the Convention were proposed,[6] the immediate results are likely to be much more limited. This is in part because it is perceived as inefficient to continue to renegotiate a convention, when within the European Union future international procedural developments will take the form of regulations or directives. Indeed the 1997 Service Convention may also be reformulated as Community secondary legislation.

II. THE BRUSSELS II CONVENTION

THE other development under the justice and home affairs pillar of the Union relevant to European civil procedure is the so-called Brussels II Convention: the Convention on Jurisdiction and Enforcement of Judgments in Matrimonial Matters signed on 28 May 1998. This Convention continues the work of the 1968 Brussels Convention by extending similar principles to the field of matrimonial matters. The earlier Convention is seen as the general convention and the 1998 Convention as a *lex specialis* which follows the principles of the earlier Convention as far as possible.

Active work on Brussels II began following a decision of the European Council in December 1993, although preliminary questionnaires and proposals already existed. Many issues were hotly contested, and particular complications arose from the need to ensure that the EU negotiations were compatible with parallel developments within the framework of the Hague Conference on Private International Law, which resulted in the Child Protection Convention of 19 October 1996. The text of Brussels II was agreed by the European Council in December 1997 after a political compromise was reached on sensitive issues, and finally adopted in May 1998 following a favourable opinion by the European Parliament. Like the 1968 Brussels Convention, Brussels II is a double treaty—it establishes rules of jurisdiction as well as recognition and enforcement. Much of the structure, and indeed content, of Brussels II will be familiar because of the kinship between the two Conventions, but quite apart from the rules on jurisdiction there are some points of difference between the two sets of rules flowing either from their distinct subject matter or in some cases from experience with the 1968 Convention.

The scope of Brussels II is strictly limited. It concerns civil proceedings[7] relating to divorce, legal separation or marriage annulment[8] and civil proceedings relating to parental responsibility for the children of *both* spouses *on the occasion of the former matrimonial proceedings*. Other matrimonial issues such as the property consequences of the dissolution of the marriage, or liability to pay maintenance, fall outside its scope. The inclusion of proceedings relating to parental responsibility was seen as essential because of the substantive law rules of some member States, but was only acceptable to other member States if kept within strict limits.

6. E.g. the Commission's ideas about the shape of the renegotiation which were put forward in a Communication of 26 Nov. 1997 (COM(97)609).

7. Although the term "court" is frequently used in the Convention, it is explicitly recognised in Art.1(2) that this must be interpreted to cover other bodies officially recognised by a member State as having jurisdiction in matrimonial matters.

8. For the purposes of this note, such proceedings will be referred to hereafter as "matrimonial proceedings".

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In terms of scope *ratione personae*, the jurisdictional rules of Brussels II contained in Article 2 of that Convention (matrimonial proceedings) must apply in cases where the respondent is either habitually resident, or a national of or "domiciled" in a member State (Article 7). The term "domicile" is intended to "have the same meaning as it has under the legal systems of the United Kingdom and Ireland".[9] If the respondent has none of those connections with a member State, then a member State is entitled to rely on its traditional domestic laws to determine whether it has jurisdiction to hear an application (Article 8). Article 8(2) contains a provision comparable to Article 4(2) of the 1968 Brussels Convention, i.e. a national of a member State habitually resident in another member State may, like nationals of that State, avail himself of the rules of jurisdiction applicable in that State. The jurisdictional rules of the Convention contained in Article 3 (parental responsibility) apply in cases where matrimonial proceedings are pending in a member State and the child in question is habitually resident in a member State.

Like the 1968 Brussels Convention, the rules on recognition and enforcement of judgments in Brussels II apply to judgments within its scope *ratione materiae* that are handed down by a court of a member State.

The rules of jurisdiction over matrimonial proceedings are established in Article 2(1). Paragraph (a) of that Article allows a choice between the courts of the member State in whose territory (i) the spouses are habitually resident, (ii) the spouses were last habitually resident in so far as one of them still resides there, (iii) the respondent is habitually resident, (iv) in the event of a joint application, either of the spouses is habitually resident, (v) the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, (vi) the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the member State in question or is "domiciled" there. The ground of jurisdiction established in the sixth indent of Article 2(1) was the result of a political compromise because of the importance attached by some member States to the need to respond to the problem of the spouse who returns to his or her country of origin on the breakup of the marriage and wishes to initiate divorce proceedings there. It was found unacceptable to create a *forum actoris* for this applicant, but it was also felt that the other bases of jurisdiction did not adequately protect such an applicant.

