THE SCANDINAVIAN COUNTRIES AND THE HAGUE CONVENTIONS ON PRIVATE INTERNATIONAL LAW 1951–64

BY

O. A. BORUM

Professor of Law,
University of Copenhagen

The Scandinavian countries have given their whole-hearted allegiance to the idea which forms the foundation of the Hague Conferences of private international law, and which according to the Statute of 1955 is "to work towards the progressive unification of private international law". They have regularly sent delegates to the Conferences,[1] and these delegates have taken a full and active part in the debates.

The interest of the Scandinavian countries has also extended to the committees of experts which have been set up to prepare conventions. One might mention the committee which drafted the convention on conflict of laws in respect of the international sale of goods. Among its members were Alten, Bagge and Ussing. Its report, ready in 1931 but not dealt with until the Conference of 1951, is among the most impressive documents in the field of private international law.

Service on a number of these expert committees enables the author to bear witness that Continental members, particularly those from the host country, have been at great pains not only to understand the point of view of their Scandinavian colleagues, but also to take it into account in the drafting of conventions. It is another matter that subsequently, in order to meet special requirements—probably most frequently from those states which still hold to a thoroughgoing nationality principle—the Conference may have had to modify the rules of the conventions in a direction which makes an acceptance by the Scandinavian countries more difficult or at any rate less attractive.

The Scandinavian countries have not appeared at the Conferences as a single bloc, and not infrequently the speeches of their delegates have shown material divergences. But since 1951 these countries have not only taken up a common attitude to all ques-

[1] Denmark from 1893, Norway and Sweden from 1894, Finland from 1925; Iceland, however, has not sent delegates. The United Kingdom was represented for the first time in 1925, the U.S.A. sent observers in 1956 and 1960 and delegates in 1964. Hitherto the official language has been French, but in 1964 English was recognized as of equal status. After that the conventions were drawn up in both languages and the two versions are of equal authenticity.

tions on the ratification of the conventions, but have also held preparatory meetings to draw up answers to the many questions that have been received from The Hague.

The old difference of opinion between the nationality and the domicile principle in the field of family law in the wider sense, with Sweden and Finland on one side and Denmark, Iceland and Norway on the other, has naturally found expression to some extent during the debates at The Hague, but can scarcely be said to have played any important part in the attitudes taken by the Scandinavian countries to the conventions adopted in 1951–64.

On the other hand, this cleavage was decisive for the position taken up by the Scandinavian countries to the earlier conventions on family law of 1902 and 1905. None of these was adopted by Denmark or Norway. Sweden, however, ratified all these conventions and incorporated rules in conformity with them in acts of 1904, 1912 and 1924. Later, Sweden—for reasons not closely connected with the domicile *versus* nationality question—abrogated all these conventions, but the Swedish legislation on international legal relations has been altered on only a few minor points. Finland has participated in the Hague Conferences since 1925. She has not ratified the conventions of 1902 and 1905, but the Finnish Act of December 5, 1929, on certain family law relations of an international nature is based on principles in harmony with the conventions.[2]

After the first world war the work at The Hague was resumed at Conferences in 1925 and 1928. The main achievements of these Conferences can be summed up in the two words, orientation and consolidation. The conventions adopted, which included one on inheritance and wills, never entered into force. Attempts to modify and to bring up to date the family law conventions of 1902 and 1905 failed.

The most fruitful feature was the introductory discussion on the possibilities of a convention on choice of law in international sales. It was still not possible to achieve agreement that the principle of the autonomy of the parties should prevail even over preceptive provisions in the country whose law would have been used if the parties had not agreed on the use of another country's law (see report in *Actes* 1928, pp. 364 f.). But the Conference was

[2] The convention regarding civil procedure was ratified by the Scandinavian countries. This paper does not take account of the conventions on civil procedure, on the service abroad of judicial and extra-judicial documents, and on abolishing the requirements of legalization.

unanimously of opinion that the work should continue and expressed a *vœu* for the setting up of a special commission which should prepare proposals for the next conference. This commission submitted its proposals in 1931. Owing to the political tension between the powers and the occurrence of the second world war, the next Conference was not convened until 1951. There France was brilliantly represented by Marc Ancel, Batiffol, de la Morandière and Niboyet. Holland provided the President of the Conference (and actual leader of the negotiations) J. Offerhaus, and was also represented by the celebrated jurist Meijers, an exceptionally keen-witted and formidable debater. Cheshire and Wortley attended for Britain, and Gutzwiller and Sauser-Hall were the Swiss delegates.

In the invitations to the Conference it was emphasized that one of the objects was to set to rest the question of the conventions on family law; the convention on inheritance of 1928 was also to be given up. It was hoped that the Conference would concern itself with "des problèmes qui ont une importance pratique plutôt que théorique". The main concern was to be the convention on conflict of laws in international sales, which in all essentials was adopted in the form it had been given in the draft produced by the special commission in 1931.

I will now give a short account of the conventions adopted during the period 1951–64 and the current attitude of the Scandinavian countries to these conventions. After that some general questions will be considered.

1. The convention on conflict of laws in the international sale of goods is—apart from the revised convention on civil procedure —the only one that has so far been ratified by the Scandinavian countries. The ratification took place in 1964, and the convention entered into force in September, 1964, so far as the following countries were concerned: Belgium, Denmark, Finland, France, Italy, Norway and Sweden. This convention, which embraces a thoroughgoing recognition of the parties' autonomy, has already had an influence on legal theory and will probably also affect the practical attitude to agreements on the applicable law with regard to other commercial contracts.[3]

[3] Contrary to "les contrats dirigés"; cf. Ole Lando, "Scandinavian Conflict of Law Rules respecting Contracts", *American Journal of Comparative Law 1957*, pp. 1 f. The *dirigisme* of the modern welfare state has had a considerable impact on the law of contracts.

