REFORMING NEW ZEALAND'S CONFLICTS PROCESS: the case for internationalisation.

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CONTENTS

I may fail in the attempt to establish true & certain principles for the decision of the various difficult questions growing out of the contrariety of laws; & yet my labour may not have been in vain, as it may tend to excite a spirit of inquiry into a subject but little understood in this country, & may lead to discussions by others more capable of accomplishing the object desired

Samuel Livermore DISSERTATION I.[1]

PART 1 THE ARGUMENT

1. *The Need For Reform*

The problem of dealing with civil cases which contain a foreign element forms the basis of the subject taught in Common Law universities as the Conflict of Laws.[2] Under a system of laws which sees the municipal legal system as the basic legal unit this subject has naturally lead a precarious existence. The interests of the State and the focus of the courts tend to be towards the maintenance and development of domestic law to the exclusion of all other systems. Yet against this trend there runs the internationalist movement which seeks to shift the focus of answering the basic problem onto an international plane. In so doing its touchstone is justice for the individual litigant. This conflict of argument is of course, a common place in the literature of the Conflict of Laws.[3] My specific aim in this paper is to examine the case for internationalisation and to apply it to the New Zealand situation. Both in terms of practice and of principle there is a clear need for reform in New Zealand. Our law on the subject abounds with inconsistencies and obscurity. In part this is the result of the lack of conscious overall planning in the area. The time for reform is right not only because New Zealand's private law as a whole has been the subject of recent wide ranging reform but also because New Zealand is seeking to play a larger and more independent role in the international community generally.

2. *The Method For Reform*

But I am not concerned here specifically with the precise substantive reforms that may be necessary in the field of the Conflict

of Laws. My interest is rather in the search for a just process for reform. To date the work of both the courts and of Parliament in this area has been piecemeal. While this might be an acceptable method in other areas of the law I shall argue that it is not in the Conflict of Laws. This is because of the essentially international character of the problems raised. Any reform in the area should reflect that international character and reflect also the overriding principle of desire to accord justice to the individual litigant. My argument then is that the search for a just process in the Conflict of Laws must necessary lead us towards a solution of international unification.

3. *The Procedural Nature of the Subject*

My emphasis on process in this paper reflects the procedural nature of the subject. The Conflict of Laws does not lay down a set of substantive rules to govern the resolution of conflict. Rather it establishes a set of procedures for the conduct of a case with foreign elements in it. Much concern in the literature has been with the theoretical implications of the subject.[4] While such discussion is no doubt necessary it is important not to lose sight of the end goal of the debate namely the goal of finding a just process.[5] If the legal system is concerned to give effect at least in part to our conception of justice then we must be concerned at least as much with procedural issues as with substantive ones.

4. *The Order of the Paper*

In order to make out the case for internalisation of the reform process for New Zealand's Conflict of Laws I shall examine first the

general reasons for international unification which stem from the nature of the subject and the principles which motivate it as well as from the inherent weaknesses in the present system. I shall attempt to counter criticisms both from those who say that the Conflict of Laws is not amenable to codification and from those who say that the Conflict of Laws is an outdated method compared to the international unification of substantive law. From arguments as to the principles which support an international codification process for the reform of the Conflict of Laws I shall turn in Part III to an examination of the current New Zealand position. I do this firstly to establish the need for reform in New Zealand. But I follow those,of necessity negative,comments with some positive examination of reform in New Zealand to date. Part IV is concerned with the options for international cooperation. From a survey of regional options I turn to the major world agency for reform in this area namely the Hague Conference. From the point of view of practical implementation of my recommendations in principle the methods and success of the Hague Conference are clearly going to be of major significance. Finally in Part V I look at New Zealand's international participation. While in the past this has had a Commonwealth Common Law orientation my specific recommendation is that we move onto a truly international plane by means of closer participation in the work of the Hague Conference. I shall examine both the merits and possibilities of this solution.

5. *The Focus of the Paper*

In my examination of the New Zealand situation I shall be focusing particularly on Family Law. I do this because it is an area to which New Zealand courts and the New Zealand legislature have paid particular

attention. This attention has been mirrored in the work of the Hague Conference. Moreover because of its concentration upon the individual and upon the achievement of just procedures for individual legal problems this area illustrates some of my basic points about process and about the principles behind the process. In concentrating on Family Law I must of necessity neglect much of the law of obligations, i.e. of contract and of tort. In this area other factors and other variants receive more prominence in New Zealand because of the Accident Compensation Act 1972[6] and internationally because of a range of uniform conventions on intellectual property and international as well as the development of uniform laws on arbitration and the international sale transaction.[7]

6. *The General Nature of the Argument*

However my chosen specific focus namely that of Family Law and my specific recommendation about participation in the Hague Conference are not essential to the general argument of this paper. The argument for the internationalisation of the reform process can be applied equally to other areas of private law and to other international institutions. That is because the argument in this paper is not on issues of substance but on proposals for a more just process.

PART II GENERAL REASONS FOR INTERNATIONAL UNIFICATION

1. The Nature of the Subject

At the outset it was claimed that the Conflict of Laws dealt basically with procedural questions which arose when there was some foreign element in a civil case. In what kinds of situation does such a foreign element arise? The classical analysis is that the Conflict of Laws answers three basic questions.[8]

1. When does the domestic court have jurisdiction to hear the case?
2. On the basis of the law of which country does it decide the case?
3. Assuming a decision or order has been made in a foreign country when will the domestic court recognize and enforce that?

The first question might be termed the jurisdiction question, the second question the choice of law question and the third question that of international civil procedure. Yet as framed each of these questions answers a procedural problem faced by a domestic court. None is determinative of the legal issue in the case yet all may have a profound effect on the result of that case. Each of these questions to some extent reflects the viewpoint of the Domestic Court. From an international perspective these three questions look slightly different:

1. Which Court is most conveniently fitted to deal with this case?
2. Which law applies most appropriately and justly to resolve the issues in this case?
3. When and how can Courts best assist each other to ensure the efficacy of the judicial process?

2. *Interrelation Between Substantive and Procedural Questions*

Notwithstanding that the procedural and substantive issues in a conflicts case are clearly divisible that line is often blurred in practice. The case law affords numerous examples of where the substantive result has affected the judge's attitude to the conflict procedure. Here are just three illustrations of this proposition.

In *Black-Clawson* v. *Papierwerke A.G.*[9] the question before the House of Lords was whether a decision of a German court that a claim by an English company was time barred in Germany effectively prevented that company from bringing proceedings in England. The question revolved around an interpretation of section 8 (1) Foreign Judgments (Reciprocal Enforcement) Act 1933 (U.K.). That section provided that inter alia German judgments "...shall be recognized in any Court in the United Kingdom as conclusive between the parties thereto in all proceedings founded on the same cause of action...". Was a decision on the grounds of limitation conclusive as to the whole action or only on the procedural issue of limitation? A majority of the Lords found that this section did not bar the plaintiff's right of action in England.[10] Lord Reid commented that:

> "If further justification for my view be needed, it would, I think, be unjust if a foreign judgment on a preliminary point were in itself sufficient prevent inquiry into the merits here."

That at least was a decision on which the law was unclear however in the Canadian case of *Schwebel* v. *Ungar*[11] the Conflict of Laws rule was clear. The issue facing the Supreme Court of Canada was whether the marriage between the parties was null and void on the ground that

the responden t had not effectively divorced her previous husband. The Conflict of Law rule determined the validity of divorce on the basis of whether or not it was recognized by the law of the country where the husband was domiciled at the time when it was obtained. The respondent and her former husband Joseph Waktor had been married in Hungary. Three years later they received a rabbinical divorce in a transit camp in Italy shortly before leaving for Israel. That divorce was not recognized by Hungary still the country of Waktor's domicile but it was recognized in Israel. The Court decided that: "for the limited purpose of resolving the difficulty created by the peculiar facts of this case" [12] the rigid rule should not be applied so as to invalidate the second marriage under Canadian law.

Seeking to put this move away from purely procedural "jurisdiction selecting" choice of law rules onto a more creative footing, the New York Court of Appeals again decided for the plaintiff in *Babcock v Jackson*. [13] The plaintiff had suffered injuries while travelling as a passenger in a car driven by the defendant in Ontario. Both parties were residents of New York, the car was licensed and insured in New York. However the choice of law rule provided that the lex loci delicti governed the availability of relief. The problem was a local Ontario statutre precluded relief in this very situation. The court decided in favour of a much more flexible approach examining which State a grouping of the contacts seem to favour and a comparison of the relative interests of the two States. In the result this led them to apply New York law and thus to allow the plaintiff the right to recovery. This case is illustrative of a much wider movement termed "the American revolution" [14] in the choice of law process. For present purposes this flexible technique advocated principally by Currie and Cavers [15] and reflected to some extent in the second American Restatement [16] serves

as a reminder that any reform in the Conflict of Laws must be based upon a perception of the true interests and principles involved.

3. *The Interests Involved*.

The first class of interests must be those of the individual litigant. Indeed Dicey suggested that these interests provided the initial motivation for the formation of Conflict of Laws in England:[17]

> The application of the foreign law is not a matter of caprice or option it does not arise from the desire of the sovereign of England or of any other sovereign to show courtesy to other States. It flows from the impossibility of otherwise determining whole classes of cases without gross inconvenience and injustice to litigants, whether natives or foreigners.

Tied in with this must be some wider perception on the part of the courts as to what justice acquires. But of course the Courts are already dealing with a system of substantive law which gives expression to a particular conception of justice. This expression may be found both in the Common Law and in the statute book. It was this question of the extent of a State's commitment to a particular policy or principle that in part concerned the Court in *Babcock v. Jackson*. The New York Court of Appeals in that case reviewed the policies of two States and concluded that while New York had a clear policy of requiring a driver to compensate his guest for injuries caused by his negligence, the policy expressed in the Ontario Statute could not conceivably have been intended to extend to the commission of a tort which had such a clear connection with New York. The weighing of State interests is, of course, just another way of dealing with the issue of sovereignty which both as a matter of principle and of practice causes

major problems in the resolution of trans-national disputes. The resolution of such disputes does not fit easily within a conceptual framework that sees law as the product of municipal legal systems. If the creation,application and enforcement of law are nothing more than functions of individual States then any attempt to look beyond the boundaries of the State must be pointless. But it seems to me that the Conflict of Laws gives expression to some larger conception of justice and it is to the explanation of that that I now turn.

4. *The Search for Principles*.

At the outset it may be convenient to remember traditional Common Law reluctance to view any area of law in philosophical terms.As Graveson said:[18]

> In attempting to examine this delicate question, one may be justified at the outset in submitting that in the Common Law world philosophy may well exist, even though no judge or lawyer would be prepared openly to admit the fact, for to do so might transgress the time honoured limits of legal respectability.

But it seems to me nevertheless that the Conflict of Laws worldwide is a response to some generally shared affront to a sense of justice. The theory proposed by John Rawls provides here a convenient structure for thinking.[19] Rawls' own conception of justice gives a priority to the idea of liberty. The Conflict of Laws seeks to respect this in a number of ways.In choosing the law which is to apply to a contract the courts use the connecting factor of the proper law. To ascertain this they look in the first place to the intention of the parties:[20]

> The legal principles which are to guide an English Court on the question of the proper law of the contract are now well settled. It is the law which the parties intended to apply. Their intention will be ascertained by the intention expressed in the contract, if any, which will be conclusive.

In the field of personal and family law the increasing concern world wide is to connect the individual with the system of law which is most likely to reflect his or her intentions. Now a closely related concept is that of the rule of law:[21]

> We can see this by considering the notion of a legal system and its intimate connection with the precepts definitive of justice as regularity. A legal system is a coercive order of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social cooperation. When these rules are just they establish a basis for legitimate expectations. They constitute grounds upon which persons can rely on one another and rightly object when their expectations are not fulfilled.

Thus if a legal system is concerned to respect legitimate expectations of rational persons it must be prepared when the occasion demands to look beyond its boundaries to the system of law by which such persons might reasonably expect to be governed and to the consequences which they might reasonably expect to flow from their actions.Bound up with this idea of the rule of law goes the idea of respect for the law. Especially in the area of the recognition and enforcement of judgments, some sort of internationalist approach is essential to ensure the efficacy and thus the maintenance and respect for domestic legal systems. This is what Graveson called the positive policy:[22]

> ...English Courts in building up the Conflict of Laws have always shown a desire to uphold transactions rather than to annul them, and to support institutions, even though unknown to English municipal law, rather than to reject them simply because they were outside the scope of the internal law.

The final strand which connects the idea of justice to the application of the law in the conflicts context is that of equality of treatment. As Rabel noted:[23]

> Since Savigny, it has been customary to regard the attainment of uniform solutions as the chief purpose of private international law. Cases should be decided under the same substantive rules, irrespective of the Court where they are pleaded.

This naturally requires that in the choice of law process the two legal systems in question should be viewed on the basis of uniform choice of law rules. Again there is a link to be made here with the reasonable expectation of the parties. As evidence of judicial recognition of the importance of this principle we may instance Lord Hatherly in *Udny* v. *Udny*:[24]

> I have stated my opinion more at length than I should have done were it not of great importance that some fixed common principles should guide the Courts in every country on international questions.

Now it will be seen that all of these principles suggest that there must be in the Conflict of Laws a tendency towards an internationalist outlook but such an outlook has been but imperfectly achieved. I turn now to look at some of the reasons why this is so.

5. *Inherent Weaknesses in the Present System.*

The first class of weaknesses arises from conflicts between different domestic systems of Conflict of Laws. By this I mean nothing more profound than that different legal systems have had different responses to answering the three basic questions I posed in paragraph 1 above.[25] Thus on the jurisdictional question the Common Law response has been based principally upon the actual presence of the defendant whereas the civil law response has been to look at which is the most convenient forum for hearing the dispute.[26] Again there has been considerable conflict between the connecting factors which form the primary element in a choice of law rule. Thus again the Common Law accent has been upon the concept of domicile whereas the Civil Law commitment has been to that of nationality. These conflicts can give rise to a whole range of intractable problems. It is to some extent possible to accept Inglis' scepticism about the two classic betes noires: classification and renvoi.[27]

> One of the most striking features of classification, for example is that while nearly every writer who has dealt with it has regarded it as basic in the Conflict of Laws, the problem has only once been mentioned (but not explored) in the Law Reports. This may lead the cynic to suspect that the problem of classification may indeed exist only in the text writers' minds, and he may very well be right. Even in the field of renvoi, now to be discussed, where there is at least a line of judicial authority, the text writers do not seem to have been able to resist the temptation to read into the cases their view of what the law ought to be.

Nevertheless, the fact that the problem of classification and renvoi can arise illustrates the weakness of a system where the conflicts rules themselves are able to conflict. To elucidate the basic nature of these problems I refer back to the case of *Black-Clawson.*[28] It will be recalled that the question before the House of Lords was as to the

effect of the order made by the German Court. That Order was made on the basis that the action which the English plaintiff company wished to bring in the German Court was time barred under the German limitation period. How had the German Court reached that decision? It began by classifying limitation according to German law and the matter of substance. This meant that it had to decide which law was to govern that matter of substance. Having found that the bills of exchange which were the subject matter of the action had been drawn negotiated and were payable in England and that the plaintiff was an English company the German Court found that the proper law of the bills was English and therefore looked to English law. But English law regards limitation as a matter of procedure. So the German Court had to decide whether it would accept the English substantive law on limitation alone as determinative of the issue, or whether it would have regard also to the fact that as a matter of Conflicts Law, English Law regarded limitation as a question of procedure. This second option would have redirected the German Court to apply its own law. This is what it did and the shorter German limitation period operated to bar the plaintiff's action. In reaching this decision the Court had to deal with both the problem of classification and the problem of renvoi namely, that the conflict's rules of the foreign law redirected the ball into its own court. Inglis' attitude is that neither of these issues in fact cause a practical problem to English Courts. As regards classification this is because the determination of the issue in the case must always remain a function of the domestic court. So that if foreign law is to be applied to solve such an issue it must solve the issue as framed by the English Court. Further he claims that the renvoi problem is solved by a foreign court approach:[29]

> ...that when an issue is raised in an English court which, according to English Conflict of Laws' rules, is to be decided according to foreign law, that issue will invariably be decided as the courts of that foreign country would decide it were that issue before them.

But my point is that the mere fact that courts in different States can and do take different attitudes to these questions suggests that we are far from the certainty and equality of treatment propounded above.

A second class of weakness might be described as an inherent preference for the lex fori. In part this can be attributed to a judge's natural belief in the superiority of the system which he is administering. As Lord Salmon said in *MacShannon v Rockware Glass Ltd:* [30]

> The administration of justice in the United Kingdom is one of the few things which has not been devalued. There are undoubtedly many foreign courts which administer justice as satisfactorily as our own; but many which do not. The view that it is often a great advantage to have access to the Queen's Courts can hardly be attributed to insular pride.

Coupled with this is the natural difficulty which a judge must encounter in dealing with unfamiliar rules and concepts. The practice of the Common Law courts reflects this in requiring proof of foreign law as a fact in the case. [31] But it seems to me that the preference for the lex fori goes deeper than this. It goes back to the commitment which those who administer a legal system must have to be specific principles and policies which under-pin that system. This is the point I was making in paragraph 3 above [32] and it is supported by David in his *International Unification of Private Law* [33] when he agrees that one of the

major obstacles to unification may be an irreducible conflict between conceptions of justice, between how a society is desired to be ordered. This preference for the lex fori offends potentially against the principles of equality of treatment between legal systems and of the promotion of the reasonable expectation of the parties.

The irregularity of treatment between courts and the patchy recognition which is given to foreign orders promotes a third class of weakness namely, the possibilities for forum shopping and forum evasion. By this,I mean, the chances that plaintiffs have of achieving a favourable result simply by choice of the jurisdiction in which they sue and the chances of which defendants have to avoid the judicial process by leaving the jurisdiction for another which does not recognize or enforce the order against them. A specific illustration of the problem of forum shopping is provided in the area of parental kidnapping of children. At Common Law a foreign judgment may not be relied upon for enforcement in a subsequent jurisdiction unless it is final and conclusive.[34] If this is coupled with the provision now commonly found in many jurisdictions that in the determination of custody disputes the interests of the child are the paramount consideration,[35] it will be seen that it is quite possible for the subsequent court to ignore the foreign order and proceed to a determination of the issues itself.[36] As Martin puts it:

> Thus, a parent who is the victim of an unfavourable custody determination in jurisdiction A has little to lose, and much to gain, by kidnapping the children of the marriage, and then reapplying for custody in the courts of jurisdiction B.

The fourth and final weakness in the present system derives from the obscurity and confusion of the present law. Prosser's allegation that "the realm of the Conflict of Laws is a dismal swamp, filled with quaking quagmires"[37] maybe supported by numerous examples from the case law. The English experience has been not merely to discover such uncertainty in the laws of other countries, as Wynn-Parry J did in *Re Duke of Wellington:*[38]

> ...but it would be difficult to imagine a harder task than that which faces me, namely, of expounding for the first time either in this country or in Spain the relevant law of Spain as it would be expounded by the Supreme Court of Spain, which up to the present time has made no pronouncement on the subject, and having to base that exposition on evidence which satisifies me that on this subject there exists a profound cleavage of legal opinion in Spain, and two conflicting decisions of courts of inferior jurisdiction.

The English experience has also been, if I may be forgiven for saying so, to compound that confusion, witness the decision of the House of Lords in *Chaplin v. Boys*[39] which failed to dispel the shadow of doubt which has hung over the English Conflict of Laws' attitude to tortious liability. Part of this uncertainty must result from the comparative youth of the subject of the Conflict of Laws. While it is possible to trace the subject back to the Roman Empire, the modern development really stems only from the nineteenth century. Nowhere is this more apparent than in England, where as North comments:[40]

> The end of the formative period is not yet in sight. There are, in fact, many transactions and events common to daily life that are quite untouched by any but comparatively ancient decisions, and there are many upon which the decisions are so hesitating and vacillating that it is still impossible to extract with assurance the governing principle.

This may not seem surprising in England where the norm is slow judicial development but one might expect a different situation in civil law countries where the norm is codification. Yet as Rabel notes the Conflict of Laws has remained remarkably uncodified worldwide.[41]

> The remaining efforts, rudimentary if not poor, contrast strikingly with the usual fondness of civil law countries for statutes and codes and even with the recent increase of legislation in Anglo American jurisdictions.
>
> [42]

The French Code Napoleon dealt with conflicts in a single article. On this meagre basis the courts built an extensive body of judge made rules. Only now is France considering a draft code. A similar situation has prevailed in Germany based on an incomplete set of provisions in the introductory law of the German civil code.[43] This situation has not aided the task of the courts but it is important to us in another respect also. For if the Conflict of Laws is inherently unamenable to codification, then all arguments for international unification are inherently pointless.

6. *Why did Conflicts go uncodified?*

The answer to this question seems to lie not in the nature of this branch of the law but rather in the history of its development and in the problem of state sovereignty. On this point the fate of the conflicts provisions in the German civil code is instructive.[44]

> During the preparatory stages of the German Civil Code of 1900 it was envisaged that one of its component books would be devoted to choice of law rules. Accordingly, a comprehensive draft of multilateral conflicts rules was prepared. However, this project encountered the resistence of the German Foreign Office, which initially rejected the very idea of statutory conflicts rules, as well as of several State governments which insisted on major structural changes. The opponents of the proposed legislation contended that it would be impolitic, if not in violation of international law, to

> enact multilateral rules that determine the territorial reach of foreign as well as of German law. They also argued that national conflicts legislation might jeopardize future international accords. Some of their reasoning sounds fairly "modern" in particular the idea that the legislature should not sacrifice German interests and international negotiating positions without the assurance of reciprocity by other nations. Those who defended the project (which included the Ministry of Justice) argued that only multilateral rules could ensure uniformity, certainty and predictability. The outcome of this spirited debate was a compromise that favoured the opponents of the draft; a limited set of largely unilateral rules was adopted.

By contrast where the political will dictated an international outlook over the value of national sovereignty, codification was not only possible but also simple and effective. For example, the very draft which was rejected in Germany was adopted and promulgated in Japan as the Horei.[45] The Horei reflects the Japanese Government's desire to facilitate foreign transactions. Though it consists of a mere thirty articles, it covers most of the conflicts compass. Similarly in more recent times many East European countries have adopted comprehensive conflict codes.[46] But while there would seem to be no substance to the argument that conflicts cannot be codified, attack on the goal of international unification of Conflict Law has come from another quarter too.

7. *Unification of conflict rules or unification of substantive rules?*

Professor David argues forceably that the unification of conflicts rules is an outdated goal:[47]

> International lawyers in the last century resorted almost exlusively to the theory of Conflict of Law when deciding what rules were to govern international legal relations. In the eyes of these lawyers there existed, and could exist, only national legal systems. Thus, when faced with an international legal relationship, the only course possible was to say by which national system it should be governed.

> Each State had developed its own system of Conflict of Laws, and it seemed desirable that these systems should be coordinated so that each legal relationship could be subject to a definite national system of law, whichever court were to consider it. These days there are also other ways of looking at it.

The major point of his recommendations is that the unification of substantive law is an inherently more satisfactory and more just goal than the unification of conflict rules. The case for a Jus Commune seems at its strongest, as David recognizes, in the area of international commercial transactions. Indeed much unification work has already been done in this area. But David acknowledges that different considerations may apply in the field of personal and family law. Here the potential conflict between different conceptions of justice is much greater. Here too the likelihood that the parties expect that their relations will be governed by a particular legal system is much greater. Moreover the interests of the State in achieving a legal order which best reflects the nature of its society suggests that a system of unification which at the same time allows for diversity is the preferable alternative in this area. Such an alternative is provided by the conflicts method. As Rabel points out:[48]

> The function of private international rules is to choose the applicable law with all its evaluations whatever they may be....The crucial point to be reformed is the blind subjection of conflicts rules to the private law of each country.

A further continuing necessity is for rules of international civil procedure which govern the service of process abroad and other related matters of judicial assistance as well as the recognition of foreign judgments and orders. Here the need for the development of uniform procedures continues unabated. These points relate back to the specific focus chosen for this paper.

8. *The International Codification Process.*

The final theoretical factor which might be said to support the internationalization of the reform of the Conflict of Laws stems from the nature of the international codification process. John Rawls' theory of justice, referred to above,[49] was concerned not only with the elaboration of specific principles which might be said to describe justice, but also with the initial construction of a theoretical position within which such principles might be developed. The name which he gave to this theoretical construct was the original position. By the use of this structure, developed from social contract theory, Rawls was concerned to present the development of just principles as the product of an initially just agreement situation. The key points about the original position were that the parties were not to be concerned with personal and particular considerations which might bias or effect their choice of just principles. Furthermore, the participants were to adopt an attitude of limited altruism that is that each person was to work for the highest personal benefit which could be obtained without impinging upon the benefits of others. Rawls developed this theory in order to describe how society might be justly ordered as a whole. Therefore one must be cautious in seeking to use the theory in the development of actual procedures and actual laws. So, for instance, Professor Cavers use of Rawls' original position to justify his own development of principles of preference in the choice of law process[50] seems unjustifiable simply because the courts in deciding a conflict case, are of course dealing with a much more specific question than the just ordering of society as a whole. But this is not to say that Rawls' method cannot tell us something useful about the most just reform process for the Conflict of Laws. In the first place his original position lays stress upon an agreement between participants in the society. Translating that

into the Conflict of Laws sphere, the relevant participants at this stage of the development of principles will surely be the States. They are the "persons" on whom the responsibility for cooperation falls, and who must work together to establish a just system. Furthermore, Rawls posits a four stage sequence for the application of the basic principles of justice derived in the original position. From the original position, the parties proceed to a constitutional convention which is concerned with the development of just procedures. Then at a legislative stage just rules are enacted, which are applied to particular cases in the final stage by judges and administators. It is important then if we wish to develop a just system of ~~the~~ Conflict of Laws, to ensure that we have the appropriate mechanism in place to develop such a reform. Clearly, if the appropriate society is to be described as made up of States representing their individual citizens, then such an international community as a whole must be involved both in the development of just procedures for the reform of the law and in the reform of the law itself. This argument is directed quite simply towards the proposition that if we are interested in the just reform of the Conflict of Laws, we must be interested in doing that by means of an international codification process.

PART III - THE NEW ZEALAND SITUATION

CHAPTER 1 - THE STATE OF CONFLICTS OF LAW IN NEW ZEALAND

1. Purpose of this Part.

Having established the general reasons for international unification, I turn now to see how some of these themes are played out in the New Zealand situation. The first chapter concerns itself with the approach to conflicts issues in general, and the second chapter looks in more detail at recent legislative responses in the area of family law to conflicts problems. Throughout this part my concern is to establish the case for internationalization for New Zealand and to examine the steps that we have already taken towards such a perspective. The starting point for such an inquiry must be with the existing sources of the law in this area.

2. Sources

The primary source of rules here, as in other branches of private law, remains the Common Law. The general picture of the Common Law is of slow development through a multitude of judicial decisions. However conflicts diverges from this pattern in two important respects. It is essentially a creature of the nineteenth and twentieth centuries. Its course has been effected quite profoundly and unexpectedly by doctrinal writing:[51]

> The general picture, however, must be qualified so far as concerns private international law, for it will have appeared that problems of the Conflict of Laws hardly arose in their true international form before the ordinary courts. Those courts accordingly

> had little opportunity for creating or expounding rules of law on this matter. The industrial revolution and the great commercial developments of the nineteenth century created new problems in private international law. For the solution of these problems the courts tended for want of better authority, to fall back on doctrinal writers.

