CHAPTER 3

DETERMINING THE TERRITORIAL SCOPE OF THE INSTRUMENT

80. The draftsmen of a treaty or similar instrument cannot overlook the importance of questions relating to its international scope, and the undoubted complexity of the problem is no reason for declining the challenge. There are two sides to the question.

First, every convention affecting conflicts of jurisdiction will necessarily have to define the international situations in which it is likely to be applicable. The difficulty is not dependent on whether the convention's territorial scope is defined as the parties' territories, nor on the determination of the subjects of international law who are likely to be parties to it. It flows from the basic assumption that in the matter of conflicts of jurisdiction, unlike conflicts of laws, the situations must have a clear connecting factor to the contracting states. That is obvious, for a treaty cannot designate the authorities of a third state.

Second, when a treaty is being drafted, it is necessary to be attentive to the demarcation between its sphere of application and that of concurrent instruments. What is at stake is more than a potential conflict between instruments or subjects of international law: it is the planned instrument's very content and scope -- its actual effectiveness.

SECTION 1 - DETERMINING CRITERIA GOVERNING TERRITORIAL SCOPE

81. Before assessing provisions that might govern the international application of rules of jurisdiction and rules on the effectiveness of foreign judgments, it is worth defining the theoretical terms in which the problem is posed, notably in the light of the concept of Community dispute.

§1. The concept of Community dispute

82. An international instrument that relates to conflicts of authority or jurisdiction will obviously have to have only limited scope as regards relations with third states. It cannot, for instance, designate the courts of a third state; this is a constraint of the sovereignty principle of public international law. But public international law does not prevent states from establishing jurisdiction over foreign residents or their own nationals resident abroad. States must determine the situations in which the rules they issue are to apply.

The provision of an international instrument that defines the necessary connecting factor between such a situation and the legal order of a contracting state can be termed the rule of applicability. The rule may vary depending whether it affects rules of jurisdiction or rules governing the effectiveness of foreign judgments. In the latter case, the fact that a judgment has been given in a contracting state is a natural factor of applicability.

In the case of rules of jurisdiction, the connecting factor may coincide with or be dissociated from the criterion of jurisdiction. Under the first method, it might be stated quite simply that the courts of the country of the defendant's domicile have jurisdiction (Article 2 of the Brussels Convention), this excludes the application of the provision where the defendant is domiciled in a third state. The second method might consist of
designating the courts of the country of the defendant's domicile even though the instrument applies only to contracts of carriage from and to contracting states (Warsaw Convention of 1929). Yet again, the courts of the country of performance of the contractual obligation can be designated where the defendant is domiciled in a contracting state (Article 5(1) of the Brussels Convention).

The scope of the applicability rule is, of course, different from that of the rule of jurisdiction. Where the conditions for applicability are not met in a given case, the rule of jurisdiction cannot be applied and an alternative rule must be sought either in the treaty itself or in another treaty or, failing them, in the lex fori. But where the situation is within the applicability rule but the jurisdiction test is not satisfied, the court has no jurisdiction and there is no ground for seeking an alternative jurisdiction rule. In the context of the Brussels Convention, for instance, where a dispute falls within the Convention's territorial scope on the basis of the defendant's domicile, jurisdiction must be determined in accordance with the Convention if the defendant is domiciled in a contracting state; it remains for the plaintiff to act in the state of the defendant's domicile under Article 2 or under Article 5(1) in the courts for the place of performance of the contractual obligation if that place is within a contracting state. If, on the other hand, the place of performance had been a criterion for territorial applicability, operating in conjunction with the defendant's domicile, that would have confined the Brussels Convention to disputes involving defendants domiciled in the Community in respect of contracts to be performed in the Community; failing one of those two factors, jurisdiction could have been determined in accordance with national law.

An applicability rule as such can take a variety of forms. It can work on a single criterion, on a combination of criteria or on alternative criteria. Article 2 of the Brussels Convention illustrates the first of those techniques. The Warsaw Convention illustrates the second. An alternative rule would be where the treaty applies if the defendant is domiciled in or is a national of a contracting state. The second and third techniques serve respectively to confine and to extend the territorial scope of the treaty's jurisdiction rules.

83. The Brussels Convention defined what academic lawyers have come to term Community disputes on a defendant's domicile criterion. In all but exceptional cases (e.g. Article 16 (exclusive jurisdiction provisions) or Article 17 (prorogation of jurisdiction)), the general rules of jurisdiction apply only where the defendant is domiciled in a contracting state. Where that test is passed, jurisdiction cannot be founded on provisions other than those of the Brussels Convention.  

In reality the Brussels Convention uses a variety of rules of applicability. For one thing, the applicability criterion is sometimes merged into the jurisdiction criterion and sometimes dissociated from it. The former situation is met in Article 2, the latter in Article 5, as we have seen. For another, the Convention determines a primary and a secondary criterion -- the defendant's domicile in a contracting state and the plaintiff's domicile in a contracting state, respectively (Article 4).

---

1 Admittedly, a different result could be attained through the provisions governing relationships with other conventions (Art. 55 et seq.).
The secondary criterion of Article 4 effects a straight renvoi to national law. This makes it possible for the secondary hypothesis to be included formally within the instrument. But the rules on recognition and enforcement of foreign decisions are applicable to all decisions given in a contracting state which may have been given by reason of the title governing jurisdiction, including decisions given by a court or tribunal which has founded its own jurisdiction on national law by virtue of Article 4.

There is more to Article 4 than that, however. A foreign plaintiff can rely on national rules generally considered "exorbitant", enumerated in the second paragraph of Article 3, in the same way as a national plaintiff.

84. The content of the Brussels Convention's applicability criteria is supposed to express the relationship between the Convention and the EC Treaty. But the defendant's domicile would hardly seem to be the best way of doing that. In relation to contracts, for instance, the performance criterion would have seemed the most appropriate link to the free movement and free trade concept (Article 9 of the EC Treaty). But in purely practical terms, the combined effect of the defendant's domicile as the applicability criterion and the place of performance as the jurisdiction criterion is to confine the scope of the concept of Community dispute while allowing the place of performance criterion to indirectly influence applicability; there is an underlying assumption that to be applicable the jurisdiction criterion must be located in a contracting state. Article 5 has been declared by the Court of Justice to be inapplicable to a contract performed in a foreign state even though the defendant was domiciled in a contracting state.2

The possibility for plaintiffs domiciled in contracting states (Article 4) to proceed in what might seem to be fora non convenientes cannot be seen as corresponding exactly to what might be required by Article 6 of the EC Treaty; while the assimilation of foreign plaintiffs to national plaintiffs applies to Community nationals, it does not apply at first sight to non-Community nationals. But Article 4 makes no distinction.

§2. Territorial applicability of jurisdiction rules

85. For the purposes of this study, the general review of the applicability rule used in connection with jurisdiction must be amplified by assessment of the specific rules of applicability proceeding from the parties' nationality (matrimonial causes) or the children's place of residence (ancillary measures).

A. Possible types of measure

86. There are several options for "European applications" in the context of a Brussels II Convention. Either the Convention would establish an applicability rule dissociated from jurisdiction rules, or it would be content with an applicability criterion combined with the jurisdiction criterion.

A dissociated rule could take a variety of forms, using a single criterion like the Brussels Convention or combined or alternative criteria, depending on the objective pursued.

