra* note 12.

47. [1976] E. Comm. Ct. J. Rep. 1541, [1976 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8377.

48. The European Organization for the Safety of Air Navigation is composed of representatives from all the Community states except Denmark and Italy.

the trial court for rehearing. That court then stayed the proceedings and asked the European Court to give an interpretation of the phrase "civil and commercial matters" in article one and to determine whether the law to be applied was the law of Belgium where judgment was given or the law of West Germany where enforcement was sought.[49] LTU argued that the enforcement of a foreign judgment is within the sovereign power of the judgment-recognizing state, and, therefore, the power to define the scope of the obligation to enforce was vested in the national courts of that state.[50] Eurocontrol argued that national rules of the judgment-granting state should be applied to define the scope of article one since this would promote the Convention's aim to remove obstacles to intra-E.E.C. enforcement of judgments.[51] The Advocate General of the European Court rejected the argument that the concept of civil and commercial matters should be given a community law meaning because this would entail many references to the European Court, hindering enforcement actions.[52] He adopted Eurocontrol's arguments as to which law should define the concept of "civil and commercial matters."[53] The European Court disagreed with its Advocate General categorically stating that the scope of the convention could not be determined solely by the rules of any member state:

> Since article one serves to indicate the area of application of the Convention it is necessary, in order to ensure, as far as possible, that the rights and obligations deriving from it for the Contracting States and the persons to whom it applies are equal and uniform, that the terms of that provision should not be interpreted as a mere reference to the internal law of one or other of the States concerned.[54]

The Court reasoned by providing that article one of the Convention shall apply "whatever the nature of the court or tribunal," the concept "civil and commercial matters" cannot be interpreted solely in the light of the division between the various types of courts existing in certain states.[55]

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49. [1976 Transfer Binder] COMM. MKT. REP. (CCH) at 7800.
50. *Id.* at 7801.
51. *Id.* at 7802.
52. *Id.* at 7811.
53. *Id.* at 7812.
54. *Id.* at 7806.
55. *Id.*

The concept in question must therefore be regarded as independent, and must be interpreted by reference first, to the objectives and scheme of the Convention and secondly, to the general principles which stem from the corpus of the national legal system. If the interpretation of "civil and commercial matters" is approached in this way, particularly for the purpose of applying the provisions of title III of the Convention, certain types of judicial decisions must be regarded as excluded from the area of application of the Convention either by reason of the legal relationships between the parties to the action or because of the subject matter of the action.[56]

The effect of this holding is to avoid the danger of conflicting decisions defining the scope of the Convention which would likely result if article one were to be interpreted by national courts. The approach taken by the Court, however, is not without its difficulties. National courts must now interpret article one not only by some abstract reference to the objectives and scheme of the Convention, but must also determine "general principles" from a comparative study of the member states legal system.

The *Eurocontrol* court also attempted to provide guidance for member state courts faced with disputes between a public authority and a person governed by private law. The court held that when a public authority acts pursuant to its powers, a dispute arising out of that act could not be said to fall within the scope of the Convention.[57]

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56. *Id.*

57. *Id.* The European Court determined that a dispute which concerns the recovery of charges payable by a person to a national or international body is governed by public law thus outside the scope of the Convention. The European Court emphasized that this rule would control when a body had unilaterally fixed the place of performance of the obligation at its registered office and selected the national courts with jurisdiction to adjudicate upon the performance of the obligation. *Id.*

The Court reiterated this ruling in dicta in another case involving the European Organization for the Safety of Air Navigation (Eurocontrol). Unfortunately, the Court did not elucidate further on the methodology to be used by national courts in their efforts to interpret Article 1. *See* Bavaria Fluggesellschaft Schwabe & Co. KC & Germanair Bedarfsluft fahrt GmbH & Co., KG v. Eurocontrol [1977] E. Comm. Ct. J. Rep. 1517, [1977-78 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8428.

