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## Hague Conventions and the Reform of English Conflict of Laws

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# Articles

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Peter M. North\*

Hague Conventions and the  
Reform of English Conflict of  
Laws<sup>1</sup>

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## I. Introduction

Over twenty years ago, Horace Read said: “The first half of this century has seen the emergence of legislation as the chief instrument of change and innovation in the law”.<sup>2</sup> True though this comment was in 1959, it has received added force in the common law world, especially in the Commonwealth, by the ‘explosion of law reform’<sup>3</sup> which has taken place since the mid-sixties. The creation of permanent statutory law reform agencies has tilted the balance even further towards legislation as the instrument of legal change. This is for two reasons. Despite the occasional judicial attempt to jump the legislative gun,<sup>4</sup> the means of implementing proposals from law reform commissions is by means of legislation, and this is assisted by the practice of many such bodies of appending draft Bills to their final reports. The fact that such agencies exist seems in recent years, in England at least, to have caused the judges in a number of instances to argue that major change in the law is not for them, but for the legislature. For instance, Lord Simon of Glaisdale dissented in the landmark decision of the House of Lords in *Miliangos v. George Frank (Textiles) Ltd.*,<sup>5</sup> which decided that English courts

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1. This is a slightly expanded version of the Sixth Horace E. Read Memorial Lecture delivered at the Dalhousie Law School on 29th September 1980.

2. Read, “The programme in Legislation at Dalhousie Law School” (1959), 13 U. Tor.L.J. 81

3. Gower, “Reflections on Law Reform” (1973), 23 U.Tor. L.J. 257

4. *Levison v. Patent Carpet Cleaning Co. Ltd.*, [1978] Q.B. 69 where Lord Denning, M.R., at p.79, said:

In such circumstances as here the Law Commission in 1975 recommended that a term which exempts the stronger party from his ordinary common law liability should not be given effect except when it is reasonable . . . and there is a bill now before Parliament which gives effect to the test of reasonableness. This is a gratifying piece of law reform: but I do not think we need wait for that bill to be passed into law. You never know what may happen to a bill.

See now the Unfair Contract Terms Act 1977

5. [1976] A.C. 443

could in future give judgment in foreign currencies, not just in sterling, the foreign currency to be converted into sterling as at the date when the court authorises enforcement of the judgment. In Lord Simon's view:

'I do not think that this is a law reform which should or can be properly imposed by judges; it is, on the contrary, essentially a decision which demands a far wider range of review than is available to courts following our traditional and valuable adversary system — the sort of review compassed by an interdepartmental committee'.<sup>6</sup>

This echoes the forceful approach of Lord Kilbrandon in a criminal appeal to the House of Lords the previous year where he said:

'If there is one lesson which has been learned since the setting up of the Law Commission it is this, that law reform by lawyers for lawyers (unless in exceptionally technical matters) is not socially acceptable. An alteration in a fundamental doctrine of our law . . . could not properly be given effect to save after the widest reference to interests, both social and intellectual, far transcending those available in the judicial committee of your Lordships' House'.<sup>7</sup>

More recently still, the House of Lords<sup>8</sup> has refused to alter the rule that the English courts will not take jurisdiction over actions concerning title to foreign land.<sup>9</sup> Lord Wilberforce took the view that the nature of the rule 'does not favour revision (assuming such to be logically desirable) by judicial decision, but rather by legislation.'<sup>10</sup>

It may be noted that two of these recent House of Lords decisions in which anxiety has been expressed about judicial law-making concern issues in the conflict of laws. Here there is a further dimension to the question of law reform — the desire to achieve reform and harmonisation) through widespread international agreement. Not only does such reform come about by legislation but by legislation implementing an internationally agreed convention. United Kingdom legislative practice with conflict of laws conventions has been to turn the Convention rules into our

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6. *Ibid.*, at 480. A broadly based Working Party is, in fact, assisting the Law Commission with further work in the field of foreign money liabilities; see Law Commission Fourteenth Annual Report 1978-1979, Law Com. No. 97, para. 2.43 and Appendix 2.

7. *D.P.P. v. Lynch*, [1975] A.C. 653 at 700

8. *Hesperides Hotels v. Aegean Turkish Holidays Ltd.*, [1979] A.C. 509

9. *British South Africa Co. v. Companhia de Moçambique*, [1893] A.C. 602

10. [1979] A.C. 509 at 537

traditional statutory form, rather than to have a short Act with the Convention given effect to in a Schedule, as tends often to be done in uniform substantive law conventions.<sup>11</sup>

There are a number of international law reform bodies which over the years have concerned themselves with matters of the conflict of laws. Some of these have been regional, such as the developments in Latin America in the Montevideo Treaties of 1889 and 1940 and the Bustamante Code of 1928, the five Scandinavian Conventions concluded between 1931 and 1934, the draft Benelux uniform laws of 1951 and 1968, the work of the Council of Europe and, most recently, the activities of the E.E.C. in the field of harmonisation of private international law.<sup>12</sup> Other activity has been on a wider international basis and some problems affecting the conflict of laws have been dealt with by the Unidroit Institute in Rome, by the United Nations in UNCITRAL and, again recently, by the Commonwealth Secretariat, particularly in the field of recognition of foreign judgments and child custody disputes. Undoubtedly, however, the most significant international body in the field of reform and harmonisation of the conflict of laws has been the Hague Conference on Private International Law.

## II. *The Hague Conference of Private International Law*

The idea of an international conference for the codification of private international law had been actively fostered in the late nineteenth century by the Italian scholar (and Foreign Minister) Mancini.<sup>13</sup> This idea came to fruition some five years after his death, with the first meeting of the Hague Conference of Private International Law in 1893, under the chairmanship of the Dutch

11. *E.g.* transport conventions, see Carriage of Goods by Sea Act 1971; Carriage of Passengers by Road Act 1974; and see the Uniform Laws on International Sales Act 1967

12. See the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (1968) and its amending Convention of 1978; and most recently the Convention on the Law Applicable to Contractual Obligations (1980)

13. For full accounts of the history of the Hague Conference, see Offerhaus, "La Conférence de la Haye de droit international privé" (1959), 16 *Annuaire Suisse de droit international* 27; van Hoogstraten, "The United Kingdom joins an Uncommon Market: The Hague Conference on Private International Law" (1963), 12 *I.C.L.Q.* 148; Nadelmann, "The United States joins the Hague Conference on Private International Law" (1965), 30 *Law and Contemporary Problems* 291; Vitta, *Hague Recueil des cours* 126 (1969 I), 113, 133-152; Nadelmann, "Multilateral Conventions in the Conflicts Field" (1972), 19 *Netherlands Int. Law Rev.* 107

scholar, Asser, who presided over the next three conferences as well.<sup>14</sup> The early work of the Conference between 1893 and 1904 resulted in the conclusion of conventions on marriage, divorce, guardianship, the effects of marriage on the spouses' property rights, judicial pronouncements of legal incapacity and civil procedure. There was then a gap in the work of the Conference until sessions in 1925 and 1928, but none of the Conventions agreed at these two later sessions were ever brought into force. The early work of the Conference had two particular inter-connected characteristics. It was dominated by the principle of nationality as a connecting factor, and was essentially a regional conference, being restricted to European states. Indeed the early Conventions have been scathingly criticised by Kahn-Freund as an expression of 'Continental European parochialism which mistook Europe for the world'.<sup>15</sup>

There was no meeting of the Conference after 1928 until its renaissance in 1951 when the Member States laid down, in a separate Treaty, a new statute for the Conference. They also established the Permanent Bureau as a small full time secretariat which operates under the guidance of the Netherlands Standing Government Committee, described by a former Secretary-General as 'the very heart of the Hague Conference'.<sup>16</sup> Since 1951 there have been regular sessions of the conference, usually every four years, which have resulted in the conclusion of nearly thirty conventions. The membership of the Conference has grown and diversified. No longer is it exclusively a Western European, civil law based regional body. The membership of 29 countries includes not only all the countries of Western Europe, both common and civil law jurisdictions, but also Canada and the U.S.A., three South American states (Argentina, Surinam, and Venezuela) as well as Australia, Czechoslovakia, Egypt, Israel, Japan and Yugoslavia. With this truly international membership has come the need, and willingness, to bridge the often substantial legal differences between the Member States, seen most forcibly in the abandonment of nationality as the exclusive connecting factor.<sup>17</sup> Indeed the movement away from Mancini's principle of nationality has been

