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THE SCANDINAVIAN CONVENTIONS ON PRIVATE INTERNATIONAL LAW

BY

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BIOGRAPHICAL NOTE

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PRINCIPAL PUBLICATIONS

1. *American-Danish Private International Law*, Bilateral Studies in Private International Law, no. 7, New York, 1957.
2. Co-editor of O. A. Borum, *Lovkonflikter*, 4th ed., Copenhagen, 1957.
3. Articles (in Danish) on private international law and on company law in Danish law reviews.
4. *Bulletin de Jurisprudence Danoise* in Journal Clunet, 1954 and 1959.
5. *Commercial Arbitration in Denmark* in The Arbitration Journal, 1958, pp. 16 *et seq.*
6. *Legal Aspects of Foreign Investment*, W.G. Friedmann and R. C. Pugh, Editors, Chapter 12, "Denmark", New York, 1959.
7. *Om formue ordningens uforanderlighed i den internationale ægteskabsret*, Tidsskrift for Rettsvitenskap, Oslo, 1959, pp. 177 *et seq.*

THE SCANDINAVIAN CONVENTIONS ON PRIVATE INTERNATIONAL LAW

CHAPTER I

INTRODUCTION

WRITERS on private international law generally state that the main aim of this branch of the law is to obtain uniformity in the decision of problems of an international nature, whatever forum they are brought before and regardless of the differences in the substantive law of the countries concerned. This aim is pursued by laying down rules regulating which country's law must be applied in cases in which a connection exists with several legal systems. These rules have the purpose of ensuring that the same provisions and rules of substantive law are applied to a case, whether the case be brought before the courts of the country to whose legal system those provisions belong, or before the courts of any other country. The writers then go on to conclude that private international law may be abolished in the relations between those countries whose substantive laws are unified, because in this situation the same provisions will be applied to a case, whether a court applies its own law or the law of another country. This, of course, is logically true. But those who take an interest in the study of private international law need not fear that the work toward unification of the law will lead to a complete abolition of private international law in the near future. The development in the relations between the Scandinavian countries shows clearly that even between countries as closely related as these five countries are in legal tradition, in social development, and in moral and ethical outlook, at least minor and sometimes major differences of substantive law will continue to exist for many years to come,

in spite of attempts for nearly one hundred years to unify important parts of Scandinavian law.

A. Origin of Scandinavian Law and Scandinavian Legal Cooperation

The community of law among the Scandinavian countries dates back to the beginning of historical times in that part of the world, that is, in the ninth century. The population is of Germanic origin, and Scandinavian law is rooted in Germanic law. The first written laws date from medieval times, the 13th century. These are provincial laws, and consequently each of the Scandinavian countries possesses several of them. Due, however, to their common Germanic root, there are many similarities between them. They show the existence of an independent Nordic legal tradition which has persisted up to the present day despite all foreign influence. At the end of the 17th and the beginning of the 18th century, the laws of the Scandinavian countries were codified and the foundations were laid for the present situation. The three western countries, Denmark, Norway and Iceland, were at that time under the domination of Denmark. Sweden was the dominating power among the two eastern countries, Sweden and Finland. The close community of law between the western countries on one hand and the eastern countries on the other came into existence through the introduction of a Danish-inspired code in the western countries in 1683 and 1687, and a Swedish-inspired code in the eastern countries in 1734. Although only very few provisions of these codes are still in force, they form the basis of the modern law in west and east respectively. But although two different codes existed in west and east, the basic ideas were still the same, because in all five countries these ideas had developed from a common ground, wholly independently of the other European legal systems, although of course some influence of Roman law could not be avoided. This latter is true especially with regard to the treatment of the law in theoretical works, since many writers had studied at Continental European universities.

After the codifications, the legal systems of the Scandinavian

countries developed as a whole independently of one another, but the common basis remained, and the factual influence of Danish law upon the law of the other western countries continued, while Finland was shortly afterwards incorporated with Russia. In the middle of the 19th century, an important Scandinavian movement began which stressed the close relationship in blood and culture between the Scandinavian countries. This movement had its origin partly in the literary romantic movement, and partly in the liberal movement of the 1830's and 1840's. Probably the most important results of this movement are to be found in the legal field. This movement gave rise to a cooperation between the Scandinavian countries which aimed at unifying their law. This cooperation has continued ever since. New common institutions are still being added to those which further this cooperation, the latest being the Nordic Council, a Scandinavian counterpart of the Council of Europe in Strassbourg.

The first and most complete results of this cooperation aimed at the unification of Scandinavian law are found in the field of the law of contracts: the laws on bills of exchange and checks, and the maritime law, are the earliest uniform laws. The laws of bills of exchange and checks have since been replaced by the laws based on the Geneva conventions. Then followed laws on sale of goods, agency, sale by instalments, and general rules for the conclusion of contracts. The most important is perhaps the law on sale of goods which has greatly influenced the work for European unification of the law on this subject [1].

The work for unification had spread to many other fields of private and public law. The field which is here of special interest is that of family law. Before 1930, the law on marriage and divorce, the law concerning marital property relations, the law on adoption, and important parts of the law concerning guardianship and the personal relations between parents and children were all practically unified.

B. Procedure Followed in Scandinavian Cooperation

I shall now say a few words about the procedure which is

1. Cf. the German translation of Alméns *Commentaries on the Law of Sale.*

generally followed in the work for unification, since some knowledge of this is necessary to understand why the Scandinavian conventions had to be made [2]. It is usual that a topic is first discussed at one of the triennial meetings of the Scandinavian Lawyers' Conference to see whether it is ripe for unification. In addition, a special Scandinavian committee has been appointed after the last war to advise the governments with regard to topics which ought to be taken up for unification. When a topic has been found ripe, each of the countries appoints a committee with the task of making, in common with similar committees from the other countries, a report and a draft for submission to the Parliaments of each of the five countries. The Parliaments of each country are not bound to adopt the recommended drafts, either unchanged or at all. Each country is free to make such changes in the draft as it thinks fit, to make the new law suit its own conditions and traditions. The system is thus the same as in the United States and in Canada, where a state or a province is free to adopt laws based upon drafts prepared by the Commissioners for Uniform Legislation with such changes as the state or province in question thinks proper to make. Although this cooperation has led to the unification of important parts of Scandinavian law, differences of detail are found in many of the laws which have been adopted as a result of this cooperation. This is especially true in the field of family law, whereas in the law of contracts practically no differences exist.

C. History of Cooperation in the Field of Private International Law

At a very early stage in the work for unification in the field of family law, it was realized that complete uniformity would not be obtained in this field. This gave rise to the idea of extending the work for unification to the field of private international law,

2. For an excellent account of the Scandinavian legislative cooperation, cf. Mario Matteucci in *Liber Amicorum of Congratulations to Algot Bagge* (Stockholm, 1956) p. 137. See also various articles in Unidroit.

In many respects, the procedure and the institutions used for the cooperation resemble those applied in the Benelux cooperation, cf. Louis Frédéricq, *L'unification du droit dans les pays de Benelux*, Revue de droit international et de droit comparé, 1957, p. 69.

so as to supplement the amount of uniformity in the substantive law by ensuring uniformity of decision in questions of inter-Scandinavian concern, in regard to which uniformity had not yet been achieved, regardless of which forum is to decide such questions. This work was also prompted by the fact that the western countries adhere to the principle of domicile while the eastern countries adhere to the principle of nationality, a fact which in itself prevents the attainment of uniformity of decision.

The modern Scandinavian cooperation in the field of private international law which resulted in the five conventions which we are going to discuss was preceded by some degree of cooperation in this field between Sweden and Denmark. It is worth while making a few remarks on this cooperation, although it is mainly of historic interest today. In several respects it prepared the ground for the conventions.

On 24 April, 1861, Denmark and Sweden concluded a convention which was mainly concerned with the reciprocal recognition and enforcement of foreign judgments. It provided for the direct execution of all judgments in private law matters. If the competent authority in the country in which the judgment originated certified the judgment to be final, the judgment creditor did not need to go to the courts of the other country to obtain an exequatur. Instead, he was allowed to have the judgment executed immediately, in the same way as if it had originated in the courts of the country of execution. Under this arrangement were also included judgments for maintenance claims from a wife, or from children, legitimate or illegitimate. The part of the convention just mentioned was replaced by the two Scandinavian conventions on the collection of maintenance claims and on the recognition and enforcement of judgments, which in many ways build upon the system of the convention of 1861.

The convention of 1861 also contained provisions on the jurisdiction of courts, but these were not replaced at the repeal of the convention as a whole when the two Scandinavian conventions mentioned came into force. Finally, it contained a provision according to which a creditor could not proceed

against assets of a debtor in one country if the debtor had been declared bankrupt in the other country. This provision is replaced by the Scandinavian bankruptcy convention.

On 7 July, 1887, Denmark and Sweden concluded a convention on the enforcement of judgments concerning judicial costs. This convention was replaced only a few years later by the Hague convention on civil procedure, which again has been supplemented and partly replaced in inter-Scandinavian relations by the Scandinavian convention on recognition and enforcement of foreign judgments.

In 1907 and 1909, two conventions concerning marriage were concluded between Sweden and Denmark. The first of these, of 5 October, 1907, was concerned with the conditions of marriage, and it provided that a national of one country who was not domiciled in the other country should not be allowed to marry in the other country unless he produced a certificate from his home country showing that he was allowed to marry under his national law. Also, the convention provided for the reciprocal recognition of certificates concerning conditions of marriage. This convention is now replaced by the Scandinavian convention on marriage, adoption, and guardianship, which contains a solution very close to that of the old convention.

The second of these two conventions, on the other hand, is still in force. This convention, of 27 November, 1909, permits consular officers of one country to perform marriages in the other country in accordance with the law of their home country, provided that at least one of the future spouses is a national of the sending country and neither of them is a national of the receiving country. However, it forbids the marriage to take place if it would be contrary to impediments of marriage in the receiving state based upon kinship or relationship by marriage from which exception cannot be granted in that country. The convention also provides for the reciprocal recognition of marriages which have been performed in this way.

Although an attempt was made in 1861 to bring Norway into this cooperation, the conventions which have been mentioned were all restricted to the relationship between Sweden and

Denmark and to some extent Iceland, which at that time was under Danish rule.

The first real attempt at a cooperation in the field of private international law comprising all the Scandinavian countries was made in connection with the preparation of the draft for the law on guardianship and interdiction. While the western countries were unable to adopt the Hague conventions in matters of family law, based, as these conventions were, on the principle of nationality, and while Finland was at that time still under Russian rule—which had been the case since the end of the Napoleonic wars—Sweden adopted a number of these conventions. Among them were the conventions concerning guardianship and interdiction. The draft for a common Scandinavian law in these matters included a chapter on private international law based upon the Hague conventions, but it allowed the retention of the principle of domicile in essential matters. It was not limited to the relations between the Scandinavian countries. This chapter of the draft was never adopted except in Sweden, which is the only one of the Scandinavian countries to possess extensive, express regulations on matters of private international law in general.

With the subject of adoption, an attempt was likewise made to draft common general rules on private international law. These, however, have only been accepted in Sweden and Norway. Recently, a first draft has been made of a convention on the private international law of paternity [3]. The work is, however, not being pursued for the moment.

3. Danish *Betænkning* No. 126/1955.

CHAPTER II

GENERAL PRINCIPLES OF SCANDINAVIAN COOPERATION IN PRIVATE INTERNATIONAL LAW

When the work was finally begun on the five conventions which are the subject of these lectures, a great amount of practical experience had been collected from the cooperation between Denmark and Sweden, from the unsuccessful drafts just mentioned and, of course, from the general work for unification of Scandinavian law. An important result of this experience was that especially because of the difference in principle between the western and the eastern countries with regard to the respective application of the principles of domicile and nationality, no attempt was made to unify the private international law of the Scandinavian countries as a whole. The work was instead limited to intra-Scandinavian relations, in which the task was eased by the high degree of uniformity in the substantive law which resulted from the common historical background and legislative cooperation. Each of the Scandinavian countries, therefore, has its own body of private international law which applies in its relations to non-Scandinavian countries [1].

A. Form of Cooperation in Private International Law

The first thing to be noted in the background which has now been given is that the cooperation in the field of private international law has taken the form of conventions, while the cooperation otherwise is mainly in the form of laws passed independently by the Parliaments of each of the Scandinavian countries on the basis of the drafts prepared in common. This difference is quite natural. The cooperation in the field of substantive law takes place to ensure the greatest amount of uni-

1. For an excellent account of Scandinavian private international law in general, cf. Friedrich Korkisch in Rabel's Zeitschrift, 1958, p. 599. ("Festgabe für Alexander N. Makarov.")

formity possible. It has always been clear that complete uniformity could not be obtained. It has already been said that if complete uniformity had been achieved, rules of private international law would be superfluous in the mutual relations between the Scandinavian countries. It is the lack of complete uniformity in the substantive law which makes it necessary to have rules of private international law to *obtain* uniformity of decision regardless of forum. But the differences between the substantive laws of the Scandinavian countries are reduced to such small proportions in most of the matters regulated by the conventions, that it would not be worth while working for uniform rules of private international law if it were not possible in this way to secure complete uniformity of decision in all the countries. It was, therefore, necessary to find solutions which would be acceptable to all the countries, and then regulate the private international law by convention.

B. Approach and Method of the Conventions

The second general feature of the conventions which should be noted is their approach to the problems. This is of general interest not only for the preparation of similar treaties, but also for private international law as a whole.

Rules of private international law are generally formulated in accordance with a certain traditional scheme. They provide, e.g., that matters of succession are governed by the law of the last domicile of the deceased or by the deceased's national law; that matters of marital property are governed by the personal law of the husband at the time of the marriage, etc. This way of formulating rules of private international law has given rise to a great number of difficulties, such as the lack of uniformity of decision, negative and positive conflicts, the so-called preliminary question, etc., which are generally grouped under the heading of the problem of characterization. An important reason why such problems arise is that the rules of private international law are of a general character. They are intended to be applied in the relations between the forum State and all other countries of the world. Even a limited study of foreign law quickly reveals that

although the problems which are regulated are mostly the same, the way in which they are regulated in the substantive law differs from country to country because of the varying structure of the legal systems. It creates seemingly insurmountable difficulties for private international law when rules of private international law, which are not framed by taking these differences in the structure of the substantive law of individual countries into account, are applied in the relations now with one country and now with another country. One of the traditional examples often used to illustrate this point is how the laws of two countries each take care of the needs of the surviving spouse after the death of the first. The law of one country does it by giving the surviving spouse half of the community property under the law of marital property, the law of the other country does it by giving the surviving spouse exactly the same amount as inheritance. If the spouses are married in the latter country where the husband is domiciled, and later move to the former country where the husband dies domiciled, then ordinary rules of private international law based on the principle of domicile will, if applied in the traditional manner, lead to the same result in both countries—namely, that the surviving wife does not receive anything: the law of the domicile of the husband at the time of the marriage does not give the wife anything, because it would provide for the wife by way of inheritance; but the succession is subject to the law of the husband's last domicile, according to which the wife gets nothing because that law provides for her by giving her part of the community property.

Private international law rules are generally formulated in the same general way in conventions as in municipal rules of private international law, because also in conventions it is the intention that they shall be applicable in the relations between any number of countries or at least between a great number of countries.

Quite slowly a movement is gaining momentum in recent years towards an attempt to make rules of private international law fitted to the relations between specific countries. It has found support with writers who have studied the problems of private

international law on a purely theoretical basis [2]. It is also supported by those who advocate the use of different conflict rules in the dealings between closely related States and in the relations to other States [3]. And finally, it is supported from a practical point of view by those who study private international law on a bilateral basis, as is being done in the United States on the initiative of Nussbaum [4]. If the courts or those who write conventions take the provisions of substantive law in the countries concerned into account before deciding the rules of private international law, many of the problems discussed in the theory of characterization may lose their apparent importance.

This is not the place to discuss this interesting development in detail. The reason for its mention is that the practical value of these thoughts is shown in the Scandinavian conventions. The provisions of these conventions are framed to fit the substantive law systems of the Scandinavian countries. Behind each provision lies a thorough investigation of the substantive law of the countries concerned, and an attempt to adapt these laws to each other or bring them into mutual harmony. A single rule of a legal system is only a fragment. Only in conjunction with a great number of other rules does it form a whole [5]. All these rules are made to fit each other harmoniously. When combined with rules in other systems with which they are not made to fit, they break the harmony of these other systems, as is shown by the example above. [6] In preparing the Scandinavian conventions, an attempt was made to create harmony in cases in which rules of two or more legal systems had to be combined. The substantive

2. Cf., for an early, important example, David F. Cavers, *A Critique of the Choice of Law Problem*, 47, Harvard Law Review (1933), p. 173.

3. Cf. H. Battifol, *Traité élémentaire de droit international privé*, 1949, p. 276, and A. A. Ehrenzweig, *Interstate and international conflicts law: A plea for segregation*, 41, Minnesota Law Review, (1957), p. 717; and now in *Conflict of Laws*, part one p. 17.

4. Bilateral Studies in Private International Law, editor Arthur Nussbaum, published for the Parker School of Foreign and Comparative Law, Columbia University in the City of New York, by Oceana Publications, New York.

5. Cf. Alf Ross, *A Textbook of International Law*, London, 1947, p. 24.

6. Cf. Werner Goldschmidt, *Die Philosophischen Grundlagen des Internationalen Privatrechts*, in "Festschrift für Martin Wolff", 1952, p. 203, and H. Battifol, *Aspects Philosophiques du Droit International Privé*, 1956.

law of the five countries was taken into account in framing each individual rule in the conventions. This work was, of course, considerably eased by the high degree of uniformity and this uniformity no doubt accounts for an important part of the success of the conventions. But I am in no doubt that this success is due primarily to the mode of preparing the conventions, which, as far as I know, is peculiar to the Scandinavian conventions. This procedure is, therefore, worth while copying in preparing conventions between other States whose laws are less uniform than those of the Scandinavian countries. The less uniformity there exists between the laws of the contracting States, the more necessary it is to take the content of the substantive laws into account when framing rules of private international law. This feature in the conventions is in my opinion one of the most interesting facts about them and is perhaps the conventions' main claim to fame.

C. Importance of the Conventions

It follows from what I have said that the scope of the conventions is a limited one. They apply only in the relations between the five Scandinavian countries, and they are not intended to be applied as they stand in relations with any other country. Their provisions are too dependent upon the legal provisions and institutions of the five countries who created them. Even an important change in one or more of the countries of the law relating to one of the subjects treated in the conventions will make it necessary to revise them if they are to remain in conformity with the underlying intentions. The convention on marriage, adoption, and guardianship does not even apply in cases in which the older law which preceded unification is still in force, e.g., in certain cases of marriage under the old law with regard to the marital property system. This is in sharp contrast to the proposed Benelux Uniform Law on private international law which is applicable, not only in the mutual relations between the Benelux countries, but also in the relations between each of these countries and a third country. The report of the commission preparing the Benelux Uniform

Law derides in very strong words the idea behind the Scandinavian conventions which I have tried to explain in the foregoing pages [7].