Perhaps the most influential of these has been Albert Venn Dicey, whose text first appeared in 1896. [52]

> His presentation of the subject in the form of a quasi code of principles, exceptions and illustrations was attractive to courts and practitioners alike and did much to establish doctrinal writing as a source of rules in the Common Law.

This text, now in its tenth edition, under the general editorship of J.H.C. Morris, and in two volumes, still enjoys its position as pre-eminent authoritative source. But it is unashamedly an English text "this is a book on the English Conflict of Laws, not a book on the Conflict of Laws on the United Kingdom, still less on that of the Commonwealth." [53] In New Zealand, where judicial decisions on conflicts issues are rare, the extent to which English authority represents the true New Zealand position must remain a matter of conjecture.

Matters of international judicial assistance, such as the service of process and the taking of evidence abroad, have been dealt with expressly in New Zealand. The Code of Civil Procedure, enacted as the Second Schedule to the Judicature Act 1908, although drawing heavily upon its English counterpart, does provide comprehensive coverage on these procedural matters. [54] The general pattern evidenced in all of these rules is to keep the service of process and taking of evidence abroad, as well as the converse service of process and taking of evidence within New Zealand for a foreign court, at the discretion of the New Zealand court. Furthermore, the rules preserve three parallel procedures: one for Commonwealth countries,

one for countries with whom we have concluded bilateral conventions, and one for a residual class of foreign countries. All of the known conventions were concluded between the two world wars and at least in the case of some their continued existence is a matter of doubt.[55] They were concluded on the initiative of the United Kingdom, and the modes of service which each permits may be discovered only by reference to the original promulgation noted in the Gazette. Such adoption of bilateral conventions represented an early rejection of the work of the Hague Conference and illustrates a continuing theme of reciprocity which has marked New Zealand's efforts at international co-operation. Reciprocity is undesirable to the extent that it allows inequalities in the treatment of litigants whose causes of actions are otherwise equally valid. The Code is currently under revision. However the new draft provides

no evidence of an overhaul of this system. The current revision of the rules suggests that now is the time for reform.[56]

Statutes provide the third source of conflicts law in New Zealand. The part played by statute in our private law generally continues to grow, and with it the problems for the conflicts perspective. Some major legislative reforms leave the trans-national perspective quite unaddressed,[57] while others create a new series of conflicts issues.[58] But thorough-going reform of Conflict of Laws has been rare. The most noteable reforms are mentioned below.

3. *The Commonwealth/Common Law Perspective*.

The Englishness of much of this branch of the law will already be apparent. That is a natural corollary of New Zealand's Common Law heritage. Though it might present its own brand of difficulty, this common heritage does represent its own brand of unconscious international unification. The existence of common conflict rules, and indeed common rules for private law generally amongst those States with which New Zealand has had the most frequent cause to have contact and commerce has itself minimized potential Conflict of Laws problems. Within such a uniform family there is little chance that a true choice of law problem would present itself to the courts. The service of process and enforcement of judgments created no problems of sovereignty, because the member States of the Commonwealth owe allegiance to the same sovereign. Moreover service of process is seen as a personal responsibility of a plaintiff[59] so that other judicial processes do not become involved.

The maintenance of this heritage has been supported by the work of the Judicial Committee of the Privy Council.[60] Its work in promoting the uniform development of the Common Law throughout the Commonwealth has particular significance in the present connection. Disputes which contain conflicts issues fall to be considered in the last resort by a truly international and impartial body. An illustration of this at work in the New Zealand context is afforded by the case of *Mount Albert Borough Council* v. *Australasian Temperance and General Mutual Life Assurance Society Limited*.[61] In that case, the Mount Albert Borough had borrowed money for public works from the respondents who were incorporated in the Australian State of Victoria. As security for the loan they issued in New Zealand debentures repayable in Victoria and bearing interest payable half yearly in that State. The debentures were issued and controlled by New Zealand legislation. The issue facing the Privy Council was whether the Victorian Financial Emergency Act 1931 which provided for the compulsory reduction of interest payments on mortgages including any debenture issued by any public or local authority could affect the interest payable by the Mount Albert Borough. Lord Wright, in delivering the opinion of the board, held that the proper law of the contract was New Zealand law and that therefore obligations arising under the contract could not be affected by the Victorian statute. He found further reinforcement for this view in the (strictly unnecessary) construction of the ambit of the Victorian statute. This case affords an early instance of the problem which statutes can cause in the Conflict of Laws. But for present purposes it shows the resolution of a difficult choice of law problem by a truly disinterested tribunal.

The commonwealth perspective has been reflected tco in the development of uniform schemes for the enforcement of judgments.

> The two major schemes evolved during the British Empire were both designed to permit direct execution by a process of registration of the original judgment, without the need to bring fresh legal proceedings on the foreign judgment. The scheme for which the Administration of Justice Act 1920 (U.K.) was the model was devised entirely for Commonwealth use. This limitation was itself a major reason for the development of alternative, and potentially substitute, arrangements for which the Foreign Judgments (Reciprocal Enforcement) Act 1933 was the model. This Act was principally designed to be used in respect of non-Commonwealth law areas although it was also capable of extension to law areas within the Commonwealth. Both models have, in fact, been the subject to modification, some substantial, in individual law areas of the Commonwealth.

New Zealand adopted substantially the 1933 scheme. The procedural benefits of the Act are only to be accorded to other countries upon specific recognition by order in council[63]

> If the Governor-General is satisfied that, in the event of the benefits conferred by this part of this Act being extended to judgments given in the superior courts of any part of His Majesty's Dominion outside the United Kingdom, or given in the superior courts of any foreign country, substantial reciprocity of treatment will be assured as respects the enforcement within that part of His Majesty's Dominions or in that foreign country, as the case may be of judgments given in the superior courts of New Zealand....

A more recent strand in Commonwealth cooperation has been the regular meetings of the Commonwealth Law Ministers, the most recent of which was held in Colombo Sri Lanka in February of this year. The proposals for reform discussed at these conferences will be the subject of discussion in Part V of this paper.

Closer to home, the possibility of closer trans tasman legal links has been enhanced by New Zealand's participation in the meetings of the (Australian) Standing Committee of Commonwealth and State Attorneys-General.[64] This committee began in Australia in the meetings of Ministers from 1959-1961.

convened for the purpose of formulating uniform companies laws for the States and Territories of the Commonwealth of Australia. The success of this venture saw the Standing Committee put on an established footing in 1961. The committee meets informally and depends entirely upon its ministers reaching a voluntary consensus. Since 1968 New Zealand has been regularly represented at the committee and indeed some of its meetings have been held in Wellington. While doubts have been cast within the Australian administration as to the committee's efficacy as an agent of uniform law reform,[65] the committee has played a key role in the development of an Australasian law of domicile and in trans-tasman procedures to deal with international parental kidnapping.

4. *The Judicial Approach*

Against this background of a common heritage, is it possible to make any specific points about local judicial attitudes to deciding cases which contain foreign elements? Care must be exercised here because of the paucity of reported case law on the subject. Nevertheless a marked emphasis on jurisdiction and on the related problems of procedure as against the choice of law question is immediately apparent. Graveson has described this as "the outstanding characteristic of the English system".[66] Yet it seems peculiarly important in the New Zealand context. The case of *Richards* v. *McLean*,[67] which provides the only noteable modern New Zealand authority on the question of the choice of law in tort, arose simply in the context of an application under Rule 48 (h) of the Code of Civil Procedure for leave to serve a writ abroad. The plaintiffs were senior officers of the Halt All Racist Tours Organization. They were bringing an action in defamation against McLean, an Auckland Sports Journalist, who had written an article about them for publication in

two South African newspapers. They sought to join those two newspapers as defendants. Although the only question which Mahon J. had to consider was whether to grant leave for service abroad under paragraph (h) which read: " Where any person out of New Zealand is a necessary or proper party to an action property brought against some other person duly served or to be served within New Zealand", the answer to this question seemed to depend upon which was the most appropriate jurisdiction to hear the case and upon which law might most likely apply. Although Mahon J. considered that, on his construction of the case of *Chaplin* v. *Boys*, New Zealand law would govern the action between the plaintiffs and the Auckland journalist, he found that it was at least arguable that South African law would have to apply to any action against the South African newspapers. "...but the very existence of such an argument could possibly weigh against the proposition that the proposed foreign defendants would be "proper" parties to the proceedings...".[68] This point was not as decisive to Mahon J. as the question of the most appropriate forum.[69]

> ...I cannot think it right that the proprietors and publishers of the foreign newspapers which republished the despatch should be brought before a New Zealand court when the real point at issue is the extent to which the reputation of each of the plaintiffs has been harmed in South Africa.... If the plaintiff's wish to proceed against the South African newspapers they will have to take proceedings in that country.

These two factors, coupled with the caution with which the judge approached the exercise of his discretion, caused the plaintiff's application to be dismissed. The effect of the decision was to exclude parties which at least on the face of it would have seemed necessary or proper parties to the action on the basis that the New Zealand court would have been unfitted to determine the issues thus raised.

This judicial reluctance to entertain actions against foreign defendants when the acts complained of were committed overseas is complemented by the willingness when the act is done within New Zealand. Three modern cases *Adastra Aviation Limited* v. *Air Parts New Zealand Limited*,[70] *Pratt* v. *Rural Aviation (1963) Limited*,[71] and *My* v. *Toyota Motor Co. Ltd*.[72] show that leave will be readily granted to serve out of New Zealand the manufacturer of an illegedly defective machine made overseas but delivered in New Zealand. This is because Rule 48 (a) authorises the court to give leave "where any act for which damages are claimed was done in New Zealand". As Hardie Boys J. said in *Adastra:*[73]

> Delivery in New Zealand of a defective machine, resulting in damage to a plaintiff in New Zealand, may well qualify as an "act done in New Zealand" as, indeed, may the suffering of damage in itself, on the footing that it is that suffering of damage which is the foundation of tortious liability.

It is of interest that the court in *My* v. *Toyota Motor Co. Ltd* purported to apply the considerations in Rule 49 as to the existence in the place of residence in the defendant of a court having jurisdiction in the matter in question, and to the comparative cost and convenience of proceeding in New Zealand or in the place of such defendant's residence, to its deliberations under Rule 48 (a), though Rule 49 is expressly limited in its operation to paragraphs (b) and (c). The courts do then take a more restrictive approach to hearing foreign cases than the rules of the code might suggest. In this connection it is of interest that under the draft revised code substantially the same list of categories which are now subject to the court's discretion under Rule 48 appear without the necessity for the leave of the court.[74] This would reverse the effect of *Richards* v. *McLean*, leaving the defendants simply with a right to enter an appearance under protest to the jurisdiction of the court or with a judicial check on the issue of a

default judgment. Service of process in the Common Law tradition is not a mere procedural necessity, it is the primary foundation of jurisdiction. It is elemental that the conduct of a conflicts case depends upon the initial willingness to assume jurisdiction. These cases then, so far as they go, represent not only a use of the jurisdiction mechanism to restrict the hearing of cases in New Zealand where the applicable law might be foreign but also a judicial willingness to maintain a discretionary control over matters which otherwise might be purely procedural. This attitude may also be seen in the operation of the provisions of the Reciprocal Enforcement of Judgments Act 1934. While the undoubted purpose of that Act was to promote a mechanism for the enforcement of foreign judgments automatic upon registration, it left the courts with power to set aside such judgments on application by the judgment debtor in a class of cases described in sections 6 & 7. The extent of the ground in s. 6 (1) (d) "that the judgment was obtained by fraud" was considered by the New Zealand Court of Appeal in *Svirskis v. Gibson*.[75] The court there held that it could order the trial in the High Court at Auckland of the issue as to whether the judgment of a Queensland Court had been obtained by fraud without the necessity of establishing a prima facie case of fraud and without the necessity of adducing any new evidence of fraud which may not have been before the original court. This had the nett effect of calling into question the assessment by a Commonwealth court of the weight of the evidence before it.

A similar interventionist attitude has marked the courts' handling of international parental kidnapping.[76] In *D v. D*, a case heard in the District Court under the Guardianship Amendment Act 1980, a wife had brought her children from Queensland to New Zealand without notification to her husband which had been provided for in the consent custody order in her favour. In an action in the Family Court of Australia at Brisbane,

which the wife had contested, Elliott J. made an order granting custody of the children to the husband. This order was registered in Auckland under Section 22A of the Guardianship Act. The wife then sought variation of the order under Section 22C. On a consideration of all the facts Blackwood D.J. found that he could exercise jurisdiction and that he should make an order granting custody to the wife on the ground "that the welfare of the child is likely to be adversely effected if the order is not made". As Denham Martin comments:[77]

> Each case turns on its facts of course, but it is hard to see how if jurisdiction was exercised on these facts, it would not be exercised in the majority of cases. It must not be forgotten that the exercise of jurisdiction under the amendment clearly should be the exception rather than the rule.

So here again, where Parliament's intention was to remove the judicial step from the recognition and enforcement of foreign judgments in all but exceptional cases, the reaction of the courts has been in favour of maintaining control.

The effect of this supervisory role has the natural corollary of the application of New Zealand law. Reverting for a moment to the question of the reluctance of New Zealand courts to apply a foreign law, perhaps part of the answer might be found in evidential difficulties. The response of the Common Law to foreign law has been to require proof of it as a fact in the case. This means that expert evidence must be given as to the contents of the foreign law. The general principle has been that no person is a competent witness unless he is a practising lawyer in the particular system in question, or unless he has acquired a practical working knowledge of the foreign law.[78] Strict application of this principle in a jurisdiction like New Zealand where such experts

are thin on the ground would make the application of foreign law all but impossible. In practice the New Zealand courts have relaxed the full rigours of this principle. In *R. v. Illich*[79] a Yugoslavian Roman Catholic priest who was required in the due performance of his duties to know Yugoslavian marriage law was judged an expert witness on the validity of a marriage celebrated in Yugoslavia. More recently in *Obrist v. Ruedi*[80] a lecturer in Comparative Law who was also a Swiss citizen was allowed to give evidence on Swiss law in a case challenging the enforcement of a Swiss judgment in New Zealand. Parliament has also acted to improve the position. Section 39 of the Evidence Act 1908 authorises the statutes of any country published by authority of its government to be admitted as prima facie evidence of such laws. Section 40 of the same Act reads:

> Printed books purporting to contain statutes, ordinances or other written laws in force in any country although not purporting to have been printed or published by authority, books purporting to contain reports of decisions of courts or judges in such country, and textbooks treating of the laws of such country, may be referred to by all courts and persons acting judicially for the purpose of ascertaining the laws in force in such country; but such courts or persons shall not be bound to accept or act upon the statements in any such books as evidence of any such laws.

In *Patel v. Patel*[81] Greig J. was able to admit both the Hindu Marriage Act 1955 and two indian law textbooks to help him to decide the validity of an Indian marriage. Despite these moves, evidential difficulties coupled with judicial unfamiliarity with other legal systems must inhibit the operation of the choice of law process in New Zealand.

5. *The Weaknesses of the Judicial Approach*

While this jurisdictional and procedural emphasis, to the exclusion of the choice of law process, no doubt represents a practical and down to earth approach to cases with foreign elements arising in New Zealand, the frequent exercise of judicial discretion can operate to deny to plaintiffs a remedy even where they may have a good cause of action, as in *Richards* v. *McLean*, or to call into question proceedings in foreign courts, as in *Svirskis* v. *Gibson*, or still worse to encourage forum shopping as in *D* v. *D*. As regards custody disputes of an international character not falling within the new special scheme in the Guardianship Amendment Act 1980, the decision of the Court of Appeal in *Re B*[82] emphasises the pre-eminence of a redetermination by the New Zealand court of the custody order which is in the best interest of the child over and above any order which may have been made in a foreign jurisdiction.

When the courts are in the rare occasion confronted with the application of a foreign law they are faced with unfamiliar and difficult issues of law. A recent example in the Family Law context is afforded by the decision of Somers J. in *Hassan* v. *Hassan*.[83] A man domiciled in Egypt at all material times, had married in the Egyptian Consulate at Athens, a single woman domiciled at all material times in New Zealand. So that the marriage would be recognized in Egypt it was celebrated in accordance with Islamic law, the personal law of the husband. Eventually the spouses came to New Zealand. Differences arose there and, in 1972, the husband, in a flat in Christchurch, divorced in his wife in the presence of witnesses by pronouncing Talak three times - thus obeying Islamic law. The parties then separated. The husband took steps to obtain a certificate from the Egyptian Consulate in Canberra that he and his wife had been divorced under Islamic law. There was expert evidence

to the effect that the divorce was valid at Egyptian law and that the Consul's certificate would be recognized and accepted as evidence of the divorce by the Egyptian courts. The husband sought a declaration under what is now Section 27 of the Family Proceedings Act 1980. Subsection 1 reads:

> An application for a declaration whether, according to the law of New Zealand -
>
> (a) a marriage is valid; or
>
> (b) a marriage has been validly dissolved
>
> maybe made by any person, whether or not that person, is a party to the marriage, or is domiciled or resident in New Zealand, and whether or not the marriage was solemnized in New Zealand.

The court held that:[84]

> The principle matter is that if as I have held the husband is according to the law of his domicile divorced I can see no advantage whatever in not recognizing that fact. To do otherwise would result in a limping marriage and that in a case where her marriage contract contemplated a dissolution by the means adopted. Accordingly, I am of the opinion that the husband is entitled to a declaration that the Talak divorce of 20th October 1971 was valid.

It is respectfully submitted that while the court reached the correct result it did so by the wrong route. Somers J. found that he did not need to determine the validity of the marriage in order to determine the validity of its dissolution. Yet the former question seems to be logically prior to the latter. "The wife" was clearly domiciled in New Zealand. Despite the decision in *Radwan v Radwan (No.2)*[85] it seems to be New Zealand law that:[86]

> Capacity to marry is governed by the law of each parties antenuptual domicile. Subject to certain exceptions, a marriage is valid as regards capacity if each of the parties has, under the law of his or her antenuptual domicile, capacity to marry the other, and, again subject to certain exceptions, it is invalid if it is invalid under the law of either parties antenuptual domicile on the ground of that party's incapacity.

Section 3 of the Marriage Act 1955 provides that its provisions so far as they relate to capacity to marry are to apply to the marriage of any person domiciled in New Zealand at the time of the marriage whether the marriage is solemnized in New Zealand or elsewhere. It is implicit from the terms of the Act, and explicit in the Common Law, that only monogamous marriages are permitted for New Zealand domiciliaries. It follows then that "the wife" can have had no capacity to enter into this potentially polygamous Islamic marriage. Therefore in contemplation of New Zealand law no valid marriage can have been created. In addition there could be no question of recognizing the validity of the divorce. As the judge recognizes, what is now section 44 of the Family Proceedings Act 1980 can have no application when the divorce has occurred within New Zealand. Further a valid dissolution within New Zealand may only be effected within the methods laid down by theAct. There is no possibility of choice of law in the dissolution context. Therefore a Talak divorced pronounced in a flat in Christchurch could not be recognized as a valid divorce by a New Zealand court.

PART III - CHAPTER 2 THE APPROACH TO REFORM: LEGISLATIVE RESPONSES IN FAMILY LAW.

1. *Scope of the enquiry*

Substantive family law in New Zealand is now dominated by a set of statutes. These are the product of a process of reform which culminated in 1980 with the set of legislative measures known as "the family law package".[87] The Marriage Act 1955 deals with the capacity to marry as well as the formal validity of marriage. The Family Proceedings Act 1980 governs proceedings relating to the status of marriage, as well separation and the dissolution of marriage. It also devotes itself to the provision of maintenance for spouses and children. In general it embodies a new approach to procedure instituted in the family courts. The problems of children are taken up in the Guardianship Act 1968, which relate to the custody access and guardianship of children. Related

to this, the Status of Children Act 1969 aims to remove the legal disabilities of children born out of wedlock with a range of principles and practical measures. Also devoted to the interest of children is the Adoption Act 1955. Finally the Matrimonial Property Act 1976 is concerned with the just division of matrimonial property between spouses when their marriage ends by separation or dissolution. These statutes represent a clear and explicit change in attitudes to dealing with family law disputes. But they do not deal so explicitly with the conflicts dimension. This is seen as a peripheral matter and the statutory provisions must in many cases be supplemented by the Common Law. However a major New Zealand reform in the Conflict of Laws, which effects most particularly the conflict dimension of family law, is the Domicile Act 1976. These seven statutes then, represent the scope of my inquiry into legislative reform. My aim is to investigate an awareness of the conflicts dimension, to assess the interests involved in dealing with that dimension, and to examine moves towards internationalization.

2. *Themes*

From a conflicts perspective, the notable point about substantive family law reform is that increasing divergence from a Common Law norm can only increase the potential for our system to conflict with that of other nations. While in many respects our legislation gives effect to worldwide trends, our answers and solutions are in many cases original and by no means the only possible choice available. The range of possible approaches to the division of matrimonial property is only one example of this,[88] The New Zealand Act clearly embodies a principle of deferred communit of property - namely that the rules about ownership by a community of both spouses do not apply until the marriage has broken down. This is in contrast to the traditional Common Law approach which was to vest all

matrimonial property in one spouse, the husband, and to the traditional civil law approach which was to regard all property required by either spouse during the marriage as belonging to the community of both spouses. Earlier legislative responses in New Zealand had also experimented with separate property systems and the division of matrimonial property on the basis of the exercise of judicial discretion.

A further theme which was explored in the previous chapter is the concentration on the aspects of jurisdiction and recognition and enforcement of foreign orders to the virtual exclusion of choice of law questions. This reflects a Common Law wide bias, which Cavers notes:

> In American law the principal questions here [i.e. in family law] go to other branches of the subject: jurisdiction of courts and the recognition and enforcement of the judgments and decrees of other courts. Only with respect to the question of the validity of marriage does choice of law loom large and, as a practical matter, the crucial issue in answering that question is often whether a prior divorce decree or annulment is invalid and open to attack.

This comment would seem equally applicable to the New Zealand experience. Yet the comment does not in itself provide a reason for discounting or downplaying the problems which family matters pose in the Conflict of Laws. Cavers, along with most of the participants in the "American Revolution" in the Conflict of Laws, has by-passed the issues raised by family law: "The answers our courts have worked out are far from satisfactory, but they appear to be the best that is compatible with that deep division in our mores which makes it seem preferable in this field to provide ways of evading the issues than to seek rational solutions for them." However, as I suggested above, the concentration on finding procedures which tend to the preservation of diversity for

domestic legal systems while at the same time promoting the principles which underly the Conflict of Laws, may in fact represent the most just solution to the conflicts problems raised in family law. Or at any rate so I shall argue.

In the field of recognition of foreign legal acts and foreign orders, there has been a trend towards widening the classes of order to which recognition will be afforded. But this has been coupled with the continuing use of the somewhat limited expedient of reciprocity. At any rate, there is considerable evidence of use of a wider range of international initiatives in the achievement of law reform. This has involved us particularly with Australia, but also with the wider Commonwealth and in isolated cases with individual foreign countries and the United Nations.

3. *Excursus on the analysis of statutes*.[91]

Before embarking upon a detailed consideration of the effect of these family law statutes on the Conflict of Laws, it is necessary to say something about the problems caused in the analysis of statutes from a conflicts perspective. There is no consensus either in the literature or in the case law upon the methods to be adopted here, partly because until recently the role played by statutes in Common Law systems has been minimized and nowhere has this been more evident than in the Conflict of Laws. The problems raised for the interpretation of statutes for conflicts purposes are multi-faceted. This is not only because the statute may purport to deal with a range of conflicts issues, but also because statutes may fall to be considered both by local courts and by foreign courts. It is important to realize at the outset that statutes

may perform a number of functions in the conflicts area which will fall to be determined only by local courts. In particular they may determine the jurisdiction of the local court or establish schemes and grounds for their recognition and enforcement of foreign order. They may also deal explicitly with procedural questions. The true problems arise when either a local or a foreign court must determine the personal or territorial application of the statute. Perhaps an obvious guideline here is that the inter-relationship between the general rules in the Conflict of Laws applied by a court and the specific statutory provision must be a matter of interpretation in every case. Applying this guideline is important in the New Zealand situation because our statutes do not attempt to lay down general or all sided choice of law rules, but they do frequently have regard to limitations on their own sphere of application. It is submitted then that there remains a residue of three classes of problem statute.

The first class of statutes are those which do not themselves influence the choice of law. They are statutes which take a basically unconscious attitude to the choice of law question and will thus apply only if they can be said, by the operation of ordinary choice of law rules, to be a part of the applicable law. Thus, in the Mount *Albert Borough Council*[92] case, the proper law of the contract between the New Zealand Borough Council and the Victorian Life Assurance Society was held to be New Zealand law. Once this question had been decided, it was logically impossible to apply the provisions of a Victorian statute. Therefore the Victorian Financial Emergency Act 1931 could not operate to reduce the rate of interest payable under debentures issued by the Borough Council. The discussion by Lord Wright of the extent of the operation of the Victorian statute was strictly speaking unnecessary.

Similarly, in *Babcock v Jackson* [93] once it had been decided by the New York Court of Appeal that a grouping of contacts linked the commission of this particular tort most closely with New York law, the ambit and policy of the Ontario statute was also strictly speaking unnecessary. Although it must be admitted that in that case the presumed ambit of the Ontario statute did influence the application of the choice of law rule.

A second class of statutes which poses rather more direct problems in the family law area is that of the effect of the mandatory provision. Some idea of the effect of such a provision might be gleaned from the decision of the House of Lords in *Black-Clawson*. [94] There, as we have seen, the house refused to give effect to a German decision denying relief to an English plaintiff on the grounds of limitation. That case could also be explained on the ground that section 2 of the Limitation Act 1939 created a rule of immediate application concerning the length of the limitation period, which could not be subordinated in English courts to any other considerations. The problems raised here are not, as in the previous class, particularly acute for a foreign court which has decided to apply New Zealand law. But the issue of interpretation posed fo rthe New Zealand court is: How far does such a mandatory substantive provision affect the operation of conflicts rules? From the legislation now in view I cite three examples:

> Matrimonial Property Act 1976 Section 49 *Legal Capacity of Married Woman*.
>
> (1) Except as provided in any enactment, the rights, privileges, powers, capacitites, duties, and liabilities of a married woman shall, for all the purposes of the law of New Zealand (whether substantive, procedural, or otherwise), be the same in all respects as those of a married man, whether she is acting in a person, official, representative, or fiduciary capacity.
>
> (2) This section shall apply to every married woman whether she was married before or after the commencement, of this Act, and whether the marriage was solemnized in New Zealand or not, and whether she is or was at any relevant time domiciled in New Zealand or not.

Status of Children Act, 1969, Section 3.
All Children of Equal Status.

(1) For all the purposes of the law of New Zealand the relationship between every person and his father and mother shall be determined irrespective of whether the father and mother are or have been married to each other, and all other relationships shall be determined accordingly.

(2) The rule of construction whereby an instrument words of relationship signify only legitimate relationship in the absence of a contrary expression of intention is abolished.

