Ireland

Response to the Questionnaire accompanying the provisional version of the new practical handbook on the operation of the Hague Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters of 15 November 1965

15 September 2003

prepared by the Irish Central Authority and the Irish Department of Foreign Affairs

I Questions addressed to non-party states.

1. Not applicable to Ireland

2. Not applicable to Ireland

II Administrative Information and Updates

3 Central Authority

3.1 The website details exhibit a small typing error in the contact information for the Irish Central Authority. It reads "The Master of the High Court, Inns Quai, Dublin 7, is designated as the Central Authority for Ireland" whereas it should read "Inns Quay".

3.2 The languages of Irish (Gaelic) and English are used by the Irish Central Authority's staff.

3.3 Approximately 300 requests per year are received by the Irish Central Authority.

Approximately 50% of these (i.e. 150) emanate from the United States of America.

A number of requests are not forwarded directly to the Central Authority in the first instance and are forwarded via diplomatic channels. Indeed since January 2001 the Irish Department of Foreign Affairs has received 65 requests to serve documents from abroad through diplomatic channels:

✍✍13 such requests emanated from Turkey;
✍✍8 such requests emanated from Denmark;
✍✍7 such requests emanated from Egypt;
✍✍5 such requests emanated from the Czech Republic;
✍✍4 such requests emanated from Spain;
✍✍4 such requests emanated from Austria;
✍✍4 such requests emanated from the Russian Federation;
✍✍3 such requests emanated from the USA;
✍✍2 such requests emanated from Italy;
✍✍2 such requests emanated from France;
✍✍1 such request emanated from Norway;
✍✍1 such request emanated from Finland;
✍✍1 such request emanated from Croatia;
✍✍1 such request emanated from Jordan;
✍✍1 such request emanated from Libya;
✍✍1 such request emanated from Liechtenstein;
✍✍1 such request emanated from Indonesia;
✍✍1 such request emanated from the Federal Republic of Germany;
✍✍1 such request emanated from the Netherlands;
✍✍1 such request emanated from Brazil;
✍✍1 such request emanated from Argentina;
✍✍1 such request emanated from Latvia; and
✍✍1 such request emanated from Morocco.

4 Case-law and reference works

(Hard copies in English to be made available with hard copy of response to questionnaire as submitted)

4.1 Significant court ruling issued pursuant to the 1965 Convention since 1992:

(Note: I.R. = Irish Reports; I.L.R.M. = Irish Law Reports Monthly)

(See Annexes 1-7 attached herewith)

1. *Analog Devices B.V.* v *Zurich Insurance Company* [2002] 1 I.R. 272

2. *O'Connor* v *Commerical General & Marine Ltd.* [1996] 1 I.R. 68

3. *Kelly* v *Cruise Catering Ltd.* [1994] 2 ILRM 394

4. *Mc Kenna* v *E.H.* [2002] 1 I.R.72

5. *Schmidt* v *Home Secretary of the Government of the United Kingdom* [1997] 2 I.R. 121

6. *Short* v *Ireland* [1996] 2 I.R. 188

7. *United Meat Packers (Ballaghaderreen) Ltd. v Nordstern Allgemeine* [1997] 2 ILRM 553

4.2 Bibliographical references of works and articles published in Ireland since 1992 in connection with the 1965 Convenion:

(See Annex 8 – 9 attached herewith)

8. Law Reform Commission Report (LRC 22-1987) on the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (1965)

(also available at http://www.lawreform.ie/publications/data/volume6/lrc_43.html)

9. Patrick O' Callaghan, "The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters", (1996) 3 Commercial Law Practitioner 1232

5 Handbook

5.1 No comment.

5.2 Generally the structure (headings and sub-headings) of the provisional version of the Handbook appear to be satisfactory.

The Irish Central Authority is of the view that a subheading should be introduced to highlight the requirement that the certificate of service should be located on the reverse side of the request.

The certification by the Central Authority should be treated separately.

In addition the following topics/areas on the current/provisional version should be addressed:

a) On the annex portion of the form it is unclear what documents are required to be annexed. It appears from the Convention that only the certificate need be included and no affidavit of service or non service, as the case may be, must be annexed.

b) The Central Authority may order that service be affected on an address which differs slightly from that requested, i.e. the wrong postcode or a non-existent house number may be stated on the request but the actual address itself is capable of service regardless of the error. Where this occurs provision should be made on the form to allow an explanation to be given by the Central Authority as to why the address served differed from the address to which service was initially requested i.e. point out the nature of the discrepancy, mistake or omission.

c) If a situation arises whereupon only some of the documents requested to be served in the request are in fact served e.g. only four out of five, perhaps there should be provision made for a description of the outstanding documents to be served to be made.

d) It should be specified that non-applicable portions of the form must be crossed out.

5.3 The Irish Department of Foreign Affairs is of the view that more emphasis should be added in the Handbook in relation to the preference that requests should be transmitted directly from the Central Authority of the requesting state to the Central Authority of the requested state and that transmission via diplomatic channels is a time-consuming process and is not necessary.

5.4 The Irish Central Authority and the Irish Department of Foreign Affairs agrees that regular and continuous updating of the Handbook is desirable. Perhaps such updating may occur as follows: the relevant authorities of each state should agree to post any new information and practices in relation to the 1965 Convention on their respective websites on a regular

basis so that other Central Authorities may access same when the need arises.

5.5 Links

http://www.gov.ie/iveagh/information/publications/hague/default.htm

http://www.courts.ie/logprof.nsf/0/d63d644fd6478ea3802567e80053d5ff?OpenDocument

http://www.lawreform.ie/publications/data/volume6/lrc_43.html

http://www.irlgov.ie/ag/#isb

http://www.courts.ie/home.nsf/lookuppagelink/home

http://www.ireland.com

III Information relating to the application of the Convention

6 Scope of the Convention (Article 1) (cf. I, 5 of the Handbook)

6.1 Since 1992 there has been a significant increase in requests for service of non-judicial documents, the litigation character of which appears to be questionable. However, the Irish Central Authority has not yet declined to serve on the basis of the doubts aforesaid.

6.2 This matter has not arisen in any great capacity.

6.3 No comment

6.4 No comment

6.5 No comment

7 Forwarding Authorities (cf. II, 1, B. (a))

7.1 The following are the persons/bodies competent to forward a request for service to the foreign central authority under article 3:

> the Central Authority;
> a practising Solicitor;
> a County Registrar; and
> a District Court Clerk.

7.2 Ireland has not to date questioned the status of the requestor.

8 Methods for service used by the Central Authority (cf. II, 1, E)

8.1 Order 121, Rule 3 of the Rules of the Superior Courts is relevant in answering this question:

> *" 3) If any particular method of service is requested, the Central Authority may direct service in the manner requested unless satisfied that such method is incompatible with the law of the State or the practice and procedure of the Court.*
>
> *4) If no particular method of service is requested or if the method is either incompatible with the law of the State or the practice and procedure of the Court, the Central Authority shall direct that personal service be effected upon the person concerned.*
>
> *Such service to be effected by the delivery to and leaving with the person concerned one copy of the document to be served and of any translation thereof.*
>
> *5) The Central Authority shall direct that service under (3) or (4) above shall be effected by the Chief State Solicitor or by some person or persons designated for that purpose by him or by the Central Authority."*

8.2 It is the practice of the Irish Central Authority to insist on the translation of all documents to be served. No party has yet requested a waiver of this requirement on the basis that the party to be served is familiar with the language in question by reason of it being his or her native tongue.

8.3 The Irish Central Authority invariably stipulates a time period within which the server engaged on its behalf is required to serve the necessary documents. Given the usual difficulties in effecting personal service, extensions of time for such service are often requested and granted.

8.4 At present, it is not the practice of the Irish Central Authority to seek to recoup from the requestor the costs of service in Ireland.

9 Translation requirement (Article 5(3)) (cf. II, 1, E (b))

9.1 Yes, translation does cause problems.

9.2 Yes, but how then is the Central Authority to judge whether the reasons (to believe that the document is understandable to the addressee) are probative of same? Is there a need to offer the addressee the opportunity to request a translation or to answer the document by asserting his ignorance of the originating language? And if this is so is that request to be made to the Central Authority?

9.3 No comment.

9.4 We should consider dropping the translation requirement *only* in respect of non-judicial documents.

9.5 Translations should be carried out by certified translators in the requesting state. If a translation is so certified, there is not need for legalization or for an apostille to be attached.

10 Timing (cf. II, 1, E, (d))

10.1 There are no up to date statistics available in relation to this matter.

10.2 No comment

10.3 No comment

11 Alternative Transmission Channels (cf. II, 2)

11.1 Consular and diplomatic channels are used too frequently. As stated at point 3.3 on page 2 above, since January 2001 the Irish Department of Foreign Affairs has received 65 requests to serve documents from abroad through diplomatic channels. The diplomatic and consular transmission channel is extremely time consuming and States' authorities should be encouraged to transmit requests for service of documents directly to the Central Authority of the requested State in order to comply with the Conventions object and purpose as set out in the preamble thereto, namely, to simplify and expedite procedures and to ensure that the documents are served on the addressee in sufficient time.

11.2 See the answer at point 8.1 above

11.3 See the answer at point 8.1 above

11.4 See the answer at point 8.1 above

12 Judicial and extrajudicial documents (cf. I, 5, E)

12.1 No comment

12.2 There are no such statistics available in relation to the volume of extrajudicial documents forwarded abroad pursuant to the Convention.

13 Date of Service – double date (cf. II, 1, E,(f))

13.1 No comment

13.2 No comment

14 Exequatur

14.1 No. The courts are likely to be unsympathetic to such an application. The courts tend to favour *lex fori*, particularly so in furtherance of an international convention.

15 Exclusion of application of the Convention between the parties

15.1 No comment

16 Fax and electronic mail (cf. II, 3)

16.1 No comment

16.2 No to all.

16.3 No comment

16.4 No comment

16.5 No comment

16.6 Yes, but judicial documents are issued in the name of the Courts Service (which is not a party to the contract) and all litigation documents after the writ are served in accordance with the Rules of Court (physical delivery) or pursuant to Court Order (up to and including the use of CD-ROM).

17 Model Forms

17.1 Yes, in the following respects:

a) The spacing is poor in all Model Forms. Blank (underlined) parts are inappropriately sized and should be made larger (on both sides of the form).

b) Delete the standalone sentence in the Certificate Form (as to the delivery of documents) between the alternative forms at sections 1 and 2. The sentence appears to duplicate the 'service' confirmation at 1.

c) The asterisk which denote that a part is to be deleted in all Model Forms should be replaced. For instance in the Certificate Form, it should be made clearer that one *must be selected* as a preferred method and that the other methods should be crossed out. In the "Summary of the Document to be served" Form and the Request Form, it should be made clearer that certain parts *must be deleted* if inappropriate to that particular request.

d) The reference to "document" in the Request Form should refer to "document(s)" as it may be the case where the Request is to serve more than one document.

e) Similarly in the Certificate Form the references to "document" on line 1 in section 1 and line 1 in section 2 should refer to "document(s)" as it may be the case where the Request is to serve more than one document. Note that in section (c) the reference is to "documents". Therefore, consistency is required.

17.2 No, but consideration should be given to the introduction of a requirement to supplement the "Summary of the Document to be served" Form with a brief description of the procedure in relation to the litigation in question i.e.:

a) if the addressee wishes to defend
b) in default of an appearance
c) or where such information may be accessed, for instance on the website of court service of the country in question.

17.3 No comment

17.4 No comment

17.5 Yes, although same are available on the website of the Hague Conference at www.hcch.net/e/conventions/

18 Reservations and reciprocity

18.1 No comment

18.2 No comment

19 Article 25: Bilateral and Multilateral Agreements (cf. IV)

19.1 Ireland is bound by the 1965 Hague Convention and the Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters. This Regulation entered into force on 31 May 2001 and replaced as between the Member States of the Community the arrangements provided for by the Hague Convention of 1965.

19.2 Not applicable to Ireland

19.3 No comment except to say that in practice, if the Irish Department of Foreign Affairs receives a request to serve documents via the diplomatic channel from an EU Member State (except Denmark) it will return the documents and request that they be submitted directly to the Irish Central Authority in accordance with Council Regulation (EC) No 1348/2000 of 29 May 2000 which obliges in Article 4 thereof that the request be transmitted *directly* and as soon as possible between the agencies designated

19.4 Not applicable to Ireland

Annex 1

ANALOG DEVICES BV ANALOG DEVICES IRELAND LIMITED ANALOG DEVICES RESEARCH AND DEVELOPMENT LIMITED AND ANALOG DEVICES INC

v

ZURICH INSURANCE COMPANY AND AMERICAN GUARANTEE AND LIABILITY INSURANCE COMPANY

THE SUPREME COURT

2001/171 (TRANSCRIPT)

24 January 2002

PANEL: Keane CJ., Murphy, Fennelly JJ.

JUDGMENTS:
FENNELLY J

The plaintiffs/respondents ("the plaintiffs") had insurance policies with the defendants/respondents ("the defendants") for their computer chip manufacturing plant at Raheen, County Limerick. Losses occurred as a result of an incident at the plant in August 1999. The defendants repudiated liability under two different policies. The present issue concerns service out of the jurisdiction of proceedings brought under the policy issued by the second named defendant appellant ("American Guarantee"). The facts are complex.

THE BACKGROUND

The first three plaintiffs are subsidiaries or associated companies of Analog Inc. ("Analog Inc."), which is incorporated under the laws of the Commonwealth of Massachusetts where it also has its principal place of business. The first-named plaintiff is incorporated in the Netherlands and registered on the external register in the State. It carries on business at the plant at Raheen as manufacturer of high performance mixed linear and digital integrated circuits. The second and third-named plaintiffs are incorporated in the State and engage in the research and/or design of integrated circuits at the Raheen plant.

There are two policies known respectively as the local policy and the master policy.

The local policy was issued by the first-named defendant ("Zurich"), which is a Swiss corporation registered in the State on the external register. The first three plaintiffs are named as the insured. This policy covered, inter alia, collective material damage and business interruption flowing from insured risks at the Raheen plant.

The master policy was issued in the United States by American Guarantee to Analog Inc. and its affiliated, subsidiary and associated companies to cover similar risks world wide (with some excepted countries not including Ireland). American Guarantee is incorporated under the laws of the State of New York, has its head office at Schaumberg, Illinois and is the indirect subsidiary of Zurich.

On 2nd August 1999, there occurred at the Raheen plant the incident which gave rise to claims under the two policies and to the proceedings with which this appeal is concerned. The plaintiffs claim that incorrect filters were fitted, during weekend preventive maintenance by a technician, to the hydrochloric acid storage

system and that the filters and "o-rings" which form part of them were damaged as a result of exposure to the acid. This, in turn, caused particles from the filters to become incorporated in a batch of wafers which comprise the integrated circuits. The wafers were rendered unfit for sale and had to be destroyed. The claim, as so far formulated, runs to several million dollars not including business interruption.

The two policies contain similar exclusions for perils consisting of errors in processing or manufacture of the products of the insured.

Both policies were in force at the date of the incident. Claims were made respectively against Zurich under the local policy and against American Guarantee under the master policy. Both Zurich and American Guarantee have denied liability. They claim that the losses arose from perils excluded by the policies and are thus not covered.

The plaintiffs claim that the incident fell squarely within the risks covered by the policies and, timely notice of the claim having been given, the defendants are bound to indemnify the plaintiffs within the respective policy limits.

THE PROCEEDINGS

On 20th January 2000, the plaintiffs issued a plenary summons against both defendants claiming a declaration that the defendants are liable under the two policies. The plenary summons, because of the US address of American Guarantee, was marked "not for service outside the jurisdiction without an order of the Court."

Before recounting more fully the history of the proceedings in this jurisdiction, I should refer, because American Guarantee relies strongly on it, to an action commenced by it against the plaintiffs on 18th January 2000, in the United States District Court for the District of Massachusetts ("the Massachusetts proceedings"). The Massachusetts proceedings are negative in character. They claim declarations of the non-liability of to American Guarantee to indemnify the plaintiffs under the master policy. In fact, American Guarantee had issued an earlier set of proceedings on 15th October 1999, but had discontinued them.

On 31st January 2000 Smith J made an order pursuant to Order 11 Rule 1 of the Rules of the Superior Courts ("the Rules") granting liberty to the plaintiffs to serve notice of a concurrent summons on American Guarantee by ordinary post at its address in Schaumberg, Illinois, USA.

No question could arise regarding the service of the proceedings on Zurich, which entered an unconditional appearance on 1st February 2000. American Guarantee on 20th April, 2000 entered an appearance under protest for the sole purpose of contesting the jurisdiction of the High Court.

At this point, it is appropriate to refer to the grounds under the Rules upon which the plaintiffs sought and obtained leave to effect service out of the jurisdiction. It is regrettable that the order of the High Court did not follow the practice so frequently laid down by the courts of specifying the particular grounds under Order 11 Rule 1 of the Rules under which leave was granted (see Shipsey v British and South American Steam Navigation Company [1936] IR 65.) ("Shipsey"). Nonetheless, it is clear from the grounding affidavit of Mr Joseph B McDonough, a Vice President of Analog Inc. and director of the other plaintiffs, sworn on 28th January 2000 which provisions of the Rules were invoked.

Order 11 Rule 1 (e) (iii) ("sub-paragraph (e)(iii)") was first invoked. Mr McDonough claimed to rely on a breach of contract by American Guarantee by failing to make payment of their losses to the first three plaintiffs at Raheen, Count Limerick, where, he said, each of those plaintiff companies was based. This amounted to a breach of contract committed within the jurisdiction.

The second provision cited was Order 11 Rule 1 (h) ("sub-paragraph (h)"). Mr McDonough claimed that American Guarantee was a "necessary or proper party" to the proceedings brought by the plaintiffs against Zurich within the jurisdiction. The claim against Zurich is identical with the claim against American Guarantee as are the grounds upon which the defendants purport to repudiate liability.

American Guarantee brought a motion before the High Court seeking an order pursuant to Order 12 Rule 26 of the Rules setting aside the service out of the jurisdiction and discharging the order of Smith J That motion was heard and was dismissed by Lavan J on 18th May 2001. It is from that order that American Guarantee has appealed to this Court.

American Guarantee contended that neither of the two invoked provisions of the Rules applied. Specifically, the non-payment of the amount of the losses did not amount to a breach of contract committed within the jurisdiction as no obligation to make such a payment had arisen. The principal contracting party under the master policy is a US corporation with its principal place of business in the state of Illinois. Nor is American Guarantee a necessary or proper party to the action brought by the plaintiffs against Zurich to enforce the local policy. The action against American Guarantee relates to a distinct policy issued by a different insurer. In addition, the court should not have exercised its discretion to permit service out of the jurisdiction because it is clear that it would not be more convenient and less costly to permit the dispute under the master policy to be litigated in this jurisdiction than in the United States where American Guarantee has issued the Massachusetts proceedings. In addition, American Guarantee relies on the Massachusetts proceedings to support an argument of "lis alibi pendens" or "forum non conveniens" and to ask, as an alternative, for an order staying the proceedings in this jurisdiction pending the determination of the Massachusetts proceedings.

In response to the motion to set aside service, the plaintiffs advanced a new ground for alleging breach within the jurisdiction of the terms of the policy, namely that a representative of the defendants attending the Raheen plant to investigate the claim in September 1999 stated that the losses fell outside the scope of the policies and that cover would be denied. This statement is hotly disputed. I will defer further comment until I come to deal with the arguments on the appeal.

I will also discuss more fully at that point of the judgment each of the other arguments. It suffices to say at this point that Lavan J rejected all the arguments of American Guarantee. He upheld the original grounds upon which Smith J had granted leave to effect service out of the jurisdiction; he thought that the defendants' commencement of the Massachusetts proceedings was no more than forum shopping and refused to stay the proceedings.

THE APPEAL

The defendants submissions on the appeal are as follows.

Sub-paragraph (e)(iii) does not apply. It is not correct to say that the defendants, even assuming them to be bound to indemnify the plaintiffs, committed any

breach of the terms of the policy within the jurisdiction. Clause 5 of the master policy, under the heading "Loss Payable" states:

"Loss, if any shall be adjusted with and payable to Analog Devices, Inc. or order whose receipt shall constitute a release in full of all liability under this policy with respect to such loss."

The address of Analog Inc. under the policy is in Norwood, Massachusetts. American Guarantee may be obliged to pay elsewhere in the event that Analog Inc. directs American Guarantee to do so. It has not been suggested that it has ever given such a direction. This is consistent with the well-established rule of law that, in the absence of any express term in the contract, the debtor must seek out his creditor and make payment to him at his place of business or residence as appropriate. The plaintiffs also refer to clause 5. They do not point to any express direction or order but say that Mr McDonough's affidavit said that the losses fell to be paid to the plaintiffs, that the issue of the proceedings should be regarded as election to have payment made to the order of Analog Inc. and to the other three plaintiffs in Ireland.

As to the contention made for the first time in response to the motion to set aside service, namely that the alleged breach consisted in the repudiation by American Guarantee of its obligation to indemnify, there is much more controversy. Since this ground appears largely to have replaced the earlier one as the basis of the plaintiffs' reliance on sub-paragraph (e)(iii), it is necessary to refer to the facts.

In an affidavit sworn on behalf of the plaintiffs on 9th November 2000, Paul R Miles, director of risk management of Analog Inc., swore that, in the course of a visit to the Raheen premises on 3rd September 1999, one Aidan Cooper, who he understood to be a claims manager with Zurich stated that the losses claimed by the plaintiffs fell within the excepted perils and that cover would be denied. Mr Cooper, however, in an affidavit sworn on 10th April 2001, swore that he not only did not make the statement attributed to him, but that he was not the agent of American Guarantee but of Zurich on the occasion of that visit. He explained in more detail than is necessary for consideration of the present issue that he was responsible for commercial claims for Zurich in Ireland. As such, he was responsible for local claims only and did not have to consider claims under the master policy. He swore that, at no time did he represent or hold himself out as representing American Guarantee or as addressing any issue under the master policy. He also swore that he stated that a problem might exist regarding coverage under the local policy having regard to the excluded perils. He went on to state that he addressed this remark to Mr Miles, to whom he was speaking on a video link to the United States, and that he read out the clauses of the local policy but stressed that he did not have authority to deny coverage under the local policy. Mr Cooper's account is supported by an affidavit sworn by Mr Robin Hamilton of McLarens, Chartered Loss Adjusters, who was also among those present.

In connection with this issue, the defendants state that the correspondence which took place after 3rd September 1999 is inconsistent with the contention that American Guarantee had denied liability on that date. Zurich (US) wrote on behalf of American Guarantee to the plaintiffs' brokers in the US stating that the exclusion for "error in processing or manufacturing" was "being considered," but that outside legal opinion was being sought. The letter insisted that the claim was not being prejudged.

The plaintiffs retort that, where there is a serious factual dispute of this kind, its resolution should be left over for the court of trial. They cite Short v Ireland and

others [1996] IR 188 ("Short") for the proposition that such disputes cannot be satisfactorily resolved on an interlocutory application such as a motion to set aside service out of the jurisdiction.

With regard to sub-paragraph (h), the defendants submit that American Guarantee cannot be considered to be a "necessary or proper party" to the action against Zurich. The claims are made under two separate contracts. There is no question of American Guarantee being liable under the local policy. The defendants accept that the test is whether the party outside the jurisdiction would be a proper party to the action if it were within the jurisdiction, but says that, in the present case American Guarantee would not, even if it were to be a company incorporated in the State, be a proper party to the action against Zurich, simply because the policies are quite separate. Both parties rely on a number of cases: Short v Ireland [1996] 2 IR 188 ("Short') ; Tromso Sparebank v Byrne (Supreme Court, Unreported 15th December 1989) ("Tromso"); International Commercial Bank plc v Insurance Corporation of Ireland plc [1989] IR 453 ("ICB v IC]"); O'Toole v Ireland [1992] ILRM 218.

THE RULES

The parts of Order 11 Rule 1 which are relevant to this appeal are:

"1. Service out of the jurisdiction of an originating summons or notice of an originating summons may be allowed by the Court whenever -

(e) the action is one brought to enforce, rescind, dissolve, annul, or otherwise affect a contract, or to recover damages or other relief for or in respect of the breach of a contract -

(i) (not relevant)

(ii) (not relevant)

(iii) by its terms or by implication to be governed by Irish Law, or is one brought in respect of a contract wherever made, even though such breach was preceded or accompanied by a breach out of the jurisdiction which rendered impossible the performance of the part of the contract which ought to have been performed with the jurisdiction; or.....

(h) any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction or...."

THE JURISDICTION

It is convenient to assess in the first instance the case for the existence of primary jurisdiction under the Rules. I will leave over for the moment the adequacy of the plaintiffs' demonstration of the suitability, on grounds relating to convenience and cost, of the Irish jurisdiction as well as the linked case on lis alibi pendens and forum non conveniens.

When the court grants leave for the service out of the jurisdiction of proceedings, it requires a person, not otherwise within the jurisdiction of our courts, to appear here and to answer the claim of a person made in what is for him a foreign court rather than leaving the plaintiff to pursue his remedy against that person in that other jurisdiction. The international comity of the courts have long required, therefore, that our courts examine such applications with care and

circumspection. The applicant must furnish an affidavit verifying the facts upon which he bases his cause of action. It is not sufficient that he assert that he has a cause of action. The court judges the strength of the cause of action on a test of a "good arguable case". No argument has been addressed to the Court in this case on the existence of the plaintiffs' cause of action. The master policy is not disputed, nor does there appear to be any dispute about the fact that there was some incident capable of causing loss under the policy. The parties are at odds, it appears, only in respect of the applicability of the exclusion clause.

On the other hand, the parties are in dispute in respect of the existence of circumstances justifying the grant of leave to effect service out of the jurisdiction. In the case of sub-paragraph (e)(iii), in particular, they are in dispute about issues of fact.

It is in this context that the plaintiffs submits that the Court should apply a test of a "fair arguable case" leaving the resolution of any disputes to the trial of the action. That approach needs to be applied with especial circumspection in a case where the issue in contention is whether the court can take upon itself jurisdiction over a foreign person or corporation. Tests similarly worded are adopted by the courts in deciding whether or not to grant some forms of interlocutory relief, specifically injunctions, or whether to grant leave to apply for judicial review. But, in those cases, the position of the opposing party is not irrevocably affected. He may succeed at the trial of an action, though an interlocutory injunction has been granted against him, and he may defeat the substantive application for judicial review. This case is different. If the court grants leave to effect service out of the jurisdiction, it asserts that it has jurisdiction. The foreign defendant is required to submit to that jurisdiction and fails to do so at his peril. In particular, if the court declines to set aside an order for service, that ends the dispute about jurisdiction. There is no later opportunity to reopen the matter.

