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EUROPEAN INFORMATION - SIA

INTERNATIONAL PRIVATE AND PROCEDURAL LAW OF THE EU

LEGISLATIVE MATERIALS

2008

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Content

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1.3 Implementation of the Rome convention

1.3.1 Denmark

- Consolidated act 1990
- Amendment 2000
- Original act 1984
- Amendment 1986
- Amendment 1990

1.3.2 Germany

1.4 EU Legislation

1.4.1 Rome I – Regulation No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations

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- Green paper 2003

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- Proposal 2003
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- Press release 2008

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- Proposal 2006
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2.2.1 Denmark, Ireland and Great Britain

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2.2.2 Corrigendum to Denmark, Ireland and Great Britain

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2.3 <u>EU Legislation</u>

2.3.1 Bruxelles I - Council Regulation No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

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  - Council Decision 2006/325 of 27 April 2006 concerning the conclusion of the Agreement
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  - Council Decision 2005/790 of 20 September 2005 on the signing, on behalf of the Community, of the Agreement
    - Proposal with explanatory memorandum
- Bulgaria and Romania - Council Regulation No. 1791/2006 of 20 November 2006 adapting certain Regulations and Decisions in the fields of free movement of goods, freedom of movement of persons, company law, competition policy, agriculture (including veterinary and phytosanitary legislation), transport policy, taxation, statistics, energy, environment, cooperation in the fields of justice and home affairs, customs union, external relations, common foreign and security policy and institutions,

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by reason of the accession of Bulgaria and Romania

- Czech etc – ACT concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded
- Amendment 2004 - Commission Regulation No 2245/2004 of 27 December 2004 amending Annexes I, II, III and IV to Council Regulation No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
    - First version - Commission Regulation No. 1937/2004 of 9 November 2004 amending Annexes I, II, III and IV to Council Regulation No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
    - Repeal of first version - Corrigendum to Commission Regulation No. 1937/2004
- Amendment 2002 - Commission Regulation No. 1496/2002 of 21 August 2002 amending Annex I (the rules of jurisdiction referred to in Article 3(2) and Article 4(2)) and Annex II (the list of competent courts and authorities) to Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters

2.3.2 Insurance etc.

2.4 Lugano Convention

2.4.1 Convention text 2007

- Decision

2.4.2 Convention text 1988

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2.4.3 Corrigendum to the convention (I)

2.4.4 Corrigendum to the convention (II)

2.4.5 Explanatory report 1990

2.4.6 Annual reports

- First report 1999
- Second report 2000
- Third report 2001
- Fourth report 2002
- Fifth report 2003
- Sixth report 2004
- Seventh report 2005
- Eighth report 2006

2.5 Hague conventions

2.5.1 Choice of Court - Convention of 30 June 2005 on Choice of Court Agreements (not yet in force)

- Proposal for a Council Decision on the signing by the European Community of the Convention on Choice-of-Court Agreements - COM(2008) 538 final

2.5.2 Choice of Court - Convention of 25 November 1965 on the Choice of Court (not yet in force)

3. Jurisdiction and enforcement in matrimonial and parenthood matters

3.1 Convention on matrimonial and parenthood matters

3.1.1 Convention text

- Act on the convention

3.1.2 Explanatory report on the convention

3.1.3 Protocol on interpretation

- Act on the protocol

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3.2 EU Legislation

3.2.1 Bruxelles IIa - Council Regulation No. 2201/2003 of 27 November

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2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation No. 1347/2000

- Amendment - Council Regulation No. 2116/2004 of 2 December 2004 amending Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation No. 1347/2000, as regards treaties with the Holy See
- Proposed amendment 2006
    - Impact assessment
    - Executive summary

3.2.2 Bruxelles II - Repealed Council Regulation No. 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses

- Czech etc – Act of accession (see above)

3.3 EU authorisation

3.3.1 Authorisation 2003 for the Hague 1996 convention

3.3.2 Authorisation 2008 for the Hague 1996 convention

3.4 Hague conventions

3.4.1 Children - Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children

- Outline of convention

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4. Insolvency

4.1 EU Legislation

4.1.1 Council Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings

- Bulgaria and Romania - Regulation of adaption (see above)
- Czech etc - Act of accession (see above)
- Amendment 2006 - Council Regulation (EC) No 694/2006 of 27 April 2006 amending the lists of insolvency proceedings, winding-up proceedings and liquidators in Annexes A, B and C to Regulation (EC) No 1346/2000 on insolvency proceedings
- Amendment 2005 - Council Regulation (EC) No 603/2005 of 12 April 2005 amending the lists of insolvency proceedings, inding-up proceedings and liquidators in Annexes A, B and C to Regulation (EC) No 1346/2000 on insolvency proceedings

