CHAPTER 2

DETERMINING THE VALUE ADDED OF THE INSTRUMENT

40. In assessing the advantages of adopting the Brussels II Convention as a Union instrument, we must consider two separate issues. First, there are the aspects relating to the institutional framework of the Community or the Union, which is a unique structure in the law of international organizations. Then the content of the instrument must be examined, though a detailed discussion is beyond the scope of this paper: it seems more useful to lay down some general reference points which might help with the drafting of particular provisions.

SECTION 1 - VALUE ADDED DERIVING FROM THE INSTITUTIONAL FRAMEWORK

41. The institutional framework of the European Union (or Community) raises two questions: one concerns the constraints imposed by institutional law, and the other relates to the benefits to be gained from using the Community or Union institutional framework for the Brussels II Convention.

Before Community or Union legislation can be adopted, the need for it must first be assessed: is there a real need for action to remove uncertainty as to jurisdiction in matters of family law, given existing relations between the Member States of the Union? What advantages would the Community or Union institutional framework bring to the Brussels II Convention.

§ 1. Assessing the need for approximation of legislation

42. The need for Union legislation can be measured in terms of the day-to-day problems encountered by its citizens and the distribution of powers between the Member States and the Community or Union.

A. Gravity of international disputes

43. An examination of existing conventions reveals that there is extremely little harmonization of divorce law. Essentially, the Hague Convention of 1 June 1970 is the only instrument, and it is limited not only in territorial scope, having been ratified only by a few states, but also in subject matter, being concerned purely with recognition rather than direct jurisdiction. It deals only with the principle of divorce and legal separation and does not cover findings of fault or enforcement. Furthermore, it is restricted to decisions granting divorces and recognizing separations and does not cover decisions refusing them.

It would appear that there are no major difficulties with the actual application of the Convention, primarily because of the prevailing liberalism of the law in the states which have ratified the Convention. This would seem to suggest that a new convention dealing virtually exclusively with the question of recognition of divorces and separations would have little raison d'être in purely formal terms. It could, however, have the psychological effect of helping to reinforce confidence between the Member States of the Union. A number of petitions have been presented to the European Parliament which indicate a real sense of unease on this matter.
For example, a divorce between a German and a French national would be subject to national law since there are no bilateral or multilateral agreements linking the two countries.\(^1\) According to French legislation and case law, only French courts may entertain divorce proceedings if either party is French. This means that the French courts do not take account of prior divorce proceedings in the German courts. The French spouse would therefore be well advised to wait until proceedings in Germany were completed before starting new proceedings in France. The reverse is not true for the German spouse, however. Since the German courts do not claim exclusive jurisdiction over matrimonial law, it would be difficult for the German spouse to object effectively to proceedings already brought in France. In this case, a Brussels II Convention would either prevent divorce proceedings being brought twice on the grounds that the parties were already legally divorced and that divorce was recognized, or, if the two cases were being dealt with simultaneously, it would bring the rules of *lis pendens* into play.

Another case concerns a Spanish woman and a British man, married in the United Kingdom.\(^2\) The marriage had been recognized by the Spanish Consulate in Brussels when the woman had come to work in Belgium. She then filed for divorce in London in 1987 but the Spanish authorities do not automatically recognize a divorce granted by the British authorities and so, under Spanish law, the woman is still married to a man who has since remarried.

In yet another case, an Italian divorced in the United Kingdom was unable to get his new marital status recorded on his passport.\(^3\)

Similar difficulties may arise when a decision is recognized in one Member State but not another. This occurred with a German, married to a French woman and residing in France, who had then obtained a divorce in a third country (the United States). Once the decree had been made the subject of an enforcement order in Germany and registered in France, the wife obtained an order that the divorce was unenforceable against her and commenced divorce proceedings in France.\(^4\) Such a case could not be dealt with under a Brussels II Convention since the original decree was issued in a non-member country and the general principle whereby an order to enforce an enforcement order is not valid precludes an enforcement order being requested for a decision to grant an enforcement order. There are two comments to be made on this case. First, the decree could have been issued in a Union State, in which case the Brussels II Convention would have applied. Second, a policy designed to secure the free movement of judgments in the Union would help to discourage a spouse from obtaining a divorce in the United States, which is frequently done but which places the respondent in a delicate position.

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1 Petition No 49/94, presented to the European Parliament, on the law applicable to the divorce of a German and a French national, 25 July 1994, FRICM253/253727.mp.


3 Petition No 76/92, presented to the European Parliament on recognition of divorce, 3 July 1992, FRICM209.209441.cg.

4 Petition No 71/94, presented to the European Parliament, on a problem concerning divorce, 3 July 1992, FRICM244/244019.MLT.
These are not isolated cases.\footnote{Cases dealt with by the courts in the Member States aside, the Committee on Petitions' files reveal similar problems for Spaniards residing in France, whose divorces are recognized in France but not in Spain: Petition No 136/93, presented to the European Parliament, on obstacles to enforcement, in the Community, of court decisions concerning maintenance, divorce and adoption, 28 January 1994 FR/CM/242/2426627.BL.A. There are also problems in Italy with the enforcement of decisions of Belgian courts in divorce and maintenance cases: Petition No 320/93, presented to the European Parliament, on the law applicable in divorce cases involving one German and one French national, 25 July 1994 FR/CM/253/253727.mp. Another example concerns a German woman living in Germany with an Italian who had divorced seven years previously and whose ex-wife had remarried. The couple married in Denmark, but the Italian authorities refused to recognize the divorce, making the marriage invalid: Petition No 430/94, presented to the European Parliament, on the Italian authorities' failure to recognize divorce PE254A254436.ech.}

However, problems are there to be solved. Not only does the domestic law of most of the Member States allow recognition of foreign decisions in some shape or form, but a dense network of bilateral conventions on civil and commercial matters is in place to facilitate recognition. However, it is not enough to remove the obstacles citizens of the Union still come up against. Furthermore, existing conventions do not address the question of direct jurisdiction, and the issue cannot be ignored, as the Franco-German dispute shows.

44. Current domestic and international rules governing international family disputes are patently lacking in clarity, as the petitions submitted to the European Parliament show. Private law international is, of course, a complex matter and therefore difficult to put into effect. While the complexity has to be accepted, being bound up with the diversity of legal systems and the inherent complexity of international matters in general, it falls to the international legislator to try to simplify the rules in the interests of clarity.

The people involved in such cases would not be the only ones to benefit. It would also help legal practitioners, who want the rules to be as clear and consistent as possible - and this goes for experts in the field, whether barristers or judges. Their requirements should also be taken into account. Otherwise there is risk that they may simply fail to apply instruments which, though in force, they are unaware of.\footnote{See B. Dutuit and F. Majoros "Le lacs des conflits de conventions en droit privé et leurs solutions possibles", [1984] RCDIP 565 f. on the lack of knowledge of the 1961 Hague Convention in Germany in the early seventies.}

B. Determining the appropriate framework for intervention

45. Before any legislative proposal can be introduced at Community or Union level, it must be established that the field in question is within the objectives set out in the Treaty on European Union. This is standard procedure for Community law, and it would have to be applied to the Brussels II Convention if it were to be based on a provision of the Treaty establishing the European Community, such as Article 220.

This would not necessarily be the case if Article K of the Union Treaty were taken as the legal basis. "Close cooperation on justice" is one the Union's objectives (Article B, first paragraph), and "judicial cooperation in civil matters" is one of the "matters of common
"interest" listed in Article K.1. This does not make joint action contingent on proof that the area in question is within the Community's jurisdiction, since the powers of the Union are without prejudice to the Community's (Article K.1), which means that the Union acts only when the Community is not empowered to.

That does not mean that the cooperation referred to in Article K may not be aimed at fulfilling an objective shared by the Union and the Community, such as the free movement of persons (Article K.1). It is worth mentioning briefly the way this concept has been extended in Community law, which seems to suggest that family matters can no longer be excluded from the Community's area of activity. This must also apply a fortiori to the Union.

But this is not enough: both the Community and the Union have to respect the principle of subsidiarity (under Article 3b of the Treaty establishing the European Community in the case of the Community and the second paragraph of Article B of the Union Treaty in the case of the Union).

1. Improving conditions for individuals: a task for the Union

The concept of the free movement of people has been extended not only in terms of the people covered but also in terms of what their rights are. In addition, some people are affected by the rules giving effect to the Staff Regulations for Community officials, so there is another imperative related to the operation of the Community as an international organization.