A further basis of jurisdiction can be found in Article 2(1)(b), which provides for the jurisdiction of the courts of the member State of nationality of both spouses or of "domicile of both spouses" established on a long-term settled basis. It is important to note in this connection that Article 2(1)(b) applies only if both spouses share nationality or a "domicile". In addition, member States must choose whether they intend to use nationality or "domicile" as a connecting factor (Article 2(2)); they cannot use both. It is unclear whether this process of selection also applies to indent six of Article 2(1)(a). The wording of Article 2(2) makes a general reference to "the criterion of nationality or of 'domicile' referred to in

9. Art.2(3).

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paragraph 1", but the Borras Report indicates that this was drafted with Article 2(1)(b) in mind.[10]

Article 3 of Brussels II then deals with jurisdiction in matters of parental responsibility. Since the inclusion of matters of parental responsibility within the Convention was in itself controversial, negotiation of the rules on jurisdiction proved difficult—the more so because of the need to achieve compatibility with the 1996 Hague Convention.[11] Article 3(1) provides the untroublesome rule that the courts of a member State with jurisdiction in matrimonial proceedings under Article 2 also have jurisdiction in a matter relating to parental responsibility where the child is habitually resident in that member State.[12] If the child is not habitually resident in that member State, but is habitually resident in another member State, the courts with jurisdiction in matrimonial proceedings under Article 2 can deal with issues of parental responsibility if two criteria are satisfied. First, at least one of the spouses must have parental responsibility in relation to the child and, second, the jurisdiction of the courts must have been accepted by the spouses and be in the best interests of the child.[13]

The court designated in Article 3(1) and (2) has a jurisdiction limited in time. Issues of parental responsibility that arise after the matrimonial proceedings themselves have come to an end[14] do not fall within the scope of the Convention. If proceedings concerned with parental responsibility have been initiated during the course of the matrimonial proceedings, however, they must be allowed to run their course.[15]

Child abduction cases are specifically dealt with in Article 4 of the Convention, which requires the courts to exercise their jurisdiction under Article 3 in conformity with the 1980 Hague Convention on Child Abduction.

A court whose jurisdiction derives from Articles 2–4 of Brussels II is also competent to hear any counterclaims that may arise by virtue of Article 5 of the Convention.

Section 2 of Brussels II contains rules on the examination by the courts of questions of jurisdiction and admissibility. These are comparable to those of Articles 19 and 20 of the 1968 Brussels Convention. Sections 3 and 4 of Brussels II on *lis pendens* and provisional and protective measures respectively differ from their sister provisions in significant respects.

The rules on *lis pendens* and related actions give priority to the court first seised and following the pattern of Articles 21 and 22 of the 1968 Convention. If the two

10. Since this process of selection is considered to be relevant when determining the scope *ratione personae* of the Convention under Art.7 (Borras Report, para.45 (1998) O.J. C221/42) it may be assumed that it is of general application and therefore also governs Art.2(1)(a).

11. The European Convention takes priority over the Hague Convention, but applies only in cases where the child is habitually resident in a member State.

12. This criterion must be satisfied for each child of both parents.

13. Art.3(2). These criteria are also applicable under the Hague Convention (Art.10(1)), but that Convention has the additional requirement that one of the spouses be habitually resident in the State hearing the case—a requirement that could not be applied in Brussels II without completely undermining its purpose and structure.

14. Whether by a final judgment or otherwise (Art.3(3)).

15. Until they end in a final judgment or otherwise (Art.3(3)).

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sets of proceedings share the same cause of action the second court seised must stay its proceedings until the jurisdiction of the first court seised is established and then decline jurisdiction in favour of that court. If the two sets of proceedings do not share a cause of action, however, the rules concerning related actions apply only in so far as the proceedings are for divorce, legal separation or annulment. They do not also include proceedings relating to parental responsibility. Furthermore (and logically in view of this restriction of scope) they apply only to cases between the same parties. The second court seised must decline jurisdiction once the jurisdiction of the first court seised has been established. Article 11(3) then specifically provides that "in that case, the party who brought the relevant action before the court second seised may bring that action before the court first seised".

Article 12 of Brussels II also follows the pattern of Article 24 of the 1968 Convention, but contains two innovations. First, it makes it clear that it applies only in *urgent* cases. Second, it restricts the measures that may be taken by a member State other than the State in which the merits of the case are being heard to those in respect of "persons or assets in that State". It therefore tries to exclude the possibility of extraterritorial measures of the kind that are frequently sought under the 1968 Convention.[16]

The provisions of Brussels II concerning recognition and enforcement of judgments follow those of the 1968 Brussels Convention in many respects and will not be considered in detail here. A few important differences need to be noted, however. First, judgments entitled to free movement under Brussels II are those that actually grant a divorce, annulment or legal separation.[17] Judgments refusing a divorce or other relief are not entitled to recognition under the Convention and thus will not give rise to an issue estoppel.[18] Second, the most important reason to seek recognition of a divorce, annulment or legal separation in the context of the Convention is in order to update the civil status records of the member State in which recognition is sought. It was decided that this should be possible without the need to seek prior *exequatur* of the judgment.[19] The rules on *exequatur* apply only, therefore, when the judgment needs to be enforced, as in the case of an assertion of parental responsibility. In other cases the onus is on the party seeking to resist recognition to initiate proceedings for that purpose.