5. Uncontested and small claims

5.1 EU Legislation

5.1.1 Regulation creating a European Enforcement Order for uncontested claims

5.1.2 Order for payment procedure - Regulation No. 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure

- Corrigendum
- Proposal

5.1.3 Small claims procedure - Regulation No. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure

- Proposal

6. Service

6.1 Convention on service

6.1.1 Convention text

6.1.2 Explanatory report on the convention

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6.1.3 Protocol on interpretation

6.1.4 Explanatory report on the protocol

6.2 EU Legislation

6.2.1 Service - Regulation No. 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation No. 1348/2000

6.2.2 Service – Repealed Council Regulation No. 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters

6.2.3 Denmark

- Agreement between the European Community and the Kingdom of Denmark on the service of judicial and extrajudicial documents in civil or commercial matters
  - Information on entry into force
- Council Decision 2006/326 of 27 April 2006 concerning the conclusion of the Agreement
  - Proposal with explanatory memorandum
- Council Decision 2005/794 of 20 September 2005 on the signing, on behalf of the Community, of the Agreement
  - Proposal with explanatory memorandum

6.3 Hague conventions

6.3.1 Service - Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters
  - Outline of convention

6.3.2 Civil procedure - Convention of 1 March 1954 on civil procedure

7. Other EU Legislation

7.1 Council Regulation No. 1206/2001 on cooperation between courts of the Member States in the taking of evidence in civil or commercial matters

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7.2 Council Directive 2002/8 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes

7.3 Council Decision 2001/470 of 28 May 2001 establishing a European Judicial Network in civil and commercial matters

7.4 Decision No 1149/2007/EC of the European Parliament and of the Council of 25 September 2007 establishing for the period 2007-2013 the Specific Programme Civil Justice as part of the General Programme Fundamental Rights and Justice

8. Other issues

8.1 Hague Conference - Council Decision 2006/719/EC of 5 October 2006 on the accession of the Community to the Hague Conference on Private International Law

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TO BE INSERTED

Convention on the law applicable to contractual obligations (Consolidated version) - First protocol on the interpretation of the 1980 convention by the Court of Justice (Consolidated version) - Second protocol conferring on the Court of Justice powers to interpret the 1980 convention (Consolidated version)

Convention on the law applicable to contractual obligations

(Consolidated version)

First protocol on the interpretation of the 1980 convention by the Court of Justice

(Consolidated version)

Second protocol conferring on the Court of Justice powers to interpret the 1980 convention

(Consolidated version)

(2005/C 334/01)

PRELIMINARY NOTE

The signing on 14 April 2005 of the Convention on the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the Rome Convention on the law applicable to contractual obligations and to the two Protocols on its interpretation by the Court of Justice has made it desirable to produce a consolidated version of the Rome Convention and those two Protocols.

These texts are accompanied by six declarations, the first one made in 1980 with regard to the need for consistency between measures to be adopted on choice-of-law rules by the Community and those under the Convention, the second, also made in 1980, on the interpretation of the Convention by the Court of Justice, the third, made in 1996, concerning compliance with the procedure provided for in Article 23 of the Rome Convention as regards carriage of goods by sea, the fourth, made in 2005 concerning the deadlines set for ratification of the Accession Conventions, the fifth, also made in 2005, concerning the timing of the submission of the proposal for a Regulation on the law applicable to contractual obligations, and the sixth, also made in 2005, on the exchange of information.

The text printed in this edition was drawn up by the General Secretariat of the Council, in whose archives the originals of the instruments concerned are deposited. It should be noted, however, that this text has no binding force. The official texts of the instruments consolidated are to be found in the following Official Journals.