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14. 1894, 1900, 1904

15. *Hague Recueil des cours* 143 (1974 III) 139, 190

16. Van Hoogstraten, "The United Kingdom joins an Uncommon Market: The Hague Conference on Private International Law" (1963), 12 *I.C.L.Q.* 148, 152

17. See de Winter, *Hague Recueil des cours* 128 (1969 III), 349

the price to be paid for a movement towards his other guiding principle of universality.<sup>18</sup>

### III. *Canada and the Hague Conference*

Canada joined the Hague Conference on October 7, 1968, but the record of Canadian acceptance of Hague Conventions cannot be described as impressive. Canada has never signed, ratified or acceded to any Hague Convention, whether concluded before or after Canada joined the deliberations of the Hague Conference. That apparently gloomy picture can be lightened a little. Formal accession by Canada to any convention concluded before 1968 poses very real difficulties because none of those earlier conventions contains a federal-state clause in a form appropriate to Canada's federal system.<sup>19</sup> Nevertheless, these earlier Hague Conventions have not been wholly ignored in Canada. The main arena for their consideration has been the annual meetings of the Conference of Commissioners of Uniformity of Legislation in Canada. This body, in whose work Horace Read played a prominent and distinguished part for many years, produced the Uniform Wills Act in 1929 and Part II of this Act dealt with the Conflict of Laws. Despite the fact that this Part was revised in 1953<sup>20</sup>, further consideration was given in 1959 to the possibility of amending these uniform provisions,<sup>21</sup> a project which was shelved the following year when it became apparent that the Hague Conference would consider the question of the formal validity of wills.<sup>22</sup> In 1961 the Hague Conference concluded a Convention on the conflict of laws relating to the form of testamentary dispositions and this Convention was implemented in the United Kingdom by the Wills Act 1963. In 1966 the uniformity commissioners substantially adopted<sup>23</sup> that legislation as an amendment to that part of the

18. Vitta, *Hague Recueil des cours* 126 (1969 I), 113, 150

19. *Proceedings of the Fifty-fifth Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada* (1973), at 124

20. *Proceedings of the Thirty-fifth Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada* (1953), at 51. These revised provisions were substantially enacted in Ontario (1954), Newfoundland (1955), New Brunswick (1959), Alberta (1960), and British Columbia (1960).

21. *Proceedings of the Forty-first Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada* (1959), at 132-136

22. *Proceedings of the Forty-second Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada* (1960), at 90

23. *Proceedings of the Forty-Eighth Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada* (1966), at 23-24, 131-140

Uniform Wills Act dealing with the conflict of laws relating to formal validity. However, only three Provinces<sup>24</sup> have adopted these reformed choice of law rules and the fact that the attempt to implement the 1961 Hague Convention in Canada has been relatively unsuccessful has been the source of some criticism.<sup>25</sup> One reason is, perhaps, that the English model of the Wills Act 1963 fits very uneasily into the present general structure of the Uniform Wills Act.<sup>26</sup> Nevertheless, this work on the law of wills does provide a legal landmark as the first attempt to translate into Canadian law the substance of a Hague Convention.<sup>27</sup>

The conflict rules in the Uniform Wills Act are not the only example of such activity and we must turn again to the work of the Uniformity Commissioners, this time in the field of tort law. At the Eleventh Session of the Hague Conference on Private International Law (1968) a convention was adopted on the law applicable to traffic accidents and a report on this convention was considered by the Uniformity Commissioners in 1970.<sup>28</sup> They recommended the adoption of a Uniform Conflict of Laws (Traffic Accidents) Act modelled on the Hague Convention.<sup>29</sup> Although this Uniform Act has, so far, only formed the basis for legislation in the Yukon Territory,<sup>30</sup> it marks a further step (albeit small) in the acceptance in Canada of Hague Conventions.

Although no further legislative steps appear to have been taken to implement other Hague Conventions in Canada, it should not be assumed that Canada has abandoned interest in the work of the Hague Conference. Far from it. Not only has Canada been most effectively represented at all the Sessions of the Hague Conference since 1968, close liaison has been established between the Department of Justice and the Uniformity Commissioners so far as

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24. Manitoba, Act to amend the Wills Act, 1975, ss. 37-44; Newfoundland, Wills (Amendment) Act 1976, s.1; and Ontario, Succession Law Reform Act 1977, ss. 34-41. See also the Law Reform Commission of British Columbia, Working Paper No. 28: The Making and Revocation of Wills (1980), Chapter VII

25. Casswell, "The Conflict of Laws Rules Governing the Formal Validity of Wills: Past Developments and Suggested Reform" (1977), 15 Osgoode Hall L.Rev. 165

26. Castel, *Canadian Conflict of Laws*, Vol. II, at 460-461

27. It is significant that the attempt was by the use of a model law, rather than direct Canadian accession to the Convention under Article 16, and see *infra*.

28. Proceedings of the Fifty-second Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada (1970), at 38, 215-262

29. *Ibid.*, at 40, 263-270

30. Conflict of Laws (Traffic Accidents) Ordinance, O. Y. 1972 (First Session) c.3

advice in the preparation for the various meetings and in considering the conventions which emerge are concerned, and to this end a Special Committee on International Conventions on Private International Law was set up in 1971.<sup>31</sup> This Committee works closely with the Department of Justice's Advisory Group on Private International Law and Unification of Law.

So far as implementation is concerned, the work of these bodies over the past few years seems to have led them to the following conclusions. Direct implementation of Hague Conventions concluded before Canada joined the Hague Conference will be impossible because of the absence from those earlier conventions of a satisfactory federal state clause. In virtually all the conventions concluded from 1968 onwards, that problem has been overcome and so the main issue has been to establish priority of treatment of these various conventions and to decide what legislative action, federal or provincial, would be necessary to implement them. Over the years priority seems to have been given to examining the Conventions on the Recognition of Divorces and Legal Separations (1970),<sup>32</sup> the International Administration of Estates of Deceased Persons (1973),<sup>33</sup> the Service Abroad of Judicial and Extra-judicial Documents in Civil and Commercial Matters (1965) and on the Taking of Evidence Abroad in Civil or Commercial Matters (1970). These last two conventions do not have federal state clauses but it is thought that, in different ways, this problem could be overcome.<sup>34</sup> Certainly, detailed consideration has been given to the ways in which they could be implemented in the Provinces.<sup>35</sup>

There are undoubted problems for a federal state, such as Canada, in ratifying and implementing international conventions in

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31. See *e.g.*, Proceedings of the Fifty-fifth Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada (1973), at 125

32. Though this may have to await revision of the Divorce Act 1968, see Proceedings of the Fifty-Fifth Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada (1973), at 125

33. This is being examined by the Ontario Law Reform Commission; see their Thirteenth Annual Report, 1979, p. 12. The Ontario Law Reform Commission has also examined the Hague Convention on the Law Applicable to Products Liability (1972) but has concluded that the approach of the Convention should not be adopted for the reform of the Ontario choice of law rules relating to products liability, see Report on Products Liability (1979), at 116-117

34. See Proceedings of the Sixtieth Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada (1978), at 167, 170

35. See Proceedings of the Sixty-First Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada (1979), at 232-304



the field of private law. They have been explained by others far more competent in federal constitutional law than I.<sup>36</sup> Although the mixture of legal systems in the United Kingdom creates some complexities in this field, they have not been very great and have not prevented the United Kingdom from ratifying and implementing a number of Hague Conventions. Assuming that the particular constitutional difficulties in Canada can be overcome, are there lessons that Canada may learn from the British experience of Hague Conventions as a means of reforming the conflict of laws? It is to this question that I want to devote the rest of my lecture.

#### IV. *The United Kingdom and the Hague Conference*

The history of United Kingdom participation in the work of the Hague Conference is much longer than that of Canada.<sup>37</sup> The British government declined an invitation in 1892 from the Dutch government to join the Conference at its inception; but in 1925, the United Kingdom, though not a member, sent a delegation to the Session of the Hague Conference held that year, but they did not stay for the whole session and did not sign the Final Act. Their stamina had improved by the time of the Sixth Session in 1928 when they not only sent in written observations, but also attended and indeed signed the Final Act. As we have seen, there was then a gap of over twenty years in the activities of the Hague Conference, until it was resuscitated with the Seventh Session in 1951, the year in which the Statute under which it operates was laid down. From that Session onwards, a British delegation has always attended the proceedings. It was not, however, until 15 July 1955 that the United Kingdom formally joined the Hague Conference. Since 1951, there have been seven sessions of the Hague Conference (the next, the Fourteenth, is due to start next month) and these have produced some twenty-six Conventions of which all but nine are in force.