(3) For the purpose of construing any instrument, the use, with reference to a relationship, of the words legitimate or lawful shall not of itself prevent the relationship from determined in accordance of Subsection 1 of this section.

(4) This section shall apply in respect of every person, whether born before or after the commencement of this Act, and whether born in New Zealand or not, and whether or not his father or mother has ever been domiciled in New Zealand.

Guardianship Act 1969, Section 23,
Welfare of Child Paramount.

(1) In any proceedings where any matter relating to the custody or guardianship of or access to a child, or the administration of any property belonging to or held in trust for a child, or the application of the income thereof, is in question, the Court shall regard the welfare of the child as the first

> and paramount consideration. The Court shall have regard to the conduct of any parent to the extent only that such conduct is relevant to the welfare of the child.

Now all three of these provisions are expressed in very wide terms. They are obviously expressive of important policies of the New Zealand legislature. They give an explicit commitment to the improvement of the status of children and of married woman which has formed the motivation for much of the recent reform in this area. Indeed this concern has spilled over into the Conflict of Laws itself, through the reforms in the Domicile Act 1976. Both the provision in the Status of Children Act 1969 and that in the Matrimonial Property Act 1976 use the expression "for all the purposes of the law of New Zealand". Indeed the provision in the Matrimonial Property Act goes even further by saying "whether substantive, procedural, or otherwise". Further indications that these provisions were intended to have a wide application to persons are afforded by Section 3 (4) of the Status of Children Act 1969 and by Section 49 (2) of the Matrimonial Property Act 1976. Moreover the Guardianship Act 1968 refers to "any proceedings". Therefore it is submitted that these sections must apply not only to substantive rules of the Common Law but also to Common Law conflicts rules. However, should there be a case which required the application of foreign law, at least the matrimonial property and status of children provisions do not seem to go so far as to require courts to refuse to apply foreign law on the grounds that they offend against these provisions.[95] The problem does not seem to arise under the Guardianship Act 1968 because a combination of Section 23 and of the general scheme proposed by the Act, would seem to preclude the possibility of ever applying a foreign law.

The final, and most difficult interpretation problem is caused by the existence of provisions and statutes which give partial recognition to the conflicts dimension. Professor Mann suggested that the line be drawn here was between unilateral conflicts rules, which indicate the circumstances in which the law of the forum is to be applied, and self limiting statutes, which do not effect the choice of law but which do effect the content of the lexfori.[96] As Morris comments: "Although the distinction between them is plain enough in principle, it is not always easy to distinguish between unilateral conflicts rules and self limiting provisions; nor has any writer succeeded in formulating a satisfactory test for distinguishing between them".[97] Factors which may be useful in drawing the line are whether the provisions are expressed in terms of connecting factors commonly used in the Conflict of Laws, and whether on its true construction the provision describes the application of the lex fori as a whole or only of that particular statute.[98]

4. *The interests involved.*

Willis Reese, the reporter of the second American Restatement on the Conflict of Laws, gave as his credo for reform the following statement:[99]

> I believe that one ultimate goal, be it ever so distant, should be the development of hard and fast rules of choice of law. I believe that in many instances these rules should be directed, at least initially, at a particular issue. And I believe that in the development of these rules consideration should be given to the basic objectives of choice of law, to the relevant local law rules of the potentially interested states and, of course, to the contacts of the parties and of the occurrence with these States.

Peter North adopts this method as the basis for an examination of the family law rules of private international law. Many of the principles which underlie an internationalist outlook in the Conflict of Laws generally will continue to apply in family laws. This is seen in some of the factors which North cites as his policy basis of choice of law rules to determine the law applicable to matters of essential validity of marriage:[100]

> (a) *Presumption in favour of validity of marriage.*
>
> As Jaffey has said recently:
>
> > Choice of law rules as to the validity of marriage should, so far as possible, be such that a marriage, duly celebrated between the willing parties, will not be held invalid without good reason.
>
> ...
>
> (d) *Protection of the justified expectations of the parties.*
>
> This is a regularly cited factor to be taken into account in devising choice of law rules, but is nonetheless relevant for its obviousness. Indeed, it has been suggested that, because "parties enter a marriage with forethought", this is a far more important factor in the law of marriage, than, say , in tort law. This must surely be correct because people are entitled to assume when they get married that, in the eyes of the law at least, they are likely to stay married.
>
> (e) *Need for certainty and stability.*
>
> The inter-relation of this factor with the previous one, I hope, immediately apparent. The parties to a marriage have a real concern that not only will their legitimate expectations as to the validity of the marriage be realised, but also that such validity will not be an issue if they change their home, or even their nationality, nor will the validity depend, in the event of marital breakdown, on the forum where any issue is litigated.

But it will be equally apparent that the forum itself has a particular interest in the application of its family law rules. In this respect they represent a particular conception of justice.

What are the salient features of this conception

in New Zealand? In the first place there is the thorough going concern, alluded to above, to promote the equality of the sexes and the interests of children. Secondly, there is the belief that disputes arising within families should be dealt with under a different procedure than other private law disputes. This has given rise to the particular processes of conciliation and mediation embodied in Part II of the Family Proceedings Act 1980 and in the operation of the family courts. This is having the profound effect of removing from the arena of adjudication many of the legal issues which arise on the breakdown of a marriage. The single simple ground for dissolution of marriage, and the limited nature of continuing spousal maintenance are but two examples of a desire to achieve an humane legal solution which is consonant with the personal needs and desires of the spouses. Only the continuing needs of children take pre-eminence over this.

The Matrimonial Property Act 1976 is expressed to be a code. The Court of Appeal has repeatedly declared that it will not allow other conceptions of justice to undermine the status policy of the Act: "The primary purpose is to substitute for abstract and individual notions of justice a settled statutory concept which must be taken from the Act itself".[101] Woodhouse J. in *Reid v. Reid*[102] found a number of principles embodied in that Act which were to guide the courts in their application of it. Particularly important were the promotion of the equal status of women, the strong bias in favour of equality in division of matrimonial property and the promotion of certainty and equality in the decisions under the Act.

How, then, has the legislature struck a balance between these principles and policies and the wider principles of justice applicable in the conflicts arena? To what extent are diversity and the

reasonable expectation of the parties preserved? These considerations will be taken up in the following analysis of the jurisdiction and choice of law rules in the statutes considered.

5. *Jurisdiction: the viewpoint of the forum.*

Special rules relating to the personal jursidiction of the New Zealand courts are to be found in the Family Proceedings Act 1980 the Guardianship Act 1968 and the Adoption Act 1955. The principal provision in the Family Proceedings Act 1980 is Section 4:

> *Jurisdiction of courts* -
>
> Subject to Sections 27, 29, 32, 37, and 48 of this Act, the High Court, District Courts, and Family Courts shall have jurisdiction and proceedings under this Act, only -
>
> (a) where at the commencement of the proceedings, any party to the proceedings resides or is domiciled in New Zealand;
>
> (b) in the case of proceedings relating to a child, where at the commencement of the proceedings -
>
> (i) any party to the proceedings resides or is domiciled in New Zealand;
>
> or
>
> (ii) the child resides in New Zealand.

On closer examination this section applies only to separation and maintenance proceedings. Where the New Zealand Court is called upon then to make a Separation Order or to make an award of spousal maintenance it is enough for one spouse to reside or be domiciled in New Zealand. Some weight is added to this proposition by Section 157 which provides that in all proceedings under the Act save

the determination of paternity the court may, if it is proved to its satisfaction that the respondent is absent from New Zealand or cannot be found, "hear or determine the application in the same manner as if the respondent had been served with the appropriate notice of the proceedings". This means that the normal Common Law rule for the assumption of jurisdiction which requires at least service on the defendant of notice of the proceedings, is relaxed at the discretion of the court. Conversely the Act does at least require that the applicant be either domiciled or residing in New Zealand. This requirement applies to proceedings for child maintenance also, though in that situation the residence of the child in New Zealand is enough. This is in keeping with the legislative policy which emphasizes the paramountcy of the welfare of the child.

Declaratory proceedings for the validity of marriage have a considerably wider jurisdictional scope:

> *Section 27, Application for Declaration as Validity of Marriage* -
>
> (1) An application for a declaration whether according to law of New Zealand,
>
> (a) a marriage is valid or
>
> (b) a marriage has been dissolved -
>
> may be made by any person, whether or not that person is a party to the marriage, or is domiciled or resident in New Zealand, and whether or not the marriage was solemnized in New Zealand.
>
> (2) An application under this section may be made whether or not any other relief is claimed under this Act.

This section bestows very wide jurisdictional powers indeed on the court.

As one New Zealand commentator puts it:[103]

> Any person may apply, he need not necessarily be a party to the marriage, nor need he be domiciled or resident in New Zealand. The country in which the marriage was celebrated is also seen as immaterial. The wording is so liberal that it is true to say that there are no jurisdictional rules in the Conflict of Laws sense at all.

Moreover the Act itself gives an extended definition of marriage[104]

> "Marriage" includes a union in the nature of marriage that -
>
> (a) is entered into outside New Zealand; and
>
> (b) is at any time polygamous, -
>
> where the law of the country in which of the parties is domiciled at the time of the union then permits polygamy.

This section then has the potential to give rise to a wide range of Conflict of Laws issues both in the sphere of choice of law and in the recognition and enforcement of foreign judgments. It was the equivalent of this section which was used by the husband in *Hassan* v. *Hassan*[105] in seeking a declaration that the Talak divorce which he had pronounced on his New Zealand wife in a flat in Christchurch represented a valid dissolution of marriage at New Zealand law. That case raised issues on the choice of law for capacity to marry and the choice of law for dissolution of marriage.[106] In *Patel* v. *Patel* the question raised under the equivalent of Section 27 was as to the formal validity of the Hindu marriage purportedly concluded in India. The sole question before Greig J. was whether there had been a marriage in India. He concluded, on the basis of the evidence of the petitioner, and by reference to Indian statutes and textbooks, that no marriage ceremony of any kind

had occurred in India and that the effect of this Indian law was that no valid marriage had been concluded.[107] In *Re Darling* the existence of the marriage was not in question. The spouses were born and married in New Zealand. However while in Liberia a wife had obtained a divorce through the Civil Law court of that republic on the grounds of her husband's cruelty. The declaration sought recognition of the validity of that foreign dissolution in New Zealand. On consideration of the grounds for recognizing overseas orders under what is now section 44 of the Act Casey J. decided that the marriage had not been validly dissolved in Liberia.

By contrast with the width of section 27, which provides only for the discretionary granting of a declaration, the jurisdiction for declaring a marriage to void abinitio is much narrower. Section 29 provides that an application may be made only where the applicant or respondent is domiciled or resident in New Zealand at the time of the filing of the application or where the marriage was solemnized in New Zealand. However the choice of law which is to govern the making of this order is clearly left open by section 29 and by section 31 (2) which provides:

> Nothing in subsection (1) of this section shall affect the law as to the validity in New Zealand of a marriage that is not governed by the law of New Zealand, or the jurisdiction of a family court to make an order declaring any such marriage to be void abinitio.

Jurisdiction to make an order that one party to a marriage is presumed to be dead is restricted even more severely to married persons who are domiciled in New Zealand.[108] Likewise applications for an order dissolving a marriage may be made only whether at least one party to the marriage is domiciled in New Zealand. While mere residence

is enough for the granting of a separation order the more formal requirement of domicile is necessary for the granting of a dissolution order.[109]

A Family Court has jurisdiction to make a paternity order only where:[110]

At the time of the filing of the application -

(a) the mother of the child resides or is domiciled in New Zealand; or

(b) the respondent in the proceedings resides or is domiciled in New Zealand; or

(c) the mother is dead and the child resides in New Zealand.

The High Court has a considerably wider jurisdiction to make declarations as to paternity under Section 10 of the Status of Children Act which allows that any person "having a proper interest in the result" may apply to the High Court for a declaration of paternity.

The jurisdiction of New Zealand courts in making declarations and orders on custody, guardianship or access to children is defined in Section 5 of the Guardianship Act:

(1) The court shall have jurisdiction under the Act in any of the following cases:

(a) Where any question of custody, guardianship, or access arises as an ancilliary matter in any proceedings in which the court has jurisdiction; or

(b) Where the child who is the subject of the application or order is present in New Zealand when the application is made; or

(c) When the child, or any person against whom an order is sought, or the applicant, is

domiciled or resident in New Zealand when the application is made.

(2) Notwithstanding the provisions of subsection (1) of this section the court may decline to make an order under this Act if neither the person against whom it is sought nor the child is resident in New Zealand and the court is of the opinion that no useful purpose would be served by making an order or that in the circumstances the making of an order would be undesirable.

Here the primary rule about residence or domicile of one of the parties to the proceedings has been modified in two important respects in favour of the child who is the subject of the proceedings. On the one hand the mere presence of the child in New Zealand is enough to give the court jurisdiction to act with regard to it, and on the other the absence of the child from New Zealand gives the court the discretion to refuse to act. The Adoption Act gives the court extraordinarily wider powers to make adoption orders "upon an application made by any persons whether domiciled in New Zealand or not" and "in respect of any child, whether domiciled in New Zealand or not".[111]

As a whole then these provisions demonstrate a traditional Common Law Conflict of Laws emphasis on domicile as the prime connecting factor between the litigant and the jurisdiction of the domestic court. In some areas this is being relaxed to allow for jurisdiction also on the grounds of residence. But the main areas of divergence lie in the protection of the interests of children: child maintenance, guardianship, custody, access, and adoption. Only the Matrimonial Property Act 1976, which is at least in part property legislation, contains no enacted rules as to jurisdiction.[112]

6. *Choice of Law: the scope for foreign law*

By contrast the scope left for the application of foreign law to a family law proceeding is far more limited and far less explicitly recognized. Choice of law questions can arise only as regards the status of a marriage or the division of matrimonial property.

As *Hassan* illustrates most vividly, a New Zealand court can be directed to an examination of foreign law when making a declaration as to the validity of a marriage. But that approach is not dictated by any statute. The Marriage Act 1955 simply refers to its own scope in section 3:

> *Application of Act* -
>
> (1) The provisions of this Act, so far as they relate to capacity to marry, shall apply to the marriage of any person domiciled in New Zealand at the time of the marriage, whether the marriage is solemnized in New Zealand or elsewhere.
>
> (2) The provisions of this Act, so far as they relate to the formalities of marriage, including the provisions relating to consents to the marriage of minors, shall apply to any marriage solemnized in New Zealand, and to any marriage solemnized under section forty-four of this Act, whether or not either of the parties to any such marriage is at the time of the marriage domiciled in New Zealand.

Although the Marriage Act 1955 is not expressed to be a code, its provisions describe exclusively the internal New Zealand law. Therefore section 3, when it refers to the application of the Act, is describing the application of New Zealand law. This description is in terms of the traditional common law connecting factors of the lex domicilii and the lex loci celebrationis. The section does not refer to the possibility of applying a foreign law, but the Family Proceedings Act 1980 clearly does contemplate this because it gives the court a wide jurisdiction to make declarations on the validity of a marriage, including polygamous marriages (a form denied to New Zealand domiciliaries under section 3(1) of the

Marriage Act 1955).[113] Therefore this section contains a unilateral choice of law rule, describing the application of New Zealand law, but leaving the choice of foreign law to common law rules. The Common Law follows a complementary approach of applying the law of the parties' ante-nuptial domicile to capacity, and the lex loci celebrationis to formalities.[114]

A New Zealand court may also declare a marriage void ab initio on the basis of foreign law. Once the jurisdictional requirements of section 29 have been met, the court must decide whether section 31(1) or section 31(2) applies. The narrow grounds on which a marriage may be declared void ab initio apply only to 'a marriage that is governed by New Zealand law', an issue determined by section 3 of the Marriage Act 1955. This puts a self-limiting restriction on section 31(1), the remainder of cases being left for the application of common law conflicts rules by section 31(2), which does not itself describe the situations where a court might declare a marriage void by applying a foreign law.

Under the Matrimonial Property Act 1976 a choice of law question may arise in a number of ways. Section 7 describes the circumstances in which the Act is to apply. Sub-section (1) provides:

> This Act shall apply to -
>
> (a) Immovables which are situated in New Zealand; and
>
> (b) Movables which are situated in New Zealand or elsewhere if, at the date of an application made pursuant to this Act, or of any agreement between the spouses relating to the division of their property, either the husband or the wife is domiciled in New Zealand.

Is this a jurisdictional or a choice of law rule? It describes the application of the Act (i,e. the application of law) rather than the jurisdiction of the court. It is directed towards the property subject to division, rather than to the parties claiming division. Yet the application

of the Act to movables depends upon one spouse having a New Zealand domicile. It is submitted that personal jurisdiction would continue to be determined by ordinary conflicts rules, with the corollary that the court may make determinations on the movable property of spouses not domiciled or resident in New Zealand, and even on immovable property (as an incidental issue) by applying foreign law following common law choice of law rules.[115] Such an application of foreign law has not been tested in the courts, and the Act embodies a strong disposition towards exclusivity. Moreover section 7(4) is moderates sub-section (1) in jurisdictional terms:

> Notwithstanding anything in subsection (1) of this section, where any order under this Act is sought against any person who is neither domiciled nor resident in New Zealand, the Court may decline to make an order in respect of any movable property that is situated outside New Zealand.

Whether or not section 7(1) is simply one side of a choice of law rule, leaving the court free to apply some other law in situations where the Act does not apply, or whether it describes the entire ambit of property which a New Zealand court may consider in making a division is thus not clear. This issue arose indirectly in *Walker v Walker*.[116] The only property amenable to division was a beach cottage in the Bay of Plenty. Between separation and division, the husband had exchanged his half-share in it for a half share of the interest of his new wife in a property at Woodford Bridge, Essex, England. That property is of course an immovable situated outside New Zealand. The question was whether the first wife could take a full half share in the New Zealand property or only a quarter, being half of all that was left as matrimonial property. The court was unamimous in allowing her the full half, but was divided in its reasoning. Cooke J., with whom McCarthy J. concurred, held that section 7(1)(a) did indeed operate to prevent the husband's share in the Essex property from becoming part of the matrimonial property, but found that the Court still

had sufficient discretion to depart from equal sharing and award the full half interest to the wife. The effect of this decision was to depart from the basic principle of the Act in a situation not expressly allowed for, in the knowledge of the existence of an immovable overseas. Richardson J's dissenting approach was to argue that section 7 does not preclude recognition of the existence of foreign immovables, at least to the extent of forcing the court to shut its eyes to them when determining a division of New Zealand property. Property could be characterised as matrimonial property as a preliminary or threshold decision which may be made before the bar imposed under the subsection operates. Such a view was criticized by McCarthy J. as having the effect of applying the Act to a foreign immovable which is the very thing prohibited by section 7. Yet, in effect, this is what the majority did too.

Choice of law may also be made by agreement. Section 7(2) provides that the Act 'shall also apply in any case where the husband and the wife agree in writing that it shall apply'. Conversely section 7(3) allows contracting out of the New Zealand scheme altogether:

> ...if the parties to the marriage have agreed, before or upon their marriage to each other, that the matrimonial property law of some country other than New Zealand shall apply to that property, and the agreement is in writing or is otherwise valid according to the law of that country, unless the Court determines that the application of the law of the other country by virtue of any such agreement would be contrary to justice or public policy.

No case has as yet arisen on the validity of such an agreement, but if justice is defined, as it has been in other matrimonial property cases, as justice as defined by the Act, including the equality of married women and the rule of equal sharing, such agreements could be substantially controlled. This was certainly the case in *Pool v Pool*,[117] which arose

under the savings provision for agreements made before the commencement of the Act. The parties had made an agreement in Holland in 1951, shortly before emigrating to New Zealand. The parties separated in 1972. The wife sought a capital sum from a farm at Waitati the pair had developed. The husband argued that the agreement operated to negative any community of property. The Court of Appeal, unanimously overruling two High Court decisions, declined to regard the agreement as settling the question in the case. They did this on the ground that it may have been possible to construe the agreement as allowing the wife a share in the farm, and, in the absence of evidence from an expert in Dutch law, there was too much uncertainty to rely completely on the agreement. Therefore the Court exercised its discretion considering not only the agreement, but the time and circumstances under which it was made and the extent of the wife's contribution to the farm. In the end she was awarded $30,000 from the farm valued at $142,000. So a foreign agreement was displaced in favour of the exercise of judicial discretion.

No other statutory provision considered contemplates choice of law, though questions on the nature and scope of a foreign law may arise in the recognition of foreign decrees, for example under section 17 Adoption Act 1955 prescribing the conditions necessary for the recognition of an overseas adoption or under section 44 Family Proceedings Act 1980 relating to recognition of overseas orders for the dissolution of marriage. Confirmation of provisional maintenance orders under section 138 Family Proceedings Act 1980 made in Commonwealth or designated countries requires, albeit inferentially, the application of the law of the country where the provisional order was made.

But when the New Zealand court is determining the issue itself, as opposed to recognizing some foreign order, it is restricted in important areas to the lex fori. Section 22 Family Proceedings Act 1980 establishes a sole ground for the granting of a dissolution of marriage. Proceedings for maintenance are to be conducted on the principles set out in Part VI of the Act. The Guardianship Act 1968, having particular regard to the mandatory nature of section 23, also excludes choice of law.

The pattern which emerges regarding choice of law may be summarized as follows:

(i) in many important areas of family law, statute operates to preclude the application of anything save the lex fori;

(ii) where statute does allow for a choice of law, it does not dictate the manner in which that choice is to be exercised, but only the circumstances in which New Zealand law is to be applied;

(iii) in doing so it harmonizes with, and provides room for the continuing operation of the Common Law;

(iv) the approach taken by the Court of Appeal is *Walker* and *Pool* indicates judicial willingness to modify principles, such as the recognition of foreign agreements and the refusal to apply the lex fori to foreign immovables, in favour of a domestic, discretionary conception of justice.

What factors have contributed to this pattern? In part the legislature has been content to leave such choice of law as it has allowed for to judicial development. Traditionally the enactment of multilateral choice of law rules has been seen as outside the scope of a domestic

legislature. Judicial development is the accepted pattern. Nevertheless the statutes examined do embody a domestic conception of justice, which the legislature has not wished subverted. Therefore family law cases with foreign elements are, in the majority of cases, dealt with according to the lex fori or sifted out at the jurisdictional level. Jurisdiction has received special attention, being based largely on the connecting factor of domicile. Precisely because domicile is still a key factor in this area of the law, its recent reform is of considerable interest.

7. *Reform of the prime connecting factor: Domicile*.[118]

Domicile is a means by which an individual is connected to a country for legal purposes. As a connecting factor it has found particular favour in the Common Law world. As with much of the rest of the Common Law on conflicts, the main principles defining domicile were developed last century in Britain.[119] Although domicile does nothing more than connect an individual to a set of substantive rules, the contents of the concept were seen increasingly as offending against principles which motivate the Conflict of Laws and developing principles behind modern family law, an area in which domicile is particularly relevant. In general movements for reform have been designed to promote the reasonable expectation of parties, the maximum possible liberty of action, and an equality of the treatment between persons. Aspects of the Common Law rules which derogated most severely from these principles were:

1. The doctrine that the domicile of origin, obtained at birth, could revive whenever the necessary conditions for the holding of a domicile of choice ceased;[120] and

2. The doctrine that the domicile of a married woman depended upon that of her husband.[121]

Moves for reform in England came as early as 1954 with the first report of the private international law committee,[122] which was considering the draft convention to regulate conflicts between the law of the nationality and the law of the domicile negotiated at the Hague Conference.[123] A bill to implement that committee's proposals foundered at Westminster on the rock of taxation. Meanwhile in New Zealand in 1958 the Secretary for Justice suggested to the Honourable Mr. Mason that New Zealand should enact legislation dealing with these two problems. A bill was prepared and introduced in 1960. It failed partly on the grounds that the reforms would introduce complications into the Conflict of Laws but more importantly,[124] as the Secretary for Justice put it in 1973:[125]

> The only object that in our view had any real force was that a change by New Zealand alone would have disadvantages. Against this, we felt at the time that action on our was more likely to promote similar reforms overseas than a mere attempt to get everybody around a table to talk about changes.

Some piecemeal reforms were made in the 1960's but a fresh emphasis[126] came when the Australian National University published a report in 1970. This report fell for the consideration of the Standing Committee of Federal and State Attorneys-General,[127] mentioned above. The Secretary for Justice summarises New Zealand's attitude:[128]

> Our attitude towards the Australian proposals has been

> to welcome them in principle while criticizing them in detail, to stress to the Australians the importance we attach to having substantially common legislation in Australia and New Zealand if there are to be changes, and to convey our desire to be involved in the formative stages of any legislation.

In fact New Zealand was responsible for a draft bill considered by a further meeting of ministers and law officers at Wellington in 1974. In New Zealand's case this became the Domicile Act 1976. The Act effectively abolishes both the doctrine of the revival of the domicile of origin[129] and the dependant domicile of married women.[130] Nevertheless the Act did not come into force until the 1st January 1981. The reason for this delay was again the desire to achieve uniformity with Australian jurisdictions. The Australian uniform Domicile Act did not come into force in all jurisdictions until 1982 and in result it differs slightly in form and in substance from its New Zealand counterpart.[131] Interestingly the New Zealand Act has been adopted, save for two provisions, in Barbados.[132] But the general picture throughout the commonwealth is of a firm basis of common law which is being gradually eroded by a variety of different legislative responses. As Professor McClean puts it:[133]

> More insidious have been the actions of the legislatures of a number of jurisdictions in reforming the law of domicile, either generally or in its application in particular contexts, to remedy what are widely seen as unsatisfactory features of the traditional concept. There is of course no reason why the rules as to domicile should be uniform in all jurisdictions and in all contexts, but equally it is possible to foresee difficulties ahead if what appears to be the same concept begins to be governed by different rules in neighbouring jurisdictions as a result of uncoordinated law reform. It is therefore for consideration whether common principles for a modernized law of domicile could be agreed upon, if indeed it is to be retained as a significant connecting factor.

Domicile is undoubtedly still a significant connecting factor in New Zealand. Moreover efforts were made to coordinate reform at least with Australia. But McLean's comments illustrate once again the need for an internationally unified response to reform in the Conflict of Laws.

8. *Recognition and Enforcement of Foreign Judgments: developing just international civil procedure.*

Recognition of the case for the internationalization of reform of the conflicts process has perhaps been most evident in the legislature's responses to the third question posed by the Conflict of Laws namely the recognition and enforcement of foreign judgments and orders. Here too there are important principles to be protected. The parties to a foreign case have a legitimate expectation that the decision made in that court will have effect beyond the borders of that country. Recognition of the decisions of foreign courts promotes respect for the rule of law.

Part VII of the Marriage Act without attempting to change the Common Law as to the validity of foreign marriages, bestows extended recognition on marriages recognized as valid in the United Kingdom by virtue of the Foreign Marriages Act 1892 -1947; a wider class of marriages concluded by commonwealth or Irish citizens; and service marriages concluded by New Zealand members of the armed forces abroad.[133]

Section 44 of the Family Proceedings Act lays down a comprehensive code for the recognition of overseas orders for divorce or dissolution or nullity of marriage.

