

**THE REFORM OF THE RULES GOVERNING JURISDICTION
AND THE ENFORCEMENT OF FOREIGN JUDGMENTS**

**Memorandum by the Commonwealth Secretariat and paper by
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1. In the Commonwealth context, the question of the recognition and reciprocal enforcement of judgments and orders and the Service of Process within the Commonwealth has received the consideration of Law Ministers over the years.

2. In 1975 a preliminary Report on the subject commissioned by the Secretariat and prepared by Professor David McClean and Professor Keith Patchett, then Professor of Law at the University of Wales, was presented to Law Ministers at their Meeting in Lagos, Nigeria in 1975. A further Report on the subject also commissioned by the Secretariat and prepared by the same authors was presented to Law Ministers at their Meeting in Winnipeg, Canada in 1977.

3. Between 1978 and 1980, the Secretariat organised a series of regional Working Meetings in Basseterre, St. Kitts (1978); Apia, Samoa (1979) and Nairobi, Kenya (1980) to examine existing arrangements and to consider ways in which improvements might be made in certain areas of the Recognition and Enforcement of Judgments and Orders, the Resealing of Grants of Administration and the Service of Process within the Commonwealth.

4. Prior to the advent of the World Trade Organisation (WTO) and the liberalisation of trade practices, difficulties were experienced in enforcing foreign judgments in civil cases which often depended on the existence or absence of reciprocal arrangements for the enforcement of such judgments. With the increase in the globalisation of trade, the issues relating to jurisdiction and the enforcement of foreign judgments are bound to assume greater significance.

5. The attached paper by Professor McClean, who has over the years represented the Secretariat at Sessions of The Hague Conference on Private International Law with which the Secretariat has reciprocal Observer status, is a continuation of the general watching brief the Secretariat maintains on behalf of member countries on general international legal developments and matters of contemporary interest and concern.

February 1999

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Introduction

1. This paper examines some highly significant developments which could have important effects on international civil litigation generally, and on Commonwealth practice in particular.

2. The background is that legal disputes cross national frontiers with increasing frequency. Raw materials exported from one country and used to manufacture a product in a second may give rise to a product liability claim from a plaintiff resident in a third. The dispute may involve injury to an individual, perhaps a tourist, or may have much wider ramifications, involving a development grant to a local enterprise paid through a foreign bank. Issues frequently arise as to: (a) the jurisdiction of the courts; and (b) the recognition and enforcement of any resulting judgment.

3. Many Commonwealth countries share a common set of principles on the issue of jurisdiction and have legislation on the recognition and enforcement of judgments based ultimately on English models. On both aspects, the existing rules are increasingly seen as unsatisfactory. They even lack coherence, for the recognition rules do not cover all judgments issued under the common jurisdictional principles! It is now possible that a new model will become available in the year 2000 which could provide the Commonwealth with the opportunity to revise and greatly improve its current practices, to the benefit of litigants and the courts.

4. The Hague Conference on Private International Law, an intergovernmental body with which the Commonwealth Secretariat has Observer status, is the primary means through which States co-operate in considering the

harmonisation and simplification of the relevant rules of law. It has been working since 1994 on a draft international convention on Jurisdiction and the Recognition and Enforcement of Judgments. A preliminary and incomplete draft was produced after the last meeting of the relevant Special Commission of the Conference in November 1998 and it is hoped that a Convention can be agreed at the Nineteenth Session of the Conference in the year 2000.

Existing Commonwealth practice

(a) Jurisdiction

5. Most Commonwealth countries have rules derived from traditional English practice, under which jurisdiction can be taken in three main sets of circumstances:

- (i) where the writ or other originating document is served on the defendant within the territorial jurisdiction of the forum State

As a basis for jurisdiction this is wholly unsatisfactory. Given ever-increasing mobility, the presence of the defendant (or an officer of the defendant company) in a particular country at one moment in time is no guarantee that the case has any real connection with the forum country. The Brussels and Lugano Conventions (to which the United Kingdom and most European countries, whether in the European Union (EU) or not, are parties) expressly prohibit its use as against

- (ii) defendants domiciled in other Contracting States; where the defendant submits to the jurisdiction; and
- (iii) where the court grants leave under what in England is Order 11 of the Rules of the Supreme Court for service outside the jurisdiction in prescribed circumstances

Some of the grounds upon which leave can be given, e.g., that the contract was made within the jurisdiction, are also viewed with disfavour as outmoded and so 'exorbitant'; especially as we move into the realms of electronic commerce, notions of the 'place of contracting' become very artificial. Most if not all Commonwealth countries which have this 'Order 11' jurisdiction nonetheless refuse to recognise judgments of other Commonwealth courts which have taken jurisdiction under identically worded Rules.

6. The rigidity of these rules is tempered by the use of the plea of *forum non conveniens* and the discretionary element in the use of Order 11; but in the practice of civil law countries neither is known and that degree of judicial discretion is regarded as an infringement on the doctrine of the separation of powers.

(b) Recognition and enforcement of judgments

7. The subject of the recognition and enforcement of money-judgments within the Commonwealth was examined in a detailed report considered by Commonwealth Law Ministers at their Winnipeg Meeting in 1977. The Recognition and Enforcement of Judgments and Orders and the Service of Process within the Commonwealth by David McClean and Keith Patchett. (Professor Patchett subsequently published a detailed study on those aspects of that subject which are

relevant to civil and commercial disputes: Recognition of Commercial Judgments and Awards within the Commonwealth (Butterworths, 1984)). As the report observed:

"In a world where international trading relations increasingly give rise to the possibility of transnational debts, the security of commercial transactions calls for a speedy, cheap and uncomplicated process for ensuring that judgments properly obtained against a debtor can be satisfied, even though his assets may be situated in another law area."

8. The great majority of Commonwealth countries have legislation modelled on one or both of two United Kingdom statutes, the Administration of Justice Act 1920 and the Foreign Judgments (Reciprocal Enforcement) Act 1933. In his 1984 book, Professor Patchett identified 45 Commonwealth jurisdictions with legislation based on the 1920 model (plus the Canadian provinces which had a distinct model still recognisably derived from that of 1920) and 56 jurisdictions with legislation on the 1933 model. Many had both. Some also had legislation reflecting earlier regional arrangements (in the Caribbean, and in Central and East Africa). Since the date of Professor Patchett's study, some countries have revised their legislation, in some cases using a model prepared for the Commonwealth Secretariat (so, Kenya in 1984 and Solomon Islands in 1988).