Since the Scandinavian conventions are so limited in their application, this might seem to deprive them of interest to any non-Scandinavian lawyer. However, while many individual solutions contained in the conventions are naturally of primary interest to Scandinavian lawyers, the conventions have also proved to be deserving of the interest of lawyers from other countries. Firstly, the way in which they have been prepared and the methods followed in preparing them, of which I have tried to give a picture, form an interesting object-lesson of how compromises can be made and solutions reached in spite of the great differences in principle between countries who adhere to the principle of nationality and countries who adhere to the principle of domicile. In spite of the close relations between the Scandinavian countries and of the great amount of completely free migration from one country to the other, there have been practically no cases involving the interpretation of the conventions in the more than twenty-five years in which they have been in force. This fact shows that as a whole the method which was chosen was the correct one for the purpose [8].

Secondly, many of the solutions, although based upon a study of the results they will lead to when taking the substantive laws of the countries concerned into account, have attracted the attention and interest of lawyers working with similar problems in other countries, and have served as models for the drafting of general conventions on private international law. The welcome given to the conventions by Niboyet and Cheshire may be quoted as a proof of this interest. Niboyet said: "A l'opposé de l'Union de La Haye, [l'Union Scandinave] est à base nettement territoriale; c'est ce qui en fait l'intérêt et demande qu'on lui attache toute l'importance qu'elle mérite. Les pays nordiques sont restés fidèles à la loi du domicile pour régir le statut personnel, tandis que l'œuvre de La Haye a eu pour point de

7. Cf., Revue critique de droit international privé, 1951, pp. 716-17.
8. Cf. H. Battifol, 21, Law and Contemporary Problems, (1956), pp. 574-76.

départ la soumission à la loi nationale. Tandis que les conventions de La Haye n'avaient pour la France aucun intérêt, et étaient plutôt nocives, celles des pays scandinaves rejoignent, au contraire, la ligne de sa tradition. Les solutions qu'elles donnent pourraient trouver l'adhésion de notre pays. Dans une Europe qui semble, à un moment donné, avoir eu le vertige de la loi nationale, elles constituent un sérieux antidote, et un retour à un cartésianisme juridique [9]."

Cheshire says: "One of the most remarkable and certainly one of the most interesting of these [arrangements between individual countries] is the inter-Scandinavian conventions [10]."

Thirdly, the courts of countries which have adopted the *renvoi* doctrine may have to apply the provisions of the conventions.

D. Subject Matters Covered by the Conventions

The five conventions with which we are here concerned treat subjects of a very varied character. They were signed in the years 1931 to 1935. The first convention which was concluded in 1931 was a direct result of the cooperation for unification of the substantive law. Its title is the Convention on marriage, adoption, and guardianship [11], and it thus treats subjects on which common Scandinavian legislation had been passed in all the countries not many years before. The subjects all appertain to questions of personal status; uniform treatment, therefore, was of great importance. Although a high degree of uniformity had been reached in the legislation, complete uniformity had not been obtained. It is, therefore, natural that these questions first attracted attention.

The second convention was also concluded in 1931. It concerns the collection of maintenance claims [12]. It has been mentioned that this was already possible between Sweden and Denmark under the convention of 1861. The frequent migration

9. J. P. Niboyet, *Traité de droit international privé*, I, 2nd ed., p. 32.

10. G. C. Cheshire, *Private International Law*, 4th ed., 1952, p. 15.

11. *League of Nations Treaty Series*, vol. 126, pp. 121, 150 and 155; and see translation of recent changes in the Appendix.

12. *League of Nations Treaty Series*, vol. 126, pp. 41 and 61; and see translation of recent changes in the Appendix.

from one Scandinavian country to the other gave rise to a number of claims of this kind, and the position taken by most of the Scandinavian countries toward the enforcement of foreign judgments created a need for facilitating the procedure necessary to collect such claims, as well as for clarifying the relations towards and between the other three countries.

The two conventions mentioned have been the subject of minor revisions in 1953.

The third convention, which was concluded in 1933, secures mutual recognition and enforcement in the five countries of judgments, originating in one of the countries, regarding private law matters [13].

The fourth and fifth conventions, signed in 1934 and 1935 respectively, gave rise to more difficulties in drafting because they touch upon subjects which have been unified only to a much lesser extent than the subjects of the first convention, and where greater differences, therefore, prevail, especially between the western countries on one side and the eastern countries on the other.

The fourth convention is concerned with matters of bankruptcy [14]. It introduces the principle of unity and universal effect of bankruptcy in most cases, and gives choice of law rules which are to be applied in the country in which the bankrupt estate is administered, in case assets are situated or claims arise in the other countries.

The fifth convention regulates problems of choice of law and jurisdiction in matters concerning the law of succession, and the administration and distribution of deceased persons' estates [15].

E. Scope of the Conventions

The five conventions contain rules on choice of law, rules on jurisdiction, and rules on recognition and enforcement of foreign judgments. Since the conventions only apply to the relations between the Scandinavian countries, it is a pertinent question

13. *League of Nations Treaty Series*, vol. 139, p. 165.
14. *League of Nations Treaty Series*, vol. 155, p. 115.
15. *League of Nations Treaty Series*, vol. 164, p. 243.

how to delimit the scope of these relations in these three respects. This was especially necessary to decide because at the time when the conventions were concluded, Sweden still adhered to several of the Hague conventions. It was, therefore, necessary to see to it that the relations which fell under the Hague conventions were not touched.

This delimitation is not made in the same way in all the conventions. The two conventions on enforcement of judgments are only limited in scope with regard to subject matter, not with regard to the nationality or domicile of the litigating parties. Therefore they comprise, with a few insignificant exceptions, all judgments in the subject matters originating with courts and authorities in one of the countries. The convention on bankruptcy comprises bankruptcies of persons domiciled in the country in which bankruptcy is declared. These three conventions are mainly concerned with procedural questions, and the delimitation, therefore, does not present particular difficulties. The remaining two conventions are mainly limited to persons who are nationals of one of the Scandinavian countries, and in most cases even further, namely to persons domiciled in Scandinavia and who are at the same time nationals of one of the Scandinavian countries. The delimitation of the scope of these two conventions, which are mainly concerned with matters of personal status, is of interest also to countries other than the Scandinavian countries, provided these other countries apply the *renvoi* doctrine. If a case concerning persons comprised by the Scandinavian conventions comes up for decision in, e.g., a French court the French court may have to apply the conventions to decide which law governs the status of the person in question. The delimitation is also of interest from the point of view of principles.

The background for the conventions, as I have stressed already, is the high degree of uniformity of the substantive law in the Scandinavian countries. Logically, this leads to the conclusion that the conventions can only apply in cases in which all the countries, according to their traditional rules of private international law, would apply the law of one of the Scandinavian

countries; it is the uniformity of these laws which makes it less pertinent whether the law of one or the other country is actually applied.

From the point of view of the eastern countries, this meant a limitation of the scope of the conventions to matters concerning nationals of one of the five countries, since these countries, which adhere to the principle of nationality, only apply Scandinavian law to Scandinavian nationals. In some respects, this limitation imposed itself, due to the fact that Sweden as a member of the Hague conventions was bound to apply the national law to nationals of other States which were members of those conventions. Even if they were domiciled in Scandinavia, Sweden was bound by treaty to apply their national law and not their domiciliary law.

From the point of view of the western countries, this limitation was on the one hand more narrow than necessary, since they applied Scandinavian law to all persons domiciled in Scandinavia. But as a consequence of the Swedish position, this limitation had, of course, to be accepted if a result should be reached. On the other hand, this limitation to Scandinavian nationals was too broad to be acceptable to the western countries because that would mean the application of Scandinavian law to Scandinavian nationals domiciled outside Scandinavia. Being adherents of the principle of domicile, they had not before applied Scandinavian law to persons domiciled outside Scandinavia, but on the contrary they had applied the law of their domicile. This explains why as a general rule the scope of the conventions had to be limited to nationals of the Scandinavian countries domiciled in Scandinavia. Thus, as a general rule the conventions do not apply, as far as personal status is concerned, to non-Scandinavian nationals domiciled in Scandinavia; nor do they generally apply to Scandinavian nationals domiciled abroad. In the few cases in which the latter does not hold true, it is usually because Scandinavian law would apply even under the traditional rules of private international law.

In those cases in which the conventions do not apply, it is, of course, the general private international law of the forum which

applies. In this respect, as a whole, no unification has taken place, although, of course, important similarities exist apart from the fact that the eastern countries apply the principle of nationality and the western countries the principle of domicile. Because of the background of the solutions contained in the conventions, no conclusions may be drawn from the provisions of the conventions about the content of the general private international law [16]. They are two completely independent bodies of law.

F. The Principles of Nationality and of Domicile in Scandinavian Law Generally, and in the Conventions

It is necessary at this stage to say something about the principles of nationality and domicile, both of which are of considerable importance in the application of the conventions.

I have already stated that the principle of nationality is accepted in Sweden and Finland, but not in Denmark, Norway and Iceland. At least in Denmark, there existed at the time of the preparation of the conventions a certain trend towards accepting the principle of nationality, but this trend never had any results in practice, and today all the western countries are firmly entrenched in the acceptance of the principle of domicile.

Conversely, in Sweden there has been a trend toward accepting the principle of domicile, corresponding to the general trend to be found in many European countries which have hitherto adhered firmly to the principle of nationality. The general acceptance of the principle of domicile in the Scandinavian conventions cannot be reckoned with in this respect. The high degree of uniformity of the substantive laws made it possible to choose almost freely between the principles of nationality and domicile in framing the conventions, since in many respects the substantive law which would be applied when following either principle would be the same.

The Swedish trend toward the principle of domicile first showed itself during and after the last war. Several authors have

16. Cf. O. A. Borum, *Lovkonflikter*, 4th ed., 1957, p. 89.

recommended a change [17], and although the majority of the legislative provisions are based upon the principle of nationality, an important number of provisions and of judgments embrace the principle of domicile.

The main reason for this current is probably to be found in the fact that Sweden has had an important immigration of refugees, especially from the Baltic countries. It is often said that countries of emigration adhere to the principle of nationality, so as to keep in touch with their emigrants as long as possible, whereas countries of immigration adhere to the principle of domicile, so as to further the process of assimilation. It is doubtful whether, originally, this has been the reason for the split between the countries who accepted one or the other principle. But it is interesting to note that it is the recent immigration into Sweden which first gave the country occasion for concessions to the principle of domicile. Whether this movement will remain restricted to these extraordinary instances, or whether it will result in a general change in principle, is impossible to say. Some indication in the latter direction may be found in the fact that the Scandinavian Lawyers' Conference for 1960 is going to discuss the following subject: "Principle of domicile or principle of nationality?"

a. Nationality

Whether a person is a national of one of the Scandinavian countries and, therefore, may be subject to the conventions depends upon the internal law of the country of which he claims to be a national. The laws on nationality are almost completely identical, being a result of Scandinavian cooperation. This cooperation began with the preparation of the Danish and Swedish laws of 1898 and 1894 respectively, and continued with the Scandinavian laws of 1925 and the laws of 1950 now in force. The way in which the present laws are framed practically excludes the possibility of a person possessing two nationalities

17. Cf. Folke Schmidt in *Festskrift tillägnad Birger Ekeberg*, 1950, p. 453; in 4 International Law Quarterly, (1951), p. 32; and Stig Jägerskiöld in Svensk Juristtidning, 1955, p. 529.

both of which are Scandinavian. Some problems of dual nationality may, however, in theory arise in regard to persons who have acquired their Scandinavian nationality before 1950, but in practice no such problems have so far reached the courts, at least in reported cases. The present laws are based on the principle of *jus sanguinis*. Therefore, no one acquires more than one Scandinavian nationality by birth. Nationality may, however, under certain circumstances be acquired in a Scandinavian country as a result of birth in that country, in connection with a declaration by the person to the authorities of the country, after he has attained the age of majority, that he wishes to acquire the nationality of the country in which he was born, thus a modified application of the principle of *jus soli*. But if the person making this declaration is a national of one of the other Scandinavian countries, he will as a result of the declaration lose his former nationality, in the same way as if he is naturalized according to ordinary naturalization procedure, so that as a result he will still possess only one Scandinavian nationality.

A person may of course be a national of a Scandinavian country, and at the same time possess the nationality of a non-Scandinavian country. No express provisions in the Scandinavian conventions regulate this situation, and it has not been presented in the courts. The problem which arises in this case with regard to the application of the conventions must probably be solved by disregarding the non-Scandinavian nationality. A third country, according to general international law, is free to choose which of a person's several nationalities it will recognize. The fact that the principles on which the law of nationality is based are common to the Scandinavian countries, and that the cooperation in this and other fields has led to the result that one may speak of a common Scandinavian nationality, makes it natural for the Scandinavian countries to prefer a person's Scandinavian nationality to his non-Scandinavian nationality. One may even go a step further and identify the other Scandinavian countries with the country of which the person is a national: the country of which a person is a national always has the right to disregard any nationality other than its own.

This result is affirmed when it is remembered that the conventions practically apply only to persons who, besides being nationals of one of the Scandinavian countries, are also domiciled in one of the countries. Under the Hague convention on dual nationality of 1930, which is being revised and renewed for the moment under the auspices of the Council of Europe, a country is always free to choose to regard a person who is a national of the country in which he is habitually resident as being a national of that country, even if he also possesses the nationality of another country. Similarly, a country may according to this convention choose only to recognize the nationality of the country with which a person under the circumstances appears to be in fact most closely connected. Since the Scandinavian conventions generally apply only to nationals who are domiciled in Scandinavia, the conditions of the convention on dual nationality for disregarding any other nationality which a person may possess are fulfilled in most cases in which the Scandinavian conventions apply at all. If the person is domiciled in the Scandinavian country of which he is a national, the first rule applies. If he is domiciled in one of the Scandinavian countries other than that of which he is a national, he may still be said in the majority of cases to be more closely connected with the Scandinavian country of which he is a national than with the non-Scandinavian country, the nationality of which he also possesses. It should be noted that the convention on dual nationality has not been ratified by all the Scandinavian countries, a fact which does not render its rules, which are based upon generally recognized principles of international law, inapplicable.

b. Domicile

The principle of domicile is of importance in two connections in the conventions. Firstly, it is applied to delimit the scope of the two conventions regulating matters of personal status and succession, because, as I have mentioned already, they generally apply only to nationals of the Scandinavian countries who are domiciled in the Scandinavian countries. Secondly, the domicile of a person, as we shall see, is a very important connecting factor in

the conventions, both with regard to choice of law and with regard to choice of juridiction.

The principle of domicile varies as to its meaning from country to country. It is often said that this raises a problem of characterization. If it is thereby meant that the variation in meaning results in lack of uniformity of decision, so that the solution in each case depends upon the forum before which a case is brought, then this is acceptable. But many facts may give rise to lack of uniformity of decision, and nothing is won by labelling them all problems of characterization. This label should be reserved for the problems arising out of differences in the understanding of the general reference terms in the private international law rules, such as law of succession, law of marital property, etc. These are problems which are connected with the structural differences in the systems of law of various countries and which, therefore, are of specific interest for the comparative study of law and for the general philosophy of law, as Battifol has recently shown in his interesting and fascinating study [18]. It is these problems which the Scandinavian conventions have tried to overcome by the method and approach described above. Differences in the understanding of the word 'domicile' and of other connecting factors contained in private international law rules are of course of great practical interest, and they are therefore worthy of a theoretical study. But there is no reason to call the subject of this study a problem of characterization. It is simply a question of the interpretation of a legal term, and it is one of the simple questions of interpretation. The problems labelled problems of characterization are perhaps also problems of interpretation, but they are very complicated problems of interpretation involving, as I said, the whole structure of the legal systems.

It is generally held that the existence of a domicile presupposes the factual establishment of a permanent residence in a specific country (*factum*) and the intention of the person so established to remain resident in that country (*animus*). If a person has always lived in one country, the question whether domicile

18. Cited above p. 15, note 6.

exists presents no problems. He will be declared to be domiciled in that country, to have his domicile of origin or birth there, without any inquiry into *factum* or into *animus*. A problem only arises in the case of persons migrating from one country to the other. Here the question is at which moment a change of domicile has taken place. I omit the questions which I think in practice are peculiar to English law, whether a domicile may cease to exist before a new one is acquired and whether in the meantime an older domicile may be revived. At what moment a new domicile of choice is established and a change of domicile has therefore taken place depends upon how much the law requires before accepting that a permanent residence has been established in a certain place, and how strict the requirements are as to the proof of the intention to remain resident in that place, two questions which are closely connected with each other.

It is generally recognized that each country, of course, decides these two questions for itself. They are questions of interpretation of private international law rules, and as it is generally accepted today that conflict rules belong to the internal law of each country, each country must also decide for itself how to interpret them. It is this *particularisme* which gives rise to differences in the understanding of the meaning of the term 'domicile'.

It is well known that the notion of domicile in the present English law is very well defined by strict conditions and rules, and that the existence of a change of domicile is very difficult to establish because of the strict requirements regarding the proof of intention to remain for ever at the new residence. As opposed to this strict English notion of domicile, it seems that in the United States a new domicile is acquired if only the person has the intention of residing in his new home for an indefinite period of time but not necessarily for ever. The French concept of domicile is apparently not very different from this American notion, but in the Frence conflict rules the principle of domicile has only a very limited application.

In Scandinavian law, the notion of domicile theoretically is supposed to be somewhat less flexible than the American notion. A change of domicile can only take place if an intention to

remain in the new home is established. But this requirement is not interpreted nearly as strictly as is the case in English law. A frequent American formulation of the requirement of intention, that the person is without any present intention of removing from his present residence, probably comes very close to the practical interpretation of this requirement in Scandinavian law [19].

It must be remembered that the establishment of a new domicile depends upon conditions which in themselves are vague, and that, therefore, complete uniformity cannot be expected to exist in the application of the principle of domicile to each individual case. It may, however, be said that the differences in the understanding of the notion of domicile from country to country have been exaggerated. It seems, therefore, that the Hague Convention of 1951 to regulate conflicts between the national law and the law of the domicile [20] is right in defining, in Article 5, a person's domicile as the place in which he is habitually resident. This definition is probably in conformity with the understanding of the principle of domicile which prevails in most countries apart from England.

The Scandinavian conventions do not contain a definition of the principle of domicile, and nothing can be inferred from the wording which they use. The expression applied in the conventions may be translated as "being settled" or "having taken up residence", but this terminology is generally taken to mean domicile, a word which is practically never used in legislative texts in Scandinavia. The conventions leave it to the courts of each country to decide in each particular case where a person is domiciled, which means that the courts of each of the countries will apply their own understanding of the principle. This shows that the notion is supposed to be understood in the same way in all the Scandinavian countries. Otherwise the intention to reach uniformity of decision in all the countries would have made it natural to give a definition. That supposition may also be

19. Cf. O. A. Borum, *Lovkonflikter*, 4th ed., 1957, p. 92.

20. Cf. O. A. Borum in *Liber Amicorum of Congratulations to Algot Bagge*, Stockholm, 1956, p. 16.

inferred from a few scattered remarks in the preparatory reports to the conventions. No conflicts, however, can arise in cases in which there should be some disagreement in the understanding of the notion, since judgments and administrative decisions rendered in one country in matters comprised by the conventions must be recognized and usually also enforced in the other countries, without examination of the substance of the case or of the fulfillment of the conditions as to the existence of domicile or nationality. This follows expressly from Article 22 of the convention on marriage, adoption, and guardianship. In this respect, the unity between the Scandinavian countries may be even closer than that which exists between the American states under the full faith and credit clause and the due process clause of the American constitution.