---

The Heidelberg proposal takes the technique of merging applicability and jurisdiction criteria, referring otherwise to national law. The uniform law would apply where the defendant was domiciled in a contracting state, or where the last shared habitual residence was in a contracting state or where the parties were of the same contracting state nationality.

87. Whether it is agreed to use an applicability criterion dissociated from or merged with the jurisdiction criterion, it is still possible to envisage two types of secondary applicability rules meeting different needs.

The first type of rule could help overcome impasses where there are doubts as to which of the jurisdiction criteria applies. In such cases it would be possible to adopt it as a marginal solution -- a *forum a necesseitate* -- on the basis of a territorial applicability criterion. The shared nationality of the two spouses, for instance, might be taken as a jurisdiction criterion. This criterion would be used on a secondary basis, rather than as an alternative to other jurisdiction criteria, where the spouses, the defendant or the plaintiff are not habitually resident in a contracting state within the meaning of the jurisdiction criterion. For example, if the spouses were both French but resident in Morocco, the Brussels II Convention would be applicable and permit the case to come before the French courts. But if the defendant resided in the European Union, or if the plaintiff resided there for the period prescribed by the Convention, the shared nationality criterion would not be applicable.

Another technique would be a *renvoi* to national jurisdiction rules where the case fell outside the Convention's territorial applicability criteria. The Heidelberg proposal follows this technique. The Brussels Convention (Article 4), as we have seen, also uses it, but adds a rule assimilating the foreigner to nationals where national jurisdiction rules apply. This has sometimes been perceived as a hostile act by the Community against non-member countries.3

Formulating a secondary rule of *renvoi* to the *lex fori* for cases where none of the jurisdiction criteria is applicable to the case would not only meet the objective of extending the scope of recognition and enforcement rules: it would also make it clear to the courts what rules they are to apply in such a case.

---

3 See, e.g., F. Jünger, "La Convention de Bruxelles du 27 septembre 1968 et la courtoise internationale: Réflexions d'un Américain" [1983] *RCDIP* 37. The somewhat unconvincing argument taken in the explanatory report (OJ C59, 1979, p. 21) is that in the absence of a possibility of using *fora non convenientes* a French national would be unable to act in the Community against a Belgian residing in the United States. Without prejudice to application of the Franco-Belgian Convention, the view does not seem justified: the case would seem to fall outside the Convention's jurisdiction rules so that national law is fully applicable, including Article 14 of the Civil Code. It is true that in the absence of assimilation, the foreign national (an Italian, say) could not proceed in France in a similar case.
B. Criteria for choice of applicability rule

88. Two types of criteria can guide the choice of applicability rule in the context of a Brussels II Convention. One would proceed from the legal basis for the Convention; the other would obey a practicability constraint. Both would assume that recourse to applicability rules dissociated from jurisdiction rules would be the exception, available only where solid grounds militated in favour of it and where it was drafted in such a way as to preclude difficulties of applying it.

89. The first question is whether the Union Treaty presupposes recourse to an applicability criterion that is more restrictive than the basic criteria underlying the jurisdiction criteria. If the instrument takes as alternative jurisdiction criteria, for instance, the defendant's residence, the last shared residence, the plaintiff's residence plus a qualifying factor of the spouses' shared nationality, each of these criteria could determine the territorial scope of the jurisdiction rules since it is understood that they apply only if the geographical connecting factor is in a contracting state. Should there be a further requirement that the defendant be resident in a contracting state or possess the nationality of such a state, even where the primary jurisdiction factor is the last shared residence?

There are many objections to founding applicability on a citizenship factor. That would require the applicability rule to be alternative, referring to the nationality of one or other party: the Convention would be applicable where the application was made or the case was brought by a national of a Member State. Citizenship further refers to nationality of a Member State, whereas the nationality that should logically be invoked would be that of a contracting state, for the Union States might not all be contracting parties. Moreover, the citizenship argument would be sustainable only if the Convention's legal basis was a suitable provision of the EC Treaty, say Article 220. Lastly, a territorial criterion -- domicile or habitual residence -- in place of nationality is more appropriate in terms of civil procedure but can hardly be founded on citizenship as matters stand.

By way of comparison, Article 220 actually refers to nationals of the Member States. This did not prevent the Brussels Convention from giving preference to domicile over nationality. The explanatory report offers a range of reasons for this: inadequacy of nationality as a criterion in civil procedure, difficulty of deciding which nationality to use where one of the parties is a national of a third state, problems of conflicts of nationalities. In addition, confining the Convention to nationals of Member States would have excluded the Convention in a case brought against, for instance, an American domiciled in Germany on a cause (performance of a contractual obligation) arising in France.

90. There is the further complication of the practicability of an applicability criterion dissociated from the jurisdiction criterion. The court would have to consider the question of international jurisdiction. If, for example, the nationality of one of the parties was used, the Brussels II Convention would be applicable to the divorce of a Belgian from an American or of a German from a French citizen but not of an American from a Mexican. Clearly there would be no jurisdiction to hear a dispute on an application from a Union citizen -- formally within the Convention -- unless one of the jurisdiction criteria was

\footnote{See Chapter 2.}
\footnote{Cited supra. n. 3, p. 14.}
linked to the territory of a contracting state. The proceedings for the divorce of the Belgian from the American, which would be covered by the Convention, could be brought within the Union if the defendant was habitually resident there. In the absence of residence or of any other jurisdiction criterion -- qualified residence of the plaintiff or last shared residence -- no action would be possible in a contracting state, since the plaintiff would not be able to plead the secondary criterion of nationality if the application was within the Convention's territorial scope as defined on the basis of the nationality criterion. This would be substantially unacceptable to several states, which wish their citizens to be able to act in their natural courts rather than in foreign courts, possibly in a distant state applying rules of civil procedure differing seriously from those of their own state.

The absence of an applicability rule dissociated from the jurisdiction rules in the Heidelberg proposal flows from a desire to reduce to a minimum the application of national rules so as thereby to reduce the risk of parallel sets of national and convention-based jurisdiction rules: the national rules would remain applicable only on a secondary basis where none of the Convention's jurisdiction criteria was situated in a contracting state. The argument flows first and foremost from a concern for simplification, and therefore transparency, of the applicable provisions. It also helps reduce the frequency of cases in which it would be necessary to recognize, on the basis of common rules, a foreign decision given by a court accepting jurisdiction on the basis of national rules following a renvoi by a secondary applicability rule like that of Article 4 of the Brussels Convention.

Applying a given applicability rule dissociated from the jurisdiction rule can have yet other pernicious effects. If, for instance, the defendant's nationality was the criterion, a French plaintiff would have to proceed under the Convention against a Belgian spouse even if both resided outside the European Union; consequently, no action could be brought in any Member State and the plaintiff would be obliged to proceed in a third state under that country's laws. By contrast, a French citizen proceeding against an American in like circumstances could do so in the French courts regardless of the Convention, pleading the French national rules.

91. To be practicable, where the applicability rule is dissociated from the jurisdiction rule, that fact would have to be stated very clearly.