IV. Special Jurisdiction

The special jurisdiction provisions of article five have proven to be a fruitful ground for controversy. Article five provides:

> A person domiciled in a Contracting State may in another Contracting State be sued (inter alia):
>
> (1) in matters relating to a contract, in the courts for the place of performance of the obligation in question; . . .
>
> (3) in matters relating to tort, delict, or quasi-delict, in the courts for the place where the harmful event occurred; . . .
>
> (5) as regards a dispute arising out of the operations of a branch, agency, or other establishment, in the courts for the place in which the branch, agency, or other establishment is situated.[58]

A. *Problems Arising under Article 5(1)*

Article 5(1) is an exception to the Convention's basic rule of jurisdiction which requires that an action must be brought where the defendant is domiciled.[59] The European Court has interpreted article 5(1) in two cases.

In *Industrie Tessili v. Dunlop A.G.*,[60] a German firm (Dunlop) brought an action in a German court for annulment of a contract for the delivery of goods. Tesilli, an Italian firm, contested the jurisdiction of the German court on the ground that in an action for indemnification for defective goods, jurisdiction should be determined according to the place of delivery of the goods, which in this case was the factory in Italy. Under German law, the place of performance was the place where the goods were situated when the breach was alleged, thus, in this case, Germany. The German court wanted to apply the lex fori in interpreting article 5(1), but eventually asked the European Court for a ruling.

In the proceedings before the Court, Tessili argued that first, the European Court should adopt a rule that would result in a consistent determination of the place of performance and second, that the seller's domicile or registered place of business should always be the "place of the performance of the obligation" for purposes of satisfying the jurisdictional requirements of the Convention in an international sale contract. Dunlop took the view

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58. Convention, *supra* note 6, at art. 5.

59. *Id.* art. 2.

60. [1976] E. Comm. Ct. J. Rep. 1473, [1976 Transfer Binder] Comm. Mkt. Rep. (CCH) ¶ 8375.

that this approach would deprive article 5(1) of any effect, since under most member states conflict of laws rules, the seller-defendant's domicile is the basis for jurisdiction. Instead, Dunlop argued that the conflict of laws rules of the lex fori should be the governing law. The European Court adopted the reasoning of the plaintiffs, Dunlop, arguing that:

> Having regard to the differences between national laws of contract and to the absence at this stage of legal development of any unification in the substantive law applicable, it does not appear possible to give any more substantial guide to the interpretation of the reference made by article 5(1) to the "place of performance" of contractual obligations. This is all the more true since the determination of the place of performance of obligations depends on the contractual context to which these obligations belong. In these circumstances, the reference in the Convention to the place of performance of contractual obligations cannot be understood otherwise than by reference to the substantive law applicable under the rules of conflict of laws of the court before which the matter is brought.[61]

The European Court thus decided that the national court before which the action was brought should decide according to its conflict of laws rules whether the place of performance was within its territorial jurisdiction.

In spite of the *Tessili* decision, article 5(1) continued to trouble national courts in actions concerning exclusive sales concessions. In *De Bloos v. Bouyer*[62] the plaintiffs brought an action in Belgium for damages for breach of an exclusive distribution contract. The defendants challenged the jurisdiction of the Belgian courts and referred the matter to the European Court. The Court held that the obligations referred to in article 5(1) were the contractual obligations that had been breached by the defendant and not any collateral obligations such as the responsibility to pay damages on breach of the contract. "As stated in its preamble, the Convention is intended to determine the international jurisdiction of the courts of the Contracting States, to facilitate the recognition and to introduce an expeditious procedure for securing the enforcement of judgments."[63] This statement indicates

61. *Id.* at 1485-86, [1976 Transfer Binder] COMM. MKT. REP. (CCH) at 7776.

62. [1976] E. Comm. Ct. J. Rep. 1497, [1976 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8376.

63. *Id.* at 1508, [1976 Transfer Binder] COMM. MKT. REP. (CCH) at 7791.

that the Court considers the single most important objective of the Convention was to vest jurisdiction over causes of action encompassed by the Convention in one court, instead of a number of courts. Therefore, based on the facts of this case, the court held:

> In disputes involving the consequences of the infringement by the grantor of a contract conferring an exclusive concession, such as the payment of damages or the dissolution of the contract, the obligation to which reference must be made for the purposes of applying article 5(1) . . . is that which the contract imposes on the grantor and the non-performance of which is relied on by the grantee in support of the application for damages or for the dissolution of the contract.[64]

Applying the *De Bloos* rationale generally, it is likely that in any dispute arising over a contract jurisdiction vests in the courts of the place of performance of the principal obligation under the contract. It must be conceeded that in many cases there will be no single country of principal obligation, but rather several obligations of equal importance. This type of contract presents seemingly intractable problems. If the contract imposes a positive obligation, the courts having jurisdiction will be those of the member state where that positive obligation should have been carried out. There is an immediate difficulty, however, if the contract imposes several positive obligations, each to be performed in a different member state. The first court in which the action is brought should be granted exclusive jurisdiction for the action for breach of all the positive obligations. This solution creates the problem of forum shopping by the plaintiff in cases in which several positive obligations to be performed in different member states were imposed on the defendants.