When Barrington J, at page 215 of the report in Short, referred to a "good arguable case," he was speaking of the merits of the substantive claim of the plaintiffs against British Nuclear Fuels to be suffering or apprehending suffering from the activities of that company in the United Kingdom. Lord Goff of Chieveley analysed the matter at some length in Seaconsar Far East Limited [1994] 1 AC. 438, though he also was principally concerned with the rule for assessment of the strength of the plaintiffs' case on the merits as distinct from the question of what test to apply on an application for service out of the jurisdiction. His discussion of the earlier House of Lords decision in Vitkovice Horni a Hutni Terzstistvo v Korner [1951] AC. 869 shows how confused the English courts were about the matter. The Law Lords thought the test to be, as laid down by the rule, as in our Order 11 Rule 5, that "the case is a proper one for service without the jurisdiction." This might not be thought to advance the matter much and Lords Simmonds and Normand appeared to accept the value of "a good arguable case". Lord Radcliffe spoke of "a strong argument" and "a strong case for argument". Hence the notion of "good arguable case." I agree that this is the appropriate standard.

When it comes to apply a test so worded or any varied wording, I think it must be borne in mind that the issue of jurisdiction is being determined irrevocably and that a foreign defendant is being summoned involuntarily before our courts. Therefore, I believe that, though disputes of fact cannot always be satisfactorily be resolved on affidavit, the court must look at the matter carefully. It is not a case where the applicant's allegations must be presumed to be true. The foreign party's affidavit evidence must also be considered.

In the light of those observations, I turn to the plaintiffs' claim under sub-paragraph (e)(iii). The first aspect is simply disposed of. Clause 5 of the master

policy provides for payment to Analog Inc., a corporation incorporated and having its address for the purpose of the policy in the United States. It could, no doubt, direct payment of any sums due to it under the policy to be paid to the other plaintiffs in Ireland, but it did not do so. Mr McDonough's affidavit does not put the matter any further, nor do I accept that the issue of the proceedings should be regarded as an election for payment in Ireland. It is equally consistent with Analog Inc. demanding payment under the terms of the policy, which, in the absence of any direction, would involve payment in the United States.

It is the second aspect which requires a judgment to be made on the facts. Mr Miles has sworn that Mr Cooper stated on 3rd September in Raheen said that the loss was not covered under the master policy, by reason of the exclusion. However, Mr Miles knew that Mr Cooper was a claims official with Zurich. He goes no further than to attribute Mr Cooper's statement in a general way to the defendants. He does not state that it was expressly made on behalf of American Guarantee. He goes on, crucially in my view, to say that this position of the defendants was "confirmed in subsequent correspondence." However, the correspondence he exhibits, and specifically the letter of 21st September from Zurich (US) mentioned earlier demonstrates that American Guarantee, while undoubtedly reserving its rights under the exclusion clause, had not adopted a definitive position. Mr Cooper, himself, is quite clear that, even in respect of the local policy issued by Zurich, he did not have authority to deny liability. A fortiori then, he could not have denied liability on behalf of American Guarantee, whom he did not represent at the meeting. The first unambiguous statement denying liability was made in a letter of 7th October, 1999, a letter written in the United States to a recipient in the United States. I do not think, therefore, that there was sufficient evidence before the High Court to show, for the purpose of founding Irish jurisdiction, that American Guarantee had given notice of its intention to rely on the exclusion clause in the master policy on any earlier date.

For these reasons, I do not think the order was correctly made under sub-paragraph (e)(iii).

In respect of sub-paragraph (h), there are two approaches. On the one hand, the two insurance policies are distinct. The insurer under the local policy is Zurich and under the master policy is American Guarantee, even if these two companies are linked by being members of the same group. On the other hand, the first three plaintiffs are named either expressly or by necessary implication as insured under each policy. Each policy covered, subject to the disputed question of the excluded perils, the type of risk which caused the loss alleged by the plaintiffs at the Raheen plant.

Clearly, American Guarantee are not a necessary party to the action against Zurich to enforce the local policy. The question is whether they are a proper party. The cases show that the courts adopt a flexible and pragmatic approach to the question. In Short, Barrington J propounded the test, long adopted by the courts both here and in England, that:

"The standard test to be applied in exercising this jurisdiction is whether the person out of the jurisdiction would, if he were within the jurisdiction, be a proper person to be joined as a defendant in the action against the other defendants."

In Massey v Heynes (1881) 21 Q.B.D. 330, Lord Esher M.R. posed the same question (see page 338): "if both parties had been within the jurisdiction, would they both have been proper parties to the action "

The defendants accept that this is the correct test. Undoubtedly they are right to

do so. In Short, the action within the jurisdiction was brought against the State for failure to take steps to prevent or stop the activities of British Nuclear Fuels in the United Kingdom. Barrington J had no doubt that, BNF would have been proper parties to an action against the State if both were within the jurisdiction. In ICB v ICI, the service effected out of the jurisdiction was in respect of third part proceedings. The defendant's claim for an indemnity from the proposed third party related to its own liability under a contract of insurance or guarantee. Clearly, in that case, as in this, the claim within the jurisdiction and the one being made against the proposed third party arose under different contracts. Yet Finlay CJ was able to say (page 468 of the report):

"I have already indicated my view of the importance as a matter of justice of ensuring in general, as far as possible, that where a defendant has a claim for indemnity against a third party it should be heard by the same tribunal and at approximately the same time as the plaintiff's claim against the defendant. The individual facts of this case are that the grounds on which the defendant seeks to avoid liability in the claim brought against it by the plaintiff namely, upon the grounds of misrepresentation on behalf of the plaintiff invalidating the contract of guarantee are to a very large extent, though possibly not exclusively, the same grounds upon which the third party claims to avoid the contract for reinsurance entered into by it with the defendant. In those circumstances, there are very compelling reasons why the third party issue should be tried by the same tribunal as tries the plaintiffs claim against the defendant. The plaintiffs claim against the defendant is, at the instance of the plaintiff brought within this jurisdiction and that was not a forum chosen by the defendant. In all these circumstances I have no doubt, notwithstanding the existence of proceedings in the High Court in England in which the third party claims a negative declaration against the defendant of its right to avoid responsibility on the reinsurance police and in which the defendant has served a third party notice arising from that claim on the plaintiff to the action in this jurisdiction."

In Tromso, the action within the jurisdiction was one in which the plaintiff, a Norwegian bank, was suing a number of individuals and an Irish bank arising out of the dishonour of promissory notes, which the plaintiff had discounted, purportedly but fraudulently issued by an employee of the Irish bank. It wished to join the Midland Bank, an English bank and ultimate parent of the Irish bank, for alleged negligence in confirming the fraudulent signature of the Irish bank's employee without referring to his lack of authority. Although the causes of action and many of the facts upon which they were based were quite distinct, the underlying circumstances were closely linked by the fact that the plaintiff said it would not have discounted the notes if they had not been verified by Midland. McCarthy J emphasised the desirability of centralising the hearing of the several causes of action and of avoiding inconsistent decisions.

The important apparent single decision to the contrary is that of Costello J in O'Toole and GPA Group plc v Ireland and others [1992] ILRM 218. The plaintiff, an aircraft leasing company, claimed that certain provisions of the Air Navigation and Transport Acts were unconstitutional insofar as they had the result of making the plaintiff liable to Eurocontrol in respect of aircraft charges primarily owed by an insolvent airline to which it had leased aircraft. Costello J held that Eurocontrol was not a "proper party". The cause of action against Ireland and the Attorney General concerned the constitutionality of legislation, a matter in which Eurocontrol had no interest whatever.

It may be difficult, at first, to reconcile the O'Toole case with the test propounded by Barrington J It might be perfectly proper, in the purely domestic context, to join in an action concerning the validity of legislation or perhaps secondary

legislation a party who may be entitled to make a claim under that legislation and, therefore affected by it. For example, Wexford County Council as the rating authority was joined as a defendant with the State to the action for a declaration of unconstitutionality of legislation concerning the rateable valuation of agricultural land (Brennan and others v Attorney General and Wexford County Council [1983] ILRM 449). Costello J did not directly refer to the test whether the parties could have been joined if both were within the jurisdiction, later restated by Barrington J In reality, I think his remarks should be interpreted as amounting to the exercise of a discretion to refuse service in a case where service out of the jurisdiction would not have been appropriate rather than stating that there was no jurisdiction to do so.

American Guarantee says that it cannot be a proper party to the action against Zurich on the local policy, the claim against it is under a distinct, quite separate and different policy. It has nothing to do with the local policy. It is difficult, however, to discern a principled distinction between the position of American Guarantee and that of the third party in ICB v ICI or that of the Midland Bank in Tromso. In each of these cases, the party within the jurisdiction was invoking the jurisdiction of the Irish courts over a person outside the jurisdiction on the basis of a different cause of action. In none of the cases cited has it been suggested that the cause of action against the claimed "proper" party must be the same as against the other party. One may be in contract and the other in tort or they may be based on different torts. It must be borne in mind that sub-paragraph (h) is an addition to the other grounds upon which leave may be granted to serve outside the jurisdiction. Thus, the cause of action against the party to be joined may have little or no connection with this jurisdiction.

Naturally, there must be a sound basis for the contention that a party to be served out of the jurisdiction is a proper party. There must be reality in law and in fact in the case against the party within the jurisdiction. His inclusion must not be a mere device to get a foreign party before the Irish courts. There must be a substantial element in the claims against the two parties. Lindley LJ. in his judgment in Massey v Heynes, cited above, thought it sufficient that the "liability of several persons depends on one investigation." (page 338 of the report). In Multinational Gas Co v Multinational Gas Services Ltd. [1983] Ch 258, Dillon LJ. said:

"Whether an action is properly brought against a particular defendant within the meaning of [...he referred to the corresponding provision...] must surely depend on the substance of the matter in the light of all the circumstances, and not on the mere form of the pleading and whether there is technically a cause of action."

When one considers the cases and the common sense of the matter, I think that there is little doubt that American Guarantee is a proper party to the action against Zurich. If both defendants were within the jurisdiction, it is scarcely conceivable that the two actions would be heard separately. They arise under separate but linked insurance policies covering the same risk and in respect of which a virtually identical ground of repudiation has been advanced. Economy and efficiency would demand that the facts of the complex set of events that occurred at the Raheen plant not be proved twice and that the expert evidence of both parties be given in one action. To hear the two actions before two different courts is to court the danger of inconsistent decisions.

Accordingly, I would uphold the order of the High Court insofar as it held that there was jurisdiction under sub-paragraph (h).

THE PROPER FORUM

I must then turn to the separate considerations advanced by American Guarantee to the effect, firstly, that the court should nonetheless refuse jurisdiction on the ground that Ireland is not a convenient or proper forum and, secondly, that the United States District Court is the appropriate forum, having regard to the Massachusetts proceedings.

There is, naturally, considerable overlap between the arguments of American Guarantee under the legally distinct headings, namely that the plaintiffs have not demonstrated that Ireland is the "forum conveniens" and that American Guarantee is entitled to a stay of the Irish proceedings on the linked grounds of "forum non conveniens" or "lis alibi pendens." I will endeavour to deal with these aspects of the appeal together. Certainly, the existence of the Massachusetts proceedings looms large under both headings. There are, of course, some differences between the two issues. I will begin by summarising the basic legal principles as they appear from the submissions of the parties, and, in particular, of American Guarantee. In effect, they are not seriously in controversy.

An order granting leave to effect service out of the jurisdiction is a matter of discretion. The court should grant leave only after careful consideration, not only of the existence of grounds upon which the court is empowered to grant leave, but of the appropriateness of the courts of this jurisdiction to try the case. The Latinism, "conveniens," may, as has been pointed out in some of the cases, mislead; the proper translation is not "convenient," but suitable or appropriate. This is illustrated, in particular, by Order 11 Rule 5, which obliges the applicant to state "the particulars necessary for enabling the court to exercise a due discretion in the manner in rule 2 specified." The latter provision obliges the court to "have regard to the amount or value of the claim or property affected and to the comparative cost and convenience of proceedings in Ireland, or in the place of the defendant's residence..." Rule 5 goes on to lay down a fundamental principle regarding the exercise of what has been stated to be a discretionary power: " and no leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction under this Order."

These provisions, taken together, mean that the applicant must satisfy the Court, ie has the burden of proving, at the ex parte stage, that Ireland is the forum conveniens. This means, according to Lord Goff of Chieveley in Spiliada Maritime Corporation v Consulex Limited [1987] 1 AC 460, at 480, "the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice." Lord Goff had reviewed a range of dicta on the issue, some emphasising the "exorbitant" character of the jurisdiction and some (older cases) the annoyance and inconvenience for a foreigner at being brought to contest proceedings in England. Lord Goff himself found the word "exorbitant" to be "an old-fashioned word which carries perhaps unfortunate overtones. "He also said that the defendant's place of residence may be no more than a tax haven. It seems to me that the dictum of Lord Wilberforce, in Amin Rasheed Shipping Corporation v Kuwait Insurance Co [1984] AC 50, expresses a correct balance. He said (at page 72 of the report):

"The intention must be to impose upon the plaintiff the burden of showing goods reasons why service of a writ, calling for appearance before an English court, should, in the circumstances, be permitted upon a foreign defendant. In considering this question the court must take into account the nature of the dispute, the legal and practical issues involved, such questions as local knowledge, availability of witnesses and expense."

The principal difference between this rule, which concerns the original grant of leave and the application by American Guarantee is that, in the latter instance, the burden of proof rests on the moving party. The applicable legal principles have been fully reviewed quite recently by this Court in Intermetal Group Ltd v Worslade Trading Ltd [1998] IR 1. It would serve no useful purpose for me to repeat the careful and perceptive analysis by Murphy J of a number of authorities from the Irish and English Courts. The test for whether to grant a stay on proceedings is one based on the "broad interests of justice." Murphy J approved expressly the test adopted by Blayney J in Doe v Armour Pharmaceutical Co Inc. [1994] 3 IR 78, at page 107, namely: "Does justice require that the plaintiff's action should be stayed " Murphy J observed that the notion of "forum non conveniens" was long associated with the law of Scotland. For this reason, I will cite an appropriate summary of the doctrine from Lord Kinnear in Sim v Robinow (1892) 19 R 665 at 668:

"The plea can never be sustained unless the court is satisfied that here is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all parties and for the ends of justice."

In his speech in Spiliada, to which I have already referred, Lord Goff made some relevant remarks about the extent of the burden of proof on the party seeking a stay of proceedings already brought in England. He thought that it would have to be shown that "there is another available forum which is clearly more appropriate than the English forum." (page 477) It does not appear, however, that English, as distinct from United States law, attributes weight to the undesirability of disturbing the plaintiff's choice of jurisdiction.

In the particular circumstances of the present case, I would add that actions for a negative declaration warrant some special remarks, to which I will advert when I come to deal with the facts about the Massachusetts proceedings.

American Guarantee claims both that the High Court should not, in the exercise of its discretion, have granted leave for service out of the jurisdiction and that the court should now grant a stay of the proceedings. As already stated, the burden in the latter respect lies on American Guarantee. It is also true that the latter issue has to be decided as of the time the application for the stay. Nonetheless, the grounds advanced by American Guarantee in both respects are very largely similar. They are:

1. American Guarantee have commenced the Massachusetts proceedings.

2. The claim against American Guarantee is based on the master policy, which was issued to **Analog** Inc. in the United States.

3. The master policy contains provisions which suggest that the appropriate jurisdiction is in the United States.

4. Virtually all of the witnesses in relation to the claim under the master policy are in the United States.

The parties have set out in their affidavits, often at great length and in reliance on many documents, the history of the proceedings on the two sides of the Atlantic.

While I have mentioned that American Guarantee had not earlier taken a clear stand on the question of liability under the policy, it certainly did so in a letter of 7th October, 1999 written by Zurich (US). American Guarantee issued

proceedings against Analog Inc. on 15th October 1999 taking the form of a "Complaint for Declaratory Judgment." These were not, however, served on any of the plaintiffs and they were unaware of them until they learned of their existence in the course of the proceedings contesting jurisdiction. It appears that American Guarantee voluntary discontinued these proceedings on 21st October 1999. The explanation offered for this in the affidavit of Kevin A McCoy of Zurich American Insurance Company is the "spirit of good faith in negotiations." Clearly, any negotiations were fruitless. After some lengthy pre-litigious correspondence, Arthur Cox & Co came on record for the plaintiffs in a letter of 7th January 2000 addressed to American Guarantee, mentioning the separate claim against Zurich, and declaring an intention to apply for leave to effect service out of the jurisdiction but asking American Guarantee if it would nominate a solicitors to accept service. A letter in reply from a Boston firm of attorneys stated that American Guarantee was Reviewing [the] request and [would] be in contact "within a week."

Instead of getting in touch "within a week," American Guarantee issued the Massachusetts proceedings on 19th January 2000 and serving them in the United States on Analog Inc. on 21st January. Whichever date is taken as representing the commencement of the Irish proceedings (the issue of the summons on 20th January represented the commencement of, but leave to effect service was granted on 31st January and service was effected on 10th February) it is tempting to borrow language used in some of the American cases and to say that American Guarantee won "a race to the courthouse". If so, the margin of its victory was slender rather than impressive.

Thereafter, the proceedings have proceeded in approximate parallel in the two jurisdictions. American Guarantee entered their conditional appearance in the Irish action on 20th April 2000. They received the papers grounding the affidavit seeking leave on 11th May, 2000. A statement of claim was issued on 9th May, 2000. American Guarantee brought its motion to set aside service on 13th September, 2000 for hearing in October 2000. Particulars have been exchanged and defences have been filed by both defendants in the Irish action. In the case of American Guarantee, this is described as a "preliminary defence" and is expressed to be subject to resolution of the current issue on jurisdiction. The plaintiffs say that the Irish proceedings are ready for hearing. It has been agreed that the discovery made by both parties in the Massachusetts proceedings may be used.

Analog inc. entered an appearance in the Massachusetts proceedings on 3rd March 2000. Thereafter there were a number of extensions of time for its pleading. It brought an unsuccessful motion for a stay in the Massachusetts proceedings. This was refused in December 2000. American Guarantee has detailed a large number of procedural steps in that action, including the filing by Analog Inc. of a counterclaim which extends to a claim for damages for unfair or deceptive acts or practices contrary to Massachusetts law.

It also appears that a motion for summary judgment under American procedures has been scheduled for 15th April 2002, though the parties disagree as to whether many or most issues will be disposed of by this means. A case conference has been set for 14th May with a view to setting a date for trial. Other action relates to discovery and the taking of pre-trial depositions.

On the whole, the two sets of proceedings seem to be in an approximately similar condition of readiness, just as they were commenced at approximately the same time. It must, naturally, be accepted that the United States District Court has jurisdiction, since that court has so decided. The parties have debated whether

that decision is definitive, an issue upon which I do not think it would be appropriate for this court to pass comment. A key point about the Massachusetts proceedings is, however, that the relief sought is expressly negative in character. It asks the court to declare American Guarantee not bound to indemnify the plaintiffs. It does not seem to be seriously disputed that the Massachusetts proceedings were intended to be pre-emptive. Indeed the history of the proceedings outlined above would lead inescapably to this conclusion. American Guarantee rejects criticism on that ground, stating that it can be legitimate to seek such negative relief. That is, no doubt so. Certainly, as I have said and as the United States District Court has decided there can be jurisdiction to entertain such an action, but that is a different question from its weight when considering a conflict of jurisdiction and where the Irish courts are asked to stay their own proceedings. However, the passage cited by American Guarantee in support is interesting. It is from Dicey and Morris on "The Conflicts of Law" (13th Edition) (2000) at 403:

"In many cases, however, there is a legitimate role for a bona fide claim for a negative declaration. In modern commercial litigation, notably in the field of insurance, a party may have a legitimate commercial need to obtain an early determination upon his liability to another who may seek to claim against him; an insurer who wishes to know whether he should conduct the defence of a threatened claim against his insured. A supplier who needs to know whether he is obliged to continue to supply a distributor or may, instead, deal elsewhere. Where a stay of proceedings for a negative declaration is sought (or there is an application to set aside service out of the jurisdiction) the Court will have to consider both the question whether there is justification for seeking that form of relief and the question whether [Ireland] is the appropriate forum. If by contrast such a declaration would be ignored so far as legal proceedings between the parties and would therefore, serve only to increase the risk of conflicting judgments, or if the proceedings are premature in the sense that the Claimant has not reasonable apprehension of being sued by the Defendant, the Claimant may be regarded as abusing the process of the Court. The Court is therefore likely to exercise its discretion to strike out the application or refuse to make the order or to stay the proceedings, or to refuse to give permission to serve proceedings out of the jurisdiction, as the case may be."

It does not appear to me that, to put the matter at its lowest, this passage offers the support for the defendants' case for which it is cited. More tellingly still, the immediately preceding passage from the work of the learned authors casts a great deal of cold water on the value of actions for a negative declaration in contests about jurisdiction. Paragraph 12-034 reads as follows:

"It frequently happens that a party seeks a negative declaration in the English court, or in the foreign court, in order to support a contention that the English court, or the foreign court (as the case may be), is the appropriate forum. Indeed, it has been said that claims for declarations, and in particular negative declarations, must be viewed with great caution in all situations involving possible conflicts of jurisdiction, since they lend themselves to improper attempts at forum shopping. Accordingly, the English court will stay English proceedings for a negative declaration against defendants subject to the jurisdiction of the English court where a foreign court is the forum conveniens, and the English court will not be disposed to authorise service out of the jurisdiction under Order 11. R 1(1), ie Rule 27, in a claim for a negative declaration, unless England is the appropriate forum. Nor will a claim in a foreign court for a negative declaration be of much weight in determining whether the foreign court is the appropriate forum for the purpose of staying English proceedings, or in determining whether the English court is the appropriate forum for the purposes of service of the

jurisdiction."

One of the authorities cited in that passage is Saipem spa v Dredging VO 2 By, The Volvox Hollandia [1988] 2 Lloyd's Rep 361. The plaintiffs rely on the following dictum of Kerr LJ. At page 371 of the report in that case:

"Claims for declarations, and in particular negative declarations, must be viewed with great caution in all situations involving possible conflicts of jurisdictions, since they obviously lend themselves to improper attempts at forum shopping."

The normal order of events is that the insured as claimant under an insurance policy will be the plaintiff. A claim for a negative declaration by the insurer is a reversal of the normal order. This is a significant matter to be weighed in the balance and it weighs against the defendants. I derive support from the judgment of Costello J in ICB v ICI (page 453 of the judgment). I draw attention only to his statement that, in that case, "with the knowledge that it was likely to be sued in Ireland, the third party instituted proceedings in England and now seeks to use the English proceedings to found an objection to the Irish Court's jurisdiction in the dispute."

American Guarantee makes one other point about the Massachusetts proceedings. It says that Analog Inc. has submitted to the United States District Court by filing a counterclaim. Analog Inc. responds that it was bound by US procedural rules to do so. Rule 13(a) of the United States Federal Rules of Civil Procedure provide that, if a counterclaim is not put forward, a party may be deemed to have waived his rights. This was not contested. It follows that Analog Inc. did not commit any voluntary act of submission to the jurisdiction of the United States District Court.

The fact that the policy was issued by American Guarantee, a US corporation, to Analog Inc., also a US corporation, (the next argument of American Guarantee) in the United States is, in no way decisive. The definition of the insured under the policy includes the first three plaintiffs, all of them companies registered in Ireland (one on the external register). Furthermore, the place of the risk, so far as relevant to this case, is in Ireland. It is interesting, in this connection, to note that, when American Guarantee joined Zurich as a co-plaintiff in the Massachusetts proceedings in May 2000, the pleading was amended to state that the local policy was "issued in connection with the Master policy."

The jurisdiction clause invoked by American Guarantee is clause 37 of the master policy. It reads:

"It is agreed that in the event of the failure of the Company to pay any amount claimed to be due hereunder or in the event of any other dispute relating to this policy, the Company, at the request of the Insured, will submit to the jurisdiction of any court of competent jurisdiction within the United States and will comply with all of the requirements necessary to give such court jurisdiction and all matters hereunder shall be determined in accordance with the law and practice of such court, not including the court's law regarding choice of law. The Company shall not transfer, change venue, or remove, or seek to transfer, change venue, or remove any lawsuit filed by the Insured in any such court."

This clause confers jurisdiction on any court of competent jurisdiction in the United States, but only at the option of the insured. The insured has not exercised that option. Thus the clause does not avail American Guarantee. It was not disputed at the hearing that this clause was quite different from an exclusive jurisdiction clause. American Guarantee could no doubt have required insured

persons to accept such a clause if it had wished. However, as the plaintiffs say, the master policy gives effect to a sort of world-wide insurance. They are, in the nature of that insurance, likely to have to submit to jurisdiction in a wide range of countries throughout the world.

As to the location of likely witnesses, I am completely unconvinced by the claim of the defendants that they are likely to be found preponderantly in the United States. The claim flows from an incident in a high grade technical manufacturing plant situated at Raheen, County Limerick. All of the evidence of fact about that incident is almost certainly going to be given by employees and executives of one or other of the plaintiff companies. The plaintiffs have furnished a credible list of likely witnesses. American Guarantee's response is the say that it "does not dispute this narrow statement as far as it goes." It cannot be disputed that a great deal of technical evidence will have to be given about the incident. Obviously, the role of American Guarantee is as insurer only and it was not party or privy to the incident. American Guarantee says, through the affidavit of Mr Kevin McCoy, that the loss was caused by an error which "occurred during the manufacturing process and not during the course of maintenance." In this connection, the plaintiffs point out that the allegedly damaged wafers as well as all documentation are to be found at Raheen. No doubt, expert evidence will have to be given and some of the experts may come from the United States, but the evidence relied on by Mr McCoy for the statement I have just cited is that of an expert with a Dublin address, Mr Donal O'Donovan. In any event, the suggested need for American evidence is, in my view, heavily outweighed by the extent of the Irish-based evidence.