The Brussels Convention does not expressly define its territorial scope by a provision akin to the Article 1 definition of its material scope. The solution has to be deduced from a combined reading of the first paragraph of Article 3 and Article 4: if the defendant is domiciled in a contracting state, he can be sued in another contracting state only as Title II permits. In other words, national rules are not applicable here. As we have seen, Article 4 amplifies this by referring to cases where the plaintiff is domiciled in a contracting state, but only to provide a renvoi to national law qualified by an assimilation of foreign litigants to nationals.

---

6 The explanatory report (ibid., p. 19) recognizes that the list of fora non convenientes in which the defendant cannot be sued is not strictly essential since only the Convention is competent to determine jurisdiction.
If the Brussels II Convention contained an applicability rule dissociated from jurisdiction criteria, clear drafting would be vital. Secondary *renvoi* to national law where the conditions for its application are not met would help to clarify matters.

On the other hand, a provision inspired by a combined reading of Articles 3 and 4 of the Brussels Convention, prescribing an applicability rule dissociated from the jurisdiction criteria, would generate difficulties of interpretation.

Assume a rule that a defendant domiciled in or having the nationality of a contracting state cannot be sued in another state except as provided by the Convention; a second provision would prescribe that where the rules of the Convention do not permit the courts of a contracting state to be designated, jurisdiction is determined by the *lex fori*. The combined effect of these two provisions could be far from felicitous.

The first provision does not clearly prescribe what is to happen in the opposite case of a defendant domiciled in a third state and having its nationality. A superficial *a contrario* interpretation would suggest recourse to the *lex fori* under the second provision, as would be the case under the Brussels Convention. In reality, where the last shared residence is in a Union State but the defendant is domiciled in a third state and has its nationality, the jurisdiction rule based on last shared residence would apply. In other words, the first provision — referring to the defendant's nationality or domicile — is not a rule of applicability but a material rule of protection.

Conversely, if the defendant is a national of a contracting state but all other connecting factors are with third states, none of the Convention's provisions can be used to determine jurisdiction. The temptation here is to use the secondary rule of *renvoi* to national laws, but the rule of protection is against this, so it is presumably impossible to commence an action against this defendant in a contracting state.

Lastly, if the defendant's residence and the parties' shared nationality were on the list of jurisdiction criteria, the first provision would be of little use; in any event, a defendant resident in or having the nationality of a contracting state would always be within the Convention's jurisdiction rules and the courts would never, therefore, be left to apply the national rules.

C. *Choice of an applicability criterion for ancillary proceedings*

92. If the Brussels II Convention embraces ancillary applications in matters of children, the question arises whether the children must be resident within a contracting state as a condition of applicability.

At first sight a provision subordinating applicability to residence in a contracting state would be consonant with standard practice. The Hague Convention of 5 October 1961 basically applies only where the child habitually resides in a contracting state. The point is actually obvious enough, since the criteria merges with the jurisdiction criterion and jurisdiction cannot be conferred on a third state. Where the Hague Convention confers jurisdiction on the state of the child's nationality, it adds the child's nationality as a
criterion of applicability. It is irrelevant whether the application is for principal or ancillary measures.

If the Brussels II Convention does not take the child's place of habitual residence as a jurisdiction criterion, there is no need to insist that the residence be in a contracting state.

93. Would recourse to an applicability criterion be advisable? Probably not, partly for the sake of consistency and partly for the sake of simplifying the identification of the applicable law -- transparency.

There is no apparent reason why the territorial applicability of ancillary applications in whatever form -- formulation of a special rule or merger with the jurisdiction rule -- should be accepted otherwise than by reference to the principal action. For example, if there was a requirement that the child be resident in a contracting state, it would not make sense for the divorce application to be subject to the Convention where the child was resident in a contracting state but neither of the parents was. Although this case would be within the Convention, it would by definition be ineligible for any of the jurisdiction criteria applicable to the main action for a divorce (residence of one or both spouses).

Conversely, if the child did not reside in a contracting state, the jurisdiction article would not be applicable. This does mean that the courts would have no jurisdiction, merely that national rules would apply.

Use of the child's residence as an applicability criterion would make things difficult for the court if there were several children, some residing in a contracting state and some not.

94. There are drawbacks to rejecting a specific applicability criterion for ancillary actions.

For one thing, the Brussels II Convention could apply where the defendant resides in a contracting state but the family residence (where the plaintiff and the couple's children live) is in a third state. It would suffice if the court were empowered to decide whether it is the forum conveniens as regards measures in respect of the children, having regard to their interests as the paramount consideration.

For another, if the Convention established a judicial-cooperation mechanism, it would operate only if the child resided in a contracting state since the foreign authority requested would by definition be that of the child's state of residence. This, it is true, puts a veritable limit on the scope of cooperation, but it could be overcome in one of two ways: either the institutional provisions for cooperation would explicitly be confined to cases where the child resides in a contracting state (there being no cooperation if this test is not satisfied), or the mechanism would extend to certain forms of cooperation with third states being parties to conventions on measures in respect of children such as the 1961 Hague Convention (assuming, however, that Convention contains cooperation provisions compatible with those of the Brussels II Convention).
§3. Territorial applicability of rules on the effectiveness of decisions

95. The fundamental principle for determining the territorial applicability of rules governing the effectiveness of foreign decisions is that the decision must have been given in a contracting state. If the state of origin is a third state, that does not mean the decision cannot be recognized, simply that the national rules will apply in the matter.

In the context of a Brussels II Convention, two types of point need making; one is based on past experience and the other concerns relationships between conventions.

A. Definition of decision given in a contracting state

96. The distinction between decisions given in a contracting state and decisions given by the authorities of a contracting state is not wholly without substance. The Brussels Convention uses both terms to express its authors' meaning clearly; while Article 26 refers to "a judgment given in a Contracting State" while Article 25 requires the judgment to have been given "by a court or tribunal" in a contracting state.

The requirement that the judgment have been given by a court/tribunal or authority of a state excludes decisions which are given in a contracting state by a foreign authority, whether or not contrary to the law of the relevant contracting state.

By way of comparison, the Hague Convention of 1 June 1970 on divorces and legal separations covers decisions "given" in a contracting state. But, as we have seen, there have been abundant controversies surrounding this expression, particularly in relation to statements of repudiation made before diplomatic and consular authorities.

In the context of a Brussels II Convention, it would be technically possible to require that the decision either be given by an authority of a contracting state or be given in a contracting state in compliance with such state's laws. It must be ensured that a statement of repudiation made at a Moroccan Consulate in Belgium cannot be recognized in France, since in Belgium jurisdiction lies exclusively with the courts. The legislation concerned is legislation conferring jurisdiction ratione materiæ and not, of course, any other kind of international rule of jurisdiction. The renvoi to national laws should not be permitted to facilitate review of indirect jurisdiction by reference to national provisions regulating territorial jurisdiction.

Opening the gates to decisions given "in" a contracting state would present a drafting problem. The explanatory report would have to be very clear on the matter. But politically it remains to be seen whether the Union States will be ready to include decisions dissolving marriages that are given by authorities in third states. It is true that a large segment of the population is potentially concerned, but that is hardly a convincing argument: nationals of non-member countries who obtain their divorce in their own country are not covered. It would be preferable to encourage nationals of non-member countries to make full use of their host country's courts. Incidentally, the proposed solution would not deprive the relevant decisions of their effectiveness as such but simply subject them to the laws of the requested state.