Where no agreement exists between the parties on the law applicable to the sale, as a rule the law of the seller is to be applied. There is, however, one important exception from this: if the seller or his representative (for example his agent) has accepted the purchaser's order in the latter's country, the law of the purchaser is to be applied. (In the case of a sale on a stock exchange or at an auction the *lex loci* is applicable.)

The rules of the convention do not apply only in relation to the signatory states. Under art. 7 states which have ratified the convention are under obligation to introduce the rules of arts. 1–6 in their national legislation with general effect in respect of other countries, irrespective of whether these have adhered to the convention. It would no doubt have been possible to confine the applicability of the convention to cases of transactions between citizens of the signatory states. But as the aim was "de rendre plus faciles les échanges commerciaux" and to bring about a system which would be comprehensible not only to specially qualified lawyers but also to merchants, and, as it was also considered undesirable that the private international law of the signatory states should operate with rules differing according to whether the buyer and seller are both domiciled in signatory states or one of them belongs to a non-signatory state, it was considered that the rules of the convention should altogether replace the rules of private international law hitherto followed in those states which adhered to the convention (report in *Actes* 1951, pp. 362–3).

Although on several points the convention gives rise to troublesome questions—whether a valid choice of law exists in the meaning of the convention, whether an order can be considered accepted in the purchaser's country by the seller or his representative, etc.— I believe it to be the most important achievement so far of the Hague Conferences held since the second world war. Its value for the further development of private international law will depend not only on how many countries adhere to it but also—and perhaps above all—on the extent to which these states follow lines and approaches of their own in interpreting and practising its rules. If this is to be possible at all it is necessary that the states should inform one another how the convention is applied and practised.

2. Under art. 5 of the convention on conflict of laws in international sales all questions concerning the transfer of ownership are expressly excluded, but in connection with this it is laid down

that all questions concerning the obligations of the parties, and especially those which relate to risks, shall be subject to the law applicable to the sale pursuant to the convention. The Special Commission of 1931 wanted to stop at this. It was known that the International Law Association was preparing a draft convention on the transfer of ownership. Should the Hague Conference, de la Morandière asked, really embark on such a difficult task, "rempli encore de complications et de controverses théoriques"? His own answer was that the commission had not intended this. While the question of the transfer of ownership was of importance to legal scholars, it was of relatively small practical significance; only on a few occasions had it given rise to litigation (Doc. 1951, p. 18).

If this wise advice had been followed, the Conferences of 1951 and 1956 would have been spared time-consuming discussions of purely theoretical interest concerning the draft convention of 1956 on the law governing transfer of title in international sales of goods.[4]

3. The third subject which was considered in connection with the convention on the conflict of laws in international sales was the question, also raised by the International Law Association, of a convention on the competent jurisdiction in litigation on international sales of goods. The Conference of 1951 discussed a draft which, while recognizing the autonomy of the parties in the choice of jurisdiction (the prorogation agreement), provided that the court in the country where the defendant was domiciled should have exclusive competence. The aim was to remove the possibility of litigation in several countries concerning the same transaction. Here, however, determined opposition arose in several quarters against recognition of exclusive competence for a single court prescribed in the convention. The outcome was that in 1956 the Conference abandoned exclusive competence where no prior agreement exists between the parties, and abstained from any provision concerning jurisdiction where such an agreement does not exist. The convention was signed in 1958, but it has never entered into force. In 1957 Austria had already sent in a request to the Permanent Bureau at The Hague that the next Conference should have on its agenda the wider general question of the establishment of common provisions on the validity and effects

[4] See Håkan Nial, *Liber Amicorum of Congratulations to Algot Bagge*, Stockholm 1956, pp. 155–9, cf. *Actes* 1956, p. 26, and Henry Ussing in *Actes* 1951, pp. 69 f., and in *Revue internationale de droit comparé* 1952, no. 1.

of agreements on the choice of court in civil or commercial matters in situations having an international character. This question was discussed in 1960 and 1964, but the matter was complicated by the fact that at the same time the Conference was considering, at the request of the Council of Europe, the far more important and more extensive subject of a general convention on the recognition and execution of decisions of foreign courts. The Conference of 1964 did not conclude its discussion of this subject, but adopted the first six articles and decided that the work should be continued at an extraordinary session. This took place in April 1966, when there was adopted a convention on the recognition and enforcement of foreign judgments in civil and commercial matters. This does not have the form of a multilateral convention of classical type, but art. 21 shows that the Conference has chosen the so-called "bilateralization" method: decisions rendered in a contracting state shall not be recognized in another state *unless* the two states have concluded a supplementary agreement to that effect.

Nevertheless work was continued on the convention on the choice of court. In 1964 a convention on this subject was adopted, although in a greatly modified form inasmuch as—in contrast to the draft (doc. prél. no. 2, May 1964) and the convention of 1958—no special legal force was accorded to a judgment rendered in reference to a choice-of-court agreement valid under the convention. From Lars Welamson's report (*Actes* 1964 IV, pp. 201 f.) it appears that it had been considered whether the convention of 1964 should replace the more specialized convention on agreements on jurisdiction concerning international sales of goods. This idea had been rejected because it was considered that it would be absurd to cause the Conference to "dévorer ses propres enfants". Another solution had also been considered, namely that of introducing the convention as a special chapter in the future convention on the recognition and enforcement of foreign judgments. But this solution, though recognized as technically feasible, was also rejected on the ground that it is conceivable that certain states might be willing to adhere to a convention on the choice of court but hesitate to sign the general convention on foreign judgments (Welamson's report, p. 8).

