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A UNITED KINGDOM PERSPECTIVE ON THE PROPOSED HAGUE JUDGMENTS CONVENTION

*Paul R. Beaumont**

I. BACKGROUND TO THE UK INVOLVEMENT IN THE HAGUE JUDGMENTS CONVENTION NEGOTIATIONS

British involvement in the Hague Judgments Convention project was early and supportive. Following the U.S. proposal of 5 May 1992, the United Kingdom (UK) supported the decision of the Special Commission on General Affairs and Policy of the Conference which met from 1 to 4 June 1992, to establish a working group to examine the proposal. Indeed the UK sent two members to the Working Group of thirteen people. The UK members, appropriately, were drawn from England and Scotland, John Watherston of the Lord Chancellor's Department and Peter Beaton of Scottish Courts Administration. The appropriateness of involving a Scottish viewpoint within the UK delegation stems from the separate legal system in Scotland which has greater historical roots in the civil law than English law but, particularly since the union with England of 1707, has been significantly influenced by the common law. It has been suggested that Scotland may act as a "bridge" between the two main juridical groups represented in the Hague negotiations, *i.e.*, the Anglo-American common law and the civil law.¹ It may be significant that one of the most difficult issues in the Hague negotiations is resolving how to deal with conflicts of jurisdiction. The civil law doctrine of *lis pendens* is simple and certain but rather arbitrary. The Anglo-

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1. See Letter from Lord Mackay of Drumadoon, Lord Advocate, to Paul R. Beaumont (Apr. 18, 1997) (on file with author) (appointing present writer to the UK Advisory Committee).

American doctrine of *forum non conveniens* is complicated and discretionary but does allow for appropriate results. The problem with the juxtaposition just enunciated is that it is essentially false, not only because it is too simplistic but also because it ignores the historical reality. *Forum non conveniens* is a doctrine of Scottish private international law which can be traced back to before the union with England and developed into its modern form in the nineteenth century. It is the product of a mixed legal system which has been exported to the United States, England and other common law countries in the twentieth century. It was not introduced in Scotland to deal with "abuses of personal service of process carried out on the territory of the forum"² because Scotland never had such a basis of jurisdiction. This, unfortunately, is an example of the Hague Permanent Bureau transposing an English problem into a Scottish context and assuming that the Scottish doctrine was devised to deal with the English problem. A civilian mind assumes that the need to have discretion to decline to exercise jurisdiction must be because the country has over broad, or exorbitant, rules of jurisdiction. However, it may simply be the case that it is impossible to devise rules of jurisdiction which will always lead to an appropriate court hearing the case. Even the archetypically fair jurisdiction rule, the domicile of the defendant, the general rule of jurisdiction in the Brussels³ and Lugano Conventions,⁴ can lead to an inappropriate forum.⁵ If the Hague Convention is to be a success then stereotypical

2. HAGUE CONFERENCE ON PRIVATE INT'L LAW, NOTE ON THE QUESTION OF "FORUM NON CONVENIENS" IN THE PERSPECTIVE OF A DOUBLE CONVENTION ON JUDICIAL JURISDICTION AND THE ENFORCEMENT OF DECISIONS 2 (Prel. Doc. No. 3, 1996) [hereinafter FORUM NON CONVENIENS NOTE]. The Note cites the first edition of A. E. ANTON, PRIVATE INTERNATIONAL LAW (1967) as authority for the statement but does not give a page reference. It refers the reader "for details" to the document submitted by the UK in Annex D. See FORUM NON CONVENIENS NOTE, *supra*, at 2. Yet an analysis of that document and of the first edition of Anton's book will provide no support for the proposition of the Permanent Bureau.

3. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1972 O.J. (L 299) 32 [hereinafter Brussels Convention] (for the consolidated, current text of this convention see 1990 O.J. (C 189) 2, reprinted in 29 I.L.M. 1413).

4. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, 1988 O.J. (L 319) 9, reprinted in 28 I.L.M. 620 [hereinafter Lugano Convention].

5. See *In re Harrods (Buenos Aires) Ltd.* (No. 2), [1991] 4 All. E.R. 348 (Eng. C.A. 1990).

assumptions will have to be abandoned in the quest for a way of resolving conflicts of jurisdiction. At least in Scotland we are used to examining issues on their merits without too many legal preconceptions.

My own involvement with the proposed Hague Judgments Convention began with the UK Government asking me to prepare a paper on *forum non conveniens* in the UK for presentation to the meeting of the special commission in June 1996.⁶ Professor Trevor Hartley of the London School of Economics was also commissioned by the UK Government to prepare a paper on punitive or excessive damages for the same special commission.⁷ We were both invited to attend the special commission in June 1996 as part of the UK delegation. This may be a welcome sign of greater use being made of academic lawyers within the UK delegation at the Hague Conference. After the great years of Professors Anton and Graveson from the 1960s to the early 1980s, when UK academic lawyers played a prominent part in the creation of new Hague Conventions, quite a few Conventions were negotiated without a UK academic delegate and their involvement may have been in danger of becoming exceptional.⁸ The U.S. delegation has an admirable blend of legal civil servants, experienced practitioners and academics which could usefully be followed by other Member States.

Of course the constraints of cost and time may prevent some Member States from having a large mixed delegation. However, there is nothing to prevent Member States from establishing such a mixture in domestic advisory committees. Indeed this is what has happened in the UK. The Advisory Committee met for the first time on 15 May 1997. It was chaired by an English judge, Lord Saville, and its membership was comprised of one Scottish judge, Lord Penrose, one Eng-

6. See FORUM NON CONVENIENS NOTE, *supra* note 2, Annex D.

7. See generally HAGUE CONFERENCE ON PRIVATE INT'L LAW, NOTE ON THE RECOGNITION AND ENFORCEMENT OF DECISIONS IN THE PERSPECTIVE OF A DOUBLE CONVENTION WITH SPECIAL REGARD TO FOREIGN JUDGMENTS AWARDED PUNITIVE OR EXCESSIVE DAMAGES Annex D (Prel. Doc. No. 4, 1996). In 1998, Professor Hartley was added to the membership of the UK Advisory Committee.

8. For example, Professor David Hayton in the Convention on the Law Applicable to Trusts and on Their Recognition, *done* July 1, 1985 (visited Jan. 19, 1998) <<http://www.minbuza.nl/Vrdragen/verdr30.html>>.

lish academic, Dr. Peter North of Oxford University, and one English solicitor QC of great academic ability, Lawrence Collins, two English barristers, David Lloyd Jones and Toby Landau, two English civil servants, John Burnett of the Department of Trade and Industry and John Watherston of the Lord Chancellor's Department, one Scottish civil servant, Peter Beaton of Scottish Courts Administration, and one Scottish academic, the current writer. Oliver Parker of the Lord Chancellor's Department is the secretary to the committee. The Advisory Committee met for a second time on 10 June 1997 to advise the delegation to the special commission in June 1997 and to advise the Government in drawing up the UK negotiating position. The delegation in June 1997 was drawn from the membership of the Committee and comprised John Watherston (head), Peter Beaton and the present writer. The committee did not engage in widespread consultation at this early stage of the negotiations, though that is planned for 1998, but it did request views from the Association of British Insurers and the Confederation of British Industry (CBI). The reason for sounding out these groups so early in the process was the fact that one of the causes of the bilateral treaty between the UK and the United States of the 1970s running aground was the opposition of British industry and insurers. The concerns related to the risk of having to recognise U.S. judgments which, in their view, awarded excessive damages against British companies or insurers.⁹

9. The committee is privileged to have as a member Sir Peter North who was involved in the draft bilateral treaty between the United States and UK. For his original analysis see P.M. North, *The Draft U.K./U.S. Judgments Convention: A British Viewpoint*, 1 NW. J. INT'L L. & BUS. 219, 219-39 (1979), and for an updated version see PETER NORTH, *ESSAYS IN PRIVATE INTERNATIONAL LAW* 201-23 (1993). North's book summarizes the criticisms of British industry and commerce. See *id.* at 213-14. The hostile reaction in the 1970s to the draft Convention was such that the then Labour Government had discussions with the insurance industry and others and renegotiated the Convention. See Hansard, H.C. Official Report 952:321 (1978). In March 1979 the results of that renegotiation were put out to consultation in the UK by the Lord Chancellor's Department. See LORD CHANCELLOR'S DEPARTMENT, *PROPOSED CONVENTION BETWEEN THE UNITED KINGDOM AND THE UNITED STATES FOR THE RECIPROCAL RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN CIVIL MATTERS* (1979). In June 1980, the new Conservative Lord Chancellor, making a statement in the House of Lords on the outcome of the consultation, said: "A substantial proportion of the bodies which commented on the Consultative Paper felt that a Convention might be harmful in view of the very high damages awarded by American juries, especially in personal injury and

The June 1997 Position Paper of the Association of British Insurers on the Proposed Hague Convention on Jurisdiction and the Enforcement of Judgments¹⁰ gives the Association's preliminary views and the CBI associated itself with the April 1996 Position Paper entitled, "World-wide Convention on Jurisdiction, Recognition and Enforcement of Judgments" of the Union of Industrial and Employers' Confederations of Europe (UNICE). As the former is a document submitted to Government in confidence, one has to be careful about using it as a source. The impression from the two sources is that although the concerns of the 1970s are still present, such as the potential for excessive damages being awarded and the unpredictability of juries, there is a greater willingness to try to achieve a solution to these problems. British industry and insurers may be more tempted by the Hague Convention negotiations than they were by the bilateral negotiations with the United States of the 1970s because it holds out the prospect of solving some of their concerns about U.S. jurisdiction at the source. A traditional recognition and enforcement convention, a single convention, cannot eliminate exorbitant jurisdictional bases. Thus, in the 1970s UK industry saw that the single convention on offer did not reduce their exposure to exorbitant bases of jurisdiction in the United States. Therefore, it could only be of assistance to those companies who had very few assets in the United States and could not have awards enforced against them there. However, if the Hague manages to agree on a double or mixed convention then it will eliminate exorbitant jurisdictions in all Contracting States, at least where the defendant has its domicile or habitual residence in one of the Contracting States, and greatly reduce the potential for forum

product liability cases; and that it would not be possible to devise any means of mitigating the enforcement of such judgments which would not be excessively difficult to operate in practice." Thus, the Government decided "not to pursue negotiations on a draft Convention." Hansard, H.L. Debs. 410:1864 (June 26, 1980).