---

7 Supra, paragraph 29.
The solution of confining the Brussels II Convention to decisions given by the authorities of a contracting state would be conducive to full consistency with the Brussels Convention.

B. Decisions given in a third state party to a convention relating to children

97. Confining the Brussels II Convention's material scope to applications for measures relating to children that are ancillary to a petition for annulment, divorce or separation means that a foreign decision ordering such measures in the context of a principal action unrelated to a petition for annulment, divorce or separation is excluded from the recognition and enforcement rules. The question is accordingly left for the lex fori, which may include relevant international conventions.

The international free movement of such decisions needs to be secured either by extending the material scope of the Brussels II Convention\(^8\) or by inserting a clause allowing some form of interaction between it and the Hague Convention of 5 October 1961 (as amended) on the protection of infants. Further discussion of this will be found in the following section.\(^9\)

SECTION 2. DETERMINING RELATIONSHIPS WITH OTHER INTERNATIONAL INSTRUMENTS

98. Since there are international conventions that could complicate the implementation of the Brussels II Convention, meticulous attention will have to be paid to conflict resolution. A general survey of techniques for the purpose will help to clarify the solution to the problem.

Before the analysis, it is worth beginning with a summary of the background. It was shown in Chapter I that, formally speaking, none of the existing conventions precludes a Brussels II Convention. But that does not mean that attention should not be paid to the interaction of treaties. Some may potentially cover some of the subject matter of the Brussels II Convention. The Hague Convention of 1 June 1970 concerns only recognition of divorce and legal separation judgments. The Hague Convention of 5 October 1961 covers direct jurisdiction in respect of all measures relating to children (ancillary or principal, interim or final, and relating to parental authority or whatever) and recognition of them, but not enforcement. The Luxembourg Convention of 20 May 1980 covers recognition and enforcement of custody decisions. The Hague Convention of 25 October 1980 does not formally cover any of the legal questions to which the Brussels II Convention relates.

It has already been stated that the existence of these instruments does not remove the need for a Brussels II Convention. Some of them are of limited scope and others have been found difficult to operate.\(^{10}\)

---

\(^8\) Supra, paragraph 60.
\(^9\) Infra, paragraphs 112 and 116 et seq.
\(^{10}\) See Chapter 1.
99. Among these instruments, the Hague Conventions of 5 October 1961 and 25 October 1980 are worthy of special attention. The former covers a substantial part of the area covered by the Brussels II Convention, and the second covers related matters and has worked well enough to be inescapable.

The problem of conflicts between the Brussels II Convention and the 1961 Hague Convention is perhaps not of major significance since a custody order is always open to review. The existence of contentious proceedings for nullity, divorce or separation will generally constitute a change of circumstances such as to warrant a review. When dealing with an individual case, the authorities of the state of divorce will begin by considering their international jurisdiction to hear ancillary applications. Then they will consider any objections based on foreign measures taken, having regard to the question whether the law applicable to the substance of the case by reason of their own conflict rules allows the decision to be changed for changed circumstances.

There are six typical situations in which there may be an interaction between the Brussels II Convention and the 1961 Hague Convention. They depend on applications being made before the authorities of the state of divorce, being a party to the Brussels II Convention, and the authorities of the state of the child's residence. It is assumed that the scope of the Brussels II Convention embraces ancillary measures in respect of the children (conferment and exercise of parental authority).

Case 1: Divorce in a Union State & residence of child in a third state party to the Hague Convention. Each authority bases its jurisdiction on each of the conventions, without connecting rules. In the state of divorce, the effectiveness of the foreign measure does not depend on the Brussels II Convention; in the state of residence, it depends on national law.

Case 2: Divorce in a Union State & residence of child in a Union State not being party to the Hague Convention. The authorities of the state of divorce base their jurisdiction on the Brussels II Convention and the authorities of the state of divorce on national law (the application being in the main proceeding); no connecting rules. The Brussels II Convention covers the effectiveness of the foreign ancillary measure in the state of residence but not the effectiveness of the foreign principal measure in the state of divorce.

Case 3: Divorce in a Union State & concurrent application for divorce in another Union State (not being party to the Hague Convention) where the child's residence is located. Ancillary applications are made in both states. The Brussels II Convention governs jurisdiction and the effectiveness of decisions in both.

Case 4: Divorce in a Union State & residence of child in a Union State, being party to the Hague Convention. The authorities of the state of divorce base their jurisdiction on the Brussels II Convention, and the authorities of the state of residence on the Hague Convention; no connecting rules. The Brussels II Convention does not determine the effectiveness of the foreign principal measure in the state of divorce; in the state of residence, it governs the effectiveness of the foreign measure.
Case 5: Divorce in a Union State, being a party to the Hague Convention, & residence of child in a Union State, also being a party to the Hague Convention. The authorities of the state of divorce must decide whether to base their jurisdiction on one or other of the conventions, and the authorities of the state of residence base theirs on the Hague Convention. In the state of divorce, the effectiveness of a foreign measure depends on the Hague Convention (since the Brussels II Convention does not cover principal measures); in the state of residence, effectiveness depends on a choice between conventions: the Hague Convention might well have the effect of precluding recognition on grounds of violation of an indirect jurisdiction rule.

Case 6: Divorce in a Union State, being a party to the Hague Convention, & residence of child in a third state, also being a party to the Hague Convention. The authorities of the state of divorce must decide whether to base their jurisdiction on one or other of the conventions: the authorities of the state of residence base theirs on the Hague Convention; no connecting rules. In both states, the effectiveness of the foreign measures depends on the Hague Convention.

These cases suggest that the risk of conflict is limited (to cases 5 & 6), that the lack of a connecting factor needs to be supplied and that extending the Brussels II Convention to applications in principal proceedings would avert the risk of asymmetrical solutions so long as the Hague Convention is not in force for all Union States.

§1. General conflict resolution techniques

100. The resolution of conflicts between conventions does not depend only on the final provisions of the treaty that establish rules of precedence but also on specific provisions relating to the rules of jurisdiction or recognition enacted either unilaterally by the treaty or by the various potentially concurrent treaties.

A. Compatibility rules

101. B. Dutoit and F. Majoros have offered an effective typology for resolution of the traditional conflict between conventions. They distinguish between compatibility clauses in the treaty itself and the general principles applicable on a secondary basis. In reality, general principles are commonly applied in convention-making.

I. General principles

102. Three principles govern the resolution of conflicts between conventions in the absence of an express conflict clause.

The maximum effectiveness rule gives priority to the instrument that best protects the interest defended by the various instruments in play, which basically means the instrument that imposes the least burden of formalities or makes recognition easiest. Where child protection is concerned, that means the instrument that affords the best protection. Where

direct jurisdiction is concerned, it might be the instrument that enables the plaintiff to bring the action, but the position is delicate since the rules governing direct jurisdiction generally tend to seek a balance between the interests of plaintiff and defendant, as can be seen from the general interpretation placed on the Brussels Convention by the Court of Justice.\textsuperscript{12}

The \textit{materialis specialis} rule gives priority to the treaty that most specifically governs the subject-matter of the case. Specialty is determined on the basis of the subject-matter, not of the states concerned; it is rare for a treaty concluded in a regional context to exclude treaties concluded in a broader international context.\textsuperscript{13} The Brussels Convention, for instance, yields to the Hague Convention of 15 April 1958 on maintenance obligations in respect of children as regards the general rules on recognition and enforcement.

