PRIVATE INTERNATIONAL LAW: CHANGE OR DECAY?*

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INTRODUCTION

THE aim of this article is to survey the private international law scene in a number of regards, tracing developments in this country over recent decades, offering some thoughts on how such changes have come about and on their impact, concluding with an element of crystal gazing for the future. The turn of the century, to say nothing of the millennium, is as good a time as any to reflect on these developments. How then has the subject changed since the end of the nineteenth century? A useful, though unsophisticated, yardstick with which to start is to look at the approaches of the two major English books on the subject and to see how their coverage of different aspects of the subject has changed over the decades.

One of the most marked changes of the 20th century has been the intrusion of statute law into private international law,[1] an area of the common law which was essentially created by judges. The textbooks, edition by edition, provide a clear sense of this change. In the Preface to the first edition of his *Private International Law* in 1935, Geoffrey Cheshire made the following now oft-quoted statement:

> Of all the departments of English law, Private International Law offers the freest scope to the mere jurist. It is the perfect antithesis of such a topic as real property law. It is not overloaded with detailed rules, it has been only lightly touched by the paralysing hand of the Parliamentary draftsman, it is perhaps the one considerable department in which the formation of a coherent body of law is in course of process, it is, at the moment, fluid not static, elusive not obvious, it repels any tendency to dogmatism, and, above all, the possible permutations of the questions that it raises are so numerous that the diligent investigator can seldom rest content with the solution that he proposes.[2]

Evidence of the absence of the paralysing hand of the draftsman is provided by the fact that the Table of Statutes in that first edition is a mere three pages long.[3] In the current, 1999, edition of Cheshire and North it is

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1. See Nott (1984) 33 I.C.L.Q. 437.
2. *Private International Law* (1935), p.vii.
3. *Ibid*, pp.lvi–lviii.

16 pages long.[4] Dicey tells a similar, perhaps more dramatic, story. There was no Table of Statutes in the first edition in 1896. Indeed, it was not until John Morris assumed the General Editorship with the sixth edition in 1949 that the first such Table appeared.[5] The Table of United Kingdom Statutes in the current, 13th, edition of Dicey and Morris (published in 2000) is over 43 pages long.[6]

These are quite striking figures and they pose a number of questions. What has led to such a marked change, surely not a mistrust of judicial capacity to develop the law? What have been the engines of this change, i.e. what bodies or organisations have delivered the change; and what has motivated them to provide it? Finally, has it been changed for the better or has it, in some way, led to the "decay" of the subject, and what are the challenges for the future?

THE AGENCIES OF CHANGE

There have been a number of agencies whose work on private international law topics has led both to proposals for statutory change and, at times, to actual legislation. A non-exclusive list might include the Private International Law Committee, the Law Commission, the Hague Conference on Private International Law, the European Commission, *ad hoc* international negotiations, and the general activities of government Departments. I shall spend a moment looking at some of the relevant agencies.

(a) The Private International Law Committee

It was in 1952 that a special body was established with particular reference to the reform of private international law. The terms of reference of the Private International Law Committee were:

> To consider what alterations may be desirable in such rules of private international law as the Lord Chancellor may from time to time refer to the Committee; and to consider, on the request of the Lord Chancellor, the subjects proposed for discussion at any international conferences on private international law in which the United Kingdom may be participating, and to consult with departments interested in the proposals; to make recommendations as to the instructions to be given to the United Kingdom representatives at such conferences; and, when requested, to consider and make recommendations on the reports of such conferences and the action to be taken on them.[7]

4. Cheshire and North's *Private International Law* (13 edn, 1999), pp.xxi-xxvi.
5. Dicey and Morris, *The Conflict of Laws* (6 edn, 1949), pp.lv-lxii.
6. Dicey and Morris, *The Conflict of Laws* (13 edn, 2000), Vol.1, pp.xxiii-lxvi.
7. First Report of the Private International Law Committee (1954), Cmd 9068, p.3.

It is clear from these terms of reference that the Committee was not being given free rein, or indeed much rein at all, over issues of private international law. During the dozen or so years of its active life (if that be a fair description), it produced seven reports. Two cannot confidently be commented on because they were never even published, namely the Second Report on international sale of goods and the Third Report on the recognition and enforcement of foreign arbitral awards. One may speculate, however, that the former provided advice on the negotiation of the draft Conventions produced by UNIDROIT in the late 1950s and which formed the basis of two Conventions concluded at The Hague in 1964 and implemented in the United Kingdom by the Uniform Laws on International Sales Act 1967.[8] As for the Third Report, although it was not published, we know from reference to it in the Fifth Report[9] that it constituted advice for the benefit of the United Kingdom representatives in the negotiations which led to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Implementation of the Convention was recommended in the Fifth Report, though this had to wait until the Arbitration Act 1975.

The first and last (the Seventh) Reports addressed the reform of the law of domicile but with no conspicuous success;[10] though the work of the Committee did provide a backcloth for the further review of this area by a Departmental Committee[11] and then by the Law Commission.[12] Although, as we shall see,[13] the Law Commission's attempts at reform were no more successful, such reform as has been effected, namely the abolition of the wife's dependent domicile, was something which the Private International Law Committee had twice opposed![14]

Of the other Reports, the Fourth Report[15] published in 1958 made recommendations for the reform of the law on the formal validity of wills, to be considered in the context of negotiations at the Hague Conference on Private International Law for a Convention thereon. Such a Convention was indeed concluded in 1960 and was given effect in this country by the Wills Act 1963, described by John Morris as a "joint product"[16] of the

8. For a brief history, see Graveson, Cohn and Graveson, *Uniform Laws on International Sales Act 1967* (1968), pp.1–3.

9. Fifth Report of the Private International Law Committee (1961), Cmnd 1515, p.4.

10. First Report of the Private International Law Committee (1954), Cmnd 9068; Seventh Report of the Private International Law Committee (1963), Cmnd 1955.

11. See Law Commission Seventh Annual Report 1971–1972, Law Com No. 50 (1972), para. 54.

12. Private International Law: The Law of Domicile, Law Com No. 168 (1987).

13. See below, pp.483.

14. First Report of the Private International Law Committee (1954), Cmnd 9068, pp.9–10; Seventh Report of the Private International Law Committee (1963), Cmnd 1955, pp.12–20.

15. Fourth Report of the Private International Law Committee (1968), Cmnd 491.

16. Morris (1964) 13 I.C.L.Q. 684, at p.685.

Committee and the Convention. Finally, the Sixth Report[17] recommended that the United Kingdom should not adhere to a draft Convention on Monetary Law proposed by the International Law Association in 1956, though Francis Mann produced a lengthy minority report, generally supportive of the Convention.[18]

At the end of the day, the Committee's work provided assistance and guidance in the negotiation, and assessment of the value, of some five international conventions. As we shall see,[19] much of that work continues to be done but in bodies more often established *ad hoc* by the Lord Chancellor's Department or, in times past, by the Law Commission and without reports of this work necessarily being published. Clearly, the Committee played a part in the reforms to be found in the Wills Act 1963, (probably) the Uniform Laws on International Sales Act 1967, and the Arbitration Act 1975. The Committee did not, however, make a major impact on private international law, for good or ill. The only major topic outside international negotiations on which its advice was sought was reform of the law of domicile; and in that context it achieved little or nothing. It was not given major issues to consider, and would not have had the resources to address them had it been asked to do so. It is not surprising that its last Report appeared just two years before the establishment of the Law Commission to whose work in the private international law field we should turn.

(b) The Law Commission

There is no doubt that the Law Commission, for a time, played a significant role in the review and reform of private international law. In discussing this role, I am in a somewhat ambivalent position. I was a Law Commissioner for part, but certainly not all, of the time when the Commission was active in this area. This gives me a particular insight into its work, but probably in the views of some also deprives me of much appearance of objectivity in assessing the value, if not the impact, of such work.

The first question to ask is why and how did the Commission become involved in examination of issues of private international law. There are several, rather diffuse, answers. The origin certainly lies in family law. The Commission's First Programme[20] in 1965 included, as Item X, Family Law with an ultimate objective of the creation of a code of family law; and Item XII was the Recognition of Foreign Divorces, Nullity Decrees and Adoptions; but again this was with the objective of the development of a

17. Sixth Report of the Private International Law Committee (1962), Cmnd 1648.
18. *Ibid*, at pp.7–19.
19. See below, pp.482, 485–496.
20. First Programme of the Law Commission, Law Com No. 1 (1965).

family law code. In the Second Programme[21] in 1968, these two items were merged into Item XIX as constituting the comprehensive examination of family law with a view to its systematic reform and eventual codification. The result was that the early private international law work of the Law Commission was entirely in the field of family law and most of it was indeed "badged" as "Family Law". From this work stemmed reports recommending reform of the law on polygamous marriages,[22] on the jurisdiction of the courts in matrimonial causes,[23] on financial relief after foreign divorce,[24] and on declarations in family matters.[25] There have been five other major reports in the family law area of private international law. The first was on the legislation necessary to implement The Hague Convention on the Recognition of Divorces and Legal Separations,[26] which was undertaken by reason of a specific reference from the Lord Chancellor in 1970;[27] then there was a major report on conflicts of jurisdiction affecting the custody of children,[28] published in 1985 but again the result of a reference from the Lord Chancellor in 1972—the time-lag being evidence of how difficult it proved to be to get agreement on this matter between the Law Commission and the Scottish Law Commission. Finally, three reports in the family law field, those on the recognition of foreign nullity decrees,[29] on capacity to contract a polygamous marriage,[30] and on choice of law in marriage more generally,[31] were "badged" as "Private International Law" topics (under a separate Programme Item[32] to which reference is made below[33]).