The group of people covered by the right to free movement has expanded. Originally, it was restricted to workers but now covers any national of a Member State travelling within the Community. The basis for this extension was the concept of the family group, enshrined in Article 10 of Council Regulation No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community, whereby a worker is entitled to move freely, with his or her spouse and dependent children. The purpose of the extension is to give effect to the Court's judgment in Cowan, granting the rights laid down in the Treaty to a tourist, in his capacity as a recipient of services. Regulation No 1612/68 was duly extended by Council Directive 90/364 of 28 June 1990 on the right of residence and eventually written into primary law by Articles 8 et seq. of the Treaty establishing the European Community, which formally established the concept of citizenship of the European Union.
The rights themselves have also been gradually extended. Even more than the concept of the family, the concept of social advantage, set out in Article 7 of Regulation No 1612/68, enabled the Court of Justice to extend the scope of the Treaty to cover all rights likely to help people integrate into the society in which they live, including the right to judicial protection in criminal proceedings. This is part of the process of achieving freedom of movement, an objective set out in primary law. In the Cowan judgment, the Court of Justice extended the content of the individual's rights by asserting his basic right to protection of his physical integrity and thereby his right to non-discriminatory access to a state compensation system for victims of crime.

In many respects it would appear that, in order for Community law to be implemented a ruling on preliminary issues of family law is required each time the "spouse", "child", "next-of-kin" or "person legally obliged to maintain" has to be determined in connection with the exercise of an economic right, such as entitlement to a social security benefit. Such questions determine the way in which Community instruments are applied, and providing the answers to them may fall not only to national courts called on to implement Community law and but also to the Community courts, both when interpreting Community law and when deciding on the merits of cases concerning the Staff Regulations. There is no doubt that the establishment of rules to prevent the adoption of contradictory decisions on such questions would be helpful to courts.

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13 Especially Council Regulation No 1612/68 of 15 October 1968, referred to above, and Council Regulation No 1408/71 of 14 June 1971, the basic instrument as regards social security rules (OL 149, 1971).
14 Note the technique used by the Court of First Instance to interpret the concept of "dependant" in two recent decisions: in Case T-85/91 Khouri [1992] ECR II-2637 and in Case T-43/90 Diaz Garcia [1992] ECR II-2621: "Unless Community legislation refers expressly to the law of the Member States to define its meaning and scope, it must be interpreted autonomously, taking account only of the context of the provision in question and the purpose of the rules of which it forms a part. However, the absence of an express reference to the law of the Member States does not preclude a judge who must apply Community law in the Community courts from referring to the law of the Member States when he is otherwise unable to find anything in the relevant Community law or its general principles which enables him to define the content and the scope of the Community law."

Both cases revolved around the meaning of the term "legal obligation to maintain", which appears in the Staff Regulations. Consideration of the conflict was at two levels. First, in order to determine which nation's law should apply using a conflict of national laws rule, the Court realized that it had first to determine which court had jurisdiction, since application of the conflict rule depends upon it. Then the Court had to consider the possibility that its decision might be dependent on the decision of a national court on the existence of a legal obligation. The Court found that, though such judgments had been handed down, they constituted a civil obligation only.

See also the judgment in Case 24/71 Meinhardt [1972] ECR 269: "The existence and the extent of the obligation on the part of the official to pay maintenance to his divorced wife must in principle be determined in accordance with the law which governs the consequences of divorce." Thus the law in question must be determined by a conflict of laws rule, which in turn must be determined on the basis of the court with jurisdiction. In Meinhardt, it was clear that German law was the lex fori as all of the relevant deciding factors were in Germany.

For a more general view of this issue, see F. Rigaux "New Problems of Private International Law in the Single Market", [1993-94] 4 King's College Law Journal 23.
47. In order to determine who has what powers in a given area, and what forms of intervention are appropriate, it is necessary to examine whether the matter at issue can be effectively resolved by the Member States or, failing that, by the Community. This is not always easy to assess as a number of different parameters are involved. It is not simply a matter of deciding which set of authorities - national or Community - is responsible for the area in question. There is also the matter of the most appropriate form of action. This can be affected by two variables. The first relates to the decision-making process used, where jurisdiction falls to the Member States, depending on whether they act within the framework for cooperation provided in the EC Treaty (Article 220) or the Union Treaty (Article K), or through other international structures. The second variable is the nature of the provisions being harmonized. These may be substantive rules, rules on conflict of laws or jurisdiction or rules on mechanisms for judicial cooperation. To sum up, it is necessary to assess the Member States’ ability to achieve the objective in question - reducing the scope for international disputes in this case - outside the institutional framework of the Community or the Union and to measure the proportionality of any action which may be taken.

In assessing the need for action, it is tempting to draw a comparison with the situation in the United States with its diverse legal systems: the Constitution lays down the principle of recognition by each state of judicial proceedings of every other state of the Union (full faith and credit clause), while each state is free to determine the jurisdiction of its various courts. There are, however, important differences between the situation in the US and the situation in Europe. First, technically speaking, the European Union is acting in accordance with the principles of public international law, and in particular the principle of national sovereignty: it therefore lends itself to the use of nationality as a criterion for determining jurisdiction in a way which US law does not. Furthermore, in contrast to the Member States of the Union, virtually all of the US states belong to the same legal family, which explains why, in relation to family law, the differences between the grounds for jurisdiction are less pronounced than in Europe. In divorce cases, jurisdiction is determined by such simple criteria as where the family resides, where one or other marriage partner lives. In some cases, one year’s residence is enough. Federal law, in the shape of the full faith and credit clause in the Constitution, also plays a part in determining jurisdiction.\(^{15}\)

48. The extent to which each state can solve the problem unilaterally, i.e. by resorting to its own private international law, is limited. It is true that, by definition, national rules of private international law do help the courts to find appropriate solutions by determining what areas fall within the jurisdiction of the national authorities and what national law is applicable (be it a domestic or a foreign one). On the other hand, the effectiveness in one country of a judgment handed down by the courts in another is dependent on the laws of the first country and, in the absence of sufficiently binding international *Lis pendens* rules, the fact that the courts in one country are hearing a case does not prevent the courts in another from judging the same case according to the relevant national laws.

\(^{15}\) For further details, see, e.g. E. Scoles and P. Hay, *Conflict of Laws*, Chap. 15, St Paul, Minn., West Publ., 1984.
States may, of course, limit the risk of contradictory judgments by adopting international treaties, be it through diplomatic channels or special forums such as the Hague Conference on Private International Law. The strengths and weaknesses of this approach are apparent from our analysis of the existing conventions. Some, such as the Hague Convention of 25 October 1980 on international child abduction, provide for effective cooperation - both administrative and judicial, in the strict sense of the term - while the effectiveness of others, such as the Hague Convention of 5 October 1961, is hampered by inherent weaknesses resulting from contradictions inherent in compromises between states with different cultural backgrounds and the absence of joint procedures for interpreting them. Moreover, the number of countries which actually ratify these conventions varies and is very low in some cases, which means that the international situation is still somewhat fragmented.

49. An initiative launched by the Member States within the cooperation framework provided by the Union Treaty could help them to remedy the shortcomings of the traditional approach based on diplomatic negotiations, as explained in the next paragraph. It should be pointed out that this cooperation is proof that the principle of subsidiarity is being taken seriously.

With Article 220 of the EC Treaty and Article K of the Union Treaty, the Member States have given themselves the opportunity to strengthen intergovernmental cooperation.\textsuperscript{16} This is quite a subtle procedure. It is in essence analogous to the conventional diplomatic cooperation procedures and is careful not to impinge upon national sovereignty. Nevertheless, it does acknowledge the existence of the Community and the Union, to which cooperation is "linked".\textsuperscript{17} In other words, if Article 220 of the EC Treaty is a precursor of sorts to the principle of subsidiarity, then Article K of the Union Treaty is a corollary.

The problems with subsidiarity would be far greater if the Community were planning to use Articles 6, 8a, 49, 100 or 235 of the EC Treaty. The only advantage would be that it would not be possible to claim that approximation of private law, including conflict of jurisdiction, was purely a matter for the individual states. As mentioned above, cooperation under Article K of the Union Treaty is without prejudice to the powers of the European Community, which implies that the Community could take action in this field. In areas other than the free movement of people, the Community has indeed approximated rules in the fields of civil law\textsuperscript{18} and procedure.\textsuperscript{19}

50. Any assessment of the need for action must clearly be based on its content. Accordingly, the following section examines the value added of the Brussels II

\textsuperscript{16} For a discussion on the use of Article 220 in family matters, see C. Kohler "L'article 220 du Traité CEE et les conflits de juridictions en matière de relations familiales: premières réflexions", [1992] Riv. dir. int. priv. proc. 221 (study predating entry into force of the Union Treaty).

\textsuperscript{17} The term is used by the Court of Justice in connection with the Brussels Convention in its judgment in Case C-398/92 Mund & Fester [1994] ECR I-474.


