CURRENT DEVELOPMENTS

PRIVATE INTERNATIONAL LAW

Edited by Wendy Kennett*

I. Family Law
II. Civil and Commercial Matters
III. The Hague Conventions in the Internet Age

I. FAMILY LAW

A. Intercountry Adoption

On 27 July 1999 a UK Act was passed to "make provision for giving effect to the Convention on Protection of Children and Co-operation in respect of Intercountry Adoption concluded at the Hague on 29 May 1993" and "to make further provision in relation to adoptions with an international element".[1] At the time of writing, however, the UK had not ratified the Convention. By section 18(3) the Act will be brought into force on a date appointed by statutory instrument.

B. Protection of Adults

A Convention on the International Protection of Adults was concluded by the States Members of the Hague Conference on Private International Law on 2 October 1999. The Convention is intended to fulfil in relation to adults the role played by the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (Convention on the Protection of Children), and many of the same experts were involved in the negotiations. The two Conventions are based on similar principles, but Convention on the Protection of Adults necessarily required some variations in approach. In particular, the protection of children is often necessitated by disputes over the child between the parents. The authorities in two or more legal systems may be appealed to for assistance and the 1996 Convention meets the need to choose between these systems. In the case of incapacitated adults it may be difficult to find anyone willing and able to take responsibility for them. The issue is less likely to be one of choice between competing systems, than identifying an appropriate system under which adequate provision can be made for the adult. Furthermore, allocation of responsibility for a child to one parent or another will arise by

* This section aims to survey recent developments in selected areas of private international law.

1. The Convention is not described further in this subject section in line with a policy of commenting on Hague Conventions at the time they are opened for signature.

https://doi.org/10.1017/S0020589300064277 Published online by Cambridge University Press

operation of law where no authority intervenes. In the case of adults, however, the specific adoption of measures of protection is required. Thus, where the validity of an act undertaken by an incapable adult is in question, this is an issue of capacity falling outside the scope of the Convention.

The need for a new Convention has arisen from the lengthening of the human life span. Some States have completely recast their internal systems for the protection of adults who are suffering from an impairment or an insufficiency in their personal faculties. Natural movements in population in modern times, and especially the rather high number of people coming to the age of retirement and deciding to spend the last part of their lives in a milder climate, have made practitioners and in particular notaries more concerned to have at their disposal private international law rules which are certain.[2]

Like the 1996 Convention on the Protection of Children, the new Convention has six chapters: Scope of the Convention; Jurisdiction; Applicable law; Recognition and Enforcement; Co-operation; General provisions. Although many of the provisions of the two Conventions are almost identical, there are significant differences.

1. Scope

The scope of the Convention is defined in its first four articles, which define the objects of the Convention (Article 1), give a (non-exhaustive but fairly complete) list of the protective measures covered by the Convention (Article 3), and regulate (exhaustively) matters excluded from the Convention (Article 4).

The adults covered by the Convention are persons who have "reached the age of 18 years" (Article 2(1)). The Convention is thus designed to follow seamlessly from the 1996 Convention which applies to children of less than 18 years. A "linking" provision can be found in Article 2(2) which provides that the Convention applies also to measures in respect of an adult who had not reached the age of 18 years at the time the measures were taken. Measures taken under the 1996 Convention will thus be monitored and amended if necessary under the new Convention once the person subject to the measures has attained the age of 18.

Adults needing protection within the meaning of the Convention are those who "by reason of an impairment or insufficiency of their personal faculties", are "not in a position to protect their interests" (Article 1(1)). A factual test is applied to try to dissuade Contracting States from referring to their domestic conceptions of incapable adults.

There is no general provision in the Convention as to its geographic scope. This means that its scope will vary according to the provision in question—the connecting factor may, for example, be the habitual residence, or presence of the adult or the location of property belonging to the adult.