10. Submitted to the Department of Trade and Industry for the UK Advisory Committee, not in the public domain.

shopping. Given that the United States has initiated the moves towards a Hague Judgments Convention, it is strongly hoped that the United States will become a contracting party to the Convention. Therefore, UK companies see a real prospect of being protected from what they perceive to be exorbitant bases of jurisdiction being used by at least some U.S. state courts.

Another factor which has changed since the 1970s is that industry in the UK has become much more used to the idea of the international regulation of jurisdiction rules through the Brussels and Lugano Conventions which came into force in the UK in 1987 and 1992 respectively.¹¹ The move towards a single market and free movement of judgments in Europe has doubtless changed perceptions in British industry. The progressive liberalisation of the global economy through the General Agreement on Tariffs and Trade¹² and the setting up of the World Trade Organisation all point towards the need to regulate international jurisdiction and thereby provide a court network, to match or better the existing arbitration system, on a global scale.

The UK finds itself at the current time responding to the opportunity to have negotiations to revise the Brussels and Lugano Conventions at the same time as it develops its negotiating position at the Hague. Legally the two issues are closely linked because they involve the detailed scrutiny of what the rules of international jurisdiction should be, how to resolve conflicts of jurisdiction when the Convention provides litigants with a choice of forum, and how to provide simple but fair rules for recognition and enforcement of judgments. Politically they are linked because at least some of the Member States of the European Union (EU) like to enter into international nego-

11. For a comprehensive treatment of these Conventions, including the texts of the two Conventions, see ALEXANDER E. ANTON & PAUL R. BEAUMONT, *CIVIL JURISDICTION IN SCOTLAND: BRUSSELS AND LUGANO CONVENTIONS* (2d. ed. 1995).

12. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194.

tiations with a common position.¹³ Formal common positions

13. Article K.5 of the Treaty on European Union provides that "Within international organisations and at international conferences in which they take part, member-States shall defend the common positions adopted under the provisions of this Title." TREATY ON EUROPEAN UNION, Feb. 7, 1992, tit. VI, art. K.5, para. 1, O.J. (C 224) 1, 98 (1992), [1992] 1 C.M.L.R. 719, 737 (1992) [hereinafter TEU]. The relevant title includes judicial co-operation in civil matters. *See id.* art. K.1(6). However, a common position can be agreed only by unanimity and therefore any one Member State can prevent the European Union (EU) from agreeing to a common position *vis-à-vis* the negotiations at the Hague. *See id.* art. K.4(3). When the Treaty of Amsterdam enters into force, measures in the field of "judicial co-operation in civil matters" will cease to be part of the intergovernmental pillar of the EU concerning Justice and Home Affairs currently in Article K of the TEU. *Id.*; *see also* Consolidated Version of the Treaty on European Union, Oct. 2, 1997, tit. VI, art. 29, 37 I.L.M. 56, 73-74 (incorporating Treaty of Amsterdam amendments). That pillar will be reduced to dealing with criminal matters. Instead civil judicial cooperation comes within the TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Feb. 7, 1992, 1992 O.J. (C 224) 1, [1992] 1 C.M.L.R. 573 (1992) [hereinafter EC TREATY], as part of an effort to establish progressively "an area of freedom, security and justice." Consolidated Version of the Treaty Establishing the European Community, Oct. 2, 1997, tit. IV, art. 61, 37 I.L.M. 79, 89-90 [hereinafter Amended EC Treaty] (incorporating Treaty of Amsterdam amendments). The Council's power to legislate is set out in new Article 65 of the EC Treaty:

Measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Article 67 and insofar as necessary for the proper functioning of the internal market, shall include:

- (a) improving and simplifying:
 - the system for cross-border service of judicial and extrajudicial documents;
 - cooperation in the taking of evidence;
 - the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases;
- (b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction;
- (c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.

Id. art. 65.

Article 67 provides for the Council to act by unanimity within the first five years after the entry into force of the Treaty of Amsterdam and that the Commission has a shared right of initiative with the Member States. *See id.* art. 67(1). Thereafter, the Commission is given the sole right of initiative and the Council can take a unanimous decision to apply the co-decision procedure with the European Parliament to the measures to be adopted under Article 65. *See id.* art. 67(2).

It is well established that the competence of the Community to enter into international commitments can be implied from the express provisions of the Treaty. In particular, "whenever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community is empowered to enter into the international commitments necessary for attainment of that objective even in the absence of an express provision to that effect." Opinion 2/94, 1996 E.C.R. I-1759, I-1787, [1996] 2

of the EU at the Hague Conference on the proposed Hague Convention may be restricted to a general welcome for the idea¹⁴ and are unlikely to amount to an agreed negotiating

C.M.L.R. 265, 289-90 (1996). For the European Community to have an external competence in the matters negotiated at the Hague, based on Article 65 of the EC Treaty, a view will have to be taken that the Convention is "necessary for the proper functioning of the internal market." Amended EC Treaty, *supra*, art. 65. This would be a very bold decision given that the phrase used is the "internal market" and not the "common market." *See id.* The operation of the internal market, in the context of jurisdiction and recognition and enforcement of judgments, is largely regulated by the Brussels and Lugano Conventions. It can be said, however, that the free flow of trade within the Community may be damaged by an inability to bring actions against, or recognise and enforce foreign judgments against, persons not domiciled in the Community who are trading in it. At first sight this may seem an unrealistic concern in that the Member States are free to continue to apply exorbitant rules of jurisdiction against such persons but it may be that at least some Member States exercise restraint in such situations either by having no exorbitant rules (e.g., Spain) or by using *forum non conveniens* (e.g., Ireland and UK). In any case the new Article 68 of the EC Treaty will allow the Council, the Commission or a Member State to request the Court of Justice to give a ruling on a question of interpretation of this new title in the EC Treaty or of acts of the institutions of the Community based on the title. *See id.* art. 68. It is therefore theoretically possible that if the Community were to put forward a common position in the Hague negotiations it could be interpreted by the European Court of Justice (ECJ) under Article 68 or challenged under what was Article 173 (after the Treaty of Amsterdam enters into force it will be Article 230). *See id.*; EC TREATY art. 173. The idea of a common position being agreed on substantive issues is rather fanciful because unanimity will apply in the Council until long after the Hague Convention is concluded in the year 2000 and it is very difficult to conceive of a situation where the Council, Commission or a Member State would want to get a judicial interpretation, or challenge the validity, of a measure taken *vis-à-vis* the Hague Convention. The only other possible internal competence in the EC Treaty which might provide a legal basis for Community competence in the Hague is Article 235 of the EC Treaty, which after the Treaty of Amsterdam comes into force will be Article 308 of the EC Treaty. *See id.* art. 235. This legal basis requires unanimity in the Council and it is clear from Opinion 2/94, cited above, that the ECJ recognises an outer limit to the scope of that Article. *See generally* Paul Beaumont, *The European Community Cannot Accede to the European Convention on Human Rights*, 1 EDINBURGH L. REV. 235 (1997); *see also* ENCYCLOPEDIA OF EUROPEAN UNION LAW: CONSTITUTIONAL TEXTS § 12.2040A (1996) (commentary by Beaumont and Moir on Article 235 of the EC Treaty); Alan Dashwood, *The Limits of European Community Powers*, 21 EUR. L. REV. 113 (1996). Politically, unanimity in the Council agreeing on Community competence in the Hague negotiations is totally unforeseeable. Legally, it would be difficult to argue that accession to the Hague Convention is "necessary" to achieve one of the Community's objectives and therefore it would seem that Article 235 (308) is not a competent legal basis.