9. Appendix A to this paper sets out a partial text, in parallel columns, of a recent model (the Foreign Judgments Act 1991 of Australia) and of the corresponding material from the United Kingdom 1933 Act. It will be seen that:

- (a) in both models (Australia s.5; UK s.1) the legislation depends for its operation on the designation of reciprocating countries, by Regulation, Order-in-Council or equivalent instrument. The geographical scope of many Commonwealth Acts in this field is remarkably small despite the widespread use of similar legislative texts;

(b) that recognition depends largely on whether the country of origin of the judgment is regarded as having had jurisdiction to grant it, though this material is awkwardly placed under a heading relating to the 'setting aside of registered judgments' (Australia, s.7(3); UK, s.4(2)). The main grounds for taking jurisdiction which are regarded as acceptable can be stated as follows:

- (i) that the judgment debtor was plaintiff in, or counter-claimed in, the court of origin (Australia, s.7(3)(a)(ii); UK, s.4(2)(a)(ii));
- (ii) that the judgment debtor, a defendant in that court:
 - (a) was at the time when the proceedings were instituted resident in, or being a body corporate had its principal place of business in, the relevant country (Australia, s.7(3)(a)(iv); UK, s.4(2)(a)(iv)); or
 - (b) had an office or place of business in that country and the proceedings were in respect of a transaction effected through or at that office or place (Australia, s.7(3)(a)(v); UK, s.4(2)(a)(v)); or
 - (c) submitted to the jurisdiction of that court by prior agreement (e.g. in a jurisdiction clause in a contract) or by voluntarily appearing in the proceedings (Australia, s.7(3)(a)(i)(iii); UK, s.4(2)(a)(i)(iii)).

There are additional grounds in the case of disputes concerning immovables.

10. Much of the Commonwealth legislation in this area is "showing its age". It suffers from a number of defects, notably the fact that many countries have very limited lists of other Commonwealth members designated as reciprocating for the purpose of the relevant Act, but the processes of enforcement can be made to work. It falls into that category, well known to law reform agencies, of legislation which really should be overhauled but seldom reaches a priority list in any one country. All that suggests that were an acceptable and up-to-date model available, based on principles acceptable to neighbouring States and trading partners in the civil law as well as the common law tradition, including such states as the United States (where common law developments have proceeded on different lines from those followed in most Commonwealth countries, and Japan) it might well be taken up by Commonwealth countries. It is this that gives recent work at the Hague considerable significance.

Developments in the field

11. Earlier work in the Hague Conference led to a Convention of 1 February 1971 on the Recognition and Enforcement of Judgments in Civil and Commercial Matters. It has not enjoyed success: only three States, Cyprus, the Netherlands and Portugal, have ratified the Convention, and as between the two last-mentioned, its provisions have been replaced by those of the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 1968, a convention negotiated under the auspices of the European Community.

12. There has been work done on this topic in a number of regional fora. So under the auspices of the Organization of American States there are two, interrelated, Inter-American Conventions negotiated in 1979, that on Extraterritorial Validity of Foreign Judgments and Arbitral Awards and that on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments. These are not in a particularly fully-developed form.

13. The signature of the Brussels Convention was one of the most significant events in this field in recent decades. It is a "double convention", which means that it prescribes the bases on which the courts of Contracting States may take jurisdiction as well as requiring the recognition and enforcement of judgments of those courts in all other such States. Even more significant was the signature in 1988 of the Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, also known as "the Parallel Convention", by which a number of other European States not within the Community adopted provisions based upon those in the Brussels text both as between themselves and with the EC Member States. The Lugano text contains some improvements of the original Brussels text and more recently that has in turn been amended to incorporate similar improvements.

Principles of the Brussels-Lugano texts

14. As has been noted above, these Conventions are 'double' Conventions; that is, they address issues both of jurisdiction and the enforcement of judgments. The latter aspect, the creation of a common market in enforceable judgments, was the initial starting-point. So a main feature of the Conventions is that a judgment obtained in any one Contracting State can be enforced, by what is virtually an automatic process involving minimal delay, in any other Contracting State. Although accompanied by inevitable qualifications, the provisions of Title III (Recognition and Enforcement) of the Conventions spell this out with stark simplicity. Article 26(1) provides: "A judgment given in a Contracting State shall be recognised in the other Contracting State without any special procedure being required" and Article 31 adds: "A judgment given in a Contracting State and enforceable in that State shall be enforced in another Contracting State when, on the application of any interested party, it has been declared enforceable there".

15. Before the Convention provisions allowing such easy enforcement could be made acceptable to potential Contracting States, there had to be agreement as to the bases upon which the relevant States would exercise jurisdiction. A State is not going to commit itself to enforce a judgment based on a claim to jurisdiction

which it regards as exorbitant. So the Convention spells out rules for the exercise of jurisdiction, the primary basis being the "domicile" of the defendant within the forum State (Article 2 of each Convention).

16. The notion of "domicile" is differently understood in different countries, or even in different contexts within the same country. The Conventions essentially allow each Member State to use its own definition so far as individual defendants are concerned (which means that two or more States may claim jurisdiction on the domicile basis) and make use of the civil law notion of the "seat" of a corporation for corporate defendants. Neither approach is satisfactory in a global context.

17. The Conventions also contain rules giving 'exclusive jurisdiction' to a court: Article 16 of the Conventions represents an agreement between the Contracting States that on certain matters there should be one court, and one court only, which could hear the case. The principal categories comprise disputes as to title to immovable property and proceedings concerned with the registration or validity of patents, trade marks, designs, or similar rights.

18. Finally, the Conventions establish, principally in Article 5, additional grounds of 'special jurisdiction', which require courts to entertain cases where the subject matter is linked to their State in specified ways. These rules can be compared with the 'Order 11' practice; but there is no element of discretion under the Conventions.

19. The principal types of special jurisdiction (without entering into the niceties) are:

1. in matters relating to a contract, the place of performance of the obligation in question;
2. in matters relating to individual contracts of employment, this place where the employee habitually carries out his work;
3. in matters relating to maintenance, in the courts for the place where the

maintenance creditor is domiciled or habitually resident;

4. in matters relating to tort, the place where the harmful event occurred;
5. as regards a dispute arising out of the operations of a branch, agency or other establishment, the place in which the branch, agency or other establishment is situated.