The rule regarding subsequent treaties is a secondary rule, applying in the absence of others. It flows from Article 30 of the Vienna Convention on the Law of Treaties.

2. \textit{Treaty practice}

103. Compatibility clauses may consist either of a waiver of priority in favour of an earlier treaty or of an express assertion of priority over an earlier treaty. Obviously, the second alternative will be the more likely where the new treaty constitutes some form of progress, perhaps by way of revision of the law made by the earlier treaty. The first alternative will be met where the earlier treaty is of sectional interest in comparison to the new one.

The priority rule may apply both to past and to future conventions. Its impact may be modified by a term that is dependent on the "competing" instrument whereby priority is waived in favour of a "competing" instrument that expressly asserts its own priority.

Alternatively, the compatibility clause may consist of a substantive rule giving effect to the treaty's purpose: priority will attach to the instrument that is best capable of achieving, say, the free movement of decisions of public authorities (maximum effectiveness principle).

It is far less common for a treaty to confer priority on national laws of contracting states. The solution might be comprehensible in the context of a specific substantive policy (as in the case of the form of free movement under consideration) though not in the absence of one. But an illustration can be found in the Rome Convention of 19 June 1980 on the law applicable to contractual obligations (Article 23).

It is equally uncommon for a treaty to waive priority in favour of regional or bilateral instruments between some of the contracting states.\textsuperscript{14}

But there is a trend for treaties to contain a general waiver of priority in favour of all other instruments expressing a determination to exercise it. This is because there are now so many treaties that their authors can no longer settle all potential conflicts unilaterally.

\textsuperscript{12} See Case 189/87 \textit{Kafefis} [1988] ECR 5565.

\textsuperscript{13} The situation does arise in the Nordic context.

\textsuperscript{14} Hague Convention, 1.6.1970, second paragraph of Article 18.
Moreover, it is easier to secure ratification of an instrument that leaves signatories free to sign other treaties as they wish. But in reality the general waiver constitutes a kind of failure to expressly resolve conflicts and leaves the general principles to apply.

104. The Brussels Convention meticulously regulates the position regarding conflicts.

It asserts its own priority over bilateral conventions (Article 55). It reaffirms the principle that instruments governing jurisdiction or recognition or enforcement in relation to specific matters take precedence over the general instrument (Article 57(1)). And it permits dissociation of distinct areas of rules governing jurisdiction, recognition and enforcement (Article 57(2)). The recognition rules are applicable to decisions given in a contracting state where the foreign court based its jurisdiction on another convention applicable in a specific matter. And the enforcement rules are applicable to decisions given in a contracting state even where the recognition of the decisions flows from another convention.

The Convention further waives priority in respect of recognition or enforcement rules where the original court based its direct jurisdiction on a court that was not the forum conveniens as defined in Article 4 (Article 59).

B. Preventive solutions

105. Other less traditional conflict resolution approaches might be envisaged on a preventive basis, meaning that they have an impact on the actual content of the treaty and preclude the very possibility of conflict. The ideal method is to reconcile the contents of the two treaties: if one, for instance, establishes a rule of exclusive jurisdiction in a given matter, the other would reproduce or refer to it to create the same exclusivity as regards recognition and enforcement.

Two preventive techniques are set out below. They and other techniques are then illustrated in the context of the Brussels II Convention in the following paragraph.

1. Interinstrumental settlement of lis pendens and related actions

106. The idea would be that, where treaties govern related matters, there would be what might be termed an interinstrumental interface either between states party to both instruments or between states party to one of the instruments. The former alternative is a restrictive one and is meaningful only where the two instruments deal with distinct but related matters.°

---

° The Lugano Convention of 16 September 1988 on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (OJ L 391) follows the second technique, by Article 54b(2)(b) it has priority over the Brussels Convention ‘in relation to a lis pendens or to related actions ... when proceedings are instituted in a Contracting State which is not a member of the European Communities and in a Contracting State which is a member of the European Communities’. The solution is a primarily formal one, since the two instruments are broadly identical. Moreover, the list of states bound by them overlaps extensively, since all the signatories to the Brussels Convention are presumed to have ratified the Lugano Convention; this explains why the Lugano Convention takes precedence.
This would, admittedly, be something of an innovation in international law of procedure, as questions of *lis pendens* and related actions are usually dealt with only between states parties to the same treaty. But it has already been done in conventions. As matters stand this solution would be no more inconsistent than an international rule of *lis pendens* or related actions established by national law without any uniform rules to set a framework. French law supplies an example. The common-law doctrine of the *forum non conveniens* is another.

2. General renvoi to another treaty

107. A second technique would consist of activating the provisions of another treaty, either by reproducing them or by renvoi to them. It could be used to define a word or expression or a condition for application of the treaty. A treaty covering, for instance, child custody, might refer to the definition given in a specific instrument. Or it might establish a rule whose content needs to be considered in the light of another instrument. The Brussels Convention illustrates this as regards verification of proper service of a court document on the defendant, which matter is to be governed by the Hague Convention of 15 November 1965 if "the document instituting the proceedings or notice thereof had to be transmitted abroad in accordance with that Convention" (Article 20). An example can be found in Community law in Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, which sets a period of protection based, for copyright, on Article 11 of the Berne Convention of 9 September 1886 (as amended on many occasions) for the Protection of Literary and Artistic Works and, for related rights, on Article 12 of the Rome Convention of 26 October 1961 for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations. Neither of these Conventions has actually been ratified by all the Union States, but that fact by itself does not make the technique unworkable. The technique consists in effect simply of taking over material used in one instrument -- not the formal instrument as such in its entirety -- and incorporating it in another as if the instrument making the reference had contained that material. The practice is common in national legislative drafting.

The technique of referring to another instrument does, of course, raise the question of the Court of Justice's jurisdiction to interpret the other instrument where the Court has such jurisdiction under the instrument making the reference. Just as the Court would agree to interpret a provision of a Community treaty or a treaty that in effect implements a Community legislative instrument (where a directive depends on an international convention for its application, as is the case of Directive 92/100/EEC), it could exercise that same jurisdiction if required to interpret any provision for the implementation of the Brussels II Convention. The fact that the interpretation would be binding only on the
Union States and not on the other parties to the Hague Convention has no effect on the jurisdiction as such; there is a similar phenomenon as regards conventions between the Community and non-member countries.

§2. Possible techniques for resolving conflicts in the context of the Brussels II Convention

108. Analysis of existing conventions has shown that none of those currently in operation in Union States would formally debar a new instrument on jurisdiction and enforcement of judgments in family matters. But the legislator, especially if he wishes to avoid creating uncertainties in the law, must still remember to incorporate compatibility clauses that will clarify the relationship between instruments; they would be easy enough to draft.

But effectiveness demands that there be provisions to remove the risk of conflict.

A. Compatibility clauses

109. The drafting of compatibility clauses could be based on existing international practice or on general principles. The option would depend on the type of instrument.

Relationships with bilateral conventions could clearly be governed by the same principle as when the original Brussels Convention was drafted -- Brussels II would take precedence. A similar solution could be adopted for regional conventions applying to specific matters. It is the very spirit of the Brussels Conventions, which are related to the Treaty on European Union, that there should be uniform rules applying throughout in all Union States.

