THE EFFECT OF TREATIES IN DOMESTIC LAW

United Kingdom National Committee of Comparative Law

Volume 7

Edited by

FRANCIS G. JACOBS
Professor of European Law, University of London

and

SHELLEY ROBERTS
Lecturer in Law, King's College, London

London
Sweet & Maxwell
1987

Chapter 11

The Hague Conventions on Private International Law

*Mr J. H. A. van Loon**

INTRODUCTION: THE HAGUE CONFERENCE AND ITS CONVENTIONS

A. THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

History

The Hague Conference on Private International Law, despite its name, is a permanent intergovernmental organization. Recurrent sessions of the conference have now been taking place for almost a century. The Conference was established by treaty and presently has 34 Member States.[1]

Its history goes back to 1893 when the first Hague Conference took place at the invitation of the Netherlands Government. The initiative had been taken by Tobias M.C. Asser,[2] who was himself inspired by the great Italian Mancini and encouraged by the success of the Latin-American Conference on Private International Law of Montevideo in 1889.[3] "*La belle époque*" saw three more Hague Con-

* Secretary at the Permanent Bureau of the Hague conference on Private International Law.

[1] Argentina, Australia, Austria, Belgium, Canada, Chile, Cyprus, Czechoslovakia, Denmark, Egypt, Finland, France, Federal Republic of Germany, Greece, Ireland, Israel, Italy, Japan, Luxembourg, Mexico, the Netherlands, Norway, Poland, Portugal, Spain, Surinam, Sweden, Switzerland, Turkey, the United Kingdom, the United States, Uruguay, Venezuela and Yugoslavia. Morocco has been admitted as a Member but has not yet accepted the Conference's Statute. November 1, 1986.

[2] See Voskuil, C.C.A., "Tobias Michael Carel asser" in *Les fondateurs de l'Institut de droit international*, pp. 11–31.

[3] See for a description of the interesting mutual influence between the international codification movements in Latin America and Europe in the 19th century, Droz, Georges A.L. and Dyer, A., "International Conventions viewed in terms of the work accomplished by the Hague Conference on Private International Law," in *Anuario Juridico Interamericano*, Washington 1984, pp. 223–261.

ferences (1894, 1900, 1904) which together produced seven multilateral treaties on private international law (see Annex). All of these Conferences, as well as those of 1925 and 1928 which did not lead to the adoption of any treaties, were organized on an ad hoc basis; with the exception of Japan, all participating countries were European States. The United Kingdom, which had at first been reluctant to participate, sent delegates to the Fifth (1925) and Sixth (1928) Sessions.

After a dormant period, due to the Second World War and the events foreshadowing it, the Hague Conference took a new élan in 1951, when it was given its Statute. This entered into force on July 15, 1955. Since the Eighth Session (1956), ordinary diplomatic meetings have been convened regularly every four years, the last one having taken place in 1984 and the next scheduled for 1988. In addition, two extraordinary Sessions have been held, one in 1966 and one in 1985. Since its inception as an international organization, the membership of the Hague Conference has been steadily growing, particularly among common law countries—which is one reason why, since 1960, the treaties have been drawn up in English in addition to the traditional French.[4]

Purpose

According to Article 1 of its Statute—"The purpose of the Hague Conference is to work towards the progressive unification of the rules of private international law." The word "progressive" has a twofold meaning here. It refers to the working methods of the Conference: the approach to unification which consists of codifying, step-by-step, carefully defined subjects of private international law. However, it also reflects a vision: the unification process should be such that it meets not only the needs of the moment but also those of a future which may lie 20, 30 or 40 years ahead. This is in fact a necessity because treaties, after their adoption by a diplomatic Session of the Conference, may take several years to get off the ground. It should also be noted that the Statute does not exclude techniques other than multilateral treaties, and the Conference's recent history, actually, shows several examples of the use of such "soft law" instruments.[5] Moreover, a treaty may, even when it fails to fulfil its vocation as a binding instrument, serve as a model law. Several examples of this will be seen below.

[4] See generally on the development of the Hague Conference: Van Hoogstraten, M.H., "The United Kingdom joins an uncommon market: the Hague Conference on Private International Law," in *I.C.L.Q.*, Vol. 12, pp. 148–167 (1963); Droz and Dyer, *op. cit.*, (n. 3); Droz, G. and Dyer, A., "The Hague Conference and the Main Issues of Private International Law for the Eighties," in *Northwestern Journal of International Law & Business*, Chicago; Northwestern University, 1981, Vol. 3, pp. 155–210.

[5] *e.g.* the Fourteenth Session of the Conference (1980) adopted a "Declaration and Recommendation relating to the scope of the Convention on the law applicable to international sales of goods, concluded June 15th, 1955," a "Recommendation concerning the draft Convention on the Civil Aspects of International Child Abduction," and a "Recommendation on information to accompany judicial and extrajudicial documents to be sent or served abroad in civil or commercial matters." See *A. & D. XIV*, Vol. I, p. I–62; I–65–66; I–67–69.

The term "private international law" in Article 1 of the Statute may also require a few brief remarks. The unification of private law may take different forms. The most radical form is that of unifying the substantive elements of private law by creating uniform provisions, governing adoption, sales, torts, etc. In the absence of such uniformity, questions will arise such as: should, or may, this child be adopted according to French or Korean law? Should Indian or English law apply to this sales contract? Does German, Yugoslav or Turkish law apply to questions of liability arising from this car accident? The various States all have their own set, or even various sets, of rules to tackle this question—their own rules of private international law. However, the problem is that even these conflict rules may, and do, differ from country to country. This in turn may, and does, cause injustice and hardship to individuals and insecurity in commercial relations. Hence, the need for a body such as the Hague Conference to bring some measure of unity into the chaos, not only of differing rules on applicable law, such as in the examples just given,[6] but also of divergent criteria for jurisdiction of the courts and other domestic authorities in international situations[7] and for recognition and enforcement of foreign judgments.[8] Moreover, in order to overcome the wide variations in international judicial and administrative proceedings (requirements as to legalisation, differing procedures for service and the taking of evidence abroad, obstacles to access to justice for foreigners such as security for costs and barriers to legal aid), the Conference has also been active in the field of what may be called international judicial and administrative cooperation.[9]

B. THE HAGUE CONVENTIONS ON PRIVATE INTERNATIONAL LAW

They are treaties, . . .

Not counting the early Conventions, to which only occasional reference will be made, (although most are still in force among a small number of countries), there are now thirty multilateral Hague treaties on private international law, 19 of which have formally entered into force and eight of which have been acceded to by one or more non-Member States (see Annex—we will refer to them in abbreviated form in the text).

There is no doubt that all these instruments are "treaties" in the classic sense. They are the fruits of diplomatic negotiations and they

[6] See *e.g.* the Conventions listed in the Annex Nos. 2–6 and III and XXXI; VIII and XXIV; X; XI, XIII; XXVII.

[7] See Annex, *e.g.* Conventions Nos. 4 and X; XIII; XV.

[8] See Annex, *e.g.* Conventions Nos. IX and XXIII; XVI and XVII.

[9] See Annex, *e.g.* Conventions Nos. 1 and 7 and II, XIV, XX and XXIX; XII.

have all the formal characteristics of multilateral law-making treaties, in particular, final clauses on matters such as entry into force, and geographical scope. They are governed by rules of public international law, in particular those on the law of treaties, and, in respect of those States which are bound by the Vienna Convention on the Law of Treaties (the majority of the Member States of the Conference[10]) they fall within the scope of that Convention.[11] And yet they have a number of features which make them stand somewhat apart in the text-books on treaties.

. . . but they relate to private rights and obligations

As law—making treaties, Hague Conventions frame an agreed legislative policy. The true object of this policy, however, is not relationships between States, nor even those between States and individuals (such as is the case with treaties on criminal or tax matters or conventions on human rights), but relationships between private persons.[12] This is so even when, as is the case in particular with treaties on judicial and administrative cooperation,[9] the treaty acknowledges or requires some action on the part of administrative

[10] On November 1, 1986 the following Member States were Parties to the Vienna Convention: Argentina, Australia, Austria, Canada, Chile, Cyprus, Denmark, Egypt, Finland, Greece, Italy, Japan, Mexico, the Netherlands, Spain, the United Kingdom, Uruguay, Yugoslavia, Sweden.

[11] See for an explicit reference to the Vienna Convention (Article 40, concerning the right of a State to participate in the revision of a multilateral treaty to which it is a Party) the "Decision on the wider opening of the Conference" of the Fourteenth Session of the Conference, *A & D XIV*, p. I–63.