Two general points may be made about this family law work. The first is that it amounted to 60 per cent of all the Commission's published reports in the private international law field. The second is that all of the nine reports were implemented by legislation essentially in the form as

21. Second Programme of Law Reform, Law Com No. 14 (1968).
22. Report on Polygamous Marriages, Law Com No. 42 (1971).
23. Report on Jurisdiction in Matrimonial Causes, Law Com No. 48 (1972).
24. Report on Financial Relief After Foreign Divorce, Law Com No. 117 (1982).
25. Report on Declarations in Family Matters, Law Com No. 132 (1984).
26. Report on Hague Convention on Recognition of Divorces and Legal Separations, Law Com No. 34 (1970).
27. Though the Law Commission had earlier been asked to advise on the negotiations which led up to the conclusion of the Convention; see below, p.490.
28. Report on Custody of Children—Jurisdiction and Enforcement within the United Kingdom, Law Com No. 138 (1985).
29. Report on Recognition of Foreign Nullity Decrees and Related Matters, Law Com No. 137 (1984).
30. Report on Capacity to Contract a Polygamous Marriage and Related Issues, Law Com No. 146 (1985).
31. Report on Choice of Law Rules in Marriage, Law Com No. 165 (1987).
32. Item XXI: Private International Law; see Third Programme of Law Reform, Law Com No. 54 (1973).
33. See below, pp.483–484.

recommended by the Commission.[34] In fact, the figures are rather more striking as this legislative response amounts to 75 per cent of the response to all private international law reports recommending legislation.

The private international law family law work was not unique by reason of the fact that some was undertaken as a result of specific references by Ministers. The same is true of other areas of work on private international law. Requests from the Foreign and Commmonwealth Office for advice led to two reports (in 1981 and 1983) on foreign money issues—one advising that the United Kingdom should not accede to two Council of Europe Conventions (advice which was followed)[35] and the other proposing a number of procedural changes, and one minor legislative change in the law on foreign money,[36] which have been implemented.[37] Two references were made by the Lord Chancellor in the private international law field. In 1978, he (and the Lord Advocate) sought advice on choice of law matters in relation to the EEC draft non-life insurance services directive, a request which led unusually not to the publication of a Law Commission report but rather of the report of a Joint Working Group of the Law Commission and the Scottish Law Commission set up to consider this matter.[38] The second reference, in 1979, requested the Law Commission to consider what changes might be desirable in the classification of limitation of actions in private international law. The genesis of this request was that the Law Reform Committee, who had reported generally in 1977 on limitation of actions, felt that this topic needed to be addressed but also concluded that it fell outside their own terms of reference.[39] The Law Commission's 1982 Report on the classification issue[40] was implemented by legislation two years later.[41]

34. See the Recognition of Divorces and Legal Separations Act 1971 (now the Family Law Act 1986, Part II); Matrimonial Proceedings (Polygamous Marriages) Act 1972 (now the Matrimonial Causes Act 1973); Domicile and Matrimonial Proceedings Act 1973; Matrimonial and Family Proceedings Act 1984, Part III; Family Law Act 1986, Parts I, II and III; Private International Law (Miscellaneous Provisions) Act 1995, Part II. Although the Report on Choice of Law Rules in Marriage recommended leaving most future development to judicial activity, such minor legislative changes as were proposed were implemented in the Foreign Marriage (Amendment) Act 1988.

35. Report on Council of Europe Conventions on Foreign Money Liabilities (1967) and on the Place of Payment of Money Liabilities, Law Com No. 109 (1981).

36. Report on Foreign Money Liabilities, Law Com No. 124 (1983).

37. Private International Law (Miscellaneous Provisions) Act 1995, Part I.

38. Report on the Choice of Law Rules in the Draft Non-Life Insurance Services Directive by a Joint Working Group of the Law Commission and the Scottish Law Commission, 11 April 1979.

39. Twenty-First Report of the Law Reform Committee (1977), Cmnd 6923, paras 2.93 and 2.96.

40. Report on Classification of Limitation in Private International Law, Law Com No. 114 (1982).

41. Foreign Limitation Periods Act 1984.

It had become clear as early as 1973 that the Law Commission was becoming more involved in private international law work and, indeed, more involved in providing advice on international discussions and draft instruments in the private international law, and related, fields. This led to the Law Commission's Third Programme that year whose sole content was the addition of a new Item XXI, Private International Law, in the following terms:

> that, in co-operation with the Scottish Law Commission, the Law Commission take under review when considered appropriate rules of private international law relating to obligations, property, family relationships and to any other matter which may be the subject of negotiations or agreements between Member States of the European Economic Community or of The Hague Conference on Private International Law.[42]

The impact of this new Programme Item on the work of the Law Commission for the next decade and a half is, in fact, more real than apparent. It can be said that only five Reports were formally described as falling within this Item and three of those, in truth, fell into the category of family law to which reference has been made already.[43] Furthermore, of the other two, one was on the law of domicile, a topic on which the Law Commission had no greater legislative impact than the Private International Law Committee, given that the Commission's 1987 report on this topic[44] is the one private international law report to have been rejected by the Government.[45] The only claim to legislative success that the Law Commission could make in this context is that the Domicile and Matrimonial Proceedings Act 1973 which abolished the dependent domicile of a wife and made other relatively minor changes to the law of domicile stemmed from the work of a Departmental Committee on which the Law Commission was represented.[46] That would then seem simply to leave the 1990 Report on Choice of Law in Tort and Delict[47] which proposed major reforms in this area and which was implemented by Part III of the Private International Law (Miscellaneous Provisions) Act 1995. However, even in the case of this major Report, it will be seen later[48] that its genesis lay in work that had originated in Brussels rather than in London.

42. Law Com No. 54 (1973), p.1. This was repeated, in identical terms, as Item 7 of the Law Commission's Fourth Programme; see Law Com No. 185 (1989), p.5.
43. See above, pp.480–481.
44. Report on Private International Law: The Law of Domicile, Law Com No. 168 (1987).
45. See Law Commission Thirtieth Annual Report 1995, Law Com No. 239 (1996), p.10, n.24.
46. See above, p.479.
47. Law Com No. 193 (1990).
48. See below, pp.486–487.

In fact, after the publication of this Report in 1990, reference to work on private international law disappears from the reports of the activities of the Law Commission, other than to note the passage of legislation to implement private international law reports,[49] and the rejection by the Government of the Report on Domicile.[50] A line was finally drawn under this area of activity of the Law Commission in 1995 when, in reference to Item 7 of the Fourth Programme, and in the context of the formulation of the Sixth Programme, it was stated that "we are discontinuing work on this Programme item for the period of this Programme, although we may of course do work on private international law when it is related to our other law reform work."[51] It does not appear, however, that any such work has in fact been done over the last five years and there is no reference to any such activity in the Law Commission's Seventh Programme of Law Reform.[52]

One might, therefore, conclude that the specific Private International Law Item in the Law Commission's Programmes has not, in terms of reforming initiative, borne a great deal of fruit. That judgement depends on how you classify fruit. It is true that the legislative output from Reports under that head is limited; but this conceals at least three issues. The first is that a decision not to recommend major legislative intervention may be the right one; and the Law Commission certainly concluded that that was the case in relation to Choice of Law Rules in Marriage.[53] Secondly, some may say that a decision in favour of legislation is the wrong one; and that view has been voiced most clearly in relation to reform of the tort choice of law rules.[54] Thirdly, the bare bones of Reports and legislation stemming therefrom conceal a great deal of the activity of the Law Commission in the private international law, and more generally international, fields during the period in question from the mid-70s to the late 80s. Furthermore, it must be borne in mind that a good deal of that activity was directed at proposals which have now become major items of legislation.

The specific language of Programme Item XXI extended to matters which might be the subject of EEC negotiations or negotiations at The Hague Conference on Private International Law and it is to the work of those two bodies that attention must now turn.

49. Thirtieth Annual Report 1995, Law Com No. 239 (1996), para. 1.15.
50. *Ibid*, p.10, n.24.
51. Law Commission Sixth Programme of Law Reform, Law Com No. 234 (1995), p.17.
52. Law Com No. 259 (1999).
53. Law Com No. 165 (1987).
54. See, e.g., the views outlined in Cheshire and North's *Private International Law* (13th edn, 1999), p.616.

(c) EEC/EU

One of the most important areas in which the Law Commission was very directly involved[55] was that which led to the reformulation of our contract choice of law rules by reason of the 1980 EEC Rome Convention on the law applicable to contractual obligations, and its implementing legislation, the Contracts (Applicable Law) Act of 1990. In fact, it was in the Law Commission's Eighth Annual Report (1972–73)[56] that mention first appears of work by the Law Commission under Item XXI to examine EEC proposals for a Convention harmonising private international law rules in the field of obligations. This work continued until the conclusion of the Rome Convention in 1980 and extended to cover advice to Ministers on whether the United Kingdom should accede to the Convention and as to what reservations, if any, the United Kingdom

55. There was, in addition to the matters discussed more fully here, a very wide range of EEC legislation—proposed or concluded—on which for a time the advice of the Law Commission was sought. Some had private international law implications, others not so. This work included advice in the following areas:

(i) Commercial agents: see Law Commission Ninth Annual Report 1973–1974, Law Com No 64 (1974), para. 38; Tenth Annual Report 1974–1975, Law Com No. 71 (1975), para. 46. This work culminated in the Report on the Proposed EEC Directive on the Law Relating to Commercial Agents, Law Com No. 84 (1977); and see also Fourteenth Annual Report 1978–1979, Law Com No. 97 (1980), para. 2.58(b); Seventeenth Annual Report 1981–1982, Law Com No. 119 (1983), para. 2.104; Eighteenth Annual Report 1982–1983, Law Com No. 131 (1984), para. 2.95.