\textsuperscript{19} E.g. Council Regulation No 40/94 of 20 December 1993 on the Community trademark: OJ L 11, 1994. The Brussels Convention also provides for this possibility by giving priority to Community instruments on specific topics.
Convention in terms of its content. The content of the Convention should, however, also be taken into account when assessing the need for approximation of laws.

There are several ways of reducing disparities between legislation on international private situations, i.e. uniform substantive legislation, harmonization of conflict of law rules or harmonization of conflict of jurisdiction rules (international powers and effectiveness of decisions). The first is the most radical as its eliminates the conflict while the other two merely manage it. With regard to the degree of approximation they achieve, however, the last two options differ: the second aims to ensure that the substance of the dispute is dealt with in a uniform manner, whereas the third merely eliminates the risk of contradictory decisions. That involves nothing more than seeking an effective solution to the problem in hand.

In line with the precedent set by Article 220 of the EC Treaty, the adoption of common rules on conflict of jurisdiction is one of a number of solutions\textsuperscript{20} which respect the principle of subsidiarity.

3. The precedent set by the Brussels Convention

51. All of the above considerations could equally be applied to the Brussels Convention of 27 September 1968, which, like the draft Brussels II Convention, deals with civil matters and conflicts of jurisdiction. This line of argument cannot be refuted simply by asserting that there is a greater correlation between the areas covered by the first Convention and the areas within the Community's jurisdiction.

Technically speaking, the first Brussels Convention can also be applied to situations not strictly covered by the EC Treaty - when, for example, neither of the parties is a worker, a provider of services or a supplier of goods within the meaning of the Treaty. This could quite frequently be the case with regard to maintenance, covered by Article 5(2). But, as we have already seen, arguments of this nature tend to lose their force as the range of areas in which the Community is entitled to act steadily grows.

Furthermore, the authors of the Brussels Convention would like to have dealt with family affairs but held back for a number of reasons. First, like any international legislators, they wanted to limit the scope of their instrument so that it would have a chance of being adopted within a reasonable space of time. And, second, they feared that the national courts would cite considerations of public policy too frequently, which could render the Convention entirely ineffective.\textsuperscript{21} But there are bound to be various kinds of sociological change. For one thing, the courts in the Member States are more open today to ideas on family matters imported from abroad. And one would expect the last forty years of European integration to have fostered in the national courts a feeling of belonging to the same European framework. This can only increase mutual trust, further enhanced by the adoption of appropriate instruments. In the field of property rights, there is no doubt that the Brussels Convention helped create a climate of confidence. Lastly, changing social values have instilled in people a more positive attitude to change, which makes them

\textsuperscript{20} In relation to matters covered by private law, administrative or judicial cooperation in the form of exchange of information, for example, are interesting possibilities.

more willing to accept the relativity of legal institutions in terms of both time and space. Yet this tendency has not led to an untidy melding of the separate national legal cultures. Indeed, this instrument of private international law has enabled the various legal systems to work together while retaining their identities.

§ 2. Coherence of the Union's institutional system

52. Concluding the Brussels II Convention within the institutional framework of the European Community or Union rather than through conventional diplomatic negotiations is likely to enhance its usefulness. This section will assess the value added in terms of the effectiveness of the Treaty by examining how the Union's institutional framework facilitates implementation of common rules.

There would appear to be three issues requiring examination in this connection: the term used for parties to the Treaty, the use of institutional mechanisms belonging to the Community and the taking into account of the "spirit of the Brussels Convention".

A. The term used to refer to parties to the Convention

53. The characteristic of conventions linked to the European Union, unlike other international treaties, is that, whether based on Article 220 of the EC Treaty or Article K of the Union Treaty, they are specific to the Member States of the Union. This raises questions as to the possibility of non-member countries participating and the existence of an obligation on the Member States to negotiate and ratify such instruments. But irrespective of the flexibility of a convention as opposed to a regular Community instrument, it is quite clear that, with regard to value added, the special feature of a convention concluded within the institutional framework of the Community or the Union is that the Member States are by definition party to it.

The Member States are probably not legally obliged to enter into negotiations within the meaning of Article 220 since it is not intended "to lay down a legal rule directly applicable as such". Whether or not this legal basis imposes an obligation on signatories to ratify is another matter.

Any judgment against a Member State would have to be grounded on Article 5 of the EC Treaty in conjunction with Article 220. Before the Court could declare that a Member State had failed to fulfil its obligations, however, it would have to be possible to determine exactly when the infringement took place since Member States must be allowed a reasonable period of time. Furthermore, a Member State cannot be criticized for failing to ratify a convention if a majority of Member States have not seen fit to do so, as is the case with the Brussels Convention of 29 February 1968 on Mutual Recognition of Companies and Legal Persons. In view of this, the relevant test may be whether or not the treaty in question was deemed to form part of the acquis communautaire, which it could if most Member

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22 These are the words used in the Court's judgment in Case C-398/92 Mund & Föster [1994] ECR I-474. The Article is intended "merely to mark out the framework of negotiations between the Member States", however, the Court held that, since its purpose was to facilitate the functioning of the common market, the Brussels Convention was "linked to the EEC Treaty".

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States had ratified it. The concept of *acquis communautaire* is used by the Brussels Convention in connection with the accession of new Member States (Article 63) and is also used in the same way in the Accession Treaties.

In the case of conventions within the meaning of Title VI of the Treaty on European Union, the possibility of any legal sanction is even more remote owing to the lack of provisions to that effect in Articles 5, 169 and 170 of the EC Treaty. It would appear that, under Article K.3(2)(c), the Council, acting by unanimous vote (Article K.4(3)), must be involved in the negotiation and the signature. Ratification does not appear to be obligatory since the Article refers merely to the Council's "recommending" conventions to the Member States.

At first sight, the question whether the Brussels II Convention will use the term "Member State" rather than "Contracting State" to define its territorial scope may seem to have little practical import. Nevertheless, the term "Contracting State" is more common and is used in the first Brussels Convention: a departure from the first in the second Convention might raise questions as to the reason for the change. The term "Member State" may be inappropriate since it refers to the status of membership of an international organization, not to that of party to an agreement. And the Convention may not be ratified by all the Member States or there may come a time, after the accession of new Member States to the Union, when not all Member States are party to the Convention, as it will take a certain amount of time to arrange for the new member(s) to sign. If a new convention is signed to make new members parties, the original Convention will never be formally applicable to them.

54. The idea behind a treaty of this kind is to create a common area of a certain size, coterminous with the Union. The intention to create an area of a minimum size is clear from the final provision on the entry into force of the instrument: the Brussels Convention makes its own entry into force contingent on ratification by all signatory states. This obviously distinguishes the Convention from other international treaties, including those concluded by the members of specific organizations. These usually enter into force once they have been ratified by no more than three or four of the contracting parties. It is true that some "Community" agreements have entered into force before being ratified by every signatory state, but the required number of ratifications was still quite high. For example, the Rome Convention of 19 June 1980 on the Law Applicable to Contractual Obligations was to enter into force after it had been ratified by seven of the nine signatory states. Article K.7 of the Union Treaty provides for the possibility of "closer cooperation between two or more Member States in so far as such cooperation does not conflict with, or impede, that provided for" in Title VI, but this would seem to assume that such cooperation should not be governed by the procedures laid down in Title VI.

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21 This test may be satisfied in the case of the San Sebastian Convention, whereby Spain and Portugal acceded to the Brussels Convention, which has still not been ratified by Belgium or Denmark. It would seem odd to require Spain and Portugal to ratify the Convention and not the other Member States. It should be possible for the Court to declare that the Member States which had not ratified had failed to fulfill their obligations unless they could advance objective reasons to explain their failure to act.

24 See Chapter 3 for a more detailed discussion of this point.

Restricting conventions to the Member States, to the exclusion of non-member countries, is in accordance with the spirit of cooperation. Witness the Conventions of Brussels of 27 September 1968 and of Rome of 19 June 1980. There is nothing to prevent the Member States from concluding other conventions with non-member countries - without prejudice to Community law. Such conventions would no doubt be linked to the cooperation provided for by the Union Treaty, without being covered by the special cooperation procedure, as was the case with the Lugano Convention of 16 September 1988. Despite the fact that this Convention takes account of the Brussels Convention and is designed to strengthen judicial cooperation in Europe, it is clearly not based on Article 220 of the EC Treaty.

55. Limiting treaties to a given number of states enables the international draftsman to tailor the contents to the requirements of the countries in question, rather than having to weigh them against those of other countries. They are therefore likely to be more consistent, and there is less chance of the treaties' effectiveness being undermined by pure compromise solutions. However, a convention linked to the Union Treaty has to take account not only of the requirements arising from the peculiarities of the various national systems but also of the obligations imposed by the Treaty; for example, the requirement not to discriminate on grounds of nationality - a principle which might well be used to settle a question of civil law. Sometimes the rules laid down by private international law conventions, though they respect the plurality of legal systems, use similar solutions to those employed by domestic law, e.g. in matters of *lis pendens* or related actions.