The existing outcome, with two mutually divergent conventions on the choice of court, does not seem to be satisfactory. I consider it extremely doubtful whether there is any need at all for an international convention on this subject; here I would refer

to the doubts expressed by Graveson in the *ad hoc* committee (doc. prél. no. 2, May 1964, p. 9). Not until one is able to see what form the general convention on foreign judgments will take will it be possible to take up a position regarding the other two conventions.

4. Already at the Conference of 1928 the French delegate Basdevant had proposed as a subject for the further work at The Hague "le régime international des sociétés" (*Actes* 1928 p. 402). In 1951 this proposal resulted in the adoption of a convention concerning recognition of the legal personality of foreign companies, etc. Basdevant's proposal had a wider aim, as had also the questionnaire sent out to the governments. The convention as it exists is of no interest to the Scandinavian countries.[5]

5. The "Renvoi" convention of 1951 (convention to determine conflicts between the national law and the law of domicile). The originator of this convention was the distinguished Dutch scholar Professor Meijers, who had prepared both the first draft (Doc. 1951, pp. 44–7) and the memorandum which is to be found in *Actes,* pp. 210–13. The object was to reduce the gap between the domicile and the nationality principle by concessions from both sides in cases where the interest in having the eliminated principle used was small. The idea of basing the convention on the *renvoi* concept was abandoned. As it has emerged, it is a convention for the regulation of conflicts between the national law and the law of domicile.

When the state in which the person is domiciled prescribes the application of the national law, but the state of which he is a citizen prescribes the application of the law of domicile, the latter must be used (art. 1). The law of domicile is also to be used by all signatory states when both the state in which the person is domiciled and the state of which he is a citizen prescribe the application of the law of domicile (art. 2). The national law is (only) to be applied when both the state in which the person is domiciled and that of which he is a citizen prescribe the application of the national law (art. 3).

In 1951 Denmark, Norway and Sweden announced their opposition to such a convention, as also did France and Italy. Finland, on the other hand, joined the majority. In view of the very sub-

[5] Cf. Håkan Nial, *Internationell förmögenhetsrätt,* 1953, pp. 77 f., Allan Philip, *Studier i den internationale selskabsrets teori,* 1961, pp. 40 f., O. A. Borum, "De conflictu legum", *Essays presented to Kollewijn and Offerhaus,* Leyden 1962, pp. 82–8.

stantial concessions that the convention contains in regard to the domicile principle, it may perhaps be said that art. 3 involves only a rather slight deviation from this. When a German is resident in Holland his status under Danish, English or Norwegian law must, strictly speaking, be judged in accordance with Dutch law. Under the convention German law must be applied in such a case because it is the one in closest accord with the two legal systems principally involved. In *Liber Amicorum to Algot Bagge* (pp. 16–21) I have tried to support this fair and reasonable solution. The convention has subsequently been signed by five countries (including France) and has been ratified by Belgium and Holland.

6. According to its agenda the Conference of 1951 was to deal with the question of a convention on maintenance. In the event, however, there was only a discussion of principles, during which the Danish and Swedish delegates emphasized that the question of recognition and enforcement of decisions concerning maintenance payments was more important than a convention to determine which country's law is to be applied in these decisions (*Actes*, p. 240).[6] This view was supported by Cheshire (United Kingdom) and Dölle (West Germany) and influenced the subsequent development. In 1956 there were adopted two conventions, one concerning the recognition and enforcement of decisions involving obligations to support children, the other concerning choice of law with regard to obligations to support children. The former convention applies to minor children born in or out of wedlock and, at the particular wish of the Scandinavian countries, adopted children.

The two conventions, which are independent of each other, entered into force in 1962 between a number of countries; of these Belgium and the Scandinavian countries ratified only the convention concerning recognition and enforcement.

The convention on the choice of law is of particular interest inasmuch as—albeit in a limited area—it embodies a principle which (apparently) diverges fundamentally from the earlier conventions in the sphere of family law. In the report of Professor

[6] The classic reflection of Meijers during the debate has often been quoted: "M. Meijers remarque qu'en matière de droit international privé on croit toujours que la manière la plus facile de résoudre les problèmes c'est de tourner la question. Lorsqu'on discute l'unification des règles de conflit, on dit qu'il faut commencer par la reconnaissance des jugements, et lorsqu'on discute de ces derniers, on dit qu'il faut commencer par l'unification des règles de conflits de lois" (*Actes* 1951, p. 241, cf. Doc. 1956, p. 132 and p. 147).

Louis de Winter presenting the special commission's draft of January 1955 (Doc. 1956, p. 127) there are first adduced a series of sound reasons for the proposal that the law of the child's habitual residence should be determinative. The authorities in the country in which the child lives and grows up are those best fitted to decide the matter. The child's interests are best cared for by these authorities, and the purpose of the convention, "la protection de l'enfant mineur", is most effectively achieved by this principle. Another advantage is that the person liable to provide maintenance cannot escape his obligation by moving to another country. The fact that the public authorities may be involved by making a grant for the maintenance of the child is an additional reason for the application of the law of the country in which the child is living.