American Guarantee lays great emphasis on the fact that the contract of insurance was negotiated in the United States and that, therefore, any witnesses concerning the negotiation or interpretation of the contract of insurance are based in the United States. Most, if not all of the witnesses listed by American Guarantee relate to underwriting or the handling of the claim. American Guarantee also reiterates that the master policy is governed by the Massachusetts law, but does not identify any relevant differences between the Massachusetts and Irish law. Insofar as Irish law is concerned, a contract is to be interpreted objectively in accordance with the meaning of the words the parties have used. The corollary is that parol evidence is not admissible so as to add to or vary that meaning. The plaintiffs plausibly question the admissibility of the evidence of witnesses concerned only with the negotiation of the contract of insurance. In this jurisdiction, the lex fori would appear to apply to that issue. If a large volume of evidence of that type would be admitted in the Massachusetts proceedings, that would appear to be a point in favour of Irish jurisdiction. The issue of interpretation which arises is whether the incident at the Raheen plant was the result of "errors in processing or manufacture." The defendants have not explained what admissible or relevant evidence can assist a court in deciding whether this exclusion applies. It seems to be very much a matter of evidence of fact, including, as I have said, expert evidence.

Apart altogether from these considerations, one outstanding fact in the litigation is that the Irish courts have undisputed jurisdiction over Zurich under the local policy. An almost identical issue arises under that policy. All the evidence I have mentioned above will have to be given in that case and in the Irish courts. So far as the plaintiffs are concerned, they must bear that cost in the Irish action in any case. However, they do not claim to be able to recover their losses more than once and it would be unfair to compel them to incur the same expense on the double. So far as the defendants are concerned, they do not have to call that evidence. Furthermore, it is clear that, in the United States, the plaintiffs will be unable to recover the costs even if successful. I do not cite that element as a

separate matter, in view of uncertainty about its relevance on the authorities. I do think, however, it is relevant to the extent that the plaintiffs may have to incur the same expense twice (with the added expense of travel for all their witnesses) if the actions against Zurich and American Guarantee have to be conducted separately.

The conclusion I am leading to in respect of the two legal issues is obvious from the foregoing commentary on the facts. The High Court, in my view, rightly exercised its discretion to permit service out of the jurisdiction on American Guarantee. It was clearly a "proper" case for the purposes of the Rule. For this reason, Lavan J was right to reject the motion of American Guarantee to set aside service. Neither has American Guarantee, in my view, discharged the burden of showing that a stay should be granted on the ground of forum non conveniens or lis alibi pendens. Lavan J was correct to decline to exercise his discretion by refusing the application for a stay.

I would dismiss the appeal.

DISPOSITION:
Appeal dismissed.

Annex 2

O'Connor v Commercial General and Marine Limited

The High Court

1996 1 IR

18 April 1996

PANEL: Morris J

JUDGMENTS:
Morris J

This matter comes before the court on the second defendant's notice of motion seeking two reliefs:-

(a) An order pursuant to O. 12, R 26 of the Rules of the Superior Courts, 1986, setting aside service upon it of the plenary summons herein on the grounds that the second defendant, being a Belgian national, ought in accordance with O. 11, r. 8 of the Rules of the Superior Courts, to have been served with notice of the plenary summons rather than the summons itself.

(b) An order setting aside the service of the summons on the grounds that the court does not have jurisdiction pursuant to the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, 1968, to hear and determine the plaintiff's claim against the second defendant.

It is necessary to set out in short form the circumstances in which this action arises.

The plaintiff says that he is a fisherman and was the owner of a fishing vessel, the "Cornelius Ferdinand" (T67). He says that on the 18th April, 1995, he received from Commercial General and Marine Ltd**.**, the first defendants, a quotation for insurance cover for the vessel which he accepted and that on the 1st May, 1995, he received a letter enclosing a cover note for the vessel. He says that the vessel was lost at sea on the 5th May, 1995, and the present claim is brought to recover the monies which the plaintiff says are due to him on foot of the said insurance policy.

The plaintiff says that originally he was unaware of the involvement of the second defendants. However, on the 16th May, 1995 he received a letter from Shannon Surveys Ltd. in which they referred to the second defendants as being "the underwriters". In subsequent correspondence, the second defendants are identified as having an address at Avenue Louise, 499-1050 Brussels, Belgium. In later correspondence, the solicitors acting for the second defendants informed the plaintiff's solicitor that the underwriters were "Omne Gulf Insurance Company" (otherwise "Omne Bahrain"). It is the second defendants' case that while it is an associate of Omne Bahrain, the two companies are distinct legal entities and that it, the second defendant, is not the insurer of the plaintiff's vessel but that Omne Bahrain is.

It is the second defendant's case that in the circumstances, this court has no jurisdiction to entertain the present claim.

With regard to the first of the two reliefs sought:

The second defendants are a limited liability company incorporated under the laws of Belgium having its place of business at Avenue Louise, 499-1050 Brussels, Belgium.

The plaintiff issued a High Court plenary summons against that company on the 3rd November, 1995, and, as appears from the certification, this summons was served on the 24th November, 1995, on that defendant at its address in Brussels.

It is submitted on behalf of the second defendants that this service is bad in that O. 11, r. 8 of the Superior Court Rules provides:

"Where the defendant is not, or is not known or believed to be, a citizen of Ireland notice of the summons, and not the summons itself, shall be served upon him."

He accordingly applies under O. 12, r. 26 for an order that the service of the summons be set aside.

Counsel for the plaintiff advances two arguments in opposition to this motion.

It is submitted that notwithstanding O. 11, r. 8 of the Superior Court Rules, service of the summons is permitted.

He bases this submission principally upon a decision of O'Brien J in James v Despott (1884) 14 L.R. Ir. 71. He submits that since in that case, the judgment concludes with the statement "I shall therefore make an order that the writ or notice of the writ be served upon the defendant in Malta . . ." it is authority for the proposition that valid service can be effected out of the jurisdiction on a non-national either by way of serving notice of the writ or the writ itself.

In James v Despott the issue before O'Brien J was the validity of certain rules (Rule 7, Consolidation order No 10) made by certain equity judges subject to the assent of Parliament, by virtue of the powers conferred upon them by the English Improvement of the Jurisdiction of Equity Act, 1852. A conflict of judicial opinion appears to have arisen in England as to whether the Act conferred upon the judges the power to make these rules. The Court of Appeal in England resolved this issue in Drummond v Drummond (1866) 2 Ch. App 32 and on the authority of that decision, O'Brien J found that the corresponding Irish orders which were based on the Irish Judicature Act, 1877, were also valid. He therefore made the order sought. His judgment does not relate to the issue of whether the summons or notice thereof is to be served. It only relates to the validity of the rule authorising the making of the relevant order.

The several rules, orders and forms which existed at the time of this judgment were repealed by Appendix R of the Rules of the Supreme Court (Ireland), 1891 which at O. 11 provided for the circumstances in which service outside the jurisdiction of a writ of summons or notice of a writ of summons might be allowed by the court. Service of such a writ or notice might be allowed, for instance, where the whole of the subject matter of the action is land situate within the jurisdiction or where the contract was made within the jurisdiction. Order 11, r. 2 vests in the court a discretion whether to allow service outside the jurisdiction and r. 7 provides that notice of the writ and not the writ itself is to be served upon a defendant who is neither "a British subject nor in British dominions".

Those provisions are in the main reflected in the Rules of the Superior Courts, 1986, and, in particular, O. 11, r. 8 repeats the provision that "where the defendant is not, or is not known or believed to be, a citizen of Ireland, notice of

the summons and not the summons itself shall be served on him.

The requirement for the service of notice of the proceedings, rather than the summons itself, be given to a non-national in another country was put by Lord Westbury in Cookney v Anderson (1863) 1 De G.J. & S. 365 as follows:-

"The right of administering justice is the attribute of sovereignty, and all persons within the dominions of a sovereign are within his allegiance and under his protection. If, therefore, one sovereign causes process to be served into the territory of another, and summons a foreign subject to his court of justice, it is in fact an invasion of sovereignty, and would be unjustifiable, unless done with consent; which is assumed to be the fact, if it be done in a case where a foreign judgment would, by international law, be accepted as binding."

It follows, in my view, that the service of a summons on a limited liability company incorporated in Belgium at its place of business in Brussels is not a service effected in accordance with the Rules of the Superior Courts and is bad and should be set aside.

It is submitted by counsel for the plaintiff that the "certification" may be regarded as equivalent to "notice" of the summons.

I do not accept this. Form No 7 provided for in the Rules of 1891 clearly indicates that a copy of the full endorsement of the summons is required to be given if there is to be a compliance with those rules. I would regard this as an essential requirement of any notice of a summons and this is not to be found in the certification in this case which is no more than an extension of the endorsement of service on the summons itself.

It is further submitted by counsel for the plaintiff that in England the distinction between the service of the writ itself and notice of the writ has been dropped and it is urged that the courts in this jurisdiction should adopt the same approach.

It would appear that the form of writ or summons in England now omits the Royal style, the title of the sovereign and the Royal Command addressed to the defendant and it also omits the witnessing or "teste" of its issue by the Lord Chancellor.

The form of summons in this jurisdiction requires the defendant within a given number of days after service to enter an appearance in the central office of the Four Courts in Dublin and it is stated to have been issued by the order of the Chief Justice.

While consideration might be given to the desirability of making an alteration of the summons so as to conform to the English form, while it retains its existing form the practice in England is of no relevance.

I am confirmed in the view that there remains an obligation upon a plaintiff to serve notice of the proceedings rather than the summons itself by the view taken by O'Hanlon J in Short v Ireland (Unreported, High Court, O'Hanlon J, 30th March, 1995) in which he commented:-

"Notice of the summons should have been served on the third Defendant, and not the summons itself, as actually happened (O. 11, r. 8). Once again this is a requirement involved in the comity of nations which should be observed meticulously, although the progress towards European union has brought about the change in procedure involved in cases falling under O. 11, in respect of which

service out of the jurisdiction can be effected without having first to seek the leave of the court."

I accordingly propose to make the order granting the second defendant the relief claimed in paragraph 1 (a) of his notice of motion and will set aside the service of the plenary summons pursuant to O. 12, rule 26.

With regard to the second relief sought, it appears to me that what is involved in this application is a determination of the substantive issue in this case, which is whether the second defendants or Omne Bahrain are the underwriters.

In my view, it would be improper to determine this issue, which is fully contested, on the evidence presented to me on affidavit. It is clearly a matter which could only properly be determined on oral evidence and I accordingly adjourn the second part of this notice of motion to the hearing of the action to be determined by the trial judge.

The plaintiff, at para. 20 of his affidavit of the 16th February, 1996, has sought, inter alia, an order joining Gulf Insurance Company EC being a limited liability company registered in Bahrain having a branch agency or other establishment at Avenue Louise, 499-1050 Brussels, Belgium as a defendant in this action. This company is of course not represented. However, I am satisfied that it is appropriate that I should, at this stage, grant the plaintiff liberty to amend the pleadings herein so as to name "Omne Gulf Insurance Company" as co-defendant and he will be given liberty to amend his pleadings so as to join it as co-defendant. I make this order on the basis that it appears to me appropriate to do so as to enable all parties relevant to this action to be before the Court. This company is stated to be the underwriters on the cover note dated the 24th April, 1995. I give the plaintiff liberty to serve notice of the summons on that company outside the jurisdiction and I will hear counsel's submissions as to whether it would be appropriate to substitute service by serving it on the second defendants in Brussels.

DISPOSITION:
Second Defendant's application granted

Annex 3

Declan Kelly

(Plaintiff)

v.

Cruise Catering Limited and Kloster Cruise Limited

(Defendants)

The Supreme Court

No. 144 of 1993
[5th of July, 1994]

Status: Reported at [1994] 2 ILRM 394

Blayney J. (O'Flaherty and Egan JJ concurring)

This is an appeal by the defendants against an order of Geoghegan J refusing to discharge an *ex parte* order made under O.11 of the Rules of the Superior Courts giving liberty to the plaintiff to serve on the defendants out of the jurisdiction a plenary summons claiming damages for breach of contract.

The plaintiff was injured in an accident which occurred on 23 October 1991 when he was working as a waiter/butler on board a ship, the Royal Viking Sun, of which the second named defendant is the owner. The plaintiff was employed on the ship on foot of a written contract of employment made between the first named defendant, as agent for the ship, and the plaintiff. It is alleged by the plaintiff that as a result of the breach of the defendants' contractual duty to him he was caused to fall when carrying a tray down a stairway in the ship. The accident occurred on the high seas when the ship was between Cozumel, Mexico, and Galveston, Texas. Immediately after the accident the plaintiff was treated by the ship's doctor and then by a doctor in Louisiana before he returned to Ireland.

The first named defendant is a Bahamas corporation, and the second named defendant is a company incorporated under the laws of Norway and has its central management there. The ship is registered in Nassau, in the Bahamas.

Geoghegan J held that the plaintiff's contract of employment with the first named defendant had been made within the jurisdiction and, accordingly, the defendants had been properly served under O.11, r.1 (e)(i) which permits service out of the jurisdiction of an originating summons in an action brought, *inter alia,* to recover damages in respect of a contract 'made within the jurisdiction'. He also held that Ireland was the most convenient forum for the trial of the action. The defendants had contended that it should be either Norway or the Bahamas, but in this Court they contended only for Norway.

The argument on the appeal was confined to these two issues. While it had been contended in the High Court that the action was based on tort rather than on contract, Geoghegan J' s finding against the defendants on this issue was not appealed.

The place where the contract was made

The facts concerning the execution of the contract were not in dispute. It was signed in triplicate for and on behalf of the first named defendant in Oslo on 15 October 1991 and was sent to the plaintiff on the same date with a covering letter. It was signed by the plaintiff in Dublin on 23 October 1991 and returned by him by post to Oslo. The covering letter had detailed instructions on the reverse side but these, unfortunately, were not in evidence. However, I think it is reasonable to assume that the plaintiff would have kept one of the three copies of the contract and returned the other two to Oslo. It is certainly common case that a copy of the contract duly signed was returned to Oslo.

It is clear on these facts that the contract was made by post so that the well-settled rule as enunciated by Denning LJ in *Entores Ltd v. Miles Far East Corporation* [1955] 2 QB 327 at p. 332, applies:-

> When a contract is made by post it is clear law throughout the common law countries that the acceptance is complete as soon as the letter is put into the post box, and that is the place where the contract is made.

Accordingly, the plaintiffs' acceptance was complete when, in Dublin, he posted the signed contract to the first defendant and where the signed contract was posted, which was Dublin, was the place where the contract was made.

It was contended by counsel for the first named defendant that this rule could on occasion cause injustice. It was possible, for example, that the acceptance might be lost in the post and in such cases it might be unjust to hold a party to a contract when he had never received the acceptance. That is no doubt correct but it is not a relevant consideration in the present case where the signed contract was received by the first named defendant. There are no circumstances here calling for any divergence from the well-established rule.

It was also contended that the implication from the form of the 'employee attestation' at the end of the contract was that there was to be no binding contract until the contract was returned to Oslo. The 'employee attestation' is as follows:-

> I, the undersigned employee, declare that I have read and understood the terms of this agreement and that no oral promises or other agreements have been made to me and that I cannot claim and am not entitled to any additional benefits of any kind whatsoever except those provided in this agreement. I declare that the application for employment, previously filled out and signed, is true and correct in every respect and that, as part of my employment agreement, I agree to abide by the conditions set forth in the ship's articles and by such company rules and regulations as are in effect from time to time.
>
> I also certify that I have received the 'welcome aboard' booklet from the employer, and agree that I will abide by these terms and conditions.

I have carefully considered the terms of this attestation and I am unable to find in them any indication that they were intended to postpone the conclusion of the contract to a date later than that specified in the well-settled rule. I am satisfied that they did not prevent the contract from becoming immediately effective once the signed contract was put in the post addressed to the first named defendant in Oslo.

I would accordingly endorse the decision of the learned High Court judge that the contract was made in Dublin.

Whether Ireland or Norway is the more convenient venue

Both sides wished to approach this issue on the basis of the principles applicable to *forum non conveniens.* They were anxious that this issue should be decided now rather than having to be dealt with perhaps at a later date as a separate issue. It seems to me, however, that it would be premature to adopt this approach when the issue is still whether the High Court has jurisdiction to hear the plaintiffs' action. The issue of *forum non conveniens* is relevant only where a court's jurisdiction to hear a case is not being contested but it is being contended that it should not exercise its jurisdiction because it is *a forum non conveniens.* That is not the situation here.

It does not follow, however, that the question of whether Ireland is a convenient venue is irrelevant. It has to be considered under O.11, r.2 which provides as follows:-

> 2. Where leave is asked from the court to serve a summons or notice thereof under rule 1, the court to whom such application shall be made shall have regard to the amount or value of the claim or property affected and to the comparative cost and convenience of proceedings in Ireland, or in the place of the defendant's residence.

In the affidavit filed on behalf of the defendants, the following reasons were put forward as to why a hearing in Ireland would involve the defendants 'in considerable expense and great inconvenience':-

1. Under clause 18 of the contract of employment, all claims have to be adjudicated upon 'pursuant to the laws of the Bahamas' and accordingly expert evidence would be required of such law.
2. The plaintiff was treated initially by the ship's doctor who was resident in Sweden, and by a doctor in New Orleans, Louisiana, and both would be necessary witnesses.
3. The master and most of the officers on the ship are Norwegian and they would be important witnesses.

As to the first of these reasons, I cannot see any greater cost or inconvenience being involved in bringing an expert in Bahamas law to Dublin rather than to Oslo. On the contrary, since it is almost certain that such an expert could be found in London, Dublin would clearly be more convenient.

As to the doctor from New Orleans, if he should be needed, Dublin would be slightly nearer than Oslo, though for the ship's doctor it would be further. However, the principal medical evidence will be as to the plaintiff's condition resulting from the accident and to deal with that all the defendants will have to do is to have the plaintiff examined in Dublin by an Irish doctor.

Some evidence obviously may be required from the master of the ship, and perhaps from one or more members of the crew, and as against the cost and inconvenience of bringing them here one has to set the cost and inconvenience of the plaintiff, his doctor (or doctors) and his engineer (who inspected the ship on 14 July 1992) having to go to Oslo, and the case having to be conducted in Norwegian.

Counsel for the defendants contended that Norway would be the more convenient forum but at the same time said that he had been instructed to inform the court that his clients would be agreeable to pay up to £2,000 towards the cost of bringing the plaintiff's doctor and engineer to Norway. It seems to me that in making this offer the defendants are necessarily recognising that the cost to the plaintiff of having to pursue his claim in Norway would be very considerably increased compared with what it would be if the case is heard in Ireland.

Taking into account all the matters relevant to the comparative cost and convenience of proceedings in Ireland and in Norway, I am satisfied that there are no grounds for refusing to permit service out of the jurisdiction on the defendants and accordingly I would dismiss this appeal.

Annex 4

McKenna v EH

The High Court

Transcript

18 July 2001

PANEL: Finnegan J

JUDGMENTS:
Finnegan J

By Order made on the 22 June, 2001, I gave liberty to the Plaintiff to issue an originating plenary summons against the Defendant and to serve notice of the same out of the jurisdiction on the Defendant he not being an Irish citizen. On the application I was satisfied that the action falls within the class of action set out in the Rules of the Superior Courts Order 11 Rule 1(g) which provides that service out of the jurisdiction may be allowed by the Court whenever:-

'Any injunction is sought as to anything to be done within the jurisdiction, or any nuisance within the jurisdiction is sought to be prevented or removed whether damages are or are not sought in respect thereof.'

The Defendant entered a qualified appearance for the purposes of challenging jurisdiction and issued a motion claiming several reliefs only one of which now concerns me, namely, an order to set aside my order of the 22nd June, 2001, on the grounds that the action

does not fall within the class set out in Order 11 Rule 1(g). It is common case that the action does not fall within any other class of action listed in Order 11 Rule 1.

The Plaintiff's claim against the Defendant is brought pursuant to the Proceeds of Crime Act, 1996. The plenary summons sets out in the schedule thereto assets in the jurisdiction consisting of sums standing to the credit of bank accounts and 2 policies of assurance. The endorsement of claim reads as follows:-

"The plaintiff's claim is for:-

1 An order pursuant to section 2 of the Proceeds of Crime Act 1996 prohibiting the Defendant/Respondent and any other person having notice of the order from disposing of or otherwise dealing with or diminishing the value of the properly described in the schedule hereto or such part thereof as may be specified by this honourable Court.

2 An order pursuant to section 3 of the Proceeds of Crime Act 1996 prohibiting the Defendant/Respondent and any other person having notice of the order from disposing of or otherwise dealing with or diminishing the value of the property described in the schedule hereto or such part thereof as may be specified by this honourable Court.

3 An order pursuant to section 7 of the Proceeds of Crime Act 1996 appointing a receiver to take possession of the property described in the schedule hereto or such part thereof as may be specified by this honourable Court, together with such directions pursuant to section 7 (1)(b) of that Act as this honourable Court

shall deem fit to give.

4 An order pursuant to section 9 of the Proceeds of Crime Act, 1996 directing the Defendant/Respondent to file an affidavit in the Central Office of the High Court specifying:-

(a) the property of which the Defendant/Respondent is in possession or control, and

(b) the income and sources of the income of the Defendant/Respondent during the past ten years or such period

as this honourable Court may specify,

5 An order pursuant to section 5 of the Proceeds of Crime Act 1996 directing that the whole or if appropriate a specified part of the said property be transferred subject to such terms and conditions as the Court may specify to the Minister for Finance or to such other person as the Court may determine.

6 Such further or other relief as to this honourable Court it may appear fit to grant.

7 An order providing that the cost of an incidental at these proceedings."

In dealing with Order 11 Rule 1(g) O'Floinn's Practice and Procedure in the Superior Courts sets out the law in the following terms:-

""any injunction". The injunction sought must be an injunction necessarily and properly sought in the originating summons as the primary relief and not secondary or ancillary to it: see Caudron .v. Air Zaire [1986] ILRM 10. See also Taher Meats Ltd .v. State Company for Foodstuff Trading and Rafidan Bank [1991] 1 IR 443. Furthermore, the criteria ordinarily applicable to the granting of an injunction (that is, balance of convenience, undertaking as to damages, etc) apply here: see, inter alia, Mitchelstown Co-operative .v. Nestle [1989] ILRM 582 and the observations at Order 50 Rule 6."

The White Book deals with the corresponding provision in England and Wales in the following terms:-

"Even though proceedings may technically fall within this sub rule, discretion to grant leave will not be exercised unless: (1) An injunction is a genuine part of the substantive relief sought and has not been claimed merely to bring the case within the Rule (Rosler .v. Hilbery [1925] 1 Ch 250 at 261 et seq., CA), and (2) There is a reasonable prospect of an injunction (itself a discretionary remedy) being granted (Watson .v. Daily Record [1907] 1 KB 853 CA)."

Order 11 Rule 1 of the present rules is for present purposes identical to Order 11 Rule 1 in the Rules of the Supreme Court (Ireland), 1905 and the Rules of the Superior Courts 1962: the present rules and the 1962 rules added some classes of action to those listed in the 1905 rules. In relation to the 1905 rules it was held in O'Connor .v. The Star Newspaper Company (Ltd) 30 LR IR 1 that Order 11 Rule 1 forms a complete and exhaustive specification of the circumstances under which and under which alone service out of the jurisdiction will be allowed. See also AG. v Drapers Co [1894] 1 IR 185. The granting of an order where those circumstances apply is discretionary.

In Re: Stubbs Russell v Le Bert [1896] 1 IR 334 the action concerned a trust all

the defendants being resident out of the jurisdiction. The trust comprised land within the jurisdiction and personal property outside. The issues in the action were exclusively concerned with an appointment of the personal property. The Lord Chief Justice gave liberty to serve out the jurisdiction and an application was brought before the Master of the Rolls to have that order set aside. In the course of his judgment the Master of the Rolls said:-

"It is desirable that the rules in reference to service out of the jurisdiction should be construed widely and so as to make them applicable to a case like

the present clearly within the spirit of the rules where there is a question of substance to be determined, which really ought to be, on analogy at least to the rest of the rules, submitted to the Irish Courts, and where no reason to the contrary founded on convenience has even been alleged."

The relief sought was refused.

There are a number of decisions of the Irish Courts on the provisions of Order 11 Rule 1(g) in the 1905 rules. In Joynt v M'Crum [1899] 1 IR 217 the plaintiff sought an injunction against the vendor of cycles within the jurisdiction and the manufacturer of those cycles in England alleging that they infringed his patent and also claimed damages. It was held that service out of the jurisdiction was properly allowed as the claim for an injunction could not be regarded as merely ancillary to that for damages.

There are a number of cases in which an order for service out of the jurisdiction was challenged on the basis that the injunction related to property out of the jurisdiction and could not be enforced (see In Re: Burlands Trademark Burland . v Broxburn Oil Company [1889] IR 542). In the present case the subject matter of the claim is property within the jurisdiction and any order which the Court may make can readily be enforced.

That the jurisdiction conferred by Order 11 Rule 1 of the 1905 rules is exhaustive was confirmed by the Supreme Court in Shipsey .v. British & South American Steam Navigation Company [1936] IR 65 and in relation to the 1962 rules by the Supreme Court in Caudron & Ors .v. Air Zaire & Ors [1985] IR 716. I see no reason why the current rules should be regarded differently.

Order 11 Rule 1(g) was considered in detail by the Supreme Court in Caudron v Air Zaire. The endorsement of claim to the plenary summons in that case sought damages

for breach of a contract which was made and breached outside the jurisdiction. An All ERoplane the property of the defendant was within the jurisdiction. In the endorsement of claim the plaintiffs also sought an injunction restraining the defendant from moving out of the jurisdiction or in any way dealing with the aeroplane so as to reduce its value below a stated sum. The defendant brought a motion seeking to have the order giving liberty to serve out of the jurisdiction set aside and failed on that motion before Barr J On appeal to the Supreme Court it was held:-

1 That to come within Order 11 Rule 1(g) the injunction sought in the action had to be part of the substantive relief to which the plaintiffs' cause of action entitled them and had to be properly and necessarily sought in the endorsement of claim contained in the originating summons.

2 That since the relief sought by the plaintiffs by way of injunction was an

interlocutory injunction pending the determination of the action and not part of the substantive relief sought at the final determination of the action the order granting liberty to the plaintiffs to issue and serve notice of the originating summons out of the jurisdiction should be set aside.