(ii) Misleading and Unfair Advertising: see Twelfth Annual Report 1976–1977, Law Com No. 85 (1977), para. 6(3).

(iii) Standard Terms in Consumer Contracts: see Twelfth Annual Report 1976–1977, Law Com No. 85 (1977), para. 6(4).

(iv) Conflict of Laws on Employment Relationships within the EEC: see Twelfth Annual Report 1976–1977, Law Com No. 85 (1977), para. 40.

(v) Harmonisation of Insurance Contract Law: see Thirteenth Annual Report 1977–1978, Law Com No. 92 (1978), para. 1.5(i)(b); Fourteenth Annual Report 1978–1979, Law Com No. 97 (1980), para. 1.2; Fifteenth Annual Report 1979–1980, Law Com No. 107 (1981), paras 1.1(i), 2.2.

(vi) Provision of Insurance Services: see Thirteenth Annual Report 1977–1978, Law Com No. 92 (1978), para. 1.5(i)(c).

(vii) Guarantees and Indemnities: see Thirteenth Annual Report 1977–1978, Law Com No. 92 (1978), para. 1.5(i)(d); Fourteenth Annual Report 1978–1979, Law Com No. 97 (1980), para. 2.58(c); Fifteenth Annual Report 1979–1980, Law Com No. 107 (1981), para. 2.57(i).

(viii) Contracts Negotiated away from Business Premises: see Thirteenth Annual Report 1977–1978, Law Com No. 92 (1978), para. 1.5(i)(e).

(ix) Products Liability: see Fourteenth Annual Report 1978–1979, Law Com No. 97 (1980), para. 2.58(a).

(x) Winding Up of Direct Insurance Undertakings: see Fifteenth Annual Report 1979–1980, Law Com No. 107 (1981), para. 2.57(ii).

(xi) Bankruptcy, Winding Up Arrangements, Compositions and Similar Proceedings: see Sixteenth Annual Report 1980–1981, Law Com No. 113 (1982), para. 2.101.

(xii) European Economic Interest Grouping: see Nineteenth Annual Report 1983–1984, Law Com No. 140 (1985), para. 2.88(ii).

56. Law Com No. 58 (1973), para. 53.

should make.[57] There was, therefore, nearly a decade of continuous input by the Commission, through a Joint Working Group with the Scottish Law Commission, and the substantial individual involvement of both Commissioners and Law Commission staff in the actual EEC negotiations. The consequence is that the shape and content of the Rome Convention, and thus of the 1990 Act, were very significantly influenced by the work of the Law Commission. Whilst ratification of the Rome Convention was not formally required by reason of our membership of the EEC, the political realities in the late 1970s were that the United Kingdom had to strive hard to ensure that a convention was concluded which was generally satisfactory from a United Kingdom perspective. It is also the case that there was a broad willingness within the then nine Member States that there should be an outcome whose success was measured by unanimous implementation.

That quest for general unanimity lies behind the provisions in the Convention[58] enabling the Member States to enter reservations in relation to two specific Articles.[59] Although during the negotiations there was a strong desire, especially within the original six Member States, that a court should be able to give effect to the mandatory rules of a third State, being neither that of the applicable law nor of the forum, it was ultimately concluded that it was better to allow States not to apply this provision (Article 7(1))[60] than to jeopardise the prospect of general agreement on the whole Convention.[61]

One specific facet of the work on the Convention merits comment because of its impact on other private international law work. The original EEC proposal for an obligations convention included non-contractual as well as contractual obligations. Under advice from the Law Commission, the United Kingdom delegation successfully sought to have the Convention limited to contractual obligations.[62] This can be explained as follows. Although the basis of choice of law in contract was similar within the then nine Member States of the EEC, detailed agreement was

57. See Law Commission Sixteenth Annual Report 1980–1981, Law Com No. 113 (1982), para. 2.67.

58. Art. 22.

59. Arts 7(1), 10(1)(e).

60. As well as the United Kingdom, three other States which negotiated the Rome Convention (Germany, Ireland and Luxembourg) entered similar reservations. The United Kingdom also entered a reservation in relation to Art. 10(1)(e).

61. There is a range of very detailed legislation emanating from Brussels in the contract field which contains private international law rules or impacts thereon. See, e.g., Dicey and Morris, *Conflict of Laws* (13th edn, 2000), paras 33–038—33–043 (unfair terms in consumer contracts), para. 33–072 (employment contracts), paras 33–118—33–121, 33–138—33–196 (insurance contracts), 33–233—33–236 (timeshares), and 33–405—33–413 (commercial agents).

62. See Law Commission Twelfth Annual Report 1976–1977, Law Com No. 85 (1977), para. 39; Thirteenth Annual Report 1977–1978, Law Com No. 92 (1978), para. 2.37.

far from easy to achieve. How much more difficult would it be to achieve agreement on choice of law in tort where rules diverged markedly across the EEC, and where there was no clear consensus, even within Member States, let alone between them, as to what the choice of law rules ought to be. Although it was agreed that, once the contractual obligations convention had been concluded, consideration would be resumed on negotiation of a non-contractual obligations Convention, that did not happen. As a consequence, this major piece of unfinished business in terms of reform of choice of law rules in tort was later addressed directly by the Law Commission (jointly with the Scottish Law Commission)[63] outside the context of EEC or EU negotiations, and led to Part III of the Private International Law (Miscellaneous Provisions) Act 1995.

Much more recently, there has been revivification of activity towards producing EU-wide choice of law rules for non-contractual obligations,[64] what has become known as the "Rome II Convention". This work restarted in 1998 and will now, given the Treaty of Amsterdam, proceed on the basis of the preparation in Brussels of a draft Regulation. It is expected that such a draft will be made available for consultation during 2001, at which point the United Kingdom will have to decide whether to "opt-in" to that process. What could well emerge is a uniform set of choice of law rules for tort, replacing those (with their various exceptions for, for example, defamation) currently found in Part III of the Private International Law (Miscellaneous Provisions) Act 1995.

In the context of private international law work within the EEC, there is one very major change in our private international law rules which came about with Law Commission input, though not through a Law Commission Report or the overt presence of the matter on the Law Commission's agenda. This is the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters. The negotiations over the United Kingdom's accession to this convention took some six years from our formal accession to the EEC in 1972; and the relevant legislation appeared on the statute book as the Civil Jurisdiction and Judgments Act 1982. There was a considerable input from both Commissioners and Law Commission staff during the 1970s both to the provision of advice to those negotiating on behalf of the United Kingdom and in the negotiations themselves (as well as in the discussions, once the accession Convention was concluded, as to the terms of the 1982 Act), even though the responsibility for the negotiations was clearly that of the

63. See Law Commission Report on Choice of Law in Tort and Delict, Law Com No. 193 (1990). The original initiative for the involvement of the Law Commission in such work is much earlier; see Law Commission Fourth Annual Report 1968–1969, Law Com No. 27 (1969), para. 67.

64. See Council Resolution of 14 Oct. 1996, (1996) OJ C 319, p.1.

relevant Government departments. It is a statement of the obvious that the 1982 Act, and its extension in the Civil Jurisdiction and Judgments Act 1991 to give effect to the Lugano Convention, have constituted some of the most significant recent changes in our private international law rules and, especially, in their practical application.

Revision of the Brussels Convention on jurisdiction and recognition in civil and commercial matters—and, by extension, revision of the related Lugano Convention—is a matter of current activity in Brussels. Again, in the post-Treaty of Amsterdam world, this work has been transformed into work on a Regulation which will not only amend but, in legal form, wholly replace the Brussels Convention embodied in the 1982 Act. This activity is proceeding apace. The United Kingdom in September 1999 opted in to the process of consultation on the draft Regulation—a process which is now substantially concluded. Indeed, one could envisage formal adoption of the Regulation within a matter of weeks.[65] What will be extremely important for the United Kingdom—and indeed for other Member States—is to ensure that there is a very considerable period before the Regulation comes into effect.[66] Although the substantive changes to the Brussels Convention which it will introduce are not huge, though they are significant, there is much to be done in terms of the substantial redrafting of the 1982 Act.

It ought also to be remembered that the early private international law work within the EEC was not limited to the law of obligations. Preliminary work was done on the preparation of a draft Convention on the private international law rules applicable to corporeal and incorporeal property on which the Law Commission was called upon to advise.[67] It appears, however, not to have progressed very far, with priority in effect having been given to the work on obligations. There is no sign of renewed activity in Brussels in this field.

Another area of recent activity in Brussels in the field of private international law concerns procedure. In this context, a convention on the service, in Member States of the European Union, of judicial and extra-judicial documents in civil and commercial matters was concluded in 1997.[68] Though not yet in force, it will provide a regime throughout the European Union similar to that provided by the Hague Convention on the same matter.[69]

65. In fact, the Regulation was adopted on 22 Dec. 2000; see OJ 2001, L 12, 16 Jan. 2001.

66. It is to come into force on 1 March 2002, see Art. 76.

67. Law Commission Eighth Annual Report 1972–1973, Law Com No. 58 (1973), para. 53; Ninth Annual Report 1973–1974, Law Com No. 64 (1974), para. 34; Tenth Annual Report 1974–1975, Law Com No. 71 (1975), para. 41.