At first, the objective of an integrated legal area would seem to preclude the making of reservations within the meaning of traditional treaty law, but in practice this is not so. The Rome Convention of 19 June 1980 provides for the possibility of reservations (Article 22). Conventions are flexible enough to take account of a special situation in a given country; witness Article I of the Protocol to the Brussels Convention, which allows defendants domiciled in Luxembourg to refuse the jurisdiction of the court where such jurisdiction is based on the place of performance of the contractual obligation at issue. This exception stems from the special circumstances in a particular country - it does not apply multilaterally - and, unlike a reservation, its implementation is not left to the discretion of the country concerned.

It would be possible to attach a protocol to the Brussels II Convention to cover the dissolution of certain types of church marriages or even the recognition of a divorce in a state which did not allow this form of dissolution.

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26 For an example of the application of Article 7 to a seizure order, see the judgment in Case C-398/92 Mund & Fester [1994] ECR I-474; for examples of the application of Articles 52 and 59, see the judgments in Case 92/92 Phil Collins [1993] ECR I-5145, in Case C-20/92 Hubbard [1993] ECR I-3777 and in Case 168/91 Konstantinidis [1993] ECR I-1214.

27 This argument is somewhat tentative owing to a lack of experience. *Infra*, paragraph 65.

28 The same result could be achieved with greater discretion and flexibility through public policy, which can be cited as a reason for refusing to accept a foreign judgment. In the case of Ireland, divorce is not completely illegal as divorces granted to Irish citizens by the courts in the country in which they are domiciled are recognized.
B. Using institutional mechanisms provided for by the Union Treaty

56. Using certain institutional mechanisms borrowed from the Community or the Union is one way of ensuring that the shared provisions of conventions linked to the European Union are uniformly interpreted.

The examination of existing conventions revealed just how divergent the interpretation of uniform rules by the national courts can be. A good example, concerning the Hague Convention of 5 October 1961, is the question of the exact relationship between the jurisdiction of the authorities in the state of nationality and those in the state of residence, or the criteria for determining nationality or place of habitual residence, especially where a child has been wrongfully removed.

By contrast, the Court of Justice can ensure that the Brussels Convention is uniformly interpreted and applied. The existence of extensive case law interpreting it needs no demonstration. On the whole, it has served to clarify the written rules or adapt them to new types of case. The case law undoubtedly enhances the adaptability of the Convention itself. A number of precedents set by the Court have subsequently been written into accession conventions. Formaly, case law clearly helps to increase legal certainty by enabling common rules to be effectively applied in a uniform manner. And on matters of substance, the Court, as the sole interpreter, can come to a determination reflecting a comprehensive view.

Of course, there is also a negative side. It is not in the least bit unusual for judgments interpreting laws to be criticized either for their general thrust or for specific points. That is how law develops. The Court’s view of a matter may even be formally rejected in subsequent accession conventions.

Treaty-writers are well advised to recognize that application of their treaties is bound to raise certain questions and to entrust these to a judicial body to answer, through interpretation. No legal instrument can predict the unpredictable, which has a habit of occurring. In other words, conferring on a court the power to interpret a legal instrument frees the draftsman from the need to settle every matter down to the last detail and set the law in rigid concrete in order to prevent conflicting interpretations.

If the Brussels II Convention did not confer jurisdiction on the Court of Justice, its value added would be significantly reduced. This would then raise the question of the potential accession of non-Union states, one of the reasons for limiting the instrument to Community Member States being the conferring of the power to deliver binding judgments on a Community institution.

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29 See, for example, the judgment in Case 133/81 Ivens [1982] ECR 1891, establishing a precedent later written into Article 5(1) of the Convention by the agreements signed at San Sebastian and Lugano.

30 The Court gradually establishes general principles for interpretation, such as judicial protection, judicial protection, economy in procedure, organization of proceedings and respect for the systematic structure of the Convention. For more details on this aspect, see F. Rigaux and M. Fallon, Droit international privé, vol. 2, Brussels, Larcier, 1993, § 807 f.

31 See the judgment in Case 241/83 [1985] ECR 99 extending the criterion based on the location of the property in Article 16 to cover short-term leases. This ruling was subsequently overturned by the San Sebastian and Lugano Conventions.

32 In the case of the Brussels Convention, the problem was solved by the conclusion of the "parallel"
C. Adopting the approach used for the Brussels Convention

57. The structure of the Brussels Convention cannot simply be disregarded when drafting the Brussels II Convention. While family matters require special treatment in some areas - witness the importance of non-contentious procedures - the Brussels Convention can be used as a model, not only because of its intrinsic qualities but also because of the requirements specifically related to implementation.

The success of the Brussels Convention over the years is no doubt due in part to the simplicity of the title on jurisdiction, which deals concisely with a vast amount of material. Practitioners are not drawn into a maze of more specialized treaties or a concatenation of principles, each with its own exceptions. If Brussels II were modelled on its predecessor, its effectiveness would be guaranteed, and it would help to reinforce a new method of settling conflicts of jurisdiction.

There is no denying the problems encountered by British and Irish lawyers when the UK and Ireland acceded to the Brussels Convention. These are largely due to differences in legal culture, the Brussels Convention having been drafted by lawyers from the Romano-Germanic family. It is also true that the Brussels Convention is now criticized for its rigidity in certain areas; the involvement of common-law lawyers in the negotiations on Brussels II would help to eliminate these. A more detailed explanation of how is given in the next section of this paper.

The Brussels Convention may influence Brussels II in another way, too: this has to do with the implementation of common rules. If the Court of Justice is entrusted with the task of interpreting the second Convention, this, coupled with their common institutional background, will lead to constant comparisons between the two Conventions, when the provisions of the second are being interpreted. In other words, by using the same wording for the same concepts, it will be possible to ensure that the two are interpreted consistently: without prejudice to the specifics of family matters, the interpretation of a term of the Brussels Convention can be applied to an identical term in Brussels II. If, on the other hand, the Conventions were to use different terms for one and the same concept, the resulting disparities would be bound to cause problems with interpretation, unless satisfactory explanations were given in the report. When the Heidelberg proposal

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33 The title on the enforcement of judgments, laying down very detailed procedural rules, will also come to be seen as innovative.

34 See P. North, "Is European harmonisation of private international law a myth or a reality? A British perspective", in Forty years on: the evolution of postwar private international law in Europe, Deventer, Kluwer, 1990, pp. 29 f.

35 This would be the case if, for example, the Brussels II Convention were to use the term "member state" to refer to what, in the original Convention, is called a "contracting state". Similarly, except where there may be objective reasons for using different terminology to take account of distinctive features of family law, the rules governing lis pendens and related actions should be based on the corresponding rules in the Brussels Convention. This goes for most of the provisions in the title on recognition and enforcement, too.
was being drafted, the EC Working Party on Private International Law attached particular importance to this issue.

SECTION 2 - CONTENT-RELATED VALUE ADDED

58. While it is outside the scope of this paper to outline the ideal content of the Brussels II Convention - if only because the content of a rule of law is not determined solely by theoretical factors - it is appropriate to mention some of the features likely to increase the value added of the instrument. These relate to subject-matter and the principles of jurisdiction. The Convention will deal with both jurisdiction and the recognition and enforcement of judgments. The structure of the title on recognition and enforcement will mirror that of the corresponding title in the Brussels Convention. The topic does not therefore require any further attention here.

§ 1. Subject-matter

59. Our analysis of existing multilateral conventions reveals a somewhat piecemeal picture with regard both to the areas covered and to the nature of the legal issues dealt with. On family matters, there are separate instruments dealing with recognition of divorces and legal separations (two conventions) and child-protection measures (three conventions), and yet another set concerning maintenance obligations (six conventions). In fact there is yet a third respect in which the various conventions differ from each other: all are ratified by different sets of states. With regard to the legal issues dealt with, only two treaties cover direct jurisdiction: the Hague Convention of 5 October 1961 in respect of child-protection measures and the Brussels Convention in respect of maintenance. Only two areas are covered by treaties on the international effectiveness of decisions, i.e. divorce and legal separation, and child-custody measures. Harmonization measures in the field of maintenance have dealt with direct jurisdiction, conflict of laws and the international effectiveness of decisions. Special, essentially non-judicial procedures have been set up to protect infants from abduction and to facilitate the recovery of unpaid maintenance.

From a strictly technical point of view, conventions governing conflicts of laws, jurisdiction and the effectiveness of decisions seem to require a horizontal rather than a vertical approach, i.e. they should cover a wide range of fields, whereas instruments establishing detailed cooperation mechanisms should be restricted to a specific field. The Brussels Convention, together with the Rome Convention of 19 June 1980 on the Law Applicable to Contractual Obligations, is one of the few conventions which follows these guidelines. The authors of the Heidelberg proposal also bore them in mind. In this connection, the traditional utilitarian, ad hoc approach to harmonization of private international law has attracted sharp criticism. 