Finally, it was put forward as an important argument that the application of the law of the child's habitual residence is the only rule (*de conflits*) which is acceptable both to "Etats-domicile" and to "Etats-nationalité". The law of the child's habitual residence would be applied not in virtue of a statute of family law or the law of obligation but as a rule *sui generis,* based on social and humanitarian grounds. This ingenious device for bridging the hitherto unbridgeable gulf between domicile and nationality was accepted without discussion at the Conference of 1956 (*Actes,* pp. 166 f.).

From the overriding principal rule in art. 1 there are only a few quite limited exceptions, which may also be accepted by domicile states. Under art. 2 a state *may* (generally) declare that the *lex fori* ("sa propre loi") shall be applied, if both the child and the person liable to maintenance have citizenship in the country of the court and the person liable to maintenance also has habitual residence therein; for example, when it is sought to order a Danish citizen resident in Denmark to pay maintenance to a Danish child in another country.

7. The comparatively easy passage which the two conventions on maintenance enjoyed at the Conference of 1956 encouraged the making of yet another attempt to revise the old family-law conventions. This was directed to the convention of 1902 concerning guardianship. In a memorandum of September–October 1958 the Permanent Bureau emphasized that this convention was out of date. The membership was no longer confined to states favouring the principle of nationality; even in some of these states it had been questioned by legal writers and by the courts

whether it was proper to rely on this principle, and it had also been necessary to discard it in certain cases, especially in the treatment of the personal legal relations of the numerous refugees. The convention of 1902 applies only to guardianship, not to parental authority. What in one country is treated as parental authority is regarded in another as a question of guardianship. Finally there was adduced the argument—which perhaps was of particular weight—that the child care exercised by the public authorities was nowadays of an entirely different extent and character from what it had been formerly, and that in practice it had proved very difficult to distinguish between guardianship and similar private-law arrangements, on the one hand, and public-law situations with a social aim, on the other. This point of view was further developed with references to the decision in the Boll case in the judgment of the International Court of Justice of November 27, 1958.[7] The need for rules which would generally cover "protection des mineurs", comprising alike guardianship, parental authority and public-law arrangements, as for example the taking into care of children and young persons, was strongly urged in the commission and at the Conference of 1960 by representatives of the Social Service International.

At the Conference the committee's draft (*Actes* 1960 IV, pp. 14 f.) underwent some amendment, but the main rule in arts. 1 and 2 was maintained. Henceforth it is the judicial or administrative authorities in the state in which the minor has his habitual residence which are competent to take all decisions for the protection of the minor's person and property, and the decisions must be in agreement with the national law (*lex fori*) of the competent authority.[8]

The consequent linking together of choice of law and competence has been described by von Overbeck as a negation of one of the principles on which private international law is based. This is scarcely correct, since it must be acknowledged that there are objective reasons in the social situations covered by the convention which argue for the application of the national law of the competent authority.

Great difficulties were encountered in finding a solution which could satisfy both the representatives of countries upholding the domicile principle and the representatives of countries which

[7] Cf. Sture Petrén in *Sv.J.T.* 1959, pp. 201–9, and Hilding Eek, *ibid.*, pp. 561–79, Alfred E. von Overbeck, *Festgabe für Max Gutzwiller,* 1959, pp. 330 f.
[8] Cf. de Winter (*Actes* 1960 IV, p. 66).

remain firmly attached to the nationality principle. It was strongly urged both by de Winter and by the Swiss delegate von Steiger (the author of the final report) that it was a matter of seeking a practical solution in order to help minors without in other respects taking up positions in the dispute between supporters of the two principles.

In order, however, to secure the desired accession to arts. 1 and 2 it was necessary to make substantial concessions concerning the national authorities. First, under art. 3 a guardianship status *ex lege* according to the minor's national law must be recognized in the other states; this applies, for example, to a rule in the national law that the surviving parent has parental authority and is the child's guardian. But the provision is so vaguely formulated that its scope is uncertain. More important is art. 4. Under this the authorities in the minor's home country, when they find that the minor's interests so require and after having advised the authorities in the place of residence thereof, can take over care in agreement with the rules of the national law. The other states are under obligation to acknowledge the decision, but are not under obligation to cooperate in the enforcement in cases where this is to be effected outside the country of citizenship.

In other respects the legal position under art. 8 is that even if guardianship, etc., *ex lege* come under the authorities of another country or the national authorities under art. 4 have taken over care, this can be disregarded by the local authorities (in the place where the minor is resident) when the minor is exposed to a serious risk to his personal integrity or to his property. Furthermore, in art. 9 the local authorities are given a special emergency competence inasmuch as in urgent cases (*dans tous les cas d'urgence*) they can make the necessary arrangements for protection.

It is not easy to ascertain how much reality there is in the provisions in favour of national authorities and national law. The Social Service International strongly emphasize that nowadays the fate of these children depends on the protective arrangements undertaken by the authorities where the child is resident, while the national authorities can in exceptional cases take charge of children who live abroad. Batiffol also expresses the opinion that an application of the personal law will seldom occur, and de Winter points out that under art. 8 it is also the local authorities that have the last word; *De conflictu legum* p. 55 and p. 524.

It is possible that the Scandinavian states might accept the convention, since it represents a gain to establish as an overriding

rule that it is the authorities in the country where the minor lives who should take charge of him and give him the protection which that country's law indicates, and since the convention acknowledges that in this sphere it is necessary to give up the cleavage between civil-law and public-law arrangements if help is to be extended to young persons who live outside their country of nationality. On the other hand, it may be objected that the convention, especially after the amendments to which it was subjected at the Conference of 1956, has become too complicated and will therefore involve the authorities applying the law in excessive difficulties. The United Kingdom had informed the Conference in advance that it was not interested in the convention (*Actes* 1960 IV, pp. 92 and 174), cf. Graveson, *I.C.L.Q.* 1961, p. 26. Six countries, including France, Holland and Switzerland, have acceded to the convention, but so far no country has ratified it.