68. OJ 1997, C261; and see Dicey and Morris, *Conflict of Laws* (13th edn, 2000), paras 8–043—8–048.

69. Hague Convention on the service abroad of judicial and extra-judicial documents in civil and commercial matters, 1965, Cmnd 3986; see below, p.492, n.90.

Finally, a further far-reaching recent development emanating from Brussels is what started as the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters. This European Union Convention, often called "Brussels II", was concluded in 1998[70] but has not been brought into force. In fact, it has been supplanted by a Regulation, of 29 May 2000,[71] intended to give effect to the provisions which were contained in the Convention, with some amendments designed to provide consistency with the proposed Regulation on jurisdiction and recognition in civil and commercial matters.[72] The Matrimonial Matters Regulation, which is directly applicable, comes into force on 1 March 2001,[73] and provides jurisdictional and recognition rules similar to, but different from, those which are currently to be found in Part II of the Domicile and Matrimonial Proceedings Act 1973.[74] The Regulation will, it is believed, be brought into effect by Order in Council, coupled with appropriate provision in the Family Proceedings Rules. There is freedom under the Regulation to apply jurisdictional rules other than those in the Regulation if no court in a Member State has jurisdiction under the Regulation. Nevertheless, it is strongly to be hoped that we would (unlike the Brussels Convention solution) move rapidly to having, so far as is practicable, just one set of jurisdictional rules, irrespective of the links with the particular case. That view is strengthened by the fact that the general approach of the Regulation is not dissimilar from our current statutory position. To have similar, but different, jurisdictional rules in this area can be nothing but a recipe for confusion.

In terms of recognition and enforcement, the Regulation only extends to decisions of courts in Member States. This will mean that here the Regulation rules[75] will be added to, rather than supplant, the recognition rules currently to be found in Part II of the Family Law Act 1986.

(d) The Hague Conference on Private International Law

The other body, apart from the EEC, whose activities are specifically mentioned in Item XXI of the Law Commission's Third Programme is The Hague Conference on Private International Law of which the United Kingdom has been a full participating member since 1955.[76] Its work in preparing draft conventions in this field provided much advisory work for

70. OJ 1998, C221; and see Kennett (1999) 48 I.C.L.Q. 467; and the Report of the House of Lords Select Committee on the European Communities on the Convention in draft: Session 1997–1998, 5th Report, HL Paper 19.
71. Council Regulation (EC) No. 1347/2000; OJ 2000, L160/19.
72. Preamble, para. (6).
73. Art. 46.
74. Chapters II and III.
75. See especially Arts 14 and 15.
76. See North, *Essays in Private International Law* (1993), pp.236–238.

the Law Commission. Although Item XXI was only added to the Law Commission's Programme in 1973, from the Commission's very first year such advisory work was being undertaken, starting with the draft Hague Convention on the Recognition of Foreign Decrees of Divorce and Legal Separation.[77] Over the ensuing years, advice was provided in the context of the negotiation of at least eight further Conventions, on the international administration of estates,[78] the celebration and validity of marriages and on the recognition of decisions relating to marriage,[79] the law applicable to matrimonial property,[80] the law applicable to agency,[81]

77. Law Commission First Annual Report 1965–1966, Law Com No. 4 (1966), paras 90–91; Second Annual Report 1966–1967, Law Com No. 12 (1967), paras 86–88; Third Annual Report 1967–1968, Law Com No. 15 (1968), paras 56–57; Fourth Annual Report 1968–1969, Law Com No. 27 (1969), paras 53–54.

78. Work on assessing the value of this Convention was first undertaken by the Law Commission in 1972–1973 (see Seventh Annual Report 1971–1972 Law Com No. 50 (1972), para. 58). The Commission concluded that it was acceptable and should be implemented (see Eighth Annual Report 1972–1973), Law Com No. 58 (1973), para. 64). For a while, work proceeded with the preparation of advice on implementing legislation (see Ninth Annual Report 1973–1974, Law Com No. 64 (1974), para. 44; Tenth Annual Report 1974–1975, Law Com No. 71 (1975), para. 51; Eleventh Annual Report 1975–1976, Law Com No. 78 (1976), para. 44). The project then slipped down the list of priorities (see Twelfth Annual Report 1976–1977, Law Com No. 85 (1977), para. 46; Thirteenth Annual Report 1977–1978, Law Com No. 92 (1978), para. 2.40; Fourteenth Annual Report 1978–1979, Law Com No. 97 (1978), para. 2.47). Then, in the light of the fact that only two countries (Portugal and Czechoslovakia) had ratified the Convention, the decision was taken to suspend further work (Fifteenth Annual Report 1979–1980, Law Com No. 107 (1981), para. 2.45). Work on the project was then effectively abandoned (Seventeenth Annual Report 1981–1982, Law Com No. 119 (1983), paras 2.81–2.82).

79. The Law Commission sought to have this topic considered by the Hague Conference (Eighth Annual Report 1972–1973, Law Com No. 58 (1973), para. 49; Ninth Annual Report 1973–1974, Law Com No. 64 (1974), para. 35); provided advice during the negotiations (Tenth Annual Report 1974–1975, Law Com No. 71 (1975), para. 42; Eleventh Annual Report 1975–1976, Law Com No. 58 (1977), para. 35); but ultimately it was decided that the United Kingdom should not sign or ratify the Convention which was eventually concluded (Seventeenth Annual Report 1981–1982, Law Com No. 119 (1983), para. 2.80).

80. The Law Commission provided advice during the negotiation of this Convention (Ninth Annual Report 1973–1974, Law Com No. 64 (1974), para. 36; Tenth Annual Report 1974–1975 Law Com No. 71 (1975), para. 43 ; Eleventh Annual Report 1975–1976, Law Com No. 78 (1977), para. 36).

81. The Law Commission provided advice during the negotiation of this Convention (Tenth Annual Report 1974–1975, Law Com No. 71 (1975), para. 44; Eleventh Annual Report 1975–1976, Law Com No. 78 (1977), para. 37).

international abduction of children,[82] international sale of goods,[83] the validity and recognition of trusts,[84] and international co-operation and protection of children in respect of inter-country adoptions.[85] The significance of this work in the present context is that the United Kingdom's ratification of three of these Conventions was followed by their implementation in three significant pieces of legislation on private international law, namely the Recognition of Divorces and Legal Separations Act 1971,[86] Part I of the Child Abduction and Custody Act 1985, and the Recognition of Trusts Act 1987.

There are four other statutes, or pieces of secondary legislation, whose genesis lies in Hague Conventions. The first of these is the Wills Act 1963[87] which made major improvements to the rules for determining the laws to govern the formal validity of wills. The Adoption Act 1968[88] enabled the United Kingdom to ratify the 1965 Hague Convention on the Adoption of Children, by extending the jurisdictional rules of the United Kingdom courts in adoptions connected to other countries which are parties to the Convention, providing for the law to be applied in such cases and for statutory rules for the recognition of adoptions made in such countries. The impact of this legislation is, however, limited as there are only two other countries[89] which are parties to the Convention. Provision is made by Order in Council made under section 40 of the Maintenance Orders (Reciprocal Enforcement) Act 1972, as later amended, for the reciprocal recognition of maintenance orders made in countries which are

82. The Law Commission provided advice during the negotiation of this Convention (Fourteenth Annual Report 1978–1979, Law Com No. 97 (1980), para. 2.29; Fifteenth Annual Report 1979–1980, Law Com No. 107 (1981), para. 2.27). The work that the Commission did on intra-U.K. conflicts in this field took account of the decision to sign and ratify this Convention (Seventeenth Annual Report 1981–1982, Law Com No. 119 (1983), para. 2.42; Eighteenth Annual Report 1982–1983, Law Com No. 131 (1984), para. 2.33; Custody of Children—Jurisdiction and Enforcement Within the United Kingdom, Law Com No. 138 (1984), para. 1.18).

83. The Law Commission provided advice during the negotiation of this Convention (Fourteenth Annual Report 1978–1979, Law Com No. 97 (1980), para. 2.58(d); Seventeenth Annual Report 1981–1982, Law Com No. 119 (1983), para. 2.101).

84. The Law Commission provided advice during the negotiation of this Convention (Sixteenth Annual Report 1980–1981, Law Com No. 113 (1982), para. 2.99; Seventeenth Annual Report 1981–1982, Law Com No. 119 (1983), para. 2.101).

85. The Law Commission provided limited advice (Twenty-Fifth Annual Report 1990, Law Com No. 195 (1991), para. 2.32; Twenty-Seventh Annual Report 1992, Law Com No. 210 (1993), para. 2.48).

86. See now Part II of the Family Law Act 1986.

87. Implementing the Convention on the Conflicts of Laws Relating to the Form of Testamentary Disposition, 1961; and on which the Private International Law Committee provided advice, above, pp.479–480.