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36 See the section on territorial scope in Chapter 3.
Of course, one should be careful not to overgeneralize and dismiss the validity of vertical harmonization out of hand. Detailed cooperation procedures may be effective only if restricted to a specific field. Or the set of legal issues covered by an instrument may have to refer only to a circumscribed field. For example, the questions surrounding the abduction of infants call for specially formulated solutions, while there is nothing - in technical terms - to stop the rules on jurisdiction and the effectiveness of decisions in divorce cases from being laid down in the same instrument as the rules on other family matters, as comparative law shows.

If the Brussels II Convention were to cover a wide range of fields, the European Union would be distancing itself from the approach used in other international forums, as it has done with past conventions. It would also make for greater coherence by subjecting all aspects of the matter to the same guiding principles and for smoother application by simplifying the system of legal classifications and reducing the number of instruments having to be taken into consideration in a given case.

60. If the Brussels II Convention were restricted to disputes between couples - marriage, divorce and legal separation and ancillary proceedings - it would be difficult to know where to draw the line on measures between couples during the marriage, measures relating to children during the marriage, ancillary measures (relating to the married couple or the children) linked to the main proceeding, and measures which may be taken subsequently.

Once it has been decided that the instrument will not cover the entire range of family matters, the criteria for deciding which areas will be included need not be based on the principle of maximum coverage. It seems that the main consideration should be to ensure that the main proceeding is dealt with in a consistent way, taking account of other relevant international conventions.

The comprehensive approach (principle of comprehensiveness), bringing together all aspects of a dispute and thereby increasing the economy of procedure, should also be considered. If it were applied, the instrument would be more likely to cover ancillary applications, whether for interim or final measures. Actions brought before or after the main divorce proceedings would, however, not be affected by the principle of comprehensiveness, unless they related to changing the decision on the main proceeding or to the effects of the partners' new status.

If this approach were adopted the Brussels II Convention would cover ancillary proceedings for maintenance involving the two spouses. Extending the scope in this way would not impinge on the Brussels Convention, which determines, in accordance with lex fori, the court with jurisdiction over actions "ancillary to proceedings concerning the status of a person" (Article 5(2)). Thus the Convention refers to the rules governing national jurisdiction in the country of the court dealing with the case.

38 For example, disposal of matrimonial property or compensation for changes in circumstances resulting from dissolution of the marriage.
39 For example, changes to separation arrangements
40 For example, an action brought to alter a court ruling on the use of the former spouse's name.
If the Brussels II Convention were extended to cover all disputes between married couples in whatever area, there would then be a significant overlap with the Brussels Convention in the field of maintenance and with the Hague Convention of 5 October 1961 on measures concerning infants.\(^{41}\)

Extending Brussels II to cover actions to have previous judgments altered would not necessarily warrant a special provision stating that the authorities which issued the initial decision had jurisdiction in such cases. There is in any case no guarantee that the individuals thus designated would be the same as those who gave the initial decision. Besides, the location of the circumstances in question may have changed in the mean time.

The principle does not only have a reductive effect. It can also lead to an extension to cover actions linked to but not ancillary to the main proceeding, such as concurrent actions concerning a child, brought in a different state from that of the divorce proceedings, relating to the exercise of parental authority during the marriage. In view of the frequency with which these interconnected disputes arise, the matter should be dealt with by Brussels II. In other words, an area - the exercise of parental authority, say - should not be covered merely as a result of its procedural status, i.e. where an application is ancillary rather than main. This does not mean, however, that the Convention must necessarily lay down the rules for a main action concerning parental authority. It could merely attempt to ensure they are implemented in accordance with another, existing instrument such as the Hague Convention of 5 October 1961 on the protection of infants.\(^{42}\)

§ 2. Assessing the principles governing jurisdiction

61. The value added of any convention, or any other legal instrument for that matter, clearly depends on its content. It would be inappropriate here to venture to say what the content of Brussels II should be, since this depends on the negotiations.

From the guiding principles for the establishment of common rules on jurisdiction in international disputes relating to the validity of marriages and to the dissolution or weakening of marital ties, including ancillary actions, it is possible to develop certain proposals relating to the structure and the content of jurisdiction rules.

A. Structure of jurisdiction rules

62. There are various factors determining the overall configuration of the system of rules governing jurisdiction in international disputes. These can be classified according to the degree of discretion left to the litigants and the court.

First, however, it is important to make a distinction between rules determining international jurisdiction, those determining internal jurisdiction and those which determine both. The first type merely stipulate what international situations fall within the jurisdiction of national authorities. They do not determine which authority, within the

\(^{41}\) See Chapter 3.

\(^{42}\) See Chapter 3.
national system, should have jurisdiction in a particular case: that is a matter for the rules of internal jurisdiction. Article 2 of the Brussels Convention falls into this first category in that it merely states that cases should be dealt with by the courts in the country where the defendant is domiciled, without specifying which court. Article 5, on the other hand, determines both international and internal jurisdiction where it confers jurisdiction on the courts for the place of performance of the contractual obligation at issue.

This distinction may be relevant to the provisions of the Brussels II Convention on ancillary measures relate children. One would imagine that, in certain civil-law systems, the divorce court would deal with such cases while, in others, they might be dealt with by a special juvenile court. A rule determining international jurisdiction only would merely confer jurisdiction on the authorities in a given state, without affecting the choice of a particular authority within that state's legal system. For example, in a particular case, the rule determining international jurisdiction may confer on the authorities of a particular state jurisdiction over the divorce and ancillary proceedings, but it would not require that the divorce court also hear ancillary applications. This would be a matter for national law, and the special juvenile court would hear them if they came under its jurisdiction in national law. What the rule of international jurisdiction would do, however, is determine whether or not such cases could be heard in the state in question.

However, where the lex fori confers jurisdiction in cases relating to children on an authority other than the divorce court, it is hard to imagine this authority adopting a measure concerning an infant residing in a different state. In such cases, the principle of comprehensiveness is subordinate to the principle of proximity. Thus there could be a provision to the effect that the authorities dealing with an action for annulment, divorce or separation in one state would have jurisdiction in measures relating to children residing abroad only if the law of that state conferred jurisdiction in such cases on them. States could be asked to state, on ratification, whether this was the case or not.

1. Structures which allow the litigant to choose

63. Rules determining international jurisdiction usually leave some scope for choice out of consideration for the interests of the plaintiff, while ensuring that the defendant has adequate legal protection. If the parties are given too much discretion, the conflict-of-law rule can be used to correct the situation.

- Structures based on choice

64. Generally, the rules determining international jurisdiction are clearly based on rules determining internal jurisdiction. In other words, if the legislation does not confer exclusive jurisdiction in respect of domestic circumstances, it does not do so for the corresponding international circumstances either. \(^{43}\) Sometimes rules determining international jurisdiction are identical with those determining internal jurisdiction, as

\(^{43}\) This applies only to direct jurisdiction. French law provides a rare example of a case where direct jurisdiction is alternative and indirect jurisdiction is exclusive (the nationality of the applicant is the decisive factor - a rule linked to Article 14 of the Civil Code).
under French law, for example. Most rules on international jurisdiction are alternative, even those relating to family law. The reasons for this are connected with international relations. When enacting rules on international jurisdiction, parliaments do not usually take account of corresponding rules in other countries. This produces conflicts of jurisdiction, which would be very hard to resolve if all the states concerned provided for exclusive jurisdiction. One drawback would be the difficulty of getting a decision contrary to such a provision recognized abroad. More seriously, however, there would be a considerable risk of denial of justice in cases which did not satisfy any of the tests for jurisdiction in any of the states involved.

English law is more flexible than continental law: the task of determining international jurisdiction is left to the courts, which are guided by a list of criteria laid down in Order XI of the Rules of the Supreme Court. A court may also refuse to hear a case if it feels that a foreign court has a better claim to jurisdiction.\textsuperscript{44}

There is another system for determining international jurisdiction, which could be described as a cascading alternative system. A national court is given a number of opportunities to claim jurisdiction, but this may be possible only if the case cannot be heard by a court in another country. In Switzerland the Federal Private International Law Act of 18 December 1987 uses this solution for divorce cases. Under Section 60 of the Act, an action may be brought in Switzerland if proceedings cannot be commenced in the country of residence of one of the marriage partners or if it would be unreasonable to require that the case be heard there.

The two structures can be combined, as indeed they are under Swiss law. This entails having a main rule, providing for alternative jurisdiction (residence of the defendant or residence of the plaintiff, for example) and subsidiary one, which comes into play when none of the criteria are met, making it impossible to bring an action (Sections 59 and 60 of the Act).