If the obligation imposed by the contract is a negative one, as in *De Bloos,* it can be assumed from the Court's decision, that the tribunals of the place where the act which infringed the negative prohibition occurred would have jurisdiction. In *De Bloos,* defendants were negotiating a contract with other distributors in Belgium which would have breached the exclusive rights given to the plaintiffs in that country. Hence Belgian courts should have jurisdiction over the dispute. Applying the reasoning in the case of a breach of positive obligations, if the defendants in *De Bloos*

64. *Id.* at 1509, [1976 Transfer Binder] COMM. MKT. REP. (CCH) at 7791.

had also breached the exclusive rights given to the plaintiffs in Luxembourg, it is possible that either the courts of Luxembourg or Belgium would have exclusive jurisdiction depending upon where the action was first started. This same logic should apply if the exclusive rights of the defendant in the non-member state of Zaire were also infringed. A contrary conclusion would mean a wasteful multiplicity of suits in each state where the infringements were committed.

In the *De Bloos* case, the European Court also rendered an interpretation of article 5(5). This article provides that with regard to a dispute arising out of the operations of a branch, agency, or other establishment, the courts of the country where the establishment is located will also have jurisdiction. The Belgian court asked the European Court whether the grantee of an exclusive sales agreement could be regarded as a "branch, agency, or other establishment" within the scope of article 5(5). The Advocate General argued that article 5(5) was intended to be used by a third party when suing a parent company in the place where the branch was situated instead of going to the place of the head office and was not intended for use by a branch company in suing its parent company. The European Court did not confirm this interpretation but merely stated that since De Bloos was not subject to the direction or control of its parent body, an essential element of the provision was missing, and the court could not regard De Bloos as a "branch, agency, or other establishment" within the scope of article 5(5).[65]

B. *Problems Arising under Article 5(3)*

In *Handelswekerij C.J. Bier V.B. and Reinwater Foundation v. Mines de Potasse d'Alsace,*[66] the European Court of Justice dealt with the ambiguity posed by the "harmful event" language of article 5(3).[67] In *Handelswekerij,* the plaintiff Dutch company brought an action in Rotterdam district court for damages to their nursery gardens by defendant's pollution of the waters of the Rhine. The defendants objected to the Rotterdam court's as-

65. *Id.* at 1510, [1976 Transfer Binder] COMM. MKT. REP. (CCH) at 7791.

66. [1976] E. Comm. Ct. J. Rep. 1735, [1976 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8378.

67. Convention, *supra* note 6, art. 5(3) reads: "in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred."

sertion of jurisdiction, claiming that jurisdiction should be given to the courts of the place where the event giving rise to the damage occurred. The European Court held that in quasi-delictual matters: "The place of the event giving rise to the damage no less than the place where the damage occurred can, depending on the case, constitute a significant connecting factor for purposes of jurisdiction."[68] The court then concluded that it was not "appropriate to opt for one of the two connecting factors to the exclusion of the other" and held that article 5(3) would allow either basis of jurisdiction, the forum being a matter of choice for the plaintiff.[69] The court reasoned that if the defendant's arguments were accepted, there would be confusion between the basis of jurisdiction laid down by article two and article 5(3).[70] Such confusion would cause article 5(3) to lose its effectiveness. Nevertheless, adopting plaintiff's suggested basis of jurisdiction could result in some tortfeasors escaping liability if the place where the damage occurred was not the defendant's domicile.[71]