8. The question of a convention on conflicts of law concerning the form of testamentary dispositions was taken up after a request made from British quarters. The subject was well prepared in von Overbeck's exhaustive report, and a preliminary draft elaborated by the Dutch governmental commission (Commission d'Etat) was subsequently dealt with by a special commission. The proposals of this latter commission were, with some minor amendments, adopted at the Conference of 1960. The convention was signed by 12 countries and has been ratified by the United Kingdom,[9] Japan, Yugoslavia and Austria (entered into force in January, 1964). The attitude of the Scandinavian countries is therefore a matter of topical interest.

The convention keeps strictly to the question of the form of testaments; it does not concern itself with competence and still less with the material validity of the will, a matter which cannot be decided without entering into the difficult question of which country's law is to be applied in judging the succession. The convention is inspired by the idea of transferring the principle of interpretation usually known as "favor testamenti" to the subject whether a testament is to be considered valid with regard to its form, when fulfilling the requirements concerning form in one of the legal systems to which there existed a reasonable connection either at the drawing up of the will or at the testator's death.

Art. 1 seems to be rather lax in this respect, since it lists the following:

[9] See Wills Act 1963 (Ch. 44, July 31, 1963); cf. Private International Law Committee, Fourth Report 1958 (Formal validity of wills).

(a) *lex loci actus*

(b) the national law of the testator at the time of making the will or at the testator's death

(c) the law of the testator's domicile at the making of the will or at his death

(d) the law of the testator's habitual residence at the making of the will or at death

(e) so far as real estate is concerned, the *lex rei sitae*.

The alternative application of the law of the testator's domicile and the law of his habitual residence (his customary or fixed domicile) gave rise to a long discussion in the special commission, but was accepted by the Conference without further debate. In the Scandinavian countries and in some others, domicile and habitual residence coincide; but this is not universally so, and having regard to *favor testamenti* it was thought desirable to keep open both possibilities of upholding the will. The most important reason for the acceptance of both alternatives was consideration for the special English rules of domicile (domicile of origin). An important aid to the understanding of the concept habitual residence is to be found in Batiffol's report (*Actes* 1960 III, p. 1964): "La Conférence a estimé que cette notion était dans l'esprit de la convention essentiellement de fait. Sans doute l'élément d'habitude peut impliquer l'appréciation d'une intention, mais il s'agit encore de la constatation d'un fait." Thus the term *résidence habituelle* is scarcely different from what in Danish and other Scandinavian law is understood by domicile (*hemvist*).[1] Therefore, a Scandinavian court, in applying the convention's rules in art. 1 (c)–(d), will normally have to take account only of the testator's domicile (in the Scandinavian meaning) at the time of the making of the will and at death. Only quite exceptionally can there be a question of further taking the English rules on domicile of origin into consideration. In reality, as Batiffol said in the commission, it is a question of an application of the testator's English *national* law.

Concerning an objection put forward by Denmark, among other

[1] In the special commission Batiffol at first described the term *résidence habituelle* as a *"pure notion de fait"* but later modified this statement: "M. Schwind (Autriche) approuvé par M. Batiffol (France), observe que la 'résidence habituelle' que l'on appelle pure notion de fait, soulève tout de même pas mal de problèmes juridiques : quand une résidence devient-elle habituelle?", etc. On the divergent terminology in the U.S.A., see W. L. M. Reese and Robert S. Green: "That Elusive Word 'Residence'" (6 Vand. L. Rev. 561, 1953), reprinted in *Selected Readings on Conflict of Laws*, 1956, pp. 483 f.

countries, that the many possibilities for a state to make reservations at ratification in respect of individual clauses would render the application of the convention difficult, the President remarked that the danger of this was not great. The reservations in arts. 10, 12 and 13 concerned Yugoslavia only, those in art. 9 the United Kingdom only. With art. 11 it is necessary to deal at somewhat greater length. It concerns the old classification question, in this case the rule in the Dutch statute book, art. 992, according to which a Dutch citizen abroad can make a will only under the supervision of a public authority.[2] If this rule is taken as a prescription as to form, the holographic testament which a Dutch citizen makes in France is valid. If, on the other hand, art. 992 is considered to concern the person's power to make a will which is judged according to his personal law, the testament is not valid. The Netherlands representatives urged that the prohibition in art. 992 should be respected in the other states when a testator did not, through domicile or habitual residence, have a closer connection with the state where the holographic testament was made (*Actes* 1960 III, pp. 95 f.). The majority, however, upheld art. 5, according to which such a prohibition is a form rule, whose setting aside cannot involve the invalidity of the testament in another country. The Netherlands (and Portugal) achieved only a very limited right to make reservations against the validity of such a will, in the case of property existing on Dutch (Portuguese) territory.

The advantage conferred by the convention through the far-reaching formal recognition of testaments is in my opinion so valuable that no time should be lost in considering its ratification. The objections that can be made against the convention are not of such a character that they should be allowed to stand in the way of such action. The date will obviously depend to some extent on what further accessions take place, especially if the convention is ratified by countries such as Germany and France.

