TOWARDS A GLOBAL JUDGMENTS CONVENTION: THE PROPOSED NEW HAGUE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS

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INTRODUCTION

The Eighteenth Session of the Hague Conference on Private International Law in October 1996 placed the drafting of a new Judgments Convention on the Agenda for the 1996-2000 quadrennium. In consequence, a Special Commission was convened on 17 June 1997 to start the process of drafting the Convention which, if all goes according to plan, will be submitted for approval by a Diplomatic Conference at the Nineteenth Session in October 2000. The Hague Conference had previously in 1971 approved a Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters ("1971 Convention"). Although this Convention is in force, having been ratified by the Netherlands, Portugal and Cyprus, the near certainty that it will not attract more subscribers was a spur to the attempt to draft a wider ranging convention.

During the previous quadrennium some preliminary work had been done to see if there was a sufficient consensus which could serve as a basis for such a Convention. A Working Group of Experts met and made a number of recommendations on the nature and scope of a proposed Convention in October 1992. That Group had a strong input from the United States, particularly from Professor Arthur von Mehren of Harvard University. Australia was not represented on that Group. In June 1994 and again in June 1996 a Special Commission consisting of experts from all member states and including several observers met in The Hague. The Australian delegation was led on each occasion by the Solicitor-General of Australia, Dr Gavan Griffith QC, and I was a member of that delegation.

The Hague Conference is a body with a world-wide membership which has existed in one form or another since 1893. Because of its European origins, more than half of its membership consists of European states most of whom

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are members of the European Union. Outside of Europe, its most important members are the United States, Japan, China, Canada, Australia, Mexico, Argentina, Egypt and Israel. The Russian Federation is usually represented by an observer. India, unfortunately, has not attended so far. Other important observers are the European Commission and the Council of the European Union. Since the Maastricht Treaty, member states of the Union are obliged to coordinate their relationships with outside states. This does not always succeed and the Union is far from monolithic. Indeed, if it were, the rest of the Conference could stay away. However, the Union's views are important, particularly on the relationship of any proposed Convention with intra-Union arrangements, which in the case of judgments is very pertinent.

WHY HAVE A JUDGMENTS CONVENTION?

This question must always be asked at the outset. Clearly, the international recognition of judgments is important in international trade and commerce. It is not surprising that English courts from an initial refusal to give standing to foreign judgments established rules for their recognition in the nineteenth century as British trade and commerce expanded. Other countries have done likewise but not necessarily at the same pace or under the same conditions. However, a Judgments Convention faces three problems: (a) the existence of exorbitant jurisdictions, (b) uneven rules for the recognition of judgments and (c) exorbitant damages.

(a) Exorbitant Jurisdictions

Each national system has maximised its rules of competence in order to protect its citizens. The most outrageous example is Article 14 of the Code Napoleon. It permits a French court to assume jurisdiction on the basis of the French nationality of the plaintiff, regardless of the nationality or residence of the defendant or the connection of the subject matter of the subject matter with France. In Scotland, Germany and Austria, jurisdiction can be assumed on the basis of property of the defendant within the jurisdiction, even though the asset is unconnected with the dispute and its value is far below the sum claimed.

The United States has claimed legislative and judicial jurisdiction over foreign defendants in anti-trust litigation because of the "effects" their acts done abroad have produced within the United States. Australian, British and South African corporations which sold asbestos from their mines to

American importers have been the subject of suit in the United States by American workers who suffered health injury in industries where the imported asbestos was used. This was so even though none of those corporations were directly represented within the United States. Suit was on the basis that the corporations were "doing business" in the United States through their distribution of the asbestos by means of subsidiaries. This was even extended to unconnected distributors who, to the knowledge of the principals, were marketing the product within the United States. In response to what was seen as exorbitant claims of jurisdiction by American courts, Australia, Canada and the United Kingdom have enacted "blocking" and "claw back" legislation, which in turn has produced resentment in the United States.[1]