14. For example, the statement by the expert for France (when it held the Presidency of the EU) to the Special Commission on General Affairs and Policy of the Hague Conference in June 1995, referred to in CATHERINE KESSEDJIAN, *INTERNATIONAL JURISDICTION AND FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MAT-*

position on any proposed rule within the Convention. The UK, and probably several other Member States, would resist an attempt to fetter their discretion to negotiate the substantive issues at the Hague. Nonetheless, the overlap between the personnel revising the Brussels and Lugano Conventions and those negotiating the Hague Convention mean that some cross-fertilisation of ideas is inevitable. In this respect, the Hague Conference is helped by the fact that it has been given observer status at the Brussels/Lugano revision negotiations, something the UK strongly advocated. It may, therefore, be helpful to explain how revision of the Brussels/Lugano Conventions has come to the fore at a time when the Hague has already embarked on the work on a new worldwide Convention. Conspiracy theorists may be concerned that this is an EU attempt to preempt the work at the Hague by producing a regional revision which becomes a take it or leave it package on the world stage. Our examination of the process will reveal that this was not an EU sponsored revision. There should not be any real danger of EU Member States insisting that positions adopted in the Brussels/Lugano framework must be followed in the Hague. Rather there is a fear amongst some parties to the Brussels/Lugano negotiations that the European model might somehow be watered down by too much attention to what is negotiated in the framework of the Hague. Let us hope that the two negotiations will help each other to arrive at better solutions. It would, for example, make a great deal of sense if the Brussels/Lugano provisions on insurance were reexamined to ensure that the protective jurisdiction is restricted to consumers even though this is not currently on the agenda for revision of Brussels/Lugano.

II. REVISION OF THE BRUSSELS AND LUGANO CONVENTIONS: BACKGROUND TO THE NEGOTIATIONS

A. *Standing Committee of the Lugano Convention 3rd Session, 2-3 September 1996*

Revision of the Brussels and Lugano Conventions did not figure in the Council Resolution establishing the list of priorities for cooperation in the field of justice and home affairs for

the period 1 July 1996 to 30 June 1998, but the General Secretariat of the Council suggested that it should become a priority item in a note to Steering Group III of 8 January 1997.¹⁵ The Secretariat gave four reasons for suggesting this change of policy. First, the Austrian and Finnish delegations made specific proposals for revision during the negotiations of the Convention for the Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the Brussels Convention.¹⁶ That Convention was signed in Brussels on 29 November 1996¹⁷ and makes some changes to the Annexed Protocol but no substantive changes to the Brussels Convention itself. Thus, the Austrian and Finnish proposals were still on the table. Second, the German delegation had indicated that certain provisions of the Brussels Convention could be clarified or amended (*e.g.*, Articles 5(1) and (3)).¹⁸ Perhaps significantly the German proposal had been put formally at the Third meeting of the Lugano Convention Standing Committee in September 1996 rather than to a meeting of a Council Working Party. Third, the protection of workers in the framework of the provision of services should be considered in the Brussels Convention following the adoption of the Council Directive concerning the posting of workers in the framework of the provision of services. Fourth, the Third Lugano Convention Standing Committee, meeting in September 1996, agreed to revise the Lugano Convention and requested Member States to submit their proposals for revision to the depositary State (Switzerland) by the end of March 1997. Switzerland would assemble the replies and forward them to all the members of the standing committee with a view to the 4th Standing Committee meeting in September 1997 in Lugano holding "an exchange of views on those proposals."¹⁹ Under Article 4 of Protocol 2 to the Lugano Convention the Standing Committee has the power, in the light of an exchange of views at the committee, to "examine the appropriateness of . . . a revision of the Conven-

15. See 12644/96 JUSTCIV 100 (Jan. 8, 1997).

16. Convention on the Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden, Nov. 29, 1996, 1997 O.J. (C 15) 1.

17. As of October 1997, however, the convention had been ratified by only the Netherlands.

18. See generally Brussels Convention, *supra* note 3, arts. 5(1), (3).

19. 12644/96 JUSTCIV 100, at 2 (Jan. 8, 1997).

tion and make recommendations.”²⁰ Although not stated by the Council Secretariat as a reason for revising the Brussels Convention it is noteworthy that the Summary Report of the meeting of the Lugano Standing Committee in September 1996 records that:

The Standing Committee wished that the appropriateness of . . . a revision of both the Brussels and Lugano Conventions might be examined. This revision would be justified on the one hand by the entering into force of the Convention on the accession of Austria, Finland and Sweden to the Brussels Convention and by the joint declaration annexed to this Convention and on the other hand by the necessity, admitted during the discussions, to ensure as extensive a similarity as possible between both the Brussels and Lugano Conventions. The Members of the Standing Committee considered that it would be desirable to organize, for instance in 1998, a Diplomatic Meeting on the revision of both Conventions.²¹

Given that of the eighteen Contracting States to the Lugano Convention only three are not currently members of the EU, *i.e.*, Iceland, Norway and Switzerland, nearly all the members of the Standing Committee were representatives of the fifteen Member States of the EU. In addition, the Commission, Council Secretariat and the Court of Justice are all observers at the Standing Committee. Thus, it was perfectly natural for the EU States to suggest that the Brussels Convention be revised in tandem with the Lugano Convention. However, the sensibilities of the Council Secretariat and the Commission may well have been affected by the fact that EU policy was being made on the hoof in a non-EU forum.

*B. Council Secretariat Note of 8 January 1997*²²

The Council Secretariat, in its note of 8 January 1997, was trying to create EU policy through the proper channels and assert the EU's right to play the lead role in the revision of Brussels and Lugano. This can be seen in the wording of its proposal to set up an ad hoc working party: “the Secretariat is

20. Lugano Convention, *supra* note 4, Protocol 2, art. 4(2).

21. Summary Report of the Standing Committee of the Lugano Convention, 3d Sess., at 3 (Sept. 2-3, 1996) (on file with author).

22. See 12644/96 JUSTCIV 100 (Jan. 8, 1997).

proposing to set up an ad hoc working party composed of experts from the Member States and *extended to include* experts from the EFTA Member States which are members of the Lugano Convention. *The Commission would be fully involved in the discussions.*²³

The Council Secretariat also suggested that meetings "would generally be in Brussels, at the premises of the Council General Secretariat. In specific instances to be determined, meetings could also be held in one of the Lugano States."²⁴ This grudging concession to the possibility of a meeting in a non-EU State was accompanied by an assertion that the meetings in Brussels be chaired by a representative of one of the EU Member States and that only meetings held in one of the Lugano States would be chaired by a representative of a non-EU member. The Council Secretariat suggested that meetings should be held at regular intervals, for example every three months, and that each meeting would last three or four days. Observer status could be accorded to States which had been invited to accede to the Lugano Convention (currently Poland, though both the Czech Republic and Hungary are being considered for accession) and to any States applying for accession to the EU or European Free Trade Association (EFTA). No mention was made of the Hague Conference on Private International Law.

The Council Secretariat asked Member States of the EU to supply it with "concrete proposals for amendments to the Brussels Convention, if possible by the end of February or beginning of March 1997."²⁵ The proposals would then be discussed at an EU meeting in March 1997 before Member States send their proposals "for the revision of the Lugano Convention" to Switzerland.²⁶ Apart from this being a ludicrously short time frame, given that the request is dated 8 January 1997, it is also a clear attempt to marginalise the Swiss role to one of dealing with the revisions of the Lugano Convention. This is confirmed by the Secretariat's statement that "[t]he first exchange of views on the expediency of revising the Lugano Con-

23. *Id.* at 4 (emphasis added).

24. *Id.*

25. *Id.* at 5.

26. *Id.*

vention would be in September 1997."²⁷ Hence, the Lugano Standing Committee meeting was to be confined to peculiarly Lugano matters and not be the first stage in the negotiations of the revision of the Brussels and Lugano Conventions together. This was not what a number of delegations who went to Lugano in September 1997 expected. In particular, some of the Scandinavian countries and the UK had come expecting to begin work on revising the Brussels Convention in tandem with the Lugano Convention. The UK sent a four-person delegation²⁸ instead of the usual one person at Lugano Standing Committees. The meeting was scheduled to last for the whole week, implying substantive discussion on both Brussels and Lugano, but during the course of the week we were informed that the meeting would finish on Thursday. It was clear that a number of other delegations did not want to discuss the Brussels Convention until negotiations moved back to Brussels within the framework of an EU body. This was never stated publicly but it was the only tenable reason for finishing the meeting early and forcing everyone to rearrange their travel arrangements. Some delegates had to suffer the "hardship" of a free Friday in Lugano because they could not change their flights.

The Council Secretariat envisaged that after the Standing Committee meeting in September 1997 in Lugano, the Council of the EU would set the revision of the Brussels and Lugano Conventions as a priority and Coreper would set up the working party of experts. It is significant that it planned the ad hoc working group as an EU body. Doubtless Coreper would simply accept the suggestions of the Governments of Iceland, Norway and Switzerland as to who their experts should be on the ad hoc group, but formally the EU is in control. One last sign of the Council Secretariat's attempt to separate the Brussels and Lugano revision was the idea that the signature of the revised Brussels Convention should be done in an EU Member State and the signing of the Lugano Convention revision in a non-EU Member State.

27. *Id.*

28. The delegation was composed of John Watherston and Oliver Parker of the Lord Chancellor's Department, Laura Dolan of Scottish Courts Administration and the present author.

C. Meeting between the Council Presidency (the Netherlands) and Switzerland of 27 January 1997²⁹

The Council Secretariat's position was modified slightly after a meeting between the Council Presidency (the Netherlands) and Switzerland on 27 January 1997. The deadline for submitting comments to Switzerland on the revision of the Lugano Convention was extended to 15 May 1997. More significantly perhaps, the proposed "ad hoc working party" is now referred to as the "joint working party." Switzerland wanted the September 1998 meeting of the working party to take place in a non-EU State, possibly in Lugano, and the final diplomatic conference at which the revised Brussels and Lugano Conventions would be signed to be held in the same place. Switzerland also favoured a single person to chair the meetings of the working party, appointed by mutual consent. Finally, Switzerland suggested that representatives of the Hague Conference on Private International Law should have observer status.