It would not seem that the draftsmen of the Vienna Convention gave much thought to treaties on private international law. According to Sir Ian Sinclair, the I.L.C. "when it formulated the final set of draft articles in 1966 also thought that it had excluded the Convention's application to treaties providing for obligations or rights to be performed or enjoyed by individuals. However, at the Vienna Conference, the delegation of Switzerland secured the passage of an amendment to article 60 [. . . ,] a new paragraph 5 which concerns provisions relating to the protection of a human person contained in treaties of a humanitarian character." (Sinclair, I., "The Vienna Convention on the Law of Treaties: The Consequences of Participation and Non-participation," in *American Journal of International Law, Proceedings of the 78th Annual Meeting*, Washington 1984, p. 271). The implications of the Vienna Convention for treaties on private international law are not yet completely clear, particularly in respect of those provisions of the Vienna Convention which cannot merely be considered to codify rules of customary law. A related question is: to what extent are the provisions of the Vienna Convention directly applicable? *Cf.* Common Court of Justice of the Netherlands Antilles and Aruba, May 20, 1986, cited at the end of this introductory chapter.

[12] We realize that the distinction between "private law" relationships and matters of "public law," while it is well-known in, and fundamental to, countries of the Romano-Germanic tradition ("civil law" or "continental" systems), has less significance, or is even unknown in other countries, such as the common law countries. However, and here we follow René David, *e.g.* in *Int. Enc. of Comp. Law*, Vol. II, Chap. 2, Nos. 18 *et seq.*, even in systems of the latter sort, relationships (or proceedings) to which the State and its dependent organs are a party are generally treated differently from those in which the State is not involved.

authorities: this intervention always serves the enforcement of private rights and obligations. As we will see in the next chapter, this specific nature of the Hague Conventions has an impact on their effect in domestic law and their interpretation by domestic courts.

They reconcile differing domestic policies on private international law

The fact that it is private international relationships which are at the heart of the Hague Conventions does not of course mean that States are indifferent to these matters; without state interest there would be no such Conventions.

State interference with private international interests starts at the domestic level resulting in legislative, judicial or administrative policies which are reflected in that State's internal system(s) of private international law and which may or may not be of a mandatory character. Under the general rules of public international law, States enjoy broad freedom in respect of these policies. The corresponding varying perspectives of different countries naturally have their influence on the negotiating process leading up to the drafting of the treaties. They may even remain unconscious, and creep out of the dark quite unexpectedly after the treaty is born. Differences of view between the United States and other Contracting States concerning the impact of the Evidence Convention (Annex, XX) on (existing) United States civil proceedings for discovery abroad only appeared after this treaty had been in force for several years; one will find little or nothing in the treaty's history pointing to any awareness of these differences in perspective.

Conversely, the difference of approach between many "continental" or "civil law" systems, which tend to apply the nationality criterion to matters of personal status, and common law countries, which prefer to see the criterion of domicile applied as a connecting factor, are well-known. Time and again compromises have been found, sometimes by combining these factors,[13] often by using innovative concepts such as "habitual residence,"[14] or by allowing for a certain measure of freedom to parties in framing their relationships,[15] freedom which, at least in some domestic systems of private international law, they had not previously enjoyed.

Similarly, conflicting views on jurisdiction of the courts, on the criteria for enforcement of judgments and on procedures for judicial and administrative cooperation must be reconciled. However, not

[13] *e.g.* in the Form of Wills Convention (XI).

[14] *e.g.* in the Protection of Minors Convention this concept has proved to be extremely useful as an intermediate tool by which to reconcile the traditional criteria of nationality and domicile; beyond this it has become very popular both with the legislature and the courts in the U.K. (see Dicey and Morris, *The Conflict of Laws*, London 1980, Vol. I, pp. 141 and 145), as well as in other States.

[15] *e.g.* in the Matrimonial Property Regimes Convention (XXV).

all differences can be ironed out or even articulated (and not all possible applications of the treaty foreseen) and one alternative which is sometimes inescapable is to tolerate a certain imprecision in defining the terms of the treaty. Examples include the term "measures of protection" in the Convention on the Protection of Minors or the term "civil or commercial matters" in the Conventions on civil procedure.[16] Here problems of "characterization" or "classification" may arise to which we will come back.

States may feel so strongly about some of their own domestic policies entering within the scope of a treaty that they want to see these policies respected as part of, or even notwithstanding, the compromise. As a result, most but not all[17] Hague Conventions contain a clause on "*ordre public*" which permits under exceptional circumstances, the non-application of the Convention where it is deemed incompatible with rules of strong public policy in the State whose authorities are called to apply the Convention. The "*ordre public*" clause may, of course, provide a weapon to a litigant whose interest is to frustrate the normal application of the Convention. The question whether similar rules of a State other than the forum State must or may also be taken into consideration is the subject of heated discussions in academic circles and has also been debated on several occasions in the Conference.[18]

The general *ordre public* exception may not be sufficient for a State, and it may claim, and obtain, the right to make a reservation. Hague Conventions usually allow for few reservations only. Some of these reflect policies which are politically more or less neutral, others such as the (qualified) reservations concerning the "pre-trial discovery of documents" made by the United Kingdom and other countries under the Evidence Convention touch upon sensitive areas of State

[16] Conventions Nos. 1, 7, II, XIV, XVI, XVII, XX, XXIX.

[17] Exceptions are found in the Conventions on Service (XIV) and Evidence Abroad (XX) which only allow for a refusal to comply with a request for service or for taking of evidence if the requested State considers that its sovereignty or security would be prejudiced thereby; and the Convention on Child Abduction (XXVIII) which only permits refusal to comply with a request for return of a child on certain specific grounds (Article 13) and if such return "would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms" (Article 20).

[18] There are really two questions: (1) if the law of State B is applicable under the conflicts rules of State A, do the rules of public policy of State B also apply? Here, it would seem, it is generally admitted in the Conference that such rules are part of the applicable law and should be applied; (2) if the law of State C, which is neither the State of the forum (A) nor a State whose law is applicable under he conflict rules in question (State B), contains a rule of public policy which, from the perspective of that State C, is required to be taken into consideration in respect of (some aspects of) the matter in question, do the courts of State A have either an obligation, or the freedom, to take that rule of State C into account? This question received a positive reply in the Agency Convention (XXVII) (Article 16) and in the Trusts Convention (XXX) (Article 16). The new Sales Contracts Convention (XXXI) does not contain such a provision, although the matter was extensively discussed.

interests. The interpretation of the latter reservation has given rise to extensive litigation.[18a]

The early Hague Conventions were based on the idea of reciprocity between the Contracting States, and hence required some link with a Contracting State even where they related only to questions of applicable law. This *do ut des* principle still holds sway for the treaties on conflicts of jurisdiction and for those on recognition of foreign judgments but has lost ground in respect of the new treaties on applicable law. The Conventions on the Form of Wills (1961), on Agency (1978) and on Sales (1955 and 1985) are examples of Conventions which apply even when the law designated is unrelated to a Contracting State. The result is quite comparable to that of the introduction of new domestic conflicts rules.[19]

The effect of Hague Conventions as model laws[20]

This brings us to a point to which we have already alluded: the potential of some Hague Conventions to serve as model laws. When the body of a treaty consists of a coherent system of rules of private international law, which has the additional advantage of reflecting a consensus among different legal traditions, it is understandable that domestic legislators and courts should draw inspiration from the treaty or its principles.

The impact of such provisions on legislators may be seen in the following examples: the Convention on the Choice of Court (which will probably never enter into force) has led to the adoption by a number of states in the United States of the Model Choice of Forum Act[21]; the 1978 Convention on Matrimonial Property Regimes (not yet entered into force) has inspired in varying degrees the new Austrian and German Codes on private international law and the Swiss draft Code on private international law[22]; the 1961 Convention on the Form of Wills inspired the Canadian Uniform Wills Act as amended in 1966.[23]

There are numerous examples, especially in France, the Netherlands and Switzerland, of application by domestic courts of the prin-

[18a] See, *e.g. Rio Tinto Zinc Corporation et al* v. *Westinghouse Electric Corporation* (*House of Lords*), [1978] 1 All E.R. 434; (*Re Asbestos Insurance Coverage Cases*) (*House of Lords*), [1985] 1 All E.R. p. 716; *Oberlandesgericht Munich*, October 31, 1980, *International Legal Materials* 1025 (1981) (*Siemens A.G* v. *Bavarian Ministry of Justice.*)

[19] *Cf.* Von Overbeck, A.E., "L'application par le juge interne des Conventions de droit international privé," in *Collected Courses of the Hague Academy of International Law*, Vol. 132 (1971), No. 28.

[20] See generally Droz, G.A.L., "La Conférence de La Haye de droit international privé et les méthodes d'unification du droit: traités internationaux ou lois modèles?", in *Revue internationale de droit comparé*, 1961, pp. 507–521; Knoepfler, F., *Les Nouvelles Conventions de La Haye de droit international privé*, Neuchatel, 1968, pp. 77 *et seq.*

[21] See intervention by Professor W. Reese, *A. & D. XIV*, pp. I–239.