Although no definition of the principle of domicile is given in the conventions, the understanding of the notion of domicile in Scandinavia, which has been advocated here and which must be regarded as that which is accepted in the Scandinavian countries, is in conformity with the intentions underlying the conventions. A notion of domicile similar to the present English one is very close to the principle of nationality, as it is very difficult to change domicile according to the English rules. The Scandinavian countries have no interest in applying a principle of this character in their mutual relations. If complete uniformity of their substantive laws existed, the natural solution would have been always to apply *lex fori*. Due to the small differences which do exist, this was, however, not found to be possible. If, e.g., a national of Sweden had not acquired a domicile in Denmark, Sweden did not find it proper that Danish law should apply in a case before Danish courts concerning him, because in spite of the high degree of uniformity between Swedish and Danish law, the application of Danish law would mean that the Swedish national would acquire a somewhat different position from that which he would have under Swedish law.

On the other hand, even the eastern countries, who generally adhere to the nationality principle, found that the degree of uniformity existing between the substantive laws of the Scandi-

navian countries makes it unnatural to stand strictly on the principle of nationality. If a Swede moves to Denmark, he will quickly become accustomed to having his legal position governed by Danish law, and the small differences which exist will easily be accepted. It is much more reasonable to apply Danish law to him than to require the Danish courts which will usually be seized with the case to make investigations into Swedish law to find out which are in fact the differences between Danish and Swedish law in the case before them. The presumption is that they are non-existent, and it is therefore natural to apply the law of the domicile as soon as a person has shown such a connection with the country that he has taken up a domicile there. The usual arguments for the application of the national law in these cases become practically without importance. The result is, of course, also in conformity with the traditional view in the western countries and with the general trend toward a principle of territoriality which has always carried considerable weight in those countries. Finally, the acceptance of the *renvoi* principle in Finland and to a limited extent in Sweden resulted in the application to nationals of the western countries domiciled in the eastern countries of the law of the domicile in a number of cases, even prior to the conventions.

The result now reached regarding which law should be applied would conform very badly with a notion of domicile according to which it would be very difficult to change domicile. The application of the law of the domicile in the latter case would lead to results almost identical with those which would be reached if the principle of nationality was applied. Only if domicile is understood, in accordance with the Continental and American tradition, as a person's habitual residence are the advantages of the high degree of uniformity utilized in applying the law of the domicile. In these circumstances, the application of the law of the domicile will in most cases mean the application of the law of the forum, because generally the courts in the place where a person has his residence will be seized with matters concerning him. That is true both for factual reasons, since the problems will generally arise in that place, and for procedural reasons, since

according to general procedural principles, e.g., *actor sequitur forum rei*, he must usually be sued in the place where he lives. Thus, the application of the principle of domicile as here understood utilizes the advantages of the uniformity in the substantive law by leading to the application of *lex fori* in most cases. At the same time, due reservation is made thereby for the application of a law other than that of the forum, in those cases in which lack of uniformity in the substantive laws would make it unreasonable to apply the law of the forum.

A natural conclusion of this is drawn in the convention on marriage, adoption, and guardianship. In the cases in which it contains rules on jurisdiction which confer jurisdiction only on the courts of the domicile, these rules provide for the application of *lex fori*, which of course will be identical with the *lex domicilii*. The rules which provide for the application of the *lex domicilii* naturally presuppose that courts other than the courts of the domicile have jurisdiction. This feature of the convention is interesting as an illustration of the interdependence between rules on conflict of laws and rules on conflicts of jurisdiction.

c. Additional Residence Requirements

It is worth mentioning at this point two rules to which I shall return later but which in certain respects modify or perhaps replace the principle of domicile as generally understood in the conventions. I have several times mentioned the fact that even in matters in which uniform legislation has been prepared, differences in detail exist; and I have pointed out that the law of succession has only been unified to a limited extent. In a few respects in which differences in the substantive laws exist as a result of this, the principle of domicile in itself was not found to lead to satisfactory results. It was necessary to find a kind of compromise between the principle of domicile and the principle of nationality, to overcome the hesitation of the eastern countries before they would accept the principle of domicile in these cases. The interesting solution of the conflicts between the national law and the domiciliary law which is found in the Hague convention of 1951 was not known when the conventions were concluded.

But even if it had been, it would not have been acceptable because it does not give a solution in the case in which the law of the country where a person is domiciled prescribes the application of the law of the domicile, while the law of the country of which he is a national prescribes the application of his national law. If, e.g., a Swede were domiciled in Denmark, Danish law would be applied in the western countries and Swedish law in the eastern countries. It was exactly this situation which the makers of the conventions wanted to overcome. The solution which they chose was to make an additional condition for the acceptance of the law of the domicile in certain cases—namely, that the person concerned had been domiciled in one case for the last two years and otherwise for the last five years in the country where he is now domiciled. If that condition is not fulfilled, the national law applies—in some cases, however, only upon request—whether the national law is identical with the law of his previous domicile or not. It thus also applies to a Swede who has not been domiciled in Denmark for two or five years, even if before moving to Denmark he was previously domiciled in Norway. I shall return to these provisions in due course in the place where they belong systematically. Here, it will only be stressed that these rules, according to the intention with which they were written, presuppose that a domicile exists according to normal conceptions. They then make requirements as to the length of time in which this domicile has been established. It is not enough, e.g., for the application of Danish law that a Swede has lived in Denmark for two or five years, if it has not been his intention to remain in Denmark but on the contrary he has had the intention all the time of returning to Sweden, e.g., after having concluded work in which he has been engaged. And if a person moves to another Scandinavian country with the intention of returning to his old country, but he decides a year later to remain in the new country, the duration of the domicile can only be counted from the moment he changed his intentions.

Although, theoretically, these rules contain requirements as to the duration of the domicile, in fact they easily have the effect of replacing the requirement of domicile. Two or five years of

residence is quite a long time when it is remembered that a domicile may be changed overnight if the necessary intention with some probability can be established to have existed. If a person or his heirs can prove that he has in fact lived in the country for the two or five years required, and no indications of importance exist that he has, or at any time during this period had, the intention of returning to his former home, then the courts and especially the administrative authorities will be very apt to agree that he has been domiciled in the country of residence during that period. Administrative authorities possess only limited possibilities for investigations of this kind. The requirement of two years' domicile concerns the question of which law governs the conditions for marriage. These provisions are administered by local, municipal, or ecclesiastical authorities, which are apt to follow clear-cut lines and to use fixed criteria to the extent possible. In practice, therefore, it will probably be found that at least the requirement of a domicile of two years' duration is replaced by a requirement of two years of residence. In my opinion, very little can be said in objection to this result.

Especially in relation to the question of marriage impediments, there is some tradition for regarding residence for two years as establishing domicile. It has been mentioned above that under the Danish-Swedish convention of 1907, a national of one of the countries who was not domiciled in the other country could not marry in the latter country without a certificate from his home country that its law did not prevent a marriage. It was, therefore, of importance to decide whether he was domiciled in the country before whose authorities he wanted to marry. In a circular letter, the Danish Ministry of Justice [21] said that all relevant facts should be taken into account to decide whether a domicile in Denmark had come into existence. When in doubt, the duration of the residence should also be regarded, and then two years' residence could generally be accepted as sufficient to constitute a domicile. Swedish practice in applying the convention seems to have been identical with this Danish view.

The idea of requiring a domicile of a certain minimum

21. Cirkulære nr. 377 of 17 December, 1907.

duration as a condition for replacing the principle of nationality by the principle of domicile is interestingly enough found in the recent French proposal for a reform of the *Code civil* [22], as well as in the proposed Benelux Uniform Law.

The French project, Article 59, provides that the status and capacity of an individual is governed by his national law. But as an exception, it is then said that if a foreign national has had his domicile in France for the last five years, then French law is applicable.

According to the Benelux Uniform Law, Article 5, the marital property system of a married couple is governed by the national law of the husband at the time of the celebration of the marriage. However, if he has never been domiciled in the country of which he is a national, or if he has fixed his domicile abroad more than five years ago, then under certain conditions the law of the first common domicile applies. In both cases we find that the connecting factor is a domicile of a certain minimum duration.

G. Proof of Foreign Law

Still another problem of a general character will be mentioned before I turn to the individual rules of the conventions. This is the problem which is often stated as the question of whether foreign law is law or fact. The kernel of the problem is whether the court must apply foreign law on its own initiative, *ex officio*, or only if a party requests foreign law to be applied. A related problem which arises, whether one or the other solution is chosen, is how the court can get knowledge of the content of foreign law and what to do if such knowledge cannot be obtained.

Undoubtedly, the Scandinavian conventions are binding upon

22. The French project is quoted in accordance with the text and the enumeration of articles which is found in the printed discussions of the Comité français de droit international privé, *La Codification du Droit international privé*, 1956, p. 19. After these lectures were written I have been informed, that as a result of objections to the proposed draft by courts and other authorities and by the Comité français, a new draft has been made. This draft has not yet appeared in print and I have, therefore, not been able to take into account such changes which may have been made in the articles of the draft referred to in these lectures.

the courts in the sense that the courts must apply the rules of the conventions on their own initiative [23]. Generally, it is left to the procedural law of each country to decide how to proceed in order to obtain the necessary information about the law of another country which must be applied according to the convention. However, the convention on succession and administration of estates contains a provision which touches upon the matter, and the problem has also been taken up in the final protocol of that convention.

As we shall see later, the convention on succession provides for the general application of the law of the domicile of the deceased, but then makes the national law applicable if the domicile has not lasted for five years, provided the application of the national law is requested by an heir. Article 6 contains the rule that if an heir requests the application of the national law, he must provide the court with information about the national law.

This is definitely not the only case in which a court must apply foreign law under the Scandinavian conventions. It seems unfounded to give a rule about who has the obligation to provide information about the foreign law in that specific case, when it is otherwise left to the courts to decide whether the court itself or one of the parties shall procure the necessary information and how it shall be done. The provision, however, gave rise to the formulation of a final protocol, partly relieving the heir of his obligations under Article 6. Although attached to this convention, the final protocol may be understood to apply more generally. It provides that letters rogatory about the content of foreign law should be sent by the Ministry of Justice or the Ministry of Foreign Affairs of one country to the Ministry of Justice in the country whose law is to be applied, or in Sweden to the Ministry of Foreign Affairs. It further provides that information must be given if the problem is regulated by express provisions, and if no express provisions exist, information shall be given to the extent that circumstances permit. In a very doubtful case where no express provisions exist, it thus cannot

23. Cf. Viggo Bentzon, Tidsskrift for Rettsvitenskap, 1934, p. 355.

be required that a complete expert opinion shall be given. It must suffice that information is given about the pertinent judicial decisions and the legal literature in point, and perhaps some indication of the doubts which arise in the case.

The question which has also given rise to so much discussion, what the court should do if no information can be obtained about the content of foreign law, cannot easily arise in the relations between the Scandinavian countries.

CHAPTER III

DISCUSSION OF THE FIVE CONVENTIONS

HAVING now concluded my remarks on the general features and principles of the conventions, I shall proceed to discuss the individual provisions of the conventions. The discussion will consist primarily of a description and an interpretation of the provisions of the conventions and to some extent of a comparison with the French and Benelux proposals. But I hope that it will at the same time illustrate what I have said about the method and approach of the conventions, and how conflicts between the principles of domicile and nationality may be overcome.

I shall begin with the two conventions which are basically concerned with problems of choice of law, although they also contain a number of provisions on jurisdiction and recognition of foreign decisions—namely, the convention on marriage, adoption, and guardianship, and the convention on succession and administration of estates, particularly the section concerning successions. Then I shall discuss the mainly procedural conventions, namely, the section on administration of estates in the latter of the two conventions just mentioned, the convention on bankruptcy, and finally the two conventions on reciprocal recognition and enforcement of foreign decisions.

A. THE CONVENTION ON MARRIAGE, ADOPTION, AND GUARDIANSHIP

The convention on marriage, adoption, and guardianship is divided into four parts. The first three parts are concerned each with one of the subjects mentioned in the title of the convention. The fourth part contains a provision as to the reciprocal recognition of judicial and administrative decisions. This latter will be treated in connection with the two conventions on this subject.

I. Marriage

The part which is concerned with marriage first deals with the contracting of marriage in two articles. Thereafter, three articles regulate the choice of law with regard to the effects of marriage in relation to marital property. Then follow three articles concerning divorce, and finally one article as to annulment of marriage.

a. Conditions of Marriage

It is a general principle of private international law in most countries that the question of whether a person fulfills the conditions for entering into a marriage must be decided by his personal law, i.e., it must be decided either by the law of his domicile or by his national law, according to which principle the country concerned adheres to. In Scandinavia, only Denmark forms an exception from this general picture. Danish law as a general rule always applies to the question of conditions for marriage to be celebrated in Denmark, whether the future spouses are domiciled in Denmark or not. However, the question of whether consent from the parents is required depends also in Denmark upon the personal law of the person who wants to marry. And further, the marriage authorities will usually not perform a marriage between two persons who are neither domiciled in Denmark nor Danish nationals if the authorities know that the marriage is prohibited according to the personal law of the parties. But the latter exception of course only comprises a very restricted number of cases, as it is rare that persons without any connection with a country want to marry there.

The convention does not enshrine this exceptional position of the Danish law of always applying the *lex fori*, but follows the general principle in these matters. In practice, however, the convention does not reach very different results from those to which Danish law leads, as we shall see.

It is provided in Article 1 of the convention that the right of a Scandinavian national to contract marriage in a State other than that of which he is a national is regulated by the law of the

State in which he wants to marry, provided he has been domiciled in that state for the last two years and still is domiciled there. If this condition is not fulfilled, his right to marry there depends upon his national law. This provision gives rise to some comment.

Firstly, it must be noted that the provision does not conform wholly with the general principle enunciated above with regard to the scope of the conventions. The provision only applies to Scandinavian nationals, but according to the wording, it applies to them whether they are domiciled in Scandinavia or not.

Secondly, the role of the principle of domicile, which is otherwise generally accepted in the convention, is here reduced very considerably. The law of the domicile according to the wording of the convention only applies if a person marries in a Scandinavian country in which he is domiciled, and only provided he has been domiciled there for the last two years. And even then the principle has been limited in its application by a final protocol according to which the Danish government has promised the Swedish and Finnish governments not to exercise its right, according to Danish law, to grant exemption from certain marriage impediments to nationals of those two countries, even if they are domiciled in Denmark and want to marry there—a kind of public policy clause in reverse.

The national law applies in practically all other cases under the convention. It applies if a person is domiciled outside Scandinavia, and wants to marry in Scandinavia, at last if he marries in a country other than that of which he is a national. If he marries in the country of which he is a national, and is domiciled in that country or is domiciled outside Scandinavia, the case is not of inter-Scandinavian concern and falls outside the convention.

Further, the national law applies if a person marries in a Scandinavian country other than that in which he is domiciled, and it also applies if he marries in the country in which he is domiciled, provided he has been domiciled there for less than two years.

As a result, the principle of domicile applies only as a limited exception. In many instances, this result conforms in practice

with the result reached by the Danish private international law in general, namely that the conditions of marriage as a whole are governed by the law of the place of celebration of the marriage. If a person domiciled outside Scandinavia marries in Scandinavia, or if a person domiciled in one Scandinavian country marries in another, the country in which he chooses to marry will very often be that in which he is a national. The national law will then be identical with the law of the place of marriage. Similarly, after two years of domicile in a State, marriage in that State will take place according to the local law. Last but not least, the final protocol contains a provision which expressly provides for the application of the law of the place of celebration. According to this protocol, the authorities have no duty to marry persons who according to the law of that country are excluded from marrying each other by marriage impediments from which an exception cannot be granted. That holds true even if under the convention a law which does not contain such marriage impediments or which provides for a possibility for exemption from them is to be applied to the right of the parties to marry. This is the only rule in the conventions, apart from the convention on recognition and enforcement of foreign judgments, which resembles a public policy clause. Apart from this rule, public policy cannot be invoked as a reason for the non-application of another Scandinavian law which according to the conventions is applicable.

At the same time, the rule of the convention does not differ very much from principles generally accepted in most European countries, including the eastern Scandinavian countries, because the fact is that the principle of nationality is enshrined in the convention with a few limited exceptions.

Problems of fraud. It is worth noticing that the application of the law of the domicile in case the marriage takes place in the country in which the person is domiciled and has been domiciled for the last two years has its counterpart in the French project for reform of the Code civil. Article 62 of this project provides that the conditions of marriage are subject to the personal law of each of the spouses. According to Article 59 of the project, which

I have mentioned above, the personal law is the national law unless a foreign national has been domiciled for more than five years in France, in which case the law of the domicile becomes his personal law. Apart from the required duration of the domicile, the provision is identical with the Scandinavian convention.

The reason why the Scandinavian convention requires a domicile of a duration of two years to permit the law of the domicile to apply instead of the national law is, however, different from the reason why, after five years' domicile in France, French law is applied according to the project. The reason why the Scandinavian convention requires a certain minimum duration of the domicile is that a small number of differences still exist between the laws of the Scandinavian countries with regard to marriage impediments. These differences have been reduced somewhat since the conclusion of the convention, but some still exist. By requiring the domicile to last for two years before the law of the domicile applies, the convention attempts to prevent fraudulent evasion of marriage impediments by persons who move to another country with the intention of marrying in contravention of marriage impediments in their national law. If they remain for two years in the new country, it may usually be concluded as I have already said that a serious change of domicile has taken place. Without a requirement of two years of domicile, it would be easy to give the impression of the establishment of an apparent change of domicile, which is actually not meant seriously. Although a marriage contracted in accordance with the apparent domiciliary law but in contravention of the national law could be annulled when the change of domicile is proved not to be serious, it is always less desirable to annul a marriage than to prevent it. This compromise between the principle of nationality and the principle of domicile does not constitute any very important concession from the principle of domicile to that of nationality, because two years will often pass before a domicile can be recognized to exist. On the other hand, the difference in purpose between the Scandinavian and the French rule becomes clear. The Scandinavian rule is a restriction on the application of the law of the domicile, the French rule restricts the application

of the national law. The purpose of the Scandinavian rule may be said to prevent fraud; this is not at all the case with the French rule, which on the contrary recognizes the connection which is established between the person and his domicile.

It may be mentioned in this connection that a rule corresponding to the French doctrine of *fraude à la loi* is not found in Scandinavian law. If a change of domicile has effectively taken place, it cannot be said to take place fraudulently. And if the change of domicile is not effective, no change of domicile has taken place and it is not necessary to invoke a rule on fraudulent evasion. Countries which adhere to the principle of nationality may be in more need of a doctrine of this kind than countries which adhere to the principle of domicile, but apparently the doctrine of fraudulent evasion has not been adopted in the eastern Scandinavian countries any more than in the western countries.

b. Forms of marriage

The convention recognizes in Article 2 the general principle that the form of celebration of a marriage is subject to the law of the country where the marriage is celebrated. To questions of form is also referred the question concerning the inquiry into whether the conditions of marriage are fulfilled, and the publicity which is required in this connection in the Scandinavian countries, the publication of banns. The convention, however, makes exceptions in this respect, both with regard to the inquiry into the fulfillment of marriage conditions and with regard to the publicity, providing for the recognition on certain conditions in one country of inquiry and publicity which have taken place in another country.