Rules determining jurisdiction may also require that the criterion used be qualified. The qualification may take the form of a material requirement or an additional criterion based on location. For example, a material requirement may state a minimum period of time a particular situation must last for, or it may be left to the court to assess.\textsuperscript{45} Or a criterion based on location may require that the plaintiff be resident in the state whose nationality he or she holds (Section 59 of the Act).

\textit{Assessment of protected interests}

65. The legislature's choice of structure will depend on the amount of discretion it wants to allow the litigant in choosing the court. This may vary from one context to another. It may be greater when it comes to internal jurisdiction or the effectiveness of foreign decisions than for international jurisdiction. As far as internal jurisdiction is concerned, the importance of the choice of court is not so very important as the same legal system will apply regardless. With regard to the effectiveness of a foreign decision, where

\textsuperscript{44} See P. Lagarde "Le principe de proximit\'e en droit international priv\'e", (1986-I) 196 Rec. Cours Ac. dr. int. 134. See paragraph 68 infra for a discussion of the theory of forum non conveniens.

\textsuperscript{45} For a discussion of the court's power of assessment, see paragraph 67 infra.
indirect jurisdiction may be at issue, a wide choice can be offered, the aim being to assess in the requested state the validity of a right legally acquired in a foreign state. However, there are other considerations to be taken into account when it comes to determining international jurisdiction. Litigants must not be allowed excessive influence over the way the substance of the case is judged. The other imperative is to find a balance between two conflicting demands, i.e. facilitating the plaintiff's access to justice (comprehensiveness) and ensuring the defendant has adequate legal protection (proximity).  

In view of this conflict of objectives between the rules on direct jurisdiction and those on indirect jurisdiction, the first need not necessarily have the same content as the second.

The imperatives of comprehensiveness and proximity are also relevant to internal jurisdiction, but not to the same extent. In international disputes, the parties may be disadvantaged by distance, language and unfamiliar procedures.

It is hard to tell on the basis of the present state of Community law whether the creation of a single area covering the whole Community, comparable to the single market, will push the legal systems in the direction of an alternative structure or a more unitary structure, with related disputes concentrated in one Member State. The unitary structure would be acceptable if the creation of the area referred to above eliminated the risk of denial of justice. The theory concerning the concentration of disputes is based on the view that, in an area in which there is freedom of movement for private individuals, jurisdiction should no longer be determined on the basis of people's movements. Thus the principle that jurisdiction should be conferred on the authorities in the place of residence of a foreign defendant makes sense only in a world where international travel is exceptionally rare because of poor transport links (as in the days when people travelled by horse and coach) or for reasons to do with national sovereignty (for example, when there is a ban on travel abroad). In an integrated area, however, it would be preferable, and in a way rational, to concentrate the dispute in the place where the circumstances giving rise to the action are concentrated. The people who developed this theory have not yet sorted out exactly where this place should be in relation to family matters, but one would assume that family disputes would be centred around the family's place of residence.

Following the reasoning set out above, the rule determining jurisdiction could concentrate litigation in the place of habitual residence of the child where child-protection measures were being sought. The weakness of the theory is that it fails to take account of the relative nature of any legal test: the "family's" needs may point to concentration in one place, the "child's" to another. Such a conceptual approach, advocated incidentally by F. von Savigny in the nineteenth century,

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46 See the following point for a discussion of this imperative. Facilitating international access to justice takes precedence in the common-law systems, which explains why the place of residence of the applicant is the main criterion (infra, paragraph 72). On the variety of the objectives pursued, with reference to the principles of sovereignty and proximity, see P. Lagarde "Le principe de proximité en droit international privé", (1986-) 196 Recueil cours A.C. dr.int. 127.

47 The adjective "internal" is used by Article 7a of the EC Treaty and in the case law of Court of Justice. See the judgment of 5 May 1982 in Case 15/81 Schul [1982] ECR 1409.

does not take account of the objective of utility, on which any policy designed to provide protection is based and which is the primary factor in determining jurisdiction.

The fact that the Community functions in much the same way as an "internal" area is another reason to step up cooperation, by, for example, setting up a mechanism whereby one court can refer a case involving children to another. 49

With regard to the Community rules on freedom of movement, one might suppose that a structure which concentrated litigation would be more likely to raise barriers than an alternative structure (though not necessarily in a way which conflicted with the rules). For example, if a company which exported a product to another state could only sue in that state, this might constitute a disincentive to export. Likewise, if an Italian couple returning to Italy after a period of residence in Germany had to start divorce proceedings in Germany, this could make people less inclined to live abroad.

The Brussels Convention opted for an alternative structure, providing for exclusive jurisdiction in particular cases only. 50 If the Brussels II Convention is to be modelled as closely as possible on its predecessor, then it will probably opt for the same type of structure too.

- The benefits of a rule on conflict of laws

66. A conflict-of-laws rule can be used to limit a litigant's influence over the decision on the substance of the case, where there is an alternative structure, by countering his or her strategy. Litigants are aware that, by bringing an action in one state rather than another, they can indirectly determine the law under which the substance of the case will be judged. For example, if a plaintiff brings an action in France, he or she knows that the French courts will judge the merits in accordance with French conflict rules, while in Belgium the courts will use Belgian rules. The rule of conflict procedure requires the court dealing with the case to apply the conflict rules which would have been applied by the authorities in another state had they been dealing with it. The authorities in question are those which would normally have jurisdiction. In other words, the procedure can be applied effectively only when the court which would normally have jurisdiction can be identified. 52

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49 For a discussion of cooperation, see paragraph 77 infra.
50 The Raiser case made it possible to object on the grounds of a barrier to freedom of movement (supra, paragraph 56). A German had leased a holiday house in Italy to another German. Though the lease had been signed in Germany, any legal differences had to be settled in the Italian courts. This could discourage German tourists from going to Italy, or at least from renting accommodation there from another German.
51 Supra, paragraph 57.
52 There is provision based on this reasoning in the Heidelberg proposal in respect of succession. Article 5 confers exclusive jurisdiction on the courts in the state in which the deceased was last habitually resident. The authorities in the place where his property is situated may be involved in the completion of certain formalities in exceptional circumstances. For the purposes of determining inheritance rights, these authorities are required to apply the law applicable under the private international law system of the state of last habitual residence. The concept of a rule on conflict of laws has been illustrated elsewhere, using different terminology; the classic technique of renvoi is an example. See also the examples given in G. Droz "Cours général de droit international privé", (1991-IV) 229 Rec. cours Ac. dr. int. 298, at 367 and 397; P. Lagarde, "Le principe de
The conflict rule could prove to be an effective means of making concentration of litigation compatible with alternative structures. For example, if, in a family matter, it was decided that the courts where the family was resident had "natural jurisdiction" in the case and these courts applied the national conflict rule, then authorities elsewhere before which cases were legitimately brought in accordance with alternative criteria such as the habitual residence of the defendant would apply the private international law of the family's country of habitual residence to the substance of the dispute.

The method could be useful in connection with the provisions of Brussels II relating to measures concerning children.53

2. *Structures granting the court discretion*

67. These considerations give the impression that litigants have a great deal of discretion in settling the question of international jurisdiction while the courts have none. The rules do indeed entitle the plaintiff to choose between the court in the place of habitual residence of the defendant or of the plaintiff, and a court seised on the basis of the first criterion cannot refuse to hear a case on the ground that it lacks jurisdiction. There are, however, two very different procedures which do allow the courts a certain amount of discretion.

68. The concept of *forum non conveniens* is used in the common-law countries.54 It can be employed by a court to decline jurisdiction if it feels it would be more appropriate for the proceeding to be entertained by a foreign court. The court would normally ascertain whether the foreign court would have jurisdiction under the law of the country in question.

The Brussels Convention, like other international conventions in the matter of indirect and direct jurisdiction, does not make express use of this concept. And there would presumably be no question of inserting it in its pure form straight into a text aimed at securing legal certainty. It might, however, be very useful as a marginal concept in cases where the criterion for determining jurisdiction laid down by the legislature is potentially too harsh or may conflict with a basic principle of international jurisdiction.55

Combining legal criteria with the court's assessment of jurisdiction in this way so as to prevent the system from being too rigid could be a helpful device in relation to cases involving children. By allowing the court to decline jurisdiction in the interests of the child, the rule would effectively enable it to refer the case to the authorities in another state if it felt that this was more appropriate in the circumstances. In making its assessment, the court should consider whether the foreign authorities can be suitably seised - and indeed whether the possibility of *renvoi* exists.

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53 proximité en droit international privé", (1986-I) 196 Rec. cours Ac. dr. int. 157.

54 *Infra* paragraph 124.