36. See Castel, "Canada and the Hague Conference on Private International Law: 1893-1967" (1967), 45 *Can. Bar Rev.* 1, 23-31; Proceedings of the Fifty-Second Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada (1970), at 157-176, 206-214; Proceedings of the Fifty-Eighth Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada (1975), at 120-123; Fischer, "The Convention on the Law Applicable to Products Liability" (1974), 20 *McGill L.J.* 44, at 73-76; Glenn, "Conflict of Laws — the 1976 Hague Conventions on Marriage and Matrimonial Property Regimes" (1977), 55 *Can. Bar Rev.* 586, 594-595, 604-605

37. The earlier history has been well catalogued by van Hoogstraten, "The United Kingdom joins an Uncommon Market: The Hague Conference on Private International Law" (1963), 12 *I.C.L.Q.* 148

However, the United Kingdom has not acceded to any of the four concluded before it formally joined the Hague Conference and, of the others, has ratified (and implemented) only seven and signed one other. This might be compared with the records of such countries as France which has ratified 15 and signed 2, the Netherlands which has ratified 12 and signed 6 and Portugal which has ratified 10 and signed 6. In defence of the United Kingdom's failure to sign, though not to ratify, is the fact that there is a difference in approach between foreign ministries to the question of signature of international conventions. Some countries take the view that it is desirable to sign as soon as possible as a gesture of international goodwill even though the prospects of ultimate ratification may not be great; others only sign when there is a real prospect of ratification and implementation. This latter tends to be the British approach<sup>38</sup> and the implementation of the one Hague Convention that the United Kingdom has signed but not ratified (that on the International Administration of the Estates of Deceased Persons (1973)) has been under consideration for some time now.<sup>39</sup>

This is not the place to examine in detail the merits and demerits of all the post-war Hague Conventions and I intend to concentrate primarily on those which the United Kingdom has ratified. However, that leaves nearly 20 Conventions in which the United Kingdom has shown no interest in their implementation. But before undue criticism is levelled at those in the United Kingdom concerned with the conflict of laws for this lack of interest, it should be pointed out that there are two groups of conventions which have not yet entered into force. The first group is five conventions concluded up to 1965<sup>40</sup> which can only muster six ratifications between them and none of which has been signed or ratified by the United Kingdom. The second group of conventions are those resulting from the work of the Thirteenth Session in 1976,<sup>41</sup> none of

38. See Hansard, H.C. Deb. Vol. 816 c. 1555 (1971); H.L. Deb. Vol. 360, c. 40

39. See *e.g.* the Eighth Annual Report of the Law Commission, 1972-1973, Law Com. No. 58, para. 64, and the Fourteenth Annual Report of the Law Commission, 1978-1979, Law Com. No. 97, para. 2.47

40. Convention sur la loi applicable au transfert de la propriété en cas de vente à caractère international d'objets mobiliers corporels (1958); Convention sur la compétence du for contractuel en cas de vente à caractère international d'objets mobiliers corporels (1958); Convention pour régler les conflits entre la loi nationale et la loi du domicile (1955); Convention concernant la reconnaissance de la personnalité juridique des sociétés, associations et fondations étrangères (1956); Convention on the Choice of Court (1965)

41. Convention on the law applicable to matrimonial property regimes;

which has yet received the necessary number of ratifications to bring it into force.<sup>42</sup> The really successful conventions, which the United Kingdom has not ratified, stem from the earlier period of post-war activity of the Hague Conference, namely those on civil procedure (1954)<sup>43</sup>, on the law applicable to maintenance obligations towards children (1956)<sup>44</sup> and on the recognition and enforcement of decisions relating to such obligations (1958).<sup>45</sup>

It will become that the United Kingdom's experience of Hague Conventions is mixed. If success is measured in terms of implementation, then some types of convention have been more successful than others. Furthermore the chances of ratification and implementation are greatly enhanced if certain factors are present. So let us turn to consider the impact of Hague Conventions on reform of the conflict of laws in the United Kingdom and to examine what seem to be the characteristics of successful, and unsuccessful, conventions.

#### V. *Impetus or sterilisation?*

A strong argument in favour of the work of the Hague Conference in the context of law reform is the impetus that it provides. It may well be that attempts by interested parties have failed to convince either the government or the legislature of the need for reform of some particular conflict of laws rules. If the Hague Conference produces a convention, it may then become that much easier, not only to point out that others have seen the need for change, but also to suggest that a legislative vehicle, or at least its chassis, is available in the form of the convention. An example of such fortuitous timing of a

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Convention on celebration and recognition of the validity of marriages; Convention on the law applicable to agency

42. The one other convention not in force has been signed by the United Kingdom, the Convention on the international administration of the estates of deceased persons (1972). There is also one other Convention and a Protocol thereto (Convention on the Recognition and Enforcement of Judgments in Civil and Commercial Matters (1971), and the Supplementary Protocol to this Convention (1971)) which is of little consequence because, though in force, only two countries (the Netherlands and Cyprus) have ratified it.

43. Convention relative à la procédure civile (1954), ratified or acceded to by 20 Member States and by 7 others.

44. Convention sur la loi applicable aux obligations alimentaires envers les enfants (1956), ratified by 12 Member States.

45. Convention concernant la reconnaissance et l'exécution des décisions en matière d'obligations alimentaires envers les enfants (1958), ratified or acceded to by 16 Member States.

Hague convention can be provided in the field of family law. In 1968, the Eleventh Session of the Hague Conference produced a convention on the recognition of divorces and legal separations. This was finally concluded in 1970 and early in that year the Law Commission and Scottish Law Commission were asked to advise on the necessary legislation to permit the United Kingdom Government to ratify the Convention which, on 19 May 1970, it announced its intention of doing.<sup>46</sup> By November 1970, the two Commissions had reported<sup>47</sup> with a draft Bill appended to their report; the Recognition of Divorces and Legal Separations Act 1971 received the Royal Assent on 27 July 1971 and came into force on 1 January 1972. Very speedy work, motivated you might think by international pressure on the United Kingdom. Not a bit of it. The Divorce Convention requires three ratifications to bring it into force,<sup>48</sup> but, at the time when the Law Commissions were asked to examine the Divorce Convention, no state had ratified it and only the United Kingdom had signed it. It did not come into force until August 24 1975.<sup>49</sup> Indeed it was said during the debates on the Bill, "We are leading the world in legislating to give effect to the intent of the Convention."<sup>50</sup> The reason for all the interest is to be found in the House of Lords' decision on recognition of foreign divorces in *Indyka v. Indyka*.<sup>51</sup> Although it liberalised the jurisdictional bases on which courts would recognise foreign divorce decrees by providing that all that was required was that one spouse should have had a 'real and substantial connection' with the country where the divorce was obtained, the decision brought a great deal of uncertainty in its wake for which it attracted substantial criticism.<sup>52</sup>

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46. The United Kingdom signed the Convention on 1 June 1970 and ratified it on 21 May 1974.

47. Law Com. No. 34; Scot. Law Com. No. 16 (1970)

48. Art. 27

49. The three ratifications then were Denmark, Sweden and the United Kingdom. Since then it has also been ratified by Finland, Norway, Switzerland and Czechoslovakia.

50. Hansard, H.C. Deb. Vol. 821, cc. 165-166. The Solicitor-General said: "We are blazing the trail for other countries by passing these provisions into our domestic law"; *Ibid.*, c.168

51. [1969] 1 A.C. 33. Judgment was actually given in May 1967. The decision has been widely applied in Canada, see Castel, *Canadian Conflict of Laws*, Vol. II at 327.

52. See e.g. North, "Recognition of Foreign Divorce Decrees" (1968), 31 M.L.R. 257, 283, and see Lipstein, [1967] C.L.J. 182; Hansard H.L. Deb. Vol. 315, c.485; Hansard, H.C. Deb. Vol. 816, c.1549

During its passage through Parliament, the Bill implementing the Divorce Convention was continually referred to as a major measure of law reform. Mention was also made in Parliament of the work of the Hague Conference and in fairly dramatic terms, such as that the problem of divorce recognition made 'international agreement imperative'.<sup>53</sup> However, this was pretty specious reasoning because, although the recognition rules of the Divorce Convention are based on reciprocity, the clear view was expressed in Parliament that the Bill should not be limited to the recognition of divorces obtained in countries which were parties to the Divorce Convention, for, indeed, at that time there were no other parties.<sup>54</sup>

The Divorce Convention coincided with a pressing domestic need for reform of the divorce recognition rules. The Convention, combined with the report and draft legislation of the two Law Commissions, provided the necessary impetus for legislative time to be made available to cure what was generally regarded as a defect in the law.