D. Meeting of the Working Party on Extension of the Brussels Convention of 26-27 May 1997³⁰

The Working Party on the Extension of the Brussels Convention met in Brussels on 26 and 27 May 1997 and drafted terms of reference for the revision of the Brussels and Lugano Conventions in light of the proposals for change which had been submitted by Member States prior to that date. This did not take the UK's final proposals into account because they were not submitted until July 1997.³¹ The general guidelines agreed by the Working Party were very anodyne:

1. During the negotiations the Working Party considers that all aspects of revision should respect the basic principles of the Brussels Convention.
2. The revision exercise should take into account the case-law of the Court of Justice although the process of revising the Brussels Convention should not necessarily constitute consolidation of that case-law.
3. Any proposal relating to revision should be examined with a view to its potential usefulness in the operation of the Con-

29. See 5618/97 JUSTCIV 8 (Feb. 12, 1997).

30. See 8158/1/97 JUSTCIV 45 (June 12, 1997).

31. See 8157/97 JUSTCIV 44 (July 29, 1997).

vention.

4. Moreover, preparations should be conducted with a view to the revision exercise starting in December 1997 or January 1998 and being finalized, if possible, at the end of 1998 or the beginning of 1999.³²

The first guideline begs the question: what are the "basic principles" of the Brussels Convention? There is no clear answer to that question. Clearly the idea of a double convention is not in question but any of the rules of jurisdiction are open to reexamination given that several delegations have questioned the main connecting factor, domicile of the defendant, which not only provides the general rule of jurisdiction in Article 2 but helps to define the personal scope of the Convention. Habitual residence is favoured as a connecting factor for natural persons by Austria, France, Germany, the EU Commission, Finland, Denmark, Switzerland and Italy.³³ The second guideline makes the obvious point that the delegations must take account of the more than ninety judgments of the European Court of Justice (ECJ) on the interpretation of the Brussels Convention.³⁴ The third point is a favourite of Community lawyers: the notion of the "effet utile." The problem is that there is no objective way of assessing the potential usefulness of a particular proposal. Therefore, the "potential usefulness" of the guideline has to be seriously questioned. In relation to the fourth guideline, one has to be a little sceptical of projected dates for concluding negotiations in the EU. The negotiations on the proposed Brussels II Convention on Jurisdiction, Recognition and Enforcement of Judgments in Matrimonial Matters began in June 1994 with the hope of having a new Convention opened for signature by the middle of 1995.³⁵ As of late 1997,

32. 8158/1/97 JUSTCIV 45, Annex (June 12, 1997).

33. See *id.* This document contains the proposals submitted by delegations with a view toward the revision of the Brussels and Lugano Conventions which had been received by the Council Secretariat prior to that date. Belgium and the UK have an open mind on the proposed change from domicile to habitual residence and the Netherlands would like to see an autonomous definition of domicile in the Convention.

34. The cases up to 1994 are noted, with the key parts of the judgments in full and a brief commentary, and grouped according to the article of the Convention in issue in Appendix 2 to ANTON & BEAUMONT, *supra* note 11, at 429-592. The articles of the Convention are analyzed in the main part of the text, taking account of the case law, in subject matter order.

35. See Paul Beaumont & Gordon Moir, *Brussels Convention II: A New Private*

the draft convention is still being negotiated.³⁶

E. Standing Committee of the Lugano Convention, 4th Session, 15-18 September 1997

1. General Guidelines for the Joint Working Party

It was recognised that these guidelines might be modified after the meeting of the Standing Committee in Lugano in September 1997, but it was implied that any such changes would relate only to matters peculiar to the Lugano Convention. In fact the Standing Committee suggested only one change which does reflect a matter peculiar to the Lugano Convention. Unlike the Brussels Convention, no reference to the ECJ is possible in Lugano Convention cases. Protocol 2 to the Lugano Convention requires national courts to consider the case law of all national courts in other Contracting States when interpreting and applying the Lugano Convention.³⁷ General guideline 2 was amended to read: "The case law of the European Court of Justice as well as of the national courts referred to in Article 2 of Protocol 2 have to be taken into account."³⁸ It was accepted in the Standing Committee that the working party should not be required to consider all judgments of national courts concerning the Lugano Convention, even though Article 1 of Protocol 2 requires this, because it would be impractical. Instead, the Working Party need only consider those national decisions which are transmitted to the designated central body, the Registrar of the ECJ, in terms of Article 2 of Protocol 2, i.e., decisions of courts of last instance and "judgments of particular importance which have become final."³⁹ Significantly, this permits the Working Party to take account of such national decisions whether they concern the Lugano or

International Law Instrument in Family Matters for the European Union or the European Community?, 20 EUR. L. REV. 268, 269 (1995).

36. For a recent analysis of the draft Convention see the Report of the House of Lords Select Committee on the European Communities, Brussels II: The Draft Convention on Jurisdiction, Recognition and Enforcement of Judgments in Matrimonial Matters, Session 1997-98, 5th Report (HL Paper 19).

37. See Lugano Convention, *supra* note 4, Protocol 2, art. 1.

38. Summary Report of the Standing Committee of the Lugano Convention, 4th Sess., Sept. 15-18, 1997, at 6 [hereinafter Summary Report of the Fourth Session] (on file with author).

39. Lugano Convention, *supra* note 4, Protocol 2, art. 2(1).

Brussels Convention.

2. List of Priorities for the Revision of the Conventions

More contentious at the 1997 Standing Committee was the list of priorities for revision of the Brussels and Lugano Conventions which had been drawn up by the Working Party. The Working Party's list of Articles was as follows:

- Articles 2, 52 and 53
- Articles 4 and 59
- Article 5(1) and (3)
- Article 6(1)
- Articles 13, 14 and 15
- Article 16.1
- Article 20(2) and (3)
- Articles 21 and 22 (and their relationship with Article 17)
- Article 24
- Articles 27 and 28
- Articles 31 et seq.
- Article IV of the Protocol
- the collective interests of consumers⁴⁰

Changes were made to accommodate Switzerland and the EU Member States, including the UK, who had not submitted their proposals for reform in time for the Working Party meeting in May 1997. The UK had to repeatedly press for the inclusion of the articles it included in its proposals for reform⁴¹ which were not already on the list, *i.e.*, Articles 17, 18, 19 and 38. In the end, all of them were included apart from Article 18 which was subsumed within "[r]eview of the whole text of the Conventions in regard to the wording and other technical and linguistic aspects."⁴² The other items added were as follows:

- Article 1
 - personal territorial scope of application, especially in regard to Articles 17, 18, 19 and 20
 - a qualification to Articles 31 et seq. as follows (whereby the project for an European enforcement order should be taken into account)

40. 8158/1/97 JUSTCIV 45, Annex (June 12, 1997).

41. See 8157/97 JUSTCIV 44 (July 29, 1997).

42. Summary Report of the Fourth Session, *supra* note 38, at 6.

the accession procedure (articles 62 and 63)⁴³

The last point about the accession procedure is peculiar to the Lugano Convention.

3. Composition of and Procedure for the Joint Working Party

The Summary Report of the Standing Committee records that there was a:

[G]eneral feeling that in the first meeting of the joint Working Group an open exchange of views should be possible, without the delegations being bound to their positions. It was stressed that any list of articles or issues to be reviewed should not be regarded as exhaustive and the order of the articles wouldn't express an order of priorities. It was considered advisable to approach the future work based on issues rather than on articles.⁴⁴

The UK Presidency of the Council of the EU will have the opportunity to shape this more issues based approach at the first meeting of the joint Working Party in Brussels in January 1998 and then at the next two meetings in April and June 1998. Thereafter, a non-EU Member State will host the September meeting. The Swiss desire for one individual to chair the meetings was supported and Gustav Möller of Finland will be Chairman, with Mrs. Jametti Greiner of Switzerland as Vice Chairman, and Fausto Pocar of Italy (University of Milan) as rapporteur. It is noticable that these three people also play important roles in the negotiations at the Hague on the worldwide judgments convention.⁴⁵

43. *Id.*

44. *Id.* at 7.

45. Professor Pocar is one of the co-rapporteurs at the Hague Conference on Private International Law Special Commission on the worldwide judgments convention (as appointed at the Special Commission in June 1997). Judge Möller chaired the initial working group that met at the Hague from 29-31 October 1992 to look into the U.S. proposal for a Hague Judgments Convention and the special commissions which met in June 1994 and June 1996 (in June 1997 he was the Finnish delegate at the special commission and he was designated as chairman of the drafting committee). Mrs. Jametti Greiner has been part of the Swiss delegation at the special commissions.