Australia itself is not immune from this trend. In the exercise of its transient jurisdiction a Queensland court not so long ago assumed jurisdiction over a dispute entirely connected with Papua New Guinea, because the plaintiff managed to serve the defendant while holidaying in Queensland.[2] In most Australian states, the Supreme Court can exercise jurisdiction in respect of a tort committed by a foreigner abroad if the plaintiff suffered some resulting harm within the jurisdiction, even though the act of the defendant and the primary impact upon the plaintiff (as in a motor accident) all took place in the foreign country.[3]

Exorbitant jurisdictions invite forum shopping. Even though judgments resulting from such jurisdictions are rarely entitled to international recognition and enforcement, they can and do place local assets acquired or to be acquired by the defendant at risk. Defendants who wish to continue to do business with the country concerned will find that they cannot simply ignore foreign judgments even though they are based on a clearly exorbitant jurisdiction which highly favours the plaintiff.

At the session of the Commission in June 1997 the Co-rapporteurs proposed that the Convention should outlaw the following as general bases of jurisdiction:

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1 1984 Foreign Proceedings (Excess of Jurisdiction) Act (Cth); 1980 Protection of Trading Interests Act (UK).

2 Tuckerman v Neville [1992] 2 Queensland Reports 657.

3 For example, in New South Wales, see Rules of the Supreme Court Part 10 rule 1A(1)(e); in Victoria, see Rules of the Supreme Court Order 7.01(1)(j). Also see Girgis v Flaherty (1985) 4 New South Wales Law Reports 248.

(a) the transient presence of the defendant within the forum;
(b) the presence within the forum of assets of the defendant;
(c) the nationality of either the plaintiff or the defendant;
(d) the domicile or residence within the forum of the plaintiff; and
(e) the "doing of business" by the defendant within the forum.

It should be remembered that the ban is on these grounds as bases for general jurisdiction. It does not prevent an action *in rem* where the asset, such as a ship, is itself the subject of the action, or where the action arises out of actual business transacted within the jurisdiction. By "general jurisdiction" is meant a jurisdiction which allows the court to assume competence over any claim raised by the plaintiff whether related to the forum or not. There was a general consensus that grounds (a) to (d) were not desirable, although some states wanted to think further about the nationality of the defendant. The United States was not, at this stage, prepared to concede (e).

(b) Uneven Rules of Recognition

The rules of recognition differ greatly from country to country. Most generous is the United States whose rules are based on the "comity doctrine". It will recognise any foreign judgment regardless of the basis for exercising jurisdiction, on condition United States standards of "due process" are met. In other words, the defendant has proper notice of the proceedings, has the opportunity of appearing in the proceedings and, if these are met, has a fair hearing.

In contrast, the English common law is more concerned with the jurisdictional power of the foreign court which must be based on the defendant being either resident (or present) in the foreign jurisdiction at the relevant time or voluntarily submitting (either by prior agreement or *ad hoc*) to the foreign proceedings. The fact that the tort is committed entirely within the foreign jurisdiction, the contract is to be performed there or the property which is the subject of the proceedings is situated there (unless the proceedings are *in rem*) is not relevant. Because of the common law fiction that a foreign judgment does not exist, it is necessary to bring a fresh suit in the country of enforcement based either on the monetary obligation created by the foreign judgment or on the original cause of action in which case any unliquidated damages can be re-assessed.

Other countries have more restrictive rules. Countries like Denmark, Norway, Sweden, Finland, the Netherlands and Indonesia do not recognise foreign judgments at all. In those countries one has to rely on multi or bilateral treaties. Others like Germany require reciprocity: a foreign judgment will only be recognised if a similar German judgment would be entitled to recognition in the country of origin or the matter is regulated by convention. Evidence that a German judgment might be re-examined for fraud at common law could place German recognition at risk. French courts in the past had claimed the right to examine any foreign judgments on the merits (*revision au fond*) and some countries may refuse recognition if the foreign court misapplied the law of the forum in which recognition was sought or it had applied a different choice of law rule (for example, the law of the domicile instead of the law of nationality) leading to a different result from the one the recognising court would have reached.

The Foreign Judgments Acts which originated in England in 1933 have been reproduced in most Commonwealth countries including Australia where their principles are now set out in the 1991 Judgments Act (Cth). The Act has simplified the common law procedure by substituting registration for the fresh action. But basically, although the common law principles of recognition have been codified, they have not been substantially expanded. The Acts are based on reciprocal arrangements, namely, they lay the framework for bilateral arrangements which must be negotiated with each country. Also, the arrangements are "single conventions" as they deal with the recognition of judgments only.