Another example of an impetus for domestic law reform being provided by a Hague Convention is seen in the field of adoption. The Adoption Act 1968 was passed in the United Kingdom to implement the Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoption (1965). The 1968 Act was drafted in an appallingly complex manner, so much so that some years ago I expressed the view 'that it is hoped that it may never be brought into force'.<sup>55</sup> Parts of the 1968 Act dealing with jurisdiction were repealed and replaced by simpler provisions<sup>56</sup> before the Convention was eventually ratified and brought into force in 1978. The Convention itself has had little direct effect on the English rules as to jurisdiction and recognition of foreign adoptions because it only applies as between States parties to it and they number only two (Austria and Switzerland) in addition to the United Kingdom. However, not only did the legislation implementing the Convention rules also provide some amendment to the jurisdictional rules for non-Convention cases, it made far-reaching changes in the

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53. Hansard, H.L. Deb. Vol. 315, c.485; and see H.C. Deb. Vol.816, c.1548

54. Hansard, H.L. Deb. Vol. 315, c. 492; H.C. Deb. Vol. 816, cc.1554, 1555

55. Cheshire, *Private International Law*, 9th ed. p. 467; a Canadian commentator was similarly critical, regarding the probable value of the Convention as 'very small in relation to the technicality and awkwardness which courts would encounter in making adoptions under the Convention': Blom "The Adoption Act 1968 and the Conflict of Laws" (1973), 22 I.C.L.Q. 109, 153

56. Children Act, 1975, s. 24

English recognition rules. The 1968 Act gave the Secretary of State power to designate foreign adoptions as 'overseas adoptions', whose recognition in England is to all intents and purposes automatic, and such adoptions are to be given the same incidents and effects as if they were English adoptions. This procedure has been applied to adoptions in a large number of Commonwealth countries (including Canada), the U.S.A., South Africa, and all Western European countries.<sup>57</sup> Recognition of Austrian and Swiss adoptions is, in this context, insignificant but the decision to implement the Adoption Convention led to legislation of much greater significance.

Unfortunately, the work of the Hague Conference can also have a completely opposite effect on the reform of the conflict of laws. Far from being an impetus, it can prove to be a source of unfortunate and, in the event, totally unproductive delay. It can have a sterilising effect. This aspect can be illustrated by a more recent Hague Convention, still in the field of family law, namely the Convention on Celebration and Recognition of the Validity of Marriages, one of the fruits of the 1976 Session. To appreciate the impact, or rather lack thereof, of this Convention on law reform, I need to take you back a few years in the work of the English Law Commission. From the earliest days, family law, including its conflict rules, loomed large in the work of the Commission. As we have seen, recognition of foreign divorces and legal separations was the subject of legislation in 1971;<sup>58</sup> the next year saw the courts being given wide jurisdiction over polygamous marriages.<sup>59</sup> In 1973, new jurisdictional rules for all matrimonial causes were laid down<sup>60</sup> and a Working Paper was published on the question of the jurisdiction and scope of declarations as to status.<sup>61</sup> Two major topics in the family law area of conflict of laws remained — recognition of foreign nullity decrees and choice of law in marriage. Work had proceeded on these topics in both Commissions for two or three years and two draft Working Papers were produced for internal discussion. However, in 1973, it became known that the agenda for the 1976 Session of the Hague Conference was to

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57. S.I. 1973, No. 19

58. Recognition of Divorces and Legal Separations Act 1971

59. Matrimonial Proceedings (Polygamous Marriages) Act 1972; see now the Matrimonial Causes Act 1973, s.47

60. Domicile and Matrimonial Proceedings Act 1973

61. Working Paper No. 48 (1973)

include the topic of 'the conflict of laws in respect of marriage . . . to include, as the case may be, questions relating to the recognition abroad of decisions in respect of the existence or validity of marriages.' In the light of this, the two Commissions suspended their work in this field, convinced that 'satisfactory reform can only be achieved with international agreement'.<sup>62</sup> It is undoubtedly true that the problem of limping marriages can best be cured by international agreement — provided satisfactory international agreement can be reached.

What then happened in the 1976 Session of the Hague Conference to the two problems on which United Kingdom law reformers had suspended work three years earlier? Despite the submission by the United Kingdom of a whole draft Part of a Convention to cover the topic,<sup>63</sup> recognition of foreign nullity decrees was excluded from the work of the Conference. To deal with this topic was thought to create more problems than could be solved<sup>64</sup> — what some might regard as a counsel of despair. While it is true that nullity recognition raises fewer problems than divorce, there is, in England, a steady trickle of such cases<sup>65</sup> and, indeed, the common law rules to be applied to them are now in some doubt since both the English nullity jurisdictional rules and the divorce recognition rules have been changed.<sup>66</sup>

Was there any greater success in 1976 in providing a comprehensive set of choice of law rules for marriage? A Convention certainly emerged from the deliberations of the 1976 Session, but this Convention on Celebration and Recognition of the Validity of Marriage has not met with immediate acclaim. While four states have signed it,<sup>67</sup> as yet none have ratified. Appraisal of the convention by commentators has not been over-enthusiastic<sup>68</sup>

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62. Law Commission Eighth Annual Report 1972-1973, Law Com. No. 58, para. 49

63. It was modelled on the 1970 Divorce Recognition Convention.

64. See Actes et Documents de la Treizième session de la Conférence de La Haye de droit international privé, Vol. III, at 122-123, 292

65. *E.g. Law v. Gustin*, [1976] Fam. 155; *Perrini v. Perrini*, [1979] Fam. 84

66. See Dicey and Morris, *The Conflict of Laws*, 10th ed., at 380-384; North, *Private International Law of Matrimonial Causes*, Chapter 12; Cheshire and North, *Private International Law*, 10th ed., at 406-416, and see Smith, "The Recognition of Foreign Nullity Decrees" (1980), 96 L.Q.R. 380

67. Australia, Egypt, Luxembourg, Portugal

68. See Batiffol, "La troisième session de la Conférence de la Haye de droit international privé" (1977), *Rev. crit. dr. int.* pr. 66, 451, 467-482; Glenn, "Conflict of Laws — The 1976 Hague Conventions on Marriage and Matrimonial

and indeed somewhat critical<sup>69</sup>. While the Convention may be an effective measure of harmonisation, it is far less appropriate as a measure of law reform. If the latter characteristic is lacking, the chances for the implementation of a substantive choice of law convention<sup>70</sup> are not great. A brief examination of the convention may reveal why it is not an effective law reform measure. The Convention falls into two main parts. Chapter I, which is optional, deals with the rules for the celebration of marriage in a Contracting State. The basic rule for formal requirements is that they are to be governed by the law of the place of celebration. In the case of essential validity, the Convention provides that a marriage must be celebrated in a Contracting State if the prospective spouses satisfy the substantive requirements of the internal law of that state and one of them habitually resides there or is a national thereof, or if the spouses satisfy the substantive requirements of the law applicable under the choice of law rules, whatever they may be, of the State of celebration. Not only does this Chapter provide a substantial inroad into the rule that a state will normally require all the requirements of its marriage law, formal and essential, to be complied with before a marriage can be celebrated there, but it also falls far short of providing a complete code of choice of law rules for marriage in that State.

The same criticism can be made of Chapter II, which is not optional, and which deals with the recognition of the validity of a marriage celebrated in another Contracting State. Its basic rule is that a marriage which is validly entered into under the law of the state of celebration shall be regarded as valid in all other Contracting States. Again this falls far short of a choice of law code for foreign marriages. Both chapters leave a large number of issues still dependent on the unharmonised and unreformed choice of law rules of the individual states. For example, Chapter I preserves, without defining, the choice of law rules of the state of celebration<sup>71</sup>

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Property Regimes" (1977), 55 Can. Bar Rev. 586, 588-595; Lalive, "La Convention de la Haye du 14 mars 1978 sur la célébration et la reconnaissance de la validité des mariages" (1978), 34 *Annuaire Suisse de droit international* 31

69. E.g., Reese, "The Thirteenth Session of the Hague Conference" (1977), 25 *Am.Jo.Comp.Law* 393, 394; "The Hague Convention on Celebration and Recognition of the Validity of Marriages" (1979) 20 *Virginia J. of Int. Law* 25, 35-36.

70. The difference between substantive and procedural conventions is discussed further, *infra*.

71. Art. 3(2)



and Chapter II only applies to the recognition of marriages which are valid under the law of the state of celebration. Recognition of marriages invalid under that law, but essentially valid under, say, the law of the domicile, is left to the unamended choice of law rules of the individual states.