4. Observer Status at the Joint Working Party

This brings us neatly to one of the contentious points at the Lugano meeting, the question of observer status for representatives of the Hague Conference on Private International Law. A very large majority was in favour of this, but "some delegations" were against (actually two delegations spoke against). When one member of the UK delegation suggested that we might be able to learn something from the ongoing negotiations at the Hague (e.g., on insurance contracts) this prompted, to quote the Summary Report, "[a]n animated exchange of views."⁴⁶ Some people took the view that the Brussels Convention is part of European integration and goes deeper than anything which will be agreed to at the Hague, so ideas from the latter should not be brought in to water down its content. This rather political conception of the Brussels Convention fails to recognise that experts in private international law meeting in the Hague might come up with a new basis for contract jurisdiction which would be a technical improvement on Article 5(1) of the Brussels Convention or may repackage the protective jurisdictions in a simpler and more intellectually defensible way than the present provisions in Articles 7 to 15 of the Brussels Convention.⁴⁷ The Summary Report could only limply conclude that the work of the Hague and other bodies "could not be ignored."⁴⁸

The admission of Poland as an observer to the Joint Working Party was "very strongly supported" but less support was given to observer status for the Czech Republic and Hungary.⁴⁹

5. Substantive Progress on Reform of the Lugano Convention

a. Article 5(1)

There was "general agreement" that the text of Article 5(1) in the Brussels Convention on individual employment con-

46. Summary Report of the Fourth Session, *supra* note 38, at 7.

47. See generally Brussels Convention, *supra* note 3, arts. 5(1), 7-15.

48. Summary Report of the Fourth Session, *supra* note 38, at 7.

49. *Id.* at 5. At the first meeting of the Joint Working Party in Brussels in January 1998, the Hague Conference on Private International Law and Poland were present as observers.

tracts, as inserted by the 1989 Accession Convention, was preferable to the text in the Lugano Convention of 1988. The two Conventions diverge where the employee does not habitually carry out his work in one country. The Lugano Convention provides that the place of performance is the place of business through which the employee was engaged.⁵⁰ This ground of jurisdiction can be relied upon by the employer. Taking account of the decision of the ECJ in *Six Constructions Ltd v. Humbert*,⁵¹ the negotiators of the 1989 Accession Convention removed the possibility of the employer invoking this ground of jurisdiction. Where the employee does not habitually carry out his or her work in one country the employee, and him or her only, can invoke the jurisdiction of the courts for the place where the business which engaged the employee was or is now situated.

It is worth noting that the situation where the employee does not habitually carry out his work in one country will arise relatively rarely given the broad construction given to that concept by the ECJ in *Rutten v. Cross Medical Ltd*.⁵² The fact that the employee worked for almost two-thirds of his time in one Contracting State and that he had his base there was sufficient to mean he habitually carried out his work there. The definition given by the Court was that: "the place where the employee has established the effective centre of his working activities and where, or from which, he in fact performs the essential part of his duties *vis-à-vis* his employer."⁵³

The Standing Committee Summary Report records that: "the opinion was expressed that article 5(1) ought to be reviewed with respect to the directive on detached workers."⁵⁴ The relevant directive is Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.⁵⁵ Article 6 of the Directive provides that:

In order to enforce the right to the terms and conditions of employment guaranteed in Article 3, judicial proceedings may

50. See Lugano Convention, *supra* note 4, art. 5(1).

51. Case 32/88, 1989 E.C.R. 341.

52. Case C-383/95, 1997 E.C.R. I-57.

53. *Id.* at I-77.

54. Summary Report of the Fourth Session, *supra* note 38, at 5.

55. Directive 96/71/EC, 1997 O.J. (L 18) 1.

be instituted in the Member State in whose territory the worker is or was posted, without prejudice, where applicable, to the right, under existing international conventions on jurisdiction, to institute proceedings in another State.⁵⁶

The Directive must be implemented into national law by 16 December 1999 at the latest. For purposes of the Directive, "posted worker" means a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works."⁵⁷

b. Article 17, Final Paragraph

The Standing Committee favoured the Brussels Convention provision on prorogation in individual employment contracts as it is more favourable to the employee than the Lugano Convention provision. The latter only permits prorogation agreements after the dispute has arisen, whereas the former restricts the employer to such post-dispute agreements but permits the employee to invoke pre-dispute clauses if they enable him or her to choose a place other than provided by Articles 2 and 5(1).

c. Article 16(1)(b)

The Standing Committee had a long discussion on this topic. The division was classically North-South. The Northern States preferred the Lugano Convention version which allows a broader exception to the exclusive jurisdiction of the place of immoveable property for tenancies of immoveable property of less than six months duration. Under the Lugano Convention it is sufficient if the tenant is a natural person and if both parties are not domiciled in the place where the property is situated, whereas under the Brussels Convention the landlord must also be a natural person and both persons must be domiciled in the same Contracting State.⁵⁸ The Southern States, including France, are anxious to preserve the exclusive jurisdiction of the situs because of the large number of holiday tenancies that

56. *Id.* art. 6.

57. *Id.* art. 2(1).

58. Compare Brussels Convention, *supra* note 3, art. 16(1)(b), with Lugano Convention, *supra* note 4, art. 16(1)(b).

they have. They can do this in relation to the Lugano Convention by entering a reservation saying they will not recognise or enforce a decision on a tenancy of immovable property if the property concerned is situated in its own State:⁵⁹ no such reservation is possible for the Brussels Convention. It has to be acknowledged that the practical difference between the two provisions is relatively slight. If the tenancy agreement is part of a broader package comprising a contract for services, such as that provided by a travel agent, then it falls outside the scope of Article 16(1) anyway.⁶⁰ The Standing Committee Summary Report suggests that "perhaps both texts ought to be revised in order to come to a parallel solution."⁶¹

d. Article 28(2) Lugano

Article 28 of the Lugano Convention permits recognition of a judgment to be refused in any case provided for in Articles 54B(3) or 57(4).⁶² Article 54B(3) allows EFTA States not to recognise judgments given in EU States against people domiciled in an EFTA State if the Lugano rules of jurisdiction were not applied.⁶³ At the Standing Committee, "a number of delegations expressed the view that this difference between both Conventions should be put aside, though it was noted that a final decision only can be taken when the results of the revision will be known."⁶⁴ The concern underlying this provision is that courts in Brussels Contracting States might mistakenly apply the Brussels Convention to cases where the Lugano Convention should be applied. This concern could be eliminated if the differences in jurisdiction rules between the two Conventions are removed by the revision of the two conventions but might increase if they were to diverge further. It seems highly probable that the differences will diminish or be eliminated and that Art. 54B(3) can be deleted. On the other hand, the general view was that Article 57(4) should be maintained,

59. In fact only France and Greece have made such a reservation to the Lugano Convention. However, it seems Poland will follow suit when it becomes a Contracting State.

60. See Case C-280/90, *Hacker v. Euro-Relais GmbH*, 1992 E.C.R. I-1111, I-1132.

61. Summary Report of the Fourth Session, *supra* note 38, at 5.

62. See Lugano Convention, *supra* note 4, art. 28.

63. See *id.* art. 54B(3).

64. Summary Report of the Fourth Session, *supra* note 38, at 5.

"but that it could be advisable to redraft the wording."⁶⁵ This permits the non-recognition of judgments given under other conventions, for example maritime conventions, where the State addressed is not a Contracting party to that convention and the person against whom recognition is sought is domiciled in that State. If it is retained in the Lugano Convention then logically it should be included in the Brussels Convention. It really makes no sense to require States to recognise judgments against their own domiciliaries (or people who habitually reside there) based on jurisdiction rules contained in conventions to which the recognising State is not a party.

e. Articles 62 and 63 Lugano

Following a proposal from the Netherlands, the Standing Committee underlined that the revision of Article 62 should make clear that in general there was no need for an accession convention when a new State accedes to the Lugano Convention. The Dutch proposal also envisages a change to majority rule for the invitation to accede (though of course a Contracting State will remain free to prevent the application of the Convention to relations between it and the acceding State). The proposal also codifies a more active role for the sponsoring State in the accession process.

F. *United Kingdom Consultation Paper of April 1997*⁶⁶

In December 1996 the Lord Chancellor's Department and Scottish Courts Administration commissioned the present writer to prepare a draft consultation paper on the revision of the Brussels and Lugano Conventions. The draft was submitted at the beginning of April and sent out shortly afterwards virtually unchanged.⁶⁷ Responses were requested by 30 May 1997, a regrettably short time scale necessitated by the fact that the UK submissions had been due in by 15 May. Over thirty responses were submitted. Those issues on which there

65. *Id.* at 6.

66. LORD CHANCELLOR'S DEPARTMENT & SCOTTISH COURTS ADMINISTRATION, CONSULTATION PAPER, THE OPERATION OF THE BRUSSELS AND LUGANO CONVENTIONS (1997) [hereinafter UK CONSULTATION PAPER].

67. *See id.* The present author and his excellent research assistant, Peter McEleavy, did the research on the paper and wrote it.

was a broad consensus were put forward in the UK submission of July 1997.⁶⁸ There are other issues where the response was mixed (e.g., whether there should be a new jurisdiction for restitution)⁶⁹ and some where the consensus was against a particular reform (e.g., the deletion of Article 5(1)).⁷⁰

G. UK Proposals for Reform

Apart from aligning the Brussels and Lugano Conventions, the UK has relatively few substantive proposals for reform. It would like to make it explicit that "threatened wrongs" are included within the scope of Article 5(3) and thereby allow injunctions to be granted in the place where the plaintiff is facing the harm in question.⁷¹ It is proposed to consolidate the decision of the ECJ in *Kalfelis v. Schröder*⁷² into a restriction on the scope of Article 6(1) so that there is at least a real connection between the disputes involving the various defendants.⁷³ The UK wants to amend Article 17 of the Conven-

68. See 8157/971 JUSTCIV 44 (July 29, 1997).

69. See UK CONSULTATION PAPER, *supra* note 66, at 15-16. This issue has not been addressed in any of the Government submissions to the revision of the Brussels and Lugano Conventions, but the Commission does at least raise the question whether "actions for recovery of undue payment" fall within Article 5(3) or Article 5(1) of the Conventions, or are best left to the general ground of jurisdiction in Article 2. See 8157/97 JUSTCIV 44, at 12 (June 19, 1997); see also Brussels Convention, *supra* note 3, arts. 2, 5(1), (3); Lugano Convention, *supra* note 4, arts. 2, 5(1), (3). On October 30, 1997, by a majority of three to two, the House of Lords decided that a claim for restitution of moneys paid under a contract *void ab initio* did not fall within the scope of either the contract (Article 5(1)) or tort (Article 5(3)) special jurisdictions and that therefore the only valid jurisdiction was that of the domicile of the defendant under Art. 2. See *Kleinwort Benson Ltd. v. Glasgow City Council*, [1997] W.L.R. 923 (Eng. H.L.). Thus, the Scottish rather than the English courts had jurisdiction. See *id.*

70. See UK CONSULTATION PAPER, *supra* note 66, at 10-13. Deletion is promoted by Finland, France, and the Netherlands, but is actively opposed by Belgium as well as the UK. See 8157/97 JUSTCIV 44, at 10-11 (June 19, 1997).