(c) Exorbitant Damages

The practice in some countries, especially the United States, of courts or juries returning verdicts for large sums in damages in tort actions (either specifically as punitive damages or out of sheer generosity when faced with a defendant with deep pockets) has given rise to concern, particularly in civil law countries. In these countries, verdicts tend to be confined to compensation only. Such intangibles as "pain and suffering" are given modest, if any, compensation. Some of them, like Germany and Switzerland, have refused to enforce the non-compensatory portion of American verdicts either on grounds of public policy or by statutory authorisation.

Even common law countries whose systems know of punitive damages rarely award them with the same gusto and abandon as some American

juries. Although it must be conceded that appeal courts regularly reduce the more extravagant awards, there are the notorious treble damages which American courts can award under anti-trust legislation. This also has produced reactive legislation in Australia, Canada and the United Kingdom whereby the amount of damages awarded can be reduced by ministerial decree. It is uncertain whether, apart from any statute, treble damages are entitled to recognition and enforcement. Punitive damages most likely are enforceable.

Therefore, it is obvious that an international Convention, especially one which regulated both jurisdiction and recognition (a so-called "double convention") would produce certainty for international commerce.

THE BRUSSELS AND LUGANO CONVENTIONS

The most important Convention on the recognition and enforcement of judgments is the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ("Brussels Convention"). This Convention is restricted to members of the European Union and all members are obliged to accede to it. Its interpretation is under the ultimate supervision of the European Court at Luxembourg. Associated with this Convention, and almost in identical terms, is the Lugano Convention of 1988 ("Lugano Convention"). It was originally designed to extend the principles of the Brussels Convention to the members of the European Free Trade Association. Now most of those states have joined the Union and its members (outside the Union) are Switzerland, Norway and Iceland. The European Court of Justice does not have jurisdiction in non-member states but by a Protocol it is agreed that the courts of non-member states shall give due regard to its decisions.

The Brussels and Lugano Conventions ("Brussels/Lugano") are double conventions because they regulate both jurisdiction and recognition. In consequence, the provisions of Title II dealing with jurisdiction are the most elaborate. Recognition in Article 26 is simply extended to all judgments rendered in a contracting state with the reservation in Article 28 that recognition shall be refused if Title II is not complied with. In other words, once jurisdiction exists under Title II recognition is ensured unless the grounds of public policy, denial of natural justice, or conflicting prior judgments under Article 27 apply.

Although this is in a sense superfluous, because a ground of jurisdiction which does not appear in Title II cannot be relied upon, Article 3 of Brussels/Lugano produces a "black list" of exorbitant grounds of jurisdiction which contracting states agree not to invoke against persons domiciled in contracting states. They include all the exorbitant grounds earlier referred to. However, those grounds can still be invoked against persons domiciled outside contracting states, such as Australians. To add insult upon injury, Article 4 extends the privilege of using the national exorbitant jurisdictions to any person domiciled in a contracting state regardless of nationality. Thus, for example, a United Kingdom citizen and domiciliary (or indeed an Australian citizen domiciled in a contracting state) can sue any defendant in the world in a French court as if he or she were a French citizen!

Brussels/Lugano provide an interesting model for the work of the Hague Conference. Jointly, they are generally regarded as working reasonably well. Because of the membership of the United Kingdom and Ireland it can cross the civil law/common law divide. Obviously a Convention designed for a small group of contiguous states in Europe cannot be simply translated into a global Convention without significant change. But it would be foolish to try and re-invent the wheel.

THE CHARACTER OF THE PROPOSED CONVENTION: DOUBLE, SINGLE OR MIXED; BILATERAL OR MULTILATERAL?

As mentioned before, a double convention would present great advantages. But it would require contracting states to agree to limit their jurisdictions, at least as regards persons domiciled in contracting states. This may be difficult for some states, notably the United States, to agree. A single Convention, like the 1971 Convention, may be easier to agree to, but may not be as attractive since many states are concerned about the jurisdictional issue, especially European states who are fearful about the more extravagant claims made in United States courts. If the new Convention is to be more attractive than the 1971 Convention it will have to offer greater security. By the same token, the new Convention should be multilateral, like Brussels/Lugano. The 1971 Convention, in contrast, required bilateral arrangements to give it effect between contracting states and this is one of the another reasons for its lack of progress.