It seems to me very doubtful whether such a Convention alone would be regarded as meeting the need for reform of the choice of law rules relating to marriage. If the incomplete rules in the Convention were regarded as meritorious, then of course they could be included as part of a legislative law reform package; thereby achieving the twin aims of desired reform and at least some international harmonisation. If the Convention rules are, however, regarded as providing little improvement in the present choice of law rules and certainly not providing a model for more broadly based reform (as I believe to be the case here), then the Convention is in many ways counter-productive.

What then has the Marriage Convention achieved so far as reform of English law is concerned? The answer must be — very little. Work has been suspended for about seven years on the two issues of choice of law in marriage and the recognition of foreign nullity decrees. There are no Convention rules on the latter topic and those on the former are not very satisfactory in themselves and certainly do not provide a complete choice of law code for marriage. The Law Commissions have now recently returned to one of these topics, (foreign nullity decrees)<sup>72</sup> as the subject of law reform within the United Kingdom. Satisfactory international law reform and harmonisation of this sensitive topic has proved elusive. The Hague Conventions early this century on marriage and divorce<sup>73</sup> were not very successful and it may be that these areas of family law impinge so directly on the social and cultural structure of individual states that the compromises necessary for international agreement really satisfy no-one.<sup>74</sup> I am not intending to suggest that

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72. See Law Commission. Fourteenth Annual Report 1978-1979, Law Com. No. 97, para. 2.46. No final decision has yet been taken as to what to do about choice of law for marriage.

73. Convention pour régler les conflits de lois en matière de mariage (1902); Convention pour régler les conflits de lois et de juridictions en matière de divorce et de separation de corps (1902). For the reasons for their lack of success, see de Winter, *Hague Recueil des cours* 128 (1969 III), 347, 376-383; Wolff, *Private International Law*, 2nd ed., at 50, 313; Palsson, *Marriage and Divorce in Comparative Conflict of Laws*, at 29-30

74. The dangers of compromise are discussed *infra*.

international uniformity is not a desirable goal, quite the contrary. But it is often difficult to achieve, and unsuccessful attempts mean the postponement of other law reform activities in that field.

VI. *International agreement as a necessary medium for national law reform*

Not only may the impetus for national reform come from international activity, as we have seen,<sup>75</sup> it may indeed only be possible to achieve national reform through the medium of international agreement.<sup>76</sup> Two examples may be given where the need for reform of national law seemed only to be realisable through a Hague Convention. The first example, that of the formal validity of wills, led to successful law reform; the second example is the less happy one of attempts to reform the law of domicile.

The Hague Convention on the Conflict of Laws Relating to the Form of Testamentary Dispositions was concluded in 1961 and provides, like divorce, another example of a happily timed Convention. It dealt with an area of law which was in need of reform both in England and in other common law jurisdictions. It provided the impetus for the English Wills Act 1963 and, as we have seen,<sup>77</sup> some Canadian Provinces soon followed suit, as did a number of Australian States<sup>78</sup>.

So far as the United Kingdom was concerned, the need for reform of the conflict of laws relating to wills was clear. Until the 1963 Act the formal validity of a will had depended on Lord Kingsdown's Act of 1861. This Act had improved on the rigid common law position that the formal validity of a will of movables was governed by the testator's domicile on death by also permitting validation of the wills of British Subjects under the law of the country where the will was made, or, if the will was made outside the United Kingdom, under the law of the domicile at the time of making the will. This set

75. Discussed *supra*.

76. It has been said by Graveson, "The International Unification of Law" (1968), 16 *Am. Jo. Comp. Law* 4, 7, that:

It may appear that the only way to achieve an internal reform of law is through the international unification of the particular branch of law, so that the local law is reformed and assimilated to an international pattern achieved through some convention, and the political weakness of local or national opinion is fortified by the international opinion which lies behind an acceptable international project.

77. See *supra*.

78. Nygh, *Conflict of Laws*, 3rd ed., at 480-481

of criteria for formal validity had long been criticised,<sup>79</sup> especially as it was confined to the wills of British subjects and drew an unhappy distinction between wills made in the United Kingdom and elsewhere. However, nothing was done. The electoral appeal of the reform of the conflict rules relating to wills was not great! Then, in 1956 at the Eighth Hague Conference the United Kingdom took the initiative in instigating the consideration of the formal validity of wills by the Hague Conference at its Ninth Session in 1960.<sup>80</sup> Furthermore, in 1958, the Lord Chancellor's Private International Law Committee reported<sup>81</sup> that the law was undoubtedly in need of reform and should be changed along lines very similar to those which emerged in the Hague Convention agreed at the 1960 Session, namely that all wills, whether or not of British subjects, whether relating to movables or immovables, and whether made in the United Kingdom or elsewhere, should be formally valid if valid under any one of the following laws, namely that of the place where it was made, of the testator's domicile at the time of making or of death, or of the testator's nationality at the time the will was made or at death. Additionally, a will of immovables would be formally valid under the *lex situs*. All of these grounds were accepted in the Hague Convention, but reference to the testator's habitual residence at the time of making the will or at death was also added.

This Convention achieved the twin objectives of providing much needed reform at home and also widespread international agreement. Not only have fifteen countries ratified it, another seven countries not parties to the Hague Conference have acceded to it; and, as we have seen, it has been relied on for the reform of the law in countries which have not become parties to the Convention. Like divorce, the need for reform existed already; the Hague Conference agreed with the United Kingdom's general approach. International agreement meant that legislative interest, and thus time, was provided. Indeed, the Bill which became the Wills Act 1963 passed through both Houses of Parliament virtually without debate.<sup>82</sup>

The Wills Convention provides a striking example, by its substantial implementation in parts of Canada and Australia, of

79. *E.g.* Morris, "The Choice of Law Clause in Statutes" (1946), 62 L.Q.R. 170, 173-176

80. See Graveson, "The Ninth Hague Conference of Private International Law" (1961), 10 I.C.L.Q. 18, 21-22

81. Fourth Report, Cmd. 491 (1958)

82. Hansard, H.L. Vol. 251, cc. 513-514, 1265-1266, 1458, 1459; H.C. Vol. 679 cc. 886-895

reform through the medium of a Convention agreed by a body to which neither Canada nor Australia at that time belonged.<sup>83</sup> Reform of the law of domicile provides a less happy illustration of the impact that international agreement may have on national law reform.<sup>84</sup> Criticism of the English rules as to domicile can be found throughout the first half of this century;<sup>85</sup> but no steps were taken to reform the law until a draft Convention was agreed by the Hague Conference in 1951 'pour régler les conflits entre la loi nationale et la loi du domicile'. In December 1952 the Lord Chancellor invited the newly created Private International Law Committee to consider whether amendment of the law of domicile was desirable and whether the United Kingdom should accede to the draft Hague Convention. The Committee answered both questions in the affirmative.<sup>86</sup> Attempts were made to implement the Committee's proposals but the draft Bills provoked powerful opposition; they were abandoned and the matter referred back to the Private International Law Committee which repeated its support for the original reform proposals but acknowledged that substantial opposition to the proposals had been generated and whether any further law reform action should be taken was a matter of policy on which the Committee made no recommendation.<sup>87</sup> No further action was taken and ten years' law reform activity petered out, a sad end to the story.<sup>88</sup> However, had it not been for the work of the Hague Conference, the question of reform of domicile might never have been taken up at all: 'Britain's desire to modify the complex English concept of domicile derived from her aspiration to become a party to the convention.'<sup>89</sup>

## VII. *Substance or Procedure?*

Conventions which make procedural improvements in the interna-

83. And see Vitta, *Hague Recueil des cours* 126 (1969 I), 113, 184-186

84. *Ibid.*, at 183-184

85. *E.g.* Foster, "Some Defects in the English Rules of Conflict of Laws" (1935), 16 *B.Y.B.I.L.* 84, 84-88; Morris, *Cases on Private International Law*, 1st ed. (1939), at 22; Wolff, *Private International Law*, 1st ed. (1945), at 122-124; Cheshire, "The International Validity of Divorces" (1945), 61 *L.Q.R.* 352, 363-364; Cheshire, *Private International Law*, 4th ed. (1952), at 182-184

86. Final Report of the Private International Law Committee (1954) *Cmd.* 9068

87. Seventh Report of the Private International Law Committee (1963), *Cmd.* 1955; and see Mann, (1959), 8 *I.C.L.Q.* 457; (1963), 12 *I.C.L.Q.* 1326