71. See UK CONSULTATION PAPER, *supra* note 66, at 19. Similar suggestions have been made by Denmark, Germany, Italy, and Switzerland. The Netherlands has stated that the issue should be clarified. See 8157/97 JUSTCIV 44, at 12-13 (June 19, 1997).

72. Case 189/87, 1988 E.C.R. 5565.

73. See UK CONSULTATION PAPER, *supra* note 66, at 20. The present text of Article 6(1) permits a person domiciled in a Contracting State to be sued "where he is one of a number of defendants, in the courts for the place where any one of them is domiciled." Brussels Convention, *supra* note 3, art. 6(1); Lugano Convention, *supra* note 4, art. 6(1). The idea that the present wording creates too wide a jurisdiction is supported by Belgium and the Netherlands. See 8157/97 JUSTCIV

tions to make it explicit that parties can agree on a non-exclusive choice of jurisdiction in a contract, whereby the courts of the chosen country have jurisdiction but not to the exclusion of the courts that can exercise jurisdiction under the general ground of jurisdiction in Article 2 and any relevant special grounds of jurisdiction in Articles 5 and 6.⁷⁴ Another example of consolidating the ECJ's case law into the text is the proposal to remove the word "solely" from Article 18 of the Convention in response to *Elefanten Schuh v. Jacqmain*.⁷⁵ The UK is suggesting a minor amendment to Article 38 of the Convention concerned with the enforcement of foreign judgments. The court hearing the second appeal against a decision authorising enforcement of a foreign judgment should be able to grant or re-impose a stay of execution pending the outcome of the appeal.⁷⁶ The most significant UK proposals are now discussed in a little more detail.

A large number of Contracting States⁷⁷ recognise that the present wording of Article 21 of the Convention is unsatisfactory in not determining when a court is seised of an action. Article 21 is a strict *lis pendens* rule which means the court first seised has jurisdiction.⁷⁸ The ECJ has left it to each State to determine when their courts are seised⁷⁹ and this has created divergence as to the critical event, for example bringing the case to the court or serving the defendant, and even uncertain-

44, at 13 (June 19, 1997).

74. See UK CONSULTATION PAPER, *supra* note 66, at 24. The UK also wants to delete the penultimate paragraph of Article 17, which has the curious effect of giving an advantage to the stronger party in contractual negotiations by giving him or her the power to insist on the weaker party being bound by an exclusive jurisdiction clause while the stronger party is free to utilise any of the other grounds of jurisdiction available under the Convention. See *id.* at 25.

75. Case 150/80, 1981 E.C.R. 1671; see also UK CONSULTATION PAPER, *supra* note 66, at 26.

76. This would have the effect of reversing the ECJ's decision in Case C-432/93, *SISRO v. Ampersand Software BV*, 1995 E.C.R. I-2269. See UK CONSULTATION PAPER, *supra* note 66, at 43. Related questions have been referred to the ECJ by the Court of Session. See *Re Petition of Marie Brizard et Roger International S.A.*, [1997] Int'l Litig. Proc. 373 (Scot. Sess. 1996).

77. These include Belgium, Denmark, Finland, France, Germany, Ireland, Italy, the Netherlands, Portugal, Spain and the UK. See also the submissions of the Commission in 8157/97 JUSTCIV 44 (June 19 1997).

78. See Brussels Convention, *supra* note 3, art. 21; Lugano Convention, *supra* note 4, art. 21.

79. See Case 129/83, *Zelger v. Salinitri*, 1984 E.C.R. 2397, 2409.

ty as to what the rule is in some States.⁸⁰ The UK wants the Convention to determine when a court is seised of an action but does not have a firm proposal as to what the date should be. The Commission and Belgium have put forward the idea that a court should be seised only when the case has been brought before the court (for example by inclusion on the list) and the notice of the institution of the proceedings has been served. A cumulative test is also supported by members of the Commercial Court in England and has recently been advocated by Mr. Justice Rix.⁸¹ The UK is also advocating another reform to Article 21. It wants to enable a court second seised not to decline jurisdiction in favour of the court first seised if the parties have given exclusive jurisdiction to the court second seised within the terms of Article 17. This is the position currently taken by the courts in the UK⁸² but it would not necessarily be supported by the ECJ.⁸³

The UK has two proposals in relation to Article 22. This is the provision that applies to related actions pending in more than one jurisdiction. It does not apply where the cause of action and the parties are the same (that is, governed by the strict *lis pendens* rule in Article 21) but otherwise it gives discretion to the court second seised to decline to exercise jurisdiction. The first UK proposal has also been advocated by some other participants in the negotiations for the revision of the Brussels and Lugano Conventions.⁸⁴ The suggestion is that the current requirement that the actions are "pending at first instance" be removed. This has proved to be a significant limi-

80. See, e.g., *Grupo Torras v. Al-Sabah*, [1996] 1 Lloyd's Rep. 7 (Eng. C.A. 1995); see also UK CONSULTATION PAPER, *supra* note 66, at 27-29.

81. Sir Bernard Rix spoke at the British Institute of International and Comparative Law on 14 October 1997 at a workshop entitled "Jurisdiction in Transnational Litigation: Issues Emerging in the Renegotiation of the Brussels and Lugano Conventions." He advocated a cumulative rule based on issue and postal notice (or personal service or appearance if earlier).

82. See *Continental Bank v. Aeakos S.A.*, [1994] 1 W.L.R. 588 (Eng. C.A. 1993); *Toepfer International G.m.b.H. v. Molino Boschi SRL*, [1996] 1 Lloyd's Rep. 510, 514 (Q.B. 1996); *Bank of Scotland v. SA Banque Nationale de Paris*, 1996 S.L.T. 103, 126-27 (Outer House 1995).

83. The point was not determined in *Case C-351/89, Overseas Union Ins. v. New Hampshire Ins. Co.*, 1991 E.C.R. I-3317, although the possibility of the exclusive jurisdictions in Article 16 taking priority over Article 21 was left open. See UK CONSULTATION PAPER, *supra* note 66, at 30-31.

84. The Commission, Finland and Germany. See 8157/97 JUSTCIV 44 (June 19 1997).

tation on the applicability of Article 22 which seems to have no clear rationale.⁸⁵ The second proposal of the UK is designed to greatly increase the flexibility of Article 22 by permitting the court first seised, as well as the court second seised, to decline to exercise jurisdiction in favour of the other court. In other words, in the absence of the strict *lis pendens* rule being applicable, a type of *forum non conveniens* test should apply whereby appropriateness rather than priority in time is the key factor. It may be that the combination of a narrowly defined *lis pendens* rule and a widely defined related actions rule modelled on *forum non conveniens* might prove a negotiable compromise in the Hague even if it cannot be achieved in the Brussels and Lugano revision where the UK has to persuade all the other Contracting States to change the existing Conventions given the need for unanimity.

In relation to Article 24 on provisional and protective measures the UK has one modest proposal, to prohibit orders for interim payment under Article 24 unless the court has jurisdiction over the substance of the case.⁸⁶

The UK is anxious to protect the autonomy of parties to choose to refer their case to arbitration or to determine that the case be heard by the courts of one particular jurisdiction. In order to achieve this policy objective it is proposing amendments to Articles 19 and 27 of the Brussels and Lugano Conventions. The former is the provision which requires courts to assess by their own motion whether they have jurisdiction.⁸⁷ At present it is only applicable if the court is dealing with a claim which is "principally concerned with a matter over which the courts of another Contracting State have exclusive jurisdiction by virtue of Article 16."⁸⁸ The UK wants to add "Article 17" after "Article 16" in order to protect exclusive jurisdiction

85. See *William Grant & Sons International v. Marie Brizard et Roger Int'l SA*, 1996 S.C.L.R. 987 (Scot. Sess. 1996); *Bank of Scotland*, 1996 S.L.T. at 131-32.

86. See UK CONSULTATION PAPER, *supra* note 66, at 32-35 (presenting a variety of possible changes to Article 24). The one mentioned in the text was the only one that commanded a broad consensus in responses to the consultation paper. The UK proposal may be affected by the decision of the ECJ in Case C-391/95, *Van Uden v. Kg Deco-Line*, which is expected soon. Advocate General Léger gave his opinion on 10 June 1997.