In principle, the inquiry as well as the publicity takes place in the country where the marriage is going to be performed, and in accordance with the procedure followed there, e.g., with regard to publicity in church or otherwise. Already in Article 1 of the original convention, it was provided, however, that a certificate of inquiry from the authorities of the country of which a person is a national, certifying that he fulfills the conditions of marriage according to his national law, must be accepted as

sufficient by the marriage authorities of the other countries, provided that the national law according to the convention is applicable to his right to marry in the country where the marriage is going to be performed. That is always the case, as we have seen, unless he wants to marry in a country to which he does not belong by nationality and in which he has been domiciled for more than two years.

When the convention was revised, a new exception, which, however, applies only to cases in which both of the future spouses are Scandinavian nationals, was added in Article 2 with regard to the publicity. According to this provision, publicity in the country where the marriage is going to take place is, under certain circumstances, not required if publicity has already taken place in another Scandinavian country. The condition is that the inquiry into the fulfillment of the marriage conditions preceding the publicity has been made in the other country in accordance with the same law which would have been applied if the inquiry had been made in the country where the marriage shall take place. Again, the reason for this condition is the rule about the application of the law of the domicile in cases in which a person marries in the country in which he has been domiciled for two years. If, e.g., a Norwegian is going to marry a Dane, and if they are both domiciled in Denmark but the Norwegian has been domiciled in Denmark for less than two years, the inquiry will be made in all the Scandinavian countries on the basis of the national law of each of the future spouses. Whether the inquiry and the following publicity take place in one or the other Scandinavian country, the certificate issued by the authorities in that country that no marriage impediments exist will be accepted in any of the other countries. If on the other hand, a Norwegian who has been domiciled in Denmark for two years or more is going to marry, the inquiry will be made in Denmark on the basis of the law of the domicile, i.e., Danish law, while in the other countries it will be made on the basis of his national law, i.e., Norwegian law. In this case, a certificate of inquiry and publicity originating in one Scandinavian country is not acceptable

everywhere in Scandinavia. If the Norwegian is to marry in Denmark, Danish authorities have to make their own inquiry. Similarly, if he wants to marry in one of the other States, the inquiry will have to be made in a country other than Denmark, in order to satisfy the requirement that the inquiry made in a country other than that in which the marriage is to be performed, if the latter country is to be bound to accept it, must be made on the basis of the same law as that which would be applied in that country. On this point, the provisions on marriage may be criticized, and it seems that a slight modification of the convention could overcome this difficulty, if, namely, the authorities would always make the inquiry with a view to where the marriage is going to be celebrated. We have, however, already come a long way, because before the revision of the convention in 1953, publicity was always required to take place in the country where the marriage should be celebrated.

c. Marital Property

I now turn to the question of the effects of marriage. The convention is limited to regulating the effects of marriage with regard to the marital property system. It does not regulate the effects of marriage with regard to the personal rights and duties of the spouses in their mutual relations.

1. *Principles.* According to the private international law of many countries including the Scandinavian countries, the personal law of the husband at the time of the marriage applies to the marital property system. This is not the rule which is found in Article 3 of the convention. This article provides that, in principle, the effects of marriage with regard to the marital property system are governed by the law of the Scandinavian country in which both of the spouses at the time of the marriage take up a common domicile. This rule must be seen in connection with the following provision which regulates the effect of a change of domicile. Here again, the convention breaks very decidedly with generally recognized principles. In many countries, again including the Scandinavian countries, the

basic principle with regard to the marital property system is the so-called principle of immutability. According to this principle, the law regulating the marital property system never changes, regardless of changes in domicile or nationality. Constructive arguments are mostly given for this principle, e.g., that the marital property system is based on a contract and, therefore, cannot change. The real basis of the principle seems to be that it is impractical for the spouses that the marital property system may change. This principle of immutability suffers many exceptions in those countries where it is embraced. Even if the husband's personal law at the time of the marriage applies in principle, the present personal law will be applied in many respects, both in the mutual relations between the spouses and in the relation between the spouses on the one side and third persons on the other side. So many exceptions are often made from the principle that it is doubtful whether it is really meaningful to talk about a principle of immutability any longer. In many countries, probably no general rule or principle exists. Instead, a number of specific rules regulating the different relations are found. In the Scandinavian convention, the principle of immutability may be said to have been replaced by a principle of mutability. According to the provision, if both spouses later take up a domicile in another Scandinavian country, the law of their new domicile applies to their marital property relations, with the exception of the effects of contracts which have been made before the change of domicile.

2. *Delimitation and Interpretation.* The delimitation and interpretation of this whole provision requires some comment.

The provision applies only to the effects of a marriage between persons who are both Scandinavian nationals, at the time of marriage as well as at the time when a problem arises regarding their marital property. It follows that the convention applies to this question only if both spouses possess Scandinavian nationality at all relevant times. If they are not Scandinavian nationals when the case arises, the convention does not apply, even if it did apply when they married. And if they were not

both Scandinavian nationals before they married, it does not apply even if they have in the meantime acquired Scandinavian nationality. If, e.g., an Englishwoman marries a Danish man and they settle in Denmark, they will never be subject to Article 3 of the convention, even if the wife is naturalized in Denmark after the marriage.

This delimitation excludes from the convention a number of cases in which Scandinavian law will nevertheless be applied in all the Scandinavian countries, even under ordinary rules of private international law. The background is the Swedish membership in the Hague convention. Under the Hague convention, the husband's nationality at the time of the marriage is decisive with regard to the applicable law. If, therefore, a foreign man marries a Scandinavian woman, Sweden is bound to apply the national law of the husband, even if the spouses settle in Scandinavia. No such obligation exists if a foreign woman marries a Scandinavian man. It was, however, found to be impractical that the convention should comprise the case in which the wife was of non-Scandinavian nationality at the time of the marriage but not the case in which the husband was of non-Scandinavian nationality at that moment.

This delimitation of the convention also explains, at least in part, why the convention has chosen the common domicile of the parties as a connecting factor, and has consecrated the principle of mutability, so that the applicable law may be said in most cases to be the law of the present common domicile of the parties or else the law of their last common domicile. Since the convention is limited to nationals of the Scandinavian countries who are domiciled in Scandinavia, the choice of the applicable law can be made with a view to the most practical solution and without regard to the personal law, because the personal law, whether the principle of domicile or the principle of nationality is followed, will in any event be a Scandinavian law. Since a high degree of uniformity in the substantive law exists, the most practical solution, which is also most in conformity with the general principles underlying the convention, is to choose the law of the domicile of both spouses. That is the

law which is most likely to be the *lex fori* and which is, therefore, known to the court. And it is the law which the spouses, as well as third parties contracting with them, will usually expect to be applicable.

This argument applies not only to the choice of the law which will govern the effects of the marriage when the marriage takes place. It also applies if the spouses later change their domicile[1]. When the law does not differ greatly from one country to another, the legal position of the spouses will not be changed in a very important manner, even if another law than before applies to them after the change of domicile. And it is much easier for third persons contracting with the spouses, and for the courts of their new domicile which will usually be seized with cases concerning the marital property, if the law of their new domicile applies.

It follows from what I have said that the convention provides for the application of the law of the country where the spouses took up a domicile at the time of the marriage. Scandinavian law does not know of a dependant domicile of the wife. In conformity with the general trend in most countries today, the domicile of each of the spouses is determined independently of each other. Accordingly, the situation may exist when spouses do not take up a domicile in the same Scandinavian country at the time of their marriage, either because they settle or are already settled in different Scandinavian countries, or because at least one of them settles outside Scandinavia. In that situation, as well as in the situation where their first common domicile is in a country outside Scandinavia, the application of the convention is excluded. It is sufficient for the application of the convention that the spouses settle in the same country, even if they do not live in the same place in that country. But if they do not take up a domicile in the same country immediately after the marriage, the convention does not apply, and ordinary rules of private international law of the forum apply instead. The situation is probably rare and it was not found to be necessary to regulate

1. Cf. Viggo Bentzon, Ugeskrift for Retsvœsen, 1932 B, p. 141.

it in the convention, which here as in most other places is limited to the more usual and practical situations.

This rule regarding the independence of the domicile of the wife is also of importance with regard to the provision regulating the effects of a change of domicile upon the marital property system. This provision also presupposes that both of the spouses change their domicile. If only one of the spouses moves from the country in which both of the spouses took up a common domicile immediately after the marriage, then the applicable law does not change. The law of their original common domicile applies until the moment when they take up a new common domicile in another Scandinavian country [2]. That holds true even if the spouses move to a country outside Scandinavia. This may be of importance to non-Scandinavian countries which, in some cases because of their application of the renvoi doctrine, may have to apply the law of the last common Scandinavian domicile to Scandinavian spouses domiciled in such countries.

Finally, the question arises whether the convention applies if spouses who are and always have been Scandinavian nationals take up a common domicile in Scandinavia at a time subsequent to the marriage, but did not do so at the time of the marriage, either because they took up different domiciles or because they were domiciled together outside Scandinavia. The wording of the convention does not expressly exclude its application in this situation, although undoubtedly the situation which was thought of in framing the provision is that in which the spouses take up a common Scandinavian domicile at the time of the marriage, and then later take up another common Scandinavian domicile. The answer to this question must depend upon an interpretation of the provision, based upon its background which has just been explained. It seems that the rule of the convention, which provides for the application of the law of the new common domicile of the spouses in case the spouses change domicile subsequent to the marriage and take up a common Scandinavian domicile, cannot apply when the spouses did not take up a

2. For a possible modification, cf. Viggo Bentzon and K. Hammerich in Revue critique de droit international, 1934, p. 864.

common Scandinavian domicile at the time of the marriage, if the result of its application is to replace a non-Scandinavian law by a Scandinavian law. The reason why a change of law was acceptable under the convention in case of change of the domicile of the spouses was the uniformity between the law which is applied before and the law which is applied after a change of domicile. This uniformity does not exist if a change from a non-Scandinavian law to a Scandinavian law takes place.

If after the marriage the spouses take up a domicile in different Scandinavian countries, a Scandinavian law will usually apply to the effects of the marriage. In the eastern countries, this is certain, because the national law of the husband applies. In the western countries. it depends upon the domicile of the husband at the time of the marriage. If that domicile is in Scandinavia, Scandinavian law applies. If it is outside Scandinavia, a non-Scandinavian law applies and a change in the applicable law will mean a change from a non-Scandinavian to a Scandinavian law. In these circumstances it seems most correct not to extend the convention to apply in these cases [3], although the development since the conclusion of the convention may have shown a trend towards the abandonment of the principle of immutability in more cases. The interpretation of the convention according to general principles of interpretation cannot be influenced by such a development.

3. *Marriage Contracts.* This point of view with regard to the interpretation of Article 3 of the convention is confirmed by the wording of Article 4 [4], which is concerned with the form of marriage contracts. This article applies only to marriage between nationals of the Scandinavian countries who at the time of marriage were nationals of the Scandinavian countries, and who at that time took up a domicile in one of the countries. The result is that the convention, if it applied to cases in which the spouses, at a time following the marriage, acquired a common

3. Cf. Federspiel, *De nordiske internationalprivatretlige konventionsudkast*, Nordisk Tidsskrift for International Ret, Acta Scandinavica Juris Gentium, 1930, p. 114, who is somewhat doubtful with regard to this result.

4. Cf. also Art. 5.

Scandinavian domicile, would contain no provisions as to the formal validity of marriage contracts made in such cases in spite of the fact that such contracts as to their content were governed by the convention.

The content of a marriage contract is subject to Article 3, i.e., the contract is governed by the law which at the relevant time applies to the effects of marriage, whether it is made in connection with the marriage or later [5]. Because of the uniformity between the substantive laws, a change of the applicable law seldom affects the contents of a marriage contract seriously. Otherwise it would not have been possible to extend the system of mutability also to marriage contracts, in contrast to what is the case even in countries which in their general private international law accept the principle of mutability.

Under Article 4, a marriage contract is valid as to its form, not only when it is valid under the law of the common domicile, but also if it is valid under the national law of one of the parties to the marriage contract. That is a concession to the eastern countries. If the spouses move to another Scandinavian country, publicity of the marriage contract in that country may be made a condition by that country for the validity of the marriage contract in relation to third persons. The principle of *locus regit actum* is not embraced in this rule of the convention, while, as we shall see, it is applied with regard to the form of wills. Although nothing has been said about the reason for this difference, I find it to be proper for the following reason:—The principle of *locus regit formam actus* in my opinion is justified in those cases in which requirements of form are made with the purpose of securing the proof of something, such as the existence of a will and the certainty that the will is actually that of the deceased and not a forgery. As soon as the purpose of requiring a form is not to secure a proof but, e.g., to protect third persons or the weaker of two contracting parties, the principle of applying the law of the place of making of the act can no longer be applied. Such

5. This applies also to the question of approval by the public authorities, in those cases in which an approval is required in the law governing the effects of marriage.

requirements are not really rules on form. They are part of the substantive law, and they may vary essentially from country to country according to the policy pursued in each country. There is in these cases an essential connection between rules of form and rules of substance which makes it impossible to combine the rules of form of one country and the substantive rules of another country; such connection is not found in those cases in which the purpose of the requirements of form is to secure a proof, and where the way of securing it is of secondary importance as long as it is secured [6].

4. *Modifications in the General Principles.* The general principle of the convention, according to which the law of the common domicile of the spouses as a general rule governs marital property problems, is modified in two respects.

a. "Acquired Rights". Firstly, if a contract has been made, whether between the spouses [7] or with third persons, this contract is governed so far as marital property problems are concerned by the law of the spouses' common domicile at the time of the conclusion of the contract, even if the spouses have subsequently taken up a new common domicile in another Scandinavian country.

b. Immovable Property. Secondly, a modification has been made with respect to the power of a spouse to dispose of immovable property which is situated in a State other than that in which the persons have their common domicile. Generally, Scandinavian private international law does not distinguish between movable and immovable property, but on the contrary recognizes the principle of unity of the marital property system. The same law applies to movables and to immovables in the law of marital property as well as in the law of succession. But because of some differences in the substantive law, it has been found more practical with regard to third persons to apply the

6. Otherwise, O. A. Borum, Ugeskrift for Retsvæsen, 1930 B, p. 117.

7. With regard to marriage contracts, it is somewhat doubtful where the line is drawn between the application of the law of the new common domicile and the law which was applicable when the contract was made. Cf. Viggo Bentzon, Tidsskrift for Rettsvitenskap, 1934, p. 345.

lex situs to questions of authority to dispose of immovable property, such as e.g. whether a spouse, without the consent of the other spouse, may sell or mortgage his own immovable property which is situated in another Scandinavian country. Apart from this exception, the effects of marriage are governed by the law of the common domicile of the parties also as far as immovable property is concerned.

5. *Comparisons.* A comparison with the Benelux Uniform Law, Article 5, and the French project for revision of the *Code civil*, Article 69 and following, presents some interesting parallels to the Scandinavian convention. Both are based upon the principle of nationality, but both make concessions to the principle of domicile. The Benelux Uniform Law applies the principle of domicile if the husband has never been domiciled in the country of which he is a national or, as mentioned above, if he has been domiciled abroad for at least five years. In these cases the marital property system is that which exists in the country in which the spouses establish their domicile immediately after the marriage, unless the national law of the husband does not authorize this system. Except for the last modification, this exception in the Uniform Law corresponds very well with the main principle of the Scandinavian convention.

The French project has as its main rule the personal law of the spouses. But that, as it may be remembered, means the law of the domicile as far as foreigners domiciled in France for more than five years are concerned. And if no common personal law exists at the time of the marriage, the law of the place of celebration applies. As a general rule, from which exceptions of course exist, that means the law of the place where the spouses are going to take up a common domicile. The rule is thus to some extent a parallel to the Scandinavian convention.

Also the rule according to which the marital property system is not immutable but may be changed during the marriage has its parallels. In this respect, it should first be mentioned that it is subject to discussion whether in England a system of mutability or one of immutability exists. Important authorities entertain

the view that a change of domicile leads to a change in the applicable law, recognizing, however, the rights of third persons under the previously applicable law, exactly as in the Scandinavian convention. In the Benelux Uniform Law, the conclusion or modification of marriage contracts in the course of a marriage are subject to the law governing the marital property system. If, however, the husband changes his nationality during the marriage, his new national law governs these questions, while no change takes place with regard to the law governing the marital property system as a whole. The French project permits spouses who become naturalized as French nationals to opt for French law of marital property by adopting within a year a contract in conformity with the *Code civil*. If they had no marriage contract before, and do not make one now, French law applies automatically in the future. In this case, if a change of the applicable law takes place, the rights of third persons under the previous marital property system are not prejudiced. This conforms with the Benelux Uniform Law and with the Scandinavian convention.

d. Divorce and Annulment

In the matters which have been discussed up to now, questions of competence of courts and authorities have not been regulated by the convention. The convention has only determined which law shall be applied when an authority or a court is seized with one of the problems which have been discussed. This has been done in such a way that in practice *lex fori* will usually be applied, but that in principle the court or other authority will have to apply foreign law in a number of cases. Uniformity of decision has thus been obtained by means of rules of choice of law.

The articles of the convention which are concerned with problems of divorce and similar questions follow a different method to obtain uniformity of decision. As a rule, they are concerned with problems of jurisdiction, and after having pointed out which court or other authority is competent to handle a matter, the convention in principle but with some exceptions provides that the law of the forum shall be applied. When only one court is competent, usually no reason exists for

that court to use foreign law. At any rate, uniformity of decision is obtained by the application of the *lex fori*.

1. *Jurisdiction in Separation and Divorce Suits.* In matters of separation and divorce, jurisdiction in cases between nationals of the Scandinavian countries is regulated by the convention. It is thus sufficient for a case to be comprised by the convention if the parties are Scandinavian nationals at the time of the case, even if they or one of them were nationals of a non-Scandinavian country at the time of the marriage. The competent courts, according to Article 7, are the courts of the country in which both spouses are domiciled. If they are not domiciled in the same country, jurisdiction lies with the courts of the country in which they had their last common domicile and in which one of them is still domiciled.

The jurisdiction which is based upon the common domicile —present or past—of the spouses may be called primary jurisdiction. Article 7 also provides in these matters for jurisdiction of the courts of the country of which one of the spouses is a national, but this jurisdiction is only a subsidiary jurisdiction which cannot be chosen freely. Only if no court has primary jurisdiction, because the spouses have never been domiciled together in Scandinavia or because neither of them is domiciled in the country in which they had their last common domicile, the jurisdiction of the courts of the country of which one of the spouses is a national may be invoked.