The Working Group proposed a compromise between the double and the single convention models. This they called the "mixed convention". Like the

double convention, the "mixed convention" would contain a list of prohibited exorbitant jurisdictions. Member states would agree not to invoke them, at least against persons domiciled in contracting states. But unlike Brussels/Lugano, they would not seek to define exhaustively the jurisdictions which would be permitted, leaving a "grey" area where courts might exercise jurisdiction on grounds which courts in other contracting States might not recognise. Thus, the United States might agree to abandon transient or "tag" jurisdiction but not jurisdiction based on "effects" within the United States, even though other states might not agree to recognise judgments based on such a jurisdiction.

The advantage of this approach is that one can proceed on the lowest common denominator as regards prohibited jurisdictions and bases for recognition. A fair degree of consensus exists on both. No country is seriously defending jurisdiction based on the transient presence of the defendant or on the nationality of the plaintiff alone. Most countries can readily agree that judgments rendered by the court of residence of the defendant should be recognised, including "special jurisdictions" based on substantive transactions having been done there by the parties acting directly (for example, branch business). Where agreement cannot be reached, for example on "doing business" without maintaining a branch locally, the "grey" area commences and controversial issues such as *lis pendens* and *forum non conveniens* can be avoided.

The disadvantage of the mixed convention and, *a fortiori*, the single convention approach, is that business persons can still be caught by extravagant jurisdictions in respect of acts performed entirely abroad but producing effects on consumers (after passing through a chain of importers and distributors) in a country to which they intended to export. As mentioned before, the inability to enforce the judgment in the country of the defendant's residence is not always a safeguard.

At the first Special Commission in 1994 it was resolved by overwhelming majority (contrast the United States) to try for a double convention first. Australia supported this as a primary objective, reserving its position in case it proved impracticable. The discussions in June 1997 proceeded on the basis that the aim was a double convention. However, the United States maintained its position that a mixed convention was desirable and this issue will have to be faced by the Special Commission at some future stage.

THE SCOPE OF THE CONVENTION

There was a general consensus that certain matters should be excluded from the Convention such as tax and customs matters, administrative decisions, social security, arbitration, most family law matters, wills and succession, and personal and corporate insolvency. These are excluded from Brussels/Lugano because they either involve public (state) interests or are better dealt with in separate conventions. Some delegates favoured the inclusion of maintenance obligations, as in Brussels/Lugano. This matter has been left open for further discussion although enthusiasm for inclusion was noticeably waning in June 1997.

A more important issue is whether the scope of the Convention should include judgments in tort and tort-like claims. This arose out of the concern with punitive and treble damages. The United States offered a solution based on Article 8A of the abortive United States/United Kingdom Agreement for the Reciprocal Enforcement of Judgments negotiated in 1978 but never ratified. That provision would have allowed the recognising court to reduce the amount of damages to be enforced to the amount that the recognising court would have assessed based on the findings of fact and law in the original court. Thus, the recognising court could not review the decision of the original court as to culpability and damage suffered. But one could say the Draft Convention would not have awarded as much because the proposal was received with some reluctance. Obviously any revision of the judgment to be enforced is less than ideal. But Swiss and German precedent shows that it is not unknown.

Therefore, this is an issue which requires considerably more discussion. Punitive and multiple damages can more easily be identified and it is possible to envisage a clause which would exclude them from enforcement under the Convention. Excessive damages is a more subjective notion and there was a reluctance to leave their exclusion to the discretion of the enforcing court whether through a revision procedure or the use of a general public policy reservation. The answer lies in a clause specifically directed to that problem, but its content is as yet to emerge.

GROUNDS OF JURISDICTION THAT MIGHT BE ADMITTED

This is the list of permitted jurisdictions to which the courts of origin would be confined in a double convention, and which in a mixed or single

convention would be bases for recognition of the foreign judgment. There was a certain degree of consensus on the headings, although closer definition might no doubt raise problems. They shall now be dealt with in turn.