9. That there is a need for a convention on international adoptions, i.e. adoptions which owing to the parties' personal circumstances, their nationality or residence have connections with several countries, is shown by the fact that a number of international organizations have worked on the subject. The need for international agreements for the protection of children from one

[2] A corresponding rule is found in the Portuguese Cod. Civ., art. 1961, and in a number of Latin American states; cf. von Overbeck, *op. cit.*, p. 116.

country whom it is desired to adopt in another country was strongly urged by the Social Service International, which submitted a detailed report, based on its extensive experience, and representatives of which took part in the meetings at The Hague. Especially since the second world war the number of adoptions of foreign children has been steadily increasing. The United Nations Technical Assistance Office (Geneva) dealt with the subject at a meeting in May 1960, from which there emerged the so-called Leysin report. For several years the Social Committee of the Council of Europe has been working on a draft convention which would harmonize the rules on adoption partly by establishing certain essential minimum requirements which the states should follow and partly by laying down more far-reaching rules which are considered desirable, for example a proviso that the child must have been with the applicants for a certain time before (final) adoption is announced. Finally the International Law Association discussed the question at its conference in Tokyo in 1964 on the basis of Dr. Lipstein's report.

The draft convention prepared at the Hague Conference of 1964 concerns international adoptions only, as is stated in arts. 1–2. Cases where both the adoptive parent and the child have the same nationality and live in the same state are not covered. Consequently these so-called internal adoptions are not governed by art. 8, under which adoptions which are announced by an authority competent according to the convention without further formality must be recognized in the other states. In contrast to the previous draft, art. 8 contains no special *ordre public* reservation, this being considered superfluous in view of the general (but narrowly limited) rule in art. 15, according to which the provisions of the convention can be set aside only when their application would obviously be in conflict with the *ordre public* of the country. The fact that the states operate different types of adoption, strong and weak, and mixed systems meant that no agreement could be reached on what "recognition" actually means, beyond that the child must be accepted as an adoptive child. But with what legal effects in relation to the adoptive parent, his family, and the child's natural family? On this the convention says nothing; cf. below on the legal effects of adoption.

The convention, like the convention concerning the protection of infants, is based on the idea that the primary issue is the question of jurisdiction, of which country's authorities should be

accorded competence. If agreement can be reached on this, the choice of law becomes a secondary consideration. In principle it was recognized that the court or the administrative authority applies the substantive rules of its own law, i.e. the *lex fori* without *renvoi* to the internal rules of any other country. This solution is compatible with obliging the competent authority *to a limited extent* to *take account of foreign law* concerning special questions in respect of which that country is particularly interested in seeing its rules applied.

In contrast to the convention concerning the protection of infants, under art. 1 of which the authorities of the minor's habitual residence are in principle accorded competence to make arrangements for the protection of the minor's person and property, while under art. 4 the competence of the national authorities is of a *subsidiary* character, the convention on adoption, in art. 3, places the authorities of the state of residence and the state of nationality on the same footing.

In this way there is created a double, competing competence with equal jurisdiction for both. The recognition of the competence of the territorial authorities can, of course, be regarded as an important concession on the part of those states which hold to the nationality principle.[3] But when it is acknowledged—as the report expressly does—that it is incontestable that the authorities in the state where the adoptive parents have their habitual residence are best fitted to investigate the circumstances of the adoptive parents and the environment in which it is proposed to place the child, it is not altogether easy for those states which adhere to the domicile principle to accept a national competence competing on a basis of equality. The report, indeed, admits that this rule has been adopted out of regard for those states which traditionally follow the nationality principle.[4] It is possible that in this matter, as in several others, one may assume that it is only a matter of a formal concession to the traditional views of the national states and one which these states will only occasionally make use of. It would, however, have been much better if the *subsidiary* character of the national authorities' competence had been expressed in the text of the convention.

In order to meet a wish put forward mainly by Denmark and Norway, art. 22 makes it possible for a state, upon ratification,

[3] Cf. Graveson, *I.C.L.Q.* 1965, p. 535: "For those countries which adhere strongly to the concept of nationality this constitutes a major concession."

[4] See Roger Maul's report of June 1965, p. 11.

to make the reservation that it will not acknowledge an adoption announced by the national authorities in pursuance of art. 3 (b), when the adoptive child is not of the same nationality as the adoptive parents and at the time of the application for adoption has his habitual residence in the state in question. The consequence of such a reservation will be that, for example, German authorities could give a German citizen resident in Denmark or Norway permission to adopt a German child. On the other hand, they could not with legal effect in our law authorize the adoption of a Danish or Norwegian child resident in Denmark or Norway respectively. The French delegate Loussouarn expressed his understanding of the fact that in this way it had been rendered possible for states to make reservations when they had a reason of decisive importance for doing so, "parce qu'un rattachement de l'adoption à leur territoire a été méconnu".

With regard to the choice of law, the convention follows the principle of the unity of *forum* and *jus*. The conditions for adoption are determined in accordance with the substantive rules of the law of the competent authority. There are, however, two exceptions from this. The first concerns the declarations of consent which are needed for the adoption on the part of the child and its natural family and the statements which must be obtained from other persons or institutions closely connected with the child. Here the rules of the child's national law must be applied. In contrast to the draft, which accorded the decision to the national authorities, it is now the territorial authorities that decide whether the declarations of consent, etc., necessary according to the child's national law have been made. This may be regarded as an improvement.