V. Insurance Claims

A major problem with the original language of the Convention was the manner in which it dealt with insurance contracts. The original provisions of articles seven through twelve reflected the attitude of the continental governments that insurance companies were out to exploit the individual policyholder. Thus many continental countries had enacted pre-Convention laws requiring foreign insurers to operate locally and, therefore, be subject to suit within those countries. Article eight states that an insurer domiciled in a contracting state may be sued in that place or in the state where the insured is domiciled, or, if he is a co-insurer, in the state where proceedings are being brought against the leading insurer. In disputes arising from the operation of a branch, agency, or establishment of the insurer in a contracting state, the insurer shall be deemed to be domiciled in that state. Furthermore, the original language of the Convention provided that "in respect of liability insurance or insurance of immovable property, the insurer may in addition be sued in the courts for the place

68. Handelswekerij, [1976] E. Comm. Ct. J. Rep. at 1745, [1976 Transfer Binder] Comm. Mkt. Rep. (CCH) at ¶ 7821.

69. *Id.* at ¶ 7281.

70. *Id.* at ¶ 7821.

71. *Id.* at ¶ 7281.

where the harmful event occurred."[72] The combined effect of these two articles offers the insured an enormous opportunity for forum shopping. Moreover, article twelve forbids jurisdiction conferring clauses except when parties agree after the dispute has arisen, when agreements between parties within the same contracting state, or when a clause allows the insured or a beneficiary to bring proceedings in more jurisdictions than those provided under the Convention.

The approach adopted by the Convention is somewhat unnecessary. Individuals do not often insure abroad. This "protection of the vulnerable consumer" approach ignores the relative size and power of the giant multinational corporations which seek bids from the London insurance market and which often have greater bargaining power than the insurance companies. The Convention originally disregarded purchasers of marine and aviation insurance as well as multinational corporations who insure themselves against liability across the world. None of the above could be thought of as vulnerable consumers. Some of the largest insurance companies in the London market exist to serve these huge corporate entities. The British insurance industry was nervous about the prospect of the United Kingdom joining the Convention since the British courts would have to enforce judgments of other member states courts even when the British insurers had taken no part in such proceedings. In the negotiations, the British delegation vigorously attempted to get the Convention to distinguish large scale commercial insurance from individual insurance. The attempt was in vain since all suggested criteria for distinction of insurance contracts were condemned as unworkable. The Convention made only two concessions to the British insurance industry. First, the new article 12(4) adopted by the Judgments Accession Convention permits clauses conferring exclusive jurisdiction in insurance contracts for non-E.E.C. insured. Second, article 12(5) as modified by the Judgments Accession Convention allows clauses conferring jurisdiction in contracts of insurance covering any of the following risks:

1. Any loss of or damage to:

   (a) Sea-going ships, installations situated offshore or on the high seas, or aircraft, arising from perils which relate to their use for commercial purposes;

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72. Convention, *supra* note 6, at art. 9.

(b) goods in transit other than passengers' baggage where the transit consists of or includes carriage by such ships or aircraft;

2. Any liability, other than for bodily injury to passengers or loss of or damage to their baggage:

(a) arising out of the use or operation of ships, installations, or aircraft as referred to in 1(a) above so far as the law of the Contracting State in which such aircraft are registered does not prohibit agreements on jurisdiction regarding insurance of such risks;
(b) for loss or damage caused by goods in transit as described in 1(b) above;

3. Any financial loss connected with the use or operation of ships, installations, or aircraft as referred to in 1(a) above in particular loss of freight or charter-hire;
4. Any risk or interest connected with any of those referred to in 1 to 4 above.[73]

Although these amendments improve the unrealistic provisions applicable to large-scale insurance contracts in the original Convention language, at some stage a detailed distinction between large-scale commercial insurance and small-scale individual insurance will have to be made and appropriate jurisdictional provisions developed to apply to each category.