The Habitual Residence or Domicile of the Defendant

This corresponds to Article 2 of Brussels/Lugano and, in principle, is uncontroversial. It would be the basic principle of jurisdiction available regardless of the nature of the subject matter or the place of occurrence of the relevant events. It would always be available even if the claim did not fall within one of the special jurisdictions. However, closer definition might reveal differences in these concepts which Article 52 of the Conventions leaves to the internal law of each state. In the case of a corporation reference is made to the place of the seat of the corporation. However, the question of whether that is the real seat (or principal place of business, which may be in New York) or the statutory seat (or place of incorporation, which may be in the Bahamas) is left to the internal law of each state by Article 53. The discussion in June 1997 evidenced support for the use of habitual residence, rather than domicile, for individuals. There was, as yet, no consensus on what should be the test for corporations.

The Place of Situation of Immovable Property in relation to Actions In Rem

This raises no great problem in principle although there was considerable debate on whether such a jurisdiction should be exclusive at the June 1997 session. If so, what was to be its extent. There was considerable support for the position that "real actions" (namely, actions which had as their purpose the assertion of interests in land) should fall within the exclusive jurisdiction of the *situs*, with the possible exception of short-term leases (holiday lettings) or cases where both the landlord and tenant live in the same country. But there was also opposition to exclusivity at all, unless the registration of the title was involved or a judgment effective *erga omnes* was sought. The United Kingdom delegation expressed the view in June 1997 that actions to enforce a trust, including a trust created by law, should not fall within the exclusive jurisdiction, even if the action concerned land abroad.[4]

[4] This proposition was accepted in relation to the Brussels Convention by the European Court of Justice on the ground that the enforcement of a "personal equity" was not a real right: see Webb v Webb [1994] European Court Reports I-1717; [1994] Queen's Bench 696. Some civil law delegations expressed disapproval of that decision.

The Forum Contractus

There was agreement that there should be a provision allowing a court to assume jurisdiction on the basis of a specified connection with the contract out of which the action arose. Under Article 5.1 of Brussels/Lugano, the place of performance of the obligation in question is the place of delivery of goods if not delivered, and the place of payment of the purchase price, if not paid. However, few members of the Commission argued that this awkward precedent should be followed.

There was support for the proposition that different connections should be specified for different types of contracts, such as employment and consumer contracts. Also, there was a consensus that in any event the position of the economically weaker party, such as the employee or consumer, should be considered which might justify a *forum actoris* in certain circumstances, as in Brussels/Lugano Article 5.1 (employee's place of work), Article 8 (insured's domicile) and Article 13 (consumer's domicile if consumer was solicited there). There was a feeling that protection should be limited to those in need such as the household consumer or insurer. It should not extend to the business purchasing goods for consumption in the course of that business or buying insurance for professional purposes.

Associated with the above, under Brussels/Lugano Article 5.5, jurisdiction was based on the place of business of a corporation, association or individual in respect of litigation arising out of transactions entered into at that place. This was generally accepted but there was debate on whether a place of business should be limited to a branch owned by an entity with the same legal personality as the defendant, or whether subsidiaries, agents or unconnected distributors would also be included. Needless to say, the United States favoured the broader proposition.

The Domicile or Place of Establishment of a Trust

The acceptance of such a ground was without controversy, subject to definition. This should be contrasted with Brussels/Lugano Article 5.6. The Brussels/Lugano text speaks of the place of the domicile of the trust, which is a nonsense, since the trust lacks legal personality.

There was agreement that there should be a special jurisdiction in relation to tort. Under Brussels/Lugano Article 5.3, courts have jurisdiction in the place