This became of importance in a case which was brought before the Swedish courts [8]. A Swedish man married a Finnish woman who acquired Swedish nationality by the marriage, but at the same time retained her Finnish nationality. The spouses' common domicile was always Finnish, but the husband left the wife in Finland and moved to Sweden. There, he sued the wife to obtain separation and relied on the fact that both spouses were of Swedish nationality to invoke the jurisdiction of the Swedish courts. The Supreme Court of Sweden, however, dismissed the case for lack of jurisdiction because the last common

8. Nytt Juridisk Arkiv, 1944, p. 81.

domicile was in Finland where the wife was still domiciled. To lawyers brought up on the principle of domicile, the result is natural, but in a country which is used to the principle of nationality, it may at first sight seem shocking. Similarly, a Danish case [9] was dismissed because the last common domicile of the spouses was Swedish. The wife sued the husband in Denmark, being herself Danish, and Danish courts therefore being competent in ordinary circumstances.

The rule on subsidiary jurisdiction of the courts of the country of which one of the spouses is a national may give rise to a difficult situation. If the spouses do not possess the same Scandinavian nationality, the courts of two countries may be seized with the same case at the same time. The convention does not provide for the suspension of one of the suits pending the decision of the other. The convention, however, as we shall see provides for the mutual recognition of decisions in divorce and separation cases. It seems, therefore, natural to apply this rule of recognition analogously in such a way that the court which is the last to be seized with the case suspends its hearings until the court first seized with the case has made a decision which the second court must respect.

The subsidiary jurisdiction in one situation becomes a primary jurisdiction. If a married couple has obtained a separation in the courts of the common domicile, a divorce on the basis of this separation may be granted in the State in which both spouses are nationals. This concession to the principle of nationality requires some explanation.

Separation in Scandinavian law is not meant as a legal institution of its own, but as a step on the way to divorce. In certain kinds of divorce cases, divorce may be obtained immediately, but in the majority of cases, divorce presupposes a separation which has lasted for a certain period of time. The required length of the period of separation varies between the countries, not very considerably, but enough so that the countries which require a shorter period have wanted to obtain for their nationals a possibility of availing themselves of the shorter period

9. Ugeskrift for Retsvæsen, 1954, p. 793.

required in their home country, even if they had their common domicile and therefore had obtained separation in a country which requires a longer waiting period. It seems that a more practical way of obtaining this result would have been to let the courts which have primary jurisdiction apply the national law in lieu of *lex fori* in these cases, instead of requiring the spouses to go to another country to obtain a divorce [10]. The rule may be critizised also for breaking with principles, but it must be regarded as a concession to the principle of nationality introduced as a compromise.

The court which has jurisdiction in separation and divorce matters is also competent, according to Article 8, to adjudicate in connection with the separation or divorce itself upon questions regarding temporary suspension of the married life, division of the marital property, damages, maintenance of the children, maintenance mutually between the spouses, and custody of the children [11].

If a question of custody or maintenance is raised without connection with a separation or divorce case, the courts of the country in which the defendant spouse is domiciled are competent. The rule applies only if the spouses are separated or divorced. The convention does not apply to such matters while the spouses are still married. With regard to custody, the rule will in practice usually mean that the courts of the country in which the child is domiciled have jurisdiction. That is in conformity with the proposal which will probably be made by the International Law Association in this respect.

2. *Choice of Law.* To the questions of separation and divorce, as well as to questions of custody and maintenance, the law of the forum always applies [12]. In cases in which primary juris-

10. Cf. O. A. Borum, *Ugeskrift for Retvæsen*, 1930 B, p. 120.

11. It has been decided in a Danish case, Ugeskrift for Retvæsen, 1955, p. 1065, that the question of the wife's right to widow's pension is covered by the rule on jurisdiction in Article 8.

12. A special rule with regard to variation of maintenance of a spouse will be mentioned in connection with the convention on the collection of maintenance claims.

diction exists, only the courts of one country have jurisdiction. That makes the application of the *lex fori* quite natural. In case of subsidiary jurisdiction where the spouses do not possess the same nationality, the applicable law will depend upon whether the jurisdiction of one or the other country's courts is invoked. However, the situation is rare, and the substantive laws of the countries are so uniform that it seems reasonable to choose *lex fori* instead of trying to decide whether it is more natural to apply the law of one or the other spouse, or perhaps still another law in this case.

3. *Division of Community Property.* The question of division of the community property according to Scandinavian substantive law, with the exception of Finland, may arise without a simultaneous request for separation or divorce. If such a question arises between spouses whose marital property system is at all subject to regulation by the convention, Article 5 contains a rule about jurisdiction in this case. This article thus applies only if both the spouses are, and were at the time of the marriage, nationals of the Scandinavian countries, and if they immediately after the marriage took up a domicile in the same Scandinavian country. According to Article 5, a request for division of the community property must be brought before the courts of the country in which both spouses are domiciled. If they are no longer domiciled in the same country, the competent court is the court of the country in which the spouse to whom the request is made is domiciled [13].

Regardless of whether the courts of one country or the other are competent, and regardless of whether a question of division of the community property arises in or without connection with a separation or a divorce case, the law which must be applied

13. If he is domiciled in Finland, the courts of the country whose law is applicable to questions of marital property have jurisdiction, i.e., the courts of the last common domicile of the spouses. Since the substantive law of Finland does not know of this question at all, it was felt that its courts should not be burdened with this kind of case. The convention does not regulate the situation in which the spouses are no longer domiciled in Scandinavia. In this case, ordinary rules of private international law must apply.

to the division of the community property is always the law which according to the convention applies to questions of marital property [14].

The convention, in effect, regulates the jurisdiction of courts in separation and divorce cases between spouses whose marital property system is not regulated by the convention. The rule on jurisdiction in divorce cases only presupposes that the spouses at the time of the case are nationals of a Scandinavian country, whereas the rule about the law applicable to the effects of marriage also requires them to be nationals at the time of marriage and to have taken up a domicile in the same country at that time. If the spouses are not both nationals of the Scandinavian countries at the time of the marriage, or if they did not then take up a domicile in the same Scandinavian country, the convention contains no rules as to the law applicable to the effects of marriage upon the marital property. Ordinary rules of private international law of the forum must, therefore, apply to the division of the marital property in these cases, even if the jurisdiction is based upon the convention [15]. The same is true with regard to claims for damages, which are also subject to the law on the effects of marriage.

4. *Annulment.* Annulment of a marriage is regulated by Article 10, which presupposes that the spouses were nationals in Scandinavia, not only at the time of the annulment case but also when they married. The latter limitation is natural, because otherwise their right to marry according to Article 1 of the convention would not be regulated by the convention, and annulment is, of course, based mainly upon the existence of marriage impediments.

With regard to the question of jurisdiction in annulment

14. This, according to the convention on succession and administration of estates, Article 7, also holds true in case of division of the community property at death. A minor modification of the rule in certain cases follows from Article 2 of that convention, to which I shall return later.

15. Otherwise, Viggo Bentzon, Tidsskrift for Retsvitenskap, 1934, p. 351, who, although criticizing the result, seems to regard the law of the forum to be applicable in accordance with Article 9. Probably in the same direction as the present author is Bentzon, *loc. cit.*, p. 352 note 1, p. 360, and p. 376.

suits, the same rules apply as in divorce suits. Also with regard to choice of law, the rules with regard to divorce generally apply to annulment cases. However, the question whether the conditions for annulment are present is governed by the law which governed the right of the plaintiff to marry. If the spouses are sued together by a third person or by the government, the conditions for annulment depend upon the law which governed the right of one of the spouses to marry. That must be taken to mean that if the conditions for annulment in only one of those laws are present, annulment may take place.

Other problems arise, however, in an annulment case, such as the question of the legal position of the children, the custody of the children, maintenance, etc. To all these questions, the *lex fori* applies.

While the rules of choice of law in annulment cases conform with general principles of private international law, it is difficult to compare the rules on divorce in the convention with those in other countries or conventions. Generally, jurisdiction may be invoked in most countries if one of a number of different connecting factors is present, as it is seen e.g., in the Hague Convention. When the courts of a number of different countries may be competent in the same case, uniformity of decision is not reached by a choice of jurisdiction, such as is the case under the Scandinavian convention. It then becomes necessary to try to obtain uniformity of decision by means of choice of law. Therefore, the *lex fori* usually plays only a minor role in the private international law of divorce. It may, e.g., have the effect of limiting the possibility of getting divorce, in the jurisdiction which is chosen, to cases in which a divorce would be obtainable not only according to the law which is actually applied to the question, the *lex causae*, but also according to the *lex fori*. That is thus the case in the Benelux Uniform Law and in Swedish law. But in spite of what has just been said, the exclusive application of the *lex fori* in divorce cases is known, e.g., in the western Scandinavian countries and in England.

II. Adoption

We now turn to the second part of the first convention, which is concerned with the private international law of adoption.

Here again, the method which has been chosen to obtain uniformity of decision is to give a rule on choice of jurisdiction. But as opposed to questions of divorce, this method seems to be followed also in many countries other than the Scandinavian ones.

a. Permission to Adopt

The convention applies only to adoption permissions to Scandinavian nationals who are domiciled in Scandinavia, and who wish to adopt a Scandinavian national, whether domiciled in Scandinavia or not. In these cases, the courts or authorities in the country in which the person who wants to adopt is domiciled are competent to decide whether a permission shall be granted.

The competent court or authority must apply its own law, but with one modification. If the person whom the adopter wishes to adopt is under the age of eighteen, and if he is domiciled in the country to which he belongs by nationality, the child welfare authority of that country must be given opportunity to express its opinion before permission to adopt is granted. This, however, does not mean that the authorities in the country where the adopter is domiciled are bound by the opinion expressed by the child welfare authority of the country of the child's domicile [16]. As the adoption according to the convention must be recognized in all the countries, the child welfare authorities do not usually have it in their power to prevent the child from leaving the country to join the adopter in his home. It is an open question as to what will be the effect if it is forgotten to ask for the opinion of the child welfare authority of the child's home country. If, however, the adoption is valid in the country where the permission is given, it seems that the wording of the article on recognition requires the other countries to recognize

16. In a Swedish case, Nytt Juridisk Arkiv, 1946, p. 546, the Finnish authorities refused to consent to an adoption in Sweden of a Finnish child domiciled in Sweden. The Supreme Court did not take this refusal into account and permitted the adoption.

it, even if this requirement is not followed. Again, when no account need be taken of any law other than the *lex fori*, it is due to the high degree of uniformity of the substantive law.

The effects of an adoption are not governed by the convention, but the question of the adopted child's and the adopter's mutual right of succession, and of the child's right of succession in relation to its natural and its adopted relatives, is governed by the convention on succession and administration of estates. Apart from this question, it seems natural to believe that the law which governs the adoption also governs its effects, at least as long as the adopter has not changed his domicile. However, this problem must be decided by ordinary rules of private international law in each of the countries.

b. Termination

The convention applies to questions of termination of an adoption, if both the adopter and the adopted are Scandinavian nationals and one of them is domiciled in Scandinavia, provided that the permission to adopt has been given in a Scandinavian country. In such cases, the courts of the country in which the adopter is domiciled have jurisdiction. If he is not domiciled in Scandinavia, the jurisdiction goes to the courts of the country where the adopted is domiciled. Also in these cases, the *lex fori* always applies.

In a Danish case [17], it was decided that the parties cannot agree to confer jurisdiction upon a court which is not competent under the convention. This probably holds true not only in cases of termination of adoption, but in all cases in which the convention contains rules on jurisdiction.

III. Guardianship

The third part of the convention has the heading of "guardianship". Its provisions are, however, far from being limited to pure questions of guardianship, and are concerned with all questions regarding incapacity, including interdiction. It applies exclusively to Scandinavian nationals who are domiciled in

17. Juristens domssamling, 1953, p. 145.

Scandinavia, and it builds upon the principle of domicile. It should be noted that the question of guardianship is absolutely distinct from the question of custody, which is only regulated in the convention with regard to problems arising as a result of divorce.

Although this part of the convention covers much more ground than the subject of guardianship, there is good reason for the heading of the part. The problems concerning a person's capacity have, namely, in the convention mainly been regulated indirectly, by the regulation of the jurisdiction of the authorities of the contracting States to appoint a guardian, to supervise guardians, and to terminate guardianship.

a. Jurisdiction

According to Article 14, guardianship for minors is subject to the authorities of the country in which the infant is domiciled, unless guardianship is already exercised in one of the other countries. In the latter case, the authorities of the country in which the guardianship is already exercised are competent in matters concerning the guardianship. Likewise, the authorities of the country in which a person who has become of age is domiciled have jurisdiction to deprive that person of the control of his estate and to appoint a guardian for him, unless this has already been done in one of the other countries.

According to Article 16, the authorities, in making their decisions in these matters, apply only their own law.

The solution of the problems of capacity is quite interesting. It may be inferred from the rules now mentioned that the question of a person's capacity is subject in principle to the law of his domicile. If, however, he changes his domicile at the time when he is under the care of a guardian, whether because of his minority or because of a decree to that effect, the jurisdiction of the authorities of his previous domicile does not cease to exist as a result of his change of domicile. The law of his previous domicile, therefore, does not cease to be applicable to the question of capacity. But the guardianship may be transferred from the authorities of the previous domicile to the authorities of the

present domicile by direct negotiations between those two authorities. The result of such a transfer is that until a new transfer takes place, the jurisdiction lies with the authorities of the new domicile, and the law of the new domicile applies. Such a transfer may also take place if, for reasons other than a change of domicile, the authorities of the two countries find a transfer to be expedient. This may be the case, e.g., because a person who is domiciled in one country owns a large fortune in another country. The transfer will as a rule be effected by the termination of the previous guardianship in the one country, and the appointment of a new guardian in the other country at the same date.

The consequence of this arrangement is that the principle of domicile governs as a general rule, but a change of domicile must be supplemented by a public act before it has effect. The reason for this is that it cannot easily be said at which moment a change of domicile has taken effect, and the management of an incapable person's affairs should not suffer by his moving from one country to another. That is especially true with regard to persons who have been declared incapable in one country, because the decree declaring the person incapable might lapse by a change of his domicile. It is less important with regard to minors, because the age of majority with one exception is the same—21 years of age—in all the Scandinavian countries. Therefore, a person will remain a minor if he moves to another country, and no vacuum will arise, as in the case of a person who has been declared incapable.

In Finland and Iceland, marriage and divorce respectively have the effect that a minor becomes of age. In the final protocol it is provided that a person who has become of age in this manner, but who is still under the age of 21, shall not again become a minor by moving to one of the other countries. That is probably in conformity with generally accepted principles.

b. Effects of Incapacity

According to Article 17, all effects of incapacity other than personal effects, as well as the powers and authorities of the guardian, are subject to the law of the country in which the

guardianship is exercised [18]. If a person is domiciled in Sweden when he is declared incapable and he makes a contract in Denmark, Swedish law will apply to the validity of that contract, unless he has in the meantime changed his domicile to Denmark and the guardianship has been transferred to Denmark. The law of the guardianship applies, and no exceptions have been made according to which the *lex loci contractus* may be applied, e.g., to the advantage of a third person in good faith, such as is the case in many countries and also in the ordinary private international law of some of the Scandinavian countries. Again, it has not been necessary to make such exceptions because of the similarity of the substantive laws. The result will in most cases be the same, whether the personal law or *lex loci contractus* applies. Similarly, the question of how the guardian shall administer the assets of his ward and to what extent the guardian is supervised in his mangement by the authorities depends upon Swedish law in this case, and the competent authorities are the Swedish authorities unless and until he changes his domicile to another country and the guardianship is transferred to that country.

The provisions stating that the effects of incapacity are subject to the law governing the guardianship do not apply to the capacity to assume obligations under a bill of exchange or a check. This question was governed at the time of the convention by specific provisions of the uniform Scandinavian laws in these matters, and it is now governed by provisions which are based upon the Geneva Conventions.

c. Other Problems

The country whose authorities have jurisdiction in matters of guardianship also, according to Article 19, decide the question if and when the guardianship shall be terminated and the person

18. This does not mean the country in which the guardian actually lives and exercises his task as a guardian, but the country whose authorities have jurisdiction with regard to the guardianship. Thus, in case of a change of domicile of a guardian and his ward, he exercises the guardianship at the old domicile until a transfer to the new domicile takes place.

who has been under guardianship shall again resume the management of his own affairs.

If a temporary guardian is needed in a country, such a guardian may be appointed, regardless of the domicile of the person for whom he is appointed to act and of the personal status of that person.

Danish law knows of a certain light kind of guardianship under which a person may only act in common with a guardian. Such a guardian may only be appointed if the person is domiciled in Denmark and is not under guardianship in one of the other countries. But then the rules of the convention also apply to this kind of guardianship. However, if a person who is under this kind of guardianship later takes up a domicile in another country, its existence does not prevent the appointment of a guardian in his new domicile, while an ordinary guardianship in Denmark would have done so according to the convention [19].

19. Under Article 4 of the convention on succession and administration of estates, the Danish guardianship for a widow who retains undivided possession of the estate lapses if the widow takes up a domicile in a Scandinavian country other than Denmark.

CHAPTER IV

DISCUSSION OF THE FIVE CONVENTIONS
(Continued)

B. Succession

I now turn from the first to the fifth and last of the Scandinavian conventions, the convention on succession and administration of deceased persons' estates. This convention is also divided into four parts, the first of which concerns rules on succession and the right to retain undivided possession of the estate. The second part concerns questions of the debt of deceased persons, the third part all other problems regarding the adminstration of a deceased person's estate, while the fourth part concerns problems of recognition and enforcement of judgments and decisions. The second and third part will be treated in connection with the convention on bankruptcy, which concerns related subjects, and the fourth part will be taken in in connection with the convention on recognition and enforcement of judgments.

I shall now discuss the first part of this convention which, like the first convention, regulates problems which in general traditionally belong to the choice of law sector of private international law. The convention applies, with practically no exceptions, only to nationals of the Scandinavian countries who are, or at their death were, domiciled in a Scandinavian country. It is generally based upon the principle of domicile. The convention regulates a field in which Scandinavian cooperation has only to a small extent taken place in framing the substantive law although uniform legislation regarding the private international law in these matters has been enacted in Sweden and Finland. The problems were, therefore, greater here than in the first convention with regard to overcoming the conflict between the principles of nationality and domicile.

I. Intestate Succession

Article 1 of the convention regulates intestate succession [1]. But the article is also of importance for succession according to a will. The Scandinavian convention does not expressly regulate questions of the validity of wills, with the exception of problems of form and capacity. However, it is probably correct to state that the possibility of total or partial invalidity of a will, due to non-compliance with rules providing for a legitime and related provisions, is subject to the law which applies to questions of intestate succession under Article 1 [2]. The rules on the right of a person's wife and children to a legitime limits his right to make a will to that part of his fortune which is not comprised by the legitime. The rules on the legitime may, therefore, be regarded as rules on the right of succession according to law, protecting the right of intestate succession against the possibility of succession according to a will of the deceased. This is in accordance with the historical development in Scandinavian law. The right to make a will is a later exception to the general rule under which the whole of the estate devolved upon the family. The Benelux Uniform Law expressly treats the question of legitime in connection with intestate successsion.