87. See Brussels Convention, *supra* note 3, art. 19; Lugano Convention, *supra* note 4, art. 19.

88. Brussels Convention, *supra* note 3, art. 19; Lugano Convention, *supra* note 4, art. 19.

clauses and to add that a court should not exercise jurisdiction in breach of an arbitration clause. The freedom of the parties to agree to change their minds would be respected by the fact that the court could continue to exercise jurisdiction if the defendant had submitted to its jurisdiction. Arbitration is outside of the scope of the Conventions and the ECJ has made it clear that the Brussels/Lugano rules of jurisdiction do not apply,⁸⁹ but a specific reference to this in Article 19 would provide an insurance policy against national courts ignoring the ECJ's ruling. The UK also wants to build in protection for arbitration and exclusive jurisdiction clauses at the recognition stage by an amendment to Article 27 of the Conventions, permitting the non-recognition of a judgment given in another Contracting State if it is in defiance of an arbitration clause or an exclusive jurisdiction clause unless the defendant had submitted to the jurisdiction of the court giving the judgment.⁹⁰ The UK's stance on the priority of choice of court clauses and arbitration clauses will be repeated at the Hague negotiations.

The final important amendment proposed by the UK Government is one that will be warmly welcomed outside of Europe. Article 27 should be amended so that judgments against parties not domiciled in a Contracting State which are based on exorbitant grounds of jurisdiction, *i.e.*, grounds not applicable to persons domiciled in a Contracting State, should not be recognised in other Contracting States. The exporting of exorbitant grounds of jurisdiction throughout the EU has long been regarded as unprincipled⁹¹ and the UK opposed it, along with

89. See Case C-190/89, *Marc Rich and Co. AG v. Società Italiana Impianti PA*, 1991 E.C.R. I-3855, I-3900-01.

90. The extent to which a recognising court is bound to recognise a judgment given in another Contracting State in defiance of an arbitration clause is a controversial question with significant recent case law in England. See UK CONSULTATION PAPER, *supra* note 66, at 36-37; see also *The "Heidelberg"*, [1994] 2 Lloyd's Rep. 287 (Q.B. 1993); *Philip Alexander Securities and Futures v. Bamberger*, [1997] Int'l Litig. Proc. 73, 94-102, 115 (Q.B. 1996). Related questions about the scope of the application of the Brussels and Lugano Conventions to cases where there is an arbitration agreement are considered in *The "Lake Avery"*, [1997] 1 Lloyd's Rep. 540 (Q.B. 1996), and *Toepfer International G.m.b.H. v. Molino Boschi SRL*, [1996] 1 Lloyd's Rep. 510 (Q.B. 1996). Further light should be shed on the relationship between arbitration agreements and the Brussels Convention in Case C-391/95, *Van Uden v. Kg Deco-Line*, which is still pending. The fact that submission is given a higher priority than the original jurisdiction or arbitration agreement reflects the UK's commitment to party autonomy.

91. See, *e.g.*, Kurt H. Nadelmann, *Jurisdictionally Improper Fora in Treaties*

the United States at the Hague Conference, when it was not a Member State of the EU.⁹² The original six Member States responded to the criticism by introducing Article 59 into the Brussels Convention.⁹³ This permits Contracting States to enter into a bilateral Treaty with a third country promising not to recognise and enforce any judgments from other Contracting States, against persons domiciled or habitually resident in the third country, which are based on exorbitant grounds of jurisdiction.⁹⁴ The UK was perhaps mollified by this change and hoped it could solve the problem by negotiating a series of bilateral conventions. It made no effort to exclude recognition of judgments based on exorbitant grounds of jurisdiction during its original Accession negotiations to the Brussels Convention in the 1970s.⁹⁵ Inexplicably it actually agreed to a tightening up of Article 59 so that certain property based grounds of jurisdiction could not be treated as exorbitant.⁹⁶ The UK has not been successful in negotiating bilateral conventions within the terms of Article 59 of the Brussels Convention with the notable exceptions of Australia and Canada.⁹⁷ The failure of the negotiations with the United States at

on *Recognition of Judgments: The Common Market Draft*, 67 COLUM. L. REV. 995 (1967); Kurt H. Nadelmann, *The Outer World and the Common Market Experts' Draft of a Convention on Recognition of Judgments*, 5 COMMON MKT. L. REV. 409 (1967-68); Kurt H. Nadelmann, *The Common Market Judgments Convention and a Hague Conference Recommendation: What Steps Next?*, 82 HARV. L. REV. 1282 (1969). The present writer would go further and abandon exorbitant rules of jurisdiction regardless of where the defendant is domiciled. See ANTON & BEAUMONT, *supra* note 11, at 21.

92. See ACTES ET DOCUMENTS DE LA SESSION EXTRAORDINAIRE DU 13-16 AVRIL 1966, at 333-431 (Hague Conference on Private Int'l Law, 1966); see also Karl Newman, *The 1968 Brussels Convention and Subsequent Developments*, in THE OPTION OF LITIGATING IN EUROPE 1, 4 (Carey-Miller & Beaumont eds., 1993); L. I. De Winter, *Excessive Jurisdiction in Private International Law*, 17 INT'L & COMP. L.Q. 706, 711 (1968).

93. See generally Brussels Convention, *supra* note 3, art. 59.

94. See *id.*

95. See Newman, *supra* note 92, at 4-5. Karl Newman was the lead UK negotiator in the negotiations on the accession of the UK to the Brussels Convention and therefore his comment is significant and rather chilling in its narrow national self interest: "In the accession negotiations, with the prospect of soon changing from being a victim to becoming a beneficiary of the existing state of affairs, the United Kingdom did not resume its attack on this feature of the Brussels Convention." *Id.*

96. See ANTON & BEAUMONT, *supra* note 11, at 70.

97. See Convention Between the United Kingdom of Great Britain and Northern Ireland and Canada Providing for the Reciprocal Recognition and Enforcement

the end of the 1970s was a particularly serious blow.⁹⁸ Cynically, it might be suggested that the UK did not want to give up its leverage in those bilateral negotiations with the United States in the 1970s by trying in the accession negotiations to remove the requirement to recognise judgments against U.S. domiciliaries based on exorbitant rules of jurisdiction. It is pleasing that in the 1990s the UK's negotiating position in the Brussels/Lugano revision cannot be accused of cynicism. The UK is willing to remove one of the incentives for the U.S. to agree to a new Convention at the Hague by arguing for the removal of the recognition of judgments based on exorbitant grounds of jurisdiction in the Brussels and Lugano Conventions. Of course, the ultimate cynic will argue that the UK can afford to look virtuous knowing that it is unlikely that all the other Contracting States will agree to the UK's proposed amendment of the Brussels and Lugano Conventions.

It is too early to attempt to try to assess the prospects for reform.

III. UK APPROACH TO THE PROPOSED HAGUE WORLDWIDE JUDGMENTS CONVENTION

The UK has not yet adopted firm views on the proposed worldwide judgments convention. It has set up an advisory committee and received a few comments from industry. It has not yet conducted a consultation exercise but will do so. It is committed to the idea of its negotiators acting in good faith to try to produce a workable draft convention while in no way binding the UK. While the "Smith" rules⁹⁹ are still in operation in the special commission, the UK will float ideas and respond to the proposals of others without adopting definitive positions. Therefore Hague watchers must not assume that the

of Judgments in Civil and Commercial Matters, Apr. 24, 1984, 1988 Gr. Brit. T.S. No. 74 (Cmd. 519); Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Australia Providing for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters, Aug. 23, 1990, 1995 Gr. Brit. T.S. No. 45 (Cmd. 2896).

98. See *supra* note 9.

99. Named after the Canadian Chairman of the June 1997 Special Commission, Mr. T.B. Smith QC, who was insistent that delegations could make proposals and statements in the negotiations without being bound by them at the early stages of the negotiations. This will last at least until some way through the March 1998 Special Commission.

UK is necessarily committed even to the proposals it put forward, alone or in combination with others, as working documents at the Hague Special Commission in June 1997. In this regard, it is interesting to note that Working Document No.15, put forward by the United States, Finland and the UK, supports habitual residence as the general ground of jurisdiction for natural persons, whereas the UK negotiating position in the Brussels/Lugano Convention revision, arrived at after consultation, is not proposing a change from domicile to habitual residence.¹⁰⁰ Of course the UK has a strong interest in trying to have the same general rule in the Hague Convention and the Brussels and Lugano Conventions. Otherwise, awkward situations could arise where a person is domiciled in the UK for the purpose of the Brussels Convention but habitually resident in the United States for the purpose of the Hague Convention. The overlapping of the scope of the Conventions is best avoided by having the same general rule of jurisdiction. The rule should either be a clearly defined domicile rule, like that contained in the Civil Jurisdiction and Judgments Act 1982,¹⁰¹ or the now familiar undefined Hague Conference norm of habitual residence.¹⁰² Curiously enough the former

100. See 8157/97 JUSTCIV 44 (June 19 1997).

101. See Civil Jurisdiction and Judgments Act, 1982, ch. 27, § 41 (Eng.); see also ANTON & BEAUMONT, *supra* note 11, at 80-84. For allocating a person domiciled in the UK to the courts of a particular part of the UK "three months" residence in that part is sufficient. See Civil Jurisdiction and Judgments Act, 1982, ch. 27, § 41(5)(b) (Eng.).