[22] Austria, I.P.R.-Gesetz, paragraph 19, FRG, Gesetz zur Neuregelung des I.P.R. Article 15; Switzerland, draft, Article 50 *et seq.*

[23] See Castel, J.-G., *Canadian Conflict of Laws*, Vol. II, Toronto (1977), p. 451.

ciples underlying Hague Conventions, either in anticipation of their entry into force, or by analogy.[24] This practice may include the consideration of Conventions which are based on reciprocity and may even be found in countries where treaties normally have effect only after transformation into national legislation.[25]

Recently a court drew special consequences from the fact that a Hague Convention had been signed by a State, referring to Article 18 of the Vienna Convention on the Law of Treaties (concerning the obligation not to defeat the object and purpose of a treaty prior to its entry into force).[25a]

EFFECT OF HAGUE CONVENTIONS IN DOMESTIC LAW

A. METHODS OF INCORPORATION[26]

Preliminary remarks

In discussing and illustrating the various incorporation techniques we should keep in mind, first, that it is a general rule of public international law that a State cannot rely on its own municipal law to limit the scope of its international obligations.[27,28] A binding treaty creates obligations for a State even when that state has failed to incorporate the treaty in accordance with its internal system. Secondly, incorporation is a technique determined by internal law and must be distinguished from the question of direct applicability

[24] See Sumampouw, M., *Les Nouvelles Conventions de La Haye, leur application par le juge interne*, Vol. I, Leyden (1976), *e.g.* p. 36 *et seq.*, (Sales Convention, (III), Netherlands and Switzerland); p. 42 (Recognition of Companies (VII), France); p. 292 (Traffic Accidents (XIX), Netherlands); *idem.* Vol. II, Alphen Rockville (Md), Antwerp (1980), *e.g.* p. 22 *et seq.* (Sales Convention (III), Netherlands and International Chamber of Commerce Arbitration); *idem.* Vol. III, Dordrecht, Antwerp, Apeldoorn (1984), *e.g.* pp. 18 *et seq.* (Sales Convention (III), Netherlands); pp. 21 *et seq.* (Recognition of Companies (VII), Netherlands); pp. 183 *et seq.* (Agency (XVII), Netherlands).

[25] *Cf. H. and H. Family Court of Australia*, [1985] F.L.C. 91–640 (October 18, 1985); the Court ordered the return to the father of a child abducted by the mother to the Federal Republic of Germany. The Court referred to the 1980 Convention on Child Abduction which at that time had been neither signed nor ratified (the Convention was signed and ratified by Australia on October 29, 1986 only) by Australia "as indicating an international consensus, at least as between the States which participated in [its preparation]."

[25a] *Common Court of Justice of the Netherlands Antilles and Aruba*, May 20, 1986 (unpublished). The case concerned an inheritance dispute involving a trust. The Court reasoned that that trust should be recognised as such *inter alia* because the Netherlands had signed the Trusts Convention on July 1, 1985.

[26] We will use the term incorporation in a broad sense, to mean the giving of effect to international norms within domestic legal systems.

[27] *Cf.* Permanent Court of International Justice, "Free Zones of Upper Savoy and District of Gex (1932 *P.C.I.J.*, series A/B, case no. 46, p. 167).

[28] This point is also stressed by Judge Pescatore (p. 275). Obviously, many states do, in practice, breach this rule although they generally admit their *international* liability.

which is a matter of interpretation of the treaty first on the international plane and then at the domestic level[29]; we will see below (C) that from an international viewpoint Hague Conventions are, generally speaking, directly applicable.

Three broad categories

The varied composition of membership of the Hague Conference provides a good illustration of the different ways in which various constitutions provide for the incorporation of international treaties into domestic law. Broadly speaking, however, it would seem to be possible to distinguish three categories of constitutions[30]:

A. The first group admits the automatic incorporation of a treaty into domestic law, once the treaty has been duly approved by the competent State organs and subsequently concluded. This system, of "monistic" inspiration, can be found in different manifestations in countries such as Belgium, Cyprus, France, Greece, Luxembourg, the Netherlands, Portugal, Spain, Switzerland, Yugoslavia and the United States, whose example has also had an impact on the Japanese Constitution and on those of Latin-American states.

B. In a second group of States, a treaty, strictly speaking, has no effect in the internal system and requires transformation by a legislative act in order to produce that effect. In this regard, these systems reflect a "dualistic" inspiration. Once parliamentary approval has been given, however, the treaty obtains a quasi-automatic applicability within the domestic order, and to that extent the result comes close to that of the first group. States which belong to this category include the Federal Republic of Germany, Italy and Turkey.

C. A third group of constitutions carries the requirement of transformation even further. In the United Kingdom, Ireland, Australia, Canada and the Nordic States—Denmark, Norway, Sweden and Finland—the treaty provisions are seen as addressed exclusively to the Contracting States. It is up to them to use these provisions in one way or another as a basis for the establishment of a set of rules addressed to the subjects of their domestic law. We will briefly discuss some problems which have arisen in respect of each of these various systems.

(a) *Automatic incorporation: problems of publicity*

The automatic incorporation of a treaty necessitates some system of publicity whereby the interested subjects of domestic law can have access to the Convention's contents, date of entry into force,

[29] See *e.g.* Maresceau, M., *De directe werking van het Europese gemeenschapsrecht*, Antwerp 1978, pp. 12 *et seq.*

[30] We have drawn inspiration here from Drzemczewski, A.Z., *European Human Rights Convention in Domestic Law, a comparative study*, Oxford 1985, p. 36, as well as from Dominice, Ch., "La Convention Européenne des Droits de l'Homme devant le juge national," 28 *Annuaire suisse de droit international* (1972), pp. 9 *et seq.* (Articles 12–14); and finally from Holloway, K., *Modern Trends in Treaty Law*, London 1967, esp. at pp. 105 *et seq.*

reservations, etc. This may occasionally pose problems. Thus the French *Cour de Cassation* had to intervene when the lower court had refused the enforcement of a German judgment according maintenance to a child, arguing that the 1958 Hague Convention on the Enforcement of Maintenance Orders for Children, although it had entered into force between France and the Federal Republic of Germany, had not yet been officially published in France. The *Cour de Cassation*,[30a] overruled this decision, stating that the treaty has its effects not only as between two States but also upon private persons as of the date of its entry into force, regardless of the fact that it was only later published in the *Journal Officiel*.[31]

(b) *Transformation: the risk of splitting ways*

Where an act of Parliament is necessary to give effect to a treaty, there is a risk that the international and domestic mechanisms may fail to converge. Such a split may occur in two directions: the treaty is ratified, but the necessary legislation fails to be made; or the legislation is passed, but ratification remains absent. We have not found examples of the former in connection with Hague Conventions; it seems, that usually, the necessary legislation is passed before the treaty is ratified, but there are examples of the latter situation. Thus, it took Italy 11 years after parliamentary approval had been given in 1966 before it ratified the 1961 Legalisation Convention, and there is a judgment of the *Corte di Cassazione* from which one receives the impression that the court did not actually realize that the Convention did not come into force for Italy until 1977.[31a]

An argument which is often brought forward in support of the transformation mechanism is that it makes the treaty provisions more accessible, by moulding them into language and forms which are familiar to the public and the courts.[32] Be that as it may, the system certainly offers no guarantee that the parties in litigation or even the courts will not overlook the treaty provisions. The German courts, for example, have apparently had some difficulty in freeing themselves from the traditional conflict rule based on nationality in applying correctly the 1956 Convention on the Law Applicable to Maintenance Obligations which requires consideration of the habitual residence of the child.[33] It is only fair to say, however, that there are also examples in which courts of States belonging to the first group[34] have overlooked treaty provisions in similar fashion.

An interesting debate on the pros and cons of the transformation

[30a] *Cour de Cassation*, November 30, 1976, *Clunet* 1977, p. 83, note D. Ruzié; *R.* 1977, p. 367; see the critical commentary on *Cour d'Appel*, Paris, November 12, 1974, *R.* 1975, p. 484, by G. A. L. Droz (p. 486).

[31] See Prof. de la Rochère's Report at p. 42. The Belgian Cour de Cassation has taken the opposite view (Prof. Maresceau, p. 13).

[31a] *Corte di Cassazione*, 6 May 1980, *Rivista di diritto internazionale privato e processuale* 1981, p. 910.

[32] See Prof. Gulmann (p. 31).

[33] See Sumampouw, Vol. I, *op. cit.* (fn. 24), pp. 88 *et seq.*

[34] *Ibid.*, pp. 92 *et seq.*

system has taken place in the Federal Republic of Germany in connection with the 1980 E.E.C. Rome Convention on the law applicable to contractual obligations. The German Government had incorporated this treaty into its general draft on private international law expressly excluding its direct applicability, and providing for certain modifications. The exclusion of the treaty's direct effect and the modifications provoked the criticism of the E.E.C. Commission in Brussels,[35] but the *Bundestag* in June of this year decided to adhere to the proposed way of incorporation.[36] *Cf.* the contribution by Professor J. A. Frowein to this Volume, p. 71.