(1) The validity of a decree or order or legislative enactment for divorce or dissolution or nullity of marriage made (whether before or after the commencement of this Act) by a Court or legislature or public authority of any country outside New Zealand shall, by virtue of this section, be recognized in all the Courts of New Zealand, where -

(a) one or both of the parties were domiciled in that country at the time of the decree, order, or enactment; or

(b) that overseas Court or legislature or public authority has exercised jurisdiction -

(i) in any case, on the basis of the residence of one or both of the parties to the marriage in that country, if, at the commencement of the proceedings any such party had in fact been resident in that country for a continuous period of not less than two years; or

(ii) in any case, on the basis that one or both of the parties to the marriage are nationals or citizens of that country or of any sovereign state of which that country forms a part; or

(iii) in any case, on the basis that the wife has been deserted by her husband, or the husband has been deported, and the husband was immediately before the desertion or deportation domiciled in that country, or

(iv) in any case, on the basis that the wife was legally separated from her husband, whether by an order of a competent Court or by agreement, and that the husband was at the date of the order or agreement domiciled in that country; or

(v) in a case of nullity of marriage on any ground existing at the time of the marriage, on the basis of the celebration of the marriage in that country; or

(c) The decree or order or enactment is recognized as valid in the courts of a country in which at least one of the parties to the marriage is domiciled.

(2) Nothing in this section shall effect the validity of a decree or order or legislative enactment for divorce or dissolution or nullity of marriage, or of a dissolution of marriage otherwise and by judicial process, that would be recognized in the courts of New Zealand otherwise than by virtue of this section.

134

Without examining in detail the effect of this section, it will be seen that subsection (1) allows for a wide range of cases in which overseas orders for dissolution will be recognized. While the primary ground

remains that of domicile, courts which have assumed jurisdiction on the basis of a number of other connections will also have their orders upheld. Furthermore, subsection (2) preserves the possibility of an expansion of categories.[141] So far attempts to use that residual class have not met great success in New Zealand. A divorce granted by a Liberian court to New Zealand domiciliaries was not recognized for New Zealand in *Re Darling*.[142] Similarly in *Godfrey* v. *Godfrey*[143] a divorce granted in the Superior Court of the state of Arizona to New Zealand domiciliaries was rejected by Mahon J. The courts are of course concerned to strike a balance between the need for recognition and a desire not to let New Zealand domiciliaries readily escape the provisions of the Family Proceedings Act with regard to dissolution.

The recognition of overseas maintenance orders also represents a wide range of alternative categories. Legislative intervention in this field has been necessitated because an order for the periodic payment of maintenance, which may be subsequently varied or discharged, is not regarded in Common Law countries as being final and conclusive.[144] Therefore an action cannot be brought on the judgment in another country. The first commonwealth scheme of 1920 originated on the motion of Sir Joseph Ward, Prime Minister of New Zealand, at the Imperial Conference of 1922;[145]

> That in order to secure justice and protection for wives and children who have been deserted by their legal guardians either in the United Kingdom or in any part of the dominions, reciprocal legal provisions should be adopted in the constituent parts of the empire in the interests of such destitute and deserted persons.

The modern New Zealand scheme has two parallel sets of provisions: one for commonwealth and other designated countries,[146] and one for countries party to the 1956 United Nations Convention for the Recovery of Maintenance Abroad.[147] The first scheme applies automatically to all

commonwealth countries.[148] There is no requirement of reciprocity. Applications may also be extended by order in council to further designated countries.[149] South Africa and California are the only two such designated countries.[150] The recent designation of California was as the result of initiatives taken in California and was accorded on the basis that California would provide a reciprocal recognition of New Zealand maintenance orders. The Act provides that all full maintenance orders are to receive upon registration the same measures for enforcement as do New Zealand maintenance orders.[151] Where the overseas maintenance order is merely provisional, the New Zealand court may proceed to confirm it applying the law of the overseas country under section 138. Registration or confirmation does not however effect the power of the New Zealand court to discharge or vary such an order.[152]

Additionally the Act contains the legislative machinery necessary for the operation in New Zealand of the United Nations Convention on the Recovery Abroad of Maintenance 1956.[153] This convention has not yet been ratified by New Zealand, because officials are still working to establish the necessary administrative machinery, and therefore these sections do not currently have a working application. Nevertheless, legislative recognition of the convention is of some interest because it represents a move towards internationalization in this area. The convention was the product of the work of the economic and social council of the United Nations. Of the commonwealth countries only Ceylon sent an expert representative to the final drafting conference. Canada and the United Kingdom sent observers. The United States of America was not represented at all. Initially New Zealand was opposed in principle to the procedure laid down by the convention.[154] The convention provides for a claimant in one convention country to apply directly to the court of another convention country for maintenance. The claimant submits

an application to the transmitting agency in his own country, which sends it to the receiving agency in the country where the respondent resides. The receiving agency transmits the application to a court. As far as possible, the court treats the application as if it were a normal maintenance application. Thus the convention does not provide a system for the enforcement of maintenance orders but rather establishes an administrative mechanism for the making of maintenance orders in the country where the respondent resides. Forty-two countries are now parties to the convention, including the United Kingdom. Australia has not yet become a party but section 111 of the Australian Family Law Act 1975 provides for the making of regulations to give effect to the convention. Legislative incentive from within New Zealand seems to have originated with the Department of Social Welfare.

The Family Proceedings Act 1980 and the Status of Children Act 1969 also contain two provisions which have not so far been put into operation. These allow for the recognition of foreign paternity orders made by courts or public authorities designated by order in council.[155] No such orders have yet been made. However the Commonwealth Maintenance Scheme does provide for the enforcement of foreign maintenance orders consequent upon an affiliation order in limited circumstances.[156]

The problems which at Common Law affected the enforcement of maintenance orders overseas, are also evident in the custody context. Such orders are not final and conclusive, and the approach which both the English and the New Zealand courts have taken has been that the court should only give effect to the foreign judgment without further inquiry when it is in the best interests of the infant that the court should not look beyond the circumstances in which the foreign jurisdiction was invoked. A narrow reading of section 23 of the Guardianship Act 1968

has influenced the judicial approach in New Zealand.[157] A reform to deal more effectively with trans-tasman abductions was developed also through the forum of the standing committee of Attorneys-General. Beginning in 1970, this process resulted in the Guardianship Amendment Act 1980. The improved registration procedure applies reciprocally with Australia, and also to the United Kingdom, (although they have not accorded similar status to our custody orders). A provision for the inclusion of further prescribed countries has not been exercised.

Finally, mention should be made of the provision in the Adoption Act 1955 for the recognition of overseas adoptions.[158] Overseas adoptions will be recognized if:

(a) the adoption is valid according to the law of the place where it occurred, and

(b) the adoption gives an adopting parent the right to custody superior to that of any natural parent, and

(c) either the adoption order is made by a court or judicial or public authority in a commonwealth country, in the United States, or in a country designated by order in council[159] (this power has been exercised) or

(d) the adoption gives the adopting parent superior property rights over the property of the adoptee to his natural parents.

Recognized overseas adoptions have the same effects as the adoption orders made in New Zealand.

In sum these provisions represent a significant move towards improved international civil procedures in the family law area. They thus significantly promote the principles outlined in Part II above.

They reflect a procedural slant which characterises much of the legislative responses to Conflict of Laws problems in New Zealand. They also reflect a traditional commonwealth and Australasian emphasis. Now it is time to return to the international arena to survey the options for an internationally unified reform process.

PART IV: THE OPTIONS FOR INTERNATIONAL UNIFICATION

CHAPTER 1: THE PRECEDENTS

1. *Interrelationship between national and international reform.*

While much of the foregoing discussion has laid stress upon the divergence between countries in their approach to conflicts issues, upon the interests of the forum country, and upon New Zealands Commonwealth Common Law framework, there do in fact exist considerable precedents for a unified approach. Indeed, as I have argued in Part II above, an internationalist outlook is something of a logical imperative in any concerted effort to reform the Conflict of Laws. In Europe, coterminous with both the national codification movements of the nineteenth century and the growth of conflicts problems, there was considerable early initiative for an internationally uniform system.[160] The German jurist Savigny advocated a system of private international law common to all civilized nations as early as 1849. The Italian Mancini, who had inspired the early codification of conflicts law to be found in the Italian Civil Code of 1865, tried concertedly to achieve a translation of the principles embodied in that code into the international sphere. His idea was for an internationally common approach to all Conflicts of Laws issues, based on a fundamental principle of nationality. Doubtless Mancini was influenced by the prevailing nineteenth century nationalism, but his efforts did result in the holding of the first conference on the subject at the Hague in 1893. So there has then, from the start, been a current of initiatives in favour of international unification, even if the Common Law has, outside its orbit, been left largely high and dry. Let us turn to look at some of the ways in which this has borne fruit.

2. *Regional options for co-operation.*

Latin America was the first region to make significant attempts at unification.[161] The unification movement began there as early as 1875 and resulted in the Montevideo conventions of 1889 and 1940 and the code Bustamante, signed at the sixth American international conference at Havana in 1928. The remarkable achievement both at Montevideo and at Havana was that the codes cover the whole field of the Conflict of Laws. However this achievement has been at the expense of a united adoption and a uniform approach. The United States, while participating at Havana, abstained from signing the Bustamante code. Latin American states have accorded it, and the parallel Montevideo conventions, a variety of recognitions. Moreover the desire to achieve the diplomatic success of apparent uniformity has in fact impeded the efficacy of these codes. For example, article 7 of the code Bustamante provides that each of the high contracting parties shall apply as personal law either the law of domicile, the law of nationality, or the law that shall have been, or shall be subsequently referred to, by their internal legislation. This is, as the code's author himself acknowledged, the international legislation of the divergences.[162] As such it is clearly counter productive to international unification. Many countries have departed significantly from the original text either by means of reservations or by contrary internal legislation, and neither code seems to be regarded as important in the practice of the courts. The need for revision has recently been recognized in two inter-American specialized conferences on private international law.[163]

If this early work in the new world illustrates an impressive uniformity, which is perhaps superficial, modern experience in the European Economic Community suggests that the achievement of consensus

may be difficult even where States have a significant commitment to uniformity. The Treaty of Rome emphasizes the need for the equality of treatment of citizens as between member States, and the approximation of the laws of member States to the extent required for the proper functioning of the common market. Article 220 provides inter alia that:

> Member States shall, so far as is necessary enter into negotiations with each other with a view to securing for the benefit of their nationals:
>
> - the protection of persons and the enjoyment and protection of rights under the same conditions as those accorded by each State to its own nationals; ...
>
> - the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards.

Clearly the way in which national courts deal with disputes effects the economic goals of the community as much as national economic policies, especially if a particular State is used as a haven of convenience by contracting parties or as a haven for judgment debtors. To date progress has been mixed and only the convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 has yet entered into force.

As Fletcher comments:[164]

> The truth is that the practical difficulties inherent in the conduct of multi-national, multi-lingual negotiations for the harmonization of private international law by means of conventions...have now become too great. While progress was reasonably obtainable between six negotiating States, all of whom broadly speaking, belonged to the same legal tradition, it rapidly became apparent that the augmentation of numbers up to nine, taking in representatives of the Common Law tradition had introduced a severe impediment to the maintenance of any sort of momentum.

Perhaps the most successful examples of regional co-operation have been in Scandanavia and Eastern Europe. Despite diverse attitudes to the Conflict of Laws, the five Nordic countries have concluded between themselves five conventions resolving, at least between themselves, the Conflict of Laws.[165] This achievement however, must be seen against the background of a much wider tradition of legal co-operation devoted also towards substantive uniformity and employing a wide range of methods and forums. In the eastern bloc , the modern national codifications, which display a conservative emphasis on nationality and the lex fori,[166] have been complemented by a close network of bilateral agreements governing international civil procedure and other conflicts problems. Taken as a whole, these represent a uniform approach.[167]

A significantly different approach to unification, and one more consonant with the Common Law, has been that taken in the United States of America through *the Restatement of the Law*.[168] The *Restatement*, which covers every area of substantive law, follows a very similar format to the English text by Dicey & Morris on the Conflict of Laws. It lays down as a code a set of rules with accompanying explanations and illustrations. These rules attempt as far as possible to reflect the Common Law as a whole. Accompanying volumes refer to specific case law in specific States. The aim of the *Restatement* is thus purely informative but in its effect it promotes a tendency towards unification. It provides a reference point from which in practice State courts rarely diverge and on which State courts widely rely. Of course the *Restatement* is declaratory rather than reforming in nature, and it works from a fundamentally shared tradition. The conflicts *Restatement* cannot of itself improve inter-State civil procedure, but it can promote the common approach to jurisdiction and choice of law. The "American revolution" in the

choice of law process happened against the background of the first *Restatement*. The second *Restatement*, approved by the American Law Institute in 1969, attempts to respond to demands for greater flexibility. It makes an explicit commitment to the range of principles and interests which are developed in Part II of this paper. 169

Section 6 - *Choice of Law Principles*.

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the fact is relevant to the choice of the applicable rule of law include

(a) the needs of the inter-State and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested States and the relative interests of those States in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of results, and

(g) ease in the determination and application of the law to be applied.

170

While the second *Restatement* has been criticized for its eclecticism, it maintains a firm commitment to the development of specific rules to achieve a balance between the different principles and interests to be borne in mind in any particular area of substantive law.

3. *The isolated work of the United Nations.*

The work of the United Nations has represented just such a concentration on specific problems arising in the international dimension of particular areas of substantive law. The first area is that of international commercial arbitration, dealt with in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.[171] This work represents an inheritance from the initiative of the League of Nations, which had framed a widely accepted protocol and convention on the subject in 1923 and 1927 respectively. The New York convention, at the periphery of our subject,has been slow to receive recognition. Commonwealth States have been particularly slow to respond, despite the early initiative of the United Kingdom.

The United Nations Convention on the Recovery Abroad of Maintenance, adopted by a special conference in New York two years previously in 1956, also represents the culmination of work beginning in the 1920's. By 1980 it had some 42 parties. The moves within New Zealand to adopt this convention have already been detailed.[172]

If the modern movement towards the achievement of international unification in the Conflict of Laws as described so far has appeared sketchy, it is because world-wide attention has focused increasingly upon the body which is now the major reform agency: namely The Hague Conference .

CHAPTER 2: THE HAGUE CONFERENCE

1. Development[173]

The conference began at the Hague in 1893 under the presidency of T.M.C. Asser. Asser shared Mancini's ideals of an overall international codification of the rules of private international law. However, although the first period of the conference from 1893 - 1904 may be described as its belle époque, it diverged from these ideals in two important respects. The conference was by no means universal in scope. In fact it represented only a small club of European States working to achieve uniformity between themselves. Moreover the earliest conventions are designed only to have effect inter partes. Relations with countries outside the contracting States are left unaffected. Secondly the original project to achieve an overall codification was soon abandoned in favour of concluding conventions in specific areas. Five of the six conventions relate to family law: they are concerned with the conclusion of marriage, divorce and separation, and guardianship of infants (1902) and with the effect of marriage on the proprietary rights of spouses, and persons of unsound mind (1905). The conference's sixth and noteable achievement was its convention on civil procedure. It dealt with the service of judicial and non judicial documents, letters rogatory, security for costs, free legal aid, free delivery of certificates of birth, marriage, and death, and imprisonment for debt, and was accepted by 23 States. For our purposes that early conference was limited in another important respect too. It was comprised entirely of members of civil law tradition. The United Kingdom never seriously examined the project, although it did have some input into the rather abortive sessions of 1925 and 1928.[174] Doubtless the conferences' early homogeneity contributed to its success.

However, between the wars, along with a wane in the political will for such a conference, there went a decline in legal acceptability. The early conventions had been premised on the principle of nationality, which was increasingly seen as too rigid as a connecting factor for modern needs. However those early conferences did set a precedent for co-operation, and reflected an early interest in procedural and family law matters, which was resumed in the modern phase of the conference beginning in 1951.

2. *Modern constitution and membership*.[175]

The conference had it Renaissance in 1951 when 16 States came together once again at the Hague for the seventh session. The new conferences' first Act was to put itself on a permanent footing by the enactment in treaty form of its statute.[176] The first article provides that the goal of the conference is to be the progressive unification of the rules of private international law. It goes on to detail the administrative organisation of the conference. The conference itself is diplomatic in character and meets in plenary session every four years. The work of the conference is supervised by a standing governmental committee of the Netherlands, which is aided in its tasks by the permanent bureau. The whole conference then is run on a very small scale footing, but its sphere of membership has continued to increase. The conference has met 7 times since 1951 and by 1980 had 29 member States. It is no longer dominated by its Western European founding members, who number only 17. The others are Czechislovakia and Yugoslavia from the socialist bloc; Egypt, Israel and Turkey; Argentina, Venezuela, Surinam, Canada and the United States of America; Japan and Australia.

There is thus a significant Common Law representation of 5 States: the United Kingdom, Australia, Canada, Ireland and the United States of America. Looking beyond the list of members, to the wider list of countries who have acceded to one or more convention, the picture changes again. It includes a further group of socialist States, Hungary, Poland, Romania, East Germany, and the U.S.S.R; a group from Africa including South Africa, Swaziland, Lesotho, Malawi , Botswana, and Niger; two countries from the South Pacific region, Fiji and Tonga; as well as Lebanon, Morocco, the Holy See, Liechtenstein, Mauritius, Bahamas, Cypris, Malta, Seychelles, Barbados and Singapore. All of this suggests nothing more than an expanding internationalism. By developing links with other major unification agencies such as Unidroit, the United Nations, the Organisation of American States, the Council of Europe and the Commonwealth Secretariat. The Hague Conference has carved for itself a pre-eminent place in the reform of conflicts law internationally. Moreover, while it works extensively as a diplomatic conference between States, member States are in fact represented predominantly by conflicts experts. So the conference provides a forum which is at once interested and impartial.

3. *Common Law influence*

From a New Zealand perspective the harmonization of the conference with the Common Law tradition is clearly of major importance. In this regard United Kingdom has taken the lead. Since 1951 it has ratified 7 conventions. These have been translated into Common Law style legislation.[177] Moreover many of the conventions thus ratified have been extended in operation to Britain's colonies and dependencies around the world. Many of Britain's foremost authorities in the Conflict of Laws

have represented her at the Hague.

The United States, Canada and Australia have not had such outstanding success. In part this results from their federal system which makes ratification difficult.[178] However the Convention on the Civil Aspects of International Child Abduction concluded in 1980, was the result of Canadian initiatives taken on the subject of parental kidnapping and recommendations to a special commission at the Hague in 1976. The implementation of this convention has excited considerable governmental interest in both Australia and New Zealand. The most recent sign of the conference's expanding interest in the Common Law is the inclusion as the major topic on the agenda of the fifteenth regular session in 1984 of a draft convention on trusts. The final strand in Common Law participation, and one which will be developed in Part V of this paper, is the achievement of observer status to the conference by the Commonwealth Secretariat . The Secretariat convened a caucus of Commonwealth members on the eve of the 1980 conference to discuss parental kidnapping, and has been much involved in the planning stages of the work on the law of trust.[179]

4. *Recent problems*[180]

Despite this remarkable growth, existing arrangements do present some difficulties. Firstly, control at the planning stages of the conventions remains largely with the Netherlands standing government committee . While there has been an expanded use of special commissions, it has not always proved possible to avert serious conflicts that have occurred over parallel European Economic Community development. The E.E.C. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters provides inter alia that all judgments must

be enforced against non-residents of the common market, even judgments rendered on a jurisdictional ground that has traditionally been held internationally unacceptable.[181] While some successful attempts were made at the Hague Conference to ameliorate the effects of this convention, it remains nevertheless a highly protectionist document. Moreover, as all the E.E.C. countries are members of the Hague Conference, this intransigence could have a negative effect on the work of the conference. An American proposal to put the general subject of contracts on the agenda of work at the Hague, made at the thirteenth session, met a similar fate because the E.E.C. was undertaking its own work in the area. Continuing european domination can cause other difficulties too. Countries which have highly developed administrative structures are less likely to be sensistive to the needs of smaller less developed jurisdictions.[182] Finally, the conventions in force still represent only a very limited coverage of the possible range of topics in the Conflict of Laws. The conference still reflects its early concerns with procedural and family law matters. Contract, tort and commercial law have met with only sporadic and singularly less successful attention. In part this results from what I have submitted to be a functionally desirable emphasis. Unification of substantive law is often the more appropriate response in international commerce. Many other international organisations are devoted towards this goal. Let us turn then, and look at the subject matter presently covered by conventions.

5. *Range of topics*

Of the twenty seven conventions concluded since 1951 seventeen are now in force, five have never entered into force, and the five most recent still await ratification. Those in force include:

(a) A group of civil procedure conventions -

(1) Convention on Civil Procedure 1954 (largely replaced by 2 and 3 below).

(2) Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civl or Commercial Matters 1965.

(3) Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970.

(4) Convention abolishing the requirement of Legalisation for Foreign Public Documents 1961.

(5) Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters and Supplementary Protocol 1971.

(b) A group of conventions dealing with family law matters -

(1) Convention on the Law Applicable to Child Maintenance Obligations 1956.

(2) Convention on the Recognition and Enforcement of Judgments concerning Child Maintenance Obligations 1958 (these two conventions now replaced by the following more comprehensive ones).

(3) Convention on the Recognition and Enforcement of Decisions relating to Maintenance Obligations 1973.

(4) Convention on the Law Applicable to Maintenance Obligations 1973.

(5) Convention Concerning the Powers of Authorities and the Law Applicable in respect of the Protection of Infants 1961.

(6) Convention on Jurisdiction, Applicable Law and Recognition of Decrees relating to Adoptions 1965.

(7) Convention on the Recognition of Divorces and Legal Separations 1970.

(c) Some limited incursions into other fields.

(1) Convention on the Law Applicable to International Sales of Goods 1955.

(2) Convention on the Conflict of Law relating to the Testamentary Dispositions 1961.

(3) Convention concerning the International Administration of the Estates of Deceased Persons 1973.

(4) Convention on the Law Applicable to Traffic Accidents 1971.

(5) Convention on the Law Applicable to Products Liability 1973.

The most recent sessions have produced conventions on matrimonial property, marriage, child abduction, agency, and access to justice. Conventions which have not come into force include general conventions on the subject of renvoi and choice of court; and commercial conventions on corporate personality, the transfer of title in the international sale of goods, and the jurisdiction of the selected forum in the international sale of goods. Work on the international sale of goods will recommence in an extraordinary session of the conference in 1985 in cooperation with Uncitral (the United Nations Commission on international trade law).

6. *Method*

Does a common method emerge from the work of the conference? The conference has covered procedural issues as well as the three classical conflicts questions: jurisdiction, choice of law and enforcement of foreign judgments. It has proceeded on an issue by issue basis, determining for each area of substantive law the principles and interests at stake and the best solutions to be adopted. It has sought to achieve certain rules and procedures in place of domestic divergence and judicial

discretions. Of paramount importance for the achievement of unification, Hague Conventions increasingly have erga omnes effects rather than merely inter partes ones.[183] Of course this is not possible in procedural matters, but many of the recent choice of law conventions are clearly to apply across the board in place of existing domestic conflict rules. For instance that on maintenance obligations provides in article 3 that "the law designated by this convention shall apply irrespective of any requirement of reciprocity and whether or not it is the law of a contracting State."[184]

But perhaps the most significant advance of all, has been the promotion of the new connecting factor "habitual residence".[185] Whatever the direction of a jurisdictional or choice of law rule, some means of connecting a person to a territory is going to be an important part of it. The Common Law has always used domicile as its prime connecting factor. Its continuing influence on our family law legislation, and the recent moves towards diversity and reform were charted in Part III. By contrast civil law countries preferred nationality. This was reflected in the early conventions of the Hague Conference. However, increasing mobility and the major upheaval of the world wars along with trends within the Conflict of Laws which emphasized respect for people's reasonable expectations, lead to a widespread dissatisfaction with nationality. In the Common Law world there has been similar dissatisfaction with the rigidity and artificiality of domicile. This led the Hague Conference to adopt the new connecting factor of habitual residence. Since 1951 it has figured prominently in its conventions, both as a ground of jurisdiction and as an element of choice of law rules. Habitual residence possesses the singular advantage of being able to step aside from the complex legal requirements which hedge about domicile and nationality. It has also avoided much potential conflict between proponents

of the other two factors. The key to the factor's success has been its emphasis on a factual examination of the person's situation. Habitual residence does not seek to define a persons legal headquarters but only to find a territory with which he is realistically and closely associated. Its determination thus remains a question of fact. Efforts to define it have on the whole been resisted by its proponents. Professor McClean, in a paper prepared for the meeting of the Commonwealth Law Ministers in 1983, concludes that it may have significant advantages for Common Law countries because it avoids the legal and evidential difficulties surrounding domicile and provides the chance of achieving a new unity in approach.[186]

These strengths, it is submitted, endow the conference with considerable potential for successful reform. How has that been worked out in the context of family law?

7. *The Approach to Reform: Conference responses in family law.*

The eight modern conventions in family law present a diverse range of responses to problems in the international sphere: diverse both in the methods adopted and in the success accorded to them.

Marriage is dealt with by the 1978 Convention on the Celebration and Recognition of Validity of Marriages.[187] Motivated by a desire to favour the institution of marriage wherever possible, this convention divides into two parts. Part 1, which is optional and applies only inter partes, deals with the law to be applied to the celebration of the marriage. Part II which applies erga omnes, assures the recognition of marriages celebrated abroad provided they are valid according to the lex loci celebrationis. The convention has been criticized as it

continues to leave room for the operation of internal conflict rules. It is not yet in force but has received five signatures including that of Australia.

The 1970 Convention on the Recognition of Divorces and Legal Separations, was conditioned by the need to strike a balance between the two evils of forum shopping for divorce and the limping marriage.[188] The result is a convention which does not deal with jurisdictional or choice of law questions, but which only lays down a basis for the recognition of foreign decrees. The lynch pin of such recognition is that the parties had their habitual residence in the State which exercised jurisdiction. The convention is in force and has been signed by ten countries including the United Kingdom. Its original application only inter partes has been extended in the United Kingdom legislation erga omnes. Morris describes the implementing Act as "injecting some much needed certainty into the law."[189]

Two Hague Conventions govern maintenance. These conventions are complementary to the United Nations Convention which New Zealand is preparing to join. As M. Verwilghen comments:[190]

> The connection between the three aspects of the problem -
>
> research into a uniform solution of Conflicts of Laws, the creation of common conditions under which foreign decisions will be recognized and enforced, and the setting up of authorities in charge of the procedures for recovery of maintenance abroad -
>
> has as its corollary the uniformity of the three multi-lateral, international treaties which relate thereto. It would, however, be difficult to say for which of these conventions the essential panel of the triptych should be reserved.

The 1973 Convention of the Law Applicable to Maintenance Obligations[191]

contemplates the application of a foreign law, a possibility not so far recognized in Common Law jurisdictions. The law to be applied throughout is that of the maintenance creditors' habitual residence:[192]

> ...the aim of the maintenance obligation is to protect the creditor. As he is the focal point of the institution, he must be considered in the reality of his daily life and not in the purely legal attributes of his person, as he will use his maintenance to enable him to live. Indeed in this field it is wise to appreciate the concrete problem arising in connection with a concrete society: that in which the petitioner lives and will live. Secondly, this system facilitates a degree of harmonization within each State: all maintenance creditors living in that State will be put on the same footing...