The only judgment delivered in the Supreme Court is that of Finlay CJ and at pages 719 et seq he said:-

"The defendant, on the other hand, contends, firstly, that in order for the Court to have jurisdiction to issue and serve notice of an originating summons out of the jurisdiction the injunction sought therein would have to be the substantive or part of the substantive relief claimed and not a relief of an interlocutory or ancillary nature and, secondly and in the alternative, that even if it was within the jurisdiction of the court to give liberty to issue and

serve out of the jurisdiction, in cases where someone sought an interlocutory or ancillary injunction that it could not do so in any case where there was added to that claim in the originating summons any other claim which was not of itself within one of the sub rules of Order 11 Rule 1 capable of being the subject matter of an order giving liberty to serve out of the jurisdiction."

The defendant was thus relying on two distinct arguments:-

1 That there was no jurisdiction to make an order under Order 11 Rule 1(g) where the relief sought was ancillary in nature and/or

2 that if there was such jurisdiction it could only be exercised where the substantive relief itself fell within one of the sub rules Order 11 Rule 1.

Finlay CJ went on to deal with this submission as follows:-

"Order 4 Rule 2 of the Superior Court Rules provides as follows:

"The endorsement of claim on a plenary summons shall be entitled on "General Indorsement of Claim" and there shall be an indorsement of the relief claimed and the grounds thereof expressed in general terms in such one of the forms in appendix B Part II as shall be applicable to the case, or if none be found applicable, then such other similarly concise form as the nature of the case may require."

"Consideration of the forms contained in appendix B Part II would indicate that whilst, of course, under the terms of the rule they are not exclusive, they universally bear a single characteristic which in my view is that they are the

ultimate relief being sought by the plaintiff in the action commenced by his originating summons. There are, of course, many forms of relief which may be sought and obtained from the court between the issue and service of the originating summons and the final determination of the claim endorsed on it. Such can be an order for discovery of documents, an order for the delivery and answering of interrogatories, and orders by way of injunction the overall intention of which on an interlocutory basis is to maintain the status quo so as to permit the just realisation of the plaintiff's claim in the event of his being successful. Such relief can and, in my view, should be obtained either on an interim basis ex parte or on an interlocutory basis by notice of motion served after the issue of the originating summons or in the matter of an intended action. They are not, however, the relief being sought in the action and are not, in my view on the true interpretation of the Rules, matters which should be claimed by way of

endorsement on the summons itself.

When in Order 11 Rule 1(g) the phrase "any injunction is sought" is used it must, in my view, be interpreted in the light of the provisions of Order 11 Rule 1 itself which provide for service out of the jurisdiction of an originating summons or a notice of an originating summons. The injunction sought, referred to in sub rule (g) must therefore on the interpretation of the Order and Rule, freed from any authority be an injunction necessarily and properly sought in the originating summons which is the document with the issue and service of which outside the jurisdiction the entire order is concerned. It cannot, in my opinion, be an injunction which is properly sought not as part of the indorsement of claim on the summons but rather by means of a motion ex

parte or on notice. The real relief sought by the plaintiffs in this action by way of injunction is, as I have already indicated, a temporary injunction pending the determination of the action only. The distinction between that type of relief by way of an injunction which I would describe as ancillary or interlocutory and an injunction of a permanent nature to be obtained at the final determination of the action is indicated by the fact that the plaintiffs, in order to gain the relief which they sought by way of injunction from the High Court, were obliged to seek and obtain from Mr Justice Costello in his order dated the 12th March 1985, not only liberty to issue and serve notice of their summons out of the jurisdiction upon the defendant but also specifically an order purporting to grant them liberty to serve a notice of motion for the relief by way of injunction out of the jurisdiction.

Counsel have been unable to refer this Court and I have been unable to find any decision of an Irish court dealing with the true construction of Order 11 Rule 1(g)."

The learned Chief Justice went on to rely upon the decision of the House of Lords in Siskina (Cargo Owners) v Distos Companior Naviera S.A. [1979] AC 210.

At this point it is important to remember the nature of the rules of procedure in these Courts. Insofar as the United Kingdom is concerned Halsbury's Laws of England Volume 37 paragraphs 1-16 are informative. There the distinction is drawn between substantive law and procedural law. Substantive law creates rights and obligations and determines the ends of justice embodied in the law, whereas procedural law is an adjunct or an accessory to substantive law. It is by procedure that the law is put into motion, and it is

procedural law which puts life into the substantive law, gives it its remedy and effectiveness and brings it into being. In Halsbury the sources of procedural laws are identified as statute law, rules of court, judicial precedent, practice directions, prescribed and practice forms, the inherent jurisdiction of the court, the practice of the court and books on practice and procedure. In this jurisdiction regard must also be had to the Constitution and the relative positions of the Legislature and the Courts under the provisions thereof.

In the State (Brown) .v. Feran [1967] IR 147 as to the conferring of jurisdiction by statute on the Courts Walsh J said:-

"So far as the Supreme Court and the High Court are concerned the provisions of Article 36 (of the Constitution), while not permitting any restriction of the jurisdiction of those courts not already permitted in the foregoing Articles, may add jurisdictions to those jurisdictions already derived from the Constitution. Examples of such statutorily conferred jurisdictions would be an appellate jurisdiction in the High Court and a consultative jurisdiction in the High Court."

Having regard to the foregoing I propose to have regard to the following propositions which appear to me to represent the law:

1 Under the Rules of the Superior Courts the categories of actions listed in Order 11 Rule 1 are exhaustive.

2 In construing the Rules of the Superior Court Order 11 Rule I the sub clauses thereof should be construed widely.

3 If a statute confers jurisdiction upon the Courts it is the duty of the Courts to give effect to the intention of the Oireachtas and any conflict between the provisions of a statute and the rules of procedural law including the Rules of the Superior Courts must be resolved in favour of the former.

The Proceeds of Crime Act 1996 has the objective set out in the judgment of Moriarty J in Gilligan .v. CAB [1998] 3 IR 175 (at page 178):-

"It seems to me that I am clearly entitled to take notice of the international phenomenon, being far from peculiar to Ireland, that significant numbers of persons who engage as principals in lucrative professional crime, particularly that referable to the illicit supply of controlled drugs, are alert and effectively able to insulate themselves against the risk of successful criminal prosecution through deployment of intermediaries, and that the Act of 1996 is designed to enable the lower probative requirements of civil law to be utilised in appropriate cases, not to achieve penal sanctions, but to effectively deprive such persons of such illicit financial fruits of their labours as can be shown to be proceeds of crime."

Again, the long title to the Act clearly sets out the legislative intention:-

"An Act to enable the High Court as respects proceeds of crime to make orders for the preservation and where appropriate, the disposal of the property concerned and to provide for related matters."

The Act sets out a discrete scheme to achieve the legislative intention of firstly preserving and secondly where appropriate disposing of the proceeds of crime. I attach

particular significance to the inclusion in the long title of the reference to orders for the preservation of the proceeds of crime. Section 2 of the Act provides for the granting of what are described as interim injunctions and section 3 for interlocutory injunctions and these sections give effect to the legislative intention to preserve the proceeds of crime. In argument before me it was submitted on behalf of the Defendant that injunction in Order 11 Rule 1(g) should be given a narrow meaning - those orders which would be granted by the courts of equity directing a person to do or to refrain from doing an act. This clearly cannot be right as the 1905 rules were expressly introduced pursuant to the Judicature (Ireland) Act 1877, the Supreme Court of Judicature (Ireland) Act 1897 and the No 2 Act of the same title and year and must at the very least extend to common law injunctions under the Common Law (Amendment) Act Ireland 1856 s.8 1 and which injunctions were then generally described as statutory injunctions: (see Wylie Judicature Acts at page 73 et seq).

In these circumstances I am satisfied that for the purposes of Order 11 Rule 1(g) which appears in identical terms in the rules of 1905, 1962 and the present rules injunction encompasses statutory injunctions whatever may be the statute in which they have their origin. Even if that were not the case it is the function of

procedural law to give effect to the intent of the Oireachtas. Further the Courts must construe the rules widely. If it is the intention of the Oireachtas, and I am satisfied that it is, that persons resident outside the jurisdiction with assets inside the jurisdiction which represent the proceeds of crime should be subject to the procedures of the Act then I am satisfied that it is the duty of the Court to give effect to that intention and if necessary have resort to the inherent jurisdiction of the Court pending the introduction of appropriate rules of procedure to give effect to the intention.

This being the case it is not necessary for me to determine whether the injunctive reliefs provided for in the Proceeds of Crime Act 1996 sections 2 and 3 are in the nature of ancillary relief similar to the Mareva injunction sought in Caudron . v Air Zaire or

substantive reliefs such as the injunctive relief sought in Joynt . v M'Crum. There are now a very wide range of statutory injunctions granted as a matter of regularity by the Courts: see discussion in Equity Doctrines and Remedies, Meagher, Gummow and Lehane at paragraph 2.133. For present purposes it is sufficient if I adapt to the circumstances of the present case the test for the grant of an injunction in aid of a statute posed by Ungoed-Thomas J in Duchess of Argyle .v. Duke of Argyle [1967] Ch 302 - does the statute manifest an intention to confer a civil right on the plaintiff: if so the possibility of an injunction arises. Again, in King .v. Goussetis [1986] 5 NSWL. 89 it was held that the appropriate test for determining whether or not an injunction should be granted is to have regard to the nature, scope and terms of the statute - it is a question of statutory interpretation whether an injunction should be granted or not.

The statute in issue here creates a statutory right to an injunction to preserve the assets said to be the proceeds of crime. It was not necessary that the statute should do so as in the ordinary course the Court would have jurisdiction to grant interim and interlocutory injunctions in aid of the statutory right created by the Act in s.4, the right to have a disposal order made. The statute does not regard the orders pursuant to sections 2 and 3 as identical in nature to an ordinary interim or interlocutory injunction in so expressly providing for them and in providing for the evidence which must be adduced in order to obtain the same and in removing them from the ordinary regime laid down in Campus Oil. Again, the statute in s.5 provides for orders ancillary to an interim or interlocutory order under the Act and this suggests to me that these orders are not to be regarded as identical to interim or interlocutory orders made under the ordinary jurisdiction of the Court. Equally however it must be said that the orders are not identical to what would ordinarily be regarded as the substantive relief sought such as a permanent injunction or an award of damages or in the present case a disposal order under s.4 should an application for the same be made. That statutory interim and interlocutory injunction is a creature sui generis. Whilst I accept that it

is not necessary or appropriate (as Finlay CJ remarked) that where an interim or interlocutory injunction is sought ancillary to substantive relief that the same should be claimed in the indorsement of claim to the plenary summons it is in my opinion appropriate to claim the statutory interim or interlocutory injunction under the Proceeds of Crime Act in the indorsement of claim and to do so by reference to the statutory origin of the jurisdiction to grant the same. Applications for interim and interlocutory injunctions pursuant to the Proceeds of Crime Act 1996 sections 2 and 3 thereof while not part of the substantive relief are sought pursuant to a specific statutory entitlement and I am satisfied differ in substance from interim and interlocutory relief as normally understood albeit that they are not the ultimate substantive relief sought in the action. To hold otherwise would

be to fail to give effect to the clear intention of the Oireachtas. As to my discretion to make the order under Order 11 Rule 1 it is clear that any order which the Court may make in this matter will be enforceable as the assets listed in the schedule to the plenary summons are within this jurisdiction. Further, the Act extends to the proceeds of crime where the crime was committed abroad: DPP & Ors .v. Hollmann & Ors O'Higgins J (unreported 29th July, 1999).

In summary I am satisfied that an interim injunction under s.2 and an interlocutory injunction under s.3 of the Proceeds of Crime Act, 1996 do not have the characteristics of mere ancillary relief in the sense of the relief sought in Caudron . v Air Zaire but rather are sui generis having been created expressly by statute. Statutory injunctions come within the ambit of Order 11 Rule 1(g). Having regard to the clear intention of the Oireachtas in creating these statutory injunctions namely to preserve assets in respect of which an order pursuant to s.4 of the Act may be sought it is the duty of the Court to give effect to that intention. Orders under the Proceeds of Crime Act s.2 and s.3 having regard to the true construction of the Act do not amount to mere interim or interlocutory relief and so

are not affected by the judgment of the Supreme Court in Caudron & Ors v Air Zaire. If I am wrong in this then there is a conflict between the Rules of Court and the Proceeds of Crime Act 1996 on its true construction which confers upon the Court that jurisdiction necessary to give effect to the Act or in the alternative the Court under its inherent jurisdiction may make such an order for the purpose of giving such effect.

Accordingly I refuse to set aside my order giving liberty to the Plaintiff to serve notice of the plenary summons herein out of the jurisdiction.

DISPOSITION:
Application refused

Annex 5

Schmidt v The Home Secretary of the Government of the United Kingdom

Supreme Court

1997 2 IR

24 April 1997

HEADNOTE:
Practice and procedure - Service out of the jurisdiction - Order setting aside service of notice of proceedings out of the jurisdiction - Plea of sovereign immunity - Whether plea available where foreign police powers exercised to create a deception - United Kingdom Police Act, 1964 (c. 48), s. 19, sub-s. 1 - Rules of the Superior Courts, 1986 (SI No 15), O. 11, R 1 (f), O. 11A, O. 12, r. 26.

Extradition - Arrest - Whether deliberate deception by police for purpose of effecting extradition arrest in excess of police powers - United Kingdom Police Act, 1964, s. 19, sub-s. 1.

Police - Powers - Arrest - Deliberate deception of suspect for purpose of effecting extradition arrest - Whether abuse of police powers illegal where proper police purpose being pursued - United Kingdom Police Act, 1964, s. 19, sub-s. 1.

The plaintiff appealed an order of the High Court (Geoghegan J) setting aside an earlier order of the High Court (Carney J) granting leave to him to serve notice of a plenary summons on the second and third defendants in the United Kingdom. The latter order was granted pursuant to O. 11, r. 1 (f) of the Rules of the Superior Courts, 1986. The plaintiff claimed damages for alleged civil, constitutional and European law irregularities by the defendants. The order had been set aside on the ground, inter alia, that the defendants were entitled to sovereign immunity from suit in the Irish jurisdiction.

The plaintiff was a German national living in Ireland since 1989. On the 19th November, 1992, he was tricked by the defendants into travelling to the United Kingdom. He was arrested pursuant to warrant and extradited to Germany where he was convicted and sentenced for drug trafficking offices committed between 1987 and 1991. Habeas corpus proceedings taken in the United Kingdom failed to invalidate his arrest by the defendants. The plaintiff instituted the present proceedings upon his eventual return to Ireland.

The defendants claimed sovereign immunity from suit on the basis that they had acted on behalf of their sovereign State. It was argued that the third defendant, being a constable, had acted within his powers under the United Kingdom Police Act, 1964, and that the second defendant, a Commissioner appointed by the Crown, had statutory responsibility for constables acting under his supervision (of which the third defendant was one). The plaintiff contended that the third defendant was engaged on a frolic of his own and could not raise the plea of statutory immunity. It was also suggested that s. 19, sub-s. 1 of the United Kingdom Police Act, 1964, precluded the third defendant from making communications outside of England and Wales such as had made to lure the plaintiff to the United Kingdom.

Held by the Supreme Court (Hamilton CJ, Lynch, O'Flaherty, Barrington and Keane JJ.) in dismissing the appeal, 1, that the third defendant was not engaged on a frolic of his own as he was doing that which he was employed to do, namely

exercising the duties and functions of an extradition officer, albeit in a very wrong way.

2. That the third defendant was not precluded from making communications outside of England and Wales in the purported exercise of his powers by reason of s. 19, sub-s. 1 of the United Kingdom Police Act, 1964; that provision was of an enabling nature rather of a restrictive one and further, if read literally, would give rise to an absurdity.

CASES-REF-TO:

Cases mentioned in this report:-

I Congresso del Partido [1983] 1 AC 244; [1981] 3 DPP 328; [1981] 2 All ER 1064; [1981] Lloyds Rep 87.

Government of Canada v The Employment Appeal Tribunal [1992] 2 IR 484; [1992] ILRM 325.

McElhinney v Williams [1994] 2 ILRM 115.

R v Commissioner of Police of Metropolis ex Parte Blackburn [1968] 2 Q.B. 118; [1968] 2 DPP 893; [1968] 1 All ER 763.

Saorstat and Continental Steamship Co Ltd. v De las Morenas [1945] IR 291; 79 ILT.R. 139.

COUNSEL:
Michael Forde SC (with him Peter Finlay) for the plaintiff.

Peter Charleton SC (with him Jacqueline O'Brien) for the second and third defendants.

Cur. adv. vult.

PANEL: Hamilton CJ, Lynch, O'Flaherty, Barrington and Keane JJ

JUDGMENTS:
Hamilton CJ

I agree with the judgment of Lynch J

O'Flaherty J

I also agree.

Barrington J

I agree with the judgment of Lynch J

Keane J

I agree.

Lynch J

This is an appeal brought by the plaintiff Norbert Schmidt against an order of the High Court (Geoghegan J) made on the 22nd November, 1994, setting aside an earlier order of the High Court (Carney J) made on an ex parte application on behalf of the plaintiff on the 28th May, 1993, giving liberty to the plaintiff pursuant to O. 11, r. 1 (f) of the Rules of the Superior Courts, 1986, to serve notice of the plenary summons herein together with a copy of the said order on the second defendant (the Commissioner of the Metropolitan Police) and on the third defendant (David Jones) at their respective addresses or elsewhere in England.

The order of the 22nd November, 1994, was made pursuant to a notice of motion which sought inter alia:-

"(a) An order pursuant to O. 12, r. 26 of the Rules of the Superior Courts setting aside the service of the plenary summons upon the second and third defendants and discharging the order made by this Honourable Court on the 28th May, 1993."

The judgment of Geoghegan J was a reserved judgment given on the 22nd November, 1994, and the findings on foot of which the order of that date was made were:-

(1) that the second and third defendants were entitled to sovereign immunity from suit in this jurisdiction and

(2) that the plaintiff's claim fell within O. 11A of the Rules of the Superior Courts, 1986, (relating to claims within the Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act, 1988, (and the Convention therein incorporated) and thus O. 11 did not apply.

On the 19th January, 1994, the first defendant (the Home Secretary of the Government of the United Kingdom) succeeded in a similar application heard by Murphy J in having the order of the 28th May, 1993, set aside and these proceedings as against him struck out on the grounds of sovereign immunity.

The general indorsement of claim on the plenary summons issued on the 21st May, 1993, reads as follows:-

"The plaintiffs claim is for damages for:-

(1) Trespass to the person.

(2) False imprisonment and deceit.

(3) Breaches of the plaintiffs constitutional rights pursuant to Article 40, s. 3, sub-s. 1, Article 40, s. 3, sub-s. 2 and Article 40, s. 4, sub-s. 1 of the Constitution.

(4) Conspiracy to deprive the plaintiff of his rights of establishment and free movement pursuant to Articles 48, 52, 53 and 54 of the Treaty of Rome and the directives, regulations and decisions made thereto.

(5) Conspiracy to deprive the plaintiff of his rights of establishment within the State pursuant to the Convention on Human Rights or rights analogous or derivative thereto as set out in the Treaty of Rome.

(6) Conspiracy to deprive the plaintiff of his rights of access to this Honourable Court pursuant to the European Convention on Extradition, the Extradition Act, 1965 and SI No 9 of 1989.

(7) Misfeasance of public office of the defendants and each of them, their servants or agents.

And the plaintiff claims costs."

The facts as appearing from the statement of claim and affidavits filed on behalf of the plaintiff and the second and third defendants are as follows.

The plaintiff is a German national born on the 2nd September, 1963. He came to live in Ireland in November, 1989, and sometime thereafter he took up residence in County Waterford where he set up a business selling kites and model All ERoplanes. In August, 1991, the plaintiff was arrested in Dublin by the Dublin Drug Squad of the Garda Siochana for possession of controlled drugs. He pleaded guilty to that offence and was sentenced to a relatively short term of imprisonment from which he was released in or about October, 1991. The plaintiff did not come to the notice of the Garda Siochana again in relation to offences in this State. It is however, suggested by the third defendant but denied by the plaintiff that in 1992, an application was made by the German authorities to the Irish authorities for his extradition to Germany: that the documentation in relation to that application was deemed by the Irish authorities not to be in order and that thereafter the German authorities did not pursue the application for extradition from Ireland any further if they made such an application at all to the Irish authorities which as I say was denied by the plaintiff.

The third defendant David Jones was at all material times a member of the Extradition Passport and Illegal Immigration Squad of the International and Organised Crime Branch of the Metropolitan Police in England. In the month of August, 1991, an international arrest warrant was issued by the Mannheim local court in Germany for the arrest of the plaintiff in respect of alleged offences of unlawful importation and supply of controlled drugs from the Netherlands into Germany. In December, 1991, Interpol in Weisbaden, Germany, requested the assistance of the United Kingdom Extradition Squad to effect the arrest and extradition to Germany of the plaintiff arising out of the said international arrest warrant.

The third defendant learned that the plaintiff was resident in County Waterford and was accustomed to travel to the United Kingdom quite frequently. He also believed from information which he had received in his professional capacity that the plaintiff used false documentation showing different identities on his visits to the United Kingdom and that it would therefore be difficult if not impossible to be aware in advance of the plaintiff's arrival so as to effect an arrest of him in the ordinary way.

With the authority of his superior officer, the third defendant devised a ruse to entice the plaintiff to come to discuss certain matters with him in the United Kingdom. The third defendant through inquiries in the Bristol area following a kite festival there succeeded in getting in contact with the plaintiff in Waterford and with his solicitor in Dublin. He told the plaintiff and his solicitor that he was investigating frauds with cheques and cheque cards in the name of an N. Schmidt and he wished to interview the plaintiff in order to ascertain whether he was involved and if not to eliminate him from his enquiries. There was no truth whatsoever in these statements. That being so the plaintiff knew that he was not involved in any such fraud and would therefore be able to have himself eliminated

from the third defendant's inquiries. Nevertheless, he inquired as to what would happen if he refused to travel to the United Kingdom and he was told that in such an event it would be normal practice to circulate details regarding the plaintiff on the police national computer as being suspected of an offence and that the plaintiff would be arrested when he first came to the notice of the authorities in the United Kingdom.

It was important for the plaintiff that he should be able to travel freely between Ireland and the United Kingdom. That being so he agreed to travel to London and accompanied by his solicitor to meet the third defendant there on the 17th November, 1992. On that morning the third defendant obtained from Bow Street Metropolitan Magistrates Court a provisional arrest warrant under the United Kingdom Extradition Act, 1989, with a view to the plaintiff's extradition from England to Germany.

It is not necessary to go into the details given in the affidavits as to the comings and goings of the plaintiff, his solicitor and the third defendant in London before they all actually met together. It suffices to say that the deception as to investigating a cheque fraud continued and they did meet on that afternoon of the 17th November, 1992. They then went to Charing Cross Police Station where the third defendant arrested the plaintiff on foot of the warrant which he had obtained that morning from Bow Street Metropolitan Magistrates Court.

The plaintiff thereafter brought habeas corpus proceedings in the High Court of Justice in England which failed and was refused by a divisional court on the 26th November, 1993. The plaintiff got leave to appeal to the House of Lords and on the 30th June, 1994, the House of Lords upheld the decision of the High Court refusing habeas corpus. The plaintiff was thereafter extradited to Germany on the 17th August, 1994, and he was convicted by the Mannheim Landgericht Court of various offences of drug trafficking between January, 1987, and December, 1991, and he was sentenced to five years and nine months imprisonment against which was taken into account the time spent by him in prison in the United Kingdom. The plaintiff was released from prison on the 23rd October, 1995, but remains on probation until his full release date which is in or about October, 1997.

Counsel for the plaintiff submitted on the second and third defendant's claim to sovereign immunity as follows:-

(1) Extradition arrangements were and are in existence between Ireland and Germany. It was no part of the third defendant's functions or duties to subvert those extradition arrangements and instead to procure the presence of the plaintiff in the United Kingdom by trickery and fraud with a view to his extradition from there to Germany.

(2) The sole purpose of the third defendant's deceitful ruse which involved persistent and deliberate lies was to get the plaintiff from Ireland to Germany. This was no part of his functions or duties and therefore cannot be regarded as a performance of any such functions or duties.

(3) The third defendant himself says that he acted on his own initiative and that neither Dublin nor Germany were involved or even knew what he was doing.

(4) Section 19 of the English Police Act, 1964, limits the third defendant's authority to England and Wales and it was no part of his functions or duties to be telephoning to Ireland to the plaintiff and his solicitor in order to deceive them into coming to England.

In the foregoing circumstances the third defendant cannot be regarded as exercising sovereign authority so as to attract sovereign immunity.

Counsel for the respondents, the second and third defendants, submitted in reply:-

(1) The plaintiff's submissions invent a new test for sovereign immunity namely proof that the sovereign authority directly authorised the actions complained of and that is not the true test.

(2) The true test is whether the actions were done on behalf of a sovereign State.

(3) A constable in England acts on his own authority. In this case the third defendant acted on his own authority but with the direct approval of his immediate superior officer, in purported and actual execution of the functions and duties of his office as a member of the Extradition Passport and Illegal Immigration Squad of the International and Organised Crime Branch of the Metropolitan Police in England.

(4) When the plea of sovereign immunity is raised, it is not because everything was done perfectly: the plea would be unnecessary and superfluous in such circumstances. It is because something bad or wrongful was done which ought not to have been done that the plea of sovereign immunity arises and reliance on it implies in itself some wrongful conduct.

(5) In this case the third defendant's conduct has been ratified by the United Kingdom authorities in successfully defending the plaintiff's habeas corpus and judicial review proceedings in the English High Court of Justice and the House of Lords.

(6) The fact that the plaintiff has sued for misfeasance of public office recognises that the actions complained of were done by the third defendant as part of the third defendant's functions and duties as a constable in the said squad and therefore even though the actions may have been wrongful they attract sovereign immunity.

Counsel for the plaintiff and the second and third defendants referred inter alia to the following cases: Government of Canada v The Employment Appeal Tribunal [1992] 2 IR 484; McElhinney v Williams [1994] 2 ILRM 115; Saorstat and Continental Steamship Company Ltd. v De las Morenas [1945] IR 291; I. Congresso del Partido [1983] 1 AC 244 and R v Commissioner of Police of The Metropolis ex parte Blackburn [1968] 2 Q.B. 118.