(c) *Transformation; danger of discrepancies between international and domestic law*

The United Kingdom, of course, provides the classic example of a country where treaties have no internal effect unless they are transformed into domestic law by Parliament. The first Hague Convention ratified by the United Kingdom was the 1961 Convention on the Form of Wills, which incidentally had been placed on the Conference's agenda at the request of the United Kingdom. The Convention profoundly modifies the provisions of the Wills Act 1861, but the Wills Act 1963, introduced to give effect to the Convention, in turn profoundly modifies the official English text of the Convention as well as its entire system. As one learned commentator observes, some doubt may arise as to the compatibility of certain of these modifications with the obligations under the Convention (whose purpose is to further the upholding of the formal validity of wills), as regards the formal conditions of revoking of a will.[37]

The Evidence (Proceedings in Other Jurisdictions) Act of 1975 offers an example of another variety of legislation giving effect to a Hague Convention. The Act was passed, in part but without saying so, to enable the United Kingdom to ratify the 1971 Evidence Convention. However, it went much further than that: its application is not confined to countries which are Parties to the Evidence Conven-

[35] See "Empfehlung der Kommission vom 15. Januar 1985 betreffend das Übereinkommen vom 19. Juni 1980 über das auf vertragliche Schuldverhältnisse anzuwendende Recht," *Amtsblatt der Europäischen Gemeinschaften* L 44 (February 14, 1985), p. 42 (authentic text).

[36] *Cf.* Von Hoffmann, B., "Empfehlt es sich, das EG-Übereinkommen über das auf vertragliche Schuldverhältnisse anzuwendende Recht in das deutsche IPR-Gesetz zu inkorporieren?", in *IPRax* 1984, pp. 10 *et seq.*; Nolte, G., "Zur Technik der geplanten Einführung des EG-Schuldvertragsübereinkommens in das deutsche Recht aus völkerrechterlicher Sicht," in *IPRax* 1985, pp. 71 *et seq.*

[37] See Von Overbeck, A.E., translation of and comments on the Wills Act 1963 in *R.* 1963, pp. 581 *et seq.* On the other hand, it has been suggested that the Recognition of Divorces and Legal Separations Act of 1971 follows the wording of the Convention on the Recognition of Divorces (XVIII), which it incorporates and whose system is extended beyond the relations with Contracting States, more closely than necessary, thus causing difficulties of application in connection with recognition in the U.K. of extrajudicial divorces such as the Islamic talaq. See Smart, P.St.J., "The Recognition of Extra-judicial Divorces," in *I.C.L.Q.*, Vol. 34 (1985), pp. 392 *et seq.*

tion; nor is it limited to courts of law, and, most importantly, it also extends to criminal matters. The judgment of the Court of Appeal in the *Westinghouse* case illustrates a certain risk which may be involved in this system, *i.e.* that one may lose sight of the Convention in its international aspects. The Court of Appeal in interpreting the 1975 Act was apparently under the incorrect impression that the United Kingdom, when it ratified the Evidence Convention, had not made a reservation concerning pre-trial discovery of documents. This led the Court to take a benevolent attitude towards the request for pre-trial discovery from the United States court. However, the House of Lords,[37a] referring to the Article 23 reservation, took a more restrictive view.[38]

A new aspect is presented by the Child Abduction and Custody Act 1985. This Act gives effect both to the 1980 Hague Convention on Child Abduction and to the 1980 Council of Europe Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on the Restoration of Custody of Children. The Act provides a rule for the case of conflict between the two Conventions: the Hague Convention then takes priority over the European Convention.[39] Some doubt arises as to whether this is entirely justifiable in the light of the common purpose of both Conventions (*i.e.* to further the immediate return of abducted children) and their respective clauses on compatibility with other treaties.[40]

Complex problems may arise for those States of this group which have a federal character and where the subject-matter of the treaty falls within the jurisdiction not (only) of the federation but of the composing units. Recent Hague Conventions all contain a so-called federal clause which permits Contracting States to extend a treaty to only one or more of these units. Canada was the first federal State to make use of this facility in connection with the 1980 Child Abduction Convention and has progressively extended the application of the Convention to almost all of its Provinces. While most Provinces have simply adopted the text of the Convention and provided for regulatory power for any complementary aspects, Quebec has adopted extensive legislation based on the Convention.[41]

[37a] *Rio Tinto Zinc Corp.* v. *Westinghouse Electric Corp.*, [1978] 1 All E.R. 434 (at 442).

[38] See also Prof. Higgins, p. 138.

[39] Child Abduction and Custody Act 1985, Chap. 60, section 16(4)(*c*). Interestingly, in the Netherlands, an early draft made with a view to implementing the two Conventions proposed to give priority to the European Convention! See also *infra*, Chapter III, A, *in fine*.

[40] If *both* Conventions aim at furthering the immediate return of children and *both* Conventions provide that they do not restrict the application of another Convention in force between the same States for the purposes of obtaining the return of an abducted child, one might have thought that the question of which of the two Conventions should be given priority should have been left to be decided upon the merits of each specific case. This is what the Netherlands implementing law will probably provide.

[41] Bill 72 (1984, Chap. 12), An Act respecting the civil aspects of international and inter-provincial child abductions, assented to June 12, 1974.

B. STATUS OF TREATIES IN DOMESTIC LAW. THE QUESTION OF PRIORITY OVER DOMESTIC LEGISLATION

The question of the status of Hague Conventions within domestic law and their possible priority over domestic legislation has, with one exception, given rise to comparatively few problems.

Systems which provide for automatic incorporation

France and the Netherlands are examples of countries of this category where treaties possess a hierarchically superior position over both prior and subsequent conflicting legislation. In the Netherlands this is subject to the condition that the provisions of the treaty are directly applicable,[42] which is generally the case as regards Hague Conventions, while in France, to the proviso that reciprocity of application can be established.[43] It has been the subject of much debate in France whether it is up to the courts to determine if this condition is fulfilled in a concrete case.[44] In 1984 the French *Cour de Cassation* decided that this is not a matter for the courts to decide but for the Government.[44a] The judgment is to be welcomed because, as the annotator, the Secretary General of the Conference, observes, an opposite decision might have encouraged delaying action by the parties with adverse consequences for the application of Hague Conventions such as those on the Protection of Minors or the Abduction of Children.[45]

The status of Hague Conventions *vis-à-vis* subsequent conflicting legislation in some other States of this group is not always clear. Sometimes the position of a treaty within the hierarchical domestic system may depend on its contents, such as in Spain, where treaty norms relative to basic rights and liberties are given a special position under the Constitution[46,47]; some Hague Conventions, such as the two just mentioned, might possibly be considered as containing such norms, others would clearly fall outside this category. However, in the absence of case-law, this subject remains of a somewhat theoretical character; moreover, in many European States the subject is changing quickly as a result of the rapidly evolving case-law of the Luxembourg and Strasbourg courts.

The one exceptional case in which a Hague Convention has given rise to great controversy over its status in domestic law is provided by the 1970 Evidence Convention and its position under United States law. The question has arisen as to the precise effect of the Evi-

[42] Constitution (as revised in 1983), Article 93.

[43] Constitution (1958), Article 55.

[44] See the discussion by Prof. de la Rochère at pp. 43 *et seq.*

[44a] *Cour de Cassation*, 6 March 1984, *R* 1984, p. 108, note G. A. L. Droz.

[45] It is another question, of course, how one views a provision such as Article 55 of the French Constitution. See the conclusions by Judge Pescatore at the end of this Volume.

[46] Constitution (1978), Article 10, paragraph 2.

[47] See also Prof. Gaja's comments at p. 97.

dence Convention, which sets up a system facilitating the taking of evidence in civil or commercial matters abroad, in respect of (existing) federal and state rules of civil procedure which provide for liberal discovery proceedings directed at documents abroad. The problem has caused perplexity both with federal and state courts and with the federal administration in the United States. To the extent that there is a conflict between the Convention and domestic law—which is not even an agreed matter[48]—theoretically, at least, the position seems clear. Under the supremacy clause of the United States Constitution, treaties pre-empt conflicting state law[49] and as regards conflicting federal law it is well settled that because treaties and congressional enactments are of equal status, the one later in date must stand.[50] Indeed, at least two courts have ruled that the Convention's procedures prevail over United States domestic rules of civil procedure.[50a]

Most United States courts, however, have solved the conflict by an interpretation of the Convention to the effect that the Convention does not purport to exclude domestic procedures for the taking of evidence abroad. However, this position, which is qualified by different courts in different ways, has led the courts to a further question. This concerns whether, under general rules of "comity," the Convention should be used as a preferable alternative to United States rules of civil proceedings, or, on the contrary, whether the Convention is applicable only in those residual instances where it can claim exclusive application.[51] The number of court decisions is considerable, and is still growing; we can only refer to some of them here: *Volkswagenwerk* v. *Sup. Ct.* (Ct. of Appeal, California) (1981)[52]; *Pierburg* (*idem.* 1982)[53]; *Lasky* v. *U.S. District Ct.* E.D. of Philadelphia (1983)[54]; *Philadelphia Gear* (*idem.*)[55]; *Schroeder* (U.S. District Ct., N.D. of Illinois) (1983)[56]; *Graco* (*idem.*, 1984)[57]; *Laker* (U.S. District Ct., District of Columbia) (1984)[58]; *Volkswagenwerk* v. *Falzon* (appeal dismissed) (1984)[59]; *Club Méditerranée* (N.Y. Sup. Ct.) (1984 appeal dismissed and *certiorari* denied).[60] *In re Anschuetz* (U.S. Ct. of Appeals

[48] See Heck, A., "U.S. Misinterpretation of the Hague Evidence Convention," in *Columbia Journal of Transnational Law* (1986), Vol. 24, No. 2, pp. 231–278.
[49] *United States* v. *Belmont*, 301 U.S. 324, 331 (1937).
[50] *Vorhees* v. *Fischer & Krecke*, 697 F. 2d 574, 575–6 (4th Cir. 1983), *Restatement (Second) of the Foreign Relations Law of the United States*, paragraph 141(1).
[50a] *Conn. Sup. Ct.*, July 22, 1982 *Cuisinart Inc.* v. *Robot Coupe*, N.D. Ill., February 21, 1984, *General Electric Co.* v. *North Star Int'l Inc.*
[51] See, *e.g.* Bruno A. Ristau, *Int. Judicial Assistance (Civil and Commercial)*, Vol. I, Washington (1984), pp. 256 *et seq.*.
[52] 123 Cal. App. 3d 480, 176 Cal. Rptr. 874.
[53] 137 Cal. App. 3d 238, 186 Cal. Rptr. 876.
[54] 569 F. Supp. 1229.
[55] 100 F.R.D. 58, 38 F.R.Svc. 2d 534.
[56] 18 Av. Cas. (CCH) 17, 222.
[57] 101 F.R.D. 503.
[58] 103 F.R.D. 42.
[59] 465 U.S. 1014.
[60] 469 U.S. 913.