Because choice of law for maintenance obligations is foreign to the Common Law tradition, Professor McClean does not recommend its adoption in the Commonwealth.[193] By contrast the 1973 Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations has been signed by some fourteen countries including the United Kingdom. It operates only inter partes and again on the basis that the foreign court had jurisdiction on the basis of either party's habitual residence in that State.

The guardianship and custody of children received early treatment in the Convention on the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants 1961.[194] The convention strikes a somewhat uneasy balance between the habitual residence and the nationality of the child as determining jurisdiction, but provides that once jurisdiction has been established internal law is to be applied. The convention was however, manifestly inadequate in dealing with removals from the jurisdiction, especially the problem of parental kidnapping. The 1980 convention on the Civil Aspects of the International Child Abduction was a response to that problem which adopts a procedural

mechanism to remove, in the majority of cases, all need for judicial proceedings. The convention provides that all rights of custody held under the law of the States in which the child was habitually resident, immediately before the removal from the jurisdiction are to be immediately enforceable to return the child to that State. Such returns are to be organized by a central authority nominated for each contracting State.

Adoptions have so far only merited the most limited attention of the 1965 convention on the Jurisdiction, Applicable Law and Recognition of Decrees relating to Adoption.[195] This convention is only in force as between Austria, Switzerland and the United Kingdom. It deals only with the problem of trans-national adoptions inter partes i.e. where the adoptor and the adoptee are resident in different contracting States The Convention bestows a concurrent jurisdiction on the courts of the country where the adoptor is habitually resident and of which he is a national. The law to be applied is the internal law.

The law applicable to matrimonial property regimes was dealt with in a 1978 convention, which, it must be confessed, operates from a rather different set of premises than the New Zealand Act.[196] The convention assumes a community of property operating from the outset of marriage, whereas community of property under the New Zealand Act is in most cases deferred until the breakdown of the marriage.

Hague Conventions now deal with most of the problems which can arise internationally in family law. In many cases they represent a compromise between the different perspectives on family law and on the Conflict of Laws held by countries. Nationality continues to coexist with habitual residence as a key connecting factor. Choice of law is

admitted more often as a possibility than the Common Law would recognize. The most widely ratified conventions have been those dealing with the third Conflict of Laws questions: namely, the recognition and enforcement of foreign orders. Here the desire to give international efficacy to the judicial process has created an incentive, where the reform and uniformity of internal legal rules might not. The conventions as a whole concentrate on the development of fixed and certain rules, and on limiting the discretion of the courts in departing from these rules.While it cannot be said that all of them are compatible with the current New Zealand law, and indeed some may not be appropriate at all for the New Zealand situation, the comprehensive work of the Hague Conference in family law does represent a sustained attempt to strike an international balance between the interests involved. As such it warrants our serious consideration. The means of implementing such consideration is dealt with in the following fifth and final part.

PART V: AN INTERNATIONALISATION PROCESS FOR NEW ZEALAND

1. *Reasons for Participation at the Hague Conference*

My survey of the options for international unification put the Hague Conference in a pre-eminent position. While regional efforts may find an easier road to success, the Hague Conference provides the only truly international forum for the creation of private international law. To that extent it fulfils a requirement for the creation of a just system of the Conflict of Laws which has so far gone largely unmet: namely, the provision of an appropriate forum for the development of common rules. Moreover it provides the necessary machinery to move away from the inherent preference for the lex fori, which any judicially administered system of domestic Conflict of Laws seems to reflect. Its modern organization as an assembly of legal experts and government officials from countries with a wide range of legal traditions suggests that degree of limited altruism which will ensure the development of the most fair and equal rules for the citizens of all participant States. From New Zealand's point of view, the work of the Hague Conference has become much more approachable with the increasing participation of Common Law and Commonwealth member countries. This ensures that Common Law problems and Common Law conceptions of justice are put into the mix in the development of uniform rules.

The direction taken in the work of the Hague Conference also reflects New Zealand's needs and interests. It has concentrated on the development of rules and procedures which are easy and practical to apply. It has paid particular attention to the improvement of international civil procedure, which is a need much evinced in New Zealand - a small

isolated country with extensive international links. Moreover it has done much work on family law problems, which is an area of the Conflict of Laws on which the New Zealand legislature has bestowed considerable attention, in the course of reforming our internal family law. Its development of improved procedures for the enforcement of maintenance and international child abduction responds more completely to needs already reflected in New Zealand legislation. Its development of uniform jurisdictional, choice of law, and recognition rules closes an open endedness in the New Zealand legislation, which looks inward at the New Zealand situation alone.

Moreover the Hague Conventionsrespond to weaknesses apparent in the current position both in New Zealand and internationally. They strike a balance between conflicting connecting factors, thus avoiding the potential problem of renvoi, which has also been dealt with expressly in some cases. As far as possible the conventions step outside the traditional concepts, opting instead for the original and flexible concept of habitual residence. The selection of specific topics allows all the problems which could potentially arise therein to be discussed and dealt with. The confusion and obscurity, which still surround much of the Conflict of Laws, and in nowhere more so than in New Zealand, are replaced by clear and codified rules. Even if they need be applied only seldom, as may be the case in small jurisdictions like New Zealand, their adoption worldwide provides a common body of experience in their application and interpretation. The problems of State sovereignty and lack of political will, which militated against national codification of conflicts law are more easily dealt with on an international plane, where each country lays down its sovereignty at least to the extent of participating in the conference and where the conference itself keeps conflicts problems under review. The conference provides a response too

to the weaknesses of forum shopping and forum evasion. Uniform choice of law rules and efficient international civil procedure limit the value of forum shopping. Increasing universality in the service of process and the enforcement of judgments limits the possibilities for forum evasion.

The actual practice, then, of the Hague Conference promotes the principles to which the Conflict of Laws is devoted. The connecting factor of habitual residence promotes liberty of action to the extent that it reflects a persons true living habits, rather than tying him artificially to some legal order. Uniform choice of law rules and benevolent rules for the recognition of foreign marriages and divorces favour the reasonable expectation of the parties as well as equality of treatment, regardless of the mere court before which one happens to appear.

Finally, and nowhere is this more important than in family law, the Hague Conference is aimed at the selection of value free procedural rules which determine the application of substantive rules. While this has been done on the basis of a balance between the interests of the States and individuals, the result is to maintain a clear distinction between the role of the Conflict of Laws and the application of substantive law and to minimize the judicial tendency to blur the two.

For all these reasons New Zealand's participation at the Hague Conference is essential for the necessary reform of our conflicts process. It remains to outline the most appropriate means for implementing such participation.

2. *Implementation*

The comparatively haphazard and limited nature of New Zealand's attempts at international co-operation so far suggests that a piecemeal consideration of Hague Conventions as they appear to respond to needs of which the legislature is made aware may be inappropriate. The area after all commands only limited political interest. What New Zealand needs is a regular channel to ensure regular consideration of all developments at the Hague. Moreover New Zealand's original reform achievement, which I have detailed in family law, could provide a necessary and valuable input into deliberations. Nevertheless, actual membership seems a somewhat remote option. Although the conference has only regular sessions every four years, which are short and in english as well as french, the expense and the expertise involved may be seen as too great for a branch of the law which is remote from the exigencies of government. What New Zealand needs to do to find a means of implementation which best reflects the existing New Zealand position and which can capitalize on existing processes. The international initiatives which we have taken so far reflect a strong Commonwealth and Australasian bias. My proposals are to put such organizations in which we already participate in these spheres, to use on the wider international plane.

3. *Reform through the Commonwealth and Australasia*

In February 1983 law ministers from all over the Commonwealth met in Sri Lanka. "The central theme of their deliberations was the exploration of ways and means to extend and enhance their already

high level of mutual legal co-operation for the benefit of the people they served."[197] This was only the most recent in a number of such meetings which have been held in different parts of the Commonwealth since 1965. The foundation in 1969 of a legal division of the Commonwealth Secretariat now headed by New Zealander Jeremy Pope, has lead to a remarkable partnership for planning, decision-making and implementation of law reform within member States. The meetings of ministers are used to consider reports prepared through the Secretariat and to decide on what future action is necessary. Of course a wide range of issues of common interest are discussed, and naturally co-operation within the field of private international law, an area well within the bounds of the Commonwealth legal tradition, has figured in discussions. So for instance, at their 1973 meeting law ministers discussed inter-Commonwealth legal relations in the field of execution of judgments and requested the combination of a background report by the Secretariat preparatory to a Commonwealth scheme. The presentation of that detailed report to the 1977 meeting in Winnepeg occasioned the following response in the communique:[198]

> Ministers felt that the legal heritage of the Commonwealth made it both practical and justifiable for its independent members to continue special procedures and rules in their relationships inter se which might differ from those ordinarily in force between sovereign states. These special arrangements fashioned for intra-Commonwealth co-operation did not preclude adherence to more universally applicable rules; nor did they prevent non-Commonwealth participation. They were conscious of the need to develop these rules in a way compatible both with activity in the international sphere and with existing obligations of Commonwealth countries. They suggested that arrangements should be kept under regular review so that they are brought up to date and improved, and where practicable extended for the benefit of all the peoples of the Commonwealth. They were also conscious of the potential for the Commonwealth to use its collective influence in other bodies such as the Hague Conference and Unidroit so as to take a lead in developing private international law to the benefit of the world community.... Ministers recommended that the Commonwealth Secretary-General explore with the Hague Conference on Private

> International Law the possibility of his keeping those Commonwealth governments who are not members of the conference fully informed of developments there and, by providing the Hague Conference with details of relevant activity within the Commonwealth assisting the conference in its endeavours.

It will be immediately appreciated that the commonwealth law ministers had thus set about creating the very kind of channel which would allow both for use of Hague Conventions and participation in its deliberations from a Common Law perspective, which I have submitted New Zealand needs. The Secretariat responded in a multi-faceted way. They concluded observer status with both the Hague Conference on private international law and Unidroit in Rome. Their influence in the development of the convention on international child abduction and the forthcoming convention on trusts has already been noted. Although the legal division of the Secretariat itself only consists of five professionals, it is able to marshall a much larger group of experts from Commonwealth countries.

The publication of the report by Professors McClean and Patchett of *The Recognition and Enforcement of Judgments and Orders and the Service of Process within the Commonwealth* was followed by up by three regional meetings held in St. Kitts (April 1978),[199] Western Samoa (April 1979)[200] and Kenya (January 1980).[201] This latter meeting enjoyed the participation of Georges Droz, Secretary-General of the Hague Conference. All of the meetings stressed the importance of the work of the Hague Conference and the desirability of making greater use of its conventions through the medium of the Secretariat. The meeting in Western Samoa, at which New Zealand was represented, saw particular virtue in using the channel of the Commonwealth Secretariat for smaller jurisdictions.[202]

> It saw a most necessary role for the Secretariat in making inputs to the Hague Conference on behalf of those who were not members, and particularly of those whose resources not only precluded them from applying for membership but were already gravely stretched by other essential international legal activity. Participants were alive to the fact that as the membership at the Hague tended to comprise large States with highly developed legal structures, there was a danger that solutions might be developed which could only be accommodated by these sophisticated structures and so preclude adherence by smaller, less well endowed, jurisdictions. There was a special role for the Commonwealth Secretariat to play in countering any such developments. The subject matter under consideration at the Hague, too, was often highly specialized and complex, and it was generally unrealistic to expect diplomatic personnel accredited to the Netherlands, or to nearby States, to have the necessary expertise to be able effectively to represent the interests of States in the expert discussions.

As a means of awakening Commonwealth members to the opportunities afforded for reform by the work of the Hague Conference, these meetings were doubtless indispensable. However the Secretariat attempted to go further than this in arguing for the adoption of Hague Conventions on a Commonwealth wide basis. In their original report, Professors Patchett and McClean had noted that "Commonwealth members have played a disappointingly small part in the work of the Hague Conference."[203] In an effort to improve this, the Secretariat has begun the practice of publishing explanatory documentation on the Hague Conventions. The first one which was available for consideration in Western Samoa, concerned the Hague Conventions on the service of process, the taking of evidence and legalization. The work includes a text of the conventions, a commentary on the text and operation of the conventions, guidance as to decisions acquired prior to accession, and guidance as to possible legislation. The attempt then was to provide all that was necessary for Commonwealth jurisdictions to acceed to these conventions and to translate them into domestic law. The Secretariat report to the 1980 meeting of ministers in Barbados urged Commonwealth wide accession.[204]

Since April 1980 the Secretariat has followed up this initial step

with five "accession kits":

1. The Hague Convention on International Access to Justice.
2. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.
3. International conventions concerning applications for and awards of maintenance.
4. International conventions in the field of succession.
5. The Hague Convention on the Civil Aspects of International Child Abduction.

Although the initial catalyst for the production of these accession kits was work on the recognition and enforcement of foreign judgments, the kits now extend into many other areas of private international law. While the coverage is by no means complete as yet, family law subjects are well represented. It seems likely that the draft model bills included in these kits could be used as the basis for implementation in New Zealand. This is particularly so as New Zealand reform initiatives have been taken into account in the preparation of the bills. It should not be forgotten also, that the United Kingdom has now ratified seven Hague Conventions and its domestic legislation, while not necessarily satisfactory or appropriate, provides an additional model for New Zealand work. Perhaps more significant is the United Kingdom experience in the administration and benefits of the conventions, which can help New Zealand in fitting this international work into a Common Law framework.

The most recent report of the Secretariat to the Commonwealth law ministers meeting at Sri Lanka in February 1983 notes that the work of Patchett and McClean on judicial assistance was adopted as a foundation for a law reform report on the topic prepared by the Law Reform Commission of Western Australia

at the request of the Standing Committee of Federal and State Attorneys-General. This body, which has already provided for Australasian reforms in the law of domicile and the parental kidnapping of children, could provide a second link in the chain from New Zealand to the Hague. Australia has been a member of the Hague Conference since 1973 and although it has only signed one convention as yet, does contribute significantly to a Common Law perspective on Hague proceedings. The Standing Committee of Attorneys-General, which has laid particular emphasis on the development of uniform laws and on improving civil procedures, seems destined to encourage greater interest in the work of the Hague Conference. Finally, New Zealand has developed a close working relationship with the Standing Committee. Officials in the Law Reform Division of the Department of Justice, have already had cause to consider many of the Hague Conventions. By linking up with the Standing Committee of Attorneys-General, and with the work of the Commonwealth Secretariat and of the meetings of the Commonwealth Law Ministers, New Zealand could set in motion a truly international process for the reform of its Conflict of Laws.

4. A Case-studyof Implementation: International Child abuduction

In order to illustrate how the proposed process could operate in the implementation of a specific Hague convention, and to outline some of the potential advantages, The Hague Convention on the Civil Aspects of International Child Abduction 1980 [206] will be briefly examined. Choice of this convention is particularly apposite because it is currently under consideration by the New Zealand government.

The Convention arose from increasing world-wide concern at the problems of parental kidnapping of children. [207] Conventional judicial responses were manifestly inadequate. In New Zealand overseas custody

orders were unenforceable, because they were neither final, conclusive nor for a fixed pecuniary sum. Judicial redetermination of the issue meant that the abducting parent had everything to gain and nothing to lose by removing children to another jurisdiction. Thus the judicial response positively encouraged forum shopping by acting ostensibly in the best interests of the children, but implicitly favouring the domestic conception of that. While various states and regional organizations had been developing new processes to deal with the problem, it was Canada that first brought the matter to the attention of the Commonwealth Law Ministers, presenting a report to their 1977 meeting at Winnipeg.[208] It was Canada also that had proposed in 1976 placing the matter on the agenda at the Hague Conference.[209] That proposal resulted in the development of the Convention which was adopted at the 1980 session of the Conference. The Convention had been prepared in meetings of a Special Commission, and drafted by a committee chaired by the Canadian H. Allen Leal. On the eve of the Plenary Session the Commonwealth Secretariat had convened a caucus of Commonwealth members to discuss a common approach. The Convention thus adopted had considerable Commonwealth Common Law input. This had been sanctioned by the Commonwealth Law Ministers, meeting in April 1980 at Barbados:[210]

> Prompt and concerted collective action was regarded as essential, and it was of great importance that any arrangements should include non-Commonwealth, as well as Commonwealth jurisdictions. The Meeting welcomes the fact that the matter is to be considered by The Hague Conference on Private International Law in October this year. A number of Governments were convinced that the present Draft Hague Convention on the topic, with jurisdiction based on the "habitual residence" of the child, was an appropriate response to the problem. The meeting expressed the sincere hope that the deliberations at The Hague would be successful, and that a large number of countries would accede to any resulting Convention as a matter of priority. The meeting was anxious to ensure that the Hague Conference was made aware of views held in various Commonwealth countries. Ministers asked the Commonwealth Secretary-General to undertake the necessary consultations, and to arrange a meeting of the Commonwealth countries who will be represented

> at the Hague to explore the possibility of their adopting a common approach. They also expressed the hope that the Secretariat, in its capacity as an accredited "observer", would be able to be represented at the relevant sessions, so that the views of other Commonwealth Governments could be made known.

What are the salient features of the Convention thus developed? The axiomatic feature appears from the preamble that in protecting the interests of children as of paramount importance, the Convention establishes procedures to ensure their prompt return to the country of their habitual residence. The Convention is thus committed to a view on the best interests of children which aims to preserve settled development, a view which is supported by most research on the subject. It also emphasises a *procedural* solution. Of what does this consist?

Each Contracting State is to designate a Central Authority, a device used in many of the Hague Conference's procedural conventions.[211] This authority will co-ordinate the administration of the Convention. Any person claiming that a child has been removed in breach of custody rights may apply to any Central Authority for assistance in securing the return of the child.[212] The application, which may follow a standard form, is to contain the information needed to establish the custodian's claim and to aid the Central Authority in finding the child.[213] The Central Authority will then set in motion judicial or administrative proceedings for the return of the child. A premium is placed on time. In general determinations should be made within six weeks of request.[214] Moreover, if the judicial or administrative authority entertains the application within one year of the removal, it is bound to order the return of the child except in closely defined exceptional circumstances.[215] It is not to determine the issue on its merits, it is simply to return the child to the country wherein it is habitually resident. Any further issue as to custody is to be determined there. Judicial intervention is thus avoided.

It will be appreciated that this kind of response could only have been developed internationally. It relies on a suspension of domestic jurisdiction in favour of a wider conception of justice for the child, and its custodian. It leaves domestic laws as to custody untouched, providing simply a procedure for the trans-national case.[216]

> ...family law in particular reflects different cultural patterns and, if the Convention is to operate successfully, there must be mutual respect among States for these differences. The child's future should normally be determined according to the cultural practices of the place of his habitual residence.

The fact that the Convention has been developed and adopted by international agreement surely strengthens the chances of this. Finally the Convention establishes a common set of procedures and organizations for contracting States. The uniform procedure ensures a reliable, consistent and rapid response where necessary.

As yet seven States have signed it, but there are a variety of moves within the Commonwealth towards greater acceptance. The Scottish Courts Administration has prepared a consultation paper for adoption in the United Kingdom.[217] In New Zealand the Law Reform Division of the Department of Justice is canvassing views and undertaking research. The Commonwealth Secretariat has produced an accession kit,[218] prepared by Mr. J.M. Eekelaar, containing a summary of the effect of the Convention and a draft bill for its adoption in Commonwealth jursidictions.

New Zealand has of course paid considerable recent legislative attention to the problem, in consultation with the Standing Committee of Federal and State Attorneys-General, resulting in the Guardianship Amendment Act 1980. The scheme is however limited in territorial scope. Moreover, despite its strong presumption in favour of return following the registration of

the overseas custody order, the judicial response has been interventionist: exercising jurisdiction to the extent that the intention of the amendment has been undermined.[219]

This inherent disposition to favour the exercise of domestic jurisdiction is reflected in the submissions made by the New Zealand Law Society to the Secretary for Justice.[220] The Soceity's interpretation favours judicial intervention as the best measure the protection of the interests of the child. To this end it recommends that 'the New Zealand courts should have an overriding discretion as to whether or not to order return having regard to the best interests of the child.'[221] In particular the domestic conception of justice and the locally developed scheme receive preference. New Zealand citizens who abudct children are to be entitled to redetermination by the New Zealand court.

These submissions gravely undermine the policy of the Convention. Theywould change a mechanism designed to avoid judicial intervention into a judicial determination based upon domestic conceptions of the just solution, which inherently favour the abductor, but not necessarily the child.

How might reform in New Zealand be implemented?

1. It should begin with discussion at the Standing Committee of Federal and State Attorneys-General. Australia is a member of the Hague Conference and participated in discussions on the Convention. The existing trans-tasman scheme ought to be overhauled to prevent a multiplicity of procedures.

2. The Convention may be acceeded to by depositing the instrument of

accession with the Ministry of Foreign Affairs at the Netherlands. It will enter into force three months from that time, but will only have effect as between those Contracting States as declare their acceptance of the accession. [222]

3. The Convention must be translated into domestic legislation to take effect in New Zealand courts. The Secretariat's draft model bill could provide a drafting precedent here, but the final form should be enacted as an amendment to the Guardianship Act 1968. New Zealand possesses a singular advantage here, having none of the hurdles which a federal system places in the way of implementing international obligations.

4. The Guardianship Act is peculiarly compatible with the Convention. The Act draws a distinction between rights of 'custody' and 'guardianship'. [223] 'Custody' refers only to the right to possession and care of a child. Similarly the Convention refers to 'rights of custody' as including 'rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence.' [224] Secondly the jurisdiction of the New Zealand court is already founded on the child, although it does run wider than the Convention's concept of 'habitual residence', to include mere presence or domicile. [225] The personal application of the Convention expires when the child reaches 16 years, as does the Act in all but special circumstances. [226] Both documents embody the same principle, making the welfare of the child paramount, and both allow that, in trans-national custody disputes, return of child will ordinarily best promote its welfare. [227] Finally, although the two schemes are not identical, New Zealand does already have, in its trans-tasman scheme, a system for forwarding, through the Department of Justice

to the courts, orders for the return of the children.[228]

5. We would be required to designate a Central Authority. The obvious choice here would be the Department of Justice. The Law Society's recommendation of the Family Court shows a misconception about the Convention. The decision to return the child would still be made by the Family Court, but the co-ordinating agency for applications can only be a Department of State. Moreover the Justice Department has already been entertaining this kind of work under the 1980 Amendment. However, as Eekelaar points out,[229] particular functions of the Central Authority could be farmed out. So, for example, the discovery of the child could be delegated to the Police.[230] Prevention of harm to the child could be undertaken by the Department of Social Welfare.[231] Section 30 Guardianship Act empowers the court to appoint a barrister or solicitor to assist the court or to represent any child who is the subject of proceedings. The duties of counsel for the child are outlined in a Family Court Practice Note.[232] They include an investigative and mediation role, as well as representation at any hearing. This innovation is thus well tuned to fulfill the roles of amicable resolution and the participation of legal counsel designated by the Convention.[233] Martin's suggestion that the whole process should be overseen by a 'kidnap task force'[234] has some attraction, though the co-ordination of the various tasks necessitated under the Convention would seem to be the raison d'etre of a Central Authority. Thus a nominated officer in the Justice Department could be made responsible for the smooth working of the system.

The Convention thus secures benefits for New Zealand in dealing with a problem which does indeed beset New Zealand, both in practical and legal terms. Implementation of the Convention would be compatible with

both the principles and the specific rules in the New Zealand legislation. Reference to the work of the Commonwealth Secretariat and consultation with the Australian Standing Committee would facilitate an easier path to reform, and one more compatible with the trans-national nature of the subject.

5. *Conclusion: the need for internationalisation*

The foregoing case-study is simply illustrative of the basic themes developed in this paper. The problems faced by individual litigants involved in trans-national disputes cannot be solved by the work of domestic courts alone. The necessary administrative machinery and internationalist outlook can only be established by international agreement.

At the outset the paper was expressed to be a search for a just process for reform. Such a process can only be one which reflects both the nature of the subject and all the interests involved. Private International Law, being the subject which would develop were the myriad of domestic systems of the Conflict of Laws to become unified, is *inherently* devoted to supra-national questions. As such its development from purely domestic law reform is inherently flawed. Domestic legal systems are committed to their own legal solutions and to their own conceptions of justice. Of course these must be considered in the formulation of international solutions, but the singular virtue of the conflicts method is that it potentially leaves domestic substantive law untouched, simply providing procedural rules to determine the sphere of application of each domestic system. In terms of a process for reform this means that there must be a 'reflective equilbrium'[235] between domestic conceptions of justice and the wider principles motivating Private International Law - a balance to be struck

anew in each particular subject area. The Hague Conference, by its very nature, provides an opportunity for this. Once the balance has been struck, the international codification process tends towards the development of uinform and certain rules, unamenable to variation by the exercise of judicial discretion in member States. This goal of a regular, uniform procedure for the determination of trans-national disputes is not to be shirked lightly, in view of the support which it lends both to the operation of domestic systems and to the conduct of affairs internationally by private individuals.

An examination of the trans-national dimension of family law throws these themes into high relief. Here is an area where real individuals rely on international legal co-operation. Here, too, is an area where the conflicts method is particularly appropriate. As an examination of New Zealand law shows, family law continues to reflect the distinctive patterns and preoccupations of a particular society. Such a conception of justice is to be preserved, and the conflicts method ensures that the diversity of family law solutions world-wide can continue to co-exist, while simply determining the proper sphere of operation of each and the greatest efficacy of each. The inherent weaknesses of the present system in New Zealand are also thrown into high relief over family issues. The legislation emphasises jurisdictional solutions over choice of law and provides but patchy recognition and enforcement of foreign orders and judgments. The judicial approach tends to reflect the attitudes of the lex fori over any wider interests.

The New Zealand experience is instructive too in a positive way. At least as regards family law, the problem of the case with foreign elements is not to be pushed to one side. Cases do arise frequently, as is only to be expected in a country with a highly mobile population.

Furthermore, the legislature has not been blind to these issues. They are contemplated in all the major family law statutes. Recently New Zealand has been taking the lead in international initiatives for reform.

All of this suggests that the logical and necessary next step is to set in motion a process for the conscious and thorough-going reform of our Conflict of Laws. The natural and obvious forum for this is the Hague Conference, and, as outlined, participation at the Hague is merely an extension of the process which has already been used for reform by New Zealand in this area, namely the Australian Standing Committee and the Commonwealth. New Zealand has a considerable amount to gain, and a considerable amount to contribute to international unification.

To echo Livermore's words,[236] the labour of this paper will not have been in vain if it excites a spirit of inquiry into a solution but little considered to the various difficult questions growing out of the contrariety of laws,[237] and leads to discussions towards internationalising the reform of New Zealand's Conflict of Laws by those more capable of accomplishing the object desired.

1. Quoted in Cavers, D.F. *The Choice-of-Law Process* Ann Arbor, The University of Michigan Press, 1965, 291.

2. The term 'Conflict of Laws' is adopted throughout this paper, in part because it is sanctioned by Common Law usage (see e.g. Dicey and Morris *The Conflict of Laws* 10th edition, London, Stevens, 1980) but in part also because it indicates the essential problems with the subject. As Jackson comments 'possible conflict is one aspect of a process which provides criteria for selection of domestic jurisdictions and rules' (Jackson, D.C. *The "Conflicts" Process* Dobbs Ferry, Oceana, 1975,iii). As the present development has been mainly derived from domestic law, the term 'Private International Law' seems more of a hope for the future (but cf. Cheshire and North *Private International Law* 10th ed, London, Butterworths, 1979, 12-14).