The Hague Convention of 25 October 1980 on child abduction does not need a specific compatibility clause since its subject-matter is without effect either on international jurisdiction or on the international effectiveness of decisions. This is not to say that there is no risk of malfunctioning: the risk must be countered by means of a preventive rule.

I. Maximum effectiveness rule

110. Relationships with conventions that have some impact on the effectiveness of decisions must be governed by the maximum effectiveness rule, which would give precedence to whichever provision was the most conducive to the international free movement of judgments.

\[\text{the Treaty did not apply - Case C-297/88 Dzodzi [1990] ECR 1-3763; Case C-231/89 Gmurzynska-Bischofer [1990] ECR 1-4003. But there are limits to what can be done with this: in Case C-346/93 Kleinwort Benson (judgment given on 28 March 1995) the Court declined to interpret the Brussels Convention where national law used it solely as model legislation with the possibility of modifying it and without conferring mandatory status on the interpretation.}\]

\[\text{Nordic Council conventions have still to be checked on this point.}\]

\[\text{Supra, paragraph 54.}\]

\[\text{Infra, paragraph 114.}\]

\[\text{Supra, paragraph 102.}\]
The Hague Convention of 1 June 1970 on divorces and legal separations is an example. Member States that are parties to it can be assured that ratifying Brussels II will do nothing to reduce its effectiveness.

The Luxembourg Convention of 20 May 1980 on child custody can be dealt with in the same way as the Hague Convention on divorce.

2. Priority for conventions on specific matters

(a) Brussels Convention on maintenance obligations

111. As regards maintenance obligations, the Brussels Convention needs no specific compatibility clause since the Brussels II Convention does not deal with these matters either in relation to children or as between spouses. If such matters were to arise in ancillary proceedings, there would still be no threat of conflict: the two Conventions can even be said to amplify each other. But if Brussels II covered principal actions regarding maintenance obligations involving children or as between spouses, there would be a conflict needing resolution. The Brussels Convention could be given precedence by a general clause relating to specific conventions. The general rule would be more delicate to apply if Brussels II determined special jurisdiction rules for maintenance proceedings as principal actions, as both conventions would then contain a special rule. The scope of Brussels II would presumably be narrower (specific proceedings regarding maintenance obligations between spouses and between parents and children).

The territorial scope of the Brussels Convention would be narrower than that of Brussels II: its direct jurisdiction rules would to all intents and purposes be confined to disputes involving a defendant domiciled in a contracting state whereas Brussels II, absent a general applicability criterion of this type, could embrace other situations such as cases where the last shared residence is in a contracting state.

The question is whether it would be consistent in the context of the Community area for Brussels II to extend to maintenance matters: is it conceivable to take criteria both of the defendant’s domicile and the residence of the claimant when the defendant is domiciled in a Union State and to add the last residence criterion where the territorial scope test is not satisfied? There is a counter-argument that this last criterion may be appropriate in the case of relations between spouses whereas the scope of the Brussels Convention is much broader (maintenance obligations as between collateral relations, etc.).

The interaction of the respective territorial factors of the Brussels and Brussels II Conventions might be further hampered if the applicability criteria are domicile for the former and habitual residence for the latter. The two concepts are not co-extensive, as one may refer to an administrative formality of registration with a public authority and the other to a purely de facto situation.

---

Supra, paragraph 60.
112. Use of a compatibility clause to govern relationships with the Hague Convention of 5 October 1961 on the protection of infants is more delicate if Brussels II extends to ancillary proceedings relating to custody. Admittedly, analysis shows that the Hague Convention does not preclude states from entering into new conventions, but a proper solution will still have to be found.

Two types of case have been identified\(^2\) in which the authority will have to choose between the two instruments as a basis for its jurisdiction -- where the state of divorce and the state of the child's residence are both parties to the Brussels II Convention and the Hague Convention, and where both are parties to the Hague Convention but only the state of divorce is a party to Brussels II. In the former case, there would also have to be a choice in order to rule on the effectiveness of the foreign measure in the state of residence.

Of the traditional conflict resolution rules, a general formulation of the *materia specialis* rule would not suffice to waive priority since, in the matter of applications for measures relating to children, the two instruments are of comparable specialization. Measures relating to divorce form a set (parental authority and maintenance obligations) that is broader than the set of measures relating to children, but they constitute a special category of disputes in relation to the whole set of children-related measures (parental authority and all forms of protection).

So there might be a clause specifically waiving priority in favour of the Hague Convention. But unconditional priority would not be without its drawbacks, for it could well deprive the authorities of the state of divorce of their jurisdiction if the Hague Convention did not confer it on them. It might be modulated by a proviso that the Hague Convention must provide the protection aimed at by the two instruments more effectively. In other words, a reference to the child's paramount interest would be appropriate in such a clause if its presence was not appropriate in the main corpus of the rule governing jurisdiction in child-related matters.\(^2\)

Another solution, inspired by the maximum effectiveness rule, would be to allow recognition or enforcement of a measure taken pursuant to the Hague Convention by means of the relevant provisions of Brussels II, following the example of Article 57(2) of the Brussels Convention.\(^2\)

A rule giving priority to the Hague Convention would not have the same effect as a rule excluding ancillary applications from the material scope of the Brussels II Convention. Including such applications would enable the authorities of the state of divorce to enjoy jurisdiction in situations not within the territorial scope of the Hague Convention, namely when the child resides in a state that is not a party to the Convention. Including ancillary applications, possibly combined with a priority clause, would be preferable to excluding them.

\(^2\) Supra, paragraph 99.
\(^2\) Supra, paragraphs 68 and 73.
\(^2\) Supra, paragraph 104.
A technique closely resembling the priority clause would be a reference to the Hague Convention in the Brussels II Convention itself; this is a preventive measure considered below.

B. Preventive measures

113. The method is to adjust the content of the Brussels II Convention to make it compatible with the operation of other conventions or to facilitate the operation of all of them. The analysis of existing conventions suggests that such adjustments could be made solely for the Hague Conventions of 5 October 1961 (protection of infants) and, to a lesser extent, 25 October 1980 (child abduction).

But first, it is worth highlighting the potential beneficial effect of Brussels II for the operation of those Conventions. By encouraging the free movement of ancillary measures relating to children and divorce and by regulating direct jurisdiction in divorce matters, it would greatly soften the impact of international family disputes.

By facilitating the international recognition of custody measures in divorce cases, the Brussels II Convention would reduce the risks of failure to return children removed unlawfully. If a custody decision was taken in the state of divorce but the child did not reside there, it would be fully eligible for recognition in the state of residence, being a party to the Brussels Convention, and would be an act that can be pleaded in opposition to a wrongful removal for the purposes of the 1980 Hague Convention. Full recognition would also be a duty of the authorities of the state to which the child was wrongfully taken.

International recognition of a divorce decision proper, not accompanied by ancillary measures, would also be conducive to harmonized custody measures wherever they were taken after the dissolution.


114. In the context of the Hague Convention on child abduction, it is necessary to ensure as far as possible that the authorities of the state of divorce cannot decide on the status of a child who is in their territory solely as a result of being wrongfully taken there. That is the price of synergy between the two conventions.