88. Van Hoogstraten, "The United Kingdom Joins an Uncommon Market: The Hague Conference on Private International Law" (1963), 12 *I.C.L.Q.* 148, 159

89. Vitta, *Hague Recueil des cours* 126 (1969 I) 113, 184

tional administration of justice, improvements which require reciprocal international agreement, have proved to be some of the most successful Hague Conventions in terms of ratifications and three such conventions have been ratified by the United Kingdom.<sup>90</sup>

They are the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (1961),<sup>91</sup> the Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters (1965)<sup>92</sup> and the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (1970).<sup>93</sup> The first of these, which abolished the need for any diplomatic or consular legalisation of foreign public documents, was a procedural simplification which came into effect in England in 1965 without the need for any legislative measures.<sup>94</sup> The second of these Conventions provides a simplified process for the service of documents, both judicial and extra-judicial, from one Contracting State to another. The United Kingdom brought this Convention into force in 1969 by means of amendment to the Rules of the Supreme Court<sup>95</sup> — no primary legislation was necessary. The third of these essentially procedural Conventions is that on the taking of evidence abroad which came into force in the United Kingdom in 1976 with the passage of the Evidence (Proceedings in Other Jurisdictions) Act 1975. Not only does the 1975 Act implement the Convention, it lays down a complete code for the taking of evidence in any part of the United Kingdom on behalf of courts elsewhere in the United Kingdom or abroad. So its scope is much wider than that of the Convention. Provisions on the taking of evidence abroad existed in a number of bilateral conventions which the United Kingdom had concluded with other states; so there was no great novelty in the 1969

90. The United Kingdom is not a party to one of the most successful of all, the 1954 Convention on Civil Procedure, which has been ratified by 20 Member States and acceded to by another 7 non-member states.

91. Ratified by 15 Member States and acceded to by 13 non-member states

92. Ratified by 16 Member States and acceded to by 3 non-member states

93. Ratified by 12 Member States and acceded to by 1 non-member state

94. See The Supreme Court Practice 1979, Vol.I, 38/10/3. English law has no conception of the legalisation of documents and the convention has had the effect of reducing the requirement elsewhere — a development welcomed by English lawyers: see Wortley, "Great Britain and the Movement for the Unification of Private Law since 1948" (1958), 32 Tul. L. Rev. 541, 545; and see Amram, "Toward Easier Legalisation of Foreign Public Documents" (1974), 60 American Bar Association Journal 310

95. See now R.S.C.O.11, r.5. Other similar bilateral conventions have been implemented under R.S.C. O.11, r.6.

Convention. Even though its provisions were less liberal than those of some of the bilateral conventions, ratification of it could lead to the United Kingdom having reciprocal arrangements on this topic with a wider range of countries.<sup>96</sup>

The passage through Parliament of the Bill which later became the 1975 Act was without incident and almost without debate.<sup>97</sup> It was pointed out that English law as regards the taking of evidence for foreign proceedings was in need of reform and modernisation and so the Hague Convention provided the impetus for legislation to reform and codify the law on this topic and to widen the scope of international co-operation by implementing the Convention.<sup>98</sup> This provides another example of the relative ease with which international procedural law reform can be implemented and of the significant contribution that the Hague Conference has made to this aspect of private international law. It ought, however, to be mentioned that the 1975 Act has since proved to be more contentious than perhaps Parliament realised at the time. The House of Lords<sup>99</sup> has since refused to permit the procedures of the Act to be used to enable testimony to be taken in England for the purposes of anti-trust proceedings in the U.S.A., where there was a danger of the witnesses to be questioned incriminating themselves so far as possible later American proceedings were concerned, and where to allow the evidence to be given would be regarded as prejudicial to the sovereignty of the United Kingdom.<sup>100</sup>

Procedural conventions may owe their success to a number of factors. Reform of the machinery for dealing with cross-border legal issues requires uniform international procedures and harmonisation to a much greater extent than does reform of substantive choice of law rules. It may be possible to implement procedural reforms without primary legislation, thereby avoiding the pitfalls of the legislative timetable. Finally, civil servants who have to operate the procedural machinery may subconsciously be more receptive to reforms which ease the burdens of their lives than those which deal with matters of substance, and it may be that the consent of their political masters to procedural changes is obtained with greater ease.

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96. Edwards, (1969), 18 I.C.L.Q. 619, 646

97. Hansard, H.C. Vol.884, cc. 2208-2210; H.L. Vol. 360, cc. 34-42

98. Hansard, H.C. Vol.884, c. 2210; and see H.L. Vol. 360, c.40

99. *Re Westinghouse Electric Corporation Uranium Contract*, [1978] A.C. 547

100. *Ibid.*, at 615-617, 630-632, 639-640, 650-651

VIII. *Too many cooks?*

There is one other Hague Convention substantially of a procedural kind which the United Kingdom has ratified and implemented very recently, namely the Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations (1973).<sup>101</sup> Under this Convention, decisions given in one Contracting State in respect of a wide range of maintenance obligations must be recognised and enforced in the other Contracting States provided certain jurisdictional criteria are satisfied, the most significant being the habitual residence or nationality of either the maintenance debtor or creditor, or the defendant's submission to the jurisdiction.<sup>102</sup> Subject to certain grounds of non-recognition, such as that the decision was obtained by fraud or is manifestly contrary to the public policy of the State where enforcement is sought,<sup>103</sup> the foreign order is in principle to be enforced as if it were an order of the State addressed.

This Convention provides not only a further example of the greater ease with which procedural reforms may be implemented but also a good illustration of a problem which is ever increasing in the area of international law reform generally, that of 'too many cooks'. There may be widespread acceptance that 'something must be done' about a particular problem, with the result that there is pressure to include the problem on the agenda of a number of law reform bodies, and perhaps on the agenda for bilateral intergovernment discussions. The result is a series of schemes for improvement, all of which may have considerable merit but differing scope. There may then be pressures of different kinds for the acceptance of some or all of these schemes. Those who have conducted successful bilateral reciprocal negotiations with another state wish to see the concluded agreement implemented; active participation by one's national delegation in more broadly based international discussions which lead to an acceptable convention also generates a force for implementation. If all the schemes are based on reciprocity and each scheme covers a relatively small number of countries, indeed perhaps only two countries, improvement of the law is achieved by piecemeal implementation. There is

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101. It was ratified by the United Kingdom on 1 March 1980 and was implemented by The Reciprocal Enforcement of Maintenance Orders (Hague Convention Countries) Order 1979; S.I. 1979 No. 1317.

102. Art. 7

103. Art. 5

a price for such improvement in terms of the coherent structure of the law and in terms of the complexity which practising lawyers must master, often at the financial expense of their clients.

This problem may be illustrated by the present state of English law on recognition of foreign maintenance orders after the bringing into force of the Hague Maintenance Obligations Convention of 1973. Maintenance orders made in Scotland and Northern Ireland can be registered and enforced in England under the Maintenance Orders Act 1950;<sup>104</sup> orders made in a large number of Commonwealth countries may be registered and enforced in England under the Maintenance Orders (Facilities for Enforcement) Act 1920; recognition of orders made in other Commonwealth and a range of non-Commonwealth countries falls under Part I of the Maintenance Orders (Reciprocal Enforcement) Act 1972. Part II of that Act implements the United Nations Convention on the Recovery Abroad of Maintenance (1956) and provides a different set of procedures for enforcement of the orders of countries which are parties to that Convention. Some countries fall within more than one régime<sup>105</sup>, but it is assumed that the most efficacious one will be used. That is not an end to this complexity because there is provision under section 40 of the 1972 Act for special reciprocal arrangements to be made with individual countries and for these arrangements to be brought into force by statutory instrument. This provision now covers recognition of maintenance orders from the Republic of Ireland, a majority of states of the U.S.A. and the states which are parties to the 1973 Hague Convention. The implementation of that Convention was made relatively easy by the existence of the appropriate machinery for delegated legislation; though section 40 provides a very wide reaching power to rewrite a large proportion of the 1972 Act. The statutory instrument implementing the Hague Convention amounts to a statement that so far as recognition of the orders from Contracting States are concerned, the first twenty-four sections of the 1972 Act shall be either amended or disappplied and, indeed, the delegated legislation contains a completely redrafted Part I of the 1972 Act.