Conclusions

The law has been extensively reviewed and declared in the recent Irish cases to which I have just referred. It is not therefore necessary for me to repeat the various dicta in those cases.

It is clear that the actions of the third defendant in this case were not commercial or civil activities. They related to his position as a constable at the relevant time assigned to the Extradition Passport and Illegal Immigration Squad of the International and Organised Crime Branch of the Metropolitan Police in England. The unchallenged evidence of Christopher Selwyn Porteus in his affidavit sworn on the 19th January, 1994, fully supports the findings of the learned trial judge as follows:-

"An affidavit has been sworn in this matter by Christopher Selwyn Porteus, the English solicitor to the Commissioner of Police of the Metropolis, New Scotland Yard, London, in which he explains that the Commissioner is appointed and paid by the Crown and is appointed by the British Queen personally on the advice of her Home Secretary under certain English statutory provisions. The deponent goes on to explain that the Commissioner is not attested as constable and is not a member of the Metropolitan Police Force. Apparently he was originally a justice of the peace but the only power he still retains as a justice of the peace since 1973 is to swear in constables. Police officers who are subject to the authority of the Commissioner are not employed by him. They hold office in their own right and are attested on appointment by making a declaration before the Commissioner or an Assistant Commissioner of Police of the Metropolis. Under an Act of 1964, a member of the police force has all the powers and privileges of a constable through England and Wales. It is then stated in para. 6 of the affidavit that the Commissioner is liable for torts committed by his constable only by virtue of a special statutory provision and not by reason of any relationship of master and servant. Mr Porteus explains that police officers in investigating allegations of criminal conduct act in their own right subject to the supervision of their senior officers and that a police officer of whatever rank, and carrying out his duties as a constable acts as an officer of the crown and a public servant."

The misconduct of the third defendant in this case in resorting to deception and lies to induce the plaintiff to travel from Ireland to the United Kingdom is analogous to the case of a member of the Garda Siochana using manifestly excessive force in effecting an arrest. The garda is not employed by the State to use excessive force, but he is employed to arrest persons suspected of criminal conduct. The fact that he uses manifestly excessive force does not relieve the State of liability for his misconduct because he was doing that which he was employed to do namely effecting the arrest of persons reasonably suspected of criminal conduct although doing it in a very wrong way.

So also with the third defendant. In acting as he did in contacting the plaintiff and his solicitor by telephone to Ireland he was not engaged on a frolic of his own. He was purporting and intending to perform and in fact was performing the duties and functions of his office as a member of the said extradition squad. If he had behaved in a perfectly proper way there could be no question of proceedings being taken against him and therefore no question of having to rely on sovereign immunity. It is because he behaved in an improper way that proceedings have been brought against him and sovereign immunity is therefore relied upon by him and the second defendant.

As I have referred to above counsel for the plaintiff referred to s. 19, sub-s. 1 of the United Kingdom Police Act, 1964, which provides:-

"A member of a police force shall have all the powers and privileges of a constable throughout England and Wales."

This section is referred to in para. 6 of the affidavit of Christopher Selwyn Porteus but its meaning and effect in this jurisdiction are matters of fact to be proved by appropriate evidence and Mr Porteus does not deal with its meaning and effect beyond saying that a member of a police force has all the powers and privileges of a constable throughout England and Wales. Counsel for the plaintiff relied on this section as though it was creating restrictions on members of police forces in order to ground the submission that the third defendant had no authority to communicate as he did with the plaintiff in this jurisdiction because the deceptive communications were received outside England and Wales and therefore the third defendant could not be regarded as exercising powers of his office as a constable

so as to invoke sovereign immunity.

No evidence was before the court to establish that as the meaning and effect of the section. In any event the section is not a restrictive or restricting section: on the contrary it is an enabling and extending section authorising members of one police force to exercise their powers as constables any where in England and Wales notwithstanding that there are a number of police forces in England and Wales each having its own specific area and in by-gone days each force was restricted to its own area. Secondly, if it was outside Mr Jones' powers as a constable to communicate with the plaintiff in the deceptive way which he did because his communication was received in this jurisdiction outside England and Wales then the same would apply to any communication by a constable which is received outside England and Wales. Thus, communications between United Kingdom Police and the Garda Siochana on matters relating to international crime would cease to be communications in the exercise of their powers and functions as constables by the United Kingdom Police because their communications would be received by the gardai in this jurisdiction outside England and Wales. Merely, to state this proposition demonstrates that the plaintiff's submissions and reliance on s. 19, sub-s. 1 of the United Kingdom Police Act, 1964, as outlined above are untenable.

I have no doubt therefore that the learned trial judge was correct in his decision that the second and third defendants were entitled to rely on sovereign immunity and for that reason to have the service of the plenary summons set aside so far as they are concerned.

The foregoing is sufficient to dispose of this appeal and it is therefore unnecessary to express any views on the question as to whether or not liberty can be given to serve out of the jurisdiction pursuant to O. 11, r. 1 of the Rules of the Superior Courts, 1986, in a case where such service might in any event be effected pursuant to O. 11A of those Rules. In those circumstances that question should be left for decision in a case where it is determinative.

In the result I would dismiss this appeal.

DISPOSITION:
Appeal allowed

Annex 6

Short v Ireland, AG, British Nuclear Fuels and Others

The Supreme Court

No 174/95, (Transcript)

HEARING-DATES: 24 October 1996

24 October 1996

PANEL: Hamilton CJ, O'Flaherty, Blayney, Denham, Barrington JJ

JUDGMENTS:
BARRINGTON J: On the 22 March, 1994, Mr Justice Carney made an order in this case giving leave to serve notice of the Plenary Summons herein on the third named defendants, British Nuclear Fuels plc, out of the jurisdiction at the registered office of the said defendant at Risley, Warrington, Cheshire, England. British Nuclear Fuels entered a qualified appearance to the said Summons for the purpose only of contesting the validity of the order which had been made giving leave to serve out of the jurisdiction and also the validity of the service of the proceedings.

By his Order dated the 30 day of March, 1995, Mr Justice O'Hanlon refused to set aside the order of Mr Justice Carney dated the 22 day of March, 1994 but set aside the service of the Plenary Summons on British Nuclear Fuels plc, directed that the said Plenary Summons be renewed for a further period of six months from the date of his Order and ordered that Notice of the said Summons together with a copy of the Order of the 22 March 1994 be served on the said British Nuclear Fuels plc.

The Plaintiffs and the said British Nuclear Fuels plc appealed and cross-appealed against the said Order of Justice O'Hanlon. Insofar as the grounds of their appeal and cross-appeal were based on alleged non-compliance with the Rules of the Superior Courts these grounds of appeal and cross-appeal were abandoned at the hearing before this Court. The only matter to be decided by this Court therefore is whether Mr Justice O'Hanlon was right in refusing to discharge the said Order of Mr Justice Carney dated the 22 March 1994.

THE PLAINTIFFS' CLAIM

The Plaintiffs' all live in the County of Louth and all claim to be citizens of Ireland and of the European Union. They bring this case on their own behalf and on behalf of their families and the "unborn"within the meaning of the Irish Constitution.

The third named defendant, and the applicant in the Motion, is British Nuclear Fuels plc which is a limited company, registered in England, the shares of which are held by or on behalf of the United Kingdom through its Secretaries of State. British Nuclear Fuels plc was established to fulfil the purposes of the United Kingdom's Atomic Energy Act 1971 and, inter alia, to facilitate the commercial development of nuclear fuel. Its' place of business is at Selafield in Cumbria, where it is holder of a site licence under the United Kingdom Nuclear Installations Act, 1965. It presently carries on business involving nuclear reactors including the reprocessing of spent nuclear fuels at the said site.

In the late 1960s' British Nuclear Fuels decided to establish at the said site a

thermal oxide reprocessing plant (hereinafter called Thorp) designed to reprocess spent Oxide fuel from nuclear reactors from Great Britain and from overseas.

British Nuclear Fuels applied for, and after a public enquiry, obtained, in May 1978, outline planning permission for the said project. Full planning permission followed in 1983. Construction work began and the building of Thorp was completed in February 1992.

The Plaintiffs' all reside on the East coast of Ireland opposite Selafield and claim to be adversely affected by British Nuclear Fuels operations. The Plaintiffs' claim moreover that British Nuclear Fuels, before carrying out the said Thorp project, should have carried out an environmental impact assessment as required by Council directive 85/337 EEC but failed to do so. They claim moreover that British Nuclear Fuels is in breach of its' obligations under EC Council Directive 80/836 (the Euratom directive) as amended by 84/467 and failed to provide adequate or satisfactory information to the public, including the Plaintiffs, establishing that the gains to be derived from the operation of Thorp exceeded the risks and disadvantages which accompanied such operation.

The Plaintiffs' claim that the gaseous and liquid discharges from the British Nuclear Fuels' site at Selafield have already caused considerable personal health and environmental damage and economic loss in the general area where the Plaintiffs live. They claim that increased radioactive contamination arising from the Thorp project will eventually result in the death of an estimated 2,000 people arising out of the first ten years of the operation of Thorp. They claim that the Plaintiffs and other Irish people are and will be included among the people who will die or are at risk of dying as a result of the Thorp operation.

The Plaintiffs claim that the operation of the Thorp project involves a significant risk of serious accidents which could involve incalculable harm to civilians and property. They say that the commissioning and operation of the Thorp project constitutes in itself a source of mental distress and psychiatric injury to the Plaintiffs and to their families especially having regard to the absence of the environmental assessment required by Directive 85/337 and/or the justification required by Directive 80/836 and having regard to the conduct of British Nuclear Fuels in relation to the Selafield site.

As a result the Plaintiffs and their families allege that they will be caused to suffer and to continue to suffer mental distress, psychiatric injury, damage and/or increased risk of damage to their personal health, interference with their enjoyment of the natural environment and economic loss and they allege that in due course the unborn will suffer in the same way.

The Plaintiffs' claim against British Nuclear Fuels:-

(i) Declarations that the Nuclear Fuel reprocessing activities which the said Defendant is beginning to carry out at its' site at Selafield, Cumbria, namely the Thorp project, are being or are about to be conducted in contravention of:-

(a) Council directive 85/337 of the 27 June 1985 by reason of the non-existence of an environmental impact assessment as to their effects as required by the said directive.

(b) Council directive 80/836 Euratom, as amended, by reason of the lack of justification within the meaning of the said directive prior to the purported authorisations of liquid air or other discharges from the said Thorp installation and project.

(c) The precautionary principle and/or the principle that preventative action should be taken, contrary to Article 13R of the Treaty of European Union.

(d) Customary International Law.

II. Such further or other declarations as to this Court sees fit.

III Injunctions restraining the said Defendant from:-

(a) Carrying on its' reprocessing activities until the said directives have been fully complied with.

(b) Discharging radioactive substances from the said Thorp Installation and Project into/or over the Irish Sea.

(c) Contaminating with radioactive substances the sea, seabed, seashore and the areas and the jurisdiction of the state contiguous to the seashore and adjacent to the residences and lands of the Plaintiffs.

(d) Breaking the precautionary principle and the principle that preventative action should be taken contrary to Article 13R of the Treaty of European Union.

(e) Breaching generally accepted principles of international customary law.

(f) Such other injunctions as to the Court may see fit.

IV. Damages and/or compensation and/or restitution to include exemplary and/or aggravated damages for:-

(a) Assault.

(b) Nuisance to the Plaintiffs' property and to the Plaintiffs.

(c) Trespass to the Plaintiffs' property and to the Plaintiffs.

(d) Negligence.

(e) Wrongful infliction of mental distress on the Plaintiffs'.

(f) Wrongful invasion of/or interference with the Plaintiffs' natural environment.

(g) Breach of the precautionary principle and/or the principle that preventative action should be taken as regards the environment rather than action contaminating same contrary to

Article 13R of the Treaty of European Union.

(h) Exposing the Plaintiffs' to unnecessary and/or unreasonable risks.

(i) Breach of established principles of customary international law.

(j) Breach and/or invasion of the Plaintiffs' rights under the Constitution of Ireland.

(k) Breach and/or invasion of the Plaintiffs' rights under the Treaty of European Union.

EXPERT OPINION

The Plaintiffs' application for service out of the jurisdiction was supported by Affidavits from two experts. The first was Mr John Henry Large, Chartered Engineer, who described the processes involved in the Thorp project in considerable detail and gave it as his professional opinion that the operation was likely to cause grave longterm detriment to the Plaintiffs and others inhabiting the East coast of Ireland. The second was Dr Mary Grehan, a Medical Practitioner in the Louth area, who had carried out an extensive study of physical abnormalities detected over a period of years in patients in the locality in which she practised and who gave as her opinion, as a result of her research, that a likely cause of such abnormalities was the operation of the Selafield plant in Cumbria.

It would be unreal to assume that these allegations will not be fiercely contested at the hearing of the Action, if there is one, but nevertheless it appears to me that Mr Justice O'Hanlon was right in holding that the Plaintiffs' had established a "good arguable case" for the purposes of an application for service out of the jurisdiction under Order 11 of the Rules of the Superior Courts.

ORDER 11

The Plaintiffs' claim is clearly a many facetted one but nevertheless it is clear that the basic claim is in the nature of a Tort or Quia Timet Action. Order 11 permits service out of the jurisdiction of Notice of an Originating Summons on a person who is not a citizen of Ireland where:-

(b) the Action is founded on a Tort committed within the jurisdiction; or --

(g) any injunction is sought as to anything to be done within the jurisdiction, or any nuisance within the jurisdiction is sought to be prevented or removed whether damages are or are not also sought in respect thereof . . ."

Whether the terms of sub-paragraphs (f) and (g) above are wide enough to include actions for relief arising out of alleged breach of constitutional rights or alleged breach of European Directives or whether the distinction is of any importance in the circumstances of this case, are matters which, I think, could properly be left to the trial of the Action.

The Plaintiffs' claim against the first two Defendants (Ireland and the Attorney General) is that they did not take such Action as was open to them to protect the personal rights of the Plaintiffs against the alleged attack being made on them by British Nuclear Fuels Ltd. Order 11 Rule 1 paragraph (h) permits service out of the jurisdiction where:-

"Any person out of the jurisdiction is a necessary or proper party to an Action properly brought against some other person duly served within the jurisdiction".

The standard test to be applied in exercising this jurisdiction is whether the person out of the jurisdiction would, if he were within the jurisdiction, be a proper person to be joined as a Defendant in the Action against the other Defendants. One can have no doubt that if British Nuclear Fuels were resident within this jurisdiction it would be a proper Defendant in the present case. Therefore it appears to me that Mrs Justice O'Hanlon was right in allowing service out the jurisdiction under this head also.

Finally Mr Justice O'Hanlon held that the balance of convenience lay in favour of

trying the case in the Irish Courts and, subject to what is said below, there was no serious challenge to his decision on this specific point.

It will therefore appear that if we are to regard the claim as being essentially a Tort or Quia Timet Action the case for service out of the jurisdiction under Order 11 has been made out.

The Brussels Convention.

The Brussels Convention of 1968 was adopted in accordance with the provisions of Article 220 of the EEC Treaty which encouraged member States of the European Economic Union to enter into negotiations with a view to securing for the benefit of their Nationals the simplification of formalities governing the reciprocal recognition and enforcement of Judgments in the European Community. It deals with disputes concerning "civil and commercial matters". The present dispute is clearly not a commercial dispute. It concerns an alleged Tort Delict or civil wrong. Whether the scope of the convention is wide enough to include Actions for damages for alleged breach of constitutional rights or alleged breach of a directive, or whether the distinction is of any importance in the circumstances of the present case, are matters for further discussion. Two matters do however appear clear. It is possible to invoke the convention to institute proceedings in the national jurisdiction where the effect of the alleged wrongful Act is felt. Secondly it would not appear to be possible to invoke the convention in an Administrative Law Action. It may be possible to invoke the convention where the Action is essentially based on some civil wrong but also contains some minor elements of administrative law. Under these circumstances the Plaintiffs' Legal Advisers deliberately chose not to invoke Article 11(a) of the Rules of the Superior Courts, which allows a Plaintiff to institute proceedings without the prior leave of the Court where he seeks to rely upon the convention, but to apply for leave under Article 11 in accordance with the traditional procedure for applying for service out of the jurisdiction. Under these circumstances it does not appear necessary to discuss the Brussels Convention any further at this stage.

JURISDICTION

The main point raised by British Nuclear Fuels in this Motion is that the Irish Courts have no jurisdiction to deal with the Plaintiffs' complaints or, if they have, the Irish Courts should, in all the circumstances of the case, decline jurisdiction, in respect of some, if not all, of the Plaintiffs' complaints.

British Nuclear Fuels say that they have complied with all the appropriate procedures in the United Kingdom. They have gone through a public inquiry, they have obtained the necessary licences authorisations and permissions under the law of the United Kingdom. They have successfully resisted a challenge to their activities in the Queens Bench Division in England.

In these circumstances they say that for the Irish Courts to entertain the present case would be, in effect, to interfere with the decisions of a neighbouring sovereign power, to embark on judicial review of decisions made by the competent authority in another State and to fail to respect the decision of the English High Court made within its own jurisdiction.

JURISDICTION OF NATIONAL COURT Mr Paul Callan SC, on behalf of the Plaintiffs', denies that he is attempting to interfere, in any way, with the jurisdiction or competence of the Courts or the Government of the United Kingdom.

Let us look at the matter first as a question of National Law leaving aside any question of European Law. It may be true that the activities of which the Plaintiffs complain take place in the United Kingdom. But what gives the Plaintiffs' a cause of action, if they have one, is not the activities as such but the allegedly harmful results of these activities in Ireland in the area where the Plaintiffs' reside. It is these allegedly harmful results which give the Irish Courts jurisdiction to deal with the complaints, and, if they find the complaints established, to attempt to give the Plaintiffs' relief, without trespassing on the jurisdiction of the Courts of any neighbouring State. Prima facie the matter would appear to be simply a matter of National Law; the Plaintiffs' would appear to be entitled to bring their claim; and the Irish Courts would appear to have jurisdiction to entertain it.

EUROPEAN LAW

The case may of course develop in a much more complicated way. Prima facie it is difficult to see how any provision of English Law could make legal in Ireland injury or damage which would otherwise be tortious under Irish Law. Certainly it is hard to see how any provision of UK Law could deprive the Irish Courts of jurisdiction which they would otherwise have. Prima facie the relevant law would appear to be the lex loci delicti rather than the law of the United Kingdom.

If however British Nuclear Fuels were to attempt to justify the effects in Ireland of it's activities in England by reference to the law of the United Kingdom the Plaintiffs' say that they would then invoke the alleged non-compliance by British Nuclear Fuels with the European directives pleaded to attack any administrative authorisations which British Nuclear Fuels may have received for the Thorp project.

Inevitably there is an element of shadow boxing in this which is one reason why the matter is best left to the trial Judge.

If however the case comes to be discussed as a case governed by European Law very different considerations may apply. First the outstanding characteristic of the European Community is that it is a community governed by law. It is debatable to what extent the old system of national sovereignty which was reflected in many of the cases relied upon by British Nuclear Fuels in the hearing of this Motion, applies between two States both of whom are members of the Community. Certainly in the sphere in which the Community Legislator has acted Community Law is supreme and the National Law of the member States must give way to it. Again there is within the European Community no hierarchal structure of Federal Courts to which the citizen can appeal to resolve conflicts between European and National Law. Every National Court within the Community is a European Court and must give primacy to European Law over National Lab where there is a clash between the two. The National Court may look to the European Court of Justice for guidance but the ultimate responsibility for enforcing European Law rests with the National Court before which the problem arises. This could have serious consequences in the event of British Nuclear Fuels seeking to rely on a British administrative authorisation and the Plaintiffs' attempting to argue that the authorisation was invalid for non-compliance with European directives.

Finally we are told that a question will arise in the case as to the nature of British Nuclear Fuels plc. In form it is a Company incorporated under English Company Law and, in no stronger or no weaker a position than any other person alleged to have committed or to be committing a Tort. At the same time all the shares in the Company are held by or on behalf of the United Kingdom through Secretaries of State. It was established for the purposes of the United Kingdoms Atomic Energy

Act 1971 and is the holder of a site licence under the United Kingdom Nuclear Installations Act, 1965. The Plaintiffs say that it is in effect a State Authority or what community Lawyers refer to as an "emanation of the State". British Nuclear Fuels denies that this is so. This is one of the matters which may have to be decided at the trial of the Action. It cannot therefore go to the question of whether the Irish Courts have jurisdiction to deal with the matter or not. However it may have far reaching effects on the case in that it may raise the question of whether the Plaintiffs' can invoke the doctrine of "direct effect" against British Nuclear Fuels.

CONCLUSION

From the foregoing discussion it is clear that the present case raises, or may raise, difficult questions of far ranging significance. Certainly the questions are too complex and difficult to be disposed of, in limine, on a Motion to dismiss for want of jurisdiction. Rather should they be left to the trial Judge to decide after full debate. I should not like anything said by me on this preliminary issue to inhibit the trial Judge in any way in his approach to the case.

Again the relief, if any, to which the Plaintiffs may be entitled and the form of such relief are matters for the trial Judge after he has heard the case.

Under these circumstances I would dismiss the Appeal on the Motion and confirm the Order of O'Hanlon J.

DISPOSITION:
Appeal Dismissed.

Annex 7

United Meat Packers (Ballaghaderreen) Ltd (In Receivership)
v
Nordstern Allgemeine Versicherungs-AG and Others

The Supreme Court

395/95 + 94/96, (Transcript)

HEARING-DATES: 24 June 1997

24 June 1997

PANEL: O'Flaherty, Barrington, Keane JJ

JUDGMENTS:
O'FLAHERTY J: We have read and heard very interesting submissions on both sides in this case, but since we have reached a clear conclusion in the matter we do not think it necessary to reserve judgment.

The background to the case is as follows. The plaintiff company, United Meat Packers (Ballaghaderreen) Limited which is now in receivership, claims against all the defendants on foot of a policy of insurance dated the 9 January, 1992, which provided insurance cover to the plaintiff company for a period of twelve months commencing on the 26 August, 1991, in respect of any losses that might be sustained by the plaintiff in respect of its stock in trade or other goods at its premises at Ballaghaderreen, Co Roscommon. On 7 January, 1992, the premises were destroyed by a fire and the plaintiff claims to have suffered serious losses in the region of £1.8 million. The plaintiff submitted his claim to the defendants, through their nominated agents, which detailed particulars of the loss and damage allegedly sustained. It appears that in March, 1992, a payment of £500,000 was made on behalf of the defendants. The plaintiff's claim was investigated on behalf of the defendants by Messrs Toplis Marine who in turn instructed Messrs Deloitte & Touche, chartered accountants, to examine the plaintiff's books and records and to identify the validity of the sums being claimed.

Mr Peter Hofmeester, on behalf of the first named defendant -- who appears to be the leading insurer, indicated by a fax dated 27 February, 1992, that in principle liability under the policy was accepted subject to the final outcome of the garda investigations and that fax indicated that the final survey report, as well as the accountant's report, would be mailed to him the following Monday. Deloitte & Touche by letter of the 3 March, 1992, to Mr Hofmeester recommended an increased payment on account in the sum of £1,780,991 subject to Mr Hofmeester being satisfied as to the eligibility of numerous elements of the claim under the terms of the insurance policy. Toplis Marine by fax of 19 March, 1992, indicated that their principals had approved a payment on account of £1 million. Mr Hofmeester by a fax of 15 October, 1992, to Mr Donnelly, the receiver, referred to the fact that the garda were still investigating the case. Concerning the insurance cover, he said that only a cover note was issued and a policy was never written by the brokers. Concerning the claim he said that it was up to the plaintiff to make the claim and to prove to the insurance companies the extent of it. He then made certain criticisms in regard to the proofs furnished in relation to the claim and concluded that the extent of the claim had not been proved and that no further payment could be made until further evidence about the extent of the claim had been given to the company.

Mr McCague of the plaintiff's insurance company, Arthur Cox and company, in the course of his affidavit sworn of the 24 February, 1995, said that the only matter which appears to be in dispute on foot of the policy is the quantum of the payment. No ground of repudiation of liability has ever been advanced. He does point to a difficulty in finding out with certainty the precise identity of the insurers. This difficulty it appears continues to this day as regards the leading insurers as to whether they are German or Swiss. It now appears to be admitted that they were German and if that is so then they would properly be capable of being served under the Brussels Convention without any resort to the Lugano Convention -- about which more anon.

An application was made to the High Court (Mr Justice Geoghegan) on the 16 November, 1993, grounded on the affidavit of Mr McCague for an order pursuant to Order 11, Rule 1(e) and (f) of the Rules of the Superior Courts to give leave to the plaintiff to serve notice of the originating summons on the first, second and fifth named defendants out of the jurisdiction. That affidavit makes it clear that the plaintiff's cause of action was against the defendants on foot of the insurance policy already referred to but unfortunately in the course of the affidavit Mr McCague made a mistake. He stated that the insurance contract had been entered into on behalf of the defendants by the defendants' agent within this jurisdiction.

Mr Justice Geoghegan, duly granted the intended plaintiff liberty to serve notice of an originating plenary summons on the first, second and fifth named defendants on the basis that it appeared "that this intended action falls within the class of actions set out in Order 11, Rule 1(e) of the Superior Courts". To interpose here -- as regards the other defendants -- they play no part in these proceedings. They have been properly served under the Brussels Convention, the case has taken its course, a statement of claim has been delivered, defences have been filed and the matter is ready for trial. Therefore, I can pass from them without any further mention.

Order 11, par 1 in so far as is material 1 provides:-

"Provided that an originating summons is not a summons to which Order 11A applies service out of the jurisdiction of an originating summons or notice of an originating summons may be allowed by Court whenever --

(e) The Action is one brought to enforce, rescind, dissolve, annul, or otherwise affect a contract, or to recover damages or other relief for or in respect of the breach of contract --

(i) made within the jurisdiction, or

(ii) made by or through an agent trading or residing within the jurisdiction on behalf of a principal trading or residing out of the jurisdiction; or

(iii) by its terms or by implication to be governed by Irish law, or is one brought in respect of a breach committed within the jurisdiction of a contract wherever made, even though such breach was preceded or accompanied by a breach out of the jurisdiction which rendered impossible the performance of the part of the contract which ought to have been performed within the jurisdiction."