VI. Installment Sales and Loan Agreements

The Convention originally provided in article fourteen that a seller or lender who is domiciled in a contracting state may be sued either in the court of that state or in the courts of the contracting state in which the buyer or borrower is domiciled. Article fifteen prohibited forum selection clauses except in limited cases. The Convention was silent on whether the provision applied only to consumer contracts of hire, purchase, and credit sales or to all types of such contracts. The European Court in *Societe Bertrand v. Paul O.H. Kg*[74] decided that the Convention provisions in article thirteen relating to the purchase of goods on installment credit terms applied only to final consumers and not to trade

73. *See* Judgements Accession Convention, *supra* note 11, at art. 9.
74. [1978] E. Comm. Ct. J. Rep. 1431, [1977-78 Transfer Binder] Comm. Mkt. Rep. (CCH) ¶ 8479.

buyers.[75] Consequently, the sale of a machine by one company to another with payment to be made by bills of exchange spread over a period of time did not amount to a sale or installment credit for the purposes of that article.[76] This decision, however, has been superseded by amendments to article thirteen made in the Judgements Accession Convention. The power of plaintiffs to sue in their own domicile and exclude any jurisdiction clause has been extended to cover all consumer contracts which are defined as "a contract concluded by a person for purposes, which can be regarded as being outside his trade or profession."[77] These consumer contracts include: a contract for the sale of goods on installment credit terms; a contract for a loan repayable by installments or for any other form of credit made to finance the sale of goods; or any other contract for the supply of goods or services in the state of the consumer's domicile the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and the consumer took in that state the steps necessary for the conclusion of the contract.[78]

If the contract falls within any of these categories, the buyer can sue the seller or financier in his own courts and does not have to go to the expense of suing abroad. Conversely, the seller and financier by article fourteen can sue only in the courts of the contracting state in which the consumer is domiciled. This is yet another example of the vulnerable consumer being protected against those with actual or imaginary stronger bargaining power. These efforts to protect consumers are entirely reasonable and in step with the emergence of consumer protection laws in Western Europe and in other industrialized nations.

VII. Prorogation of Jurisdiction

Article seventeen of the Convention provides that if the parties, one or more of whom is domiciled in a contracting state, agree in writing that the courts of a contracting state are to have jurisdiction to settle any disputes which have arisen or may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction. Agreements that include an exclusive consensual jurisdiction clause, however, will have no

75. *Id.*
76. *Id.*
77. Judgements Accession Convention, *supra* note 11, at art. 13.
78. *Id.*

legal force if they are contrary to the provisions of articles twelve or fifteen concerning matters relating to insurance and installment sales and loans, or if the courts excluded by contract have exclusive jurisdiction under article eighteen.

Under article seventeen the party for whose sole benefit the exclusive consensual jurisdiction was given may proceed in any other court which has jurisdiction under the Convention. The language of the article does not specify whether it would apply to oral contracts unilaterally confirmed in writing as in the case of commercial transactions conducted over the telephone and confirmed unilaterally by telex. The European Court has stated that article seventeen must be construed strictly since an exclusive jurisdiction agreement excludes the basic rule of jurisdiction in article two and the special rules of jurisdiction in articles five and six of the Convention. The European Court has, therefore, mandated that national courts must examine whether the consent to the exclusive jurisdiction clause has been unambiguously demonstrated.

In *Estastis Salotti di Colzani Aimo e Gianmario Colzani v. Ruwa Polstereimaschinen Gmbh,*[79] the German company Ruwa had offered written tenders to the Italian company Estastis for a supply of machinery. These tenders expressly referred to the conditions of sale printed on the back of the offer, one of which conferred exclusive jurisdiction on the courts of Cologne. A contract was drawn under Ruwa's letterhead and signed by both parties. On the reverse side, the contract contained the same conditions of sale as were in the written tenders. The Supreme Court of West Germany asked the European Court whether the article seventeen requirement that the agreement be in writing was fulfilled by having the exclusive jurisdiction clause on the reverse side of the contract. Surprisingly, the European Court held that the mere printing of the exclusive jurisdiction clause on the reverse side of a contract did not fulfill the conditions of article seventeen because it could not be certain whether the other party had actually consented to the clause excluding the normal provisions of the law. The Court stated, however, that this ruling would not apply where the actual contract signed by both parties expressly referred to general conditions containing a clause conferring jurisdiction.