According to Article 1, intestate succession is regulated by the law of the country in which the deceased was domiciled at his death. The convention has thus in principle accepted the domicile as connecting factor.

a. The Five Years Rule

However, the eastern countries which adhere to the principle of nationality in their ordinary private international law have not been able to accept the principle of domicile without certain precautions, in view of the fact that the substantive law has not

1. This also comprises the question of the right of succession of adopted children. A special provision in Article 14 regarding a question in this connection, namely, the reservation of the adopter's right to make a will regardless of the adopted child's right to a legitime, will become of less importance as a result of recent changes in the law on adoption.

2. The correctness of this statement is supported by the provisions in Article 13, mentioned below.

been unified. Again, here as in the first convention it was necessary to find a compromise between the countries adhering to the principle of nationality and the countries adhering to the principle of domicile. Both parties had to make some concessions, but the adherents of nationality have probably conceded most. In view of the general trend in the direction of the principle of domicile, the solution may be worthy of imitation in other cases of conflict between the two principles.

The convention does not require the existence of a domicile of a certain duration before the law of the domicile may be applied, as is the case with regard to the application of the law of the domicile to the question of a person's right to marry. Instead, any heir or legatee for whom it is of importance may within a certain time limit [3] request the application of the national law of the deceased in lieu of the law of his last domicile, provided the deceased had not been domiciled for the last five years before his death in the country in which he was domiciled at his death. That means that, generally, the law of the domicile will be applied even if a person has only been domiciled for a very short time in the country in which he was domiciled at his death. Since the law of the last domicile, as we shall see, is the law of the forum, this is certainly the most practical solution. There is no reason why the court or the executor should apply a law other than its own, if no one has any interest in the application of another law. Only if a person can show that it is of importance to him that the national law is applied will the court apply foreign law, provided that he can prove that the domicile has lasted less than five years.

If the State is to assume the succession, as an heir or as *bona vacantia* under the national law, because the deceased has not made a will and no intestate heirs exist under the national law, then the law of the domicile always applies [4].

3. The time limit is six months from the death or the termination of the administration, whichever is the later. It does not apply to persons who have not been represented in the administration.

4. Similarly, the law of the deceased's last domicile always applies with regard to the existence and the extent of the responsibility of the heirs for the debts of the deceased, including alimony to an illegitimate child or its mother, and also their responsibility for the fulfillment of the will.

A person may have an interest in the application of the national law of the deceased, e.g., because he will get more under the national law than under the law of the domicile, or because he will get nothing under the latter law [5]. While the question of whether the surviving spouse may retain undivided possession of the estate in case the deceased leaves issue is regulated by specific provisions in the convention, the rule in Article 1 also applies to the right to retain undivided possession of the estate when the deceased does not leave any issue, but leaves other relatives. That means that if, under the national law of the deceased, the surviving spouse would have this right, while he or she would not have it under the law of the last domicile, he or she may request the application of the national law if the domicile has not lasted for five years. And vice versa, if the surviving spouse would have the right under the law of the domicile but not under the national law, the other heirs may request the application of the national law.

b. The Right to Retain Undivided Possession of the Estate

The provisions in Articles 2, 3 and 5 concerning the right of the surviving spouse to retain undivided possession of the estate when the deceased spouse leaves issue, including adopted children, are based upon the same system, but they are somewhat more detailed. This right to retain undivided possession of the estate is in those Scandinavian countries in which it exists, namely the western countries, of very great practical importance. Its principle is that the surviving spouse keeps all the marital property, his own as well as that which the deceased spouse could dispose of. Thus, no distribution among the heirs takes place before the surviving spouse dies, remarries, asks for distribution himself, or else a case arises of abuse by the surviving spouse of his right to dispose of the whole of the estate. This right to retain possession of the whole of the estate varies, however, as

5. The convention also expressly provides that an heir who has a right to receive maintenance under the deceased's national law in addition to his right as an heir, but who does not have this right under the law of the domicile, may request the application of the national law.

to its specific content and conditions from country to country, and it is not found in the eastern countries. It was, therefore, necessary to make specific provisions regulating when and according to which law this right should be preserved or acquired in case of migration between the countries. Also, lacking specific provisions, it might be questionable whether the right to retain undivided possession of the estate shall be characterized as an institution under the law of marital property or an institution under the law of succession, or perhaps even as a rule of procedure. This again shows how valuable it is to avoid abstract conflict rules, and to frame the rules of private international law by taking the content of the substantive law into account as it has been done in the Scandinavian conventions.

1. *The law of the domicile permits it.* Article 2 is concerned with the situation in which the deceased spouse was domiciled in a country according to whose law the surviving spouse has a right to retain undivided possession of the estate. The article provides that the law of the domicile applies to this question, even if the deceased spouse was a national of one of the other countries. The wife, thus, has the right to retain undivided possession of the estate if the law of the husband's last domicile so provides. However, a descendant has a right to have the estate administered and distributed if he has a right to do so under the national law of the deceased, provided that the last domicile of the deceased had not lasted for five years when he died. This right the descendant may exercise at his own choice immediately after the death of the first spouse, or else at a later time, e.g., when he becomes of age. The article makes only one exception to this right of the descendants, namely, in case the surviving spouse at the time of the marriage was a national of the country in which the deceased died domiciled. In this case, the surviving spouse always has the right to retain undivided possession of the estate, regardless of the duration of the domicile.

The substantive law rules on the right to retain undivided possession of the estate vary somewhat, as I have said, between the countries which know of this legal institution. If the general

principle of the convention applied,—namely, the five years rule—the descendants and the surviving spouse (e.g.) of a deceased of Danish nationality who died domiciled in Norway would have the right to request the application of Danish law if the Norwegian domicile of the deceased had not lasted for five years. That is not the case according to the convention. The surviving spouse must always acquiesce in the application of the law of the domicile in these cases. And the descendants must acquiesce in the application of the law of the domicile, unless the national law gives them a right to have the estate distributed. The national law may give them that right not only because it does not know at all of the institution of retaining undivided possession of the estate, but also because the conditions for this retention in the national law are not fulfilled. Therefore, the descendants of the Dane who was domiciled in Norway may have an interest in and may apply for the application of Danish law, if that gives them the right to have the estate distributed, but not otherwise. It was found that the similarity between the laws of those countries which know of this legal institution is so important that there is no reason why the court of the domicile of the deceased should apply another law than its own, except in those cases in which the application of another law leads to distribution.

If the estate of a Swedish national is distributed because of the application of Swedish law, the surviving spouse always has the right given to him by Swedish law to take out means of a certain value in advance, even if this right does not exist in the law of the deceased's last domicile. Again, the reason for this specific provision is the doubt which this rule of Swedish law presents with regard to its characterization.

2. *The law of the domicile does not permit it.* Article 3 regulates the situation in which the law of the deceased's last domicile does not provide for a right of the surviving spouse to retain undivided possession of the estate, thus the opposite situation to that of Article 2. According to Article 3, the surviving spouse in any case has the right to retain undivided possession of the

estate if the national law of the deceased so provides, even if the deceased died domiciled in a country according to whose law such a right does not exist, provided that the deceased's domicile there had not lasted for five years. The article does not mention that the surviving spouse must request the application of the national law, because a request is always necessary to avoid administration and distribution of the estate. The article further contains some procedural rules, which are necessary because the substantive law of the country, whose authorities are going to arrange for the retention of the undivided possession of the estate, does not know of this institution.

The mixture of the national and the domiciliary law which the rules on succession in the convention consecrate is peculiar to the Scandinavian convention. The Benelux Uniform Law has chosen the national law of the deceased. The French project has chosen the law of the domicile. The Scandinavian convention is a result of a compromise between countries which each adhere to different principles. But it may be said that the convention is close to the acceptance of the principle of domicile.

II. Wills

The following Articles, 8 to 11, are concerned with problems relating to wills.

a. Form

Article 8 concerns the question of form. It provides that the will is valid as to its form, firstly, if it fulfills the requirements in the Scandinavian country in which it is made. This rule is in accordance with the generally recognized principle of *locus regit formam actus*. Secondly, a will is valid as to its form if it is made in accordance with the requirements in the law of the domicile of the deceased at the time when he made it, provided he was domiciled in a Scandinavian country; and thirdly, it is valid if it follows the rules of his national law at that time. This gives quite a wide choice of possibilities [6].

6. The revocation of a will is valid if it is made in accordance with the law of the domicile or the national law of the testator at the time of the revocation. Here, the observance of the law of the place where the revocation is made probably does not suffice.

However, since the article applies to wills by all persons who at the time of their death are Scandinavian nationals domiciled in Scandinavia, a number of possibilities are open and yet not regulated by the convention. A Scandinavian national domiciled in Scandinavia at his death may have been non-Scandinavian when he made his will; or although Scandinavian, he may have been domiciled outside Scandinavia. If he has made the will in a Scandinavian country in accordance with the *lex loci*, he is always covered by the convention. But he may have made the will in accordance with the law of the country where he died domiciled, or in accordance with the law of the country whose nationality he possessed at the time of his death. Or he may have made the will in accordance with the non-Scandinavian national or domiciliary law, or in accordance with the law of the place outside Scandinavia where the will was made. The latter may also be true of a person who, when he made his will, was a Scandinavian national, whether domiciled or not domiciled in Scandinavia.

None of these possibilities are regulated by the convention, but the words of the convention must not be taken to mean that a will is not valid in any of these cases [7]. The question must depend upon the ordinary rules of private international law of the forum. At least in Denmark it is thus sufficient to make the will valid that the rules as to the form of wills in the law of the last domicile of the testator are fulfilled. That is in conformity with the proposals which will probably be laid before the next Hague Conference, and also with the proposals contained in the 4th report of the English Private International Law Committee [8]. It has not been found necessary to include a provision in the Scandinavian convention exhausting all these possibilities. The important thing was to ensure equality between the principles of nationality and domicile.

b. Causes of Invalidity

Articles 9 and 10 are concerned with the importance, concer-

7. Cf. Viggo Bentzon, Tidsskrift for Rettsvitenskap, 1934, p. 362; O. A. Borum, *Lovkonflikter*, 4th ed. 1957, p. 134.
8. Command Paper, no. 491/1958.

ning the validity of a will or its revocation, of the age and state of mind of the testator, or of the application of compulsion, fraud or undue influence against him, or of his error. The general rule is that the law of the country where the testator was domiciled when he made or revoked the will applies. Thus, also in this respect the principle of domicile is embraced. But Article 9 has a special rule containing a concession to the principle of nationality with regard to requirements of a certain age or of capacity: namely, in relation to an intertemporal private international law problem, a *conflit mobil*. If, at the time of the making or revocation of a will, the testator had not been domiciled for five years in the country where he was domiciled, the will or revocation is valid if it has validity either according to the national law or according to the law of the domicile—thus, an alternative conflicts' rule.

III. Other Problems of Succession [9]

Questions regarding the interpretation of a will are not regulated by the convention. They may cause serious problems, which are subject to the ordinary private international law of the forum.

The following articles of the convention regulate a number of subjects which, because of their character, have been regulated differently from the main problems.

Article 12 regulates some problems which have partly been touched upon also in the Benelux Uniform Law. It provides that the binding effect of waivers of inheritance, covenants concerning the succession to property, and donations *mortis causa* is subject to the law of the domicile of the deceased at the time when the agreement was made. The same law applies to the question of whether an heir who has received something from the deceased while the deceased was still alive can keep it, or must bring it into hotchpot as an advancement made to the heir.

9. Certain rules in Swedish and Finnish law about the depositing of wills with the court, and about the taking out of summons relating to the validity of a will within a certain time, apply only if the deceased was domiciled in Sweden or Finland at his death.

a. Advancements

The latter rule consecrates a principle which is also accepted in the Benelux Uniform Law. According to this law, the duty to bring advancements into hotchpot depends in general upon the law which regulates the succession as a whole, namely, the last national law of the deceased. But if the national law of the deceased at the time when he made a donation to an heir exempts the heir wholly or in part from bringing it into hotchpot, then that rule applies. The Benelux Uniform Law in this rule reproduces the Hague Convention of 1928. There is an interesting difference between the Scandinavian rule and the Benelux rule. According to the Scandinavian convention, the law of the domicile at the time when the advancement was made is always decisive. If it imposes a duty of bringing the advancement into hotchpot, that duty remains whether or not such an obligation exists under the law of the last domicile of the deceased. According to the Benelux Uniform Law, the obligation is in principle regulated by the last national law of the deceased. If under that law no obligation exists to bring the advancement into hotchpot, the heir can never be obliged to do it. But even if that law imposes such a duty upon the heir, he may be exempted from it by the national law of the deceased when the advancement was made. The Benelux rule is thus more advantageous to the heir than the Scandinavian rule which, as opposed to the Benelux rule, may lead to a duty for the heir to bring the advancement into hotchpot, even if he would have no such duty under the law which regulates the succession as a whole. I admit that my sympathy is with the Benelux rule, which to me seems more consistent than the Scandinavian rule.

b. Immovable Property

Article 13 touches upon a problem which is subject to great diversity of opinions and solutions in various countries. In a number of countries, a distinction is made between the law regulating the succession to movables and the law regulating the devolution of immovable property. This distinction is in

principle abandoned long ago in Scandinavia. The general rules which I have mentioned apply to immovables as well as to movables, regardless of *situs*. Article 13 introduces a modification in this system. While the law of the last domicile of the deceased, as we have seen, generally applies to the question to which extent a person may dispose of his property by will, the *lex situs* according to Article 13 plays a certain role in this respect with regard to immovables.

The article provides that the law of the country where immovable property, typically a farm or a manor, is situated applies to the question of whether an heir has a better right to the immovable property than other heirs, and whether the testator may dispose with regard to that property in such a way that some heirs are favored at the expense of other heirs. Similarly, the rule of perpetuities of the law of the *situs* of immovable property always applies to the devolution of that property [10].

The reason why these exceptions from the general rule are made is that the problems involved often touch upon the economic policy of the country concerned with regard to land. In a way, these rules may be said to belong to public law and therefore to be outside the scope of private international law.

C. Administration of Deceased Persons' Estates, and Bankruptcy

I have now finished the treatment of that part of the convention which is concerned with the law of succession. The principles which govern bankruptcy, according to the bankruptcy convention, and those which govern the administration of deceased persons' estates, according to the convention on succession and administration of estates, are in many respects identical. I shall, therefore, in the following treat those provisions of the two conventions, which have something in common, together.

The bankruptcy convention comprises the bankruptcy of all domiciliaries of the Scandinavian countries, while the convention

10. The question whether the rule of perpetuities in a country applies to the succession to movables situated there is not regulated by the convention.

on the administration of estates is limited to nationals of the Scandinavian countries who are domiciled in Scandinavia [11].

I. General Principles

Many arguments are cited for and against the principle of plurality, as well as for and against the principle of unity and universal effect of bankruptcy and administration of estates. The principle of plurality means that a bankruptcy or administration in one country has only the purpose of distributing the assets in that country, and may even be limited to the satisfaction of creditors or heirs in that country. The result may be a number of concurrent bankruptcies. The content of the principle of unity and universal effect of the bankruptcy or administration is that administration or bankruptcy proceedings only take place in one country and comprise all the assets of the deceased or bankrupt wherever they are found, with the purpose of satisfying all the claimants on an equal footing regardless of where they belong.

The principle of plurality is rarely consecrated with regard to administration of deceased persons' estates, but it is (e.g.) foreseen in the French project as a measure of protection of French nationals in case of discrimination against them abroad. It is, on the other hand, the general principle in most countries with regard to bankruptcy.

The equal treatment of all creditors, which is a main purpose of bankruptcy proceedings, is usually best obtained by means of the principle of unity and universal effect of the bankruptcy. But often creditors in one country feel that they are, or are in fact,

11. Since the bankruptcy convention applies only to the administration of deceased persons' insolvent estates, to the extent that the administration of deceased persons' estates is regulated by a Scandinavian convention, the bankruptcy of a national of a non-Scandinavian country who is domiciled in a Scandinavian country is comprised by the bankruptcy convention; but the administration of his estate is not, whether he dies insolvent or not. The bankruptcy convention applies to the administration of deceased Scandinavian nationals estates if they are domiciled in a Scandinavian country under whose law the estate of a deceased person, for whose debts the heirs have taken on no responsibility, is subject to bankruptcy proceedings. In the other countries, the convention on administration of estates is applied also to the administration of such estates, even if they are insolvent, unless the administration is declared bankrupt.

not treated on an equal footing with the creditors in the country where bankruptcy proceedings take place. Also, it may be more costly for them to have to go to another country to get their share of all the assets, when assets are found in their own country, which would suffice for their satisfaction. Finally, no agreement exists as to where a bankruptcy should be declared. For these reasons, concurrent bankruptcies may take place, or creditors in one country may get full satisfaction in assets situated in that country, in spite of the fact that bankruptcy proceedings take place at the same time in another country.

However, the fallacy of this situation is generally recognized, and many attempts have been made to overcome it by conventions which enshrine the principle of unity and universal effect of bankruptcy, such as the Hague convention of 1926, the Bustamente code, and a number of bilateral conventions, especially between France and other countries [12]. Most successful seem to be those conventions which are concluded between a small number of States which are closely related, both with regard to the content of the substantive law and otherwise, such as the Scandinavian countries. The principle of unity and universal effect is in fact enshrined in both of the Scandinavian conventions in these matters.

a. Administration of Estates

In the convention on administration of estates, that principle is accepted without exceptions. The administration takes place in the country in which the deceased was domiciled and in accordance with the law of that country, and it comprises the whole of the estate regardless of where the assets of the estate are situated [13]. It should be mentioned, however, that with regard

12. Cf. Pierre Safa, *La faillite en droit international privé*, (Beyrouth, 1954) p. 141.

13. If the surviving spouse has retained undivided possession of the estate, administration takes place in the country in which the surviving spouse is domiciled or was domiciled at his death, and in accordance with the law of that country. That is true even if it entails the application of the law and the jurisdiction of the courts of another country than that in which the spouse who died first was domiciled, due to the fact that the surviving spouse had moved to another country after the death of the other.

to jurisdiction the convention applies only to cases in which the administration is conducted by a court. If an executor is appointed in the will, the ordinary private international law of a country regulates the question of whether an executor who is domiciled in a country other than that in which the deceased was domiciled may administer the estate. Even if this question is answered in the affirmative, the convention applies to the question of the applicable law. The executor may thus have to apply another law than his own.

b. Bankruptcy

The principle of unity and universal effect is also accepted in the convention on bankruptcy. But while the convention on administration of estates provides for the exclusive jurisdiction of the courts of the domicile, no such provision exists in the bankruptcy convention. The application of the convention and thus also the principle of unity and universal effect is limited to those cases in which in fact the jurisdiction of the court declaring the bankruptcy is based upon the domicile of the bankrupt; and the court must specifically mention if it has based its jurisdiction upon another fact than the domicile. If bankruptcy is declared at the domicile of the bankrupt, the law of the forum applies as a general rule to the proceedings and these comprise the assets of the bankrupt in all the Scandinavian countries. No proceedings may be instigated in the other countries against the assets situated there, either by individual creditors or in the form of bankruptcy proceedings. If, on the other hand, bankruptcy proceedings are introduced in one country based upon a criterion, recognized in the law of that country, other than the domicile, then the convention does not apply; ordinary rules of private international law in the other countries regulate the effect there of such a bankruptcy. If bankruptcy proceedings are later started at the domicile concurrently with those already taking place in another country, the proceedings at the domicile have no effect upon the bankruptcy which has begun in another country based upon a different criterion than the domicile. The bankruptcy at the domicile then only comprises assets in the four other countries.