What happened here is that in the course of the affidavit that was sworn on behalf of the plaintiff it was paragraph 1(e)(ii) that was relied upon. That was a mistake. It should have been sub-par (iii). The order when it was drawn up did not go into subparagraphs. It simply said it was made under Order 11, 1(e).

The next thing that happened was that the pleadings took their course and an appearance under protest was issued on behalf of the first, second and fifth named defendants and also on behalf of the third and fourth named defendants. The other appearances were entered without protest.

The next stage in the saga was that after a motion for judgment was brought against all the defendants for failure to deliver a defence, a motion was brought dated the 13 January, 1995. The first to fifth named defendants challenged the jurisdiction of the courts. That motion was grounded on the affidavit of Mr Clancy, the defendants' solicitor, sworn on the 12 January, 1995, in which he stated that the defendants had no agent within the jurisdiction. In other words, that Mr McCague was indeed mistaken in the averment he had made. The plaintiff then countered by applying for liberty to amend the plenary summons and statement of claim to make reference to the power of the Irish courts to determine the matters in issue in the proceedings pursuant to the jurisdiction conferred on the Irish courts under the Lugano Convention. This has been given the force of law in this jurisdiction under the Jurisdiction of Courts and Enforcement of Judgments Act, 1993. Particular reliance was placed on Article 5, 1, 7, and 8(2) of the Lugano Convention which would mean that no leave originally would have been required to go under Order 11 at all. The Lugano Convention would have been in the same position as the Brussels Convention in all respects and would come under the terms of Order 11 A. Article 8 is worth noting. It provides:-

"An insurer domiciled in a Contracting State may be sued:

1. in the courts of the State where he is domiciled; or

2. in another Contracting State, in the courts for the place where the policy-holder is domiciled; or

3. if he is a co-insurer, in the courts of a Contracting State in which proceedings are brought against the leading insurer.

An insurer who is not domiciled in a Contacting State but has a branch, agency or other establishment in one of the Contracting States shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Stated."

The point of all this is that at the time when the application was made to Mr Justice Geoghegan, the Lugano Convention had not entered into force in this jurisdiction. By the time the proceedings were instituted, which was the 2 December, the Lugano Convention had come into effect. It had come into effect the day before, on the 1 December, 1993. Therefore the true position at the time the proceedings were issued was that no leave of the Court was required. They could simply have been issued and served on the defendants.

The other relief the plaintiff sought at this stage, nonetheless, was that having attempted to make peace with the High Court by offering apologies for the mistake that had been made in Mr McCague's affidavit, the plaintiff wanted the service to stand. The service had been issued under, as already indicated, the correct paragraph and the only thing amiss was this mishap that had befallen Mr McCague in his affidavit.

Miss Justice Carroll in her judgment delivered on the 31 July, 1995, took the view that Mr Justice Geoghegan had not been asked to make the order under Order 11(1)(e)(iii) and I quote from her judgment:-

"I must assume that the order was made squarely on the agency ground and I cannot assume that another judge would grant service out of the jurisdiction on ground (iii) on the evidence which was before Geoghegan J."

On behalf of the plaintiff, Mr Gallagher submitted that the learned High Court judge misdirected herself in the manner in which she approached the application to set aside the service. The correct enquiry, he said, was to find out whether there was evidence before the court which established if the court did have jurisdiction under Order 11 in relation to the proceedings against the relevant defendants and, in particular, whether it had jurisdiction under Order 11,1(e) which was the order on foot of which the leave was granted.

I would hold with that submission. The Court clearly had such jurisdiction and accordingly the relief sought by the relevant defendants ought to have been refused.

The learned trial judge then went on to draw a distinction with the case of Doran v Power [1996] 1 ILRM 55. The point in that case was that the parties had endorsed the plenary summons with a reference to the Brussels Convention when in fact the proceedings lay under the Collision Convention which did not require any endorsement. This Court granted leave to the plaintiff in that case to amend the proceedings, obviously by deletion. That was done. I have the order before me and it states that the plaintiff was given leave to amend the proceedings. It does not spell out that the amendment was by deletion but that must obviously be so. The learned High Court judge seemed to think, and Mr Finlay has also relied on this point, that since the amendment took the form of being an amendment by deletion it was in a different situation to the Doran case. For my part, I regard this as a distinction without a difference. Whether an amendment is by deletion or by addition does not seem to me to be germane. Nonetheless, Mr Finlay justifies the order of the High Court. He says that the affidavit was inaccurate: the wrong information was given to the court. The court had proceeded on the basis that it was the agency sub-paragraph that was being relied upon. He says that the defendants were entitled to object and to succeed in their objection.

He makes a further point. He says that the two proceedings are mutually exclusive. The plaintiff is entitled to go under the Lugano Convention, Order 11 A, or is entitled to go under Order 11, but the plaintiff must elect as to which procedure to adopt.

I do not agree. At the time that the application was made to Mr Justice Geoghegan, the Lugano Convention had not entered into force in this jurisdiction. Therefore, the only application that could have been brought to Mr Justice Geoghegan was under Order 11. A mishap occurred, as already related in the course of this case, with the affidavit. Mr McCague attempted to make his peace with the Court in a generous and full spirit. That should have been accepted by the other side. These court applications were excessive and unnecessary.

This Court pays great respect to the discretion whenever exercised by any trial court but it also has a full discretion of its own which was laid down in Re Morelli [1968] IR 11 and, of course, under Order 28, Rule 12 of the Rules of the Superior Courts it is provided:-

"The Court may at any time, and on such terms as to costs or otherwise as the Court may think just, amend any defect or error in any proceedings, and all necessary amendments shall be made for the purpose of determining the real

question or issue raised by or depending on the proceedings."

This is clearly a case where the discretion of the court should be exercised in favour of the plaintiff. I would reverse the finding of the High Court judge in the matter.

I would further declare that since the Lugano Convention was in force at the time the proceedings were issued then the Lugano Convention also applies to the proceedings.

We have been told that separate proceedings, but in identical terms, have been issued under the Lugano Convention. This was no doubt done ex abundanti cautela on the part of the plaintiff's advisors. Just in case there would be any possibility that the plaintiff would not get a full measure of justice in this Court, they, perhaps, thought it necessary to do that. However, these proceedings would now seem to be redundant. The plaintiffs' advisors must take their best course in regard to that as to how to bring the whole matter into proper order and present it to the High Court judge in due course in an intelligible fashion. I would also be in favour of giving the plaintiff liberty to apply to the High Court for such priority as the High Court may be in a position to afford to the hearing of this action in the light of the delay occasioned by these unnecessary proceedings.

A final footnote: it appears that while the judge refused the plaintiffs' motion to amend the proceedings, when clarification was sought of her order, it appears that she intended that the proceedings should be struck out and that that was so provided in the order. The plaintiff have separately appealed that decision but since the matter is now governed by the substantive ruling that we give, no order need be made on foot of this separate appeal.

Nem Diss.

DISPOSITION:
Judgment accordingly. Nem Diss.

Annex 8

THE LAW REFORM COMMISSION

AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

Report

(LRC 22–1987)

HAGUE CONVENTION ON THE SERVICE ABROAD

OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS

IN CIVIL OR COMMERCIAL MATTERS (1965)

IRELAND

The Law Reform Commission

Ardilaun Centre, 111 St Stephen's Green, Dublin 2

First Published December 1987

INTRODUCTION

The Commission is grateful for observations received from the Rules Committees of the Superior Courts, the Circuit Court and the District Court, the Master of the High Court, the Chief Registrar of the High Court, Mr Caoimhín Ó hUigínn, Barrister-at-Law, Principal Officer. Department of Justice and Mr James Martin, Assistant Principal Officer, Department of Justice. However, it wishes to make it clear that it alone is responsible for the contents of the Report and the recommendations therein.

THE PRESENT LAW AND THE CONVENTION

The Convention on the Service Abroad of Judicial and Extra-judicial Documents in Civil or Commercial Matters (hereinafter the Hague Convention) was adopted at the Tenth session of the Hague Conference on Private International Law in 1964, at which Ireland was represented by Mr Patrick Terry of the Department of Justice. The Convention, the text of which is contained in Annex 2 to this Report, is designed to facilitate the service of documents abroad for the purposes of civil proceedings. To this end each Contracting State is required to designate a Central Authority to arrange for the service of documents coming from other Contracting States.[1] The Central Authority must serve or arrange to have served documents sent to it by the authority or judicial officer competent under the law of the State in which the documents originate.[2] Except in cases where the addressee accepts a document voluntarily, it must be served either

(a) by a method prescribed by the internal law of the Central Authority for the service of documents in domestic actions upon persons who are within its territory, or

(b) by a particular method requested by the applicant unless such a method is incompatible with the law of the state addressed.[3]

Except in cases where the addressee accepts the delivery of the document voluntarily, a Central Authority may require the document to be translated into the official language or one of the official languages of the State addressed.[4] When the documents are served, the Central Authority or any other authority designated by that State must forward a certificate to the applicant stating that the document has been served and this certificate (completed according to a model annexed to the Convention) must include the method, place and date of service and the person to whom it was delivered.[5] If the document has not been served, the certificate must set out the reasons which have prevented service.[6] As regards method of service the model certificate annexed to the Convention merely requires a statement without elaboration either that the document has been served by the method prescribed by the internal law of the receiving state for the service of documents in domestic actions upon persons who are within its territory or that it has been served by the particular method requested by the applicant or that it was delivered to the addressee who accepted it voluntarily. The Central Authority may not claim any payment for the service it renders except in respect of costs occasioned by the employment of a judicial officer or by the use of a particular method of service requested by the applicant.[7] The State addressed may refuse to comply with a request for service if it deems that compliance would infringe its sovereignty or security.[8] It may not refuse to comply with such a request solely on the ground that under its internal law it claims exclusive jurisdiction over the subject matter of the action or on the ground that its internal law would not permit the action upon which the application is based.[9]

Under the Rules of the Superior Courts, which govern proceedings in the High Court (including the Central Criminal Court), the Court of Criminal Appeal and the Supreme Court, the general rule is that any document, whether it be a pleading, notice, affidavit or order, is served by leaving it (or a copy) at or sending it (or a copy) by registered prepaid post to the residence or place of business in the State of the person to be served or the place of business of the solicitor (if any) acting for him in the proceedings to which the document relates.[10] Where the person to be served is out of the jurisdiction and has no solicitor within it so that it is impossible to comply with this rule, application may be made to the court "for substituted or other service or for the substitution for service of notice by advertisement or otherwise".[11] In that case the court has discretion to direct whatever form of notification or publicity is likely to bring the document to the attention of the person to be served. In any event the court may declare any service actually effected sufficient.[12] Where no appearance has been entered for a party or where a party or his solicitor, as the case may be, has omitted to give an address for service in documents he has served, any document which has not to be served personally or for which no other mode of service is directed, may be served by filing it in the Central Office.[13]

Personal service is required, where reasonably practicable, in the case of certain documents, notably an originating summons or other document initiating proceedings.[14] It is effected by delivering a copy of the document to the defendant in person and showing him the original or duplicate original.[15] Where a defendant is out of the jurisdiction an originating summons may not be served on him without the leave of the court.[16] This will be granted only in certain specified cases where the courts are empowered to assume jurisdiction as an exception to the general rule that no action will lie unless the defendant is in the jurisdiction and is served with a summons there. If leave is given to serve a summons out of the jurisdiction, it seems that it should be served personally on the defendant unless it is made to appear to the court that the plaintiff is unable to effect prompt personal service. In that case the court is empowered to make an order for "substituted or other service or for the substitution for service of notice by letter, advertisement or otherwise".[17] An application for substituted service within the jurisdiction will be granted, even if the defendant is out of the jurisdiction, provided the court is satisfied that it will in all reasonable probability be effective to bring him knowledge of the document.[18] Such substituted service usually takes the form of service or delivery by post to the defendant's solicitor or agent in the jurisdiction.[19] In the case of a summons, as with other documents, the court has power to declare the service actually effected sufficient.[20] Where the defendant is not known or believed to be a citizen of Ireland, notice of the summons and not the summons itself must be served upon him.[21] This is because some States object to the service of a summons within their jurisdiction on their citizens as being an infringement of sovereignty.[22]

In the Circuit Court, the general rule is that a document must be served by delivering it to the person on whom it is to be served personally, or by delivering it at the residence or place of business of such person, or by sending it by pre-paid post, addressed to such person at his last known residence or place of business.[23] This rule differs from its equivalent in the Rules of the Superior Courts in several respects; it does not require registered post; it makes no provision for service on the solicitor of the person to be served; and it does not preclude service outside the jurisdiction. Where service in accordance with it is impracticable, the judge may make an order for

substituted service, or for the substitution for service of notice by advertisement or otherwise as may be just.[24] The Rules of the Circuit Court make provision for other modes of service for certain classes of document. In the case of a Civil Bill or other originating document, the Rules provide for service of a copy by a Summons Server appointed by the County Registrar "upon the defendant personally wherever he is to be found within the jurisdiction or at the defendant's residence within the jurisdiction personally upon the husband or wife of the defendant, or upon some relative or employee of the defendant over the age of sixteen years and apparently resident there".[25] As in High Court proceedings, an originating document may be served out of the jurisdiction with the leave of the court. This may be granted only in certain cases specified in the Rules where the courts are empowered to assume jurisdiction as an exception to the general rule that no action will lie unless a defendant is in the jurisdiction and is served with a summons there. As the rules relating to the service of an originating document assume service within the jurisdiction, an application for an order for service out of the jurisdiction necessitates an application to the court for an order for substituted service, or for the substitution for service of notice by advertisement or otherwise as may be just.[26] Such an order could provide for service or notification outside the jurisdiction. As in High Court proceedings, where permission is given to serve a document out of the jurisdiction on a person who is not a citizen of Ireland, notice of the document and not the document itself must be served on him.[27] Personal service is also required in the case of a witness summons and for a notice to attend court to show cause against committal for contempt for failing to comply with an order of the court.[28] But in either case the Court has discretion to allow some other form of service. In fact, no new Summons Servers have been appointed for over 20 years so that they are now to be found in only a few areas. In areas where no Summons Servers have been appointed, special rules have been established by statute.[29] These apply to any document by which proceedings in the Circuit Court are instituted and any other document relating to civil proceedings in the Court which is a notice, order or witness summons.[30] In such cases it is provided that service of a document may be effected by registered prepaid post in an envelope addressed to the person to be served at his last known residence or place of business in the State.[31] Where the person to be served is outside the State or his whereabouts cannot be ascertained or where the envelope containing the document is returned undelivered to the sender, the Court may then make an order for substituted service or for the substitution of notice by advertisement.[32] Such an order could make provision for service or notification outside the jurisdiction.

The District Court Rules contain no general provision relating to the service of documents. In areas where no Summons Server has been appointed, service of documents instituting proceedings and witness summonses are governed by the same provisions as apply in such circumstances in Circuit Court proceedings.[33] Otherwise, service of a Civil Process must be effected by a Summons Server on the defendant either personally or at his residence or place of business on his spouse, agent, clerk, servant or person in charge of his usual abode.[34] Where such service cannot be effected, provision is made for other forms of service, including, by order of the court, sending a copy of the civil process by pre-paid post addressed to the defendant at his last-known residence or place of business.[35] Where the Court gives leave to serve an originating document or notice of it out of the jurisdiction, service of it may be effected by registered post.[36] Save where the Court directs otherwise, a certificate of posting of the registered packet is sufficient evidence of its service.[37]

The Commission has noted that in its Eighth Interim Report published in 1968 the Committee on Court Practice and Procedure made recommendations for the simplication of the law relating to the service of documents. It recommended that any requirement of personal service or physical delivery should be abolished except for a notice of motion to commit or attach for contempt of court or a debtor's summons in bankruptcy and that provision should be made in the Rules of the Superior Courts for service of court documents, including witness summonses, by ordinary pre-paid post, without leave, directed to any address within the jurisdiction, enclosed in a sealed envelope marked on the outside “Court Document” and endorsed with the sender's name and address.[38] However, no specific recommendation was made in the Report in respect of service out of the jurisdiction.

The Hague Convention offers an official channel for the service of documents in other States and an authoritative confirmation from an official body in the State where the documents are served of the fact that service has taken place. Under Article 5 of the Convention requiring the service of documents by the particular method requested by the applicant, the Central Authority in another Contracting State could be required to effect personal service in accordance with Irish law. In High Court proceedings this would enable personal service of an originating summons or other similar document to be effected by the Central Authority of another State, so saving the expense involved if a party had to arrange for personal service in another State himself and affording a better assurance that the summons has been received than if it had been sent by post. In Circuit Court and District Court proceedings, as has been noted, the document originating proceedings may generally be served by registered post. Service is proved by producing an official Post Office Certificate of Posting of the registered envelope to the last known residence or place of business of the persons to be served and a statement by the sender in a statutory declaration that the envelope has not been returned undelivered to the sender.[39] How good a guarantee this is that a document has actually reached the person to be served depends on whether the postal service in his country returns undelivered letters. Clearly, verified personal service by an Official Authority of that State affords a more reliable guarantee. Other methods of service by the Central Authority of another State under the Convention may be more reliable than sending a document by registered post from Ireland to certain countries. For this reason it is considered that it would be advantageous if service pursuant to the provisions of the Hague Convention were available in Circuit Court and District Court proceedings as well as in High Court proceedings.

The Commission has examined the obligations which would be assumed by the State if Ireland becomes party to the Hague Convention. At present, the Rules of the Superior Courts provide for the service of any process or citation at the request of a court or tribunal of a foreign country before which any civil or commercial matter is pending.[40] Such requests are sent through the Department of Foreign Affairs to the Master of the High Court. The letter of request for service must be accompanied by a translation into English and by two copies of the process or citation to be served also accompanied by translations. Such service must be effected in accordance with the practice and procedure of the High Court by the solicitor for the person suing out the process or citation, or, in the event of there being no such solicitor, by the Chief State Solicitor. Service is effected by delivery to and leaving with the persons to be served one copy of the process to be served, and one copy of the translation, in accordance with the rules and practice of the court. Orders for substituted service may be obtained

from a Judge of the High Court where this is necessary. The person effecting service must provide an affidavit of service verified by notarial certificate and particulars of the charges for the cost of effecting such service. The correctness of the charges are certified by the Master of the High Court who completes a certificate stating that the service proved by the affidavit is such as is required by the law and practice of the High Court in Ireland. The Master sends this to the Department of Foreign Affairs for transmission to the requesting court or tribunal. The Hague Convention imposes certain obligations over and above those specified in these provisions. Under its terms, it is obligatory to serve any judicial documents forwarded by an "authority or judicial officer competent under the law of the State in which the documents originate" or any extrajudicial document emanating from the authorities and judicial officers in another State.[41] This would cover a wider range of documents than the processes and citations covered by the present rule. It would also cover requests emanating from bodies or persons other than courts and tribunals and might extend to those emanating from individual lawyers in countries where they are competent to serve judicial or extrajudicial documents. Under the Convention it may not suffice to serve a process in accordance with the practice and procedure of the High Court as the Central Authority designated by a State is obliged to serve documents by the particular method requested by the applicant unless this method is incompatible with its law.[42] Where service is not effected in accordance with its provisions, the reasons which have prevented service must be set out in the certificate.[43] Under the Convention it is not permissible to make any charge for service except in respect of costs occasioned by

(a) the employment of a judicial officer or a person competent under the law of the State of destination,

(b) the use of a particular method of service.[44]

In the Commission's view none of these considerations should inhibit adherence to the Convention. *Accordingly it is recommended that Ireland should become party to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*.

The Commission would also draw attention to the fact that the operation of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of the European Communities (the Judgments Convention) which is to be given the force of law in Ireland under the Jurisdiction of Courts and Enforcement of Judgments (European Communities) (No. 2) Bill, 1987 would be facilitated by adherence to the Hague Convention. A State may decline to enforce a foreign judgment under the Judgments Convention if documents required to be served in its jurisdiction have not been served in accordance with its law. In some States it is contrary to law, as being an infringement of sovereignty, for a court or official or litigant in a foreign country to serve a judicial document on a person within its jurisdiction. The Hague Convention would be of assistance in facilitating service in accordance with the internal law of the person to be served in such cases. Also, under

Article 20 of the Judgments Convention, where a defendant domiciled in one Contracting State is sued in the court of another Contracting State and does not enter an appearance, the court must stay the proceedings so long as it is not shown that the defendant has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end. It goes on:

> "The provisions of the foregoing paragraph shall be replaced by those of Article 15 of the Hague Convention of 15th November, 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial matters, if the document instituting the proceedings or notice thereof had to be transmitted abroad in accordance with that Convention."

All the other Parties to the Judgments Convention are party to the Hague Convention and the adherence of Ireland to the Hague Convention would achieve a desirable uniformity.

Each State which is party to the Hague Convention must designate a Central Authority to receive requests for service coming from other contracting States. As a request for service may be refused on the ground that it infringes the sovereignty or security of the State it seems appropriate that such requests should be channelled through the Department of Foreign Affairs so that it can deal with any policy questions which arise. This is in line with the existing procedure under which a letter of request from a foreign court for the service of a process or citation in a case pending before it is transmitted to the Master of the High Court from the Minister for Foreign Affairs with an intimation from the latter that it is desirable to give effect to it.[45] The Commission considered whether it would be desirable to appoint the Master as the Central Authority and thus short-cut the process. In dealing with applications for the enforcement of foreign judgments under the Maintenance Orders Act, 1974 and the Jurisdiction of Courts and Enforcement of Judgments (European Communities) (No. 2) Bill, 1987 the Master has power to decide whether they infringe public policy before making an order for enforcement. There is something to be said for centralizing in one office all matters relating to international judicial co-operation. However, the Commission has noted that most of the states party to the Convention have designated a department of government to be their Central Authority. Having regard to this and the existing role of the Minister for Foreign Affairs, *the Commission recommends that the Minister for Foreign Affairs should be designated as the Central Authority for Ireland under Article 2 of the Convention. In also recommends that in line with the present rule relating to the service of a process or citation pursuant to a letter of request, the Minister should transmit requests for service of documents under the Convention to the Master of the High Court who should order that the Chief State Solicitor effect service in accordance with the practice of the High Court. It is further recommended that the Master should be designated as an authority for the purpose of completing a certificate that a document has been served under Article 6 of the Convention*. Under the existing rules he provides a certificate that the documents which are the subject of the letter of request have been served.[46]

Article 9 of the Convention provides that a Contracting State is to be free to use consular channels to forward documents for the purpose of service to those authorities of another Contracting State which are designated by the latter under this Article for this purpose. *It is recommended that the Central Authority should alone be designated by Ireland under Article 9 to receive documents forwarded through consular channels from another Contracting State*. This would avoid any confusion arising from a multiplicity of channels.

The Convention does not provide for the specific designation by Contracting States of the authorities or judicial officers who are competent under their laws and so, under Article 3, entitled to forward documents to another Contracting State for the purposes of service. As a result, some difficulty has arisen as to whether documents should be served at the request of lawyers in other jurisdictions. The United Kingdom authorities have indicated that documents for service will be accepted only from judicial, consular, or diplomatic officers of other Contracting States. But in this they differ from other States and it has been doubted whether the practice fully accords with the Convention. In the United States, for instance, foreign lawyers' requests are accepted as it is regarded as highly improbable that a lawyer with no genuine interest in a case would initiate a request. It is largely a question of proof. *It is recommended that it should be the responsibility of the Central Authority designated by the Government of Ireland to decide in the individual case, under Article 3, on the competence under the law of the State in which the documents originate of the authority or judicial officer requesting service*. Conversely, to assist parties in proceedings before the Irish courts, *it is recommended that the Central Authority should undertake to forward documents whose service is required for legal proceedings in Ireland to the Central Authority of the State where those documents are to be served pursuant to the Convention*.

Under Article 8 of the Convention each Contracting State is free to effect service of judicial documents upon persons abroad without application of any compulsion directly through its diplomatic or consular agents. However the Article goes on to provide that any State may declare that it is opposed to such service within its territory, unless the documents are to be served upon a national of the State in which the documents originate. As no restrictions are placed in Ireland on the service of documents in aid of foreign legal proceedings it is not considered that any such declaration need be made under Article 8 of the Convention. For similar reasons it is not considered that Ireland should make an objection pursuant to Article 10 of the Convention interfering with the freedom to send judicial documents by postal channels directly to persons abroad. However, as it is considered that all requests for service in Ireland should be channelled through the Central Authority, *it is recommended that Ireland should object pursuant to Article 10 to*

(i) *the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,*

(ii) *the freedom of any person interested in judicial proceedings to effect service of judicial documents directly through judicial officers, officials or other competent persons of the State of destination.*

However it is also recommended that it should be stated in the Declaration that it does not preclude a person interested in judicial proceedings in another jurisdiction (or his lawyer) from effecting service through a solicitor in Ireland.

Reference has already been made to Article 15 which is designed to protect defendants who may not have received notice of the institution of proceedings against them. Under the existing law in this jurisdiction this protection is afforded by the fact that proceedings cannot be legally instituted unless a document is served on the defendant in accordance with the relevant rules of court. If the defendant fails to appear in response to a summons or other originating document, judgment by default may be given against him on proof that the requisite service of the summons has taken place.[47] In cases where some form of substituted service is allowed it is conceivable that a defendant will never actually learn of the proceedings. To guard against injustice arising in such cases, it is provided that where final judgment is entered in default, it is open to the court to set aside or vary such a judgment upon such terms as may be just.[48] The Convention contains provisions on this matter which are more specific. Article 15 provides that where a writ of summons or an equivalent document is transmitted abroad for the purpose of service under its provisions, and the defendant has not appeared, judgment shall not be given until it is established that

(a) the document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory, or

(b) the document was actually delivered to the defendant or to his residence by another method provided for by this Convention, and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.

It was anticipated that these provisions could give rise to difficulties as it might be impossible to obtain judgment where a defendant who is abroad evades service or where the Central Authority in another Contracting State fails to effect service or to certify that it has done so in accordance with the Convention. To meet these eventualities, Article 15 contains a further provision allowing a Contracting State to declare that a judge may give judgment even if no certificate of delivery or service has been received if all the following conditions are fulfilled –

(a)

the document was transmitted by one of the methods provided for in this Convention;

(b)

a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document;

(c)

no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.