20. There are also provisions dealing with jurisdiction over co-defendants, counter-claims and recourse actions (Article 6), submission to the jurisdiction (Article 18) and 'prorogation of jurisdiction' (i.e. jurisdiction clauses) (Article 17).

21. As between themselves, the Contracting States expressly excluded the exercise of jurisdiction on a number of grounds deemed exorbitant. These are set out in Article 3 of the Conventions and include rules which enable jurisdiction to be founded on the mere fact that the document instituting the proceedings was served on the defendant during his temporary presence in the forum State.

Current work at The Hague

22. The aim of the current work in the Hague Conference is to develop a global convention which will draw on the best modern texts, particularly those of Brussels-Lugano, but with every provision designed to take fully into account the different approaches found across the world. There is little doubt that a modern text would be of enormous value not least for Commonwealth countries with their somewhat dated legislation. If the text can become a successful Convention transcending the boundaries created by regional arrangements, and by different legal and constitutional histories, it will be a major achievement.

23. The greatest added-value of a new Hague Convention over the existing instruments would be the participation of the United States (a matter important to the

European countries but equally to countries such as Australia, Canada, China, Japan and those in the Caribbean). This is not just because of the importance of the United States in international commerce: the existence of 50 different States with their own rules as to jurisdiction and recognition creates considerable difficulty, which would be removed were a federal treaty to be in place, pre-empting State law. There remain, however, obstacles to an agreement on terms which would be acceptable to the United States and to the other potential parties.

24. Part of the problem lies in the fact that the bases of jurisdiction available to courts in the United States are identified largely by interpretation of the Due Process Clause of the United States Constitution, which is taken to require an appropriate degree of connection between the defendant and the chosen forum. This has given rise to caselaw developing bases of jurisdiction such as the defendant's 'doing business' in the forum, whereas bases of jurisdiction defined by reference to the plaintiff (e.g. the habitual residence of a consumer wishing to sue for breach of a consumer contract, a basis available under the Brussels and Lugano texts) could run into constitutional challenges.

25. Another, and not wholly unrelated, difficulty concerns forum non conveniens which operates in common law jurisdictions and especially in the United States to qualify what might otherwise be exorbitant assertions of jurisdiction. The United Kingdom and Ireland, in accepting the Brussels Convention, in effect abandoned the use of forum non conveniens in their dealings with other Contracting States (though there remain doubts as to the exact effect); but what may be acceptable in a regional context may not be appropriate in a global convention. The difficulty remains that civil law countries are unfamiliar with the idea of forum non conveniens and have genuine concerns as to the degree of judicial discretion it involves.

26. Another issue, one much pressed by the Australian delegation at The Hague, is that of the level of damage awards. As is well known, the level of damages awarded (often by juries) in United States courts, whether as compensatory or as punitive damages, is often

far higher than would be contemplated elsewhere. Could a means be found of enabling judgments to be enforced but only to the extent, in terms of the quantum of damages, which reflected the practice of the State of enforcement? This was addressed 20 years ago in the negotiations between the United Kingdom and the United States for a bilateral convention. A text was produced in 1978, but has never been signed. The last version of that text excluded judgments to the extent that they were for punitive or multiple damages but also dealt with the issue of excessive compensatory damages as follows:

“Where the respondent establishes that the amount awarded by the court of origin is greatly in excess of the amount, including costs, that would have been awarded on the basis of the findings of law and fact established in the court of origin, had the assessment of that amount been a matter for the court addressed, that court may, to the extent then permitted by the law generally applicable in that court to the recognition and enforcement of foreign judgments, recognise and enforce the judgment in a lesser amount.”

27. In early rounds of the discussions at The Hague, the United States delegation expressed a willingness to negotiate on a similar basis in the context of a possible Hague Convention, but its position has hardened. The United States position seems to be that the special position worked out in a bilateral negotiation between two States with close ties and mutual confidence in their respective legal systems is not readily adaptable for use on a global basis.

The nature of a possible Hague Convention

28. The Special Commission of the Hague Conference which is charged with preparing a draft Convention for presentation to a full Session of the Conference in 2000 is setting itself the task of negotiating a fully “double convention” in the style of Brussels-Lugano. The difficulties in accommodating some United States approaches in a double convention may yet see a retreat to what is called a “mixed” Convention. Under such a Convention

- (a) certain bases for taking jurisdiction would be prescribed by the Convention and all judgments pronounced by courts taking jurisdiction on one of those bases would be guaranteed recognition and enforcement in all other Contracting States (subject to the exceptions usually found in this context, e.g. where no notice had been properly given to the defendant of the action against him);
- (b) certain bases for taking jurisdiction would be declared exorbitant and their use prohibited, and any judgment granted on such a basis would be denied recognition and enforcement;
- (c) a Contracting State would remain free to take jurisdiction on other bases, neither prescribed nor exorbitant, in accordance with its national law, but the recognition and enforcement of any judgments pronounced on such bases would fall outside the convention, and would depend on the national law of the State in which recognition and enforcement was sought.

The partial draft of November 1998

29. After a number of meetings exploring and clarifying issues, the Special Commission moved in November 1998 towards the establishment of a draft Convention, still pursuing the aim of a ‘double’ convention. At the end of the November 1998 meeting, the Drafting Committee presented the text reproduced as **Appendix B** of this paper. It will be seen that the text is far from being a complete draft, and that it contains a number of variants (sometimes based on opposed principles). It is also the case that the Drafting Committee was not able in the time available to revise some parts of the text which had been seen and criticised by the Special Commission during the meeting. Nonetheless, the text serves to indicate the current state of the work, and the following paragraphs offer some commentary upon it.

Article 1: Scope

30. The policy of confining the draft to 'civil and commercial matters' is uncontroversial, and many of the exclusions in Article 1(2) follow naturally from its adoption. Unfortunately, however, the approaches of the civil law and common law countries divide on the meaning of 'civil and commercial'. The difficulty is well-known, but it remains difficult to draft wording which catches the differing understanding of the relationship between administrative law (and of special administrative tribunals) and civil matters in general. The words in square brackets in Article 1(2) are all related to this set of issues.

31. It will be noted that the Convention does not apply to arbitration (where the New York Convention holds sway) or to 'proceedings related thereto'; so a court judgment related to an arbitral award would not be within the scope of the Convention.

Article 2: Geographical scope

32. There is no draft text, but this is an important issue for Commonwealth countries. The question is to what extent the Convention will affect (parties from) non-Contracting States. This can arise in a number of forms, but, for example, the Brussels and Lugano Conventions have jurisdictional rules which generally apply only where the defendant is from another Contracting State; in other case the Contracting States are free to apply their traditional jurisdictional rules (as the United Kingdom does). But it is not clear whether the Hague Convention will adopt that same approach.