Let us assume two states both parties to the Brussels II and Hague 1980 Conventions. If an authority in the state of divorce has given a decision in a case concerning a child who is on its territory after being wrongfully taken there, the measure might be ineligible for recognition in the state of residence, putting the requested state in a dilemma between the Hague Convention and the Brussels II Convention, but what is more, the measure decided on by the authority in the state of divorce will have to be contradicted in another state when the child is subsequently taken there as preference will then have to be given to the Hague Convention.

---

29 Supra, paragraph 105.
There is also a dilemma for the authorities in the state of divorce. Experience with applying the 1980 Convention shows that the courts are hesitant on this point; in some states they believe they have jurisdiction even where the child's presence in the state, constituting residence for the purposes of the lex fori, is the result of a wrongful removal thither. But the Hague Convention forbids them to rule on the substantive issue of custody before a 'reasonable time' has elapsed (Article 16).

115. The solution to the conflict will not lie simply in defining habitual residence. The definition tends to be regarded as a question of fact with concepts of intention of duration sometimes grafted on. It cannot be treated as the same thing as residence determined in accordance with the law.

It might be thought that prohibiting the authorities of the state of divorce, to which the child has been taken wrongfully, from ruling on the substance of the custody issue (Article 16 of the Hague Convention) would suffice to solve the problem. Matters would actually be clearer if the prohibition were formulated as a ground of lack of jurisdiction in the Brussels II Convention; this would avert the risk of interpretation difficulties.

There are several possible ways of presenting the rule.

One very explicit way would be to provide that the authorities of the state of divorce may not rule on ancillary applications in breach of the 1980 Hague Convention. This would not necessarily require all the Union States to have ratified the Hague Convention; a recommendation that they do so might, however, be appended. It would only be necessary to assume that regard is had to the Convention solely in those cases where it is actually applicable, i.e. where a child residing in a contracting state is removed to another contracting state.

To circumvent this territorial limit on the Hague Convention, a renvoi by incorporation\(^{30}\) might be made in the form of a provision that the authorities of the state of divorce must proceed in conformity with the Hague Convention, which would refer, then, to the text of the Convention without regard to its applicability in the specific case.

Other formulations, though less clear, might achieve the same result. The concept of lawful habitual residence might be one of them; it would assume settlement at a place of residence in conformity with the lex fori, including the Hague Convention if it has been ratified in the relevant state. The Heidelberg proposal refers, at the third indent of Article 2(1), to the spouse with whom a child, being a minor over whom he/she has the right of custody, habitually resides, it being presumed that custody must be exercised lawfully for that purpose. An explicit requirement of lawfulness would be open to the same risk of ambiguity,\(^{31}\) and the explanatory report would have to make things clear.

---

\(^{30}\) Supra, paragraph 107.

\(^{31}\) Because the lawfulness of residence could be taken to refer to an authorization scheme, depending on the applicable law, or because the Hague Convention allows the court to hear and determine custody cases in certain circumstances, even in the event of wrongful removal.
2. The Hague Convention of 3 October 1961

116. The interaction of the Brussels II Convention with the 1961 Hague Convention could require a series of provisions governing related actions and limitation of the jurisdiction of the authorities of the state of divorce on territorial grounds, time grounds or substantive grounds. Alternatively, it might operate by means of a general or partial renvoi to the Hague Convention.

It will readily be understood from these hypotheses that the interaction will be truly workable only if the reference factor from the Hague Convention is a definite jurisdiction criterion such as the child's habitual residence; current reviews are moving in that direction. As the Convention stands, there is too much uncertainty in the way nationality and residence factors operate, and the Convention itself offers no pointers as to which should be preferred. If the Brussels II Convention took over an applicability criterion from the Hague Convention as currently drafted, the reference could probably be only to habitual residence.

(a) Lis pendens and related actions in the international context

117. A related actions rule, of course, is the best way of averting the risk of contradictory decisions. A related actions rule is likely to be more effective than a lis pendens rule as distinguished in the conventional way of the law of civil procedure. If an application for measures is ancillary to a divorce petition, an application made as principal application in another state will not have the same cause. Lis pendens would be applicable only in the exceptional situation of concurrent divorce proceedings in different states on the same cause.

An interinstrumental related actions approach\textsuperscript{32} would seem appropriate\textsuperscript{33} between authorities bound by the same set of rules governing applications for measures in respect of children, viz. the provisions of the 1961 Hague Convention.

Adoption of such a rule presupposes a modicum of confidence in the operation of the foreign court in terms of international jurisdiction. This, it may be assumed, now exists in the context of the Hague Convention, especially if the outcome of the review now in motion is to concentrate applications for measures on the criterion of the child's habitual residence.

It would be preferable, though not essential, for each of the conventions to establish a solution.

118. In practice, the rule would apply only if a divorce petition was made with an application for ancillary measures in a state that is a party to the Brussels II Convention and a principal application was made at the same time in a Hague Convention country where the child normally resided. If the proceedings both concerned applications ancillary to divorce proceedings commenced simultaneously in Union States, only the Brussels II Convention's lis pendens rules would apply. Alternatively, where the divorce petition was

\textsuperscript{32} Concept presented supra, paragraph 106.
\textsuperscript{33} Typical cases presented supra, paragraph 99.
presented in a Brussels II state but an ancillary application was made in another state, the response should be the same as to a principal application made in a foreign state.

It can be seen that an interinstrumental related actions rule would be useful even as between Brussels II states in so far as Brussels II does not cover principal applications. The Convention's specific *lis pendens* and related actions rules would not be applicable as between the application ancillary to the divorce petition and the principal application. It would not be enough to extend them to principal applications as long as the Convention contains no specific rules on jurisdiction in respect of such applications.

It follows from the foregoing that adopting an interinstrumental related actions rule would be a valuable incentive to ratify the Hague Convention, since it would make it possible to settle the all too common conflict between ancillary and principal applications made in different states.

119. What should be done to solve the problem of *lis pendens* and related actions in the context of a clause for the avoidance of conflicts between conventions?

It might be tempting to adopt a rule evincing a material policy seeking to give practical effect to a specific principle operating either globally or in terms of proximity. The former would favour jurisdiction for the authorities of the state of divorce; the latter would favour the authorities having jurisdiction under the Hague Convention. The very presence of such a provision would manifest the draftsmen's concern to have regard to constraints of proximity.

But conferring basic priority on the authorities of the state of the child's residence where cases are brought before them would run the risk of depriving the jurisdiction conferred by the Brussels II Convention in relation to ancillary applications of its practical effect since it would be enough for the defendant to commence proceedings in the state of the child's residence after commencement of the divorce proceedings to block action on the ancillary application.