The second exception is far more doubtful. According to art. 4, clause 2, the territorial authorities must respect interdictions in the national law of the adoptive parent or parents, which stand in the way of the adoption. The list of the prohibitions which must be respected was considerably increased in the final convention. According to art. 13 the following national interdictions to adoption have to be respected:

(a) the existence of descendants of the adopter or adopters;
(b) the fact that a single person is applying to adopt;
(c) the existence of a blood relationship between an adopter and the child;
(d) the existence of a previous adoption of the child by other persons;

nevertheless a strong desire to produce a convention, it was ultimately agreed to avoid putting in any rule on this matter, which simply means that the question will have to be decided according to the rules of private international law applicable in the country where the problem arises.[6] In support of the assumption that a convention on adoption can function and be of use without containing any rule as to the country according to whose law the legal effects are to be judged, reference was made during the negotiations to the Scandinavian convention of 1931. The argument was, however, weakened to some extent by the fact that the substantive rules on the legal effects of adoption in the Scandinavian legal systems were in 1931 closely similar and are still in substantial agreement.

The report also refers on p. 13 to the fact that an adoption made in agreement with the convention shall under art. 8 be recognized without further formalities in the other signatory states, and thus that the child's capacity as adoptive child of the adoptive parents cannot be attacked or brought into doubt; this also applies when it is a question of inheritance.

The fact that it proved impossible to achieve anything except this negative result is certainly due to the fact that the substantive rules on the legal effects of an adoption, both in relation to the adoptive parents (and their family) and in relation to the adoptive child, differ markedly in the various states.[7] Some recognize "strong" adoption with full family assent (*adoptio plena*), while others go no further than recognizing "weak" adoption. Admittedly this means that the child in relation to the adoptive parent is regarded as the latter's legitimate child, but it preserves inheritance to the natural family and customarily does not accord inheritance to the family of the adoptee (*adoptio minus plena*). Other legal systems offer a choice between several systems.

On the question of the *legal effects of the adoption as regards inheritance and citizenship* it was not found possible to come to

[6] Maul emphasized (October 23) that this solution involved practically the same results as art. 8 of the previous draft, according to which the legal effects should be determined according to "la loi du statut personnel des adoptants", with the consequence that legal effects would be changed in the event of a change in the statute; but it was considered to be more acceptable to those countries which adhere to the nationality principle.

[7] Compare in this connection the comment made by Prof. W. L. M. Reese (U.S.A.) in the meeting of October 23, 1964, to the effect that before one can prepare a convention on adoption it is necessary to define what one understands by adoption, inasmuch as this term represents different realities according to the legislation of the different countries.

an agreement. Proposals for embodying in the convention a substantive rule which would make all adoptions effected according to the provisions of the convention *strong adoptions* (*adoptio plena*) failed for a number of reasons. In the first place the rule would bring about a dualism in the legal status in those states which internally observed weak adoption (*adoptio minus plena*) and would compel them to recognize, for the purposes of the convention, strong adoption. Furthermore, a number of delegates felt that it was undesirable on grounds of principle to embody *far-reaching* substantive provisions in a convention on private international law.[8]

The question of the exclusivity or non-exclusivity of the convention also gave rise to deep differences of opinion. From individual quarters it was maintained that if the convention was not exclusive it would be without value, while on the contrary side it was pointed out that the convention nevertheless meant that an adoption effected with due observation of the convention's rules would be recognized without further ado. In respect of other adoptions there was, as now, freedom with regard to recognition or non-recognition. The fairly extensive dissatisfaction with the provisions of the convention led to the acceptance of the last-mentioned rule. But there were also divergent opinions as to what this rule would mean. Maul, who is a supporter of exclusivity, interprets the rule of non-exclusivity as meaning only that a signatory state can give its authorities competence to announce adoption apart from the grounds of competence named in art. 3 (the adoptive parents' habitual residence or nationality) and, for example, give the authorities, where the child lives or is a citizen or where *one* of the adoptive parents lives or is a citizen, competence to announce adoption. In these cases there is no obligation to observe the other provisions of the convention. On the other hand, Maul maintains that, if the authorities of a state are competent under art. 3, they are bound by the other provisions of the convention, not only regarding procedure, declarations of consent according to the national law, but also by the prohibition rules in the national law which according to art. 13

[8] Art. 6 contains substantive provisions: adoption may not be authorized unless it will be in the child's interest, and above all there is the provision, central to the purposes of the whole convention and the contribution of the Social Service International, that there must be a thorough investigation concerning the adoptive parents, the circumstances of the adoptive child and its family, so far as possible in cooperation with public or private organizations which have special knowledge of "inter-country adoptions".

must be respected in the other states; see report, pp. 18–19. Maul bases this interpretation on a very dubious *argumentum e contrario* from the provision in art. 2 (c) that the convention is not applicable to an adoption which is not declared by an authority possessing competence under art. 3. The opponents of exclusivity, however, expressly stated that one of the reasons why they could not agree to this principle was the requirement that the national prohibitions (art. 13) should be respected. When exclusivity was rejected this, in my opinion, means that a signatory state—without being bound by art. 4, cf. art. 13—can proclaim an adoption which it finds socially desirable, provided the conditions for this are in accordance with the state's own internal law. The other states are free to determine whether they will recognize such an adoption or not.

It is beyond the scope of this paper to try to evaluate the results of the Hague Conferences and to forecast to what extent their declared object, "l'unification progressive des règles de droit international privé", can be expected to be realized.[9] It should, however, be said that without the outstanding contributions and the spirit of sacrifice shown by the Dutch delegates no progress could have been made. The Commission d'Etat and the Permanent Bureau have steadfastly held to the belief that, in spite of all the setbacks—especially the reluctance to ratify—it is nevertheless useful to assemble delegates from a steadily increasing number of countries to the discussions at The Hague. Only a few concluding remarks now remain to be made.