Article 3: Defendant's forum

33. The Special Commission agreed, with little difficulty, that the principal basis of 'general' jurisdiction (that is, jurisdiction existing regardless of the subject-matter of the dispute, like service within the jurisdiction in the familiar common law practice) should be, where the defendant was a natural person, the defendant's habitual residence. Habitual residence is a factual notion, free of the technicalities surrounding domicile.

34. More difficulty was met in agreeing an approach for corporations and other legal persons. The November 1998 text gives jurisdiction to the courts both for the place of incorporation or formation and also for the place where central management was exercised. This was preferred to an approach based on the notion of 'principal place of business' on the ground (which not all delegations found convincing) that a potential plaintiff would find it harder to be sure he had correctly identified the principal place of business.

Article 4: Choice of court

35. There is agreement that the Convention must deal with choice of court or jurisdiction clauses. The proposed text gives them binding force, and allows for the possibly different approach of non-Contracting States. The areas yet to be addressed principally concern the priority to be given to choice of court clauses as against other Convention rules: as against rules giving exclusive jurisdiction to a specified court (e.g. in cases concerning land) or creating what is coming to be called 'protected jurisdiction' (e.g. the special rules allowing a consumer to sue in his 'home' court).

Article 5: Appearance by the defendant

36. The principle, of jurisdiction created by submission, is relatively uncontroversial. The practical difficulties derive from the very great variety of procedures, so that there is a real problem in finding a form of words which identifies the point beyond which a challenge to the jurisdiction can no longer be raised without amounting to submission. For example, some States have procedures which enable a defendant to enter a limited appearance solely to challenge the court's jurisdiction, but others insist that any such challenge must be part of a defence which also addresses the merits.

Article 6: Contracts

37. This is proving one of the more controversial areas. Variant 2 is not dissimilar to the Brussels and Lugano text which has the language (in Article 5(1)) "in matters relating to a contract, in the courts for the place of performance of the obligation in question", but the proposed Hague text requires more: a

significant part of the obligation must in fact be performed. The argument is that a mere obligation to perform in State X does not create a significant link with that State, a matter of particular concern to the United States delegation.

38. Variant 1 is even closer to United States ideas allowing the plaintiff (and not only a consumer plaintiff) to sue in the courts of his own habitual residence where the defendant has engaged in certain closely defined types of related activity in that same State. European civil lawyers are deeply suspicious of the forum actoris, jurisdiction at the plaintiff's home court, so there are cross-currents of argument which will take some time to resolve.

Article 9: Branches

39. Both the familiar common law rules and the Brussels-Lugano texts recognise jurisdiction, where a dispute has arisen from the operation of a 'branch' of a company, in the country where the branch was situated. The scope to be given to the notion of a 'branch' attracts less international agreement, and the mere involvement of an agent or employee of the defendant is not seen as the equivalent of a branch.

40. The text in the November 1998 proposals reflects the continuing disagreement, and also tries to incorporate the United States notion of defendants 'doing business' in the forum State. As those ideas are also to be found in one Variant of Article 6 (see above), it is unclear how the various aspects of the present draft will be incorporated in the eventual text.

Article 10: Torts

41. This is also proving difficult. Paragraph 1 of the 1998 text is derived in part from the experience of operating the Brussels-Lugano text. The 'place of injury' test in 1(b) can produce fortuitous jurisdiction if unqualified (notably in the case a product taken to some country far removed from both the country in which it was manufactured and the markets in which it was intended to be sold).

42. Paragraph 3 is again influenced by European experience. In a number of cases, the courts have held that there is jurisdiction in the

State of injury but that damages can be awarded in the courts there only in respect of loss suffered in that State. A very similar idea is presented here.

43. Paragraph 2 appears to be concerned with jurisdiction to grant injunctive relief, to restrain threatened conduct.

44. There will almost certainly be special rules (in the Articles yet to be drafted) as to protective jurisdiction in respect of consumers and employees. Consumers may be allowed to sue in the courts of their own habitual residence in disputes arising out of consumer contracts, a concept which would include some insurance policy cases. Workers, similarly, might be allowed, in disputes arising out of a contract of employment, to sue in the courts for the place which constituted the centre of their employment activities under the contract.

45. It seems likely that where a dispute concerns questions of title to land, only the courts at the place where the land is situated will have exclusive jurisdiction. It remains to be settled how such a principle would be expressed, whether it would extend even to questions concerning tenancies, and how it would relate to issues arising under trusts. Jurisdiction in disputes between the trustees and beneficiaries under a trust would be separately dealt with, perhaps by giving jurisdiction to the courts designated in the trust deed or for the place where the trust had its principal place of administration, and failing both the place with which the trust had the closest connection. It seems likely that certain types of issue as to the establishment and internal 'constitution' of companies will be reserved to the State in which the company was formed and is registered.

Article 14: Provisional and protective measures

46. To the common lawyer, the measures dealt with here are best illustrated by the Mareva injunction (to which the new Civil Procedure Rules in England give the more mundane name 'freezing injunction'). The increasing importance of such measures in practice needs no underlining, but some countries view the development of 'world-wide Marevas' with deep suspicion. For this reason

the draft of Article 14 looks more like an examination paper than a set of recommendations.

Article 20: Prohibited grounds of jurisdiction

47. Article 20 draws the important distinction between general and special jurisdiction. All the grounds listed would be unacceptable as bases for the assertion of general jurisdiction, unrelated to the subject-matter of the dispute. Grounds (a) (the presence of property, especially land) and (e) (doing business) might well be acceptable as bases of jurisdiction where the dispute concerns the property or arises out of the 'doing business'. Ground (f) is of particular interest to Commonwealth countries. It will be seen that the Drafting Committee is considering an exception in respect of civil actions based on violation of human rights protected by international conventions.

Article 23: Lis pendens and Article 24: Declining jurisdiction

48. The state of the text indicates the level of disagreement. In Article 23, Proposal I in its two variants is derived from the approach in the Brussels and Lugano Conventions, which essentially give jurisdiction to whichever court in a Contracting State is first seised of the case (assuming, of course, that it is entitled to take jurisdiction under the Convention rules). Experience has shown that the notion of the court being 'seised' is far from unproblematic, and the Variants are attempts to address that problem. Proposal II introduces an element of discretion akin to that familiar under the plea of forum non conveniens.