3. See for example Cheshire, G.C. 'Plea for a Wider Study of Private International Law' (1947) 1 ILQ 14; and Rabel, Ernst *The Conflict of Laws A Comparative Study* 2nd edition, Ann Arbor, University of Michigan Law School, 1958, Chapter 3 (wherein the expression 'internationalization' is adopted, 103).

4. See Inglis' criticisms of this in his *Conflict of Laws* Wellington, Sweet and Maxwell, 1959, Chapter 1.

5. The theme of 'process' is developed more fully by Cavers supra note 1 and Jackson supra note 2.

6. See Shapira, G. 'N.Z. Accident Compensation and the Foreign Plaintiff: Some Conflict of Laws Problems' (1980) 12 *Ottawa Law Review* 413.

7. The impact of international conventions on private law generally in New Zealand is beyond the scope of this paper, but for a general review of work being done in this area see David, R. 'The International Unification of Private Law' (1971) II 5 *International Encyclopedia of Comparative Law*.

8. See Cheshire and North supra note 2, 7.

9. [1975] A.C. 591.

10. Ibid 618.

11. (1964) 48 D.L.R. (2d) 644.

12. Ibid 649.

13. [1963] 2 *Lloyd's Reports* 286; 12 NY 2d 473.

14. See for example North, P.M. 'Development of Rules of Private International Law in the Field of Family Law' (1980) 166 *Recueil des Cours* 31.

15. Currie, B. *Selected Essays on the Conflict of Laws* 1963, and refer (1983) 34 *Mercer Law Review* which contains a symposium on the Conflict of Laws dedicated to the memory of Brainerd Currie; Cavers supra note 1, and refer (1977) 41 *Law and Contemporary Problems* which contains 'Contemporary Perspectives in Conflict of Laws: Essays in Honor of David F. Cavers'.

16. *Restatement (Second) of Conflict of Laws (1971)* and refer article by its reporter Willis Reese 'The Second Restatement of Conflict of Laws

Revisited' (1983) 34 *Mercer Law Review 501*.

17. Dicey, A.V. *Conflict of Laws* 1st ed., London, Stevens, 1896, 10. quoted in Graveson, R.H. 'Philosophical Aspects of the English Conflict of Laws' in *Comparative Conflict of Laws Selected Essays* Volume 1, Amsterdam, North-Holland Publishing 1977, 21.

18. R.H. Graveson 'Philosophical Aspects of the English Conflict of Laws' (1962) 78 L.Q.R. 337. Reprinted as Chapter 2 of *Comparative Conflict of Laws Selected Essays, Volume 1* Amsterdam, North-Holland Publishing Company, 1977, page 14.

19. John Rawls *A Theory of Justice*, Cambridge, The Belknap Press of Harvard University Press, 1971.

20. *R v International Trustee for the Protection of Bondholders* [1937] A.C. 500, 529 per Lord Atkin.

21. Rawls supra note 19 at page 235.

22. Graveson supra note 18 at page 38.

23. Rabel supra note 3 at page 94.

24. (1869) L.R. 1 H L (Sc & D) 441, 452.

25. Supra at page 5.

26. The House of Lords discuss this conflict in *MacShannon v. Rockware Glass Ltd* [1978] A.C. 795.

27. Inglis supra note 4 at page 10.

28. [1975] A.C. 591.

29. Inglis supra note 4 at page 19.

30. [1978] A.C. 795.

31. *Fremoult v. Dedire* (1718) 1 P. Wms 429; *Nelson v Bridport* (1845) 8 Beau. 527.

32. Supra pages 8 - 9.

33. Supra note 7 at pages 27 - 30.

34. Dicey and Morris supra note 2, 439 - 443; 1092 - 1098.

35. For New Zealand s 23 Guardianship Act 1968. But see also sub-s (3).

36. Martin, D. *Parental Kidnapping of Children: Domestic Comparative and International Responses* unpublished research paper, V.U.W., 1982, 8.

37. Prosser *Selected Topics on the Law of Torts* (1953) 89, quoted in Inglis supra note 4 at page 3.

38. [1947] Ch 506, 515.

39. [1971] A.C. 356. As Jackson comments (supra note 2 at page 363) 'This decision of the House of Lords represents, perhaps, the lost opportunity of the greatest magnitude.' For New Zealand see *Richards v McLean*

[1973] 1 N.Z.L.R. 521, and the analysis by Brown 'Jurisdiction and Choice of Law in Tort' (1976) 8 V.U.W.L.R. 267.

40. Supra note 2 at page 36.

41. Supra note 2 at page 45.

42. Article 3:

- The laws of police and security bind all those persons who are present within the territory of the State.

- Immovables, even if possessed by aliens, are subject to French law.

- Laws which concern the status and capacity of persons apply to all French citizens even when abroad.

43. See generally Alexander N. Makarov 'Sources' (1972) III 2 *International Encyclopedia of Comparative Law* 5.

44. Friedrich K. Juenger 'The Conflicts Statute of the German Democratic Republic: An Introduction and Translation' (1977) 25 A.J.C.L. 332, 336.

45. The Horei or Law Concerning the Application of Laws 1898. An english translation of this code, and some commentary on it may be found in Enrenzweig, Ikehara and Jensen *American-Japanese Private International Law* New York, Oceana, 1969.

46. See for example the East German code discussed supra note 44.

47. Supra note 7 at page 37.

48. Supra note 2 at pages 97, 102.

49. At page 9, cited supra note 19.

50. Cavers supra note 1 at pages 130 - 131.

51. Graveson, R.H. 'The Special Character of English Private International Law' (1971) 18 N.I.L.R. 31, reprinted as Chapter 1 of *Comparative Conflict of Law Selected Essays* Amsterdam, North-Holland Publishing Co, 1977, Volume 1, page 6.

52. Ibid page 7.

53. Dicey and Morris, supra note 2, Preface ix.

54. See Sim and Cain *The Practice of the Supreme Court and Court of Appeal of New Zealand* 12th ed, Wellington, Butterworths, 1978.

55. See McClean, J.D. and K.W. Patchett *The Recognition and Enforcement of Judgments and Orders and the Service of Process within the Commonwealth* London, Commonwealth Secretariat, 1977, Chapter 8.

56. Although the draft code is not yet public, I have been privileged to see a copy. For information on the most substantial changes see 'A New Code of Civil Procedure' [1978] N.Z.L.J. 431; and Webb, P.R.H. 'Service out of the New Zealand Jurisdiction without leave: the Old Order Changeth' *Multum non Multa Festschrift fur Kurt Lipstein,* Heidelberg, C.F. Muller Juristicher Verlag, 1980, 355.

57. See Webb, P.R.H. 'Heaven Help the Overseas Conflict Lawyers' [1979] N.Z.L.J. 442.

58. See for example the Accident Compensation Act 1972, discussed by Shapira supra note 6.

59. As McClean and Patchett (supra note 55, at page 191) comment:

> A plaintiff in one Commonwealth country wishing to bring an action against a defendant resident in another Commonwealth country is left very much to his own initiative in the matter of service of process. In practice his solicitor will try to effect service through agents in the defendant's country, and an order for substituted service may be sought if personal service proves impracticable. This system, if it can be so described, works, but it is remarkable that little provision is made for simple modes of service such as service by post, and that intra Commonwealth service is generally excluded from the official channels for service provided in many countries.

60. See Graveson, R.H. 'The Judicial Unification of Private International Law', reprinted as Chapter 4 of *Comparative Conflict of Laws Selected Essays*, Amsterdam, North-Holland Publishing Co, 1977, Volume 1, page 66.

61. [1938] A.C. 224.

62. Supra note 55 at page 18.

63. Reciprocal Enforcement of Judgments Act 1934 s 3(2).

64. For a brief history and outline see N.H. Bowen 'The Work of the Standing Committee of Attorneys-General' (1971) 45 A.L.J. 489.

65. See the report from the Senate Standing Committee on Constitutional and Legal Affairs *Reforming the Law* Canberra, Australian Government Publishing Service, 1979.

66. Supra note 51 at page 8.

67. [1973] 1 N.Z.L.R. 521.

68. Ibid 526.

69. Ibid 528.

70. [1964] N.Z.L.R. 393.

71. [1969] N.Z.L.R. 46.

72. [1977] 2 N.Z.L.R. 113.

73. Supra note 70 at page 395.

74. See Webb supra note 56.

75. [1977] 2 N.Z.L.R. 4. But compare the approach taken in *James Meikle Pty Ltd v. Noakes* (1983) Unreported, Auckland Registry, A823/80, where Prichard J. held 'that to succeed on this ground the judgment debtor is not necessarily required to show a prima facie case of fraud - the whole circumstances must be looked at and if the Court is then left with a feeling of uneasiness as to the manner in which, or the evidence on which, judgment in the original Court was obtained, this is sufficient to call for a direction that an issue be tried under R. 23(2) of the Reciprocal Enforcement of Judgments Rules 1935. I have no such qualms in the present case.'

76. (1982) Unreported, Auckland Registry, M156/80, discussed in Martin supra note 36. But it may be that the New Zealand Court of Appeal is moving towards the view that immediate return to the jurisdiction of the custodial parent may be in the child's best interests: *L v L* (1979) Unreported, Wellington Registry, CA 68/79, discussed in Martin supra note 36 at pages 34 - 7.

77. Supra note 36 at page 88.

78. *Sussex Peerage Case* (1844) 11 Cl. & F 85; *Ajami v Comptroller of Customs* [1954] 1 W.L.R. 1405.

79. [1935] N.Z.L.R. 90.

80. (1977) Unreported, Hamilton Registry, A 202/73; noted in [1977] Recent Law 293.

81. (1982) 1 N.Z.F.L.R. 413.

82. [1971] N.Z.L.R. 143.

83. [1978] 1 N.Z.L.R. 385.

84. Ibid 392.

85. [1973] Fam 35, which advocated the doctrine that where parties were domiciled in different countries before marriage, their capacity to enter into a polygamous marriage was governed by the law of the intended matrimonial domicile, is distinguishable from *Hassan* anyway because, although the evidence as to intentions is conflicting, the partie settled first in New Zealand, so the same restrictions would continue to apply. And see criticism of *Radwan* by Cheshire and North, supra note 2 at pages 349 - 350.

86. *Family Law Service* (New Zealand), Wellington, Butterworths (hereinafter cited as N.Z.F.L.S.) 1114 - 1115.

87. Atkin comments ((1982) 2 no. 1 *Oxford Journal of Legal Studies* 146) 'The 1980 session of the New Zealand Parliament saw the passage of perhaps the most substantial package of family law legislation in the country's history.' It consisted of:

    (i) Family Proceedings Act 1980.

    (ii) Family Courts Act 1980.

    (iii) Guardianship Amendment Act 1980 (overseas custody orders).

    (iv) Social Security Amendment Act 1980 (liable parent contribution scheme).

    For a preliminary discussion of this legislation see Webb, P.R.H. and J.G. Adams *Family Law 1981* Auckland, A , 1981.

    For some discussion of the antecedent philosophy see: Report of the Royal Commission on the Courts (1978); Atkin, W.R. 'Spousal Maintenance: A New Philosophy?' (1981) 9 N.Z.U.L.R. 336;

    Angelo and Atkin 'A Conceptual and Structural Overview of the Matrimonial Property Act 1976' (1977) 7 N.Z.U.L.R. 237.

The selection of statutes has been based on their impact in the conflicts field, and follows this order:

(i) Marriage Act 1955;

(ii) Family Proceedings Act 1980;

(iii) Guardianship Act 1968;

(iv) Status of Children Act 1969;

(v) Adoption Act 1955;

(vi) Domicile Act 1976.

88. See Angelo and Atkin ibid; N.Z.F.L.S. 7001-2.

89. Cavers supra note 1 at page 117.

90. Ibid 116; and refer North supra note 14 at pages 46 - 49.

91. This discussion is drawn principally from an evaluation of:

Morris, J.H.C. 'Statutes in the Conflict of Law' *Multum non Julta Festschrift fur Kurt Lipstein* Heidelberg, C.F. Muller Juristicher Verlag, 1980, 187, reprinted in Dicey and Morris,supra note 2 pages 14-23

Mann,F.A. 'Statutes and the Conflict of Laws' (1972-3) 46 B.Y.I.L. 117;

Lipstein, K. 'Inherent Limitations in Statutes and the Conflict of Laws' (1977) 26 I.C.L.Q. 884.

92. [1938] A.C. 224, discussed supra at page 26.

93. [1963] 2 *Lloyd's Reports* 286, 12 N.Y. 2d 473, discussed supra at pages 7 - 8.

94. [1975] A.C. 591, discu-sed supra at pages 6, 12 - 13.

95. This would depend upon whether 'For all the purposes of the law of New Zealand' is construed to control only domestic New Zealand law, or also to dictate the choice of foreign law by acting as a bar on New Zealand's conflicts rules.

96. Mann supra note 91.

97. Dicey and Morris supra note 2 at page 18.

98. These guidelines, drawn in part from Unger (1967) 83 L.Q.R. 427 draw a distinction between the statutory provision which replaces the common law choice of law rule in so far as it refers to domestic law (unilateral choice of law rule); and the provision that leaves the choice of law rule untouched and only comes into operation to determine the application of the particular statute once the common law choice of law rule has already been applied (self-limiting provision).

99. Reese (1976) 150 *Recueil des Cours* 1, 180; quoted in North supra note 14 at page 44.

100. North supra note 14 at pages 55 - 57.

101. *Martin v Martin* [1979] 1N.Z.L.R. 97, 99 per Woodhouse J.

102. [1979] 1 N.Z.L.R. 572, 580 - 3.

103. N.Z.F.L.S. 1045.

104. Family Proceedings Act 1980 s 2.

105. [1978] 1 N.Z.L.R. 385, discussed supra at pages 34 - 5.

106. (1982) 1 N.Z.F.L.R. 413.

107. [1975] 1 N.Z.L.R. 382; see also *Godfrey v Godfrey* [1976] 1 N.Z.L.R. 711.

108. S 32.

109. Ss 4, 37.

110. S 48.

111. S 3.

112. But see the following discussion of the effect of s 7.

113. Ss 2, 27; refer preceding section on jurisdiction.

114. N.Z.F.L.S. 1109 - 1119 'Marriage and the Conflict of Laws'.

115. This approach is also taken in N.Z.F.L.S. 7005 - 8.

116. (1983) Unreported, C.A. 59/82.

117. (1983) Unreported, C.A. 8.82; Cooke, Somers & Bisson JJ.

118. Domicile is of course discussed extensively in all the major texts, but a succinct history of this connecting factor and an appraisal of moves within the Commonwealth for its reform may be found in McClean, J.D. 'Reform of the Law of Domicile in Commonwealth Jurisdictions' Annex to LLM (83) 11, a paper prepared for the 1983 Meeting of Commonwealth Law Ministers. The material will be more widely available in Professor McClean's forthcoming book *The Recognition of Family Judgments in the Commonwealth*.

119. For example see the landmark House of Lords cases, on appeal from Scotland;

Bell v Kennedy (1868) L.R. 1 Sc. & Div. 307, H.L.; and,
Udny v Udny (1869) L.R. 1 Sc & Div. 4-41, H.L.

For a discussion of the modern common law principles see Dicey and Morris supra note 2 at pages 100 - 107.

120. See Dicey and Morris supra note 2 at pages 128 - 9.

121. See McClean supra note 118 at pages 10 - 13.

122. Cmnd. 9068 (1954).

123. Convention pour regler les conflits entre la loi nationale et la loi du do micile (1955).

124. See Inglis' trenchant criticisms of reform supra note 4 Chapter 4. On the reform of the derivative domicile of married women he comments: "It is a type of suffragette movement inspired not by

any pressing hardship, but by a desire for social 'justice' - a concept which it is quite impossible to define, and which is usually invoked as a last resort when no better argument is available....Family relations in the Conflict of Laws are complicated enough without misconceived ardour for reform adding further difficulties". The Secretary for Justice in 1973 (infra note 125) described Inglis' views as 'highly idiosyncratic'.

125. 'Law of Domicil - Standing Committee of Australian Attorneys-General', report of the Secretary for Justice to the Minister of Justice, 26 January 1973. Copy obtained by kind permission of Law Reform Division, Department of Justice.

126. Matrimonial Proceedings Act 1963 s 3; Guardianship Act 1968 s 22.

127. Supra pages 27 - 28.

128. Supra note 125.

129. Section 11.

130. Section 5.

131. See discussion in McClean supra note 118 at page 17.

132. Domicile Reform Act 1979 (Barbados). The two provisions not so adopted are those concerning the age at which a child can acquire an independent domicile and domicile in 'unions'.

133. N.Z.F.L.S. 1114.

140. N.Z.F.L.S. 4021 - 4039.

141. In *Indyka v Indyka* [1969] A.C. 33, the House of Lords held that a divorce could be recognized at English law if the applicant had a "real and substantial connection" with the country where the divorce was granted. This test has proved the terminus a quo for subsequent common law development.

142. [1975] 1 N.Z.L.R. 382, see supra page 50.

143. [1976] 1 N.Z.L.R. 711.

144. McClean and Patchett supra note 55 Chapter 3.

145. Minutes of the Proceedings of the Conference, Cd. 5745, quoted BY McClean and Patchett ibid 66.

146. Family Proceedings Act 1980 ss 135 - 143; 147 - 8.

147. Family Proceedings Act 1980 ss 144 - 6, 149.

148. Section 2 defines "Commonwealth country" as including

(a) The Republic of Ireland; and
(b) A territory for whose international relations the government of a country that is a member of the Commonwealth is responsible; and
(c) The Cook Islands; and
(d) Niue; and
(e) Tokelau.

The Commonwealth Countries Act 1977 defines, in its first schedule, the basic list of Commonwealth countries recognized in New Zealand.

149. Section 135.

150. The Family Proceedings (Designated Country) Notice 1981 S.R. 1981/263 recognized South Africa;
The Family Proceedings (Designated Country) Notice 1982 S.R. 1982/233 recognized California. Background information drawn from Law Reform Division, Department of Justice.

151. Section 141.

152. Section 142.

153. See McClean and Patchett supra note 55 Chapter 3, especially pages 98 - 100;
See also McClean, J.D. *International Conventions Concerning Applications for and Awards of Maintenance* London, Commonwealth Secretariat, 1981 for discussion and a draft Bill designed for Commonwealth accession, as well as the full text of the Convention.

154. Information derived from a background paper prepared by Margaret Nixon, Law Reform Division, Department of Justice, 2.7.76.

155. Family Proceedings Act 1980 s 73 sub-ss (1)(f), (2) & (3)
Status of Children Act 1969 s 8 sub-ss (5) & (6).

156. Family Proceedings Act 1980 s 2 "Maintenance order" includes:
'(iii) In Part VII of this Act, a subsisting order (including an order in or consequent on an affiliation order) for the payment by any person of a periodical sum of money towards the maintenance of a person whom the first-mentioned person is, according to the law in force in the place where the order is made, liable to maintain.'

157. But see s 23(3). These issues are dealt with more fully supra at pages 15 & 31 - 32, and see further Martin supra note 36.

158. Section 17.

159. S.R. 1967/68/2 designates Austria, Denmark, Finland, Netherlands, Norway and Sweden.

160. See especially Vitta, Edoardo 'International Conventions and National Conflict Systems' (1969) 126 *Recueil des Cours* 111, Chapters I and II, but see also: David supra note 7 and Makarov supra note 43.

161. For a detailed account of Latin American development see Parra-Aranguren, Gonzalo 'Recent Developments of Conflict of Laws Conventions in Latin America' (1979) 164 *Recueil des Cours* 55, but see also Vitta, David and Makavov ibid.

162. Dr. Antonio de Bustamante y Sirven, quoted in Parra-Aranguren ibid 73.

163. Discussed by Parra-Aranguren ibid Chapters IV & V.

164. Fletcher, Ian F. *Conflicts of Laws and European Community Law* (Problems in Private International Law 3), Amsterdam, North-Holland Publishing Company, 1982, 274. This work contains a comprehensive discussion of work within the E.E.C. on uniform Conflict of Laws.

165. See David supra note 7 at pages 185 - 8, and Vitta supra note 160 at pages 152 - 5.

166. See, for example, the East German code discussed by Juenger supra note 44.

167. See Vitta supra note 160 at pages 157 - 8.

168. See David supra note 7 at pages 198 - 200.

169. See Reese supra note 16 at page 508.

170. See for example Cavers supra note 1 at pages 69 - 72; Reese attempts to answer these criticisms supra note 16 at pages 508 - 519.

171. See David supra note 7 at pages 130 - 2; and also Patchett, K.W. *The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,* explanatory documentation prepared for Commonwealth Jurisdictions, London, Commonwealth Secretariat, 1981, which contains the text of the Convention, an assessment of it, and a draft Bill for its adoption by Commonwealth States.

172. Supra pages 65-6 and references cited therein.

173. For the early history of the Hague Conferences see David supra note 7 at page 141; and Vitta supra note 160 at page 133.

174. See Van Hoogstraten, M.H. 'The United Kingdom joins an Uncommon Market: the Hague Conference on Private International Law' (1963) 12 I.C.L.Q. 148.

175. The literature on the modern work of the Hague Conference is vast and multilingual. The Permanent Bureau has produced a *Bibliography relating to the work of the Conference* (1945-1978) La Haye, Imprimerie Nationale, 1978, which provides a complete key to the publications of the Conference itself and to academic writings on it.
The Conventions themselves are contained in *Conference de la Haye de Droit International Prive Recveil des Conventions (1951-1977)* La Haye, Martinus Nijhoff, 1977 (hereinafter cited as *Recueil*.
The fate of the Conventions in the courts is detailed in T.M.C. Asser Institut *Les nouvelles Conventions de La Haye: leur application par les juges nationaux* Tome I, Leyden, Sijthoff, 1976; Tome II, Alphen aan den Rijn, Sijthoff Cv Noordhoff/anvers, Maarten Kluwer, 1980.
The proceedings of the Hague conference are published in a peries of volumes entitled *Actes et documents de la Conference de La Haye de droit international prive* (these are not available in New Zealand).
A complete table of signatures and ratifications of the Hague Convention is published as of the first of March of each year in the first issue of the *Revue Critique de droit international prive,* and as of the first September in Issue 4 of the *Netherlands International Law Review*. The most up-to-date table available ((1982) 29 N.I.L.R. 277) is reproduced as Appendix 1 of this paper.

176. Statute de la Conference de La Haye de Droit International Prive (1955) *Recueil 1*.

177. 1. Convention on the Conflicts of Law relating to the Form of Testamentary Dispositions 1961, given effect in the Wills Act 1963 (U.K.);
2. Convention abolishing the Requirement of Legislation for Foreign Public Documents 1961 (no legislation required);
3. Convention on Jurisdiction, Applicable Law and Recognition of

Decrees relating to Adoptions 1965, given effect in the Adoption Act 1968 (U.K.);
4. Convention on the Service Abroad of Judicial and Extra-Judicial Documentsin Civil or Commercial Matters 1965, given effect in Order 11, rule 6 of the Rules of the Supreme Court (England);
5. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970, given effect in the Evidence (Proceedings in Other Jurisdictions) Act 1975;
6. Convention on the Recognition of Divorces and Legal Separations 1970, given effect in the Recognition of Divorces and Legal Separations Act 1971 (U.K.);
7. Convention on the Recognition and Enforcement of Decisions relating to Maintenance Obligations 1973, given effect by the Maintenance Orders (Reciprocal Enforcement) Act 1972 as modified by the Reciprocal Enforcement of Maintenance Orders (Hague Convention Countires) Order 1979, S.I. 1979 No. 1317.

178. See Nadelmann, K.H. 'Ways to Unify Conflicts Rules' *De Conflictu Legum* (1962) 9 N.I.L.R. 349 for the American perspective on this problem.

179. See Commonwealth Secretariat 'The Commonwealth Secretariat's Activities in the Field of Private International Law' LL.M (83) 15, memorandum to the 1983 Meeting of Commonwealth Law Ministers.

180. See Nadelmann, K.H. 'Clouds over International Efforts to Unify Rules of Conflict of Laws' (Spring 1977) 41 *Law and Contemporary Problems 54*.

181. Such as judgments with plaintiffs nationality or domicile or mere presence of assets as basis. See Nadelmann ibid, and Fletcher supra note 164.

182. This point is adverted to in the Pacific region in *Recognition and Enforcement of Judgments and Orders and the Service of Process within the Commonwealth: A Report of a Working Meeting held at Apia, Western Samoa. 18 - 23 April 1979* London, Commonwealth Secretariat, 1979, para 1.17:

> It [the Working Meeting] also expressed the hope that the Commonwealth would be able to make a contribution to the work of the Hague Conference, making it still more sensitive to the needs of common law jurisdictions, and especially to the problems of smaller jurisdictions. At present the dominant members had elaborate legal bureaucracies, and tended, not unnaturally, to think in those terms. Some at least would find it difficult to comprehend that there might be countries with no resident judiciary, and with no well-staffed Ministry of Justice.

183. For discussion of the significance of this see Vitta supra note 160 Chapter II.

184. Convention on the Law Applicable to Maintenance Obligations 1973, *Recueil 219*.

185. See Cavers, D.F. '"Habitual Residence": A Useful Concept?' (1972) 21 A.U.L.R. 475. See also McClean supra note 118; and Dicey and Morris supra note 2 at pages 144-8.

186. See McClean supra note 118 at page 26.

187. *Recueil* 242; for comment see:
Glenn, H. Patrick 'Conflict of Laws - The 1976 Hague Conventions on Marriage and Matrimonial Property Regimes' (1977(55 Can. Bar Rev. 586; and, North supra note 14, Chapter IV.

188. *Recueil* 128; for comment see;
Anton, A.E. 'The Recognition of Divorces and Legal Separations' in Graveson, R.H. et al. 'The Eleventh Session of the Hague Conference of Private International Law' (1969) 18 I.C.L.Q. 618, 620-643.

189. See comment in Dicey and Morris supra note 2 at pages 345-7.

190. *Actes et documents de la Douzieme session* La Haye, Bureau Permanent, 1974/75. Tome IV: obligations alimentaires, rapport de M.M. Verwilghen, para 4, quoted in McClean and Patchett supra note 55 at page 105.

191. *Recueil 218.*

192. Verwilghen supra note 190 para 138, quoted in McClean and Patchett supra note 55 at page 97.

193. McClean, J.D. *International Conventions concerning Applications for and Awards of Maintenance* explanatory documentation prepared for Commonwealth Jurisdictions, London, Commonwealth Secretariat, 1981, 19-22.

194. *Recueil* 42;
for comment see Dyer, A. 'International Child Abduction by Parents' in Droz, G.A.L., Pelichet & D yer 'The Hague Conference on Private International Law 25 years after the Founding of its Permanent Bureau: Achievements and Prospects' (1980) 168 *Recueil des Cours* 231, 237-243.

195. *Recueil* 64;
for comment see Graveson, R.H. 'TheTenth Session of the Hague Conference of Private International Law' (1965) 14 I.C.L.Q. 528, 532-8.

196. *Recueil* 228;
for comment see Glenn supra note 187.

197. *Meeting of the Commonwealth Law Ministers (1983) Communique* LM.M. (83) 53, London, Commonwealth Secretariat, 1983.