88. Later consolidated in the Adoption Act 1976.

89. Austria and Switzerland.

parties to the 1973 Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations. On the procedural front, the Evidence (Proceedings in Other Jurisdictions) Act 1975, by providing for the taking of evidence in England for the purposes of foreign proceedings, gives effect to the 1970 Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters. Administrative steps, rather than the introduction of primary legislation, have been taken to give effect to two further Hague Conventions on matters of process in relation to international litigation.[90]

There are also some 20 other Hague Conventions concluded since 1954 which the United Kingdom has not signed, ratified or acceded to;[91] and there are two which the United Kingdom has so far signed but not ratified.[92]

Turning to current activity at the Hague Conference, the most significant item is the work that has been continuing since 1994 on a draft world-wide convention on jurisdiction and recognition and enforcement of judgments in civil and commercial matters.[93] This could almost be described as the Brussels Convention writ large onto the world scene. There have been intensive, if prolonged, negotiations at The Hague of such a Convention;[94] and progress has, inevitably, not proved easy, given that a much wider group of countries is involved, not least including the

90. The Hague Convention abolishing the requirement of legalisation for foreign public documents, 1961; see Dicey and Morris, *Conflict of Laws* (13th edn, 2000), para. 8–079; the Hague Convention on the service abroad of judicial and extra-judicial documents in civil or commercial matters (1965); see Dicey and Morris, *op cit*, paras 8–040—8–042; and see North, *Essays in Private International Law* (1993), p.246.

91. The Private International Law Committee, in fact, recommended acceptance of one of these, namely the Convention on conflicts between the law of nationality and the law of domicile (1955); see First Report of the Private International Law Committee (1954), Cmd 9068. The Law Commission provided advice in relation to those on the validity and recognition of marriages, on the law applicable to matrimonial property, on the law applicable to agency, and on the law applicable to contracts for the international sale of goods; see above, pp.483, 490–491.

92. Both of these are ones on which advice was provided by the Law Commission, i.e. those on the international administration of estates (see above, p.490) and on international co-operation and protection of children in respect of inter-country adoptions (see above, p.491).

93. It was formally agreed at the Eighteenth Session of the Hague Conference in 1996 to include this topic on the agenda of the Nineteenth Session; see Final Act of the Eighteenth Session, Part B, No. 1.

94. See, for example, the following Reports from Catherine Kessedjian, Deputy Secretary General: International jurisdiction and foreign judgments in civil and commercial matters (Preliminary Document No. 7, April 1997); Synthesis of the work of the Special Commission of June 1997 on international jurisdiction and the effects of foreign judgments in civil and commercial matters (Preliminary Document No. 8, Nov. 1997); Synthesis of the work of the Special Commission of March 1998 on international jurisdiction and the effects of foreign judgments in civil and commercial matters (Preliminary Document No. 9, July 1998); Note on provisional and protective measures in private international law and comparative law (Preliminary Document No. 10, Oct. 1998).

United States whose approach to many of the jurisdictional issues differs widely from that of the Member States which are parties to the Brussels Convention, whether they are civil law or common law States. In part, this is, of course, because many of the United States' jurisdictional rules have evolved through consideration of inter-state, rather than international, conflicts. It is also the case that, in the broader international arena of The Hague, such doctrines as *forum non conveniens* and *lis alibi pendens* have taken on a greater significance and this has increased the difficulty of reaching overall agreement.

The prospects of success at The Hague are mixed. Furthermore, success has to be measured not just in terms of a Convention actually being concluded, but also of whether it is so laden with compromises that few States will ratify it.[95] It is inevitable in negotiating a Convention of this significance, given the potential geographical breadth of its application, that compromises undoubtedly have to be made in the process. The secret is to try to ensure that a large number of States accept that the disadvantages of the compromises are outweighed by the advantages to be gained both by the ease of recognition and enforcement abroad of judgments of one's own courts, and by the international agreement that certain domestic grounds of jurisdiction are unacceptable as the basis of international recognition. These balances are hard to strike. Those with longer memories will recall that it proved impossible for the United Kingdom and the U.S.A. to conclude a bilateral Convention simply on recognition and enforcement—given the legal and commercial concerns raised, rightly or wrongly, on both sides of the Atlantic.[96] How much harder is it likely to be to achieve agreement on a multilateral Convention. If it is achieved, however, then a further new legislative structure will need to be built here to stand alongside the Civil Jurisdiction and Judgments Act 1982 (or its replacement)[97] to deal with the recognition and enforcement of judgments from those countries which have ratified such a new Hague Convention, and to deal with the impact of such a Convention on our common law jurisdiction rules.

(e) UNIDROIT, UNCITRAL and the Council of Europe

The work of a number of other international bodies in areas contiguous at least to private international law has resulted in the passage of United Kingdom legislation which impacts in that field. For example, mention

95. See the Preliminary Draft Convention on jurisdiction and foreign judgments in civil and commercial matters, adopted by the Special Commission on 30 Oct. 1999, and the Report thereon by Nygh and Pocar, Enforcement of Judgments (Preliminary Document No. 11, Aug. 2000).

96. North, *Essays in Private International Law* (1993), pp.201–223.

97. See above, pp.487–488.

has already been made of the work of UNIDROIT in the field of establishing uniform laws on international sales.[98] A further UNIDROIT Convention provides a Uniform Law on the Form of International Will concluded in Washington in 1973. Although statutory effect was given to this by the Administration of Justice Act 1982,[99] the relevant provisions have never been brought into force. Whilst other proposals for conventions emerging from UNIDROIT were examined in the past by the Law Commission, none of them has as yet been implemented by the United Kingdom.[100] In the case of UNCITRAL,[101] a Model Law on International Commercial Arbitration was adopted in 1985 and substantial effect was given to it in the Arbitration Act 1996.[102] Furthermore, the Law Commission provided advice[103] during the negotiation of what became the United Nations Convention on Contracts for the International Sale of Goods (1980),[104] though the United Kingdom has not ratified and implemented this Convention.[105]

Closer to home in Europe the work of the Council of Europe has had a major impact on a number of areas of private international law. For example, the issue of whether parties may claim exemption from the jurisdiction of the English courts on the basis of sovereign or State

98. See above, p.479.

99. Ss. 27–28, Sched 2. The Law Commission had an input into this work; see Sixth Annual Report 1970–1971, Law Com No. 47 (1971), para. 68.

100. See the request by the Lord Chancellor that the Law Commission advise on two draft agency Conventions : Second Annual Report 1966–1967, Law Com No. 12 (1967), para. 35. This advice was provided in 1968 in an unpublished report, the substance of which is not revealed in the Law Commission's Fourth Annual Report 1968–1969, Law Com No. 27 (1969), para. 70; but the Law Commission continued to be involved in discussions on these topics : Sixth Annual Report 1970–1971, Law Com No. 47 (1971), para. 67; Seventh Annual Report 1971–1972 Law Com No. 50 (1972), para. 57; Thirteenth Annual Report 1977–1978, Law Com No. 92 (1978), para. 1.5(iii). Doubts as to the acceptability of the Convention are expressed in the Fourteenth Annual Report 1978–1979, Law Com No. 97 (1980), para. 2.58(e), a view sustained in the Eighteenth Annual Report 1982–1983, Law Com No. 131 (1984), para. 2.96. See also the limited work done on the draft Convention on the Hotelkeeper's Contract: Law Commission Fourteenth Annual Report 1978–1979, Law Com No. 97 (1980), para. 2.58(f).

101. The work of UNCITRAL in developing a Model Law on Electronic Commerce and Uniform Rules on electronic signatures are considered below, p.502.

102. Despite the recommendation of the Departmental Advisory Committee on Arbitration Law, in 1989, that the Model Law should not be adopted; and see Dicey and Morris, *Conflict of Laws* (13th edn, 2000), paras 16.005—16.006.

103. See Law Commission Twelfth Annual Report 1976–1977, Law Com No. 85 (1977), para. 6(5); Thirteenth Annual Report 1977–1978, Law Com No. 92 (1978), p.5; Sixteenth Annual Report 1980–1981, Law Com No. 113 (1982), para. 2.100.

104. See Honnold, *Uniform Law for International Sales* (3rd edn, 1999), esp. pp.1–10.

105. Though the Law Commission has, more recently, provided views on whether the Convention should be implemented in the United Kingdom; see Law Commission Thirty-Second Annual Report 1997, Law Com No. 250 (1998), para. 2.17.

immunity[106] is governed by the State Immunity Act 1978, giving effect to an earlier Council of Europe Convention.[107] In the case of problems arising from child custody disputes, the Council of Europe Convention in this field was implemented in Part II of the Child Abduction and Custody Act 1985, and forms a further part of the armoury of protection against the effects of child kidnapping.[108] The Administration of Justice Act 1982 implements a Council of Europe Convention on the Establishment of a Scheme for the Registation of Wills (1973); but the relevant provisions[109] have never been brought into force. It has been seen earlier[110] that the Law Commission recommended[111] that the United Kingdom should not become a party to two Council of Europe Conventions relating to Money Liabilities, advice which was accepted.[112]

(f) Other multilateral and bilateral conventions

If one moves from the arena of judicial activity to that of arbitration, international conventions have had a major role to play here in determining the rules to be applied, rules which have become embodied in United Kingdom legislation. Hence Part II of the Arbitration Act 1950 finds its origins substantially in the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards; Part III of the Arbitration Act 1996[113] implements the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards;[114] and the Arbitration

106. Diplomatic and consular immunity are also governed by legislation emanating from international conventions; see, e.g., Diplomatic Privileges Act 1964 (giving effect to the Vienna Convention on Diplomatic Intercourse and Immunities 1961); Consular Relations Act 1968 (giving effect to the Vienna Convention on Consular Relations, 1963); and see also the Consular Conventions Act 1949; the Diplomatic and Consular Premises Act 1987.