2. Jurisdiction

Articles 5–12 of the Convention deal with issues of jurisdiction to take measures directed to the protection of the adult's person or property. It is in this

2. Report of the Special Commission on the Protection of Adults (Rapporteur P. Lagarde).

area that the divergence between the 1996 Convention and the present Convention is most marked, for the reasons outlined above. Rather than concentrating jurisdiction in the authorities for the State of the adult's habitual residence, a range of possible jurisdictions is identified, although the jurisdiction of the authorities in the State of the adult's habitual residence has a position of primacy. Article 5(1) establishes the jurisdiction of the judicial or administrative authorities of the Contracting State of the habitual residence of the adult, and Article 5(2) provides for authorities having jurisdiction to change with a change in the adult's habitual residence.

Article 6 makes special provision for adults who are refugees, those who are internationally displaced, and those whose habitual residence cannot be established. The Contracting State of the territory of which these adults are present has jurisdiction in each case.

The nationality of the adult in question provides a further jurisdictional connecting factor (except in the case of refugees and internationally displaced persons). The authorities of a Contracting State of which the adult is a national have jurisdiction under Article 7(1) to take measures for the protection of the person or property of the adult "if they consider that they are in a better position to assess the interests of the adult, and after advising the authorities having jurisdiction under Article 5 or Article 6, paragraph 2 [for adults whose habitual residence cannot be established]".

The jurisdiction of the State of nationality is concurrent with that of the adult's habitual residence, but is subject to certain conditions, which render it subsidiary to the jurisdiction of the State of habitual residence. According to Article 7(2) the jurisdiction must not be exercised if the authorities having jurisdiction under Article 5, Article 6(2) or Article 8 have informed the authorities of the State of nationality that they have taken the measures required by the situation, or have decided that no measures should be taken, or that proceedings are pending before them. Furthermore, Article 7(3) provides that any measures taken by the State of nationality shall lapse as soon as the authorities having jurisdiction under Article 5, Article 6(2) or Article 8 have taken the measures required by the situation or have decided that no measures are to be taken.

To extend the range of States that may exercise jurisdiction in relation to an incapacitated adult, while retaining the primacy of the State of the adult's habitual residence, Article 8 enables the authorities in the latter State to request the authorities of certain other States to take measures for the protection of the person or property of the adult. The request may relate to all or some aspects of such protection. A request may be made by the State of habitual residence of its own motion, or on an application by the authority of another Contracting State which wants to assume responsibility for the adult. If the requested authority declines jurisdiction, the authorities in the State of habitual residence will retain it.

The Contracting States to which such a request may be addressed are (Article 8(2)): (a) a State of which the adult is a national; (b) the State of the preceding habitual residence of the adult; (c) a State in which property of the adult is located; (d) the State whose authorities have been chosen in writing by the adult to take measures directed to his or her protection; (e) the State of the habitual residence of a person close to the adult prepared to undertake his or her protection; and (f) the State in whose territory the adult is present, with regard to the protection of

the person of the adult. Article 8(2)(d) is intended to deal with the possibility allowed by some legal systems for an adult to make provision for possible later incapacity.

In addition to general protective measures—the subject matter of Articles 5 to 8—there may be a need to take measures concerning particular property, or to deal with a particular emergency that has arisen in a State other than the one with jurisdiction to take general measures. These possibilities are covered by Articles 9 to 11.

To ensure that there is no gap in the protection of the adult, Article 12 provides that measures taken in application of Articles 5 to 9 "remain in force according to their terms,[3] even if a change of circumstances has eliminated the basis upon which jurisdiction was founded, so long as the authorities which have jurisdiction under the Convention have not modified, replaced or terminated such measures". This approach does not, however, apply in a case covered by Article 7(3). Measures taken by the State of nationality will lapse simply because the State of the habitual residence has concluded that no measures are necessary.

3. *Applicable law*

The general rule of the Convention is contained in Article 13. In exercising their jurisdiction under the Convention, the authorities of the Contracting States shall apply their own law. Some flexibility is permitted, however. According to Article 13(2), in so far as the protection of the person or the property of the adult requires, the authorities concerned may exceptionally apply or take into consideration the law of another State with which the situation has a substantial connection.

Article 14 draws a distinction between measures adopted and the conditions of implementation of those measures. Thus a measure such as the appointment of a guardian will take place in accordance with the law of State of the appointing authority—whose jurisdiction is based on Articles 5–8 of the Convention—but if the guardian has to act in another State, the way in which the guardian must proceed is a matter for the law of the place of acting. The law of the latter State will, for example, determine when, if at all, the guardian needs court authorisation before acting. Interpretation of this provision is likely to lead to some difficulty when the States whose laws are potentially applicable take very different approaches to the regulatory issues concerned.