The German court also inquired about the effect of a provision

79. [1976] E. Comm. Ct. J. Rep. 1831, [1976 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8379.

in a signed contract which referred to a previous written offer containing a clause conferring exclusive jurisdiction. The European Court held that reference back to a prior document was permissible provided that the clause conferring exclusive jurisdiction could be confirmed by a party exercising reasonable care and that the clause conferring jurisdiction had been communicated with the offer to the other contracting party. Implied or indirect references to earlier correspondence were not permitted.[80]

In another case, *Galeries Segoura SPRL v. Rahim Bonakdarian*,[81] the European Court dealt with a situation in which the vendor, after orally concluding a sale, wished to rely on his general conditions of sale. He subsequently confirmed the contract in writing, attaching to this confirmation the general conditions of sale, which included a clause conferring exclusive jurisdiction. Again the European Court held that it could not presume that one of the parties waives the advantage of the jurisdictional bases provided by the Convention. The court held that it could not accept the argument that a purchaser agreeing to an oral contract must be deemed to have accepted any clause conferring jurisdiction which might appear in the vendor's general conditions. In such a case, unilateral written confirmation of the contract by the vendor is ineffective.[82]

In the same case, the court addressed the problem of whether article seventeen would apply to a contract of sale concluded orally without reference to the existence of general conditions of sale containing the exclusive jurisdiction clause. The court held that subsequent notification of general conditions could not change the terms agreed upon between the parties, unless the general conditions, including the jurisdiction clause, were expressly accepted in writing by the purchaser. The court, however, noted an exception to this rule in the case of a continuing trading relationship between the parties. Under these circumstances, the course of trading as a whole could be governed by the general conditions preferred by the party giving the confirmation, including the exclusive jurisdiction clause.[83]

The interpretations of article seventeen rendered in *Ruwa* and

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80. *Id.* at 1842, [1976 Transfer Binder] COMM. MKT. REP. (CCH) at 7836.

81. [1977] E. Comm. Ct. J. Rep. 1851, [1976 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8380.

82. *Id.*

83. *Id.* at 1862, [1976 Transfer Binder] COMM. MKT. REP. (CCH) at 7848.

Rahim created major problems for commercial interests dealing with contracts common in international trade and commerce. The status of bills of lading incorporating standard charter party provisions and insurance certificates incorporating the standard policy provisions for each trade became very uncertain. In view of this problem, the Judgements Accession Convention has amended article seventeen. The amendment provides that in international trade and commerce, an agreement conferring jurisdiction on the courts of a particular country will be recognized if it is in a form consistent with existing custom and practice of which the parties are or ought to have been aware.[84] The new Judgements Accession Convention also states that when parties who are domiciled in a contracting state have concluded a jurisdiction agreement the courts of other contracting states shall have no jurisdiction over their disputes unless the chosen court has declined jurisdiction. This addition also seems entirely reasonable.

VIII. Recognition and Enforcement of Judgments

All judgments within the E.E.C. falling within the scope of the Convention will be recognized and enforced by any member state with very limited exceptions. The most important exceptions to this general rule are found in article 27. First, the Court addressed may refuse to recognize a judgment that is contrary to the public policy of the state of that court.[85] Second, member states may refuse to enforce a judgment if the defendant had not received proper notice of the proceedings and the judgment was given in default.[86] Third, if the judgment is irreconcilable with one given in the recognizing court in a dispute between the same parties, that state may refuse to give effect to the later judgment.[87] Last, a state may refuse enforcement if the courts of the state in which the judgment was given have decided a preliminary question concerning the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills or succession in a way which is inconsistent with a rule of the private international law of the state in which recognition is sought, unless the same result would have been reached by the

84. Judgements Accession Convention, *supra* note 11, at art. 11.
85. Convention, *supra* note 6, at art. 27(1).
86. *Id.* art. 27(2).
87. *Id.* art. 27(3).

application of the rules of private international law of that state.[88] Article 28(1) also excepts judgments conflicting with the basis of jurisdiction laid down in articles three through five of the Convention.

It must be noted, however, that when a member state is deciding the applicability of one of these exceptions, it is bound by the findings of fact and law on which the original court based its jurisdiction. Thus it cannot review the exercise of jurisdiction on any other ground under article 28(3).[89] The public policy exception may become a major problem if national courts use it to avoid the provisions on the recognition and enforcement of judgments. Nevertheless, several provisions of the Convention were written to prevent this from occurring. First, article 38(3) excludes jurisdictional objections based on public policy. Second, paragraphs (2) and (3) of article 28 may prevent national courts from using the public policy exception to review facts or substantive law. Finally, article 27(2) prevents any use of the exception on the basis of lack of due process even arising.[90]

The nonreviewability of the substance of the foreign judgment was settled when articles 29 and 31 were considered by the European Court of Justice in *De Wolf v. Harry Cox B.V.*[91] The Supreme Court of the Netherlands asked the European Court whether a plaintiff with an enforceable judgment could be permitted to start proceedings de novo in another contracting state rather than undertake the more costly enforcement procedures under article 31. The European Court categorically rejected this possibility holding that the enforcement procedure provided for in the Convention was exclusive, and that article 29 precluded the

88. *Id.* art. 27(4).