107. European Convention on State Immmunity (1972), Cmnd 5081; and see Sinclair (1973) 22 I.C.L.Q. 254.

108. This is another area where advice was provided by the Law Commission : see Law Commission Thirteenth Annual Report 1977–1978, Law Com No. 92 (1978), paras 1.5(ii)(c), 2.25; Fourteenth Annual Report 1978–1979, Law Com No. 97 (1980), para. 2.29; Fifteenth Annual Report 1979–1980, Law Com No. 107 (1981), para. 2.27; Sixteenth Annual Report 1980–1981, Law Com No. 113 (1982), para. 2.52; Seventeenth Annual Report 1981–1982, Law Com No. 119 (1982), para. 2.42. Advice was also provided on Commonwealth initiatives in the same field: Thirteenth Annual Report 1977–1978, Law Com No. 92 (1978), paras 1.5(v), 2.25; Fifteenth Annual Report 1979—1980, Law Com No. 107 (1981), para. 2.27.

109. Sections 23–26.

110. See above, p.482.

111. Law Com No. 109 (1981).

112. Law Commission Seventeenth Annual Report 1981–1982, Law Com No. 119 (1983), para. 2.71. Advice was also provided by the Law Commission on work in the Council of Europe on Penalty Clauses: Twelfth Annual Report 1976–1977, Law Com No. 85 (1977), para. 6(6); Thirteenth Annual Report 1977–1978, Law Com No. 92 (1978), para. 1.5(ii)(b).

113. Replacing provisions of the Arbitration Act 1975.

114. It has been seen earlier, p.479, that the Private International Law Committee provided advice on this matter.

(International Investments Disputes) Act 1966 gives effect to the provisions of a convention concluded in Washington in 1965.

Whilst the above provide examples of legislation stemming from multilateral conventions, it is also the case that there has been considerable legislation, particularly in the earlier part of the 20th century, to provide structures to enable effect to be given to bilateral conventions. The primary context has been in terms of the recognition and enforcement of judgments, not least in terms of reciprocity between the United Kingdom and other countries of the Commonwealth. This approach can be exemplified both by legislation in the field of recognition and enforcement generally,[115] and by such legislation in the particular area of maintenance orders,[116] where the legislation is coupled with ancillary jurisdictional provisions.

Finally, there is a whole area of law, namely that relating to international carriage and transportation, where problems of private international law have been substantially sidestepped through the implementation of international conventions which have provided uniform rules to be adopted by all States which adhere to the conventions in question;[117] though they also often provide special rules relating to jurisdiction and recognition.[118]

20TH CENTURY CHANGE: A CONCLUSION

It was indicated earlier[119] that a most striking feature of the development of private international law over the last century has been that statute law has been the primary instrument of change—far more so, in my view, than judicial activism; though there are, of course, a number of important examples of judicial development of this area of the law.[120] What is remarkable about the legislative changes is that their genesis lies almost exclusively in the work of agencies outside central government. This is not especially surprising, as it is often said that "there are no votes in law reform". More remarkable is the fact that the impetus for change has, in fact, usually come from outside the United Kingdom. Although, as has

115. Administration of Justice Act 1920; Foreign Judgments (Reciprocal Enforcement) Act 1933.

116. Maintenance Orders (Facilities for Enforcement) Act 1920; Maintenance Orders (Reciprocal Enforcement) Act 1972 (also implementing the United Nations Convention on the Recovery of Maintenance Abroad, 1956); Maintenance Orders (Reciprocal Enforcement) Act 1992.

117. Cheshire and North's *Private International Law* (13th edn, 1999), p.10.

118. Dicey and Morris, *Conflict of Laws* (13th edn, 2000), Chapter 15.

119. See above, pp.477–478.

120. Examples that come to mind are *De Nicols* v. *Curlier* [1900] AC 21; *Vita Food Products Inc* v. *Unus Shipping Co Ltd* [1939] AC 277; *Government of India* v. *Taylor* [1955] AC 491; *Boys* v. *Chaplin* [1971] AC 356; *Miliangos* v. *George Frank (Textiles) Ltd* [1976] AC 443; *Spiliada Maritime Corpn* v. *Cansulex Ltd* [1987] AC 460.

been seen, the Private International Law Committee had a role to play, and the Law Commission, for a period, a much greater one, a great deal of the legislative change instigated or influenced by the work of those bodies can be traced directly, or indirectly, to the endeavours of international bodies, whether permanent or *ad hoc*—in Brussels, The Hague, Rome, Strasbourg, New York or elsewhere.

WHAT HAS MOTIVATED CHANGE AND WHAT HAS BEEN ITS IMPACT?

Change is no novelty in the field of private international law. The last decades have seen our system of rules having to come to terms with new challenges posed, potentially at least, by the ease and speed of transportation, travel and communication—off-shoots in the commercial world of a globalised economy. Furthermore wars, a changing world political scene and aeroplanes have all been contributors to the 20th century development of private international law rules whether by the legislature or by the courts. These issues of change can be examined in the context of a number of different legal areas.

(a) Family Law

There is no doubt that legal developments in the field of family law have been much influenced by external events; and interestingly this has been an area of more judicial activism than most. The development of the concept of the common-law marriage was a response to the impact of the Second World War and, later, of the Vietnam War,[121] on the movement of populations and the creation of bodies of refugees, evocatively described by Sir Jocelyn Simon P as "one of those tides of population which seem so characteristic of our times which cast the petitioner and his family on these shores".[122]

Still within the field of family law, the need to reform the rules of jurisdiction over matrimonial causes and on the recognition of foreign divorces and annulments[123] was undoubtedly influenced by the impact of the ease of foreign travel on the ability to form new and, indeed, multiple personal relationships. No better example of this can be provided than by one of the *causes célèbre* in this field, *Vervaeke* v. *Smith*.[124] This saga starts with a marriage at the British Consulate in Shanghai between a British man and a Russian woman. It is followed by a divorce in Nevada, the man's second marriage in England to a Belgian prostitute on the basis that he was to be paid for going through the ceremony and should then

121. E.g., *Re X's Marriage* (1983) 65 F.L.R. 132.
122. *Merker* v. *Merker* [1963] P 283, at 301.
123. See above, pp.480–481, 490.
124. [1983] 1 AC 145.

immediately leave for South Africa, the Belgian prostitute's marriage in Italy to an infamous brothel keeper active in this country and across Europe (and having served terms of imprisonment in this country and in Belgium), and then his death on the night of the marriage. There were then English proceedings upholding the validity of the Nevada divorce and thus of the later English marriage,[125] followed by Belgian proceedings annulling that English marriage, and, finally, the decision of the House of Lords to deny recognition to the Belgian annulment, uphold the validity of the sham English marriage and thus prevent the Belgian prostitute from succeeding to the brothel keeper's estate. Oh to have the film rights!

Two other 20th century examples of the impact of change might be provided. The need for the development of rules relating to the recognition and effect of polygamous marriages has largely been a consequence of large-scale immigration to this country, predominantly in this context from the Indian sub-continent. The explosion of decisions on child abduction is readily attributable to the ease, and the diminishing real cost, of air travel. A side note to this development is that it is the one area of private international law rules concerned with family law where change has brought an increase in litigation; elsewhere legislative change has had the opposite effect. In the latter case, the changes were essentially designed to solve the problems, clarify and improve the law; in the former case, they were designed to create remedies, both legal and administrative, where none had existed before.

(b) Property Law

Whilst family law is the field of private international law which appears to be of most direct significance to private individuals, the field of next greatest significance might be thought to be that of property law, including particularly the law of succession. One can, of course, point to some striking examples of travel leading to problems in this field, one of the most vivid being that of succession to the estates of the sixth Duke of Wellington (who was killed in action in the Second World War), stemming from the fact that the military successes of the first Duke in the Peninsular Wars had led to his being created not only Duke of Wellington but also Duke of Ciudad Rodrigo. Indeed, this Spanish Dukedom was created after his storming of the fortress at Cuidad Rodrigo. The 20th century problems concerned succession to the estates attached to that Spanish Dukedom.[126] Other examples are that of a German domiciled mother and daughter killed together in the blitz in London and thus raising issues of the law to govern issues of *commorientes*;[127] and, in the

125. *Messina* v. *Smith* [1971] P 322.
126. *Re Duke of Wellington* [1948] Ch 118.
127. *Re Cohn* [1945] Ch 5.

case of a French marriage, that of the succession by a widow to the substantial estate of her husband, the founder of the Café Royal in Regent Street.[128] Nevertheless, despite these examples, the incidence of reported cases in the property field is, in fact, remarkably low, and there has been relatively little pressure for change, save in one or two very specific areas, such as the determination of the range of laws by which a will may be regarded as formally valid.[129] Interestingly, the ever-increasing internationalisation of trade has not produced a great flurry of property issues for the courts; though there was in the 1980s a number of Scottish and Irish decisions on retention of title clauses;[130] and we also may now be seeing some impact of new technologies in the area of electronic transfer of money and securities with a number of new problems arising therefrom.[131]

(c) Obligations

Where one might most obviously expect to find an impact on private international law from the globalisation of commerce would be in the field of contract and, to a lesser degree, torts. We have seen,[132] however, that the impetus for change, certainly in the field of contract choice of law, has been more politically than overtly commercially based. The creation of a single market in Europe was thought to call for uniform private international law rules in the contractual field, assuming that the unification of substantive commercial law was a much longer term, if achievable, goal—though we know that there has been, and is, considerable work towards that goal. Indeed, the same can also be said for Brussels-based work on non-contractual obligations, which in its earlier forms provided the impetus for the Law Commission's work on tort choice of law rules, and which has now come back to prominence again in Brussels.[133]

(d) Jurisdiction and recognition

The most striking recent development of all is that, particularly but not exclusively in relation to contractual disputes, the arena of argument and litigation has been very markedly transferred from the choice of law area to that of jurisdiction and, to a lesser degree, recognition and enforcement. The catalyst, or cause, of this change is the Civil Jurisdiction and

128. *De Nicols* v. *Curlier* [1900] AC 21.
129. See above, pp.479–480, 491.
130. See Dicey and Morris, *Conflict of Laws* (13th edn, 2000), paras 30–111—30–113.
131. See Cheshire and North's *Private International Law* (13th edn, 1999), pp.972–973.
132. See above, p.483, 486–487.
133. See above, p.487.