198. *Meeting of the Commonwealth Law Ministers (1977 Selected Memoranda* London, Commonwealth Secretariat, 1977, 5.

199. *Recognition and Enforcement of Judgments and Orders and the Service of Process within the Commonwealth: A Report of a Working Meeting held at Basseterre, St. Kitts 24-28 April 1978* London, Commonwealth Secretariat, 1978.

200. *Recognition and Enforcement of Judgments and Orders and the Service of Process within the Commonwealth: A Report of a Working Meeting held at Apia, Western Samoa 18 - 23 April 1979* London Commonwealth Secretariat, 1979.

201. *Recognition and Enforcement of Judgments and Orders and the Service of Process within the Commonwealth: A Report of a Working Meeting*

held in Nairobi, Kenya 9-14 January 1980 London, Commonwealth Secretariat, 1980.

202. Supra note 200 at page vii.

203. Supra note 55 at page 105.

204. *Meeting of the Commonwealth Law Ministers (1980): Memoranda* London, Commonwealth Secretariat, 1980, 236: 'In view of the unanimity of opinion at the Regional Meetings, Ministers may feel that it would be timely for those Commonwealth countires who have not already done so to set in hand consideration of accession to the Convention'.

205. 'Review of Legal Activities of the Commonwealth Secretariat' *Meeting of Commonwealth Law Ministers (1983)* LM.M. (83) 2, London, Commonwealth Secretariat, 1983, 8.

206. The text of which comprises Appendix II.

207. Discussed by Martin supra note 36.

208. Supra note 198 at page 69.

209. For an outline of the development of the Hague Convention see Dyer supra note 194.

210. Supra note 204 at page viii.

211. See Chapter II - *Central Authorities*.
For another prominent convention to use the central authority see Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965, *Recueil 76*.

212. Article 8.

213. Idem.

214. Article 11.

215. Articles 12 and 13, and art. 20.

216. Eekelaar J.M.
The Hague Convention on the Civil Aspects of International Child Abduction London, Commonwealth Secretariat, 1981, 24.

217. Noted in (1983) 9 Commonwealth Law Bulletin 634.

218. Supra note 216.

219. See discussion supra at pages 15, 31-2; and Martin supra note 36.

220. Reported in *Lawtalk* 180 (September 7, 1980). Full text of the recommendations supplied by kind permission of the New Zealand Law Society.

221. Idem.

222. Article 38.

223. Section 3; N.Z.F.L.S. 6401-3.

224. Article 5.

225. Section 5; discussed supra at pages 51-2.

226. Section 24.

227. Convention preamble; Guardianship Act s 23 (1) & (3).

228. Scheme developed in the Guardianship Amendment Act 1980, contained in ss 22A-L Guardianship Act.

229. Supra note 216 at pages 9-11.

230. Article 7a.

231. Article 7b.

232. (1 January 1982) N.Z.F.L.S. 9901-3.

233. Article 7c & 7g.

234. Supra note 36 at pages 138-9.

235. The term is drawn from Rawls supra note 19 at pages 48-53, where it is used in relation to the development of moral theory.

236. Quoted as the frontispiece to this paper; see supra note 1.

237. In part this lack of consideration begins in the universities and text books of the common law world. As the Apia Working Meeting notes (supra note 182 at page viii):

> The Meeting also saw a need for law schools to be reminded of international activity, not only at The Hague but in such bodies as UNCITRAL, UNIDROIT, IMCO, ICAO and WIPO. Major textbooks tended to gloss over such international developments, and the experience of some participants was that some law teachers completely ignored them.

My thanks to my own law teachers for exciting my spirit of inquiry, and to Julie Shand who typed this paper from dictated tapes with much patience.

APPENDIX I: CURRENT STATUS OF THE HAGUE CONVENTIONS

(1982) 29 N.I.L.R. 277.

NFORMATION CONCERNING THE HAGUE CONVENTIONS ON PRIVATE INTERNATIONAL LAW*

Situation as of 1 September 1982.

Entries into force subsequent to this date and pending the expiration of time consequent upon already executed formalities are indicated by the use of italics.

The following States have accepted the Statute of the Conference which entered into force on 15 July 1955 and have consequently become Members of the Organization: Argentina, Australia, Austria, Belgium, Canada, Czechoslovakia, Denmark, Egypt, Finland, France, Germany, (F.R.G.), Greece, Ireland, Israel, Italy, Japan, Luxemburg, Netherlands, Norway, Portugal, Spain, Surinam, Sweden, Switzerland, Turkey, United Kingdom, United States, Venezuela and Yugoslavia.

I CONVENTION ON CIVIL PROCEDURE, 1 MARCH 1954

In the relations between the Contracting States this Convention replaces the Convention of 17 July 1905 on Civil Procedure.

Member States	Signature	Ratification or accession	Entry into force
AUSTRIA	01.03.54	01.03.56	12.04.57
BELGIUM	01.03.54	24.04.58	23.06.58
CZECHOSLOVAKIA	(accession)	13.06.66	11.08.66
DENMARK	02.09.55	19.09.58	18.11.58
	Objection: Denmark has declared that it objects to the methods of transmission mentioned in Article 6, paragraph 1, No. 3, and in Article 15.		
EGYPT	(accession)	18.09.81	16.11.81
FINLAND	17.09.56	08.01.57	12.04.57
FRANCE	24.01.56	24.03.59	22.06.59
	Extension: France has extended the Convention to: the Islands of Saint-Pierre et Miquelon, French Somaliland, New Caledonia and French Polynesia (entry into force on 23 January 1961); the French departments of Algeria and overseas departments (Guadeloupe, Martinique, Guyana, Réunion) (entry into force 17 July 1961); the Sahara departments (Oasis and Saoura) (entry into force 17 October 1962).		

* The information given on territorial extensions does not purport to prejudice any solution to be found for the problem of State succession in respect of treaties after independence.

For information previously appearing under this heading reference should be made to (1974) 21 NILR 203-211, 333-347; (1975) 22 NILR 85-92, 355-368; (1976) 23 NILR 88-99; (1978) 25 NILR 239-256.

GERMANY (F.R.G.)	09.04.57	02.11.59	01.01.60

Declaration: The Federal Republic of Germany has declared that the Convention applies to the *Land* Berlin.

ISRAEL	(accession)	21.06.68	19.08.68
ITALY	01.03.54	11.02.57	12.04.57
JAPAN	12.03.70	28.05.70	26.07.70
LUXEMBURG	28.06.54	03.07.56	12.04.57
NETHERLANDS	01.03.54	28.04.59	27.06.59

Extension: The Netherlands has extended the Convention to the Netherlands Antilles (entry into force 2 April 1968).

NORWAY	23.03.54	21.05.58	20.07.58
PORTUGAL	20.02.57	03.07.67	31.08.67

Extension: Portugal has extended the Convention to all Portuguese overseas territories. Poland and the Soviet Union have objected to this extension (entry into force 25 January 1967 except for Poland and the Soviet Union). Option: Portugal has taken the options of Article 1, paragraph 3 and of Article 9; transmission of documents and Letters Rogatory is therefore effected through diplomatic channels.

SPAIN	12.04.57	20.09.61	19.11.61
SURINAM	(accession)	10.07.77	07.09.77
SWEDEN	28.06.54	21.12.57	19.02.58
SWITZERLAND	02.07.54	06.05.57	05.07.57
TURKEY	(accession)	13.05.73	11.07.73

Objection: Turkey has declared that it objects to the methods of transmission mentioned in Article 6. Diplomatic or consular officials may effect service, or execute Letters of Request in accordance with Article 15, only in respect of their own nationals.

YUGOSLAVIA	(accession)	12.10.62	11.12.62

Other States

HUNGARY	(accession)	21.12.65	18.02.66
LEBANON	(accession)	09.11.74	07.01.75
MOROCCO	(accession)	17.07.72	14.09.72
POLAND	(accession)	12.01.63	13.03.63

Extension: Portugal has extended the Convention to all Portuguese overseas territories. Poland has objected to this extension (entry into force 25 January 1967 except for Poland and the Soviet Union).

ROMANIA	(accession)	01.12.71	29.02.72
USSR	(accession)	28.05.67	26.07.67

Objection: Portugal has extended the Convention to all Portuguese overseas territories. Poland has objected to this extension (entry into force 25 January 1967 except for Poland and the Soviet Union).

VATICAN CITY	(accession)	19.03.67	17.05.67

II CONVENTION ON THE LAW APPLICABLE TO INTERNATIONAL SALES OF GOODS, 15 JUNE 1955

Member States	Signature	Ratification or accession	Entry into force
BELGIUM	01.08.55	29.10.62	01.09.64
DENMARK	23.10.56	03.07.64	01.09.64
FINLAND	12.04.57	03.07.64	01.09.64
FRANCE	25.07.55	30.07.63	01.09.64
ITALY	13.04.56	17.03.58	01.09.64
LUXEMBURG	15.06.55		
NETHERLANDS	15.06.55		
NORWAY	24.10.56	03.07.64	01.09.64
SPAIN	12.04.57		
SWEDEN	23.10.56	08.07.64	06.09.64
SWITZERLAND	20.09.71	29.08.72	27.10.72
Other States			
NIGER	(accession)	11.10.71	10.12.71

III CONVENTION TO DETERMINE CONFLICTS BETWEEN THE NATIONAL LAW AND THE LAW OF DOMICILE, 15 JUNE 1955

Member States	Signature	Ratification or accession	Entry into force
BELGIUM	01.08.55	02.05.62	
FRANCE	25.07.55		
LUXEMBURG	15.06.55		
NETHERLANDS	15.06.55	22.12.60	
SPAIN	12.04.57		

IV CONVENTION CONCERNING RECOGNITION OF THE LEGAL PERSONALITY OF FOREIGN COMPANIES (Sociétés), ASSOCIATIONS AND FOUNDATIONS, 1 JUNE 1956

Member States	Signature	Ratification or accession	Entry into force
BELGIUM	01.06.56	28.03.62	
FRANCE	12.06.56	30.07.63	
LUXEMBURG	12.06.62		
NETHERLANDS	20.09.56	23.10.59	
Extension to Netherlands Antilles and Surinam.			
SPAIN	12.04.57		

V CONVENTION ON THE LAW APPLICABLE TO MAINTENANCE OBLIGATIONS TOWARDS CHILDREN, 24 OCTOBER 1956

Member States	Signature	Ratification or accession	Entry into force
AUSTRIA	24.10.56	24.06.59	01.01.62
Option under Article 2 taken.			
BELGIUM	17.10.69	26.08.70	24.10.70
Option under Article 2 taken.			
FRANCE	24.10.56	02.05.63	01.07.63
Extension: France has extended the Convention to the whole of the territory of the French Republic (i.e., to the French overseas departments and territories) (entry into force 1 December 1966).			
GERMANY (F.R.G.)	26.08.59	02.11.61	01.01.62
The Convention is applicable to the *Land* Berlin. Option under Article 2 taken (Act of 2 June 1972).			
GREECE	24.10.56		
ITALY	08.10.58	22.02.61	01.01.62
Option under Article 2 taken.			
JAPAN	10.02.77	22.07.77	19.09.77
LUXEMBURG	24.10.56	27.08.58	01.01.62
Option under Article 2 taken.			
NETHERLANDS	24.10.56	15.10.62	14.12.62
NORWAY	24.10.56		
PORTUGAL	07.01.58	06.12.68	03.02.69
Extension: Portugal has extended the Convention to all territories of the Portuguese Republic (entry into force 3 September 1969).			
SPAIN	24.10.56	27.03.74	25.05.74
SWITZERLAND	04.07.63	18.11.64	17.01.65
Option under Article 2 taken.			
TURKEY	10.06.70	28.02.72	27.04.72
Option under Article 2 taken.			
Other States			
LIECHTENSTEIN	(accession)	21.12.72	18.02.73
Option under Article 2 taken.			

VI CONVENTION CONCERNING THE RECOGNITION AND ENFORCEMENT OF DECISIONS RELATING TO MAINTENANCE OBLIGATIONS TOWARDS CHILDREN, 15 APRIL 1958

Member States	Signature	Ratification or accession	Entry into force
AUSTRIA	15.04.58	05.09.60	01.01.62
BELGIUM	11.07.58	15.09.61	01.01.62
CZECHOSLOVAKIA	(accession)	24.09.70	29.12.70

Acceptance of accession: the accession of Czechoslovakia entered into force on the dates indicated in the relations with the following States which have declared that they accept it: Belgium (29 December 1970), France (10 February 1971), Switzerland (13 April 1971), Germany (F.R.G.) (6 May 1971), Italy (5 June 1972), Austria (4 July 1972), Norway (11 October 1972).

DENMARK	12.08.65	02.11.65	01.01.66
FINLAND	10.02.66	26.06.67	24.08.67
FRANCE	06.01.65	26.05.66	25.07.66

Extension: France has declared that the Convention will apply to the whole of the territory of the French Republic (which comprises the French overseas departments and territories). This extension entered into force on the dates indicated in the relations with the following States which have declared that they accept it: Netherlands, Surinam, Netherlands Antilles (2 March 1968), Austria (11 October 1968), Germany (F.R.G.) (17 October 1969).

GERMANY (F.R.G.)	08.10.58	02.11.61	01.01.62

The Convention is applicable to the *Land* Berlin.

GREECE	15.04.58		
ITALY	08.10.58	22.02.61	01.01.62
LUXEMBURG	14.03.62		

Reservation under Article 18.

NETHERLANDS	25.05.59	28.02.64	28.04.64

Extension: an extension to the Netherlands Antilles and Surinam entered into force in the relations with: Belgium (15 June 1964 and 1 September 1964), Germany (F.R.G.) (31 October 1964), Italy (13 November 1964), Norway (25 August 1966), France (28 October 1966), Denmark (5 January 1967), Sweden (3 August 1968), Austria (9 August 1968).
The Reservation made by the Netherlands on ratification was withdrawn on 12 December 1980.

NORWAY	19.05.58	02.09.65	01.11.65
PORTUGAL	09.09.71	27.12.73	24.02.74

Extension: Portugal has declared that the Convention applies to the whole of its national territory.

SPAIN	18.01.73	11.09.73	09.11.73
SWEDEN	10.12.65	31.12.65	01.03.66
SWITZERLAND	04.07.63	18.11.64	17.01.65
SURINAM	(accession)		25.11.75

Surinam, to which the Convention had been extended by the Netherlands, has declared that the Convention will continue to be applicable after independence on 25 November 1975. For the States which had accepted the extension (see above, Netherlands) and for the Netherlands this declaration came into effect on 25 November 1975. Thereafter the Convention entered into force between Surinam and Turkey on 30 March 1977, this State having declared on that date that it accepts the accession.

TURKEY	11.06.68	27.04.73	25.06.73

Other States

HUNGARY	(accession)	20.10.64	19.12.64

Acceptance of accession: the accession of Hungary entered into force on the dates indicated in the relations with the following States which have declared that they accept it: Germany (F.R.G.) (19 December 1964), Italy (5 April 1965), France (30 August 1966), Switzerland (25 June 1971), Austria (4 July 1972), Norway (11 October 1972), Netherlands (27 August 1979).

LIECHTENSTEIN	(accession)	02.06.72	01.08.72

Acceptance of accession: the accession of Liechtenstein entered into force on the dates indicated in the relations with the following States which have declared that they accept it. Switzerland (1 August 1972), Hungary (8 August 1972), Netherlands (15 August 1972), Germany (F.R.G.) (7 December 1972), Norway (8 December 1972), Finland (14 December 1972), Sweden (20 December 1972), Denmark (12 January 1973), Austria (5 April 1973). Reservation under Article 18.

VII CONVENTION ON THE LAW GOVERNING TRANSFER OF TITLE IN INTERNATIONAL SALES OF GOODS, 15 APRIL 1958

Member States	Signature	Ratification or accession	Entry into force
GREECE	15.04.58		
ITALY	09.12.59	24.03.61	

VIII CONVENTION ON THE JURISDICTION OF THE SELECTED FORUM IN THE CASE OF INTERNATIONAL SALES OF GOODS, 15 APRIL 1958

Member States	Signature	Ratification or accession	Entry into force
AUSTRIA	08.10.58		
BELGIUM	24.04.58		
GERMANY (F.R.G.)	12.10.59		
GREECE	15.04.58		

IX CONVENTION CONCERNING THE POWERS OF AUTHORITIES AND THE LAW APPLICABLE IN RESPECT OF THE PROTECTION OF INFANTS, 5 OCTOBER 1961

Member States	Signature	Ratification or accession	Entry into force
AUSTRIA	28.11.66	12.03.75	11.05.75
FRANCE	29.11.61	11.09.72	10.11.72

Reservation under Article 15.

GERMANY (F.R.G.)	22.10.68	19.07.71	17.09.71
The Convention applies to the *Land* Berlin.			
ITALY	15.12.61		
LUXEMBURG	03.01.63	13.10.67	04.02.69
Reservations under Articles 13, paragraph 3. and 15.			
NETHERLANDS	30.11.62	20.07.71	18.09.71
The Convention is applicable to the Netherlands Antilles and Surinam.			
PORTUGAL	29.09.67	06.12.68	04.02.69
Extension to all territories of the Portuguese Republic.			
SWITZERLAND	18.11.64	09.12.66	04.02.69
Reservation under Article 15.			
YUGOSLAVIA	05.10.61		

X CONVENTION ON THE CONFLICTS OF LAW RELATING TO THE FORM OF TESTAMENTARY DISPOSITIONS, 5 OCTOBER 1961

Member States	Signature	Ratification or accession	Entry into force
AUSTRIA	05.10.61	28.10.63	05.01.64
Reservation under Article 12.			
BELGIUM	10.10.68	20.10.71	19.12.71
Reservation under Article 10.			
DENMARK	05.10.61	21.07.76	19.09.76
FINLAND	13.03.62	24.06.76	23.08.76
FRANCE	09.10.61	20.09.67	19.11.67
Reservation under Article 10. Extension: France has declared that the Convention will extend to the French overseas departments and territories.			
GERMANY (F.R.G.)	05.10.61	02.11.65	01.01.66
The Convention is applicable to the *Land* Berlin.			
GREECE	05.10.61		
IRELAND	(accession)	03.08.67	02.10.67
ISRAEL	(accession)	11.11.77	10.01.78
ITALY	15.12.61		
JAPAN	30.01.64	03.06.64	02.08.64
LUXEMBURG	05.02.68	07.12.78	05.02.79
Reservations under Articles 9, 10 and 12.			
NETHERLANDS	17.03.80	02.06.82	01.08.82
Reservation under Article 10.			
NORWAY	05.10.61	02.11.72	01.01.73
PORTUGAL	29.09.67		
SPAIN	21.10.76		
SWEDEN	05.10.61	09.07.76	07.09.76

SWITZERLAND	09.09.70	18.08.71	17.10.71
Reservation under Article 10.			
UNITED KINGDOM	13.02.62	06.11.63	05.01.64
Reservation under Article 9. Extensions: The United Kingdom has proceeded to the following extensions: Antigua, Basutoland, Bermuda, British Honduras, Brunei, Cayman Islands, Dominica, Falkland Islands and its Dependencies, Fiji, Gambia, Gibraltar, Grenada, Isle of Man, Montserrat, New Hebrides (to the extent that it is under British jurisdiction), Saint Christopher, Nevis and Anguilla, Saint Helena and its Dependencies, Seychelles, Tonga, Turks and Caicos Islands, Virgin Islands (entry into force 14 February 1965); Barbados, British Guyana (entry into force 8 May 1965); Mauritius (entry into force 19 February 1966); St. Lucia (entry into force 13 May 1966); St. Vincent (entry into force 8 July 1966); Swaziland (entry into force 22 May 1967); Hong Kong (entry into force 23 August 1968).			
YUGOSLAVIA	05.10.61	25.09.62	05.01.64

Other States

BOTSWANA	(accession)	18.11.68	17.01.69
Reservations under Articles 9 and 13. The Convention had been extended to Bechuanaland by the United Kingdom. After independence that State, now Botswana, acceded to the treaty by making the reservation under Article 13 and declared that it would apply the Convention only to wills made after the date of independence, i.e., 22 September 1967.			
FIJI	(accession)	19.07.71	10.10.70
The Convention had been extended to Fiji by the United Kingdom. That State declared that it considers itself to be bound by the Convention as of the date of independence, i.e., 10 October 1970. Fiji has confirmed the reservation made under Article 9.			
GERMANY (G.D.R.)	(accession)	23.07.74	21.09.74
MAURITIUS	(accession)	24.08.70	12.03.68
The Convention had been extended to Mauritius by the United Kingdom. That State declared that it considers itself to be bound by the Convention as of the date of independence, i.e., 12 March 1968.			
POLAND	(accession)	03.09.69	02.11.69
Reservation under Article 12.			
SOUTH AFRICA	(accession)	05.10.70	04.12.70
Reservations under Articles 9, 10 and 12.			
SWAZILAND	(accession)	23.11.70	22.01.71
Reservation under Article 9.			
TONGA	(accession)	10.08.78	04.06.70
The Convention had been extended to Tonga by the United Kingdom. That State declared that it considers itself to be bound by the Convention as of the date of independence, i.e., 4 June 1970. Reservations made under Articles 9 and 10.			

XI CONVENTION ABOLISHING THE REQUIREMENT OF LEGALISATION FOR FOREIGN PUBLIC DOCUMENTS, 5 OCTOBER 1961

Member States	Signature	Ratification or accession	Entry into force
AUSTRIA	05.10.61	14.11.67	13.01.68
BELGIUM	10.03.70	11.12.75	09.02.76

FINLAND	13.03.62		
FRANCE	09.10.61	25.11.64	24.01.65

Extension: on ratification France declared that the Convention would apply to the whole French territory (including the French overseas departments and territories) (entry into force 24 January 1965). By a special declaration France thereafter extended the Convention to the French-British Condominium of the New Hebrides (entry into force 15 February 1966).

GERMANY (F.R.G.)	05.10.61	15.12.65	13.02.66

The Convention applies to the *Land* Berlin.

GREECE	05.10.61		
ISRAEL	(accession)	15.06.78	14.08.78
ITALY	15.12.61	13.12.77	11.02.78
JAPAN	12.03.70	28.05.70	27.07.70
LUXEMBURG	05.10.61	04.04.79	03.06.79
NETHERLANDS	30.11.62	09.08.65	08.10.65

Extension: the Convention has been extended to the Netherlands Antilles (entry into force 30 April 1967) and to Surinam (entry into force 15 July 1967).

PORTUGAL	20.08.65	06.12.68	04.02.69

Extension: The Convention has been extended to all the territories of the Portuguese Republic (entry into force for the non-metropolitan territories 21 December 1969).

SPAIN	21.10.76	27.07.78	25.09.78
SURINAM	(accession)		25.11.75

The Convention had been extended to Surinam by the Netherlands. That State has declared that it will be bound by the treaty as of 25 November 1975, date of independence. No objection by any other Member State.

SWITZERLAND	05.10.61	10.01.73	11.03.73
TURKEY	08.05.62		
UNITED KINGDOM	19.10.61	21.08.64	24.01.65

Extension: the United Kingdom has proceeded to the following extensions: Jersey, Guernsey, Isle of Man (entry into force 24 January 1965); Antigua, Bahamas, Barbados, Basutoland, Protectorate of Bechuanaland, Bermuda, British Antarctic Territory, British Guiana, British Solomon Islands Protectorate, Brunei, Cayman Islands, Dominica, Falkland Islands and its Dependencies, Fiji, Gibraltar, Gilbert and Ellice Islands, Grenada, Hong Kong, Mauritius, Montserrat, New Hebrides, St. Helena, St. Christopher, Nevis and Anguilla, St. Lucia, St. Vincent, Seychelles, Southern Rhodesia, Swaziland, Tonga, Turks and Caicos Islands, Virgin Islands (entry into force 25 April 1965); French-British Condominium of the New Hebrides (entry into force 15 February 1966).

UNITED STATES	(accession)	16.08.81	15.10.81
YUGOSLAVIA	05.10.61	25.09.62	24.01.65

Other States

BAHAMAS	(accession)	10.07.73

The Bahamas considers itself bound by the Convention as of 10 July 1973, date of independence. The Convention had been extended to the Bahamas since 25 April 1965. No objection by the other Contracting States.

BOTSWANA	(accession)	30.09.66

The Convention had been extended to Mauritius, Botswana (formerly Bechuanaland) and to Fiji by the United Kingdom. By unilateral declaration made on independence these States have expressed the wish to become a Party to the Convention. According to the interpretation given to this declaration by the Governments, the Convention entered into force with

retroactive effect to the date of independence of those States, i.e., 30 September 1966 for Botswana.

CYPRUS	(accession)	01.03.73	30.04.73
FIJI	(accession)		10.10.70

The Convention had been extended to Mauritius, Botswana (formerly Bechuanaland) and to Fiji by the United Kingdom. By unilateral declaration made on independence these States have expressed the wish to become a Party to the Convention. According to the interpretation given to this declaration by the Governments, the Convention entered into force with retroactive effect to the date of independence of those States, i.e., 10 October 1970 for Fiji.

HUNGARY	(accession)	19 11.72	18.01.73
LESOTHO	(accession)		04.10.66

Lesotho considers itself to be bound by the Convention since 4 October 1966, date of independence of ex-Basutoland. No objection by the other Contracting States.

LIECHTENSTEIN	18.04.62	19.07.72	17.09.72
MALAWI	(accession)	03.10.67	01.12.67
MALTA	(accession)	03.01.68	02.03.68
MAURITIUS	(accession)		12.03.68

The Convention had been extended to Mauritius, Botswana (formerly Bechuanaland) and to Fiji by the United Kingdom. By unilateral declaration made on independence these States have expressed the wish to become a Party to the Convention. According to the interpretation given to this declaration by the Governments, the Convention entered into force with retroactive effect to the date of independence of those States, i.e., 12 March 1968 for Mauritius.

SEYCHELLES	(accession)	30.01.79	31.03.79
SWAZILAND	(accession)		06.09.68

The Convention had been extended to Swaziland by the United Kingdom. Swaziland has declared itself to be bound by the Convention since 6 September 1968, date of independence. No objection by the other Contracting States.

TONGA	(accession)		04.06.70

The Convention had been extended to the Island of Tonga by the United Kingdom. Tonga has declared itself bound by the Convention since 4 June 1970, date of independence. No objection by the other Contracting States.

XII CONVENTION ON JURISDICTION, APPLICABLE LAW AND RECOGNITION OF DECREES RELATING TO ADOPTIONS, 15 NOVEMBER 1965

Member States	Signature	Ratification or accession	Entry into force
AUSTRIA	27.02.67	08.10.68	23.10.78
Declarations under Articles 13, 16 and 17.			
SWITZERLAND	04.08.67	07.06.73	23.10.78
Reservation under Article 22.			
UNITED KINGDOM	15.11.65	24.08.78	23.10.78
Declarations under Articles 13, 14, 16 and 17.			

XIII CONVENTION ON THE SERVICE ABROAD OF JUDICIAL AND EXTRA-JUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS, 15 NOVEMBER 1965

In the relations between the Contracting States this Convention replaces the first Chapter of the Convention on Civil Procedure of 1 March 1954.

A great number of declarations have been made under this Convention, notably concerning the utilisation of the various subsidiary channels of transmission. These declarations cannot be reproduced here. Only designations of the Central Authority and extensions will be mentioned.