49. This idea is developed further in the 'optional' Article 24; it is not wholly clear in what sense it is optional. It will be clear that the Drafting Committee felt obliged to include, if only in square brackets, rather detailed provisions which spell out matters which in common law courts are understood as matters of practice in the exercise of the court's wide discretion. It is the very width of that discretion which makes the whole notion difficult for some civil law countries to accept, but it is far from clear that an optional Article, which some Parties could accept and others reject, would be workable.

Articles 25 and 26: Recognition and enforcement

50. The principle of easy recognition and enforcement is basic to the whole project, and these two articles state the general rule. The text indicates the few points on which no clear decision had been taken in the discussions thus far.

Article 27: Grounds for refusal of recognition and enforcement

51. Potentially more controversial, the discussions revealed broad agreement, and Article 27 draws heavily on well-established precedents in other Conventions. Paragraph 2 requires a court to accept findings of jurisdictional facts (for example that the State of origin was the place of central management of a corporation or business association) found as fact by the court in contested proceedings in the State of origin.

Articles 28 to 31

52. These seem not to require detailed comment, as the principles are familiar. The prohibition of any requirement of legalisation and of security for costs based on the nationality or habitual residence of the applicant (the judgment-creditor) should give rise to no difficulty.

Article 31bis: Legal aid

53. This provision may give rise to more discussion. Variant 1 has the effect of extending to the State requested to enforce a judgment the effect of a decision in the State of origin that a party should have legal aid. Variant 2 has a more limited effect in international terms, keying the grant of any legal aid to the terms on which legal aid might be granted to a party habitually resident in the State addressed. The latter seems the more acceptable.

Article 32bis: Damages

54. This is an attempt to address the highly controversial issues, already mentioned, as to the level of damages. Paragraph 1 would enable some States to decline to enforce awards of

exemplary, punitive or otherwise non-compensatory damages (though it is drafted in a positive rather than a negative way). Paragraph 2 tackles the even more sensitive issue of 'excessive' compensatory damages. It is here that the 'politics' of the negotiations are at their least predictable, and the issue will undoubtedly be used as a bargaining counter in future stages of the negotiations, right up to the final Session in 2000.

General conclusions

55. Although much work remains to be done, the prospect of a new Convention is an exciting one, which would have enormous advantages for Contracting States. It may be necessary for existing rules to be retained for use in dealings with non-Contracting States, but it is very likely that the terms of the new Convention will set the norm for jurisdictional rules and for the recognition and enforcement of judgments in the 21st Century. Despite the growth of arbitration, many disputes can only be handled by the courts and a reformed system will both assist litigants and, by greater simplicity, reduce the overall cost of operating the courts.

ENFORCEMENT OF FOREIGN JUDGMENTS LEGISLATION

Australia

FOREIGN JUDGMENTS ACT 1991

Application of this Part on the basis of reciprocity of treatment

5.- (1) If the Governor-General is satisfied that, in the event of the benefits conferred by this Part being applied to money judgments given in the superior courts of a country, substantial reciprocity of treatment will be assured in relation to the enforcement in that country of money judgments given in all Australian superior courts, the regulations may provide that this Part extends in relation to that country.

(2) ...

(3) If the Governor-General is satisfied that, in the event of the benefits conferred by this Part being applied to money judgments given in all or some inferior courts of such a country, substantial reciprocity of treatment will be assured in relation to the enforcement in that country of money judgments given in all or some Australian inferior courts, the regulations may provide that this Part extends in relation to specified inferior courts of that country.

(5) ... a judgment is taken to be final and conclusive even though:

- (a) an appeal may be pending against it; or
 - (b) it may still be subject to appeal;
- courts of the country of the original court.

(6) [Possible application to some non-money-judgments]

Setting aside a registered judgment

7. -(1) ...

(2) Where a judgment debtor duly applies to have the registration of the judgment set aside, the court:

(a) must set the registration of that judgment aside if it is satisfied--

(i) that the judgment is not, or has ceased to be, a judgment to which this Part applies; or

(ii) that the judgment was registered for an

United Kingdom

FOREIGN JUDGMENTS (RECIPROCAL ENFORCEMENT) ACT 1933

Power to extend Part I of Act to foreign countries giving reciprocal treatment

1. - (1) If, in the case of any foreign country, Her Majesty is satisfied that, in the event of the benefits conferred by this Part of this Act being extended to, or to any particular class of, judgments given in the courts of that country or in any particular class of those courts, substantial reciprocity of treatment will be assured as regards the enforcement in that country of similar judgments given in similar courts of the United Kingdom, She may by Order in Council direct--

(a) that this Part of this Act shall extend to that country;

that such courts of that country as are specified in the Order shall be recognised courts of that country for the purposes of this Part of this Act: and

that judgments of any such recognised court, or such judgments of any class so specified, shall, if within subsection (2) of this section, be judgments to which this Part of this Act applies.

(3) ... a judgment shall be deemed to be final and conclusive notwithstanding that an appeal may be pending against it, or that it may still be subject to appeal, in the courts of the country of the original court.

Cases in which registered judgments must, or may, be set aside

4. -(1) On an application in that behalf duly made by any party against whom a registered judgment may be enforced, the registration of the judgment--

(a) shall be set aside if the registering court is satisfied--

(i) that the judgment is not a judgment to which this Part of this Act applies or was registered in contravention of the foregoing provisions of this Act: or