A third point to which attention should be drawn is the fact that the defences against recognition in Article 15 of the Convention differ in certain respects from those under the 1968 Brussels Convention. A different list of defences applies depending on whether it is (i) a divorce, annulment or legal separation[20] or (ii) a judgment on a matter of parental responsibility[21] that is sought to be recognised.

16. This would presumably limit the availability of extraterritorial *Mareva* injunctions to cases where the measure is intended to bite on a person present within the jurisdiction—but such injunctions are hardly a common feature of matrimonial litigation.

17. And associated orders concerning costs etc.

18. But presumably might occasionally be recognised by a member State which has broader rules on recognition as in Cases 9 and 10/77, *Bavaria Fluggesellschaft Schwabe & Co. KG & Germanair Bedarfsluftfahrt* v. *Eurocontrol* [1977] E.C.R. 1517.

19. Provided that the judgment is not subject to further appeal in the State of origin.

20. Four defences are listed.

21. Six defences are listed.

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In both cases a public policy defence is maintained. Recognition must be "manifestly" contrary to the public policy of the member State in which recognition is sought. In case (ii) the courts are also directed to take into account the "best interests of the child". Similarly, in both cases there is a requirement of due and timely service of the document which instituted the proceedings before a default judgment will be recognised—"unless it is determined that the respondent has accepted the judgment unequivocally". The ambit of this proviso[22] remains to be clarified, but the example given in the Borras Report is of the situation where the respondent has remarried.

The list of defences to recognition of a divorce etc. contains a provision comparable to Article 27(3) of the 1968 Brussels Convention, which allows a judgment to be refused recognition on the ground that it is irreconcilable with a judgment "given in proceedings between the same parties in the Member State in which recognition is sought". The counterpart to Article 27(5) of the 1968 Brussels Convention in this list has, however, been reformulated to take account of the defects in that provision. Under Brussels II a judgment shall not be recognised "if it is irreconcilable with an earlier judgment given *in another Member State* or in a non-Member State between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought". There is no need for the two judgments to share a cause of action as required by Article 27(5) of the 1968 Convention.

The list of defences to recognition of a judgment relating to parental responsibility contains two additional defences and takes a different approach to the issue of irreconcilable judgments. As to irreconcilable judgments, a judgment of one member State which is sought to be recognised in another will be refused recognition if it is irreconcilable with a *later* judgment of the member State in which recognition is sought. This approach takes account of the fact that orders relating to parental responsibility may be subject to reconsideration in the light of new circumstances, and thus a judgment of the State addressed is not entitled to automatic priority. The same approach is therefore adopted in the context of a conflict between judgments from two States outside the State addressed. It is the later in time that prevails. In the case of the judgments of non-member States, such a judgment will be recognised only if it is a judgment of the State in which the child is habitually resident and also fulfils any other conditions necessary for it to be recognised in the State addressed.

The two remaining defences to recognition both relate to the right to be heard. They ensure that a judgment will not be recognised if it was given without the child having been given the opportunity to be heard "in violation of fundamental principles of procedure of the Member State in which recognition is sought",[23] or without a similar opportunity being given to any other person claiming that the judgment infringes his or her right of parental responsibility.

To ensure that the fundamental differences in the rules of law adopted by different member States in relation to divorce and annulment do not result in

22. An innovation by comparison with the 1968 Brussels Convention.
23. Except in cases of urgency.

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refusals of recognition on the grounds of public policy, Article 17 of the Convention expressly provides that recognition may not be refused because the law of the State addressed would not allow divorce, legal separation or annulment on the same facts.

The European Court of Justice will have jurisdiction to interpret Brussels II. Article 45 of the Convention establishes the jurisdiction of the Court, and the conditions under which that jurisdiction can be exercised are contained in an accompanying Protocol, as in the case of the Service Convention. The main feature distinguishing this Protocol from its immediate predecessor is the fact that member States can choose whether references can be made by any court acting in an appellate capacity, or only by the highest courts of member States.[24]

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24. Art.2.

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