Judgments Act 1982 and its various later amendments, implementing in this country the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and the later Lugano Convention. There has been a huge cascade of reported decisions, both from the English courts and the European Court of Justice in Luxembourg, as well as other national courts, on a whole range of aspects of these rules. This can, of course, be explained at least in part by the working out in the English common law context of this new structure of rules with their concepts forming something of a bridge between the common law and civil law system. It is also worth comment that the greater proportion of these decisions concern commercial contractual disputes, whether the provisions under examination are the general provisions of the Brussels and Lugano Conventions or those directly concerned with contractual issues. There is clear evidence that the main arena of dispute has moved from choice of law to jurisdiction and recognition. The introduction of a new Brussels Regulation[134] will do nothing to diminish this process. A crude comparison might illustrate this. Thirty years ago, discussion of issues of jurisdiction and recognition accounted for about one-eighth of Cheshire and North,[135] and one-sixth of Dicey and Morris.[136] Today it accounts for one-third of the coverage in Cheshire and North[137] and one-quarter of the coverage in Dicey and Morris.[138]

LOOKING AHEAD

The nature of the fundamental issues and challenges to be addressed by rules of private international law is unlikely to change. We shall still need to have answers to the three fundamental questions: Can the courts in this country entertain a particular claim or, in certain circumstances, do the courts in another country provide a clearly more appropriate forum? If the case is to be heard here, does the court apply English law or that of some other country? If there has been a decision by a court in another country, will it be recognised here and to what extent will that judgment be enforced here? What is changing dramatically, and is set to change ever more rapidly, is the context in which these issues will arise for decision; and that will pose problems as to whether existing rules are adequate to answer these standard questions in a changing world.

134. See above, pp.487–488.
135. *Private International Law* (8th edn, 1970), pp.76–119, 611–658.
136. *Conflict of Laws* (8th edn, 1967), pp.121–221, 963–1088.
137. *Private International Law* (13th edn, 1999), pp.179–530.
138. *Conflict of Laws* (13th edn, 2000), pp.235–648.

THE ELECTRONIC AGE

We have become fully used to the impact of computers on the whole range of everyday life, whether in ensuring that supermarket shelves are stocked with food, car engines work effectively, buildings can be more effectively designed, or plotting our whole genetic makeup. We have also become used to the Internet as a method of accessing a vast amount of information, some good, other less so, on a worldwide basis. Email is becoming (or has indeed become) the preferred mode of communication within offices, across the country and internationally, in a whole variety of circumstances, whether social, commercial or governmental. The size of the impact of the Internet is extremely interesting. It was estimated that, in September 2000, the number of organisations and individuals "on line" worldwide was 377m, with the U.S.A. accounting for about 160m and Europe the next largest with 106m.[139] That constitutes growth of 88 per cent in the worldwide figures over the previous 12 months.[140] In terms of the growth of providers of Internet services, there are over 31m domain names registered worldwide,[141] a figure which has grown 181 per cent over the previous 12 months.[142]

It is not only the growth of the use of the Internet that is a significant development; so also is the convergence of technologies. We have become used to households with television, video, CD player, landline and mobile telephone as well as computers, both fixed and laptop. All of this is replaceable by a screen, loud speakers and the WAP technology of a third generation mobile phone; with music and entertainment downloaded via the Internet, the screen used not only for inter-active digital television but also for making purchases paid for by credit card, direct bank transfer or direct onto a telephone bill or, indeed, in theory any other utilities bill; and with an ever-expanding range of information services, some free, others paid for. Buying goods or information services, as with the provision of entertainment, will not be constrained by national boundaries. Although the actual delivering of tangible goods will require some physical cross-border activity, that is not the case with the delivery of information services, nor will it be the case with delivery of music or films onto the consumer's own CD or video—or indeed, simple storage in digital form in the computer system. The same may also go for the purchase of books and the reading of newspapers.

That is a picture of the consumer world. The commercial world is little different. Of course, commerce is the provider of all these services to the

139. Nua Ltd; www.nua.ie/surveys.

140. There appears to have been a 10% growth from Sept. to Nov. 2000; see www.nua.ie/surveys.

141. www.domainstats.com.

142. From the end of Oct 2000 to mid-Jan. 2001, that figure grew again by over 10%.

consumer along with similar, but probably different, services to other members of the commercial world. As with consumers, the Internet has become not only a medium for the provision of a whole range of services and for the purchase of goods, but is also an increasingly preferred medium simply for the processes of doing business. All of this can transcend national boundaries and domestic legal systems. It would appear, therefore, to be a very fruitful area for the further development of private international law—or for the development of uniform rules rendering choice of law rules (though not necessarily rules on jurisdiction and recognition and enforcement) superfluous.

There has been considerable activity over the last decade in terms of developing a uniform law approach to some, at least, of these issues. A good example is provided by UNCITRAL's Model Law on Electronic Commerce, concluded in 1996. This Model Law has been adopted in some countries and adapted for implementation in others.[143] Further work under the aegis of UNCITRAL has progressed towards the promulgation of Uniform Rules on electronic signatures,[144] a topic on which the European Union has moved further ahead with the adoption at the end of 1999 of the Directive on a Community framework for electronic signatures.[145] The latest step in the United Kingdom was the passage of the Electronic Communications Act 2000, section 7 of which gives evidential force to electronic signatures. What is clear, however, from the European Union Directive is that it does not address issues relating to contractual validity more generally,[146] and thus excludes reference to private international law.

There is, in my view, no doubt that the application of Model Laws, or uniform European Union provisions, will for many decades to come still leave a large role to be played by private international law in the electronic Internet world. Indeed, these issues are under active consideration under the aegis of the Hague Conference.[147] The challenges lie in trying to determine the extent to which this rapidly developing environment for commerce and world-wide communication more generally will require changes to our established structure of private international law. I want to take just a few examples here.

In the case of tort, for example, the Internet is the means of providing a massive amount of information in spoken as well as written form, with a capacity instantaneously to deliver that information almost anywhere in

143. See Electronic Data Interchange, Internet and Electronic Commerce, Hague Conference on Private International Law, General Affairs, Preliminary Document No. 7, April 2000, pp.5–6.
144. *Ibid*, pp.6–7.
145. Directive 1999/93/EC, OJ 2000 L13, 19 Jan. 2000, p.12.
146. *Ibid*, Art. 1.
147. See n.143, above.

the world. This raises the prospect, for example, of risks of world-wide defamation, interference with intellectual property rights,[148] damage to property by the infection of software systems, and other forms of damage to property or economic interests by "hacking" or "spamming". Courts in this country have already had to consider cases where defamation via the Internet has been alleged.[149] The challenges posed by the commission of torts via the Internet will need to be a major issue on the agenda of those in Brussels attempting to produce a Regulation on choice of law in the field of non-contractual obligations.[150] What is clear from the preliminary discussions in the context of the work of the Hague Conference is that there is no more agreement on the applicable law in the case of on-line torts as compared with torts more generally.[151]

Turning to choice of law in contract, I can say from personal experience that there is no doubt that those who, 20 years ago, negotiated the Rome Convention had e-commerce neither in the front nor the back of their minds! We know from Article 1(4) of the E-Commerce Directive, concluded last June, that, in general at least, it does not establish additional private international law rules for e-commerce.[152] Nevertheless, the least that is called for is careful examination of the adequacy of the Rome Convention rules in this very changed environment. In an ideal world, that would be completed before 17 January 2002, the date by which Member States have to comply with the E-Commerce Directive.[153]

My third example is that of jurisdiction. It is quite clear that the jurisdictional problems of the Internet world are firmly on the agenda of those involved in the negotiation at the Hague Conference of the proposed world-wide convention on jurisdiction and recognition.[154] A host of issues arise here in the context of jurisdiction. In commercial contracts which are both concluded and performed on-line, do the place of performance, of the conclusion of the contract, or of the activity in question have any real relevance as jurisdictional criteria? How, indeed, can we identify the parties and find a locality for each of them, when everything takes place on-line? How realistic is it for suppliers to consumers of on-line services world-wide always to be subject to the jurisdiction of the courts of the domicile or habitual residence of every

148. See Fawcett and Torremans, *Intellectual Property and Private International Law* (1998), pp.158–161, 248–249.

149. E.g., *Godfrey* v. *Demon Internet Ltd* [2000] 3 W.L.R. 1020.

150. See above, p.487.

151. See n.505, above, pp.21–22.

152. Directive 2000/31/EC, OJ L178, 17 July 2000; and see below, p.143.

153. Art. 22(1).

154. These issues were considered by a group of experts meeting in Ottawa in Feb. 2000; see Hague Conference on Private International Law, General Affairs, Preliminary Document No. 7, April 2000, pp.33–35. That meeting was inconclusive and it is understood that there will be further such discussions early in 2001.

consumer?[155] What are the appropriate jurisdictional rules in relation to employment contracts where the work is performed entirely on-line? In all these cases, under what criteria are choice of jurisdiction clauses acceptable? Work on these varied difficult issues has, so far as the Hague Conference is concerned, been proceeding in specialist sub-groups; but no clear solutions have emerged. When they do, we shall have to face the issue of the extent to which they need to be carried back into the new EU Regulation on jurisdiction and recognition and enforcement.[156]

CONCLUSION

The last 30 years have witnessed a new phenomenon—the increased politicisation of change in this field. To Geoffrey Cheshire that would have appeared a very strange idea, given the judge-made nature of the rules; but the more the agenda is set by international bodies, the greater is the significance of international relations in law-making decisions. Whilst this factor has played a part, but not a major one, in the United Kingdom's response to the Hague Conference, the Council of Europe, UNCITRAL or UNIDROIT, the situation in relation to the European Union is very different. Furthermore, the conclusion of the Treaty of Amsterdam, 1997[157] has given added significance to the political process. There is increased Brussels activity in private international law. The legislative tool is now a Regulation, not a Convention. The negotiation process is one which is far more directly controlled by Commission officials than by representatives of the Member States.[158] The political pressure to "opt in" to the consultation process is high, as is the pressure to accept, in the Council of Ministers, the outcome of that process. Furthermore, private international law does not rank high up the national political agenda. So the likelihood of the exercise of a veto, where one is still available, is very low.