- amount greater than the amount payable under it at the date of registration; or
- (iii) that the judgment was registered in contravention of this Act; or
 - (iv) that the courts of the country of the original court had no jurisdiction in the circumstances of the case; or
 - (v) that the judgment debtor, being the defendant in the proceedings in the original court, did not (whether or not process had been duly served on the judgment debtor in accordance with the law of the country of the original court) receive notice of those proceedings in sufficient time to enable the judgment debtor to defend the proceedings and did not appear; or
 - (vi) that the judgment was obtained by fraud; or
 - (vii) that the judgment has been reversed on appeal or otherwise set aside in the courts of the country of the original court; or
 - (ix) that the judgment has been discharged; or
 - (x) that the judgment has been wholly satisfied; or
 - (viii) that the rights under the judgment are not vested in the person by whom the application for registration was made; or
 - (xi) that the enforcement of the judgment, not being a judgment under which an amount of money is payable in respect of New Zealand tax, would be contrary to public policy; or
- (b) may set the registration of the judgment aside if it is satisfied that the matter in dispute in the proceedings in the original court had before the date of the judgment in the original court been the subject of a final and conclusive judgment by a court having jurisdiction in the matter
- (3) For the purposes of subparagraph (2)(a)(iv) and subject to subsection (4), the courts of the country of the original court are taken to have had jurisdiction:
- (a) in the case of a judgment given in an action in personam :
 - (i) if the judgment debtor voluntarily submitted to the jurisdiction of the original court; or
 - (ii) if the judgment debtor was plaintiff in, or counter-claimed in, the proceedings in the
 - (ii) that the courts of the country of the original court had no jurisdiction in the circumstances of the case; or
 - (iii) that the judgment debtor, being the defendant in the proceedings in the original court, did not (notwithstanding that process may have been duly served on him in accordance with the law of the country of the original court) receive notice of those proceedings in sufficient time to enable him to defend the proceedings and did not appear; or
 - (iv) that the judgment was obtained by fraud; or
 - (vi) that the rights under the judgment are not vested in the person by whom the application for registration was made;
 - (v) that the enforcement of the judgment would be contrary to public policy in the country of the registering court;
 - (b) may be set aside if the registering court is satisfied that the matter in dispute in the proceedings in the original court had previously to the date of the judgment in the original court been the subject of a final and conclusive judgment by a court having jurisdiction in the matter
 - (2) For the purposes of this section the courts of the country of the original court shall, subject to the provisions of subsection (3) of this section, be deemed to have had jurisdiction--
 - (a) in the case of a judgment given in an action in personam--
 - (i) if the judgment debtor, being a defendant in the original court, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings . . . ; or
 - (ii) if the judgment debtor was plaintiff in, or counter-claimed in, the proceedings in

- original court; or
- (iii) if the judgment debtor was a defendant in the original court and had agreed, in respect of the subject matter of the proceedings, before the proceedings commenced, to submit to the jurisdiction of that court or of the courts of the country of that court; or
 - (iv) if the judgment debtor was a defendant in the original court and, at the time when the proceedings were instituted, resided in, or (being a body corporate) had its principal place of business in, the country of that court; or
 - (v) if the judgment debtor was a defendant in the original court and the proceedings in that court were in respect of a transaction effected through or at an office or place of business that the judgment debtor had in the country of that court; or
 - (vi) if there is an amount of money payable in respect of New Zealand tax under the judgment; or
 - (b) in the case of a judgment given in an action of which the subject matter was immovable property or in an action in rem of which the subject matter was movable property--if the property in question was, at the time of the proceedings in the original court, situated in the country of that court; or
- the original court; or
- (iii) if the judgment debtor, being a defendant in the original court, had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of the country of that court; or
 - (iv) if the judgment debtor, being a defendant in the original court, was at the time when the proceedings were instituted resident in, or being a body corporate had its principal place of business in, the country of that court; or
 - (v) if the judgment debtor, being a defendant in the original court, had an office or place of business in the country of that court and the proceedings in that court were in respect of a transaction effected through or at that office or place.
 - (b) in the case of a judgment given in an action of which the subject matter was immovable property or in an action in rem of which the subject matter was movable property. if the property in question was at the time of the proceedings in the original court situate in the country of that court;

HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

Special Commission on international jurisdiction and the effects of foreign judgments in civil and commercial matters (10 - 20 November 1998)

Proposal by the Drafting Committee (Working Document No 144 dated 20 November 1998)

CHAPTER I SCOPE OF THE CONVENTION

Preamble not yet discussed

Article 1 Substantive scope

1 This Convention applies to civil and commercial matters.

2 The Convention does not apply to the following matters -

- a civil status and legal capacity of natural persons;
- b maintenance obligations;
- c matrimonial property regimes [and other rights and obligations arising out of marriage]¹;
- d wills and succession;
- e insolvency, composition or analogous proceedings;
- f social security;
- g arbitration and proceedings related thereto;
- [h questions of administrative law;]
- i taxation and customs;
- j ²

[3 A dispute is not excluded from the scope of the Convention by the mere fact that a governmental agency or other governmental instrumentality is a party to the proceedings.]

¹ This may need to be extended to relationships having consequences analogous to those of marriage.

² The questions of liability for nuclear activity will be dealt with in Article 37 (relations with other conventions).

[4 The Convention applies to disputes within its scope of application regardless of the nature of the body exercising judicial authority on behalf of the State.]³

Article 2 Geographical scope not yet discussed

CHAPTER II GROUNDS OF JURISDICTION

Article 3 Defendant's forum

Subject to the provisions of this Convention -

a a natural person may be sued for any claim in the courts [of the Contracting state] [of the place] where that person is habitually resident [or, if the habitual residence cannot be determined, where that person is domiciled];

b a legal entity may be sued for any claim before the courts [of the Contracting State] [of the place] where it has been incorporated or formed, or where it has its central management, or, if that place cannot be determined, the place of its principal activity.

Article 4 Choice of court

1 If the parties have agreed that a court or courts of a State shall have jurisdiction to settle any dispute which has arisen or may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction unless the parties have agreed otherwise.

2 Such agreement shall be valid as to form, if it was entered into

a in writing or by any other means of communication which can be evidenced by a text; or

³ The Commission may wish to consider whether this paragraph, if acceptable, should apply only to recognition and enforcement.

- b orally and confirmed in writing or by any other means of communication which can be evidenced by a text; or
- c in accordance with a usage which is regularly observed by the parties; or
- d in accordance with a usage of which the parties were or ought to have been aware and which is regularly observed by parties to contracts of the same nature in the particular trade or commerce concerned; or
- [e in accordance with any other form accepted by the court seised].

3 Reservation of protective forum - text to be decided

4 Reservation of exclusive jurisdiction - text to be decided

[5 Where such an agreement designates a court or courts of a non-Contracting State, courts in Contracting States shall [decline jurisdiction] [or suspend proceedings⁴] [unless the court or courts chosen have themselves declined jurisdiction].]

Nota bene: With regard to choice of court clauses, the following topics are still to be considered:

- 1 Sufficient links between the forum and the litigation
- 2 Provisional and protective measures
- 3 Warranty
- 4 Intervention
- 5 Appearance of the defendant

Article 5 Appearance by the defendant

1 Subject to the provisions of this Convention, a court has jurisdiction if the defendant proceeds on the merits without contesting jurisdiction.