Fifth Circuit) (1985)[61]; *In re Messerschmitt* (*idem.*)[62]; *Aerospatiale* (U.S. Ct. of Appeals Eighth Circuit).[63]

In the latter case the United States Supreme Court has granted *certiorari*.

It is interesting to note that there seems to be a broad consensus in the United States that the 1965 Convention on Service Abroad excludes domestic procedures for service of process abroad.[64] It is similarly accepted that the Legalisation Convention pre-empts conflicting (state) law.[65]

Systems providing for quasi-automatic incorporation

In the countries belonging to this group treaty provisions take precedence over all prior legislation and can be invoked before the courts. This has been decided repeatedly in the Federal Republic of Germany in respect of the Protection of Minors Convention which has the status of federal law in Germany. It is not entirely predictable, it would seem, how the courts would treat a conflict between a Hague Convention and a federal law enacted subsequently to its entry into force for Germany.[66] Sometimes the principle *lex specialis derogat legi generali* might provide a solution.[67] As regards a possible conflict with the German Constitution, however, the *Bundesverfassungsgericht* will not hesitate to accord priority to constitutionally guaranteed fundamental rights even over treaty provisions.[68]

Systems requiring transformation

In the States of this group a treaty has not, strictly speaking, the status of a source of law. This does not (*cf.* Preliminary remarks) imply complete freedom for the legislator to do as he sees fit after the ratification of a treaty: the State remains bound under public international law by its treaty obligations. It may be interesting to refer in this respect to the "Declaration" adopted by the Fourteenth Session of the Hague Conference (1980) at the request of Scandinavian States and relating to the scope of the 1955 Sales Convention.

[61] 754 F. 2d 602.
[62] 757 F. 2d 729, 731.
[63] 782 F. 2d 120.
[64] 608 P. 2d 68, 71 (Ariz. 1980). See most recently Junker, A., "Der lange Arm Amerikanischer Gerichte: Gerichtsgewalt, Zustellung und Jurisdictional Discovery," in *I.P.Rax* 1986, Heft 4, pp. 197 *et seq.* *Kadota* v. *Hosogai* (Ct. of App. Arizona) (1980) followed by many other similar decisions.
[65] Opinion of the Attorney-General of California, March 19, 1982, *International Legal Materials*, Vol. XXI, No. 2 (March 1982), p. 357.
[66] *Cf.* the report by Professor J. A. Frowein to this Volume.
[67] See Prof. Frowein, p. 69 (and compare also Prof. Gaja's comments at p. 99).
[68] As it did in respect of the E.E.C. Treaty in its judgment of May 29, 1974, *N.J.W.* 1974, 1927. See criticism by Ferid, M., "Die derzeitige Lage von Rechtsvergleichung und IPR in der Bundesrepublik Deutschland," in *ZfRvgl*, Vienna 1981, p. 86 (at p. 93).

Sweden and Denmark in particular wanted to enact special conflict rules for consumer sales but felt restricted by the 1955 Convention. The Fourteenth Session, considering that the interests of consumers were not taken into account when the 1955 Convention was negotiated, "declared" that the treaty "does not prevent States Parties from applying special rules on the law applicable to consumer sales."[69]

Direct applicability

Given their subject-matter, which relates to private legal relationships, it is not surprising that Hague Conventions are generally cast in language which addresses not only the Contracting States but also private individuals. In other words, Hague Conventions are, from the standpoint of public international law, generally self-executing or directly applicable, subject of course to the condition that the institutions of the contracting parties allow for such immediate application. An exception must be made for the 1961 Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, in so far as it makes the exemption from legalization subject to a formality, the addition of a special certificate (*apostille*) issued by a competent State authority. Obviously, this treaty can operate only when States have designated such an authority. The same goes for those provisions in other treaties, mainly those on judicial and administrative cooperation, which require the designation of, and intervention by, domestic institutions other than the courts.[70] The direct applicability of Hague Conventions in those States which allow for it would not seem to be controversial nor to present any major difficulties.

INTERPRETATION OF HAGUE CONVENTIONS BY DOMESTIC COURTS

Introduction

Hague Conventions are often brought before the courts. There are hundreds of court decisions concerning the pre-war treaties alone[71] and many more involving the treaties adopted since 1951[72]; the 1956 and 1958 Conventions on Maintenance for Children and the 1961

[69] See *A. & D. XIV*, Final Act, p. I–62; see Diamond, A.L., "Conventions and their revision," in *Unification*, Liber amicorum Sauveplanne, Deventer 1984, pp. 45 *et seq.*

[70] See Von Overbeck (n. 19), p. 19.

[71] See Kosters, J. and Bellemans, F., *Les Conventions de la Haye de 1902 et 1905 sur le droit international privé*, Haarlem/La Haye 1921.

[72] See Sumampouw (n. 24).

Convention on the Protection of Minors in particular have led to streams of case-law, especially in the Federal Republic of Germany, France, Austria, Switzerland and the Netherlands. More recently the Evidence Convention has triggered extensive litigation in a number of countries, most particularly, as we have seen, in the United States and the United Kingdom.

In countries where treaties need to be transformed into domestic legislation in order to have internal effect, such as in the United Kingdom, it is not, strictly speaking, the treaty which is applied and interpreted but the transforming statute. A number of recent United Kingdom court decisions make it clear, however, that even where legislation has been enacted to give effect to a Convention, reference may and should where necessary be made to the treaty itself, to see whether it assists in the interpretation of the legislation.[73] Hand in hand with this goes, it would seem, a growing willingness of United Kingdom courts to look for internationally acceptable interpretations, if necessary with the help of consultation of the *travaux préparatoires*[74] and excursion into comparative law.[75] For a recent illustration involving the Evidence Convention see *In re State of Norway's Application*, [1986] 1 F.T.L.R. 507 (Court of Appeal), *per* Kerr L.J. For his interpretation of the words "civil or commercial matter" in the Evidence (Proceedings in Other Jurisdictions) Act 1975, Lord Justice Kerr first looked for assistance to the text of the Convention. When the text did not provide an answer, he sought to establish "a generally accepted international interpretation." He consulted the *travaux préparatoires* and compared the laws of civil law countries, but found it impossible to arrive at such an interpretation. In the end, he decided to combine the interpretations of the laws of the requesting court and his own law, both favouring the inclusion of tax matters within the concept of civil and commercial matters.[76]

[73] Prof. Higgins suggests that the position in the U.K. may not yet be this clear (p. 137).

[74] *Cf.* Sinclair (n. 11, at p. 275).

[75] *Cf.* generally Lord Denning, M.R., *What Next in the Law* (London 1982), pp. 293 *et seq.*

[76] The example is given as an illustration of the good will of the Court only; the problem with the term "civil or (or: and) commercial matters" is that it has its origin in civil law thinking (*cf.* n. 12). The term was accepted by the U.K. in the 1930s in a number of bilateral treaties on civil procedure which it then concluded with civil law countries, but only at the request of the latter. It never became a current legal term in common law jurisdictions, nor, for that matter, in the Nordic countries. So, the whole exercise of looking for a "generally accepted international interpretation," based on a common denominator of the various families of law, was in this way doomed to failure from the outset, because the interpretation could be found only with reference to the civil law (*cf.* the clarification made in the 1978 Convention of Accession of Denmark, Ireland and the U.K. to the 1968 E.E.C. Civil Jurisdiction and Enforcement of Judgments Convention in respect of the term "civil and commercial matters" as used in Article 1 of the 1968 Convention; at the request of the acceding countries it has now been expressly provided that the Convention "shall not extend, in particular, to revenue, customs or administrative matters").