The Commission recommends that Ireland should make the declaration permitted by Article 15. Otherwise an Irish court might be debarred from entering a judgment by default in cases where the Central Authority in another Contracting State fails to effect service or fails to carry out its obligations under Article 6 of the Convention to provide a certificate of service. The majority of States party to the Convention, including the United Kingdom and the United States, have made a declaration under this Article.

The effect of Article 20 of the Judgments Convention is that upon ratification of the Hague Convention by Ireland, Article 15 thereof will have the force of law in the State for proceedings within the scope of the Judgments Convention as regards service on persons domiciled in other member states of the Communities. To cover service in other states party to the Hague Convention, or in proceedings not falling within the scope of the Judgments Convention, *the Commission recommends that the text of Article 15 should be incorporated as nearly as possible in the rules of court*. This will have the advantage of preserving consistency in the application of Article 15.

Where judgment is entered against a defendant who fails to appear in response to a summons served under the Convention, Article 16 provides that the judge in such a case is to have power to relieve the defendant from the effects of the expiration of the time for appeal from the judgment if

(a)

the defendant, without any fault on his part, did not have knowledge of the document in sufficient time to defend, or knowledge of the judgment in sufficient time to appeal, and

(b)

the defendant has disclosed a *prima facie* defence to the action on the merits.

It is further provided that an application may be filed only within a reasonable time after the defendant has knowledge of the judgment. Contracting Parties are permitted to make a declaration to the effect that an application for relief will not be entertained if it is filed after the expiration of a time to be stated in the declaration which shall be not less than one year. The Commission does not recommend that a declaration under Article 16 should be made as it would limit the existing discretion of the courts to set aside judgments which is not subject to a rigid time limit. It is not considered that any legislative action in the form of amendment of the rules of court is necessary to give effect to Article 16. The Article does not purport to state exhaustively the grounds on which a judgment in default of appearance may be set aside. It merely specifies one set of circumstances in which a judge must have power to take this action. Under our existing law a judge has such power in these cirumstances if an application is made in a reasonable time.[49]

To avail of the facilities offered by the Hague Convention for the service of documents in other jurisdictions it will be necessary to amend the rules of court so that the service of documents in accordance with the internal law of the State where they are served pursuant to the provisions of the Convention is deemed to be sufficient service for the purpose of domestic legal proceedings. The Commission has considered whether it should be mandatory to use the channels and methods of service for which provision is made in the Hague Convention. An advantage of so doing is that some States party to the Judgments Convention will not enforce a judgment unless proceedings have been served in accordance with its internal law and this is facilitated by the Hague Convention. On the other hand service by the method prescribed by Irish law may be quicker and afford a more reliable guarantee that the document has reached the addressee than service in accordance with the Convention. This would be the case, for instance, where personal service is required by Irish law and service by post suffices under the internal law of the State where the document is to be served. In view of this it is considered that the leave of the court should be necessary where personal service is required for the service of a document under Irish law and service by some other method is proposed. *Accordingly the Commission recommends that documents in a civil or commercial matter pending before the courts should be served in another State party to the Convention either by the method prescribed for the service of the document within the jurisdiction or, with the leave of the court, in accordance with the provisions of the Convention by a method prescribed by the internal law of that State for the service of documents in domestic actions upon persons within its jurisdiction; however, no leave should be required except where personal service is prescribed for the service of the document in question within the jurisdiction*. A draft rule to give effect to the provisions of the Convention along the lines recommended is contained in Part 1 of Annex 1 of this Report. The rule contains provisions affording protection to defendants who have not received adequate notice of the institution of proceedings against them as the requirements of the Convention in this regard are more specific than the existing law. It also contains a general provision applicable to States not party to the Convention

that a document should be served there by the method prescribed for the service of such a document upon a person within the jurisdiction.

If Ireland is to become party to the Hague Convention it will also be necessary to amend Order 121, Rule 9 of the Rules of the Superior Courts providing for the service in this jurisdiction of foreign judicial and extrajudicial documents. It is considered that it would be most convenient to repeal the existing rule and to adopt a new rule. *Accordingly, it is recommended that Order 121, Rule 9 should be replaced by a provision along the lines of the draft contained in Annex 1, Part II of this Report covering all requests for service of documents in aid of foreign legal proceedings, whether or not they are made pursuant to the Convention.* In recognition of the status of the Irish lanaguage under the Constitution, provision is made for the translation of documents into Irish as well as English. Provision has also been made for the authentication of the translation. It was considered appropriate to follow the provisions for translation of foreign documents in Section 9 of the Jurisdiction of Courts and Enforcement of Judgments

(European Communities) (No. 2) Bill, 1987. The draft rule also differs from the present rule in that the Master may exercise the jurisdiction to order substituted service now reserved to a judge.

The Commission desires to draw attention to the provision in Article 12 of the Convention that the service of judicial documents coming from a Contracting State shall not give rise to any payment or reimbursement of taxes or costs for services rendered by the State addressed. In *State (Gilliland) v The Governor of Mountjoy Prison*,[50] the Supreme Court held that a clause in an Extradition Treaty with the United States that "the requested State shall make no pecuniary claim against the requesting State arising out of the arrest, detention, extradition proceedings and surrender of the person sought under this Treaty" involved a charge upon public funds. On this basis it would appear that the Hague Convention with its requirement in Article 12 that service of judicial documents coming from a contracting State shall not give rise to any payment or reimbursement of taxes or costs for the services rendered must be regarded as one which involves a charge on public funds. It would therefore be necessary to have its terms approved by Dail Eireann prior to Ireland becoming bound by it in accordance with Article 29.5 of the Constitution unless the view is taken that it is of a technical and administrative character. *The Commission recommends that the opinion of the Attorney General should be obtained by the Government on the question whether the terms of the Convention need to be approved by the Dail under Article 29 of the Constitution prior to ratification.*

FOOTNOTES

1 Hague Convention, Article 2.

2 Ibid., Articles 3 and 5.

3 Ibid., Article 5.

4 Ibid.

5 Ibid., Article 6.

6 Ibid.

6 Ibid.

7 Ibid., Article 12.

8 Ibid., Article 13.

9 Ibid.

10 Courts Act, 1971, Section 23; Rules of the Superior Courts, Order 121, Rule 2.

11 Rules of the Superior Courts, Order 121, Rule 7.

12 Ibid., Order 9, Rule 15.

13 Ibid., Order 121, Rule 5.

14 Ibid., Order 9, Rule 2; Order 41, Rule 8 (Service of judgments or orders); Order 70, Rule 7 (citations in matrimonial cases must be served personally "when this can be done"); Order 74, Rule 49 (Notice of motion on persons against whom an order is sought under sections 184, 297, 298 and 391 of the Companies Act, 1963); Order 76, Rules 19, 48, 82 (Service of a debtor's summons and some other notices in bankruptcy proceedings); Order 79, Rule 53 (Service of citations in probate cases); Order 84, Rule 1 (Orders of habeas corpus, certiorari, mandamus, prohibition and attachment); Order 86, Rule 16 (Order to produce documents, exhibits and other things to the Court of Criminal Appeal); Order 97, Rule 13 (Service of an election petition). Order 121, Rule 6 provides:

> "Where personal service of any document is required by these Rules or otherwise, service shall be effected as nearly as may be in the manner prescribed for the personal service of an originating summons."

15 Ibid., Order 9, Rule 3. There are special rules governing service on infants, lunatics and corporations aggregate (Ibid., Order 9, Rules 5–7). A document may be served on a company by leaving it or sending it by ordinary pre-paid post to the registered office (Companies Act, 1963, Section 379).

16 Rules of the Superior Courts, Order 11.

17 Ibid., Order 121, Rule 7. See also Order 9, Rule 2 which also governs substituted service but which contains no reference to notice by letter.

18 *Shelswell–White v O'Connor and Ors*. (1961) 95 I.L.T.R. 113.

19 Ibid.; Also *Walsh v. Kennedy*, (1934) 68 I.L.T.R. 238.

20 Rules of Superior Courts, Order 9, Rule 15; *Alcock v. Condon*, (1933) 67 I.L.T.R. 232; *Stubbs v Bromfield*, (1936) Ir. Jur. Rep. 74.

21 Ibid., Order 11, Rule 8.

22 However, it should be noted that the latest revision of the Rules of the Supreme Court in England does not contain any provision for serving notice of documents where a defendant is abroad.

23 Rules of the Circuit Court, 1950, Order 10, Rule 20.

24 Ibid., Order 10, Rules 9, 10.

25 Ibid., Order 10, Rule 4. Special rules govern service on infants and lunatics; see Order 10, Rules 12, 13.

26 Ibid., Order 10, Rules 9, 10.

27 Ibid., Order 11, Rule 7.

28 Ibid., Order 21, Rule 3; Order 36, Rule 3.

29 Courts Act, 1964, Section 7.

30 Ibid.

31 Ibid., Section 7(3).

32 Ibid., Section 9(5).

33 Ibid., Section 7.

34 District Court Rules, 1948, Rules 47 (2), 127 (2). A new Rule 46 was substituted by the District Court Rules (No. 1), 1962. For service on corporations and other bodies see District Court Rules, 1948, Rule 48.

35 Ibid., Rules 128, 129. Formerly, under the special default procedure for debt and liquidated money demands, a Civil Process had to be served personally on the defendant but now the ordinary rules of service apply in such cases. [District Court (Summary Judgment) Rules, 1963, Rule 4(3), Second Schedule which annulled Rules 160 and 165 of the District Court Rules, 1948.]

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36 District Court Rules (No. 1), 1962, Rule 4(4).

37 Ibid.

38 Committee on Court Practice and Procedure, Service of Court Documents by Post (Prl. 218), para. 28.

39 Rules of the Circuit Court (No. 1) 1965, Rule 4.

40 Rules of the Superior Courts, Order 121, Rule 9.

41 Hague Convention, Articles 3, 17.

42 Ibid., Article 5.

43 Ibid., Article 6.

44 Ibid., Article 12.

45 Rules of the Superior Courts, Order 121, Rule 9.

46 Ibid., Order 121, Rule 9(6).

47 Rules of the Superior Courts, Order 13; Rules of the Circuit Court, 1950, Orders 23,24; District Court Rules, 1948, Rules 129, 160, 165.

48 Rules of the Superior Courts, Order 13, Rule 11; Rules ofthe Circuit Court, 1950, Order 27; District Court Rules, 1948, Rules 162, 163

49 Rules of the Superior Courts, Order 13, Rule 11. In proceedings before the Circuit Court or the District Court, the person against whom judgment in default of appearance or defence has been given has 10 days from the time he has knowledge of the judgment to move to have it varied or set aside (Rules of the Circuit Court, 1950, Order 27, Rule 1; District Court Rules, 1948, Rules 162, 163). But the Court has a general power to enlarge time limits (Rules of the Circuit Court, 1950, Order 59, Rule 6; District Court Rules, 1948, Rule 13).

50 [1987] I.L.R.M. 278.

RECOMMENDATIONS

1.

Ireland should become party to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (1965): para. 8.

2.

The Minister for Foreign Affairs should be designated as the Central Authority for Ireland pursuant to Article 2 of the Convention. In line with the present rule relating to the service of a process or citation pursuant to a letter of request, the Minister should transmit requests for service of documents under the Convention to the Master of the High Court who should order that the Chief State Solicitor effect service in accordance with the practice of the High Court: para. 10.

3.

The Master of the High Court should be designated as an authority for the purpose of completing a certificate that a document has been served under Article 6 of the Convention: para. 10.

4.

The Central Authority should alone be designated by Ireland under Article 9 to receive documents forwarded through consular channels from another Contracting State: para. 11.

5.

The Central Authority designated by the Government should have responsibility to decide in the individual case under Article 3 on the competence under the law of the State in which the documents originate of the authority or judicial officer requesting service: para. 12.

6.

The Central Authority should undertake to forward documents whose service is required for legal proceedings in Ireland to the Central Authority of the State where those documents are to be served pursuant to the Convention: para. 12.

7.

When ratifying the Convention Ireland should object pursuant to Article 10 to

(i) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,

(ii) the freedom of any person interested in judicial proceedings to effect service of judicial documents directly through judicial officers, officials or other competent persons of the State of destination.

However it should be stated in the Declaration that it does not preclude a person interested in judicial proceedings in another jurisdiction (or his lawyer) from effecting service through a solicitor in Ireland: para. 13.

8.

When ratifying the Convention Ireland should make a declaration pursuant to Article 15 of the Convention that a judge may give judgment in proceedings before an Irish court even if no certificate of service or delivery in accordance with the Convention has been received if

(a) the document was transmitted by one of the methods provided for in the Convention,

(b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the transmission of the document, and

(c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed: para. 14.

9.

The provisions of Article 15 of the Convention relating to obtaining a judgment in default of appearance by the defendant should be incorporated as nearly as possible in the Rules of the various courts: para. 15.

10.

To avail of the facilities provided by the Convention the rules of the various courts should be amended in accordance with the draft contained in Annex 1, Part 1 to this Report. Under the proposed rule it should be provided that documents should be served in another State party to the Convention either by the method prescribed for the service of such a document upon a person within the jurisdiction or, with the leave of the court, in accordance with the Convention by a method prescribed by the internal law of that State for the service of documents in domestic actions upon persons within its jurisdiction; however, no leave should be required except where personal service is prescribed for the service of the document in question within the jurisdiction. The rule should also include a general provision applicable to all other States that a document should be served there by the method prescribed for the service of such a document upon a person within the jurisdiction: para. 17.

11.

To discharge the obligations imposed by the Convention, Rule 9 of Order 121 of the Rules of the Superior Courts should be replaced by a provision along the lines of that contained in Annex 1, Part II of this Report covering all requests for service of documents in aid of foreign legal proceedings whether or not they are made pursuant to the Convention: para. 18.

12.

The advice of the Attorney General should be sought on whether the terms of the Convention need to be approved by the Dail under Article 29 of the Constitution prior to ratification: para. 19.

ANNEX 1

DRAFT REVISIONS IN RULES OF COURT

PART 1

Additional Provisions in Rules of the Superior Courts, the Rules of the Circuit Court and the District Court Rules

1.

Where any document for use in civil or commercial proceedings is to be served upon any person outside the jurisdiction that document shall, unless the addressee agrees in advance to accept service otherwise, be served by the method prescribed for service of such a document within the jurisdiction.

"The method prescribed for service within this jurisdiction" shall not include a requirement that a document shall be served by a particular person but shall include a method decreed in an order for substituted service, including the substitution for service of notice by advertisement or otherwise.

2.

Where any document for use in civil or commercial proceedings is to be served upon any person in any other State which is party to the Convention that document may be served by a method prescribed by the internal law of that State for the service of documents in domestic actions upon persons within its jurisdiction provided always that the leave of the court be obtained if the document is of a class for which provision is made for personal service when it is served within the jurisdiction.

3.

A certificate by the Central Authority or other authority designated in respect of a country under the Convention as to how a document has been served or stating that it has been served in accordance with the internal law of that country shall be evidence of the facts stated.

4.

A document purporting to be such a certificate as is mentioned in the previous paragraph shall, unless the contrary is proved, be deemed to be such a certificate.

5.

Where a person wishes to have a document served pursuant to the Convention, he may lodge with the Central Authority designated by the Government for the purpose of that Convention,

(a)

a request for service of the document in the form specified in the Annex to the Convention;

(b)

a summary of the document to be served, in the form specified in that Annex;

(c)

two copies of the document and an additional copy thereof for each person to be served;

(d)

a translation of the document into the official language of the country in which service is to be effected, or, if there is more than one official language of that country, in any of those languages which is appropriate to the place in the country where service is to be effected;

(e)

an undertaking to pay the expenses, payment or reimbursement of which is claimed under the Convention by the Central Authority designated thereunder in respect of the country in which service is to be effected.

6.

Where a document instituting proceedings has to be transmitted abroad for the purpose of service, under the provisions of the Convention and the defendant has not appeared [or given notice to defend] judgment shall not be given until it is established that –

(a)

the document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory, or

(b)

the document was actually delivered to the defendant or to his residence by another method provided for by the Convention,

and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.

7.

The Court may give judgment even if no certificate of service of delivery, as provided by the Convention, has been received, if all the following conditions are fulfilled,

(a) the document was transmitted by one of the methods provided for in the Convention,

(b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document,

(c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.

Notwithstanding the provisions of this sub-section the judge may order, in case of urgency, any provisional or protective measures.

8.

For the purposes of this Order "the Convention" means the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

PART II

Draft Rule to replace Order 121, Rule 9 of the Rules of the Superior Courts

When a document in any civil or commercial matter pending before a court or tribunal of a foreign country is transmitted to the Master by the Minister for Foreign Affairs with an intimation that it is desirable that effect should be given to the same, the following procedure shall be adopted:

(1) The request for service shall be accompanied by a translation thereof in the Irish language or the English language, and by two copies of the document to be

served, and two copies of the translation thereof in the Irish language or the English language, such translations to be certified as correct by a person competent to do so.

(2)

Service of the document shall be effected, by the method requested unless such method is incompatible with the law of the State. Save as aforesaid it shall be effected in accordance with the practice and procedure of the Court by the Chief State Solicitor.

(3)

Service in accordance with the practice and procedure of the Court shall be effected by delivering to and leaving with the person to be served one copy of the process to be served, and one copy of the translation thereof, in accordance with the rules and practice of the Court.

(4)

After service has been effected the process server shall return to the Master one copy of the process, together with the evidence of service by affidavit of the person effecting the service or stating the reason for not effecting service and particulars of charges for the cost of effecting or attempting to effect such service.

(5)

Particulars of charges for the cost of effecting service shall be submitted by the solicitor aforesaid to the Taxing Master who shall certify the correctness of the charges, or such other amount as shall be properly payable for the cost of effecting service. A copy of such charges and certificate shall be forwarded to the Minister for Finance by the Master.

(6)

The Master shall transmit to the Minister for Foreign Affairs evidence of service or the reason why service could not be effected and a copy of the charges and the Taxing Master's certificate, duly certified for use out of the jurisdiction.

(7)

The Master may make all such orders for substituted service or otherwise as may be necessary to give effect to this rule.

Annex 9

THE HAGUE CONVENTION ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL AND COMMERCIAL MATTERS[1]

PATRICK O'CALLAGHAN*

On June 4, 1994, the Hague Convention entered into force for Ireland. The Convention was signed on behalf of Ireland on October 20. 1989. It was incorporated into the procedural law of Ireland by two statutory instruments a short time later, which amended the Superior Court Rules and the District Court Rules.[2] No changes have yet been made to the Circuit Court Rules. This has lead to the anomalous position in the Circuit Court whereby the provisions of the Hague Convention are expressed by statute to be applicable in Brussels Convention matters[3] but are not applicable in other matters.[4] This anomaly is examined later in this article.

The question arises as to whether the Convention has been validly incorporated into Irish law. Irish law holds to the dualist system of municipal and international law. Each system of law, both municipal and international exists separately and cannot purport to have an effect on, or overrule, the other. Before a treaty can be rendered applicable directly within the state, an intermediate stage after ratification and before domestic operation must be undertaken. Otherwise the executive would be able to legislate without the legislature. Whilst it is clear that Ireland must lay every international agreement to which it becomes a party before Dáil Éireann, a second stage is necessary before that agreement becomes part of Irish law.

Under Article 29(6) no international agreement may become part of the domestic law of Ireland save as may be determined by the Oireachtas. It is dubious whether the making of a statutory instrument by the Rules of the Superior Court Committee can be said to be a valid incorporation of the Hague Convention into Irish law. To incorporate the Convention into Irish law, the proper course would have been to pass appropriate legislation[5].

The incorporation of the Convention has led to changes to Irish practice and procedure, including a system for ease of recognition of foreign service. Fundamental issues arise as to whether these changes have been properly

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[1] Treaty Series No. 17 of 1994

[2] A new Ord. 11B and Ord. 121A were inserted into the Super Court Rules by S.F. No. (3) of 1994. A new set of District Court (Service Abroad of Documents in Civil or Commercial matters) Rules, 1994 was enacted by S.I. No. 120 of 1990.

[3] Due to Protocol IV of the Brussels Schedule to the Jurisdiction and Enforcement of Judgments (European Communities) Act 1988.

[4] Due to the combined provisions of Ord. 59, f. 14 of the Circuit Court Rules and the lack of any amendments to the Circuit Court Rules.

[5] See Kelly, Hogan and White *The Irish*

implemented. Questions arise also as to how the Rules of the Superior Court Committee can confer jurisdiction on the Master of the High Court in relation to service in foreign proceedings, as the powers given to the Rules Committee do not extend to foreign proceedings. The statutory basis for the purported exercise of this jurisdiction is doubtful.

In relation to service abroad of Irish proceedings, the conferral of jurisdiction on the Master of the High Court is, it is submitted, *ultra vires* the powers given to the Rules of the Superior Court Committee by section 14(3) of the Courts (Supplemental Provisions) Act 1961 to confer jurisdiction on the Master of the High Court. This arises because the Rules Committee is given power by that subsection to confer jurisdiction on the Master only in uncontested cases. No system can be set up for distinguishing between contested and uncontested cases in relation to service. At present the Master has no jurisdiction in relation to *inter partes* service orders unless this is expressly conferred by statute, *e.g.* under the Settled Land Acts.[6] However, additional powers may be given to him by the Court and Court Officers Act 1995 which may solve this problem.[7]

Moreover, it is difficult to see how the District Court Rules Committee has power to confer any jurisdiction on the Master of the High Court. The statutory basis for the purported exercise of that jurisdiction is doubtful.

Furthermore, effective incorporation of the Convention requires changes to substantive Irish law as well as alterations to domestic practice and procedure. This cannot properly be effected by merely altering rules of court, as these cannot alter substantive rules of law.[8] The Convention should have been implemented by means of an Act of the Oireachtas which would have facilitated changes not merely to Irish practice and procedure, but also changes to substantive Irish law which would have given full effect to the Convention.

The primary focus of this article is the Rules of the Superior Court which seek to give effect to the provisions of the Convention. Where relevant, reference is made to the provisions of the District Court Rules. The article first considers the Convention as adopted, its mode of incorporation into Irish law, the relevant provisions of the Superior Court amendments, its inter-relationship with the Brussels Convention and the current situation in the Circuit Court.

BACKGROUND TO THE CONVENTION

The Convention resulted from the Tenth Session of the Hague Conference on Private International Law in 1964. It was passed unanimously by all 23 countries represented at the session, which included Ireland.[9] It came into force following the deposit of the third instrument of ratification of it[10] on November 15, 1965. The

[6] Sixteenth Interim Report of the Committee on C Practice and Procedure (1972)p.8
[7] S.25
[8] Sec s.36 of the Courts of Justice Act 1924 and Ilenchy J. in *People (Director of Public Prosecutions) v. Quilligan (No. 2)* [1989] I.R. 46 as 53
[9] Mr Patrick Terry, now with the Department of Equality and Law Reform attended on behalf of Ireland
[10] Art. 27(2)

Convention is unusual in that it provides, by Article 28(2), that non-members of the Conference could only join if no objection is interposed by any state then party to the Convention. One of the drafters of the Convention records the reason for this provision as the restriction of the application of the Convention to states whose procedural standards meet those of the members of the original Conference.[11]

OBJECT OF THE CONVENTION

The object of the Convention was to provide a system whereby service of judicial documents of one country, in another, would be greatly simplified. It further seeks to ensure that proof service has been effected. It sets out to achieve these twin aims whilst ensuring that actual notice of the document has been brought to the recipient in each case in sufficient time to enable him to defend the action.

It is intended to achieve these objectives by laying down a procedure to follow in each circumstance which guarantees acceptance of the fact that service has been properly effected. This thereby removes issues as to whether or not service has been properly carried out in the country addressed. It is also intended to avoid costly and complex issues of fact concerning foreign law and whether service has been properly effected in accordance with the relevant foreign law.

To this end, the Convention provides for a government sponsored "Central Authority", which will undertake responsibility for the service of papers emanating from countries which are signatories to the Convention. In Ireland, the Master of the High Court has been designated the Central Authority.

Whether or not an applicant for service utilises the foreign Central Authority in ensuring service is effected in the foreign jurisdiction is a matter of choice. Articles 9 to 11 of the Convention permit wide use of alternative channels for the transmission of the documents for the purpose of service except to the extent that a particular country formally objects to a particular method. The effect of Article 19 of the Convention is to leave unimpaired any internal legislation in the state of destination which may authorise channels other than those provided in the Convention.

The Convention does not affect the forms of service which prevail in Contracting States. The forms of service which apply in these states in respect of domestic actions will apply. Where a document is transmitted for service abroad, the Convention applies. The main change effected by the Convention occurred in many continental countries where it led to the removal of the previously used system of *notification au* parquet to serve parties abroad. This system permitted the plaintiff to serve process merely by delivery to a local court official. Diplomatic channels were then used to try to give notice to the defendant abroad, but failure to do so did not invalidate the service.[12]

[11] Amran (1965)29A.I.L.L. 87 and 91
[12] Ibid

LIMITS

The 1965 Hague Convention is only applicable to civil or commercial matters. This phrase has received a generous interpretation by the Central Authority in most Contracting States.[13] This assists defendants as well as plaintiffs as it ensures they have notice of the relevant proceedings.

INTERRELATIONSHIP WITH THE BRUSSELS CONVENTION

One important point is the interrelationship between this Convention and that other important Convention applicable to civil and commercial matters – the Brussels Convention on the Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters. Under the Annexed Protocol to the Brussels and Lugano Conventions, it is provided by Article IV:

> "Judicial and extrajudicial documents drawn up in one Contracting State which have to be served on persons in another Contracting State shall be transmitted in accordance with the procedures laid down in the conventions and agreements concluded between the Contracting States."

Each of the existing signatories of the E.C. Treaty is a party to the Hague Convention. Accordingly, where a court exercise jurisdiction pursuant to the Brussels and Lugano Conventions, the provisions of the Hague Convention govern the service of judicial and extrajudicial documents between Contracting States.

RATIFICATION BY IRELAND

On April 5, 1994 Ireland deposited its instrument of ratification of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. Ireland, in depositing its instrument of ratification made an objection pursuant to Article 10 and made a declaration pursuant to Articles 3 and 15. These are set out below.