The question of the relation of the Hague conventions to the Scandinavian convention of 1931 (containing certain provisions on private international law regarding marriage, adoption and guardianship) was raised on several occasions by the Scandinavian delegates. They asked for a provision expressly stating that accession to the Hague conventions constitutes no obstacle to the continued existence of the Scandinavian convention, and they wanted

[9] Ph. Francescakis (Greek delegate 1964) in a paper in the *Journal du droit international* 1965, no. 1, which is concerned with the question of a convention on divorce, has stressed the difficulties which arise because a conference is always a "réunion diplomatique" where the delegates are the representatives of their governments but at the same time appear as "experts" who feel themselves bound by their national systems of private international law, which now constitute a burdensome theoretical apparatus. A balancing of the different theoretical viewpoints in a convention will therefore be an involved and difficult technical task.

the provision formulated in such a way that it would be clear that the Scandinavian countries were entitled to revise the convention of 1931 or possibly to replace it by another convention.[1] However, it did not prove possible to achieve more than the provisions in art. 18, clause 2, in the convention on the protection of infants and art. 12 in the adoption convention, which state that the convention in question is no obstacle to other conventions which bind contracting states. This formula was accepted by the Scandinavian delegations, who at the same time made it clear that they reserved the right to make, in the future also, such modifications in the convention of 1931 as would not be in conflict with the Hague convention.[2]

The very detailed discussions at The Hague of the burning issues of private international law have undoubtedly served to narrow down differences.[3] Everyone realizes that the old idea of a common, supranational private international law is a dream. But there is an increasing realization that in view of the steadily growing legal consensus between the nations it is incumbent on the individual nations to try to reach solutions which can be accepted by the other countries to which the legal relation might have connection. The ability of the Scandinavian countries to gain support for their views is enhanced by the fact that countries such as the United Kingdom, Ireland and the U.S.A. now take part in the Conferences. Most of the countries which hitherto have based their rules on nationality no longer adopt such a rigid attitude as they did formerly; and the domicile states may also be prepared to make concessions to the principle of nationality, especially as a subsidiary criterion for jurisdiction and choice of law. In the same way, they may also accept nationality as the decisive consideration in certain fundamental questions such as,

[1] See *Actes* 1960 IV, pp. 208–11 and p. 242, Maul's report, June 1965, p. 34. It was desired to retain observation of "autres conventions conclues *ou à conclure*"; cf. Batiffol's pronouncement (p. 209) "les Etats parties à une convention ont toujours le droit d'établir entre eux par la suite des conventions bilatérales".

[2] Art. 3 of the convention on testamentary dispositions starts from the principle of *favor testamenti* inasmuch as it accepts "règles actuelles *ou futures*" which involve recognition of the formal validity of testament.

[3] Perhaps it is possible even now to say that on the basis of individual provisions in the Hague conventions and independently of ratification there is developing an evolutionary private international customary law. Graveson mentions as an example of this the concordant provisions in several of the new conventions of the ascertainment of the applicable law in a reference to a "national" law comprising several systems (e.g. United Kingdom and U.S.A.), see *I.C.L.Q.* 1965, p. 535.

for example, consent to adoption. On the other hand, there seems scarcely any possibility of accepting that, for example, the prohibition of divorce in Italy and Spain should constitute an absolute obstacle to the granting of divorce to Italian or Spanish citizens who through residence in a Scandinavian country for a period of years have established a permanent connection with that country.

The unsatisfactory status of ratification of conventions drafted by the Hague Conferences,[4] as well as the steadily increasing number of legal systems of differing kinds which are now represented at the Conferences, has made topical the question whether the purposes of the Conferences could not be achieved in another way than through international *conventions* on conflicts of law and jurisdictions. The issue was in fact raised as early as 1956 by the United States delegates,[5] who suggested that the objectives could perhaps be reached more effectively if the Conferences did not view it as their sole task to prepare multilateral conventions but—at any rate in certain cases—instead formulated model statutes.[6] The states would not be obliged by convention to follow these; they would rather be apprehended as draft statutes which the organization preparing them would ask the countries to observe. The states would be free to introduce model statutes in their national legislation on choice of law and jurisdiction, and they could modify the provisions of the model statute (even at a later date) in order to adapt it to the national substantive legislation or the rules which apply to the solution of conflicts of law.

The question of model statutes *versus* conventions was dealt with in detail at the Conference of 1960. The idea won some support but also aroused some doubts; in particular it was emphasized that the traditional task of the Hague Conferences was to prepare binding multilateral conventions and that their diplomatic character could be endangered if the line hitherto followed were to be abandoned. The idea of model statutes was not rejected, but the *Acte final* of 1960 contains a resolution reaffirming the merits of conventions.[7]

[4] Cf. statement of the Commission d'Etats, *Actes* 1961, p. 209, and President Offerhaus's opening address, pp. 23 f.

[5] *Actes* 1956, pp. 266–73, where the American views are stated by Nadelmann.

[6] Concerning the difference in the U.S.A. between model laws and uniform laws, see *Actes* 1956, p. 273. On the terminology in the debate at The Hague, see Droz's report, *Actes* 1960 I, pp. 231 f.

[7] See Kurt H. Nadelmann in *American Journal of Comparative Law*, vol. 9, no. 4 1960, pp. 587–90, Philip W. Amram in *Proceedings of the American Society of International Law* 1960, pp. 62–7, Georges A. L. Droz in *Revue*

However, the issue was not fully debated or clarified. At the 1964 Conference a new resolution was adopted referring to the special interest of the United States in the matter and calling upon the Permanent Bureau to prepare model statutes on the subjects covered by the *Acte final* of 1964.

internationale de droit comparé 1961, no. 3, R. H. Graveson in *I.C.L.Q.* 1961, pp. 29 f.