54 It is explained by, e.g., P. Lagarde, "Le principe de proximité en droit international privé" (1986-I) 196 Rec. cours Ac. dr. int. 157.

55 See the next paragraph for a discussion of this second possibility.
In case of difficulty in formulating an "interinstrumental" rule on related actions, this method would enable the authorities in the state in which the divorce was granted to decide that jurisdiction in ancillary actions should, in the interests of the child, be conferred on the authority designated by the Hague Convention of 5 October 1961.

69. Another, quite different way of leaving some room for manoeuvre in determining jurisdiction would be for the legislature to draw up a list of negative jurisdiction criteria. It would include all the criteria which courts could not use to claim jurisdiction. These criteria would be deemed unsuitable, i.e. unacceptable for the defendant in an international dispute. The unsuitability could be linked to an abstract concept, e.g. the feeling that the bringing of an action would be unreasonable and vexatious, or to a particular territorial criterion, such as the nationality or the habitual place of residence of the plaintiff.

A negative list of this kind would not necessarily leave the courts themselves any discretion. If it were drawn up by an international legislator, it would be intended for the national legislator, which would then have to decide whether to adopt a positive list compatible with the negative one or leave it to the national courts to judge.

This technique clearly does not go as far in harmonizing national rules on international jurisdiction as a positive list would. It takes a minimalist approach to harmonization, based on the lowest common denominator. This does not mean to say, however, that it might not perhaps be useful in unblocking negotiations.

There does not seem to any formal precedent for the use of a negative list in previous conventions. Nevertheless, there is nothing to prevent a rule on indirect jurisdiction taking this form as it would constitute a ground for refusing a foreign decision, i.e. it would enable the court addressed to affirm that, in a particular case, the foreign court lacked jurisdiction.

The method would only increase the value added of the Brussels II Convention if it were the only means of bringing all family and inheritance matters within the scope of one instrument. The Convention's main focus would then be the effectiveness of foreign decisions and the rules governing jurisdiction would be minimal. If, on the other hand, the Convention dealt essentially with divorce cases, then it would achieve little more than had already been accomplished by the Hague Convention of 1 June 1970.

B. Content of the territorial criteria

70. Before the jurisdiction criteria that might be used in the Brussels II Convention are evaluated in terms of their potential added value, the practical utility of the nationality principle, a plaintiff-related criterion and territorial factors must first be considered.

1. Nationality principle

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See Chapter 3.
71. The crucial importance of nationality in family law is a well-known fact. It looms large not only in the Roman-Germanic family but also, whatever appearances might suggest, in the common-law concept of the domicile of origin, for although the two elements do not entirely overlap, they commonly coincide in practice. The domicile of origin is at least as stable as nationality, if not more stable in today’s world: it is the domicile acquired at birth from the parents’ domicile of origin, and it is preserved, even in the event of habitual residence abroad, in the absence of a clear intention to change it durably.

Without going into the question of the nationality of one of the parties for the moment (this is considered below), suffice it to say that the existing conventions give pride of place in matrimonial causes to the common nationality of the parties. The Hague Convention of 1 July 1970 treats it as sufficient to found the jurisdiction of the original court. The ICCS Convention of 8 September 1967 allows the court requested to withhold recognition where, among other things, the spouses were nationals of the state requested.

Compatibility of a jurisdiction rule based on the nationality criterion with Article 6 of the EC Treaty is also worth mentioning. But any assessment of the discriminatory nature of such a rule would be somewhat delicate. 57

In terms of value added in the context of matrimonial causes, the use of common nationality among other territorial criteria would mean alignment on the existing conventions, which would be counter to the principle of the Community area. The conclusion would be different if the criterion were qualified. The qualification would a priori be a territorial factor such as the plaintiff’s habitual residence. Combined application with the forum non conveniens doctrine might also be envisaged. 58 the courts of the country of the common nationality could decline jurisdiction if they felt, given the circumstances of the case, that the courts of another state had jurisdiction. The point could be made in a different way, following the Swiss approach: the court would have jurisdiction if the action were not possible in another state or if it was not reasonable to insist that it be brought there, given the circumstances of the case. Or again, nationality might be used as a secondary factor in conjunction with an applicability criterion 59 where none of the territorial factors provided for in the legislation was in a contracting state; the forum non conveniens doctrine might also apply, the court investigating the question whether the courts of a third state were simply more appropriate to hear the action.

2. Plaintiff-related criteria

72. Any criterion related solely to the plaintiff in the current state of convention-based law will today be perceived as tending even more than the common nationality criterion to support attempts to impose a forum non conveniens. The criterion might be the plaintiff’s nationality, residence or domicile.

All the evidence is against the use of the plaintiff’s nationality, habitual residence or domicile without further qualification. No existing convention has ever done so. Some conventions actually outlaw it.

57 See infra in the passage relating to the plaintiff criterion.
58 Supra, paragraph 68.
59 See Chapter 3.
In divorce matters the Hague Convention of 1 July 1970 accepts the plaintiff's habitual residence only if it is qualified in terms either of duration (one year) or of location (last shared residence). The plaintiff's nationality can be used only in conjunction with his/her habitual residence or with actual presence and last shared residence (itself further qualified by a requirement that divorce be prohibited in the state in question).

The Brussels Convention firmly condemns the unqualified use of the criterion of the plaintiff's domicile, residence or nationality not only in property matters (Article 3(2)) but also (as regards nationality) in personal status matters Article 5(2)). The defendant's nationality incidentally, comes in for the same treatment.

 Might the plaintiff-related criteria of nationality and residence constitute a form of direct or indirect discrimination contrary to Article 6 of the EC Treaty? The affirmative answer would imply the need to prove that a plaintiff who is not eligible for the rule is in the same situation as one who is. It is not conceivable to insist that a state open up its courts to all and sundry without some connecting factor. But where the plaintiff-related factors are on lists of alternatives and function in practice only where other connecting factors are absent, it is not clear on what ground a foreign national residing in a foreign country could claim access to the courts. The conclusion might be different if access to the courts of a state were based exclusively on the plaintiff's nationality, domicile or residence to the exclusion of other criteria such as the defendant's domicile.

The question that remains is what qualifying factors might make the criterion acceptable. The object would be to reconcile the plaintiff's concern for access to justice in a complex international dispute with principles of rational organization of the administration of justice and protection for the defendant. Conventions tend to prefer strict qualifying factors such as duration of residence. There is a strong temptation to subject the criterion of the plaintiff's habitual residence to a condition open to discretionary treatment by the court along the forum non conveniens line of thinking: the court has jurisdiction if in the circumstances of the case it is not reasonable to demand that the action be commenced in another contracting state or in a third state. But the very fact that this would be discretionary is the reason why it rarely provided for by the conventions. The proximity idea might also work, in conjunction with other criteria such as the spouses' common nationality.

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60 This may seem an odd question in the context of a convention based on Article K of the Treaty on European Union, since the area covered by Article 6 is the area covered by the Treaty establishing the European Community. But it would be incongruous for the Member States to be able to use intergovernmental cooperation as a means of achieving together what they are forbidden from doing individually. The fact that Article K makes no reference to Community law is presumably attributable to the fact that the two are not exactly coextensive, but there is no getting away from the point that access to justice is a potential corollary of freedom of movement (see supra, paragraph 46 and 49) and may therefore be within the purview of Community law, even if only on a secondary basis.

61 See supra, paragraph 71.

62 See following paragraph.

63 P. Lagarde, "Le princeipe de proximité en droit international privé"., (1986-1) 196 Rec. cours A. c. dr. int. 150, acknowledges that the conventions, like the continental systems, are excessively rigid and wishes them to display greater openness to techniques that would reflect proximity factors
73. Plaintiff-related criteria cannot, of course, be extended unmodified to applications for measures relating to children. The fact of being a child may be good grounds for selecting the child's place of residence (even if the child is the plaintiff), but this would constitute a special protection objective warranting a departure from the usual rules on jurisdiction.

But the special protection objective will not always warrant a departure from the usual rules on jurisdiction. Rather it warrants an additional possibility being offered on top of the usual rules. There is a shining example in the consumer protection field (Articles 13 to 15 of the Brussels Convention) and in relation to maintenance obligations (Article 5(2)). This might suggest that the child or his/her representative should be allowed to apply to the authorities of the state of divorce without having to reside there. In other words, in the context of a Brussels II Convention it would not suffice to confer jurisdiction on these authorities in the event of consent between the spouses; that jurisdiction should be conferred in respect of applications by the children also. A more flexible approach would be to provide that where the child does not reside in the state whose authorities have jurisdiction in matters of divorce, the question of jurisdiction to take measures relating to the children is to be considered in the light of the paramount interests of the child.\(^{64}\)

3. Domicile and habitual residence in practice

74. The use of a domicile or habitual residence criterion in the Brussels II Convention would raise the problem of what to make of it practice. The problem, of course, arises with every convention.