where the harmful event occurred. The European Court of Justice has interpreted this in *Bier BV v Mines de potasse d'Alsace* [5] as giving the plaintiff in a transborder tort the choice between the place where the act causing harm was done and the place where the harm ensued. In a later decision in *Marinari v Lloyd's Bank*[6] the same court has restricted the place of harm to the immediate harm or place of first impact of the wrongful act refusing to extend it to consequential harm which the plaintiff may have continued to suffer upon returning home. A large number of proposals has been made ranging from an acceptance of the Brussels/Lugano text, as interpreted by the European Court of Justice, to a proposition that the plaintiff who suffers harm at his or her residence should be able to sue there, on condition the defendant could have reasonably foreseen that such effects could occur at the plaintiff's residence. The last named proposal is controversial since generally, civil lawyers are wary of broad discretionary concepts such as "reasonably foreseeable". There is, of course, a connection between the acceptance of a "doing business" ground and tortious liability, especially in cases of product liability. If a company knowingly distributes dangerous products within the forum, either itself or through a wholly owned subsidiary, there is a strong moral and commercial argument that it should be prepared to face claims in the courts of that country. There was some discussion of "group actions" and "multiple claims" which might arise out of product liability issues or mass disasters, such as Bhopal. I had the feeling that at this stage, it belonged to the "too hard" basket.

Under Brussels/Lugano Article 6.3, provision should be made for jurisdiction in respect of counterclaims arising out of the plaintiff's action in the court which has jurisdiction over the plaintiff's claim. This provision was not deemed controversial. More debatable is a proposal based on Article 6.1 allowing co-defendants to be sued in any place where one of them is domiciled. However, there was no discussion of this in June 1997.

Provision should also be made in respect of prorogation agreements based on the autonomy of the parties to select their forum, as in Brussels/Lugano Article 17. There should also be provision for *ad hoc* submission or "tacit" prorogation. There was a feeling that the court selected by the parties should accept jurisdiction and not invoke *forum non conveniens* to decline it. Further, if it is the court which otherwise would have jurisdiction,

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5 [1976] European Court Reports 1735.

6 [1996] Queen's Bench 217 (Case C-364/93).

jurisdiction should not be denied although the court chosen is foreign. The position of third parties remains to be discussed. Some concern was expressed for the protection of weaker parties and the suggestion was made that agreements and submissions induced by superior economic strength should be disallowed. While it was agreed that in principle prorogation agreements should be evidenced by writing, allowance should be made for technological advances which eliminate the use of documents and recognition of international standard practices where reference of disputes to particular courts can be assumed from the behaviour of the parties. A radical proposal was to treat writing or electronic communication merely as the "best evidence".

Grounds of Jurisdiction Based on the Sovereign Power of the Forum

This rather vague description covers issues such as the existence or dissolution of companies or associations, and the registration or validity of patents and trademarks. Brussels/Lugano Articles 16.2 and 16.3 give exclusive jurisdiction to the courts of the state of registration. There appeared to be general agreement that courts, other than in the place of registration of such entities and rights, should not be prevented from assuming jurisdiction to determine issues of existence and validity *inter partes*; otherwise a simple weapon would be provided to an obstructive party to defeat the proceedings.

Maintenance Obligations

In case maintenance obligations are to be included, there was consensus that jurisdiction should be based on the residence of the maintenance creditor. This is in contrast to Brussels/Lugano Article 5.2 and may conflict with the constitutional requirements of "due process" to the defendant, especially in the United States.

Lis pendens and Forum Non Conveniens

Brussels/Lugano deal with *lis pendens*, but exclude *forum non conveniens*. As regards *lis pendens* the Conventions provide in Article 21 that any court other than the one first seised shall of its own motion stay its proceedings until the jurisdiction of the first court can be established. If that is established, the second and further courts shall decline jurisdiction.

This is in direct contrast with the common law approach where the existence of a *lis alibi pendens* is merely regarded as a factor in deciding whether the second forum is *forum non conveniens*. If the plaintiff can point to a substantial juridical advantage in the second forum, the plaintiff may be allowed to proceed even if this may lead to race to judgment. Such a result would be abhorrent to civil lawyers.

The criticism made of Article 21 is that it leads to a race to the court door. Since the European Court of Justice held in *The Maciej Rataj*[7] that an application for a declaratory order of non-liability by a potential defendant raises a *lis pendens*, both parties can manipulate the system through forum shopping; the defendant can force the plaintiff to sue in the defendant's residence by first filing an application for a declaration that there was no valid contract or that the defendant did not breach the contract even if that course of action is patently manipulative. A provision along the lines of Article 21 might create problems for non-European countries.