The result is that a solicitor wishing to advise on the recognition of a foreign maintenance order has to decide whether it falls within the régimes provided by two multilateral international conventions,

104. s. 16

105. *E.g.* Barbados, France, Norway, Sweden and Switzerland fall under both Parts I and II of the 1972 Act.



a whole series of bilateral reciprocal agreements, inter UK legislation or the common law.<sup>106</sup> It cannot be said that the addition of the six countries parties to the 1973 Hague Convention creates this complexity, but recognition of maintenance orders does provide a striking example of the results of piecemeal reform stemming from different international agreements. A variety of schemes may in some cases be inevitable because of the differing reciprocal needs of different countries; but from the point of view of simplicity and certainty, the fewer the separate schemes the better.

A further example of the complexity that may stem from a variety of concurrent initiatives all dealing with the same serious problem is provided by an item on the agenda for the 1980 Session of the Hague Conference — child kidnapping and the recognition of foreign custody orders. Seen from a United Kingdom point of view, this topic is the subject of at least four separate initiatives. The Law Commission and Scottish Law Commission published a working paper in 1976<sup>107</sup> dealing with both jurisdiction over and recognition of custody orders within the United Kingdom and agreement has now been reached on the major policy issues for the preparation of a final report. The Council of Europe concluded a Convention on the recognition and enforcement of decisions concerning custody and on restoration of custody of children which was signed by the United Kingdom in May 1980. A draft Convention on the civil aspects of international child abduction has been prepared by a Special Commission of the Hague Conference which is to be submitted to the main session of the conference in October 1980 and active interest has been expressed by the Commonwealth Secretariat<sup>108</sup> and a number of member states of the Commonwealth, including Canada, in the preparation of a scheme to deal at least with child kidnapping. There has even been some initiative within the E.E.C. to provide at least special administrative machinery for dealing with the recognition and enforcement of custody orders of the courts of the Member States of the E.E.C. Everyone agrees that there is a pressing social problem to be resolved — as international travel becomes relatively cheaper the

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106. For a fuller account of the present position, see Law Commission Working Paper No. 77 (1980): *Financial Relief after Foreign Divorce*, Appendix.

107. Law Commission Working Paper No. 68; Scottish Law Commission Memorandum No. 23 (1976)

108. See *The International Abduction of Children by a Parent or Guardian*, (1980), a paper prepared by J. M. Eekelaar for the Commonwealth Secretariat

problem gets greater. Agreement on the solutions is, however, much more difficult.

There are significant differences between the two major initiatives: the Council of Europe Convention and the draft Hague Convention. The former deals primarily with the recognition and enforcement of all child custody orders and is subject to no mandatory time limit. The Hague Convention deals only with cases of improper removal, *i.e.* child kidnapping, and proceedings must be initiated within six months of the improper removal. To that extent its scope is narrower than that of the Council of Europe Convention; but in one important respect its scope is broader, for it applies to all cases of improper removal, whether or not there has been a prior court order. A further difference between the two conventions is that, under the draft Hague Convention, the power of the court to refuse to return a child who has been improperly removed is exercisable on different and more restricted grounds than those applicable under the Council of Europe Convention.

While concurrent initiatives create complexity, it is not a complete answer to say that only one body should deal with the topic or that a State which is a member of more than one of these international bodies should wait and see what they all produce and then choose one of them. There are two reasons for treating such solutions with caution. The first is that of the membership of the bodies. The Hague Conference has twenty nine members; the Council of Europe a slightly smaller number. Some countries are members of both bodies; others are not. Maximum international agreement can only be achieved by implementing both Conventions, provided they are not incompatible. Furthermore, there are often strong political pressures against adopting a wait and see attitude. Foreign ministries may well take a different view of the merits of a convention from that taken by lawyers. If a convention does no harm and some good, why wait for the possibility of a better one if international goodwill may be realised by signing and indeed ratifying the present one? There is also a more direct political pressure in a subject as emotive as custody disputes. Members of Parliament are often able to produce instances where one of their constituents is at the moment unable to recover a child but would have been able to do so if a particular convention was in force. It is not an unreasonable reaction of a government to act quickly to stop the problem recurring — but the result may once again be piecemeal and complicated international law reform.

The agenda for the 1980 Session of the Hague Conference provides another example of a difficulty created by several bodies operating in the same field. This time the clash is between the work of the Hague Conference and that of the E.E.C. in the field of contractual choice of law rules. After about ten years of negotiations the nine Member States of the E.E.C. have agreed on a Convention on the Law Applicable to Contractual Obligations. This convention was concluded in Rome on 19 June 1980 and has so far been signed by all the Member States except Denmark and the United Kingdom. It provides a new set of choice of law rules in contract for all cases, whether or not connected with the E.E.C., coming before the courts of the Member States. This E.E.C. initiative in the reform and harmonisation of the conflict of laws has been attacked<sup>109</sup> as tending to supplant the work of the Hague Conference with its more broadly based membership and indeed the fact that work was progressing in the E.E.C. context seems to have been a major factor contributing to the decision of the Hague Conference in 1976 not to take up the suggestion of working on a contract choice of law convention<sup>110</sup>. Criticism of this clash of interests has been forceful.

“The Common Market has apparently chosen to pre-empt for itself codification of the rules of conflict of laws, thus blocking the Hague Conference from doing the job for which it was created. This is a heavy responsibility. Having the Conference operate at the Market’s pleasure, to pick up crumbs here and there is not likely to appeal to the other member States”.<sup>111</sup>

The problem is not, however, limited to future work of the Conference but extends to the existing Conventions. The E.E.C. contract convention lays down choice of law rules applicable to all international contracts: but it also preserves other international conventions to which Member States are parties.<sup>112</sup> The most significant of these is the 1955 Hague Convention on the law applicable to international sale of goods. Sale of goods is probably the most important international contract and four Member States of the E.E.C.<sup>113</sup> are parties to the 1955 Convention. As this Convention prevails over the E.E.C. Convention, the harmonisation objective of the latter is defeated if about half the Member States of

109. Nadelmann, “Clouds over International Efforts to Unify Rules of Conflict of Laws” (1977), 1 *Law and Contemporary Problems* (No. 2) 54, 64-71

110. *Ibid.* at 65-69

111. *Ibid.* at 71

112. Art. 21

113. Belgium, Denmark, France and Italy

the E.E.C. apply the choice of law rules of the 1955 Convention to the most important international contract. The result has been a desire on the part of those E.E.C. States not parties to the 1955 Hague Convention that the others should denounce it. Indeed, even if all the Member States of the E.E.C. became parties to the Hague Convention, a significant element of harmonisation would be lacking because different choice of law rules would apply to sale of goods contracts and to other contracts; this would lead to great complexity, especially with regard to those transactions which combine sale of goods with other obligations. There is, however, a desire at the Hague Conference to attract wider acceptance of internationally agreed choice of law rules for sale which is manifested by the inclusion on the agenda for the 1980 Session of a draft convention, adopted in 1979 by a Special Commission, on the law applicable to certain consumer sales.

This competition between law reform proposals in the field of obligations<sup>114</sup> is likely, in my opinion, to have the result that the United Kingdom will not now sign the 1955 Hague Sales Convention,<sup>115</sup> or whatever revision of it or whatever consumer sales convention emerges from the 1980 Session of the Hague Conference. Similar conflict is to be seen between the Hague Conference and the E.E.C. in the field of tort law. The United Kingdom has signed neither the Hague Traffic Accidents Convention of 1971 nor the Products Liability Convention of 1973 and is, in my view, most unlikely to do so at least while negotiations on a choice of law convention on non-contractual obligations are proceeding in the E.E.C.

### IX. *The Dangers of compromise*

Reform of the law on a national basis has a major advantage over reform through an international agency — the need for compromise is much reduced. It is not entirely eliminated. Legislative acceptability may require some compromises to be made. Where the state involves more than one legal system, as in both the United

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114. There is the possibility of even wider conflict as the Eleventh Session of UNCITRAL, meeting in 1978, decided to include unification of conflict rules for international sales on its programme of future work, though with no particular priority until it was seen whether the Hague Conference revised the 1955 Convention.