A. PRINCIPLES OF INTERPRETATION

It is, of course, vital to the life of treaties such as those of the Hague Conference which depend for their application and interpretation entirely upon national authorities that they be interpreted by the domestic courts in the light of their object and purpose (*cf.* Article 31, paragraph 1, of the Vienna Convention on the Law of Treaties). This means, first of all, that a uniform interpretation is sought. To the extent that treaties, like the Convention on the form of wills or the Conventions relating to children, seek to further certain specific interests (the promotion of the formal validity of wills or the welfare of children), the interpretation should, moreover, take those interests into account; where the object of the Convention is to further judicial and administrative cooperation, the interpretation should serve that purpose. For a thorough examination of the object and purpose of the 1965 Service Convention see *Cour Supérieure de Justice* of Luxemburg, January 21, 1981, *R* 1981, 708, note G. A. L. Droz. And see, for an explicit ruling on the principles of interpretation, *Hoge Raad* (Netherlands), February 21, 1986 (*Arcalon*), *Rechtspraak van de Week* 1986, No. 50, where it was stated, again relating to the Evidence Convention: "The nature and purpose of this treaty, which purports to further international cooperation between courts of Contracting States, militate in favour of a broad interpretation of its Article 1."; *cf.* also *Oberlandesgericht* Munich, October 31, 1980, 20 *International Legal Materials* 1025 (1981).

Our impression from the case-law material in various Member States is that these principles often guide the courts in an implicit way. Examples of the application of Hague Conventions beyond their scope show, moreover, a willingness of certain courts to give wide effect to these treaties. Examples include, among others, the application beyond its geographical and temporal scope of the 1956 Convention on Maintenance for Children by courts of the FRG, the Netherlands and Switzerland.[77] For an application of (implementing) legislation of the 1954 Convention in relation to a State non-Party, see Osaka High Court, July 12, 1973, *Japanese Annual of International Law* 1975, 196.

Of course, there also remain instances in which a Convention is interpreted narrowly or is even overlooked altogether.[78]

Subsequent practice

A recent development in the Hague Conference which may influence a Convention's "context" (*cf.* Article 31, paragraph 2, of the Vienna Convention) is seen in the meetings of governmental experts on the operation of treaties, in particular those on judicial and administrative proceedings. These meetings have been useful not only for an exchange of information but also have resulted in

[77] See Sumampouw (n. 24), Vol. I, pp. 85 *et seq.*; Vol. II, pp. 31 *et seq.*

[78] *Cf.* Von Overbeck (n. 19), at p. 14.

developing consensus on some issues of the interpretation of treaties. The results are published[79] and are taken into consideration by courts. See, *e.g.* Hoge Raad in Arcalon cited *supra*, p. 238.

Travaux préparatoires

The *travaux préparatoires* of Hague Conventions are published *in extenso* in the Proceedings (*Actes et documents*) of the Sessions. In particular the reports on the Conventions, written by an expert chosen from among the delegates, often contain a wealth of background material. Sometimes the *travaux préparatoires* clarify an issue which is not self-evident. *Cf.* in respect of the 1954 Convention on Civil Procedure OLG Frankfurt, *IPRax* 1984, 32, or in respect of the 1971 Traffic Accidents Convention *Cour d'Appel de Paris*, June 24, 1981, *R* 1982, 691, note M. L. Pelichet.

Sometimes they confirm what one might presume from a reading of the text: *cf.* Hoge Raad, Arcalon, cited *supra*, at p. 184.

One must conclude, however, that courts generally do not use the *travaux préparatoires* very extensively. This is in part made up for by excellent treatises on the various Conventions which are often based upon thorough research of their history, including the *travaux préparatoires*, *e.g.* several recent judgments of the Austrian *Oberster Gerichtshof* concerning the 1961 Convention on the Protection of Minors, which were generally criticized by Austrian scholars, could have been avoided *inter alia* by a consultation of the *Actes et documents*. See OGH, December 10, 1980, *ZfRvgl* 1981, 217 and November 30, 1980, *IPRax* 1984, 159.

Decisions of other courts

Those Hague Conventions which require a form of cooperation between courts of different countries naturally lead to an exchange of views on the Convention. When a request for taking of evidence abroad is issued by a court in State A in what it considers to be a "civil or commercial" matter within the meaning of the Evidence Convention, that view may influence the court of the receiving State B. As to the issue of whether the courts in State B are *bound* by the

[79] See Hague Conference on Private International Law, *Practical Handbook on the Operation of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, Antwerp/Apeldoorn, which takes into account the results of a meeting of experts on the Convention held in November 1977; and the *Practical Handbook on the Operation of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*, Antwerp/Apeldoorn 1984, which recounts the report of the meeting of experts of June 1978; a second meeting on the operation of this Convention was held in 1985. The results were published in *International Legal Materials*, Vol. XXIV, November 1985, p. 1668.

view of the courts in State A, the prevailing opinion is that this is not the case. *Cf. Re Norway* and *Arcalon* cited *supra*.

Sometimes a Convention prescribes such an exchange of views; under Article 10 of the Protection of Minors Convention the courts of one Contracting State should, before taking measures of protection in respect of a child, consult, as far as possible, the courts of another Contracting State whose previous measures of protection are still in force. However, this system is not widely used.[80] In the absence of such procedures, it would not seem that courts consult each other or each other's judgments very frequently, notwithstanding the excellent information service provided by a number of legal journals and the remarkable collection of case-law to be found in *Les Nouvelles Conventions de La Haye*.[81]

New problems: conflicts of Conventions

It is reported that there have been over 100 court decisions since 1975 involving a conflict of Conventions; many of these involve conflicts between Hague Conventions and other Conventions.[82] These conflicts may be of different kinds. Sometimes the treaties are really incompatible from the point of view of public international law, and it must then be determined which one prevails.[83] However, many modern treaties on private international law now provide (and this has become a consistent practice in the Hague Conference) that the Convention shall not restrict the application of provisions of domestic law or of other Conventions dealing with the same subject-matter. If two Conventions have such a clause and both claim to be applied in a concrete case, there is strictly speaking no conflict in the sense of public international law. But litigants and courts are left with a number of questions. May one invoke one part of one treaty and one part of the other and enjoy the best of both worlds?[84] Is it possible to develop special conflict rules, possibly inspired by those

[80] See Hoyer, H., "Haager Minderjährigenschutzabkommen und Wechsel des gewöhnlichen Aufenthalts während des anhängigen Verfahrens," in *I.P.Rax* 1984, p. 164 (at p. 165).

[81] See n. 24.

[82] See Majoros, F., "Das Kollisionsrecht der Konventionskonflikte etabliert sich: die Regel der maximalen Wirksamkeit in der *doctrine* des schweizerischen Bundesgerichts (Entscheidung Denysiana vom. 14 März 1984)," in *Festschrift für Karl H. Neumayer*, Baden-Baden 1985, pp. 431 *et seq.*

[83] This was the case in the Denysiana decision of the Swiss *Bundesgericht* B.G.E. 110 I b, pp. 191–195.

[84] This question received an affirmative reply in the Civil Jurisdiction and Judgments (Accession) Convention (n. 76) in respect of the "conflict" between this Convention and the Hague Maintenance Enforcement Conventions, in so far as the provisions for recognition and enforcement of judgments of the former Convention are concerned. It follows from Article 25, paragraph 2, under (b) *in fine* of the Accession Convention that where both the Judgments Convention and one of the Hague Maintenance Enforcement Conventions apply, the conditions for enforcement of the latter shall be applicable, but the—more expeditious—procedures for enforcement of the Judgments Convention may nevertheless be applied.

of the conflict of laws, for these problems; if so, should the court apply such rules *ex officio*? There are many more questions than can be dealt with here, but there is also a pressing need for answers.[85]

B. PROBLEMS OF CHARACTERIZATION

As we have seen, Hague Conventions reflect compromises between different approaches of private international law, and, as a result, sometimes have to use concepts which cannot be defined with great precision. It may be tempting for a court to interpret such a concept entirely according to its domestic views and to characterize a foreign legal institution in terms of its own system. *Cf.*, *e.g.* the judgments of the O.G.H. cited *supra*.

The 1984 Trusts Convention offers an example of a very special technique designed to avoid such a result. The trust device is widely used in common law countries, but unknown in most civil law systems. The latter, therefore, often have great difficulties in dealing with trusts, and they may even, by characterizing trusts in terms of their own institutions, distort the trust concept. Now the Trusts Convention lists a number of characteristics which help to identify and to respect trusts, and requires Contracting States to recognize trusts as trusts and not as some more or less analogous institution.[86]

A somewhat different set of problems derive from the intersection of Convention rules and domestic private international law rules.[87] The 1978 Marriage Convention provides for uniform rules concerning the validity of marriages. Now what is the position when, in the context of a question concerning the legitimacy of a child, the validity of its parents' marriage is disputed? Does the court then have to apply the Convention or may it apply its own, perhaps different, conflict rules? The Convention indicates that it ought to be applied (Article 12). A more ambiguous answer concerning a similar problem is given by the 1956 and 1973 Conventions on the law applicable to maintenance. Fortunately, however, a certain measure of international consensus among the courts in different countries seems to have emerged resulting in a greater likelihood that children in particular will obtain equal maintenance treatment.[88]

[85] See generally Volken, P., *Konventionskonflikte im I.P.R.*, Zurich 1977, and Majoros, F., *Les Conventions internationales en matière de droit privé*, part I (Paris 1976) and part II (Paris 1980).