Inevitably, therefore, the traditional solution -- priority for the authority first seised -- will have to be preferred. A relaxation of this principle might be envisaged, perhaps by giving an incentive for the authorities in the state of divorce, if they are first seised, to consider whether, in the light of the circumstances of the case, the foreign authority is not the more *conveniens*: the predominant interest of the child might be a useful pointer here.34

(b) *Confining jurisdiction to the authorities of the state of divorce*

120. Apart from the hypothesis of *lis pendens* or related actions, which presupposes that proceedings are commenced in two places at once, other conciliation mechanisms are conceivable which would affect the exercise of jurisdiction conferred on the state of divorce. They concern the outcome of assessment by the authorities of the state of divorce of the paramount interest of the child, having regard for that purpose to the Hague Convention

---

34 The hypothesis is supported by P. Lagarde, "Le principe de proximité dans le droit international privé contemporain", [1986] Rec. cours A.c. dr. int. 1, 154.
Adoption of investigatory measures

121. A first method would be to preserve the jurisdiction of the authorities of the state of divorce with an incentive for them to apply for measures of investigation to the authorities having jurisdiction under the Hague Convention. This would assume the establishment of an international cooperation mechanism effective enough to ensure that the foreign authority responds in good time. Direct notification would be essential to avoid hold-ups with central authority transmissions.\(^{35}\)

Implementing this solution would require the two conventions to have been ratified by the states of both authorities.

Application to authorities of state of residence

122. Another method, more far-reaching, would allow the authorities in the state of divorce to ask the authorities having jurisdiction under the Hague Convention to determine what measures to take themselves. If the foreign authority declined or omitted to act, the authorities in the state of divorce would be authorized to take the necessary action themselves.

Implementing this solution would require the two conventions to have been ratified by the states of both authorities.

Exclusion of applications for measures after divorce

123. The jurisdiction of the authorities of the state of divorce over ancillary applications should be confined to applications directly linked to the divorce petition. This would mean interim measures ordered during the proceedings and final orders, including those given by consent of the spouses where the applicable law makes provision for it. Their jurisdiction should not extend to post-divorce review of such measures.

The grounds for this are to be found in the conclusions of the review of existing conventions: priority is increasingly given to the authorities of the state of the child's habitual residence on grounds of proximity. If the state of divorce was not the child's habitual residence, the authorities there would be involved only in exceptional cases where the entire family situation had to be considered as such. Once final measures have been ordered, that constraint ceases to apply.

But the restriction could be confined to cases where the authorities of the state of divorce had no jurisdiction to take such measures under the Hague Convention. These authorities would then enjoy jurisdiction wherever the child resided in a Union State that had not ratified the Hague Convention.

\(^{35}\) Supra, paragraph 77.
124. The exercise of jurisdiction by the authorities of the state of divorce could be further modulated by a quite different procedure going not to jurisdiction or cooperation but to the substance of the case. The idea would be to write into the Brussels II Convention a conflict rule whereby the authority in the state of divorce would deal with the substance of the case in the same way as would the foreign authority regarded, in the absence of the divorce petition, as *conveniens* for the substance of the application. That would mean the authority for the state of the child's habitual residence which, if required to hear and determine a case, would do so in accordance with the national law determined by the conflict rules of the *lex fori*. The authorities of the state of divorce, then, would apply the rules of private international law of the authorities of the country of residence. If they declared the law of the country of habitual residence to be applicable, it would be applied. If they declared the law of the country of nationality to be applicable, it would be applied.

This method is of admittedly limited scope, since it affects only the examination of the substance of the case. It substitutes conflict rules, not substantive rules, so it does not necessarily guarantee that the child will be able to make his/her views known to the authorities of the place of residence. A letters rogatory scheme would be needed to achieve that.

The conflict scheme can operate in symbiosis with the Hague Convention only if the Convention is revised or if reference is made to it in terms confined to the law of the state of residence. As the Hague Convention stands, it is not enough to refer to the law applicable to the authorities having jurisdiction under the Hague Convention since the Convention accepts the concurrent jurisdiction of the authorities of the states of nationality and residence, each applying its own law. It thus contains a conflict rule of an either/or nature which would not be workable in the state of divorce unless the authorities there had the option between the two systems of applicable law and could choose whichever was more favourable to the child; the Hague Convention does not actually permit that kind of choice.

Adoption of a conflict of laws rule further presupposes that the authority hearing the case can adopt measures on the basis of a foreign legal system. There is no real difficulty as regards custody, visiting rights, property administration between parents and ascendants and guardianship. The problem is more delicate when the involvement of administrative authorities becomes inevitable -- educational support, say, or internment. But comparative law studies suggest that such measures would not be outside the jurisdiction of the authority dealing with an application for a measure linked as such to the divorce. In other words, ancillary applications covered by Brussels II would not extend to the full range of measures of protection within the purview of the Hague Convention but would be confined to the conferment and exercise of parental authority.

---

36 *Supra*, paragraph 66.
37 *Supra*, paragraph 77 et seq.
125. A more radical technique for reconciling instruments is conceivable but would have the effect, formally at least, of broadening the scope of the Brussels II Convention. This would be to make a pure and simple reference to the Hague Convention either in toto or solely as regards the recognition and enforcement of judgments. The advantage would be that the Brussels II Convention's recognition and enforcement provisions would extend to principal measures.

Regarding jurisdiction, it would suffice for there to be a special provision to the effect that an application for the establishment or revision of measures for the protection of children could be taken by the authorities designated by the Hague Convention, plus a provision bringing such measures within the material scope of Brussels II (by an article resembling Article 1 of the Brussels Convention). The Title of the Brussels II Convention governing recognition and enforcement would then automatically cover such measures.

The technique may seem a little artificial in that it makes the substance and territorial scope of uniform rules relating to child-related measures dependent on their status under the Hague Convention. If the Hague Convention was ratified by only some of the Member States, the outcome would be a form of variable geometry difficult to reconcile with the institutional context of the Brussels II Convention.

This dependence on the territorial scope of the Hague Convention could be avoided by a reference allowing adoption of measures by the authorities designated by the Hague Convention. This would be a reference to the text of the Convention, operating in the same way as a reproduction of it, but without regard for that Convention's formal applicability to a given case. This might be termed a reference by incorporation. The difference between this and the preceding solution is that the substance of the Hague Convention could be applied to a situation not within its territorial scope, i.e. even where the child resides in a country that is not a party to the Hague Convention. The variable-geometry risk is thus averted.

Dependence in terms of substance could be removed by a provision that the reference rule did not deprive the authorities of the state of divorce of their jurisdiction but added to it, usually in favour of the state of residence. The solution to the problem of related actions would not need an interinstrumental rule, since the authorities of the state of residence would by definition be authorities of a Union State.

It might be a more elegant drafting technique to bring child-related measures direct within the Brussels II Convention and designate the authorities of the place where the child habitually resides as having jurisdiction. But this might be politically delicate, partly because it would formally extend the scope of Brussels II and partly because the Member States would no longer have an incentive to ratify the Hague Convention, even though ratification might be useful as a means of dealing with the position of children not residing in a Union State.

---

38 Supra, paragraph 107.
126. These reference techniques are similar in effect to a compatibility clause waiving priority in favour of all or part of the Hague Convention. The impact, however, differs in a number of respects.

An unconditional priority clause would switch the Brussels II Convention off whenever the child resided in a Hague Convention country. The jurisdiction of the authorities of the state of divorce would be reduced, possibly to zero, and the recognition of a foreign measure taken outside divorce proceedings would not be within the Brussels II Convention and so would not be enforceable by its refined procedures.

Nor would a priority clause ensure application of the Hague Convention's jurisdiction rules where the child resides in a Union State that is not a party to it, or allow the Court of Justice to interpret them39 (assuming it is given the desirable jurisdiction to interpret the Brussels II Convention).

---

39 Supra, paragraph 56.