115. For criticism of the Convention, see Jacobson, "International Sales of Goods" (1954), 3 I.C.L.Q. 659

Kingdom and Canada, there may be conflicting views necessitating skilled reconciliation. However, international bodies with a membership representing fundamentally different legal and political systems can usually only reach agreement by means of substantial compromise — certainly if there is to be any real hope of widespread acceptance of the agreement or Convention which emerges. Sometimes this process of compromise is wholly beneficial in that it provides international respectability for the abandonment of criticised national rules which might not otherwise be achieved. A striking illustration of this is the ever increasing use by the Hague Conference of habitual residence as a connecting factor to bridge the gap between the common law world's reliance on domicile and the civil law systems' dependence on nationality. Indeed this has led in the United Kingdom to much wider acceptance of habitual residence as a connecting factor, even outside the Hague Conventions in which it originated. Domicile has not been abandoned but has become an alternative connecting factor to habitual residence in, for example, the rules as to the jurisdiction of the courts over matrimonial causes.<sup>116</sup>

Compromise can, on the other hand, lead to unsatisfactory solutions which satisfy no-one, a 'lowest common denominator' approach to law reform. This can take two forms. The first is the use of reservations. Agreement may only be reached in negotiations by making some provision optional, by giving a State the power to declare that it will not apply the rule. A striking example of this is Part I of the 1976 Hague Marriage Convention whose rules as to the celebration of marriages in the forum state are optional.<sup>117</sup> A random glance at the last eight Hague Conventions shows that all but two contain powers of reservation. The wider the powers and their exercise, the less international uniformity that is achieved, though such uniformity is itself the mainspring of reform on the international, rather than the national, plane.

There is a real danger that governments, legislators and law reformers may say: 'If that is the best international uniformity you can get, we would rather have domestic law reform without the uniformity'. One must remember, before criticising that reaction too severely, that implementation of a Hague Convention is no guarantee of widespread uniformity. Statistically, the twenty-six

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116. Domicile and Matrimonial Proceedings Act 1973

117. See Art. 16

conventions concluded in the post-war period average about six ratifications per convention. Indeed some international uniformity may be achieved even via unilateral reform in that other similar-minded jurisdictions in, for example, the common law world might choose to adopt some or all of the changes made in another jurisdiction. The greater the co-operation between different law reform agencies, the more likely this is to happen.

The other form in which compromise may be seen is in the formulation of very complex rules. The particular problem which worries one State or group of States and which cannot be accommodated in the general rule is made the subject of an exception, and then the exceptions grow. Similarly, compromise between certainty and the desire to have a different outcome depending on the various law/fact patterns involved leads to complexity. Both of these approaches are illustrated by the two fairly recent Hague conventions in the field of tort law. The Traffic Accidents Convention (1971) has, in Article 3, a general choice of law rule that the internal law of the State where the accident occurred is to be applied. Ensuing articles provide a long list of exceptions to this rule depending on the origins of the vehicle and of the parties.<sup>118</sup> The Products Liability Convention (1973) does not even start with a simple basic rule but applies the law of the State of the place of injury only if that State is also either the plaintiff's habitual residence, the defendant's principal place of business or the place where the plaintiff acquired the product.<sup>119</sup> Again, further exceptions then follow. These rules amount to an attempt to identify the most likely factual circumstances to arise and the law that would be applicable under a flexible general proper law approach and then to cast those solutions in the form of specific rules. A structure of complex rules is inevitable. They are likely to look even more complex when transposed into the statutory form necessary in the United Kingdom for their implementation and I suspect that this is one, at least, of the reasons why the United Kingdom has neither signed nor ratified either of these conventions. As Cavers has suggested, 'the proper law of the tort is an artifact that courts are

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118. For Canadian criticism of the complexity of this Convention, see Castel and Crépeau, "International developments in choice of law governing torts: Views from Canada" (1971), 18 *Am.Jo. Comp. Law* 17, 23-25. Other defects are indicated by Newman, "The Law Applicable to Traffic Accidents" (1969), 18 *I.C.L.Q.* 643

119. Art. 4

better qualified to fashion than conventions'.<sup>120</sup>

### X. Conclusions

In the Preface to the first edition of his *Private International Law*, Geoffrey Cheshire gave as one of the fascinations of the subject that 'it has been only lightly touched by the paralysing hand of the Parliamentary draftsman'. What was true in 1935 is, as we have seen, much less true today, paradoxically because we live in an age of institutional law reform. The fact that the product of the work of such bodies, whether national or international, is ultimately legislation means that the new rules of law are cast in the statutory concrete of Acts of Parliament. However, rules designed to serve the interests and legal systems of a wide variety of states are most likely to be successful when they avoid the complexity of much modern legislation; when they lay down general rules, not overcluttered with detailed exceptions. Changing patterns in society and in commerce suggest that flexibility is a virtue — especially as amendment of internationally agreed conventions can only be achieved by the slow process of further international negotiation.

The United Kingdom's experience of the Hague Conventions has been that complicated conventions stand less chance of implementation than simple ones; that conventions designed to simplify the international administration of justice have proved more acceptable than those concerned with substantive conflict of laws rules; that conventions which fulfil an existing need for reform are more likely to be implemented than those whose main objective is seen to be change in the interests of international harmonisation; and, finally, that the increase in the number of bodies concerned with law reform in the international context has led inevitably to a lessening of the impact of the work of the Hague Conference and to increased complexity in the law when the rules of Hague Conventions have to be dovetailed in with the reforms proposed by other bodies.

One problem that the United Kingdom does not face is that posed by a federal constitutional system. Many areas of the conflict of laws in Canada fall within provincial rather than federal legislative jurisdiction. On a number of occasions Canadian authors<sup>121</sup> have

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120. Cavers, "The Proper Law of Producer's Liability" (1977), 26 I.C.L.Q. 703, 728. For forceful criticism of the complexity of the Products Liability Convention, see Tebbens, *International Product Liability*, at 333-360

121. E.g. Kos-Rabcewitz-Zubkowski, "The possibilities for treaties on private

suggested that the most practicable means of giving effect in Canada to Hague Conventions is by model laws rather than by formal ratification and implementation.<sup>122</sup> The disadvantage with such an approach is that, while some Hague Conventions though cast in the form of treaties are in essence sets of uniform rules, others apply in terms only to relations with the other Contracting States. This disadvantage is not always insuperable if a country is prepared to abandon the element of reciprocity involved. For example the Divorce Recognition Convention of 1970 only applies to the recognition in one Contracting State of divorces and legal separations obtained in another Contracting State. Nevertheless, the United Kingdom legislation implementing that Convention<sup>123</sup> applies to all foreign divorces and legal separations no matter where obtained and including grounds of recognition<sup>124</sup> wider than those in the Convention.<sup>125</sup> Where, however, reciprocal machinery is required model laws provide no answer.<sup>126</sup>

Horace Read was more enthusiastic over model laws, as might befit a long-serving member of the Conference of Commissioners on Uniformity of Legislation in Canada, and it is perhaps

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international law to serve as model laws" (1966), 26 R. du B. 229; Castel, "Canada and the Hague Conference on Private International Law: 1893-1967" (1967), 45 Can. Bar Rev. 1, 10-19; Proceedings of the Fifty-Second Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada (1970) at 157-214; Lederman, "The Private International Law System: Some Thoughts on Objectives, Methods and Relations to Public International Law" in *Canadian Perspectives on International Law and Organisation* (ed. MacDonald, Morris, Johnston) (1974) 137, at 147-150

122. For discussion of the attempts to persuade the Hague Conference to produce model laws rather than international treaties, and of the merits of the two approaches, see Nadelmann & Reese, "The American Proposal at the Hague Conference on Private International Law to Use the Method of Uniform Laws" (1958), 7 Am. Jo. Comp. Law 239; Nadelmann, "Uniform Legislation vs. International Conventions", in *International Trade Arbitration* (ed. Domke) (1958) 167; Amram, "Uniform Legislation as an Effective Alternative to the Treaty Technique" (1960), 54 Proceedings of Am. Soc. of Int. Law 62; Droz, "La conférence de la Haye de droit international privé et les méthodes d'unification de droit: traités internationaux ou lois modèles?", [1961] Rev. int. de droit comparé 507; Nadelmann, "Uniform Legislation versus International Conventions Revisited" (1968), 16 Am. Jo. Comp. Law 28

123. Recognition of Divorces and Legal Separations Act 1971

124. *Ibid.*, s.6

125. The United Kingdom took advantage of Article 17 of the Convention which permits a Contracting State to have rules more favourable to recognition than those in the Convention.

126. *E.g.* under the Convention concerning the International Administration of the Estates of Deceased Persons (1973)



appropriate to conclude this lecture with his view, expressed in 1969, on the way in which Canada could best gain the advantages of membership of the Hague Conference. He said:

“In this country the advantages of membership in the Hague Conference could be better gained, not by formal adherence to the conventions but by active participation in its work and use of its conventions as models for uniform acts. In this way, perhaps with an occasional slight departure from uniformity, greater flexibility and adaptability to conditions peculiar to this country could be ensured”.<sup>127</sup>

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127. *The Ansul*, (Dalhousie University Law School) January 1969