89. *Id.* art. 28(3).

90. *See* Mamer v. Brand Ladenbau K. G., 11 COMM. MKT. L.R. 407 (Luxembourg 1974), as an example of how the provisions of the Convention mentioned prevent unreasonable use by national courts of the "ordre public" exception in article 27.

91. [1976] E. Comm. Ct. J. Rep. 1760, [1976 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8381. Judgments Convention, *supra* note 6, at art. 29 states: "Under no circumstances may a foreign judgment be reviewed as to its substance." *Id.* Art. 31 states: "A judgment given in a Contracting State and enforceable in that State shall be enforced in another Contracting State when, on the application of any interested party, the order for its enforcement has been issued there."

review of the substance of a foreign judgment.[92] The Court concluded that recognition of the possibility put forward by the Dutch court would open the way for the enforcing courts to avoid unpalatable results dictated by the Convention.[93] The Court reasoned that this ruling was reinforced by article twenty-one which requires later seized courts to decline jurisdiction in favor of the original forum. The court felt the duplication of the main actions would result "in a creditor possessing two orders for enforcement on the basis of the same debt."[94]

The general rule under the Convention is that enforcement must be effected after the recognition of the foreign judgment. Nevertheless, articles 36 through 39 permit a stay of execution if an appeal is pending. In the recent case of *Industrial Diamonds Supplies v. Riva,*[95] the European Court held that the meaning of the phrase "ordinary appeal" in articles 30 and 38 of the Convention had to be determined by Community law and not by the law of any member state. These articles provide that any appeal which may result in the annulment or the amendment of the judgment to be enforced constitutes an "ordinary appeal." In most other respects, the articles on the recognition and enforcement of judgments seem free from major defects and do not require any special mention.

IX. Conclusion

As seen from the foregoing discussion, the Convention is fraught with uncertainty and unresolved problems. Nevertheless, the Convention is of great importance to lawyers both in the European Community and the world at large, in which business increasingly is conducted across national boundaries. The attorney whose clients do business in Community states must follow the developments concerning the Convention and be aware of the difficulties the Convention poses. To avoid further difficulties in some of the troublesome areas of the Convention, actions must be taken in certain areas.

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92. De Wolf, [1976] E. Comm. Ct. J. Rep. at 1767, [1976 Transfer Binder] Comm. Mkt. Rep. (CCH) at 7857.

93. *Id.*, [1976 Transfer Binder] Comm. Mkt. Rep. (CCH) at 7857.

94. *Id.*

95. [1977] E. Comm. Ct. J. Rep. 2175, [1977-78 Transfer Binder] Comm. Mkt. Rep. (CCH) ¶ 8453.

A. *Domicile as a Basis for Exclusive Jurisdiction*

As discussed above, the concept of domicile has significant variations in its meaning in the different member states. This situation will be further aggravated by the accession of Great Britain to the Convention, as the common law concept of domicile is totally different from that of the civil law. It would help to clarify the application of the Convention in this area if Great Britain employs the term habitual residence in its internal legislation implementing the Convention. A leading English writer has suggested that a presumption of the existence of such forensic residence should arise after one month's actual residence, and that such a presumption should not prevent proof of actual forensic residence after an even shorter period than one month.[96] Any longer period may leave a party without a domicile until the longer residency period is achieved. In addition, the courts can render more efficacious the domicile criterion as a basis for exclusive jurisdiction by interpreting the domicile concept in the context of the Convention to mean the place of habitual or forensic residence.