The powers of representation granted by an adult (either under an agreement or by a unilateral act) to be exercised when such adult is no longer in a position to protect his or her own interests are the subject of Article 15. In the absence of choice, the existence, extent, modification and extinction of such powers are governed by the law of the State of the adult's habitual residence at the time of the agreement or act. Within limits, however, the adult may choose a governing law. The law must be "designated expressly in writing" and must be one of the following: (a) a State of which the adult is a national; (b) the State of a former habitual residence of the adult; or (c) a State in which property of the adult is located, with respect to that property. Under Article 15(3) the manner of exercise

3. This form of words is intended to take account of the possibility that the measures may be only intended to remain in force while the adult is in the State that issued the measures.

of such powers of representation is governed by the law of the State in which they are exercised.

There remained a concern among the negotiators that powers of representation granted under such a mandate might over time become inoperable or inadequate. Under Article 16, therefore, a residual power is given to a State that would otherwise exercise jurisdiction under the Convention to withdraw or modify those powers. Such withdrawal or modification should only take place if the powers of representation are "not exercised in a manner sufficient to guarantee the protection of the person or property of the adult" and in making any changes the law governing the original grant of the powers should be taken into consideration to the extent possible.

Article 17 protects the validity of a transaction entered into by a third party who has dealt with a person claiming to be the adult's representative. The protection applies if the parties to the transaction were present in one State and if the alleged representative would be entitled to act as such under the law of that State. The third party is thus not required to consider whether another law may be applicable under which the alleged representative is not entitled to act as representative. The protection does not apply, however, if the third party knew or should have known that the question of capacity was governed by the applicable foreign law.

The remaining provisions of the chapter on the applicable law are familiar features of Hague and other choice of law Conventions. If an adult is within the subject matter and geographic scope of the Convention, the provisions on choice of law apply even if the designated law is the law of a non-Contracting State (Article 18); *renvoi* is excluded (Article 19); designation of the applicable law does not prevent the application of the mandatory rules of the State in which the adult is to be protected (Article 20); and application of the designated law can be refused if its application would be manifestly contrary to public policy (Article 21).

4. *Recognition and enforcement*

The provisions on recognition and enforcement of protection contain features which are now common in conventions dealing with recognition and enforcement—such as the prohibition of any review of the merits of the case (Article 26) and the requirement that the authorities in the requested State are bound by the findings of fact on which the State of origin based its jurisdiction (Article 24). According to Article 22 of the Convention the measures taken by the authorities of a Contracting State shall be recognised by operation of law in all other Contracting States. A decision on recognition or non-recognition can be sought by any interested party under Article 23. There are five grounds for non-recognition (Article 22(2)). These are (a) lack of jurisdiction, (b) failure to accord the adult a hearing, (c) public policy or the conflict with a mandatory rule of the requested State, (d) incompatibility with measures taken later in a non-Contracting State which would have had jurisdiction had the Convention rules been applicable, where those measures fulfil the requirements for recognition in the requested State, and (e) where the measure adopted involves placement of the adult in the requested State, failure to consult with the competent authority in that State before adopting the measure (as required by Article 33).

Enforcement of the measures is necessarily a matter for the law of the requested State (Article 27).

5. Co-operation

Article 28 requires the designation of a Central Authority. The role of the Central Authority is, *inter alia*, to co-operate and promote co-operation amongst the competent authorities, to facilitate communication between those authorities and to provide information about the laws and services available for the protection of adults. A number of provisions of the Convention require the exchange of information between authorities to ensure that there is no duplication in the measures taken for the protection of an adult, to establish whether a State that has close connections with the adult is willing to take responsibility for protective measures, or to assist in finding or aiding an adult who is in need of protective measures (e.g. Articles 7(3), 8, 10(4), 33, 34). These communications may take place through the Central Authority, but can also take place between local authorities. Article 37 provides for the possibility of Contracting States entering into agreements to improve the procedures for co-operation.