Some degree of flexibility, however, exists under Article 22 which provides that in the case of related actions being brought in several fora, any court, other than the court first seised, may stay its proceedings and if satisfied that the actions can be consolidated in the first court, may decline jurisdiction. This is the nearest the Conventions come to *forum non conveniens* type considerations and gives rise to hope that a compromise might be reached on *lis pendens*, especially if the discretion could be extended to the court first seised as well.

Much time was spent in June 1996 on a discussion of forum *non conveniens*. The civil law tradition is hostile towards judicial discretion. The idea that a court which has by law been given jurisdiction can decline to exercise it, is regarded by many as a "denial of justice" (*deni de justice*). One can expect considerable opposition to the introduction of *forum non conveniens* in the Convention. Of course, if it is not to be a double convention, *lis pendens* and *forum non conveniens* will not be required. By general agreement the topic was not discussed in June 1997.

Here again, there is a possibility of compromise. The recently concluded 1966 Hague Convention on the Protection of Children, which is a double convention, uses as its primary jurisdiction the habitual residence of the

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7 [1995] 1 Lloyd's Reports 302.

child. However, it allows the court of the habitual residence to transfer the matter to other jurisdictions, such as that of the nationality of the child, the divorce forum of his or her parents or any place with which the child has a closer connection. This power is only to be exercised in the best interests of the child. The precedent is obviously not immediately appropriate for the purposes of the judgments convention, but it shows that agreement on some form of *forum non conveniens* can be reached if the courts between whom transfers can take place are defined and the principles upon which transfer can be made are set out. However, the positions of the various states involved in the debate must be allowed to mature.

CONTROL OVER THE COMPETENCE AND DECISION OF THE ORIGINAL COURT

Brussels/Lugano limit the powers of the recognising court to re-examine the facts on which the original court based its jurisdiction or review the substance of the decision of the original court. In relation to the merits of the decision itself there was an obvious consensus that under the proposed convention the court of enforcement should not re-examine the merits of the original decision or be allowed to object to the law applied. But there was considerable discussion as to whether the court of enforcement should be allowed to examine for itself the factual basis upon which the foreign court exercised jurisdiction. It was accepted that if the defendant had appeared and not contested the jurisdiction, the exercise of jurisdiction should not be questioned again. But this left the problem of default judgments and unsuccessful attempts to object to the jurisdiction of the foreign court. This raises a number of problems. For instance, if default judgments are more easily re-examinable, defendants might be encourage to stay away. Further, a number of questions remain to be answered. The following are examples:

Assuming that as in Brussels/Lugano there is provision for denial of recognition of a default judgment if the defendant was not given sufficient notice of the proceedings, should examination of the first court's jurisdiction be confined to cases where the defendant had unsuccessfully objected to the jurisdiction of that court?

Whose standards and interpretation of the Convention has precedence: the court of origin or the court of enforcement? This raises the question of uniform interpretation and the definition of concepts such as "domicile" and "seat of the corporation".

Should the second court be bound by the findings of fact on which the first court justified the assumption of jurisdiction?

Should the question of possible lack of jurisdiction of the first court be raised only by the defendant, or should the second court raise it on its own motion?

Should the judgment be assailable for fraud? If so, should that include intrinsic fraud, namely, fraud of which the defendant was aware or could reasonably be expected to have been aware at the time of the original hearing and which the defendant may have raised unsuccessfully in the original hearing?

Should the first court be required to give grounds for the judgment even in default, consent and summary judgments so that the second court can examine their sufficiency?

These issues will be considered at the next session of the Special Commission in March 1998.

CONCLUSION

This brief survey has shown that there are still many complex issues to be resolved. There are some fundamental differences in approach between common lawyers and civil lawyers to be overcome. There are also some important issues to be resolved between the United States and the rest of the world. There is also some tension between the members of the European Union and those who are outside it.

I believe that those differences, important as they are, are not insuperable. With goodwill they can be overcome. With the globalisation of international trade and the increasing irrelevance of national borders, a system for ensuring that judgments are recognised and enforced throughout the world is absolutely vital. If the national laws and courts fail to meet the challenge through an international convention which offers a simple and efficient solution, international commerce may have to turn to other ways of enforcement, not necessarily desirable or pleasant.