The convention on bankruptcy applies to all bankruptcies at the domicile, including bankruptcy of legal persons [14]. To the domicile of a person corresponds, according to the convention, the seat or central management of a legal person. If the legal person is a registered company or association, the seat will usually be at the place of registration. But although the theory of registration is almost generally accepted in Scandinavia today, that was not the case when the convention was made; the seat may therefore perhaps in certain cases be taken to be the effective seat. The provision, however, has not given rise to any difficulties.

Under both conventions the courts in the countries other than that of the domicile have a duty upon request to make an inventory of assets situated in their jurisdiction, and to take temporary care of those assets. The assistance of the courts of the country where assets are situated shall be given to the same extent to the courts of the other countries as to other courts of the same country. This rule is supplemented by the Hague Convention on Civil Procedure, which may be invoked to obtain the assistance of the courts of the other countries in cases which are not foreseen in the rule of the convention.

c. Determination of the Situation of Assets

In both of the conventions, the place where an asset is situated plays a certain role. They, therefore, contain identical provisions regulating how to determine the *situs* of an asset in relation to provisions of the conventions according to which that is of importance. Claims belonging to the deceased or the bankrupt are situated at his domicile. That is contrary to ordinary Scandinavian rules of private international law, according to which a claim is situated at the domicile of the debtor, but it has been found to be more practical in these cases. It does not give rise to any difficulties, since the debtor will usually be domiciled

14. The winding up out of court of an insolvent company is not subject to the convention, with the exception of the winding up of a bank by a publicly appointed liquidator, provided the law of the country where the liquidation takes place excludes the possibility of bankruptcy, as is the case in Denmark and Norway.

in one of the other countries. It is simply a rule to extend the general application of the *lex fori* in these matters. The rule seems to be in accordance with Continental conceptions. If, however, the claim is based upon a negotiable instrument, it is regarded as being situated in the country where the negotiable instrument is situated. A registered ship or aircraft is with one exception regarded as being situated in the country where it is registered. Only with regard to the procedure for the sale of assets of the bankrupt estate does the latter rule not apply. According to Article 6 of the bankruptcy convention, the law of the place where an asset is situated applies to this procedure. In regard to this provision, a ship or an aircraft is situated where in fact it is.

The convention on administration of estates contains provisions specifying the rules on jurisdiction and on choice of law applying in certain cases, but these rules only confirm the general rule which has already been reported.

d. Choice of Law

1. *Lex fori.* Article 1 of the bankruptcy convention enumerates a number of points to which the law of the forum applies. As only bankruptcies at the domicile are comprised by the convention, *lex fori* and *lex domicilii* are identical. In general it may be said that the *lex fori* applies to all problems of bankruptcy which are not regulated by specific rules which provide for the application of a different law. The delimitation of problems of bankruptcy from other problems to which the rules of private international law of the convention do not apply is a problem of characterization which does not give rise to great difficulties, in view of the similarity of the laws of each of the countries. In one case in which it could be foreseen that doubts might arise because rules of another character are found in the bankruptcy legislation of some of the countries, a provision has been included in the convention stating explicitly that the convention does not apply.

2. *Lex rei sitae.* Although the general rule of both conventions is that the law of the domicile applies, a number of articles

provide for the application of a different law, namely *lex rei sitae*. I shall mention some of the more important.

Thus, *lex rei sitae* decides the question of whether certain property may at all be seized in bankruptcy proceedings for the satisfaction of the creditors. Some rights are of such a personal character that according to the *lex situs* the creditors cannot proceed against them; or certain property may, by declaration of a third person which is valid under the *lex situs*, have been exempted from being attached by creditors.

The question of whether a conveyance or mortgaging of, or other contracts concerning, real property which are made before the beginning of bankruptcy proceedings are valid against the bankrupt estate without registration, and whether they can be invalidated to the advantage of all the creditors, is also governed by the *lex situs*. This rule is in accordance with ordinary principles of private international law. Similarly, the law of the place where movable property is situated at the time when bankruptcy proceedings begin decides whether sales or mortgaging of movable property are valid without registration, or can be invalidated. The law of the place where real property is situated also decides whether registration of the bankruptcy is necessary to prevent the bankrupt from disposing of the property.

The question of priorities gave rise to complicated problems in framing the convention, because the order of priorities differs from one country to the other. Here again it has been of great importance for the attainment of a satisfactory result that the content of the substantive law of each of the countries has been taken into account in framing the convention. The rule governing the question of priorities applies both to bankruptcy and to the administration of deceased persons' estates.

While generally the law of the forum applies also to the question of priorities, Article 7 provides that when property is situated in a country other than that in which the proceedings take place, then the law of the place where the property is situated at the moment when proceedings are started governs the question of whether a claim has priority for payment out of the value of that specific property. That law also governs the

order in which several claims which have priority in the same property shall be paid. If certain claims have priority in specific property according to the *lex situs*, then these claims always have priority before claims which have priority in the assets of the estate as a whole, regardless of whether this priority exists in accordance with the lex situs or the law of the forum. Thus, e.g., if according to the law or the forum a claim for wages has a priority to be paid before all other claims, it will not be paid out of the value of specific property in another country before claims with priority in that specific property according to the *lex situs*, such as mortgages in real estate, are paid. That holds true even if according to the *lex situs* the wage claims would have been paid first. This rule is not a conflicts rule, but a rule of substantive law. It was, however, impossible to obtain satisfactory results in any other way. In some of the countries, certain claims have a priority in the assets as a whole, while the same kind of claims in another country may have priority only in specific assets. In some countries a claim with priority in specific assets must yield to claims with priority in the assets as a whole, while in other countries such claims are satisfied without regard to other claims. It proved impossible to adjust these priority rules to each other by means of rules of private international law only, and the rule regulating these questions has, therefore, partly the character of a substantive law rule. The idea has been further developed with regard to taxes and rent in a highly technical rule as to which I shall not go into detail. I have reported this priority arrangement to show that to obtain satisfactory results in these matters it is necessary to go into the substantive law rules, to compare them, and to see how they can be adjusted to each other, and even sometimes to combine rules of private international law with substantive law rules. In this case it may be said that in spite of the unity and universal effect of the bankruptcy proceedings which take place at the domicile, concurrent bankruptcies have been established in those countries where assets are situated, to the advantage of those creditors who have given the bankrupt credit, relying on the priority in specific assets which they have under the *lex situs*.

e. Composition Schemes other than in Bankruptcy

While a composition scheme in bankruptcy is a result of ordinary bankruptcy proceedings and no special rule, therefore, is necessary with regard to such a scheme, still it is necessary to have a rule specifically providing for the effect of proceedings for a composition scheme other than in bankruptcy. The principle of unity and universal effect of bankruptcy proceedings also aplies to such proceedings to obtain a composition scheme enforced by a majority of the creditors other than in bankruptcy, provided that the proceedings take place at the domicile of the debtor. Such proceedings in one Scandinavian country have the same effect of limiting the right of individual creditors to seek satisfaction in assets of their debtor in another Scandinavian country, just as if the proceedings took place in the latter country.

f. Advertisement for Creditors

Finally, it should be mentioned that both the convention on administration of estates and the convention on bankruptcy contain provisions, having the character of a substantive law, ensuring that creditors in the other countries than that in which the proceedings take place get the necessary information [15]. The background of these provisions is that while everyone in his own country is supposed to read the official *Gazette*, a knowledge of its content cannot even be supposed to exist in the other countries.

15. According to Article 18 of the convention on administration of deceased persons' estates, advertisement for creditors having claims, not lodged within a certain time, has no effect with regard to known claims of creditors in the other States who have not been specifically notified about the advertisement and its ordinary effect according to *lex fori*, unless that has come to their knowledge in some other way.

Similarly in Article 2 of the convention on bankruptcy, it is provided that information about the bankruptcy ought to be sent to all creditors whose existence is known to the court, unless their claims are recognized without notification on their part. And if objection is made to the recognition of their claim, this must be announced to them.

CHAPTER V

DISCUSSION OF THE FIVE CONVENTIONS
(Continued)

D. Recognition and Enforcement of Foreign Judgments

Two conventions and a number of provisions contained in the other conventions still remain to be treated. They are all concerned with problems of recognition and enforcement in the other countries of judgments and decisions originating in a Scandinavian country.

I. Chronology

The chronology of these provisions presents some interest, both in general and with regard to their interpretation.

The convention on marriage, adoption, and guardianship, which is first chronologically, contains rules purely limited to recognition. No enforcement is necessary with regard to most of these decisions, but the recognition has the effect that the decisions are binding upon the courts and authorities in the other countries, which is of great importance in matters concerning status.

Then follows the convention on the collection of maintenance claims, and in this convention enforcement of decisions in the other countries is of primary importance.

The convention on recognition and enforcement of judgments contains general provisions concerning both problems. It contains provisions which delimit its scope generally as well as in relation to the previous conventions, and also in relation to the two last conventions, which were under preparation when it was concluded.

Finally, both of the last two conventions contain provisions of an independent character providing for recognition and

enforcement, as well as provisions referring to the general convention and extending the scope of that convention to the field of these two conventions.

I shall begin with a discussion of the general convention, and take up the rules of the other conventions on the way where they fit best. Thereafter, I shall discuss the convention on the collection of maintenance claims.

II. The Convention on Recognition and Enforcement of Foreign Judgments

a. Generalities. The Public Policy Clause.

It is well-known that the problem of recognition and enforcement of foreign judgments has been subject to a great deal of discussion and to the preparation of a number of conventions on a multilateral and a bilateral basis. Generally, only those conventions which have been concluded between a limited number of States, or States with a common legal tradition or with frequent commercial and human relations, have been successful. The reason is probably a certain fear of undertaking obligations to enforce judgments which have been granted as a result of a foreign judicial procedure, which is very different from that which is followed in the enforcing country, or which at least is unknown to that country while at the same time the substantive law which lies at the basis of the foreign judgment differs from the law of the enforcing country [1]. In the body which to my knowledge has most recently discussed the problems, *viz.*, the International Law Association, a trend has been found, which is wholly consistent with this experience, toward limiting the work to the making of a model convention for the use of States which want to conclude treaties on this subject, instead of preparing a project with the purpose of having it accepted as a multilateral convention. And practically all conventions on the subject contain rules ensuring the right of a country not to enforce a foreign judgment in case either the procedure followed or the substantive law applied is contrary to the public policy of the country in question.

1. Cf. H. Munch-Petersen, Ugeskrift for Retsvæsen, 1934 B, p. 2.

It is questionable whether the subject at all deserves the amount of interest which is given to it. The number of cases in which foreign judgments are presented for execution in a country is probably very limited. It has been stated that in Norway only 12 cases of enforcement were presented under the Scandinavian convention in the three years from 1953 to 1955, and the highest amount which was enforced in these cases was about £ 80 [2]. The really important subject seems to be the collection of maintenance claims, on which subject several international conventions have been prepared. The migration from one country to another of persons who have maintenance obligations towards other persons gives immediate importance to the problem of collecting such claims. Apart from that, a person will generally be sued in the same place where a judgment against him must be enforced, and the need for enforcement in other countries is limited to exceptional cases. Much more important is the need for recognition of foreign judgments, especially in cases concerning status, such as divorce cases.

The method followed by the Scandinavian convention in arranging for the recognition and enforcement of foreign judgments is wholly dependent upon the fact that the convention is limited to the Scandinavian States. The close cultural and legal relationship between the five countries has made it possible for them to trust fully that the decisions reached in the other countries are just and equitable according to Scandinavian conceptions and standards, and that they have been reached as a result of a procedure which fully considers Scandinavian requirements of due process of law. Because of the high degree of uniformity of the substantive laws, and because of the unification of certain parts of private international law in the conventions and the similarity of other parts of it, there is also a high degree of probability that a judgment granted in another Scandinavian State has reached the same conclusion as that which would have been the result if the case had been tried in the courts of the country where the enforcement of the judgment is sought. These facts have made it mainly a technical problem

2. Cf. Hambro in Journal du droit international, 1957, p. 930.

to reach a result with regard to the recognition and enforcement of Scandinavian judgments in the other Scandinavian countries. As a general rule, it has not been necessary to take those precautions in this convention, which are included in all other conventions, against the obligation to enforce all judgments. It is not that the Scandinavian countries feel that they have a higher standard in these matters than other countries; but they know each other, each other's law and legal procedure, and most fears in international relations stem from lack of knowledge.

Nonetheless, this convention is the only one of the Scandinavian conventions to contain a public policy clause. According to Article 12, the convention imposes no obligation to recognize or to enforce a decision or a settlement if it would be manifestly contrary to the public policy of the country. This public policy clause has so far never been applied. The reason why it is found in this convention as opposed to the four other conventions is probably of a purely technical order. None of the Scandinavian countries today in principle enforce foreign judgments except as a result of a treaty, and in at least some of the countries, it is a condition for the conclusion of a treaty that it contains a public policy clause. New legislation would, therefore, have been required to avoid the clause in this convention.

b. Recognition

The first three articles of the convention are concerned with the question of recognition of judgments. According to Article 1, two groups of judgments are recognized: Firstly, binding judgments granted in a Scandinavian country in a case which has been tried in the forms of civil procedure. Secondly, judgments in cases tried in the forms of criminal procedure, in so far as the judgment is concerned with claims for damages tried in connection with the criminal trial.

Binding judgments are judgments which are final in the State in which they have been granted, in the sense that no appeal against them is possible, except as an extraordinary remedy which requires special permission. A judgment is,

therefore, not binding if appeal is possible, even if the jugdment may be executed in the country of origin.

According to Article 2, certain decisions other than those mentioned are included in the right to recognition, especially settlements in court and binding decisions on costs.

1. *Relation to the other Scandinavian Conventions.* The binding judgments which must be recognized in the other countries are, as I have said, characterized in the convention by the forms of procedure followed to obtain them. This has made it necessary to make exceptions from the obligation to recognize foreign judgments in a few cases. These cases are enumerated in Article 11 of the convention. But the majority of the cases mentioned there have been excepted only because the conventions on bankruptcy and on succession and administration of estates had not yet been concluded, at the time when the convention on recognition and enforcement of foreign judgments was signed.

The cases which have been excepted are firstly judgments on descent.

Further, judgments on the right of succession, on the responsibility of the heirs for the debts of the deceased, and on the administration of deceased persons' estates are excepted from the convention. With regard to these judgments, provisions are found in the convention on succession and administration of estates. Article 28 of that convention makes the convention on recognition and enforcement of judgments applicable to judgments on the right of succession and on the responsibility for the debts of the deceased provided the deceased was a Scandinavian national domiciled in Scandinavia. It must be remembered in this connection that generally the convention on recognition and enforcement applies to all Scandinavian judgments, regardless of the nationality or the domicile of the parties. But with regard to judgments on succession, it applies only to judgments in cases which are subject to the convention on succession. Further, according to Article 27 of the convention on succession, decisions rendered in conformity with that convention with regard to the method of administration and with

regard to the right of a surviving spouse to retain undivided possession of the estate are binding in all the countries. This follows from the provision in the article itself and, thus, the convention on recognition and enforcement does not apply.

Further cases which, according to the convention on recognition and enforcement, are excepted from its sphere of application are cases on bankruptcy, composition schemes, and invalidation of contracts made by the bankrupt. In the convention on bankruptcy, Article 10 renders the convention on recognition and enforcement applicable to judgments on invalidation. The bankruptcy itself is according to the bankruptcy convention of universal effect in all the countries, provided that it is declared at the domicile. And the bankruptcy convention in Articles 10 and 15 renders compositon schemes which are confirmed by a court in one of the States binding in all the other States.

Judgments concerning taxes or other problems of a public law character are not comprised by the convention, even if they are tried in the forms of civil procedure. Taxes are, however, enforced in the countries other than that in which they are imposed, in accordance with bilateral treaties concluded between most of the countries. Denmark thus has treaties concerning enforcement of tax claims with Norway, Sweden and Finland.

Judgments rendered by industrial courts are not subject to the convention. And judgments covered by the convention on the collection of maintenance claims are excluded from the general convention.

The convention on recognition and enforcement in Article 10 contains a provision relating to the convention on marriage, adoption, and guardianship. It provides that the general convention does not make any changes in Article 22 of the convention on marriage, adoption, and guardianship. According to the marriage convention, Article 22, most decisions under the convention, whether they are rendered by courts or administrative authorities and whether they are of a positive or a negative character, (e.g.) whether they grant a divorce or refuse to grant a divorce, are binding in the other countries without any confirmation or inquiry into the substance of the

decision, or into the fulfillment of the conditions of the convention with regard to the domicile or the nationality of the persons involved. Such decisions must simply be accepted on their face value by the other countries. The only question which may be tried by the recognizing authorities is whether the decision is at all comprised by the convention. It is assumed that the general convention on recognition and enforcement gives binding effect in the other countries also to such judgments granted under the marriage convention which do not already have binding effect under that convention [3]. More important is the fact that judgments regarding a number of matters comprised by the marriage convention, in cases which are not comprised by that convention because of the parties not being Scandinavian nationals or domiciled in Scandinavia, must be recognized under the general convention. The marriage convention is, as it will be remembered, as a rule limited to Scandinavian nationals domiciled in Scandinavia. No such limitation applies to the convention on recognition and enforcement, and most of the matters comprised by the marriage convention are not excepted in the convention on recognition and enforcement. Thus a Danish judgment regarding the marital property of an English couple domiciled in Denmark must be recognized in Sweden, although not comprised by the marriage convention.

2. *Conditions for Recognition.* Many conventions on recognition and enforcement of foreign judgments and practically all rules found in the internal law of a country regarding this subject make it a condition for the obligation to recognize and enforce foreign judgments that the judgment has been rendered by a court which was competent in accordance with certain specified rules, or perhaps simply in accordance with the rules regulating the jurisdiction of the courts of the enforcing country. E.g., the rule may be that if the courts of the country in which the judgment is to be enforced are only competent if the domicile of the

3. Cf. Viggo Bentzon, Tidsskrift for Rettsvitenskap, 1934, p. 375, and H. Munch-Petersen, Ugeskrift for Retsvæsen, 1934 B. p. 10. Otherwise the wording of the convention on recognition art. 10.

defendant is in that country, a foreign judgment rendered by a court in a country in which the defendant was not domiciled will not be recognized and enforced there.

The basis for rules of this kind is that it is found to be inequitable that a person may be drawn away from a forum which is a natural forum for him or for the kind of case in which he is involved. Such rules attempt, therefore, to protect persons living in the country from excessive rules of jurisdiction in other countries. A typical example of such an excessive rule which is often mentioned in this connection is the French civil code, Article 14, according to which a person who is not of French nationality and who is not resident or domiciled in France and who has never been to France may be sued in the French courts by a French national. There must be certain limits to the facts on which jurisdiction may be based if international recognition of the judgment is wished. It is natural that a country will set the same limits for the jurisdiction of the courts of other countries as those which it sets for the jurisdiction of its own courts. The development in England toward extending the cases of recognition of foreign divorce decrees, which began with the case of *Travers v. Holley* ([1953] P. 246), may be said to be based upon this point of view. This extension followed upon a similar extension of the jurisdiction of English courts. In conventions, this principle cannot be followed for practical reasons, and an enumeration of the facts on which jurisdiction may be based if the judgment shall be recognized under the convention must be made.