6. General provisions

The chapter on general provisions deals with a number of technical issues. It provides for the issue of a certificate to any person entrusted with responsibility for a protected adult to facilitate their actions on behalf of that adult in other Contracting States. It also contains rules to assist in the interpretation of the Convention in federal or multi-legal system States, deals with relationships with other Conventions and provides rules on the languages in which communications between competent authorities and/or Central Authorities may take place.

7. Conclusions

The protection of incapacitated adults is an issue of increasing importance in modern society and the Convention is potentially a significant instrument for dealing with the international problems that may arise. On the other hand, it is clear that Member States to the Hague Conference had concerns about the extent to which the implementation of the Convention might have major financial consequences and this may be a factor inhibiting ratification.

II. CIVIL AND COMMERCIAL MATTERS

A. Jurisdiction

Article 5(1) of the Brussels and Lugano Conventions continues to pose problems for the courts.

In the last few months the European Court has answered two questions concerned with the interpretation of Article 5(1) of the Brussels Convention. Case C-440/97, *GIE Groupe Concorde and Others* v. *The Master of the vessel Suhadiwarno Panjan and Others* essentially asked the Court to reconsider the position it adopted in Case 12/76, *Tessili* v. *Dunlop*[4] and later confirmed in Case

4. [1976] E.C.R. 1473.

C–288/92 *Custom Made Commercial* v. *Stawa Metallbau*[5] to the effect that the place of performance of the obligation in question under a contract is to be determined by reference to the applicable law. The Court declined to do so. Its decision to retain its existing stance was indeed reinforced by the fact that States arguing for an autonomous interpretation of "place of performance" could not agree on the principles to be applied. The renegotiation of the Brussels and Lugano Conventions must be seen as the appropriate forum to argue for the revision of Article 5(1). Such representations have indeed been made, and the proposed Article 5(1) does attempt to provide an autonomous definition of the place of performance in relation to sale of goods and contracts for services[6]—but the wide range of possible types of service contract, and the different ways in which Member States characterise contracts[7] mean that this reformulation of Article 5(1) is likely to create as many difficulties as it resolves.

In Case C–420/97, *Leathertex Divisione Sintetici SpA* v. *Bodetex BVBA* the Court was faced with a problem of interpretation flowing from its ruling in Case 266/85, *Shenavai* v. *Kreischer*.[8] There the Court had concluded that in the case of a dispute concerned with a number of obligations arising under the same contract and forming the basis of the proceedings brought by the plaintiff, the court before which the matter is brought should, when determining whether it has jurisdiction, be guided by the maxim *accessorium sequitur principale* so that, where a number of obligations are at issue, it will be the principal obligation which will determine its jurisdiction. In *Leathertex*, however, the referring court (the Belgian Supreme Court) had concluded that the two obligations forming the basis of the litigation—one to be performed in Belgium and the other in Italy—were both of equal importance. No one principal obligation could be identified. The guidance of the European Court was therefore sought on whether the Belgian courts could hear claims in relation to both obligations.

The Court took a restrictive approach in answering this question and concluded that where both obligations were of equal rank, each must be sued on in its respective place of performance. The fragmentation of litigation that would result could, after all, be resolved by suing the defendant at his domicile under Article 2 of the Convention.

5. [1994] E.C.R. I–2913.

6. The proposed text of Art.5(1) reads as follows:

A person domiciled in a Member State may, in another Member State, be sued

1. (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;
   (b) unless otherwise agreed, the place of performance of the obligation in question shall be:
   — in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered;
   — in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided [NB employment contracts are separately regulated];
   (c) if point (b) does not apply, then point (a) applies.

A fuller account of the revised Convention will be given when the text is finalised.

7. For example, the German version of the proposed Art.5(1) refers to "*Dienstleistungen*"—but a *Dienstvertrag* is only one of several different types of contract which may involve a service element.

8. [1987] E.C.R. 239.

The proposed version of Article 5(1), if implemented, will lead to a modification of this approach. As noted above, it identifies an autonomous place of performance of sale of goods contracts and contracts for the provision of services. The Commission Report accompanying the draft Regulation notes that "[T]his pragmatic determination of the place of enforcement applies regardless of the obligation in question, even where this obligation is the payment of the financial consideration for the contract. It also applies where the claim relates to several obligations. The rule may, however, be 'displaced' by an explicit agreement on the place of performance."