102. Dr. Clive has recently argued that habitual residence should be left undefined at the Hague and should not be given a technical meaning by the legislatures or courts of Member States. See E. M. Clive, *The Concept of Habitual Residence*, 1997 JURID. REV. 137. There is a great deal of merit in this view but it does run the risk that there will be considerable divergence from state to state as to what constitutes habitual residence. It is notable that where a person's residence has lasted for less than a year there are conflicting authorities on whether this constitutes "habitual residence." See *id.* at 141-42. Some of the many cases in the UK are as follows: *Singh v. Singh*, 1997 Green's Weekly Digest 20-930 (three and one half months not enough); *Cameron v. Cameron*, 1996 Sess. Cas. 17 (Scot. Sess. 1995) (four months was enough); *Findlay v. Findlay (No.2)*, 1995 S.L.T. 492 (Outer House 1994) (four to five months not enough); *Re B (Child Abduction: Habitual Residence)*, [1994] 2 Fam. 915 (two months not enough); *Re R (Wardship: Child Abduction)*, [1993] 1 Fam. 249 (eleven months was not enough); *Re N (Child Abduction: Habitual Residence)* [1993] 2 Fam. 124 (three months not enough); *In re B (Minors) (Abduction) (no.2)*, [1993] 1 Fam. 993 (seven months was enough to constitute habitual residence); *A v. A (Child Abduction)*, [1993] 2 Fam. 225 (eight months was enough); *In re F (A Minor) (Child Abduction)*, [1992] 1 Fam. 548 (one month was enough); *V v. B (A Minor) (Abduction)*, [1991] 1 Fam. 266 (two months

may produce more certainty than the latter.¹⁰³ One issue which should be dealt with is what happens in the period when an individual has left his domicile or habitual residence before acquiring a new domicile or habitual residence. Although Working Document No.23, an anglo-American partnership, advocates an exclusive ground of jurisdiction for trusts it may well be that upon mature reflection the UK will prefer a non-exclusive ground of jurisdiction for trusts.

There are some fundamentals where the UK position is not likely to change. The support for the principle of party autonomy is seen in the UK's desire in the Brussels/Lugano revision to give priority to exclusive jurisdiction clauses and arbitration agreements over any other ground of jurisdiction (apart from submission which is itself a feature of party auton-

was enough). What makes the difference in these cases is usually the "intent" element. The "habitual" quality of "residence" cannot be ascertained entirely objectively and has an element of subjectivity.

103. The statutory definition may help to resolve the difficult and frequent cases where an individual's residence in a country has been for less than a year. The Finnish proposal to the Brussels/Lugano revision is for domicile to be replaced with habitual residence as the general ground of jurisdiction and that residence of one year would create a presumption of habitual residence. *See* 8157/97 JUSTCIV 44, at 8 (June 19 1997). However, such a presumption is unnecessary as it is non-controversial. From a commercial point of view, a simple rule of three months residence would be attractive. The Hague would be reluctant to have such an "arbitrary" rule in family law matters and therefore might resist any attempt to define habitual residence in that way for the proposed worldwide judgments convention. On the other hand the UK statutory domicile created for the Brussels and Lugano Conventions is so far removed from the traditional concept of domicile applied in family and succession that it can be used as a convenient label to create a simple residence based jurisdiction which is more than presence but less than some concepts of habitual residence. The subjective intent of the person is irrelevant. The objective conduct of the person concerned may be looked at to see if he or she is actually resident in a particular jurisdiction. It is a little worrying to see the English Court of Appeal interpreting the residence requirement in the UK statutory domicile as being "[a] settled or usual place of abode" which connotes "some degree of permanence or continuity." *Bank of Dubai Ltd. v. Abbas*, [1997] Int'l Litig. Proc. 308, 311-12 (Eng. C.A. 1996). The notion of "settled" and "permanence" signify longer term connections with a jurisdiction than seem necessary to establish "domicile" as defined in the Civil Jurisdiction and Judgments Act (1982 Act). One other small concern about habitual residence in this context is that the UK courts have been inclined to say that a person cannot have more than one habitual residence at the same time. *See Cameron v. Cameron*, 1996 Sess. Cas. 17 (Scot. Sess. 1995); *Re V (Abduction: Habitual Residence)*, [1995] 2 Fam. 992; *Dickson v. Dickson*, 1990 S.C.L.R. 692, 703. This results in an inconsistency because it has been accepted that a person can have a statutory domicile within the meaning of the 1982 Act in more than one place at the same time. *See Daniel v. Foster*, 1989 S.C.L.R. 378.

omy) and over the normal *lis pendens* rule and to allow the parties to choose a non-exclusive forum. In the Hague negotiations the same commitments are likely to shine through.¹⁰⁴ This commitment to party autonomy will of course be tempered by the need to create protective jurisdictions for certain categories of litigants. The UK will certainly want to see consumers protected but will look sceptically at protecting the holders of insurance policies unless they are consumers, *i.e.*, natural persons acting outwith the scope of their trade or profession. The UK will consider carefully the need for and the scope of a protective jurisdiction for employees. The UK is likely to oppose the inclusion of maintenance within the scope of the Convention. The scope of and necessity for any exclusive grounds of jurisdiction, for example, over rights *in rem* in immovable property, will be examined. The hierarchy of rules will have to be clarified, *e.g.*, will it be possible for a protective jurisdiction to be overridden by submission. Here, the clash between the principle of protecting a weaker party and the need to respect party autonomy is sharply focused. There is a good case for saying that after a dispute has arisen even a protected party should be free to choose an alternative jurisdiction expressly (choice of court clause) but it is slightly more difficult to argue that they should be deemed to have accepted it tacitly by not contesting the jurisdiction of the court chosen by the stronger party (submission). The relationship between the scope of the Hague Convention and that of the international agreements on arbitration is an important issue. An example of the problem is the question of whether the jurisdiction of the courts to grant a declaration that a defendant is entitled and obliged to arbitrate a particular dispute should fall within the scope of the Hague Convention. Another problem is whether the Hague Convention will permit the non-recognition of a judgment from a Contracting State on the grounds that it was given in violation of a valid arbitration clause.

It is clear that not all disputes can be dealt with within the framework of party autonomy or protective jurisdiction

104. A preview of this can be seen in the UK's brief Working Document No.17 at the June 1997 Special Commission which wants to cater for non-exclusive jurisdiction clauses and wants the "formal requirements for the validity" of choice of court clauses to be as "liberal as possible." The UK states that the objective is to give effect to the "intentions of the parties."

rules. Therefore it will be necessary to agree on a general ground of jurisdiction whether it is domicile or habitual residence.¹⁰⁵ It is also clear that whatever general ground of jurisdiction is chosen it will not be acceptable as the sole ground. A number of alternative special grounds of jurisdiction will have to be agreed upon, for example on salvage.¹⁰⁶ It is highly likely that the UK will support special jurisdictions for both contract and tort. The consultation exercise on the revision of the Brussels and Lugano Conventions shows that there is not widespread dissatisfaction in the UK with the contract and tort grounds of jurisdiction in those Conventions and certainly no clear consensus as to how they could be improved. One of the risks associated with the Hague Convention negotiations is that an attempt will be made to draft entirely new contract and tort grounds of jurisdiction. The meaning of these new clauses may be uncertain and in the absence of a court like the ECJ which can impose a uniform interpretation there is a great risk of diverse interpretations in different Contracting States. The lack of a court providing a uniform interpretation of the Hague worldwide judgments convention is a serious concern for some people in the UK: particularly if the Convention ends up being a double convention or a mixed convention with a large number of white list grounds of jurisdiction. The Lugano Convention works because it is almost identical to the Brussels Convention and benefits from the ECJ's uniform interpretation of the latter. A particular concern about the mixed convention solution is the risk that new grounds of jurisdiction will be developed in the grey area which are just as exorbitant as those in the black list, but in the absence of a role for a court beyond the state concerned will not be prohibited. The lack of an overarching body to interpret the Convention and to police its fair application in different Contracting States makes some people in the UK nervous about the Convention being open to all States in the world. To combat this, a

105. See discussion *supra* notes 101-03. At the moment "habitual residence" seems to be a very strong favourite at the Hague. See HAGUE CONFERENCE ON PRIVATE INT'L LAW, PRELIMINARY RESULTS OF THE WORK OF THE SPECIAL COMMISSION CONCERNING THE PROPOSED CONVENTION ON INTERNATIONAL JURISDICTION AND FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS 5 (Info. Doc., Sept. 1997).

106. See Working Document No.26 (put forward by the UK and the Netherlands at the June 1997 Special Commission).

suggestion has been made that, in relation to non-Member States of the Hague Conference, their accession to the Convention would not take effect in relation to a Contracting State unless it declares its acceptance of the accession.¹⁰⁷

It still seems to the present writer that two of the largest obstacles to a successful Hague Convention were the issues given prominence in the June 1996 Special Commission: resolving conflicts of jurisdiction and dealing with what some Member States regard as excessive damages awards. The UK has not yet developed a firm negotiating position on how to resolve these problems. It can act as a bridge between continental European concerns for certainty on the former issue and restraint on the latter and U.S. desires to protect flexibility on the former and liberty to juries on the latter. The UK understands the importance of the jury system, though we have largely abandoned it in civil cases, and we believe in discretion in conflicts of jurisdiction but have come to live with the certainty of the Brussels and Lugano Conventions.

107. This is the solution adopted for the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, art. 38, S. TREATY DOC. No. 99-11, at 14 (1985), *reprinted in* 19 I.L.M. 1501, 1504.