2 Variant 1

The defendant has the right to contest jurisdiction. Without prejudice to provisions of the law of the forum allowing more time, this right shall be exercisable

[Option 1 - within a reasonable time after the commencement of the proceedings]

[Option 2 - at least up to the time of the first defense on the merits].

Variant 2

The defendant has the right to contest jurisdiction not later than the time of the first defense on the merits.

Article 6 Contracts

Variant 1

A plaintiff may bring a claim, in matters relating to contracts, in the courts of a Contracting State if

- 1 the plaintiff's habitual residence or seat is located in that State; and
- 2 the defendant engaged in activity in that State that constituted a significant step
 - a in the creation of the contract obligation on which the claim is based, such as solicitation of business, or
 - b in the defendant's preparation to perform the obligation on which the claim is based, or
 - c in the performance of the obligation on which the claim is based.

Variant 2

1 A plaintiff may bring a claim, in matters relating to contracts, in the Contracting State in which the obligation in question was to be performed under the terms of the contract, provided that a significant part thereof was in fact performed. If the claim is based on several obligations, the principal obligation shall be determinative.

2 The preceding paragraph shall not apply where the obligation in question is to pay for goods or services.

Article 7 Contracts with consumers not yet discussed

Article 8 Contracts with employees not yet discussed

Article 9 Branches

⁴ If this solution is accepted by the Special Commission, additional rules may have to be considered.

The plaintiff may bring a claim in the courts of a Contracting State in which a branch, agency or other establishment [, or an employee or other representative] of the defendant is situated or has acted for or on behalf of the defendant in conducting regular commercial activity, including promotional activity directed at that State or the sale of goods or provision of services in that State, provided that the action is based on a claim that relates to such activity.

Article 10 Torts or delicts

1 The plaintiff may commence an action based on a claim in tort or delict in the courts of the Contracting State -

a in which the act or omission of the defendant that caused the injury occurred, or

b in which the injury arose, provided that the defendant could reasonably foresee that the activity giving rise to the claim could result in such injury in that State, including activity through commercial channels known by the defendant to extend to that State.

2 The plaintiff may also commence an action in accordance with the preceding paragraph when either the act or omission, or the injury is threatened.

[3 If an action is commenced in a jurisdiction other than that where the act or omission that caused the injury occurred or where the defendant is habitually resident or has its seat, the court shall have jurisdiction only in respect of the injury that occurred in that State.]

Articles 11-13 Reserved

Article 14 Provisional and protective measures

1 A court that is seised or is about to be seised of proceedings on the merits and which has jurisdiction under the Convention has jurisdiction to take provisional or protective measures [in connection with those proceedings].

2 A court of the place where property is located has jurisdiction to take provisional or protective measures in respect of that property.

Nota bene: With regard to provisional and protective measures, the following topics are still to be considered:

1 Should the rule in the first paragraph be extended to any court having jurisdiction under the Convention?

2 Should a choice of court clause prevent other courts from taking provisional or protective measures, unless the parties have agreed otherwise?

3 Should there be a third paragraph as follows: "A court of a Contracting State has jurisdiction to take provisional or protective measures if their effect is limited to the territory of that State."?

4 Definition of provisional or protective measures?

5 Extraterritorial effects of orders in personam

6 Recognition and enforcement

Articles 15-19 reserved

[Article 20 Examples of prohibited grounds of jurisdiction

1 General jurisdiction of a State over the defendant may not be based exclusively on one or more of the following [in particular]

a the presence in the territory of the State of property belonging to the defendant, [or the seizure by the plaintiff of property situated there];

b the nationality of the plaintiff;

c the nationality of the defendant;

d the domicile, habitual or temporary residence of the plaintiff within the territory of the State;

e the carrying on of commercial or other activities by the defendant within the territory of the State;

f the service of a writ upon the defendant within the territory of the State [with the exception of actions based on a violation of human rights protected by international conventions];

g [a unilateral specification of the forum by the plaintiff];

h [the declaration of enforceability or registration of a judgment].

2 Unless otherwise provided in the present Convention, the grounds under paragraph 1, subparagraphs b, c, d, f and g may not also serve as grounds to establish special jurisdiction.]

Articles 21-22 reserved

Article 23 Lis pendens

PROPOSAL I

1 When an action having the same subject matter is already pending between the same parties in the court of another Contracting State, the court second seised shall stay the case if it is to be expected that the court first seised will, within a reasonable time, render a decision capable of being recognised under this Convention in the State of the court second seised.

2 The court second seised shall decline jurisdiction as soon as it is presented with a decision rendered by the court first seised which complies with the requirements for its recognition or enforcement under this Convention.

[3 Variant 1

For the purposes of the preceding paragraphs, a court is seised when an application has been made before it and the document instituting the proceedings or an equivalent document has been duly served on the defendant.

Variant 2

For the purposes of this Article, a court is deemed to be seised at the date on which the document instituting the proceedings or an equivalent document is filed with the court, provided that the document is received within fifteen days (from the date of filing) by the authority or person responsible for service. Failing this, the court is deemed to be seised when service is effected.

However, if the document must be served before being filed with the court, the court is deemed to be seised at the date on which the document instituting the proceedings or an equivalent document is received by the authority or person responsible for service, provided that the document is filed with the

court within fifteen days of receipt by the plaintiff of proof of service. Failing this, the court is deemed to be seised when the document is filed.]⁵

[PROPOSAL II

1 If the court first seised determines that the court second seised in another Contracting State has jurisdiction and is [manifestly] more appropriate to resolve the dispute, it may suspend proceedings and direct the party concerned to request the court second seised to exercise its jurisdiction in place of the court first seised.

2 In determining the appropriateness of a forum the courts concerned will consider all relevant factors and in particular

- a the distance between the habitual residence, or the seat of each of the parties and the court seised,
- b the nature and location of the evidence capable of contributing to the resolution of the dispute and the procedure necessary to obtain such evidence.

3 The courts seised may proceed to an exchange of views.

4 If the court second seised determines that it has jurisdiction and accepts jurisdiction in place of the court first seised, the latter shall decline jurisdiction.

If the court second seised refuses to exercise jurisdiction, the court first seised shall revoke the suspension of the proceedings.

[5 Such procedure shall not have the effect of allowing a party to invoke a limitation period [time bar] with respect to a claim which was not subject to such limitation when it was pending before the court first seised.]]⁶

Article 24 Declining jurisdiction (optional provision)

Variant 1

⁵ Variant 2 was not fully discussed.