The proposed new version of Article 5(1) does not, however, seem likely to afford any assistance in dealing with the problem of interpretation that was recently addressed by the House of Lords in *Agnew* v. *Länsförsäkringsbolagens A.B.*[9] in the context of Article 5(1) of the Lugano Convention. The litigation took the form of an action to avoid a reinsurance contract for non-disclosure. The defendant was a Swedish insurance company. The claimants were representative Lloyd's underwriters and United Kingdom insurers. It was sought to contest the jurisdiction of the English courts on several grounds. The defendant argued that the dispute was a "matter relating to insurance" within the meaning of Articles 7 and 11 of the Lugano Convention and that the reinsured should therefore be sued at its domicile. It was the unanimous view of the House of Lords (as also the Court of Appeal) that reinsurance fell outside the scope of Section 3. This conclusion was based on an examination of the policy considerations underlying Section 3 of the Convention, and also on the fact that the Schlosser Report[10] quite bluntly stated that Section 3 excluded reinsurance.

There was also unanimous agreement that the dispute was a "matter relating to a contract". The issue raised was the avoidance of a contract. The contract was not void *ab initio* (cf. *Kleinwort Benson Ltd* v. *Glasgow City Council*[11]). The question whether an obligation to disclose material facts was a "contractual obligation" whose place of performance could determine jurisdiction proved more controversial, however, since the obligation arose prior to the conclusion of the contract rather than as a result of the contract. A majority of their Lordships (3:2) concluded that it was consistent with the natural meaning of the language used by the Convention to view such an obligation as contractual. Policy consideration also favoured this approach.

Similar problems of interpretation have arisen in other jurisdictions and the matter remains unaddressed by the European Court under the Brussels Convention. The original version of Article 5(1) was not framed to deal with an action to avoid a contract, or a declaration that a contract is invalid—yet these are common in practice. It is a pity that the renegotiation of the Conventions did not provide an opportunity to clarify the law in this regard.

The European Court was also called upon to consider the interpretation of Article 16(1) of the Brussels Convention during the period under consideration. In Case C-8/98, *Dansommer* v. *Götz* it reaffirmed its earlier case law and declined

9. 17 Feb. 2000.

10. On the Convention on the Accession of Denmark, Ireland and the UK to the 1968 Brussels Convention.

11. [1999] 1 A.C. 153.

to extend the flexibility introduced in Case C-280/90, *Elizabeth Hacker* v. *Eurorelais*[12] to a situation where obligations other than those forming part of a tenancy agreement were of minor significance in the relationship between the parties.

B. Choice of Law

On 1 June 1999 new regulations entered into force in Germany containing private international law rules in relation to unjust enrichment, tort and property issues.[13] The final adoption of this legislation, after many years of deliberation, is perceived as in part an attempt to reinforce Germany's position in the present negotiations for European Union rules governing choice of law in non-contractual relations. The new legislation amends the EGBGB (Introductory Law to the German Code of Civil Procedure) which contains a codification of Germany's private international law rules. The EGBGB originally contained to a large extent rules specifying when German law applied—rather than true private international law rules. These "unilateral" rules have gradually been "bilateralised" through case law and amending legislation. Until now there has been no systematic codification of the law in relation to unjust enrichment, tort and property. The new legislation adopts some but not all of the solutions developed in the case law.

Amended Articles 38 and 39 of the EGBGB govern choice of law in cases of unjust enrichment. According to Article 38(1), where a claim arises from performance (of a supposed obligation) by one party, the applicable law is the law governing the legal relationship that gave rise to that performance. Article 38(2) deals with the situation where a claim arises from interference with a protected interest. The applicable law is the law of the place where the interference occurred. Other cases of unjust enrichment fall under Article 38(3) and are governed by the law of the State in which the enrichment occurred. Article 39 deals with the particular situation of *negotiorum gestio*. Claims arising by operation of law from the management of the affairs of another are subject to the law of the State in which the transaction took place (Article 39(1)). Claims arising from meeting another's commitments are subject to the law governing that commitment.