The Scandinavian convention contains one provision which is influenced by this point of view. According to Article 11, the convention does not apply to decisions and settlements in court concerning ownership of or limited rights over real property which is situated in another country than that in which the judgment is rendered. The court which properly has jurisdiction with regard to real property is the court at the *situs*. Only decisions made by that court are recognized in the other countries under the convention [4].

4. Cf. H. Munch-Petersen, Ugeskrift for Retvæsen, 1934 B, p. 16, and Karlgren, *Kortfattad lärobok i internationell privat- och procesrätt*, p. 195.

Apart from this provision, the Scandinavian convention has followed another course than that which is generally followed. Instead of enumerating the courts which have jurisdiction and whose judgments are, therefore, recognized in the other countries, the convention has chosen to limit the obligation to recognize judgments by default in the other countries. In principle, all judgments are binding in the other countries, regardless of the jurisdictional basis, but according to Article 3 [5] they are binding only on certain conditions if rendered by default. The reason for this provision is that because of the close relationship of and the high degree of uniformity of the substantive laws it does not make very much difference whether a case is tried in one or the other Scandinavian country, provided that the parties agree and the court according to its own law, including the Scandinavian conventions, has jurisdiction. Only if the judgment is rendered by default is there any reason to investigate the basis of jurisdiction.

The condition for the binding effect of judgments by default is either that the defendant at the time when the writ was served was domiciled in the country where judgment by default was rendered or had a legal representative there, or that agreement had been made that that court should have jurisdiction, or that the judgment concerns compensation for damages caused in the State where the judgment was rendered, provided the writ has been served on the defendant personally while he was in that State. This provision does not, however, limit the obligation under the marriage convention, Article 22, to recognize judgments and decisions rendered by default in accordance with the rules contained in that convention; cf. the general convention, Article 10.

The problem of what the recognition implies arose in a Swedish case [6]. During the last war, a Norwegian couple obtained divorce in Norway, and the woman later married a Swedish man in Sweden. After the war, the Norwegian authorities declared

5. This article is only of limited application with regard to judgments which must be recognized under the convention as a result of Article 28 of the convention on succession and administration of estates.

6. Nytt Juridisk Arkiv. 1947, p. 346.

the divorce to be invalid as being a result of abuse of power by the Nazi authorities, and this decision was confirmed by a Norwegian court to which the wife had appealed. The wife then sued for divorce from her Swedish husband in the Swedish courts, and he at the same time asked for an annulment of the marriage. The court did not grant relief to either of them, and thus might be said not to have recognized the Norwegian judgment declaring the divorce to be invalid. The result of the case is in my opinion proper, but the reasons for the judgment given by the court are somewhat obscure. It seems that it may be concluded from the grounds of the judgment that the effects of a foreign judgment which is recognized cannot exceed the effects of a similar judgment originating in the country which is called upon to recognize the foreign judgment. The court held that a Swedish judgment of this kind would not lead to either divorce or annulment and, therefore, neither could the Norwegian judgment have either of these effects [7]. It was apparently not examined if the Norwegian judgment would have any effect upon a new marriage according to Norwegian law. Such an examination lay near at hand, and if the result had been in the negative, it seems obvious that the court could have reached its decision on the basis that a judgment cannot have more effects in the other countries than in the country where it originates.

The decision seems to me to be sound, both in principle and in the circumstances. If a new status has been created in reliance upon a public decision, the repeal of this decision should not influence the existence of this new status. This principle also seems to be in accordance with generally accepted principles of administrative law. A provision of the general convention can also be invoked in favor of the Swedish decision, although it is concerned with enforcement and not with recognition. According to Article 9, enforcement takes place in each State in accordance with the law of that State, notwithstanding provisions in the judgment or settlement with regard to means of enforcement.

7. Cf. Folke Schmidt in Revue critique de droit international privé, 1948, p. 428.

The same principle has in a way been applied in the Swedish case with regard to recognition.

c. Enforcement

All decisions and settlements which are recognized under the convention on recognition and enforcement or under the convention on marriage, adoption, and guardianship can be enforced in the other States in accordance with the convention on recognition and enforcement, provided that they may be enforced in the country in which they originate. The interest lies in the way in which this enforcement takes place.

No registration of the foreign judgment or other public act by the authorities in the enforcing country is required before enforcement may take place, such as is often the case under similar conventions, e.g., in England under the Foreign Judgments (Reciprocal Enforcement) Act, 1933. The request for enforcement must be addressed directly to the authority which usually takes care of the enforcement of judgments in the country where enforcement is sought. The only difference between a judgment originating in the enforcing country and a recognized judgment originating in one of the other countries is that the latter must be accompanied by a declaration from the authorities in the country in which the judgment has been rendered. In this declaration, it must be stated that the judgment is one of those which are comprised by the convention, that it is binding and may be enforced in the country of origin, and, if it is a judgment by default, that the conditions for recognition of such judgments are fulfilled. If these requirements are satisfied, the judgment must be enforced in accordance with the law of the enforcing country, without any further inquiry into the substance of the case, or into the question whether the court which rendered the judgment had jurisdiction according to its own law or according to the other Scandinavian conventions. The convention provides that the decision about enforcement should be taken without giving the other party any opportunity to be heard, except in extraordinary circumstances. To such circumstances must be referred the case in which it is asserted that the judgment is

contrary to the public policy of the enforcing country, unless it is clear that this objection is unfounded, which it will usually be.

No rule similar to this rule providing for a declaration of the fulfillment of the conditions of the convention exists with regard to recognition. In the rule in the marriage convention, Article 22, providing for recognition in the other countries, it is stated that recognition under that convention shall take place without *exequatur* and without an inquiry into the substance of the case or into the fulfillment of the conditions with regard to domicile or nationality. The only thing which can be tried is, thus, whether the decision is at all comprised by the convention. No such rule is found in the general convention. Undoubtedly, recognition under this convention must take place without an inquiry into the substance of the case. But the court which is supposed to be bound by the foreign judgment must be allowed to investigate whether the conditions in the convention for recognition are fulfilled before (e.g.) dismissing a new case concerning the same subject matter and between the same parties, at least when the judgment is not accompanied by a declaration which would make it immediately enforceable.

III. The Convention on the Collection of Maintenance Claims

Lastly, we turn to the convention on the collection of maintenance claims. The subject of this convention has attracted great interest in recent years. In the United Nations, a convention was concluded in 1956 [8], according to which the parties to the convention promise to assist each other with the recovery of maintenance claims. A convention has also been prepared at the Hague conference in 1956 which in many respects presents similarities to the Scandinavian convention. This convention has already been signed by Norway and it may also soon be accepted by Denmark.

a. Scope of the Convention

The Scandinavian convention concerns judgments, administrative decisions, and written agreements with regard to main-

8. Convention on Recovery Abroad of Maintenance of 20 June, 1956 (1956, V. 4).

tenance claims of a spouse, present or former; of children, whether legitimate or illegitimate or adopted; and of the mother of an illegitimate child, provided they are enforceable in the country where they originate. It does not comprise decisions on maintenance by children of their parents, a legal institution which only exists in some of the countries.

The convention concerns all judgments, decisions, and agreements originating in the Scandinavian countries, regardless of whether the parties are Scandinavian or domiciled in Scandinavia. It is thus not limited in the same way as the marriage convention. It also concerns maintenance claims of other kinds than those which, with regard to jurisdiction and choice of law, are regulated by the marriage convention. And the convention is wider in scope than the convention on recognition and enforcement of foreign judgments, because it is not limited to judgments, but also provides for the enforcement of administrative decisions and settlements out of court and private written agreements which are valid under the law governing them.

b. Conditions for Collection

With regard to jurisdiction, the same system is followed as regards maintenance obligations towards illegitimate children and their mothers as in the general convention. If a defendant is represented in court, or he has been notified in due time of the proceedings, the judgment or decision can always be enforced in the other countries. But even if that is not the case, and the decision has been rendered by default enforcement must take place if the defendant was domiciled in or was a national of the country in which the decision was rendered. With regard to other maintenance claims, no such conditions for enforcement are provided for in the convention.

The provision referred to became of importance in a Norwegian case [9]. A Norwegian was represented by a barrister in the first meeting in a Swedish court, and he was himself examined during subsidiary proceedings in a Norwegian court. He contended that he had not been represented in court and that the Swedish

9. Norsk Rettstidende, 1951, p. 667.

judgment, therefore, cuold not be enforced in Norway. The Norwegian court did not accept his argument and enforced the judgment.

An important problem in these matters is the possibility of conflicting decisions in various countries, and especially of a decision in the country where enforcement is sought which is in conflict with the foreign decision which is to be enforced. The Hague Convention of 1956, Article 2, 4, simply provides that a decision cannot be enforced if it is contrary to a decision rendered between the same parties on the same subject in the State in which enforcement is sought. I shall in this connection return for a moment to a provision in the marriage convention.

It may be remembered that under the marriage convention, Article 8, the same court which has jurisdiction with regard to separation and divorce may also adjudicate with regard to maintenance. If the question of maintenance is raised at a later time than the separation or divorce proceedings, the courts of the defendant's domicile have jurisdiction. It is then added that the court of the defendant's domicile has jurisdiction also with regard to variation of maintenance orders which, originally, have been made, either in connection with a separation or a divorce suit or afterwards. Since these decisions must be recognized in the other countries under the marriage convention, a maintenance decision of the courts of one country rendered in accordance with the marriage convention stands and must be recognized under that convention and enforced in the other countries under the convention on collection of maintenance claims, at least until it is varied by the same court or by a court which is now competent under the marriage convention. And the article somewhat limits the possibility of variation. It provides, namely, that if the law of the country in which separation or divorce was granted prevents a later stipulation of or increase in maintenance for the other spouse, neither can such a decision be made in the other States.

Apart from this provision, the courts of a country which have jurisdiction either in accordance with the marriage convention, or outside the scope of that convention in accordance with *lex fori*, may stipulate maintenance and vary earlier decisions, either

of their own or of the courts of the other countries, in accordance with the applicable law. In general, any such decision is enforceable in accordance with the convention, provided the rule on jurisdiction is complied with.

This may lead to the result that several decisions may exist between the same parties, e.g., one Swedish and one Norwegian decision. Thus, the situation might arise that the claimant would choose the most advantageous decision and seek to have it enforced. Within the scope of the marriage convention, that probably cannot take place. The decisions rendered in accordance with that convention must be recognized in the other countries. They may later be varied in accordance with the convention, but in a country which has not been asked to vary a decision, the foreign decision must be recognized. If two decisions exist, of which the latter varies the former, it seems reasonable to assume that only the more recent of the two decisions must be recognized and, therefore, enforced, provided the conditions for enforcement according to the convention are present. If not, the earlier decision must be enforced.

Outside the scope of the marriage convention, no general obligation exists to recognize foreign maintenance decisions [10], and here it seems that the claimant is free to choose which of several foreign decisions he wishes to have enforced.

Only one of these conflicts is regulated in the convention. If the courts or administrative authorities in the country in which enforcement of a foreign maintenance decision is sought have themselves made a decision, according to which the maintenance claim is fixed at an amount smaller than in the foreign decision, or in which it has been decided that no maintenance shall be paid, the foreign decision is not enforceable [11].

c. Procedure

It has already been mentioned that under the maintenance

10. Viggo Bentzon, Tidsskrift for Rettsvitenskap, 1934, p. 377, is not in opposition to this statement.

11. No similar rule exists with regard to the conflict between a foreign decision and an agreement between the parties originating in the country in which enforcement is sought. The situation is, however, not very practical.

convention, as opposed to the general convention, a demand for enforcement is not presented directly to the authorities of the enforcing country. The claimant must ask the authorities of a country to request enforcement in the country where the person who is going to pay maintenance is resident. They then send the request to the authorities of the country in which enforcement is to take place, accompanying the judgment, decision, or agreement with a declaration that it fulfills the conditions of the convention for being enforced in accordance with the convention. After enforcement has taken place, the authorities in the enforcing country then send the money to the requesting authorities. It is generally believed that the authorities of the enforcing country cannot try whether the conditions which are certified to be present by the authorities of the requesting country are in fact present. They may only investigate whether a conflicting decision has been made in the enforcing country. In the Norwegian case which I have reported above, the Norwegian courts seem nonetheless to have tried the question whether the jurisdictional conditions were fulfilled. The case probably ought to have been dismissed. This possibility does not seem to have been raised during the case.

This procedure for enforcement is usually practical, but it may have a curious effect in some cases. Since a declaration certifying the conditions of the convention to be complied with must accompany the request for enforcement, it seems that this request must come from the country in which the judgment or decision originates. Often it originates in the country where the defendant is domiciled, and the convention then becomes of importance only if the defendant moves to another country. It may be that he moves to the country where the claimant is domiciled. The result is that to have the decision enforced, the claimant will have to send the decision to the country in which the defendant was formerly domiciled. The authorities of that country will then return it to the authorities of the country where both parties are now domiciled, and after enforcement the money must go the same way back. In practice, I am sure that this will

never happen, but it seems that the text of the convention might have been somewhat differently formulated.

I hope that this analysis of the conventions has shown that they contain interesting and often new solutions to familiar problems, solutions which are based upon the long tradition of private international law, but which at the same time are no more bound by this tradition than that they utilize the practical advantages which are offered through a high degree of uniformity in the substantive laws and a new approach to the problems.

APPENDIX

TRANSLATION OF RECENT CHANGES IN THE TEXT OF THE TWO FIRST CONVENTIONS

I. The Convention on Marriage, Adoption and Guardianship

Article 2 is replaced completely by the following:

"The publication of banns, including the inquiry into the fulfillment of the conditions of marriage, and also the marriage celebration shall be subject to the laws of the State before whose authorities the marriage is celebrated.

Publication of banns in accordance with the aforesaid laws is, however, not required if a publication of banns, which has taken place in accordance with the laws of one of the other States, still has effect; provided that each of the future spouses has thereby been found to have the right to marry under the laws which, pursuant to the law of the State of celebration, govern their right to marry. The same shall apply even if only one of the future spouses is a national of a contracting State other than that before whose authorities the marriage is celebrated, and the other spouse is a national of the State of celebration."

Article 7, paragraph 2 is replaced completely by the following:

"If the application cannot be dealt with under the first paragraph in any of the States, the matter may be settled in a State of which one of the parties is a national."

Article 9, paragraph 2 is deleted completely.

II. The Convention on the Collection of Maintenance Claims

Article 1, paragraph 1, the last sentence is completely replaced by the following:

"The same shall apply to judgments which have not yet

acquired force of law, and to an order or a decision by the court, the judge, or the *Overeksekutor*; provided that the judgment, order or decision can be executed under the rules governing judgments which have acquired force of law."

Article 1, paragraph 3. The following words are deleted: "during his stay in the country".

Article 2, paragraph 1, the line about Norway. Add: "or by a *Fylkesmand*".

Article 3, paragraph 3. Add: "or to a party designated by that authority".

BIBLIOGRAPHY

Conventions

I. Convention on marriage, adoption, and guardianship: *League of Nations Treaty Series*, vol. 126, pp. 121, 150, and 155 *.

II. Convention on the collection of maintenance claims: *League of Nations Treaty Series*, vol. 126, pp. 41 and 61 *.

III. Convention on recognition and enforcement of foreign judgments: *League of Nations Treaty Series*, vol. 139, p. 165.

IV. Convention on bankruptcy: *League of Nations Treaty Series*, vol. 155, p. 115.

V. Convention on succession and administration of estates: *League of Nations Treaty Series*, vol. 164, p. 243.

* Changes in I and II from 1953 have not yet been published in the *United Nations Treaty Series*. An unofficial transtlation made by the author is found in the Appendix.

Preparatory Works

Sweden: *Lagberedningens förslag angående vissa internationella rättsförhållanden*, I-V, 1929-33. *SOU*, 1929:12, 13; 1931:9; 1933:1, 35.

Denmark: *Udkast til konventioner mellem Danmark, Finland, Island, Norge og Sverige*, 1929-33.

Most Scandinavian general treatises on the subject of procedure, decedents' estates and bankruptcy contain important chapters on the Scandinavian conventions. The following books and articles are especially concerned with matters of private international law, and the articles are as a whole limited to treating the conventions. The Roman numeral indicates the convention which is treated in the book or article, in accordance with the numerals given above.

Backström (Åke). — *Internationell förmynderskapsrättsliga problem rörande finländska fosterbarn i Sverige*, Tidskrift utgiven av Juridiska Föreningen i Finland, 1949, p. 291. (I)

Bentzon (Viggo). —*Fem nordiske retskonventioner*, Tidsskrift for Rettsvitenskap, 1934, p. 336. (I-V)

— and Hammerich, K., *La récente union scandinave de droit international privé*, Revue critique de droit international, 1934, p. 855. (I-V)

Bloch (J-D.). — *Die Nordische Konvention über internationalprivatrechtliche Bestimmungen auf dem Gebiet des Ehe-, Adoptions- und Vormundschaftsrechts*, Zeitschrift für ausländisches und internationales Privatrecht, 1934, p. 627. (I)

Borum (O. A.). — *De skandinaviske konventionsudkast*, Ugeskrift for Retsvæsen, 1930 B, p. 113. (I-II)

— *Lovkonflikter*, 4th ed., 1957, in collaboration with Allan Philip. (I-III, V)

EKEBERG (Birger). — *Två nordiska konventionsförslag*, Svensk Juristtidning, 1929, p. 508. (I-II)

FEDERSPIEL (Holger). — *De nordiske internationalprivatretlige konventionsudkast*, Nordisk Tidskrift for international ret, Acta scandinavica juris gentium, 1930, pp. 92, 190 and 279. (I)

HAMBRO (Edvard). — *Recognition and enforcement of foreign judgments in the Nordic countries*, Journal du droit international, 1957, p. 908. (III)

HULT (Phillips). — *Föräldrar och barn enligt svensk internationell privaträtt*, 1943. (I)

KARLGREN (Hjalmar). — *Kortfattad lärobok i internationell privat- och processrätt*, 1950. (I-III, V)

MUNCH-PETERSEN (H.). — *International og internordisk anerkendelse af domme*, Ugeskrift for Retsvæsen, 1934 B, p. 1. (III)

NIAL (Håkan). — *Internationell förmögenhetsrätt*, 2nd ed., 1953. (IV)

VON NUMERS (Sigurd). — *Förutsättningerna och formerna för ingående av äktenskap*. Tidskrift utgiven av Juridiska Föreningen i Finland, 1933, p. 21. (I)

PALMGREN (Bo). — *Den nordiska konkurskonventionen*, Tidskrift utgiven av Juridiska Föreningen i Finland, 1935, p. 133. (IV)

Répertoire de droit international, Supplément 1934, "Union Scandinave". (I-II)

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