Member States	Signature	Ratification or accession	Entry into force
BELGIUM	21.01.66	19.11.70	18.01.71
Central Authority: Ministère de la Justice.			
CZECHOSLOVAKIA	(accession)	09.05.82	01.06.82
Central Authorities: Ministry of Justice of the Czech Socialist Republic and Ministry of Justice of the Slovak Socialist Republic.			
DENMARK	07.01.69	02.08.69	01.10.69
Central Authority: Ministry of Justice.			
EGYPT	01.03.66	12.12.68	10.02.69
Central Authority: Ministry of Justice.			
FINLAND	15.11.65	11.09.69	10.11.69
Central Authority: Ministry of Justice.			
FRANCE	12.01.67	03.07.72	01.09.72
Central Authority: Service civil de l'entraide judiciaire internationale, Ministère de la Justice.			
GERMANY (F.R.G.)	15.11.65	27.04.79	26.06.79
Central Authority: The Central Authority is for the *Land* Baden-Württemberg, das Justizministerium Baden-Württemberg, D 7000 Stuttgart; Bavaria, das Bayerische Staatsministerium der Justiz, D 8000 München; Berlin, der Senator für Justiz, D 1000 Berlin; Bremen, der Präsident des Landgerichts Bremen, D 2800 Bremen; Hamburg, der Präsident des Amtsgerichts Hamburg, D 2000 Hamburg; Hesse, der Hessische Minister der Justiz, D 6200 Wiesbaden; Lower Saxony, der Niedersächsische Minister der Justiz, D 3000 Hannover; North-rhine-Westphalia, der Justizminister des Landes Nordrhein-Westfalen, D 4000 Düsseldorf; Rhineland-Palatinate, das Ministerium der Justiz, D 6500 Mainz; Saarland, der Minister für Rechtspflege, D 6600 Saarbrücken; Schleswig-Holstein, der Justizminister des Landes Schleswig-Holstein, D 2300 Kiel.			
ISRAEL	25.11.65	14.08.72	13.10.72
Central Authority: The Director of the Courts, Jerusalem.			
ITALY	25.01.79	25.11.81	24.01.82
Central Authority: Le greffe près la Cour d'appel de Rome.			
JAPAN	12.03.70	28.05.70	27.07.70
Central Authority: Ministry of Foreign Affairs.			
LUXEMBURG	27.10.71	09.07.75	07.09.75
Central Authority: Parquet général de la Cour supérieure de Justice.			
NETHERLANDS	15.11.65	03.11.75	02.01.76
Central Authority: Officier van Justitie bij de Arrondissementsrechtbank, The Hague.			

NORWAY	15.10.68	02.08.69	01.10.69

Central Authority: Ministry of Justice.

PORTUGAL	05.07.71	27.12.73	25.02.74

Central Authority: Direction générale des Services judiciaires, Ministère de la Justice.

SPAIN	21.10.76		
SWEDEN	04.02.69	02.08.69	01.10.69

Central Authority: Ministry of Foreign Affairs.

TURKEY	11.06.68	28.02.72	28.04.72

Central Authority: Ministry of Justice.

UNITED KINGDOM	10.12.65	17.11.67	10.02.69

Central Authority for the United Kingdom: "Her Majesty's Principal Secretary of State for Foreign Affairs"; for England, "Senior Master of the Supreme Court, London", for Scotland, the "Crown Agent for Scotland, Edinburgh", for Northern Ireland, the "Master (Queen's Bench and Appeals), Belfast".

Extensions entered into force on 19 July 1970 (Central Authority for each territory between brackets): Hong Kong (Colonial Secretary); Antigua (The Registrar, High Court of Justice, St. John's, Antigua); Bermuda (The Registrar of the Supreme Court); British Honduras (The Supreme Court Registry); Virgin Islands (The Registrar of the Supreme Court); British Solomon Islands Protectorate (The Registrar of the High Court, Honiara); Cayman Islands (Her Majesty's Principal Secretary of State for Foreign and Commonwealth Affairs, London); Central and Southern Line Islands (The Registrar of the High Court, Honiara, British Solomon Islands Protectorate); Falkland Islands and its Dependencies (The Registrar of the Supreme Court, Stanley); Fiji (The Registrar of the Supreme Court); Gibraltar (The Registrar of the Supreme Court); Gilbert and Ellice Islands (The Registrar of the High Court, Tarawa); Guernsey (The Bailiff); Jersey (The Attorney General); Isle of Man (The First Deemster and Clerk of the Rolls); Montserrat (The Registrar of the High Court); Pitcairn (The Governor and Commander-in-Chief); Saint-Helena and its Dependencies (The Supreme Court); Saint Lucia (The Registrar of the High Court of Justice); Saint Vincent (The Registrar of the Supreme Court); Seychelles (The Supreme Court); Turks and Caicos Islands (The Registrar of the Supreme Court); Anguilla (The Registrar of the Supreme Court) (Shall enter into force *2 october 1982).*

UNITED STATES	15.11.65	24.08.67	10.02.69

Central Authority: Department of Justice. The Convention applies to all States of the United States, to the District of Columbia, and to Guam, Puerto Rico and the Virgin Islands (U.S. Sector).

Other States

BARBADOS	(accession)	27.09.69	01.10.69

Central Authority, Ministry of Foreign Affairs.

BOTSWANA	(accession)	28.08.69	01.09.69

Central Authority: the Minister of State in the Office of the President of the Republic.

MALAWI	(accession)	25.11.72	01.12.72

Central Authority: The Registrar of the High Court.

SEYCHELLES	(accession)	18.06.81	01.07.81

Central Authority: The Registrar, Supreme Court, Victoria, Malié.

XIV CONVENTION ON THE CHOICE OF COURT, 25 NOVEMBER 1965

Member States	Signature	Ratification or accession	Entry into force
ISRAEL	25.11.65		

XV CONVENTION ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS, 18 MARCH 1970

In the relations between Contracting States this Convention replaces Articles 8 to 16 of the Conventions on Civil Procedure of 1905 and 1954.

Member States	Signature	Ratification or accession	Entry into force
CZECHOSLOVAKIA	06.02.75	12.05.76	11.07.76

Czechoslovakia has declared that evidence may be taken on its territory by diplomatic officers or consular agents and commissioners on condition of reciprocity. Central Authorities: Ministry of Justice of the Czech Socialist Republic and Ministry of Justice of the Slovak Socialist Republic.

DENMARK	18.04.72	20.06.72	07.10.72

Denmark has declared that it will not accept Letters of Request in the French language and that it objects to the taking of evidence by commissioners. Central Authority: Ministry of Justice.

FINLAND	09.03.76	07.04.76	06.06.76

Finland will not accept Letters of Request in the French language; it does accept the use of the Swedish language. Central Authority: Ministry of Foreign Affairs.

FRANCE	28.08.72	07.08.74	06.10.74

France has declared that it will only execute Letters of Request written in French or accompanied by a translation into French; Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries will not be executed. Central Authority: Ministry of Justice (Service civil de l'entraide judiciaire internationale). France has also declared that the Convention applies to the whole of the territory of the Republic.

GERMANY (F.R.G.)	18.03.70	27.04.79	26.06.79

Letters of Request should be in German or translated into German. The Federal Republic of Germany objects to the taking of evidence on its territory by diplomatic officers or consular agents if German nationals are involved. Central Authority: The Central Authority is for the *Land* Baden-Württemberg, das Justizministerium Baden-Württemberg, D 7000 Stuttgart; Bavaria, das Bayerische Staatsministerium der Justiz, D 8000 München; Berlin, der Senator für Justiz, D 1000 Berlin; Bremen, der Präsident des Landgerichts Bremen, D 2800 Bremen; Hamburg, der Präsident des Amtsgerichts Hamburg, D 2000 Hamburg; Hesse, der Hessische Minister der Justiz, D 6200 Wiesbaden; Lower Saxony, der Niedersächsische Minister der Justiz, D 3000 Hannover; Northrhine-Westphalia, der Justizminister des Landes Nordrhein-Westfalen, D 4000 Düsseldorf; Rhineland-Palatinate, das Ministerium der Justiz, D 6500 Mainz; Saarland, der Minister für Rechtspflege, D 6600 Saarbrücken; Schleswig-Holstein, der Justizminister des Landes Schleswig-Holstein, D 2300 Kiel.

ISRAEL	11.11.77	19.07.79	17.09.79

Central Authority: The Director of the Courts, Jerusalem.

ITALY	06.02.75	22.06.82	21.08.82
LUXEMBURG	02.05.75	26.07.77	24.09.77

Luxemburg has declared that Letters of Request in German will be accepted. Letters of Request issued for the purpose of obtaining pre-trial discovery of documents will not be executed. The *Parquet général* has been designated as the Central Authority and the authority competent to authorize diplomatic officers or consular agents and commissioners to proceed to taking of evidence.

NETHERLANDS	28.02.79	08.04.81	07.06.81

Letters of Request will be accepted in Dutch, German, English or French. Central Authority: Officier van Justitie bij de Arrondissementsrechtbank, The Hague.

NORWAY	18.03.70	03.08.72	07.10.72

Norway has declared that it does not accept Letters of Request in the French language. Central Authority: Ministry of Justice.

PORTUGAL	18.03.70	12.03.75	11.05.75
SPAIN	21.10.76		
SWEDEN	21.04.75	02.05.75	01.07.75

Central Authority: Ministry of Foreign Affairs.

UNITED KINGDOM	18.03.70	16.07.76	14.09.76

The United Kingdom does not accept Letters of Request in French. Central Authority: Foreign and Commonwealth Office, and for Northern Ireland, The Master (Queen's Bench and Appeals), Belfast.
Extensions: the Convention has been extended to: the territory of Hong Kong (entry into force 22 August 1978; competent authority: Chief Secretary), Gibraltar (entry into force 20 January 1979, competent authority: the Deputy Governor), the Sovereign Base Areas of Akrotiri and Dhekelia in the Island of Cyprus (entry into force 24 August 1979; competent authority: the Senior Registrar of the Judge's Court of the Sovereign Base Areas of Akrotiri and Dhekelia), the Falkland Islands and its Dependencies (entry into force 25 January 1980; competent authority: the Governor of the Falkland Islands and its Dependencies), the Isle of Man (entry into force 15 June 1980; competent authority: Her Majesty's First Deemster and Clerk of the Rolls) and the Cayman Islands (entry into force 15 November 1980; competent authority: His Excellency the Governor). These territories will not accept Letters of Request in French.

UNITED STATES	24.07.70	08.08.72	07.10.72

The Convention has been extended by the United States to the Island of Guam, Puerto Rico and the Virgin Islands. This extension entered into force on 10 April 1973. The Ministry of Justice has been designated as the Central Authority.

Other States

BARBADOS	(accession)	05.03.81	04.05.81

The accession will have effect only in the relations between Barbados and Contracting States having declared acceptance of this accession. The Convention entered into force between Barbados and the United States 20 June 1981, Netherlands 20 June 1981, Luxemburg 4 August 1981, Israel 19 September 1981, United Kingdom of Great Britain and Northern Ireland, Cayman Islands, Falkland Islands and Dependencies, Gibraltar, Hong Kong, Isle of Man, the Sovereign Base Areas of Akrotiri and Dhekelia in the Island of Cyprus 21 September 1981.

SINGAPORE	(accession)	27.10.78	26.12.78

The accession will have effect only in the relations between Singapore and Contracting States having declared acceptance of this accession. The Convention entered into force between Singapore and the United States 9 April 1979, Sweden 10 April 1979, the United Kingdom of Great Britain and Northern Ireland 13 May 1979, Gibraltar and Hong Kong 13 May 1979, Norway 20 May 1979, Czechoslovakia 3 June 1979, Denmark 7 August 1979, Luxemburg 3 December 1979, France 27 December 1979, Finland 12 January 1980, the

Netherlands 20 June 1981, Germany (F.R.G.) 13 September 1981, Israel 19 September 1981. Central Authority: Registrar of the Supreme Court. Chapter II of the Convention is not applicable as regards Singapore. Singapore will not accept Letters of Request in French.

XVI CONVENTION ON THE RECOGNITION OF DIVORCES AND LEGAL SEPARATIONS, 1 JUNE 1970

Member States	Signature	Ratification or accession	Entry into force
CZECHOSLOVAKIA	06.02.75	12.05.76	11.07.76
Reservations under Articles 19, paragraph 1, and 24.			
DENMARK	05.12.72	25.06.75	24.08.75
EGYPT	08.05.79	21.04.80	20.06.80
FINLAND	19.11.74	16.06.77	15.08.77
LUXEMBURG	06.11.81		
NETHERLANDS	29.08.79	23.06.81	22.08.81
NORWAY	12.10.72	15.08.78	14.10.78
SWEDEN	13.09.74	25.06.75	24.08.75
SWITZERLAND	23.07.75	18.05.76	17.07.76
Reservation under Article 24, paragraph 2.			
UNITED KINGDOM	01.06.70	21.05.74	24.08.75

Reservation under Article 24 with certain attenuations.
Extensions: the extension of the Convention to Guernsey, Jersey and the Isle of Man by the United Kingdom entered into force on 2 November 1975 in relations with Sweden, on 2 May 1978 with Switzerland, on 19 September 1981 with Denmark, on 28 August 1982 with the Netherlands. The extension to Gibraltar and Hong Kong entered into force on 4 June 1977 in relations with Switzerland, on 11 July 1977 with Sweden, on 19 September 1981 with Denmark, on 28 August 1982 with the Netherlands.

XVII CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS AND SUPPLEMENTARY PROTOCOL, 1 FEBRUARY 1971

Member States	Signature	Ratification or accession	Entry into force
NETHERLANDS	12.07.72	21.06.79	20.08.79
. Also signed and ratified the Protocol.			
Other States			
CYPRUS	01.02.71	08.06.76	20.08.79

Non-Member State of the Conference allowed to sign the Convention in its capacity as a Member of the Council of Europe. Also signed and ratified the Protocol.

XVIII CONVENTION ON THE LAW APPLICABLE TO TRAFFIC ACCIDENTS, 4 MAY 1971

Member States	Signature	Ratification or accession	Entry into force
AUSTRIA	06.09.73	12.03.75	03.06.75
BELGIUM	04.05.71	04.04.75	03.06.75
CZECHOSLOVAKIA	06.02.75	12.05.76	11.07.76
FRANCE	04.05.71	07.02.72	03.06.75
LUXEMBURG	03.06.71	14.10.80	13.12.80
NETHERLANDS	04.05.71	31.10.78	30.12.78
PORTUGAL	04.05.71		
SWITZERLAND	03.12.80		
YUGOSLAVIA	17.10.75	17.10.75	16.12.75

XIX CONVENTION CONCERNING THE INTERNATIONAL ADMINISTRATION OF THE ESTATES OF DECEASED PERSONS, 2 OCTOBER 1973

Member States	Signature	Ratification or accession	Entry into force
CZECHOSLOVAKIA	04.04.75	20.10.76	
ITALY	06.02.75	02.10.81	01.01.82
Reservation under Article 26, No. 3.			
LUXEMBURG	02.10.73		
NETHERLANDS	02.10.73		
PORTUGAL	10.10.73	22.04.76	
TURKEY	29.09.76		
UNITED KINGDOM	02.10.73		

XX CONVENTION ON THE LAW APPLICABLE TO PRODUCTS LIABILITY, 2 OCTOBER 1973

Member States	Signature	Ratification or accession	Entry into force
BELGIUM	24.03.76		
FRANCE	18.12.73	19.07.77	01.10.77
ITALY	06.02.75		
LUXEMBURG	02.10.73		
NETHERLANDS	02.10.73	27.06.79	01.09.79
NORWAY	02.10.73	13.10.76	01.10.77
Reservation under Article 16, paragraph 1, no. 1.			

PORTUGAL	10.10.73		
YUGOSLAVIA	15.12.76	15.12.76	01.10.77

XXI CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF DECISIONS RELATING TO MAINTENANCE OBLIGATIONS, 2 OCTOBER 1973

Member States	Signature	Ratification or accession	Entry into force
BELGIUM	09.11.76		
CZECHOSLOVAKIA	06.02.75	12.05.76	01.08.76
Reservation under Article 26, no. 2 letters (a) and (b).			
FINLAND	28.05.80		
Reservation under Article 26, no. 1 and 2.			
FRANCE	18.12.73	19.07.77	01.10.77
GERMANY (F.R.G.)	02.10.73		
ITALY	06.02.75	02.10.81	01.01.82
Reservation under Article 26, no. 3.			
LUXEMBURG	02.10.73	19.03.81	01.06.81
Reservation under Article 26, no. 2 and 3.			
NETHERLANDS	02.10.73	12.12.80	01.03.81
Reservation under Article 26, no. 2 letter (a). On ratification the Netherlands extended the Convention to the Netherlands Antilles.			
NORWAY	13.07.76	12.04.78	01.07.78
Reservation under Article 26, no. 2.			
PORTUGAL	10.10.73	04.12.75	01.08.76
Reservation under Article 26, no. 1 and 2, letter (b).			
SWEDEN	01.02.77	17.02.77	01.05.77
Reservation under Article 26, no. 1 and 2. The Convention is extended to official deeds on a reciprocity basis.			
SWITZERLAND	23.07.75	18.05.76	01.08.76
Reservation under Article 26, no. 2 letters (a) and (b).			
TURKEY	02.10.73		
UNITED KINGDOM	30.11.73	21.12.79	01.03.80
Reservation under Article 26, no. 2 and 3.			

XXII CONVENTION ON THE LAW APPLICABLE TO MAINTENANCE OBLIGATIONS, 2 OCTOBER 1973

Member States	Signature	Ratification or accession	Entry into force
BELGIUM	09.11.76		

FRANCE	18.12.73	19.07.77	01.10.77
ITALY	06.02.75	02.10.81	01.01.82
Reservation under Article 15.			
LUXEMBURG	02.10.73	13.10.81	01.01.82
Reservation under Article 14, no. 3 and Article 15.			
NETHERLANDS	02.10.73	12.12.80	01.03.81
On ratification the Netherlands extended the Convention to the Netherlands Antilles. The reservation of Article 15 was made at the time of ratification.			
PORTUGAL	10.10.73	17.12.75	01.10.77
Reservation under Article 14, no. 2 and 3.			
SWITZERLAND	23.07.75	18.05.76	01.10.77
Reservations under Article 14, no. 1 and 2 and Article 15.			
TURKEY	02.10.73		

XXIII CONVENTION ON THE LAW APPLICABLE TO MATRIMONIAL PROPERTY REGIMES, 14 MARCH 1978

Member States	Signature	Ratification or accession	Entry into force
AUSTRIA	14.03.78		
FRANCE	26.09.78	26.09.79	
PORTUGAL	12.07.78		

XXIV CONVENTION ON CELEBRATION AND RECOGNITION OF THE VALIDITY OF MARRIAGES, 14 MARCH 1978

Member States	Signature	Ratification or accession	Entry into force
AUSTRALIA	09.07.80		
EGYPT	14.03.78		
FINLAND	24.09.80		
LUXEMBURG	14.03.78		
PORTUGAL	26.05.78		

XXV CONVENTION ON THE LAW APPLICABLE TO AGENCY, 14 MARCH 1978

Member States	Signature	Ratification or accession	Entry into force
FRANCE	14.03.78		
PORTUGAL	26.05.78	04.03.82	

XXVI CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION, 25 OCTOBER 1980

Member States	Signature	Ratification or accession	Entry into force
BELGIUM	11.01.82		
CANADA	25.10.80		
FRANCE	25.10.80		
GREECE	25.10.80		
PORTUGAL	22.06.82		
SWITZERLAND	25.10.80		
UNITED STATES	23.12.81		

XXVII CONVENTION ON INTERNATIONAL ACCESS TO JUSTICE, 25 OCTOBER 1980

Member States	Signature	Ratification or accession	Entry into force
FRANCE	25.10.80		
GERMANY (F.R.G.)	25.10.80		
GREECE	25.10.80		
LUXEMBURG	13.04.81		
Other States			
MOROCCO	16.09.81		

Reservation under Article 28, paragraphs 1 and 2, letters (b) and (c).

APPENDIX II. THE HAGUE CONVENTION ON THE CIVIL ASPECTS ON INTERNATIONAL CHILD ABDUCTION 1980. (1980) 27 N.I.L.R. 397.

DOCUMENTS

HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

FINAL ACT OF THE FOURTEENTH SESSION
(held from 6 to 25 October 1980)

The undersigned, Delegates of the Governments of Argentina, Australia, Austria, Belgium, Canada, Czechoslovakia, Denmark, the Arab Republic of Egypt, Finland, France, the Federal Republic of Germany, Greece, Ireland, Israel, Italy, Japan, Jugoslavia, Luxemburg, the Netherlands, Norway, Portugal, Spain, Surinam, Sweden, Switzerland, Turkey, the United Kingdom of Great Britain and Northern Ireland, the United States of America and Venezuela, and the Representatives of the Governments of Brazil, the Holy See, Hungary, Monaco, Morocco, the Union of Soviet Socialist Republics and Uruguay participating by invitation or as Observer, convened at The Hague on the 6th October 1980, at the invitation of the Government of the Netherlands, in the Fourteenth Session of the Hague Conference on Private International Law.

Following the deliberations laid down in the records of the meetings, have decided to submit to their Governments –

A The following draft Conventions –

I

CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

The States signatory to the present Convention,

Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,

Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,

Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions –

CHAPTER I - SCOPE OF THE CONVENTION

Article 1

The objects of the present Convention are –

a to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

b to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

Article 3

The removal or the retention of a child is to be considered wrongful where –

a it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph *a* above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

Article 5

For the purposes of this Convention –

a 'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

b 'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

CHAPTER II - CENTRAL AUTHORITIES

Article 6

A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

Federal States, States with more than one system of law or States having autonomous territorial organizations shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers. Where a State has appointed more than one Central Authority, it

shall designate the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State.

Article 7

Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures –

a to discover the whereabouts of a child who has been wrongfully removed or retained;

b to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;

c to secure the voluntary return of the child or to bring about an amicable resolution of the issues;

d to exchange, where desirable, information relating to the social background of the child;

e to provide information of a general character as to the law of their State in connection with the application of the Convention;

f to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access;

g where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;

h to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;

i to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

CHAPTER III – RETURN OF CHILDREN

Article 8

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

The application shall contain –

a information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;

b where available, the date of birth of the child;

c the grounds on which the applicant's claim for return of the child is based;

d all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

The application may be accompanied or supplemented by –

e an authenticated copy of any relevant decision or agreement;

f a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;

g any other relevant document.

Article 9

If the Central Authority which receives an application referred to in Article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be.

Article 10

The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –

a the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

b there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Article 14

In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

Article 15

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

Article 16

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

Article 17

The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.

Article 18

The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

Article 19

A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.

Article 20

The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

CHAPTER IV - RIGHTS OF ACCESS

Article 21

An application to make arrangements for organizing or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.
The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.
The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organizing or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

CHAPTER V - GENERAL PROVISIONS

Article 22

No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in the judicial or administrative proceedings falling within the scope of this Convention.

Article 23

No legalization or similar formality may be required in the context of this Convention.

Article 24

Any application, communication or other document sent to the Central Authority of the requested State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English.
However, a Contracting State may, by making a reservation in accordance with Article 42, object to the use of either French or English, but not both, in any application, communication or other document sent to its Central Authority.

Article 25

Nationals of the Contracting States and persons who are habitually resident within those States shall be entitled in matters concerned with the application of this Convention to legal aid and advice in any other Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State.

Article 26

Each Central Authority shall bear its own costs in applying this Convention.
Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers. However, they may require the payment of the expenses incurred or to be incurred in implementing the return of the child.
However, a Contracting State may, by making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.
Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any

costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

Article 27

When it is manifest that the requirements of this Convention are not fulfilled or that the application is otherwise not well founded, a Central Authority is not bound to accept the application. In that case, the Central Authority shall forthwith inform the applicant or the Central Authority through which the application was submitted, as the case may be, of its reasons.

Article 28

A Central Authority may require that the application be accompanied by a written authorization empowering it to act on behalf of the applicant, or to designate a representative so to act.

Article 29

This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of Article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention.

Article 30

Any application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto or provided by a Central Authority, shall be admissible in the courts or administrative authorities of the Contracting States.

Article 31

In relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units –

a any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;

b any reference to the law of the State of habitual residence shall be construed as referring to the law of the territorial unit in that State where the child habitually resides.

Article 32

In relation to a State which in matters of custody of children has two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

Article 33

A State within which different territorial units have their own rules of law in respect of custody of children shall not be bound to apply this Convention where a State with a unified system of law would not be bound to do so.

Article 34

This Convention shall take priority in matters within its scope over the *Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors*, as between Parties to both Conventions. Otherwise the present Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organizing access rights.

Article 35

This Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States.
Where a declaration has been made under Article 39 or 40 the reference in the preceding paragraph to a Contracting State shall be taken to refer to the territorial unit or units in relation to which this Convention applies.

Article 36

Nothing in this Convention shall prevent two or more Contracting States, in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to derogate from any provisions of this Convention which may imply such a restriction.

CHAPTER VI – FINAL CLAUSES

Article 37

The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Fourteenth Session.
It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 38

Any other State may accede to the Convention.
The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.
The Convention shall enter into force for a State acceding to it on the first day of the third calendar month after the deposit of its instrument of accession.
The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.
The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.

Article 39

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect at the time the Convention enters into force for that State.
Such declaration, as well as any subsequent extension, shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 40

If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession

declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

Any such declaration shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands and shall state expressly the territorial units to which the Convention applies.

Article 41

Where a Contracting State has a system of government under which executive, judicial and legislative powers are distributed between central and other authorities within that State, its signature or ratification, acceptance or approval of, or accession to this Convention, or its making of any declaration in terms of Article 40 shall carry no implication as to the internal distribution of powers within that State.

Article 42

Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 39 or 40, make one or both of the reservations provided for in Article 24 and Article 26, third paragraph. No other reservation shall be permitted.
Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.
The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

Article 43

The Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in Articles 37 and 38.

Thereafter the Convention shall enter into force –

1 for each State ratifying, accepting, approving or acceding to it subsequently, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance, approval or accession;

2 for any territory or territorial unit to which the Convention has been extended in conformity with Article 39 or 40, on the first day of the third calendar month after the notification referred to in that Article.

Article 44

The Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 43 even for States which subsequently have ratified, accepted, approved it or acceded to it. If there has been no denunciation, it shall be renewed tacitly every five years.
Any denunciation shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands at least six months before the expiry of the five year period. It may be limited to certain of the territories or territorial units to which the Convention applies.
The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 45

The Ministry of Foreign Affairs of the Kingdom of the Netherlands shall notify the States Members of the Conference, and the States which have acceded in accordance with Article 38, of the following –

1 the signatures and ratifications, acceptances and approvals referred to in Article 37;

2 the accessions referred to in Article 38;

3 the date on which the Convention enters into force in accordance with Article 43;

4 the extensions referred to in Article 39;

5 the declarations referred to in Articles 38 and 40;

6 the reservations referred to in Article 24 and Article 26, third paragraph, and the withdrawals referred to in Article 42;

7 the denunciations referred to in Article 44.

In witness whereof the undersigned, being duly authorized thereto, have signed this Convention.

Done at The Hague, on the .... day of ..... 19.., in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Fourteenth Session.