It should be noted that Article 41, which is considered further below, also by its terms modifies the application of Articles 38–39.

Articles 40–42 are concerned principally with tort choice of law rules. The basic rule is (unsurprisingly) the application of the *lex loci delicti* (Article 40(1) EGBGB). This is defined as the law of the place in which the tortfeasor acted. The solution that had been developed in the case law favoured the victim by allowing him or her a choice between the law of the place of acting, and the place where the damage was suffered. The new rules appear to adopt a more neutral position, but this is subject to a proviso which may in practice prove more important than the general rule. The victim can ask for the application of the law of the State in which the damage occurred—but only if the request is made at first instance and before the end of the preliminary hearing (*frühen ersten Termins*) or the end of any

12. [1992] E.C.R. I-1111.
13. BGBl. 31 May 1999 p.1026 ff.

preparatory written phase of proceedings (*schriftlichen Vorverfahrens*). It remains to be seen whether the courts will require a conscious request for the application of German law as the law of the place of damage, or will be prepared to read an implied choice of German law into any case pleaded without reference to choice of law issues. On the assumption that a significant proportion of victims will be Germans suing in their home courts in respect of damage suffered in Germany as a result of acts committed abroad, the approach of the courts on this issue will materially affect the impact of the new law.

Article 40 does not attempt to address the problems that may arise in cases where harmful acts have been undertaken in several jurisdictions, or where harm has been suffered in several jurisdictions. These will have to be resolved by case law.

There are a number of exceptions to the *lex loci delicti* rule:

- If both parties have their habitual residence in the same State at the time of the harmful event, that law of the latter State is to be applied (Article 40(2)).
- If there is a significantly closer connection with the law of a State other than the one designated by Articles 38–40(2), then the more closely connected law should be applied (Article 41).
- If the parties agree on the applicable law after the non-contractual obligation has arisen, that law will be applied (except to the extent that the rights of third parties may be affected) (Article 42).

The significantly closer connection test is one which has been argued for in German legal literature but not really taken up by the courts. The new rules, while establishing the test in general terms, also give two examples of situations in which a closer connection may be found (Article 41(2)). The connection may arise out of a specific legal or factual relationship between the parties (e.g. a contractual relationship, or a group trip out); or it may arise out of the shared habitual residence of the parties (an example relevant in the application of Article 41 to unjust enrichment cases, but which is specifically provided for in relation to tort cases by Article 40(2)).

Article 40(3) provides a kind of functional equivalent of the former English "double actionability" rule: it establishes situations in which tort claims that are subject to a foreign law cannot be asserted. These situations are first, when the claim is significantly broader than is necessary for the appropriate compensation of the injured party; second, when the claim obviously serves a different purpose than the appropriate compensation of the injured party; and third, when the claim conflicts with rules on liability in an international agreement that is binding on Germany.

Finally, Articles 43–46 of the new rules deal with property rights. Article 43 establishes the *lex situs* rule in relation to rights to property. Paragraph (2) of that Article provides that if the property in which rights have been established moves to another State, the rights may not be exercised in a way that is in conflict with the laws of its new location. Paragraph (3) requires consideration of events, not just in Germany but in any other State in which the property was previously located, when establishing whether the conditions for acquisition of property rights have

been met. Article 44 deals with claims relating to "nuisance" (harmful effects coming from immovable property) and subjects them to the rule contained in Article 40(1). Article 45 deals with property rights in various forms of transportation. Article 46 applies the "significantly closer connection test" to property rights.

III. THE HAGUE CONVENTIONS IN THE INTERNET AGE

In September 1999 the Hague Conference on Private International Law and the University of Geneva hosted a conference examining the impact of electronic forms of communication on the existing Hague Conventions. As a result a series of recommendations were drawn up relating to the interpretation of the Conventions and to the need for possible amendments. The recommendations can be found at the website of the Hague Conference (www.hcch.net) and further details and documentation can be found at cuiwww.unige.ch/~billard/ipilec.

WENDY KENNETT

https://doi.org/10.1017/S0020589300064277 Published online by Cambridge University Press