[86] See, in particular, Articles 2 and 11 and *cf.* Article 15 *in fine* of the Trusts Convention. See, generally, Dyer, A. and Van Loon, H., "Report on trusts and analogous institutions," in *A. & D. XV*, pp. 10 *et seq.*

[87] Technically speaking, this is the problem of the "preliminary question."

[88] The problem stems from the fact that while some systems of conflict of laws view maintenance as an aspect of filiation, applying the law which governs filiation also to questions of maintenance, other systems see them as separate issues, which are governed by separate conflict rules. See *e.g.* Böhmer, C. and Siehr, K., *Das Gesamte Familienrecht*, Part II (Frankfurt 1979), loose-leaf edition), Chap. 7.4, No. 9.

C. "ORDRE PUBLIC" AND SIMILAR DEVICES

Where the application of a Convention would lead to a result which is seriously unacceptable to domestic public policy in a specific case, the court may refuse to apply a foreign law or to recognize a foreign decision or to execute a letter rogatory. The language used in the various Conventions is restrictive, however: the foreign law or decision must be "manifestly incompatible with public policy (*ordre public*)"; the letter rogatory must "prejudice the sovereignty or security of the State addressed."

The courts appear to be generally reluctant to throw up such barriers. In practice, it would seem that the *ordre public* defence is successful only when interests close to fundamental human rights are at stake. See, *e.g. Corte di Cassazione*, December 17, 1981, *Rivista di diritto internazionale privato e processuale* 1983, 330, in respect of recognition and enforcement of a Swedish order for the payment of maintenance for a child against the Italian father involving the 1958 Maintenance Convention: the Swedish proceedings "would be contrary to the constitution only if the rights of defence were seriously affected and the parties were not able to defend themselves before the foreign court." This had not, however, been the case. The United Kingdom's sovereignty and immunity were considered by the House of Lords in *Re Westinghouse* to have been prejudiced in respect of part of the letters rogatory concerned, following express statements of the British Government to that effect.[89]

D. WAYS OF SECURING UNIFORM INTERPRETATION

On March 27, 1931 a Protocol was signed which conferred jurisdiction on the Permanent Court of International Justice in respect of disputes concerning the interpretation of Hague Conventions on international law. The Protocol provides that the judgment of the Court shall entail an obligation for the States to apply the treaty on its territory in the way indicated by the Court. Jurisdiction of the P.C.I.J. under the Protocol passed to the International Court of Justice which, in 1958, decided a dispute between Sweden and the Netherlands over the interpretation of the 1902 Hague Convention on Guardianship of Minors (Elisabeth Boll).[90] The Protocol is still in force among nine countries,[91] but this is the only occasion on which it has been applied. This is not surprising, because Hague Conventions deal essentially with private rights and obligations

[89] See [1978] All E.R. at pp. 437–438.

[90] Case concerning the Application of the Convention of 1902 governing the Guardianship of Infants 1958, *I.C.J.*, November 28, 1958; see *I.C.J.* Reports 1958, 55–136.

[91] According to the Depositary, these are (as of November 1, 1986): Belgium, Denmark, Estonia, Finland, the Netherlands, Norway, Portugal, Sweden, Hungary.

which normally will be enforced by the interested private parties themselves, and not through States. It looks as if the situation in respect of the Evidence Convention is somewhat unusual in this respect; here, some form of inter-State settlement of disputes on the interpretation of the Convention is not entirely inconceivable.[92]

The Protocol to the E.E.C. Convention on the Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, conferring jurisdiction on the Luxembourg Court to decide on issues of interpretation submitted by domestic courts, shows that supranational procedures for the interpretation of treaties on private international law in the context of private litigation can operate successfully. The Court's decisions have in fact already touched upon matters which interest the Conference, such as the interpretation of the words "civil or commercial matters,"[93] and the relationship between the 1965 Convention on Service Abroad and the E.E.C. Jurisdiction and Judgments Convention which refers to the 1965 Convention in its Article 20, third paragraph.[94]

For the foreseeable future,however, it would seem that the best way to further the operation of Hague Conventions is by means of regular meetings of governmental experts who are working with the treaties and can influence practitioners in their countries. The meetings held thus far on the Service and Evidence Convention and on the Child Abduction Convention[95] have proved to be very useful and illuminating and rewarding for all participants. Given the crucial role of the domestic courts, especially the highest courts, in the interpretation of Hague Conventions, it might be worthwhile examining whether these meetings could not be extended to regular meetings of members of the judiciary of the Member States of the Conference.

ANNEX

1 Convention relating to civil procedure—signed November 14, 1896 (Additional Protocol May 22, 1897) (revised by Convention No. 7)

2 Convention relating to the conflict of laws in regard to marriage—signed June 12, 1902 (revised by Convention No. XXVI)

3 Convention relating to the conflict of laws and jurisdictions in

[92] In fact, a number of States Parties to the Evidence Convention submitted *amicus curiae* briefs in the *Anschuetz, Messerschmidt* and *Aerospatiale* cases cited *supra*, which illustrates the extent to which the litigation involved also affects the interests of States.

[93] Court of Justice, E.E.C., October 14, 1976, case 29/76 (Eurocontrol) 1976, E.C.R. p. 1541; see also n. 68 *supra*.

[94] Court of Justice, E.E.C., July 15, 1982, case 228/81 (Pendy Plastic Products B.V.), 1982, E.C.R. p. 2723.

[95] A short meeting on this Convention was held at the Fifteenth Session in 1984: it proved to be too short so that, in the near future, another one will be held.

regard to divorce and separation—signed June 12, 1902 (revised by Convention No. XVIII)
4 Convention relating to the conflict of laws and jurisdictions in regard to guardianship of minors—signed June 12, 1902 (revised by Convention No. X)
5 Convention relating to the conflict of laws in regard to the effects of marriage in respect of the rights and duties of the spouses concerning their personal relationships and their property—signed July 17, 1905 (revised by Convention No. XXV)
6 Convention relating to guardianship and other measures of protection of adults—signed July 17, 1905
7 Convention relating to civil procedure—signed July 17, 1905 (revised by Convention No. II)

"Statute"	I	Statute of the Hague Conference on Private International Law (entered into force on July 15, 1955)
"Civil Procedure"	II	Convention relating to civil procedure—signed March 1, 1954 (revised by Conventions Nos XIV, XX and XXIX)
"1955 Sales of Goods"	III	Convention on the law applicable to international sales of goods—signed June 15, 1955 (revised by Convention No XXXI)
"Transfer of Title"	IV	Convention on the law governing transfer of title in international sales of goods—signed April 15, 1958
"Sales—Choice of Court"	V	Convention on the jurisdiction of the selected forum in the case of international sales of goods—signed June 15, 1955
"National Law vs. Law of Domicile"	VI	Convention to determine conflicts between the national law and the law of domicile—signed April 15, 1958
"Recognition of Companies"	VII	Convention on recognition of the legal personality of foreign companies, associations and foundations—signed June 1, 1956
"Maintenance Children—Applicable Law"	VIII	Convention on the law applicable to obligations to support minor children—signed October 24, 1956 (revised by Convention No XXIV)
"Maintenance Children—Enforcement"	IX	Convention on the recognition and enforcement of orders for the maintenance of children—signed April 15, 1958 (revised by Convention No XXIII)

"Protection of Minors"	X	Convention on the powers of authorities and the law applicable in respect of the protection of minors—signed October 5, 1961
"Form of Wills"	XI	Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions—signed October 5, 1961
"Legalisation"	XII	Convention Abolishing the Requirement of Legalisation for Foreign Public Documents—signed October 5, 1961
"Adoption"	XIII	Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions—signed November 15, 1965
"Service Abroad"	XIV	Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters—signed November 15, 1965
"Choice of Court"	XV	Convention on the Choice of Court—signed November 25, 1965
"Enforcement of Judgments"	XVI	Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters—signed February 1, 1971
"Protocol on Jurisdiction"	XVII	Supplementary Protocol to the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters—signed February 1, 1971
"Divorce—Recognition"	XVIII	Convention on the Recognition of Divorces and Legal Separations—signed June 1, 1970
"Traffic Accidents"	XIX	Convention on the Law Applicable to Traffic Accidents—signed May 4, 1971
"Taking of Evidence"	XX	Convention on the Taking of Evidence Abroad in Civil or Commercial Matters—signed March 18, 1970
"Administration of Estates"	XXI	Convention Concerning the International Administration of the Estates of Deceased Persons—signed October 2, 1973
"Products Liability"	XXII	Convention on the Law Applicable to Products Liability—signed October 2, 1973