⁶ The problem of the effect of a declaratory action on lis pendens remains to be examined.

I In the absence of an express choice of court by the parties [or an exclusive jurisdiction], a court of a [Contracting] State having jurisdiction under the provisions of the Convention may, by way of exception and] at the request of any party at an early stage of the proceedings, suspend consideration of the case [or decline jurisdiction] if it considers that another [Contracting State] court has jurisdiction and would [clearly] [manifestly] be better placed in the particular case to try the dispute and to promote the ends of justice.

II In deciding whether to suspend consideration [or decline jurisdiction], the requested court shall consider [the following factors] [all the relevant factors, including in particular the following]

a the balance of convenience for the parties to the proceedings [and their witnesses] having regard in particular to:

– the availability and situation of the evidence and the location of the parties and the witnesses,

– [the language of the witnesses and the documents in the proceedings,]

– the likely relative speed and cost of proceedings in the two courts;

b whether one court and not the other will be applying its own law;

c the desirability of avoiding a multiplicity of legal proceedings and the risk of conflicting decisions;

d how far the litigation has progressed in the other court; e the enforceability of any decision which may result; and

f the relative strengths of the connections with the two courts of the parties and the dispute.

[III The requested court may consult with the other court, while fully respecting the rights of the parties, before deciding whether to suspend [or decline jurisdiction] in favour of that court.]

[IV The requested court [shall] [may] require the defendant to give such undertakings as meet the ends of justice, including an undertaking that he will not rely on a period of limitation or prescription having expired.]

[V If the requested court decides to suspend [or decline jurisdiction] in favour of the courts of a non-Contracting State it may order the defendant to lodge security in the requested court in an amount to satisfy any judgment of the other court in favour of the plaintiff and to cover the costs.]

[VI The requested court shall decide on the question whether to suspend [or decline jurisdiction] without [undue] delay.]

VII In the event that the other court does not assume jurisdiction, the requested court shall [revoke the suspension of the case and] proceed to consider the case.

VIII In the event that the other court assumes jurisdiction, the requested court may decline jurisdiction.

(The following paragraph could be included in the Chapter on Recognition and Enforcement)

IX A decision may not be refused recognition or enforcement on the ground that the court addressed takes the view that the court of origin should have declined jurisdiction.

Variant 2

No provision permitting the judge to decline jurisdiction.]

CHAPTER III RECOGNITION AND ENFORCEMENT

Article 25 The notion of decision

1 The rules of this Chapter shall apply to all decisions given by [the courts] of⁷ a Contracting State, irrespective of the name given by that State to the decision.

They apply also to

[a decisions which order provisional or protective measures and]

7 See Article 1.

b an award of judicial costs or expenses [even if such award does not proceed from a court], provided that it relates to a decision which may be recognised or enforced under this Convention.

Article 26 General rule

1 A decision rendered in a Contracting State shall be recognised in another Contracting State if it is final in the State of origin.

2 To be enforceable in the State addressed, a decision must be enforceable in the State of origin.

Article 27 Grounds for refusal of recognition and enforcement

1 Recognition or enforcement of a decision may however be refused

a if the decision was rendered by a court not having jurisdiction under this Convention,

[b if proceedings [between the same parties and] having the same subject matter are pending before a court of the State addressed and those proceedings were the first to be instituted,]

c if the decision is irreconcilable with a decision rendered [between the same parties], either in the State addressed, or in another [Contracting] State, provided that in the latter case the decision is [capable of being] recognised or enforced in the State addressed,

d if recognition or enforcement of the decision would be manifestly incompatible with the public policy of the State addressed.

2 In questions relating to the jurisdiction of the court of origin, the authority of the State addressed shall be bound by the findings of fact on which that court based its jurisdiction [unless the decision was given by default].

3 Without prejudice to such review as is necessary for the purpose of application of the preceding provisions, there shall be no review of the merits of the decision rendered by the court of origin.

Article 28 Decisions rendered by default

A decision rendered by default shall not be recognised or enforced unless the defaulting party has had, in the circumstances, sufficient time and opportunity to present his defense.

Article 29 Documents to be filed

1 The party seeking recognition or applying for enforcement shall furnish -

a a complete and certified copy of the decision;

b if the decision was rendered by default, the original or a certified copy of a document establishing that the document which instituted the proceeding or an equivalent document was brought to the knowledge of the defaulting party;

c all documents required to establish that the decision is final in the State of origin and, as the case may be, that the decision is enforceable in that State;

d if the authority addressed so requires, a translation of the documents referred to above, made by a person so qualified to do so.

2 No legalisation or other like formality may be required.

3 If the terms of the decision do not permit the authority addressed to verify whether the conditions of this Convention have been complied with, that authority may require the production of any other necessary documents.

Article 30 Procedure

1 The procedure for the recognition, declaration of enforceability or registration for enforcement of the decision is governed by the law of the State addressed. The authority addressed shall act expeditiously.

2 If the decision contains provisions which are severable, one or more of them may be separately recognised, declared enforceable or registered for enforcement⁸.

Article 31 Costs of proceedings

⁸ The Drafting Committee is of the view that this provision should be placed in the Article dealing with the effects of the decision (Article 32).

No security, bond or deposit, however described, shall be required by reason only of the nationality or habitual residence of the applicant [in a Contracting State] to guarantee the payment of judicial costs or expenses.

Article 31 bis Legal aid

Variant 1

A party granted legal aid in the State of origin shall be extended such aid under equivalent conditions [to the most favourable extent] provided by the law of the State addressed in any proceedings for the recognition or enforcement of a decision.

Variant 2

damages have been awarded, recognition may be limited to a lesser amount.

b In no event shall the authority addressed recognise the decision in an amount less than the amount of damages which that authority could have awarded in the circumstances, including those existing in the state of origin.

3. References in this Article to damages include, where appropriate, judicial costs and expenses.]

Persons habitually resident in a Contracting State shall be entitled, in proceedings for the recognition or enforcement of decisions in another Contracting State, to legal aid under the same conditions as apply to persons habitually resident in the requested State.

Article 32 Effects of the decision not yet discussed. *Article 32 bis Damages*

1 In so far as a decision awards non-compensatory damages, it shall be recognised at least to the extent that similar or comparable damages could have been awarded in the State addressed.

2 a [In exceptional cases] when the debtor, after proceedings at which the creditor has the opportunity to be heard, satisfies the authority addressed that in the circumstances, including those existing in the state of origin, [grossly] excessive