INCORPORATION INTO IRISH LAW

The Convention has been incorporated into Irish law by statutory instrument amending the previously existing rules of court. A similar method was used in England and Wales.[14]

i) Constitutional Issues

When the Law Reform Commission considered the Convention in its Report,[15] it recommended that the view of the Attorney General be taken as to whether the Convention, being an international agreement, needed the approval of the Dáil prior to ratification. It drew attention to the provisions of Article 12 of the Convention which

[13] See the Practical Handbook on the Operation of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (1983) at p.30
[14] See Ord. 69
[15] LRC 22 1987 Report on the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (1965)

provides that the service of judicial documents coming from a Contracting State shall not give rise to any payment of taxes or costs for services rendered by the State addressed. Under the provisions of article 29.5.2 of the Constitution, such approval by the Dáil is necessary where a charge is imposed upon public funds, except where the convention is of a technical and administrative character.[16]

The Attorney General, in considering this issue, appears to have taken the view that the Convention is of a technical and administrative character. Although this may be correct on an interpretation of the Constitution, a number of points can be made. Most legal agreements may be said to be technical in nature. By definition anything which sets up a scheme of some sort is also administrative. As a result of the interpretation given by the Attorney General, very few international agreements or conventions will require either Dáil approval or to be laid before the Dáil – even if they impose a charge on public funds. In the present instance, this procedure has lead to some oversight which may have been ameliorated by a more thorough airing of the relevant issues in the Dáil. This is dealt with further below.

However, a second issue arises under Article 29.6 of the Constitution. This is the issue as to whether the Hague Convention on Service Abroad requires to be consented to by Dáil Éireann before it can be incorporated into Irish law. It is submitted that it ought to have come before the Dáil before it could have been incorporated into Irish law. If this were not the case, it would amount to an abrogation of the legislative function by the executive if every international agreement ratified by the executive organ of the State automatically became incorporated into Irish law.

Article 29[17] recognises the dualistic nature of the international and municipal systems of law in Irish law. There is a dual process before an international agreement can become part of Irish law. The first stage is that the State becomes a party to the international agreement. This process is called ratification and is governed in the internal Irish legal order by Article 29.5. The second stage requires that the international agreement be incorporated into Irish law. This part of the process is governed in the internal Irish legal order by Article 29.6. The determination of the Oireachtas is necessary before an international agreement becomes part of Irish law.

It is submitted that the making of rules by the Superior Courts Rules Committee does not and cannot amount to a determination by the Oireachtas as to whether an international agreement can become part of domestic Irish law. The Oireachtas is given a function in relation to the international relations of the State by Article 29(6). It is debatable whether this function is one which can be delegated to a subordinate legislature in accordance with Article 15(2)(2) for determination of this issue by a subordinate body is not determination by the Oireachtas. The language of Article 29.6. is in absolutist terms. It provides:

[16] In the State (Gilliland) v. Governor of Mountjoy Prison [1987] I.R. 201, Finlay C.J. stated that Article 29(5) envisaged three separate categories of international agreement, one of which were those of a technical or administrative character which need neither to be laid before Dáil Éireannnor irrespective, apparently, of whether it involves any charge on public funds, do its terms require the approval of Dáil Éireann.

[17] Sub-articles 5 and 6

> "No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas."

It is submitted that to seek to import the Hague Convention by means of a statutory instrument made as part of the Rules of the Superior Courts is unconstitutional.

ii) Legislative Issues

Under the scheme of amendments to the Rules of the Superior Courts which have been adopted, a separate regime has been adopted for domestic proceedings which require service abroad and for foreign proceedings for which service is required to be effected here.

(a) *Service in a Foreign Country.*[18] In relation to the internal scheme which has been set up for incorporation of The Hague Convention, a number of oversights has occurred. These stem in the main from a failure to appreciate the fundamental distinction between domestic and international law and the need for appropriate incorporation measures to be followed. Several of the relevant legislative provisions which are applicable have been either ignored or disregarded. So too has the distinction, which runs throughout our law, between substantive legal matters and those which merely deal with practice and procedure, been ignored. The position has been further exacerbated by the failure to appreciate the nature of the original jurisdiction of the High Court. The original jurisdiction of the High Court applies only to Irish court matters. It does not extend to matters in aid of foreign proceedings unless this jurisdiction has been expressly conferred by statute.

The flaws in the scheme adopted result in the main from the recommendations put forward by the Law Reform Committee in the 1987 Report. In that Report it was recommended that the Convention be adopted into Irish law by amending the Rules of the Superior Courts. A similar method had been adopted in England and Wales.[19] However, the legislative scheme subsisting in England is markedly different from that obtaining in Ireland and proper account was not taken of that fact.[20]

In relation to domestic proceedings which require service abroad, Order 11B purports to give jurisdiction to the Master of the High Court, a practising solicitor, a country registrar and a District Court clerk to act as competent judicial officers for the purposes of the Convention.

Firstly, the Master of the High Court has no jurisdiction to make an order in respect of service *inter partes* except where he is given such power by a specific statute. This was accepted by the Committee on Court Practice and Procedure in 1972 in their Sixteenth Interim Report.[21] They took the view that no residual power regarding service orders devolved on the Master of the High Court by Section 31(3) of the 1924 Court Officers Act. Amendments have recently been

[18] Ord. 11B
[19] See Ord. 69 Supreme Court Practice
[20] See S.99(4) of the Supreme Court of Judicature (Constitution) Act 1925; Administration of Justice Act 1977
[21] p.8

made in the Court and Court Officers Act 1995 to amend the jurisdictional limits of the Master of the High Court.[22] As such the Master of the High Court possesses no jurisdiction in relation to service orders generally unless power is otherwise conferred on him – no such power has been conferred.

Secondly, section 14(3) of the Courts (Supplemental Provisions) Act 1961 gives power to the Rules of the Superior Courts Committee to confer jurisdiction on the Master of the High Court only in relation to uncontested cases. It provides:

> "(3) Rules of the Court may, in relation to proceedings and matters (not being criminal proceedings or matters relating to the liberty of the person) in the High Court and Supreme Court, authorise the Master of the High Court and other principal officers, within the meaning of the Courts Officers Act 1926 to 1951, to exercise functions, powers and jurisdictions in uncontested cases and to take accounts, conduct enquiries and make orders of an interlocutory nature."

As not all cases under the Hague Convention will be uncontested, this conferral of jurisdiction by the Superior Court Rules Committee is *ultra vires* their powers and invalid. It is submitted that section 25(3) of the Court and Court Officers Act 1995 further fails to ameliorate this deficiency as it does not deal with the jurisdiction of the Rules Committee to confer power on the Master of the High Court.

It must be mentioned at this juncture that section 36(ix) of the Courts of Justice Act 1924 apparently permits rules of court to be made by the Superior Court Rules Committee for "the adaption or modification of any statute that may be requisite for any of the purposes of this Act and all subsidiary matters". However, as Walsh J. states in *Thompson v. Curry*[23] this power cannot be used to amend a statutory provision. In that case the court accepted the provision allegedly conferred power to modify or adapt an Act. However this reasoning is of doubtful validity if one follows the reasoning of the Supreme Court in cases such as *City View Press Ltd. V. AnCO* [24] for the power to modify or adapt legislation is one which cannot be validly delegated to the Rules Committee. Article 15.2.1 of the Constitution provides that the Dáil is the sole legislative authority.

(b) Service of Foreign Process in Ireland: In relation to the service of foreign process within the jurisdiction, a number of points may be made. The High Court has original jurisdiction in relation to Irish proceedings. However, it is submitted that a statute is required to give jurisdiction to the High Court in respect of foreign proceedings. This is what occurred in relation to the Brussels Convention, although that was part of our obligations as members of the E.C.

Similar points to those above may be made regarding the lack of power of the Superior Court Rules Committee to give jurisdiction to the Master of the High Court over contested proceedings and the lack of jurisdiction of the Master of the High Court over *inter partes* service orders.

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[22] S.25
[23] [1970]I.R.61
[24] [1980]I.R.381

(c) Form Adopted Generally: In relation to the scheme adopted generally, several changes to substantive Irish law are required by the incorporation of the Convention. The jurisdiction of the Superior Court Rules Committee extends only to pleading, practice and procedure generally.[25] It does not extend to matters of substantive law, which can only be dealt with by statute under Article 15. A more appropriate method would have been to enact an Act of the Oireachtas to implement appropriate changes. The making of orders for substituted service, matters of status and default judgments required substantive law amendments.

OVERVIEW OF THE IRISH SCHEME

In depositing their instrument of ratification, Ireland designated the Master of the High Court as the Central Authority who will receive requests for service from other Contracting States.[26] As the Central Authority, the Master of the High Court ensures that the document is properly served, either in accordance with domestic forms of service, or in accordance with a particular method requested by the applicant, unless the particular method is incompatible with Irish law. Voluntary acceptance of service by the recipient dispenses with the need for formal service.[27] In any case where service has not been effected or a particular form of service has not been effected, the Central Authority may make an order for substituted service, following an application from the State Solicitor. A summary of the document to be served must also be served with the document itself[28] in the form laid down in the Convention. Where service of process cannot be effected, the Central Authority may return the request for service stating the reasons why service has not been effected.[29]

SERVICE OF FOREIGN PROCESS IN IRELAND

The Master of the High Court is the Central Authority for the receipt of requests for service coming from other Contracting States. However, a solicitor is also a competent person for effecting service in accordance with the Convention. This follows from the fact that Ireland, when depositing its instrument of ratification, made an objection under Article 10, by which it objects to:

> *i. the freedom under Article 10(b) of judicial officers, officials or other competent persons of the State of origin to effect service in Ireland of judicial documents directly to judicial officers, officials or other competent persons and*
>
> *ii. the freedom under Article 10(c) of any person interested in a judicial proceeding to effect service in Ireland of judicial documents directly through judicial officers, officials or other competent persons.*

However this objection is not intended to preclude any person in another contracting State who is interested in a judicial proceeding or his lawyer, from effecting service in Ireland directly through a solicitor in Ireland.

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[25]

[26] Under Art. 2

[27] Art. 5 para. 2

[28] Art. 5

[29] Ord. 1121A, c.3(9)b

This objection gives rise to two questions which have to be answered before the service of foreign process in Ireland is valid. The first is whether the mode of service followed is valid under the law of the State of origin. The second question which is important is the competency of the Irish official who effects service. Under the terms of this objection, there are only two officials who possess the necessary competence to effect service under the Convention in Ireland. These are the Central Authority and a solicitor. No one else is permitted to validly effect service in Ireland under the terms of the Convention. This has the effect that, although service may ultimately be valid according to the law of the State of origin, it is not good service for the purposes of the Convention.

This has the practical effect that any solicitor in Ireland can act as agent for a foreign solicitor so as to effect service in Ireland. However, it prevents town agents or legal services agents from validly effecting service in Ireland for a foreign firm in accordance with the Convention. Therefore any foreign firm of lawyers, in Germany for example, cannot utilise an Irish agent for the purpose of effecting service in Ireland, unless that Irish agent is a solicitor where it is desired to properly effect service in accordance with the Convention. This is an important limitation, for nowhere is it explicitly stated. It arises by implication from the terms of the objection to the ratification of the Convention. Many foreign legal firms are unaware of this limitation and many, at present, seek to effect service in Ireland in accordance with the Convention through an agent of some sort. Arguably it would even prevent a foreign litigant in person in the state of origin from effecting personal service of his own action in Ireland in accordance with the Convention, for he would neither be a solicitor nor the Central Authority, who are the only competent persons to effect service in Ireland under the Convention. This limitation on the competency of persons to effect service in accordance with the Convention of foreign proceedings in Ireland should be explicitly stated in legislation.

Postal service is also a valid method of service under the Convention.[30] If the foreign country mandates postal service as part of its law then this is good service in Ireland for the purposes of the Convention. This is so even where a similar document would not be served by post under Irish law. This has the effect of weakening the protection to Irish defendants from being taken by surprise by a judgment registered abroad against them, as service will be deemed good even if the wrong address is used.

Where it is sought to effect service of foreign process in Ireland using the Central Authority it is necessary to lodge with the Central Authority a request which conforms to the form set out in the Annex together with the relevant proofs.[31]

i. The request for service in duplicate. This should also contain, in the form attached to the Convention a summary of the document to be served;

ii. The document to be served, or a copy of it,[32] in duplicate. These should be translated into either the Irish language or English because of the power given to the Irish Central Authority to request translation under Article 5;

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[30] Art. 10a
[31] Ord.131A, r.3(2)
[32] Art. 3

iii. An undertaking to reimburse the costs of service.

A particular method may be requested by the applicant who desires service.[33]

This will be given effect to by the Central Authority unless it is satisfied that the method requested is incompatible with the law of Ireland or the practice and procedure of "the Court"[34] Where a particular method of service is requested, but is incompatible with the law of Ireland or the practice and procedure of the State, it is provided that personal service shall be effected on the person sought to be served. [35] However this absolute rule is mitigated by the provisions of Order 121A, rule 3(9) which provides that the Central Authority, on the application of the Chief State Solicitor, may make such order for substituted service as appears necessary. This amounts to a change in the substantive law and, it is submitted, would require legislation. The Superior Court Rules Committee have no power to effect a change in the substantive law in this manner.[36]

CERTIFICATES

Where a foreign legal document has been served in Ireland under the provisions of the Convention, the Master of the High Court is the appropriate authority for completion of certificates that the Convention has been complied with.[37] These must be completed in accordance with a model form provided under the Convention. This certificate states the document has been served and includes the method, the place and the date of service and the person to whom the document was delivered.[38] Where the document has not been served the certificate shall set out the reasons which have prevented service. This certificate will form an essential proof of service in any subsequent application, where the document has been served abroad in accordance with the terms of the Hague Convention.

The Central Authority of the state of destination may refuse to comply with a request for service only if it deems that compliance would infringe its sovereignty or security.[39] No refusal is justified on the basis of want of jurisdiction of the requesting state.

SERVICE OF IRISH PROCESS ABROAD

Where it is sought to utilise the provisions of the Convention in order to effect service abroad of a judicial or extrajudicial document, then the document must be forwarded to the Central Authority of the foreign state by a "judicial officer" in this state. A judicial officer is someone competent under the Convention to forward documents to the Central Authority of another State.[40] By Ireland's instrument of ratification it was

[33] Art. 5(b)
[34] Presumably where a certain form of service genereally, this will not preclude use of it in relation to service in aid of a foreign proceedings.
[35] Ord. 121A, f3(4)
[36] Section 36 of the Courts of Justice Act
[37]
[38] Art. 6
[39] Art. 13
[40] See definition in Ord.IIR, e.1

declared that a practising solicitor, a County Registrar, a District Court Clerk and the Central Authority (the Master of the High Court) were the persons competent to deliver judicial and extrajudicial documents to another State under Article 3 of the Convention. This is further enacted into Irish law under the provisions of Order 11B, rule 2(3).

Use of either the Irish Central Authority or the foreign Central Authority is purely optional for the applicant for service under the Hague Convention. Article 9 to 11 of the convention permit wide use of alternative channels for the transmission of the documents for the purpose of service except to the extent that a particular country objects to a particular method. There are several avenues open if an Irish solicitor wishes to serve a judicial or extrajudicial document abroad – absent the voluntary acceptance of the document by the recipient under Article 5(c), for voluntary acceptance renders reference to the procedural mechanisms of the Convention unnecessary.

A solicitor can either:

i. seek the assistance of the office of the Master of the High Court to forward the document to the relevant Central Authority of the state of destination, where it will be served in accordance with the Convention;

ii. forward the document to the foreign Central Authority of the state of destination with a request for service by it;

iii. provided the state of destination does not object, enlist the assistance of the judicial officers, officials or other competent persons of the state of destination to effect service either through the judicial officers of Ireland,[41] or of his own accord;[42]

iv. provided the state of destination does not object and provided it is mandated by an Irish court, serve the documents through postal channels,[43] e.g. under the Circuit Court Rules.

FORMS OF PROCESS COVERED

The Convention applies to judicial and extrajudicial documents.[44] By Order 11(B)2, the method of service provided by that Order applies to the service of any summons, notice, document, citation, petition, affidavit, pleading, order or any form either issued pursuant to the Rules of the Superior Courts or lodged for service with a request to the Central Authority for service under the Convention.

Extrajudicial documents are, by nature, not connected with lawsuits. However they require the intervention of an "authority" of the State addressed. The inclusion of extrajudicial documents was included at the request of the experts of Ireland and the U.K. It had previously been the intention of the drafters to exclude documents emanating from private persons from the scope of the Convention. Examples of

[41] Art. 10(b)
[42] Art. 10(c)
[43] Art. 10(d)
[44]

extrajudicial documents are demands for payment, notices to quit in connect with leaseholds, certain consents to adoption and protests in relation to bills of exchange but all on the condition that they emanate from an authority or from a process server. In both Ireland and England, certain of these documents could be served by a private person. In certain other countries the assistance of an appropriate authority is necessary where service is sought to be effected.

PROCEDURE – SERVICE ABROAD

Where it is sought to effect service abroad using the Central Authority it is necessary to lodge with the Central Authority:

i. A request for service of the document and a copy in the form set out in the Annex to the Convention;

ii. Two copies of the document to be served with an additional copy for each person to be served;

iii. A translation of each document into the official language or one of the official languages of the State addressed unless the said document is already in one of the official languages of the State addressed. It is important to note that this is a requirement of internal Irish law;

iv. An undertaking to pay the costs of service.

The documents must be lodged by either a party to the proceedings or a competent judicial officer, as defined in the Convention.

A request for service in accordance with the terms of the Convention must conform with the form set out in the Annex to the Convention. The request must either:

i. conform with a method of service prescribed by the internal law of the state of destination for service of documents in domestic actions upon persons resident in the territory of the state of destination; or

ii. if a particular method is requested by the applicant, this method must not be incompatible with the law of the State of destination.[45]

Where the request complies with the necessary proofs and has been lodged by an appropriate person, then the documents will be forwarded to the Central Authority of the State where service is to be effected.[46]

Where a solicitor wishes to forward the relevant process for service to the foreign Central Authority himself, reference should be made to the office of the Master of the High Court to find out the address of the relevant foreign Central Authority to which the document or process should be sent so as to ensure effective service. A full list is maintained. It is further important to check the list of objections which the state of

[45] This was a Swiss proposal – See Graveson (1965)14 I.L.C.Q.528 at 540
[46]

destination has made in ratifying the Convention. This may affect the manner, mode or person who can effect service in the state of destination. A full list is maintained in the office of the Master of the High Court.

If a solicitor decides to effect service himself he needs to be aware of several of the provisions of the Convention and the manner in which the Convention has been incorporated into the law of the State where service is sought to be effected. The first requirement is that the solicitor be aware of the countries which are a party to the Hague Convention. The Master of the High Court is obliged to maintain a list of all countries which have adopted the Convention together with the official languages of each and the address of the Central Authority in each country.[47] This list is available for inspection in the Central Office and copies are available on request. Reference should be made to this list to ascertain whether the country in which service is sought to be effected is a party to the Convention. At present all countries in the E.C. with the exception of Austria, almost all U.K. colonies, Canada, the U.S., Israel, China, Norway, the Czech and Slovak republics, Egypt, Cyprus, Turkey, Japan and Switzerland are parties to the Convention.

An important point to note where the recipient state is Germany is the number of different addresses to which process might be sent, owing to the internal delegation of the functions of the Central Authority under the Convention to each *land* under Article 18.

APPROVAL PROCEDURE

Where a solicitor wishes to effect service himself but wants to know if all the relevant documents have been properly included by him before forwarding them to the Central Authority of the State of destination, then there is an approval procedure set out in Order 11B, rule 3(3) whereby the Central Authority may certify that the necessary conditions for transmission to the Central Authority of the state of destination have been complied with. This is a novel feature of the Irish rules which is not included in the original Convention. Where the provisions have not been complied with, the Central Authority will inform the applicant and specify the objections to the request.[48]

OTHER METHODS OF SERVICE

A permissive provision is included in Article 8 of the Convention which allows service by the state of origin upon persons abroad, through its diplomatic or consular agents in the state of destination. This must be effected without compulsion. However, a contracting State may declare it is opposed to this form of service unless the person to be served is a national of the State of origin of the document.

Article 9(1) also permits each contracting State to use consular channels to forward documents to the authorities of the state of destination of it so wishes. If exceptional circumstances so require, diplomatic channels may also be used by a Contracting State to forward the relevant judicial and extrajudicial documents to the state of

[47] Ord. 11Bf.3(5)
[48] Ord. 11Bf.3(4)

destination.[49] There is also power given to any two Contracting States to stipulate channels of transmission other than those provided in the Convention.

JUDGMENT IN DEFAULT

Where judgment in default of appearance is sought to be obtained on the basis that service has been effected under Order 11B which incorporates the Hague Convention, it shall not be given until it is established that the defendant was served either in accordance with the internal law of the state of destination or by some other method provided for in the Convention in sufficient time to enable him to defend.[50] The application for leave to enter judgment will be with the leave of the court,[51] and will be supported by the proceedings.[52] Where the Central Authority of the destination state has been used to effect service, a certificate in the form set out in the Annex to the Convention should be adduced as proof that service has been properly effected.

When ratifying the Convention, Ireland made a declaration under Article 15 of the Convention that a judge in Ireland may give judgment even if no certificate of service or delivery had been received, provided that certain conditions were fulfilled. The text of Article 15 has been substantially incorporated into the Rules of the Superior Courts as part of Order 11B, rule 4(5). This states:

> "Notwithstanding rule 4(1) the Court may give leave to enter judgment if no certificate of service or delivery has been received from the Central Authority of the State addressed, provided that:
>
> (a) The document was transmitted by one of the methods provided for in the Convention.
>
> (b) A period of time (of not less than six months) considered adequate by the Court has elapsed since the transmission of the document.
>
> (c) No certificate of any kind has been received and that every reasonable effort has been made to obtain it through the competent authorities of the State addressed."

Any provisional or protective measures in support of the judgment are automatically possible.

JUDGMENT IN DEFAULT AND BRUSSELS CONVENTION

Where service out has been effected under Order 11A, rule 2 as well as the defendant being served abroad, then the requirements of Order 11B, rule 4 and Order 13A which prescribes certain requirements for compliance with the Brussels Convention, are cumulative.[53]

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[49] Art. 9(2)
[50] Ord. 11B,f.4(2)
[51] Ord. 11B,f.4(3)

[52] Ord. 11B,f.4(4)
[53] Ord. 11B, f.4(1)

Article 20 of the Brussels Convention provides:

> "Where a defendant domiciled in one Contracting State is sued in a court of another Contracting State and does not enter an appearance, the court shall declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from the provisions of this Convention.
>
> The Court shall stay the proceedings so long as it is not shown that the defendant has been able to receive the document instituting the proceedings in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end.
>
> The provisions of the foregoing paragraph shall be replaced by those of Article 15 of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, if the document instituting the proceedings or notice thereof had to be transmitted abroad in accordance with that Convention."

Hereafter all documents served abroad under the Brussels and Lugano Conventions (except for service in Austria) will in the future have to be served in accordance with the Hague Convention, as the provisions of the final paragraph will govern all such cases. Accordingly the provisions of Article 15 of the Hague Convention will govern the giving of judgment in default where jurisdiction has been founded on the Brussels Convention.[54]

SETTING ASIDE A DEFAULT JUDGMENT

Where it is sought either to set aside or to extend time for appealing a judgment obtained in default, a court needs to be satisfied that:

(a) the application was made within a reasonable time after the defendant had knowledge of the judgment, and

(b) the defendant, without any fault on his part, where it is a judgment in default, did not have knowledge of the document in sufficient time to defend or, in the case of an appeal, did not have knowledge of the judgment in sufficient time to appeal, and

(c) that the defendant has disclosed a prima facie defence to the action on the merits.[55]

If satisfied with the above criteria, then the court may set aside the judgment or extend the time for appeal, on such terms and conditions as appear just.

One lacuna which is present in Irish law is the non-incorporation of the rule that judgments relating to matters of status or capacity of persons are not subject to the

[54] See Case 228/81Pendy Plastic Products BV v.Pluspunkt Handelsgesellschaft GmbH [1982] E.C.R. 2733

[55] Ord. 11B, f.4(6)

above rules. At the time of the drafting of the Convention, another Convention of matters relating to marriage and divorce was before the Conference and it was considered by the drafters that this provision should not apply to such matters.[56] This is the better view as it puts an end to uncertainty in such cases as decrees of divorce and nullity.[57] An amendment to exclude the application of this rule to family matters should be preferable. However, as this would involve matters relating to substantive law rather than mere matters of procedure, an Act of the Oireachtas is the appropriate method to proceed if seeking to ameliorate this deficiency.

COSTS

The applicant for service is to pay the cost of the services of judicial officers or competent process servers. Where service is effected in aid of a foreign proceeding, then the process server will swear an affidavit of service which will include, where the cost of service exceeds the normal cost of effecting service, the costs actually incurred. Where service is effected abroad, the costs incurred in effecting service are recoverable upon taxation as part of the normal costs incurred.

THE CIRCUIT COURT

To date no amendments have been made to the Circuit Court Rules so as to give effect to the Convention. Whilst it is submitted that this is not the appropriate course to follow so as to give effect to the Convention in that court, the present position is that the Hague Convention on Service Abroad can be utilised in the Circuit Court where matters relating to the Brussels Convention are being dealt with.

As the Circuit Court Rules already possess rules dealing with service of documents, there is no room for the implication of the relevant High Court Rules which incorporate the Hague Convention under Circuit Court Rules. However the provisions of Section 3 and the First Schedule of the Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act 1988 provides that the Hague Convention on Service Abroad shall have effect in Brussels and Lugano Convention matters. As set out above, Article IV of the Annexed Protocol to the Brussels Convention provides that Conventions and Agreements concluded between the Contracting States shall govern the transmission of judicial and extrajudicial documents. As the Hague Convention on Service Abroad is applicable in each E.C. State, save for Austria, it governs the transmission of all documents under the Brussels Convention. Accordingly it should be possible to utilise the provisions of the Hague Convention on Service Abroad to serve Circuit Court proceedings where it is a Brussels Convention matter. This would ensure easy proof that service has been validly effected in the state of destination.

CONCLUSION

The appropriate course to seek to follow to give full and proper effect to the Hague Convention on Service Abroad is to pass an Act of the Oireachtas incorporating its provisions into Irish law. The mode of incorporation by amendments to the Superior

[56] Amram, above at n.11
[57] See Graveson (1965) 14 I.C.L.Q. 528 at 541

Court Rules is seriously flawed. The present system, it is argued, is both unconstitutional and unlawful.

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