155. This was a hotly debated issue in the context of the preparation of the new EU Regulation on jurisdiction and enforcement (see above, p.488), as may be seen from Eaglesham, *Financial Times*, 7 Nov. 2000; European Report, No. 2549 2 Dec. 2000, p.3.

156. See above, p.488.

157. And now the Treaty of Nice, 2000.

158. This issue can be illustrated most strikingly in the context of the interrelation of the new EU Regulation on jurisdiction and recognition with the related negotiations at the Hague Conference; see above, pp.488, 492–493. Given that the Brussels Convention has been overtaken by the Regulation, the Member States have, in strict theory, lost the right to be represented and negotiate separately at The Hague. It has become a matter of external Community competence with the EU, in theory, negotiating on behalf of the whole Union. By agreement, and as the result of deep concerns in Member States, not least the United Kingdom, this strict position has been ameliorated, in a joint declaration agreed by the Council and the Commission, which allows Member States to continue to express views etc. in negotiations at The Hague on the draft Convention, provided such actions are not inconsistent with any common position agreed by the Council of Ministers and any written proposals are sent in advance to the Presidency and the Commission.

A further implication of this changed process is that we are seeing some private international law issues becoming the concern of varied pressure groups. A good example can be provided by the forceful expression of views, by both consumer bodies and those who provide goods and services, in the European debates over e-commerce legislation, on both choice of law and jurisdiction issues. The vigour of the debates was increased by reason of their transcending national boundaries.[159] In my experience, it has been rare in recent decades, save perhaps in the insurance field,[160] to see such wider public interest in private international law issues.

Two inter-related concerns emerge from this situation—one legal, the other structural. The legal concern is that the negotiating processes should address both the practical anxieties of those who have become more alive than in the past to the implications of private international law rules and also the need to ensure the maintenance of the general structures of private international law, whilst devising workable rules for the benefit of the public as well as of lawyers and judges. The nature of this problem can be illustrated by the way in which private international law issues are dealt with in the E-Commerce Directive. As mentioned earlier,[161] there is a preliminary provision, in Article 1(4), stating that the Directive does not establish additional rules on private international law. When, however, one comes to the substantive rules in Article 3(1) and (2), we find that these are made subject to provisions in the Annex which include matters of private international law relating to freedom of choice of the applicable law and mandatory rules.[162] Something seems lacking in terms of consistency of approach.

The second concern is structural. An examination of the process of development of Private International Law, certainly over the past half century, excluding development by the judiciary, reveals, as I have tried to show, that a very considerable role has been played by international law reform bodies, whether *ad hoc* or permanent, as well as by the Law Commission and the Private International Law Committee. Even where bodies in this country have been involved, their work has more often than not flowed out of the activities of the various international organisations. Indeed, I believe it fair to say that, for half a century, the agenda for change in this area of the law has been very substantially set abroad and not in this country. It is also the case that, although the United Kingdom may be actively represented in the deliberations of these international

159. See above, pp.503–504.
160. Though see above, p.493 in the case of the draft U.K./U.S. convention on recognition and enforcement.
161. See above, p.503.
162. OJ 2000, L178, 17 July 2000, at L178/16.

bodies, the fruits of their work are often not put into effect here. This is a consequence of the fact that where representatives of 40 or more States are involved in deliberations on topics the approach to which may vary greatly between legal cultures, the prospects of an instrument emerging which is other than a compromise are not high. It is also the case that countries, the United Kingdom included, devote energies to deliberations in some areas because they are loyal members of the organisation in question, rather than because they see a real need for, or a real hope of, an internationally agreed solution. Occasionally, of course, the political will to resolve an identified social issue may drive the agenda ahead—of which the work of the Hague Conference on Child Abduction is a striking example. A recent example of the general problem is provided by the current negotiations in the Hague Conference for a world-wide convention on jurisdiction, recognition and enforcement. This is not proving easy and is taking longer than might have been hoped.[163] The outcome will involve compromises necessary to achieve formal agreement on a concluded Convention. Whether, if such agreement is achieved, the Convention is then signed and ratified by a significant number of States, including the United Kingdom, will be quite another matter.

A number of questions are raised. An important one is: Do we have the most appropriate systems in place to address issues of change which undoubtedly will continue to be with us, the speed of which may well increase in an electronic age, where the agenda will continue to be set by international bodies (often of course with significant input from the United Kingdom), and where the process of addressing these issues is becoming increasingly political in nature? Of course, I hope that those in the academic world will increasingly have the adapting of private international law rules to an electronic age in the forefront of their research and writings. In terms of appropriate systems, the number of individuals who are available to address these issues is limited, whether they are officials from government departments, especially the Lord Chancellor's Department, or judges, practitioners or academic lawyers. We have returned to the use of *ad hoc* committees. This was the means used in the context of the negotiation of the original Brussels Convention and is being used—in the case of a committee chaired, in fact, by me—for the provision of advice on the work done, or being done, on the EU Regulation to replace the Brussels Convention and on the negotiations at The Hague on the world-wide recognition Convention. There is at the

163. See above, pp.492–493. A preliminary draft Convention was adopted in Oct. 1999; see the Report thereon by Nygh and Pocar, Enforcement of Judgments Preliminary Document No. 11, Aug. 2000. It was assumed that matters would then be concluded at a Diplomatic Conference in 2001. However, negotiations continue and a full Diplomatic Conference before 2002, if then, seems most unlikely.

moment no other mechanism available, no obvious institutional structure charged with addressing these issues, unlike the situation in a number of other States in the European Union or in the U.S.A. and Canada. Yet, there is a range of issues which are upon us, as I have tried to illustrate in terms of the Internet age and of the wider public interest in private international law matters. Where e-commerce issues pose problems in the field of jurisdiction, we have the advantage that they can be, and are, being examined in the context of the current international debates on this topic. Nevertheless, even here, if the proposed Hague Convention turns out to be unacceptable to the United Kingdom, the jurisdictional problems of an electronic age will not go away. Furthermore, their resolution in terms of a European Union Regulation does not hold good for cases involving the rest of the world. That still also leaves choice of law issues. Here the forum for debate will, in the case of obligations, whether contractual or non-contractual, be the European Union, and I believe that e-commerce issues will have to be addressed here. Nor do I believe that property choice of law rules can be excluded from the need to give careful consideration to the suitability of our choice of law rules in this changed world of electronic activity.[164]

I am left with a concern that we do not have a clear institutional focus with an identified body clearly seen to be addressing these issues over a broad spectrum—a role played by the Law Commission a decade or two ago.[165] Without such a body, with an open consultative process, it will be hard to provide the input from those at the forefront of these developments—and the change is fast—and it will also be hard to address these issues across the spectrum of private international law rules rather than simply on a piecemeal basis as is the case now, with the agenda being set by whatever international discussions are in hand, and the timetable depending on the speed, or otherwise, of those discussions. The danger is that, when international discussions fail to produce agreement, or fail to produce a nationally acceptable solution, the hard work and thinking on these issues which has been contributed to those discussions is not then used in any local national discussions. Furthermore, the increased politicisation of the processes gives added force to the need to involve a broader spectrum of interests and to canvass a wider range of views.

164. The private international law problems of electronic share or money transfers are well illustrated by *Macmillan Inc* v. *Bishopsgate Investment Trust plc (No. 3)* [1996] 1 W.L.R. 387; Cheshire and North's, *Private International Law* (13th edn, 1999), pp.969–973.

165. The inclusion in the Law Commission's Seventh Programme, Law Com No. 259 (1999) of Item 8: Electronic Commerce is certainly to be welcomed, as is the fact that the Law Commission is addressing some of these issues in the context of work on sale and carriage of goods, and on associated banking and insurance transactions: Law Commission's Thirty-Fourth Annual Report 1999, Law Com No. 265 (2000), paras 3.2—3.5. It is the case, however, that the issues to be addressed are far wider than those encompassed by the Law Commission's current programme of work.

To return to my title, change there has certainly been and will continue to need to be. In the Internet age, to avoid decay, i.e. the continuation of rules unsuited for a whole new world of commerce and communication, a focused approach needs to be adopted to these new challenges. It was Francis Bacon who said: "It is a reverend thing to see an ancient building or castle not in decay". The same goes for private international law.

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