Both criteria are met in relation to international jurisdiction. The Hague Conventions always refer to habitual residence, whatever the subject-matter. The Brussels Convention tends to use domicile; habitual residence appears solely in connection with maintenance obligations, but then only as an alternative to domicile. So whereas the Hague Conference prefers habitual residence to domicile, the former possibly embracing the latter, the Brussels Convention keeps the two apart while recognizing that habitual residence is a useful factor where questions of personal status are involved.

It can be deduced that in family matters habitual residence is tending to supplant domicile\(^ {65} \) as the dominant criterion, as witness the fact that the Heidelberg proposal itself uses it.

The explanation lies very simply in the fact that habitual residence is relatively easy to ascertain in practice. That in turn has two advantages: it reduces the threat of divergent interpretations and is better than domicile at establishing proximity between court and cause.

\(^{64}\) The explanatory report could state that the wishes of the parents and of the child must be taken into account in such cases.

\(^{65}\) Not, however, in the sense of "domicile of origin". See infra, paragraph 76.
All this assumes that habitual residence, unlike domicile, is easy to determine. The position is not quite as simple as that, however.

Domicile is a more abstract concept than habitual residence. Habitual residence basically means the place where one has one's interests and ties. That can be part of the definition of domicile, but domicile can be defined in specific ways by the law as well. For the purposes of civil procedure, it might correspond to entry in a public register, which might in turn be in a place where the citizen has his main centre of interests. The importance of the distinction should not be overstated, but when the concept is applied in practice the domicile criterion does call for an answer to a legal question that does not arise in the case of habitual residence: what law will apply to determine whether the domicile is a legal domicile?

The Brussels Convention seeks to solve the problem by defining domicile not in an autonomous, direct fashion but through a reference to national law: by Article 52, 'In order to determine whether a party is domiciled in the Contracting State whose courts are seised of a matter, the Court shall apply its internal law.' And 'If a party is not domiciled in the State whose courts are seised of the matter, then in order to determine whether a party is domiciled in another Contracting State, the court shall apply the law of that State.' This is a sort of conflict rule, designating the law of the state in which domicile is likely to be located. It will be for that law to determine whether entry in a register is required or whether the main place of settlement is what counts.

Since use of the residence concept is designed precisely to overcome the difficulty of an autonomous definition of domicile, the only conclusion that ultimately matters is the conclusion reached by the court hearing the matter, having regard to all the circumstances of the case. In other words, the practical operation of the concept is within the sovereign powers of decision of the authority required to make the decision. It is significant in this respect that when the habitual residence concept was inserted in Article 5(2) of the Brussels Convention it was not felt necessary to add a provision along the lines of Article 52. But the true import of the concept also requires the court, when reaching its conclusion, to have regard to the reality of the fact of settlement, whereas that may not be necessary in the case of domicile.

It is well known that residence *per se* is not used in the conventions. It is always qualified as "habitual". All this means is that the stability of settlement in a particular place must be considered. A duration element is implicit in this. The Resolution of the Council of Europe of 18 January 1972 on the unification of legal concepts for the determination of habitual residence refers to duration and continuity. Does duration need further clarification, perhaps by reference to a one-year period? Some conventions do so in relation to the plaintiff's residence; the Hague Convention of 1 July 1970 is a case in point. The Working Party on Private International Law considered the idea in relation to a spouse's habitual residence but finally renounced it in favour of a different qualifying factor -- habitual residence of the spouse having custody of the child.

It might be objected that applying a duration condition to the habitual residence criterion is a tautology. Certainty as to the law might be a valid ground, but all this does is rigidify the law and tie the court's hands as if it could not be trusted.
The duration condition might be more easily acceptable if applied to domicile, where duration is not currently a vital element. The Council of Europe Resolution declares the person's manifest intention to be as important as the performance of this or that formality required by law, but intention can be deduced, for instance, from the duration, actual or envisaged, of the residence.

The analysis of existing conventions suggests that, outside the implementation of the conventions, the courts might in certain circumstances have regard to intention where settlement (the fact of which must be proved) corresponds to a definite plan to remain in the country for an indefinite period of time. In other words, residence may be habitual from the early weeks of settlement of the foreign family if there is no clear intention to "return" in the near future; this would not be the case where a couple settled in a foreign country to study there for a definite period. A qualifying duration factor, say of one year, would be obviously inadequate to deal with this situation.

In the context of the Brussels II Convention it is accordingly suggested that the criterion used to determine where a person basically lives should be habitual residence rather than domicile and that no qualifying factors in terms of duration should be imposed.

If domicile were also to be used, the renvoi to national law made by Article 52 of the Brussels Convention should be made in like fashion.

If domicile were used, it should not be open to divergent interpretation from one provision to another. There would be a real risk of confusion if the concept was used in the sense of domicile of origin in one provision to confer a ground of jurisdiction comparable to nationality but used elsewhere without that connotation; the habitual residence concept would be preferable in the second case.

The domicile and habitual residence concepts raise a further conflict problem where there is a change of circumstances over a period of time: what happens in the event of change of residence between the time of commencement of the action and the day of judgment -- does the former concept apply or the second? Analysis of the existing conventions suggests that the problem is a real one where child-related measures are at stake. The general economy of the Brussels II Convention suggests that the time of commencement of the action should be the material time and the jurisdiction should be conserved if the child relocates in the course of the proceedings, since in certain circumstances the Convention would allow the authority dealing with the case to entertain applications for measures in respect of children residing in other countries. Residence in the country of the court is thus not essential for examination of the substance of the case. Consistency with the Brussels Convention, where the problem can also arise in the context of maintenance obligations, would be best secured by leaving the question to be answered when the Convention is up for interpretation.

Regarding child-related measures, use of the child's habitual residence raises specific problems in wrongful removal situations. That question will be considered in the following chapter.

C. Cooperation for jurisdiction purposes

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77. The establishment of sophisticated cooperation machinery between the Member States for the determination of jurisdiction could be one of the Brussels II Convention's most valuable innovations. A Convention such as this is as a matter of principle founded on a spirit of cooperation and helps to build up the climate of trust between authorities; the Brussels Convention bears witness to this. More generally, the analysis of existing conventions reveals that the authorities are perfectly willing to cooperate with each other in child-related matters.

The question of cooperation will arise especially in connection with ancillary applications for child-related measures. It will be for the authorities in the state of divorce to apply to the authorities of the child's state of residence for measures of investigation and even for decisions on the exercise of parental authority. Since they will be acting outside the scope of the Brussels II Convention, the process will involve interaction between that Convention and others, which point will be considered in the following chapter.

At the present stage of proceedings, two points can be made regarding the procedures for cooperation of this type.

Cooperation need not necessarily be organized in the Brussels II Convention itself, even though it affects the exercise of jurisdiction. It could be governed by a protocol as the transmission of court documents is governed by a Protocol to the Brussels Convention.

78. In an area resembling an internal law-enforcement area, it should be possible to organize cooperation between authorities without the need to go through a central authority in individual cases. Article IV of the Protocol to the Brussels Convention offers an example of how to organize transmission of court documents between public officers. It should be possible to make provision for notifications from registrar to registrar.

It might also be worth considering cooperation between approved agencies with relevant expertise and international networks. There is a precedent for this in the Hague Convention of 29 May 1993 on Protection of Children and Cooperation in respect of Intercountry Adoption. While this Convention provides for the intervention of central authorities in the traditional sense, it also allows them to be assisted by accredited bodies, notably for the management of information relating to the prospective adoptive parents, monitoring proceedings and replying, 'in so far as is permitted by the law of their State, to justified requests from other Central Authorities or public authorities for information about a particular adoption situation' (Article 9). The Convention specifies that bodies wishing to be accredited must demonstrate 'their competence to carry out properly the tasks with which they may be entrusted' (Article 10); any such body must 'pursue only non-profit objectives', 'be directed and staffed by [qualified persons]', and 'be subject to supervision by competent authorities of [the] State as to its composition, operation and financial situation' (Article 11).

Such bodies -- the Geneva-based International Social Service might be one -- could perform a similar function, perhaps under cover of a request for an expert report.

79. The performance of acts of cooperation would naturally have to conform to certain formalities, and differences between contracting states in this respect should be borne in mind. As is confirmed by Article IV of the Protocol to the Brussels Convention regarding transmission of court documents between public officers, transmissions must be made in
the form prescribed in the state of destination. There may also be difficulties concerning
languages, as the state of destination may require a certified translation.

The Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or
Commercial Matters offers useful pointers. While it presupposes passage via a central
authority, it contains a number of provisions regulating letters of request, notably in
regard to languages (French and English being generally acceptable) and monitoring
(information for the requesting authority to allow the parties to be present, assistance from
the requesting authority for the execution of the request).