"Maintenance—Enforcement"	XXIII	Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations—signed October 2, 1973
"Maintenance—Applicable Law"	XXIV	Convention on the Law Applicable to Maintenance Obligations—signed October 2, 1973
"Matrimonial Property"	XXV	Convention on the Law Applicable to Matrimonial Property Regimes—signed March 14, 1978
"Marriage"	XXVI	Convention on Celebration and Recognition of the Validity of Marriages—signed March 14, 1978
"Agency"	XXVII	Convention on the Law Applicable to Agency—signed March 14, 1978
"Child Abduction"	XXVIII	Convention on the Civil Aspects of International Child Abduction—signed October 25, 1980
"Access to Justice"	XXIX	Convention on International Access to Justice—signed October 25, 1980
"Trusts"	XXX	Convention on the Law Applicable to Trusts and on their Recognition—signed July 1, 1985
"Sales Contracts"	XXXI	Convention on the Law Applicable to Contracts for the International Sale of Goods—signed December 22, 1986

SIGNATURES AND RATIFICATIONS OF THE HAGUE CONVENTIONS / Status on: 1 November 1986

MEMBER STATES OF THE CONFERENCE / Statute	I	ARGENTINA	AUSTRALIA	AUSTRIA	BELGIUM	CANADA	CHILE	CYPRUS	CZECHOSLOVAKIA	DENMARK	EGYPT	FINLAND	FRANCE	GERMANY, FED.REP.	GREECE	IRELAND	ISRAEL	ITALY			*continued overleaf*
Civil Procedure*	II			R	R				A	R	A	R	R	R			A	R			
Sales of Goods*	III				R					R		R	R					R			
Transfer of Title	IV														S			R			
Sales – Choice of Court	V			S	S									S	S						
National Law vs. Law of Domicile	VI				R								S								
Recognition of Companies	VII				R								R								
Maintenance Children – Applicable Law*	VIII			R	R								R	R	S			R			
Maintenance Children – Enforcement*	IX			R	R				A	R		R	R	R	S			R			
Protection of Minors*	X			R									R	R				S			
Forms of Wills*	XI		A	R	R					R		R	R	R	R	A	A	S			
Legalisation*	XII			R	R			A				R	R	R	R		A	R			
Adoption*	XIII			R																	
Service Abroad*	XIV				R			A	A	R	R	R	R	R	R		R	R			
Choice of Court	XV																S				
Enforcement of Judgments*	XVI							R													
Protocol on Jurisdiction*	XVII							R													
Divorce – Recognition*	XVIII		A					A	R	R	R	R						R			
Traffic Accidents*	XIX			R	R				R				R								
Taking of Evidence*	XX							A	R	R		R	R	R			R	R			
Administration of Estates	XXI								R									S			
Products Liability*	XXII				S								R					S			
Maintenance – Enforcement*	XXIII				S				R			R	R	S				R			
Maintenance – Applicable Law*	XXIV				S								R	S				R			
Matrimonial Property	XXV			S									R								
Marriage	XXVI		S								S	S									
Agency	XXVII												R								
Child Abduction*	XXVIII		R		S	R							R		S						
Access to Justice	XXIX											S	R	S	S						
Trusts	XXX																	S			
Sales Contracts	XXXI																				

* = in force S = Signature R = Ratification A = Accession

SIGNATURES AND RATIFICATIONS OF THE HAGUE CONVENTIONS / Status on: 1 November 1986

MEMBER STATES OF THE CONFERENCE / Statute		JAPAN	LUXEMBOURG	MEXICO	NETHERLANDS	NORWAY	POLAND	PORTUGAL	SPAIN	SURINAME	SWEDEN	SWITZERLAND	TURKEY	UNITED KINGDOM	UNITED STATES	URUGUAY	VENEZUELA	YUGOSLAVIA			
Civil Procedure*	II	R	R		R	R	A	R	R	A	R	R	A					A			
Sales of Goods*	III		S		S	R			S		R	R									
Transfer of Title	IV																				
Sales — Choice of Court	V																				
National Law vs. Law of Domicile	VI		S		R				S												
Recognition of Companies	VII		S		R				S												
Maintenance Children — Applicable Law*	VIII	R	R		R	S		R	R			R	R								
Maintenance Children — Enforcement*	IX		S		R	R		R	R	A	R	R	R								
Protection of Minors*	X		R		R			R	S			R	A					S			
Forms of Wills*	XI	R	R		R	R	A	S	S		R	R	A	R				R			
Legalisation*	XII	R	R		R	R		R	R	A		R	R	R	A			R			
Adoption*	XIII											R		R							
Service Abroad*	XIV	R	R		R	R		R	S		R	S	R	R	R						
Choice of Court	XV																				
Enforcement of Judgments*	XVI				R			R													
Protocol on Jurisdiction*	XVII				R			R													
Divorce — Recognition*	XVIII		S		R	R		R			R	R		R							
Traffic Accidents*	XIX		R		R			S	S			S						R			
Taking of Evidence*	XX		R		R	R		R	S		R	S		R	R						
Administration of Estates	XXI		S		S			R					S	S							
Products Liability*	XXII		R		R	R		S										R			
Maintenance — Enforcement*	XXIII		R		R	R		R	S		R	R	R	R							
Maintenance — Applicable Law*	XXIV	R	R		R			R	R			R	R								
Matrimonial Property	XXV		R					S													
Marriage	XXVI		S					S													
Agency	XXVII							R													
Child Abduction*	XXVIII		R					R	S			R		R	S						
Access to Justice	XXIX		S									S									
Trusts	XXX		S		S									S							
Sales Contracts	XXXI																				

* = in force S = Signature R = Ratification A = Accession

SIGNATURES AND RATIFICATIONS OF THE HAGUE CONVENTIONS / Status on: 1 November 1986

NON-MEMBER STATES		ANTIGUA AND BARBUDA	BAHAMAS	BARBADOS	BOTSWANA	FIJI	GERMAN DEM. REP.	GRENADA	HUNGARY	LEBANON	LESOTHO	LIECHTENSTEIN	MALAWI	MALTA	MAURITIUS	MONACO	MOROCCO	NIGER			
Civil Procedure*	II								A	A							A				
Sales of Goods*	III																	A			
Transfer of Title	IV																				
Sales — Choice of Court	V																				
National Law vs. Law of Domicile	VI																				
Recognition of Companies	VII																				
Maintenance Children — Applicable Law*	VIII											A									
Maintenance Children — Enforcement*	IX								A			A									
Protection of Minors*	X																				
Forms of Wills*	XI	A			A	A	A	A			A				A						
Legalisation*	XII		A		A	A			A		A	R	A	A	A						
Adoption*	XIII																				
Service Abroad*	XIV	A		A	A								A								
Choice of Court	XV																				
Enforcement of Judgments*	XVI																				
Protocol on Jurisdiction*	XVII																				
Divorce — Recognition*	XVIII																				
Traffic Accidents*	XIX																				
Taking of Evidence*	XX			A												A					
Administration of Estates	XXI																				
Products Liability*	XXII																				
Maintenance — Enforcement*	XXIII																				
Maintenance — Applicable Law*	XXIV																				
Matrimonial Property	XXV																				
Marriage	XXVI																				
Agency	XXVII																				
Child Abduction*	XXVIII								A												
Access to Justice	XXIX															S					
Trusts	XXX																				
Sales Contracts	XXXI																				

continued overleaf

* = in force S = Signature R = Ratification A = Accession

SIGNATURES AND RATIFICATIONS OF THE HAGUE CONVENTIONS / Status on: 1 November 1986

NON-MEMBER STATES		ROMANIA	SEYCHELLES	SINGAPORE	SOUTH AFRICA	SWAZILAND	TONGA	U.S.S.R.	VATICAN CITY
Civil Procedure*	II	A						A	A
Sales of Goods*	III								
Transfer of Title	IV								
Sales – Choice of Court	V								
National Law vs. Law of Domicile	VI								
Recognition of Companies	VII								
Maintenance Children – Applicable Law*	VIII								
Maintenance Children – Enforcement*	IX								
Protection of Minors*	X								
Forms of Wills*	XI				A	A	A		
Legalisation*	XII		A			A	A		
Adoption*	XIII								
Service Abroad*	XIV		A						
Choice of Court	XV								
Enforcement of Judgments*	XVI								
Protocol on Jurisdiction*	XVII								
Divorce – Recognition*	XVIII								
Traffic Accidents*	XIX								
Taking of Evidence*	XX			A					
Administration of Estates	XXI								
Products Liability*	XXII								
Maintenance – Enforcement*	XXIII								
Maintenance – Applicable Law*	XXIV								
Matrimonial Property	XXV								
Marriage	XXVI								
Agency	XXVII								
Child Abduction*	XXVIII								
Access to Justice	XXIX								
Trusts	XXX								
Sales Contracts	XXXI								

* = in force S = Signature R = Ratification A = Accession

Abbreviations

A. & D.	Actes et documents de la Conférence de La Haye (Proceedings of the Sessions of the Hague Conference); published since 1893. The references (XIV, XV, etc.) are to the order of the Sessions
Clunet	Journal du Droit International, fondé par E. Clunet, Paris
I.C.L.Q.	International and Comparative Law Quarterly, London
IPRax	Praxis des Internationalen Privat- und Verfahrensrechts, Bielefeld
N.J.W.	Neue Juristische Wochenschrift, München and Frankfurt
R.	Revue critique de droit international, Paris
ZfRvgl	Zeitschrift für Rechtsvergleichung, Vienna