The European Court should interpret article 52(2) in a manner that would avoid a renvoi problem. The simplest way of achieving this without amending the article would be to require the state to whom the reference is made to decide the question of domicile on the basis of its own national provisions without reference to that state's conflict of laws rules. Thus, the words "the Laws of that State" in article 52(2) could be interpreted to mean the domicile substantive law of the state to which reference is made. This possible procedure is called the internal law theory or the substantive reference theory. Under this theory, no proof of the conflict of laws rules of the state to which reference is made is required. Only proof of the internal or substantive law of that state would be required.[97]

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96. R. GRAVESON, CONFLICT OF LAWS, 101-02 (1974).

97. For the way in which the Hague Conference tried to deal with the renvoi problem, see note 39 *supra*. If, as the writer suggests, the courts of all the contracting states begin in a uniform fashion to interpret domicile to mean habitual or forensic residence, the renvoi problem envisioned in the wording of Art. 52(2) should disappear.

B. *The Meaning of "Civil and Commercial Matters"*

In the *Eurocontrol* case,[98] the European Court instructed national courts to interpret the phrase "civil and commercial matters" in light of the objectives and scheme of the Convention and by reference to "general principles" from a comparative study of the member states legal systems. As suggested above, this approach is too vague and uncertain. The European Court should follow its own instructions and give a concrete definition to the concept, thereby imposing some uniformity on the decisions of national courts in this area.

C. *Special Jurisdiction Problems in Article Five*

The European Court's decision in *Industrie Tessili* interpreting article 5(1) to mean that it was for the forum to decide according to its own conflict of laws rules whether the place of performance was within its territorial jurisdiction seems reasonable and logical. The European Court's ruling in the *De Bloos* case, however, poses difficult problems as discussed above. While most of these problems can in practice be averted by the lis pendens provisions in articles 21 and 22,[99] the problems as to forum shopping still remain in cases involving several contractual obligations of equal importance. While the European Court could instruct national courts to deny jurisdiction in cases of blatant forum shopping, the problem may be a necessary evil which must be accepted to obtain the other benefits of these articles.

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98. Firma LTN GmbH & Co., K.G. v. Eurocontrol, [1976] E. Comm. Ct. J. Rep. 1541, [1976 Transfer Binder] COMM. MKT. REP. ¶ 8377. *See* text accompanying notes 47-55 *supra*.

99. The "lis pendens" provisions in art. 21 does not mean that national courts must make a detailed examination to see if there are concurrent actions pending in other jurisdictions. The courts need only ascertain whether there are any concurrent actions if the circumstances are such as to lead the court to believe this may be the case. If the national court finds that a court from another jurisdiction was first seized of jurisdiction, the former court will stay proceedings and then ascertain whether the latter is entitled to hear both actions. If the answer is positive, the court will declare its lack of jurisdiction and dismiss the case. BULL. E. C. SUPP. 12/72 70-71. Most of the problem cases arising under article 5(1) with contracts that impose obligations of approximately equal importance will probably be solved under the "lis pendens" provisions of article 21 because it is unlikely second and later seized courts would want to draw fine distinctions as to exactly which contractual obligation was of greater importance.

The only problems created by article 5(3) and the decision of the European Court in *Mines de Potasse d'Alsace* will be those faced by the courts of Great Britain and the Republic of Ireland. On accession to the Convention, they will have to recognize the jurisdiction of the courts of the other contracting states even though that jurisdiction is exercised solely on the basis of the commission of the tort in the place of jurisdiction, and not the service of process on the defendant within the jurisdiction. These courts will have to develop a new approach to the issues of jurisdiction in the torts area of their conflict of laws system.

The problems involved in the jurisdiction by consent provisions in article seventeen and the special rules for insurance claims in articles seven through fifteen have to some extent been dealt with by the provisions of the Judgments Accession Convention as have the problems arising under the hire purchase and credit sale transactions. Nevertheless, a comprehensive definition of the term "consumer sale" is needed from the European Court.

There can be little doubt that both lawyers and litigants who are affected by the Convention, would prefer to operate under the conflict of laws rules of their own nations which, although complex, were nevertheless familiar. The Convention will involve more lawyers and litigants in the civil and commercial law procedures and substantive laws of other contracting member states. Although this may result in the confusion of lawyers, litigants and judges, the substance of the Convention is founded on entirely feasible and practical concepts. There can also be no doubt that "the free movement of judgments, rights and liabilities" are essential to the workings of a Common Market.