Language version of the Official Journal ¦ 1980 Convention ¦ 1984 Accession Convention ¦ 1988 First Protocol ¦ 1988 Second Protocol ¦1992 Accession Convention ¦ 1996 Accession Convention ¦ 2005 Accession Convention ¦

German ¦ L 266, 9.10.1980, p. 1 ¦ L 146, 31.5.1984, p. 1 ¦ L 48, 20.2.1989, p. 1 ¦ L 48, 20.2.1989, p. 17 ¦ L 333, 18.11.1992, p. 1 ¦ C 15, 15.1.1997, p. 10 ¦ C 169, 8.7.2005, p. 1 ¦

English ¦ L 266, 9.10.1980, p. 1 ¦ L 146, 31.5.1984, p. 1 ¦ L 48, 20.2.1989, p. 1 ¦ L 48, 20.2.1989, p. 17 ¦ L 333, 18.11.1992, p. 1 ¦ C 15, 15.1.1997, p. 10 ¦ C 169, 8.7.2005, p. 1 ¦

Danish ¦ L 266, 9.10.1980, p. 1 ¦ L 146, 31.5.1984, p. 1 ¦ L 48, 20.2.1989, p. 1 ¦ L 48, 20.2.1989, p. 17 ¦ L 333, 18.11.1992, p. 1 ¦ C 15, 15.1.1997, p. 10 ¦ C 169, 8.7.2005, p. 1 ¦

French ¦ L 266, 9.10.1980, p. 1 ¦ L 146, 31.5.1984, p. 1 ¦ L 48, 20.2.1989, p. 1 ¦ L 48, 20.2.1989, p. 17 ¦ L 333, 18.11.1992, p. 1 ¦ C 15, 15.1.1997, p. 10 ¦ C 169, 8.7.2005, p. 1 ¦

Greek ¦ L 146, 31.5.1984, p. 7 ¦ L 146, 31.5.1984, p. 1 ¦ L 48, 20.2.1989, p. 1 ¦ L 48, 20.2.1989, p. 17 ¦ L 333, 18.11.1992, p. 1 ¦ C 15, 15.1.1997, p. 10 ¦ C 169, 8.7.2005, p. 1 ¦

Irish ¦ Special Edition (L 266) ¦ Special Edition (L 146) ¦ Special Edition (L 48) ¦ Special Edition (L 48) ¦ Special Edition (L 333) ¦Special Edition (C 15) ¦ Special Edition (C 169) ¦

Italian ¦ L 266, 9.10.1980, p. 1 ¦ L 146, 31.5.1984, p. 1 ¦ L 48, 20.2.1989, p. 1 ¦ L 48, 20.2.1989, p. 17 ¦ L 333, 18.11.1992, p. 1 ¦ C 15, 15.1.1997, p. 10 ¦ C 169, 8.7.2005, p. 1 ¦

Dutch ¦ L 266, 9.10.1980, p. 1 ¦ L 146, 31.5.1984, p. 1 ¦ L 48, 20.2.1989, p. 1 ¦ L 48, 20.2.1989, p. 17 ¦ L 333, 18.11.1992, p. 1 ¦ C 15, 15.1.1997, p. 10 ¦ C 169, 8.7.2005, p. 1 ¦

Spanish ¦ Special Edition, Chapter 1, Volume 3, p. 36 (see also OJ L 333, p. 17) ¦ Special Edition, Chapter 1, Volume 4, p. 36 (see also OJ L 333, p. 72) ¦ L 48, 20.2.1989, p. 1 ¦ L 48, 20.2.1989, p. 17 ¦ L 333, 18.11.1992, p. 1 ¦ C 15, 15.1.1997, p. 10 ¦ C 169, 8.7.2005, p. 1 ¦

Portuguese ¦ Special Edition, Chapter 1, Volume 3, p. 36 (see also OJ L 333, p. 7) ¦ Special Edition, Chapter 1, Volume 4, p. 72 (see also OJ L 333, p. 7) ¦ L 48, 20.2.1989, p. 1 ¦ L 48, 20.2.1989, p. 17 ¦ L 333, 18.11.1992, p. 1 ¦ C 15, 15.1.1997, p. 10 ¦ C 169, 8.7.2005, p. 1 ¦

Finnish ¦ C 15, 15.1.1997, p. 70 ¦ C 15, 15.1.1997, p. 66 ¦ C 15, 15.1.1997, p. 60 ¦ C 15, 15.1.1997, p. 64 ¦ C 15, 15.1.1997, p. 68 ¦ C 15, 15.1.1997, p. 53 ¦ C 169, 8.7.2005, p. 1 ¦

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Maltese ¦ C 169, 8.7.2005, p. 10 ¦ C 169, 8.7.2005, p. 23 ¦ C 169, 8.7.2005, p. 10 ¦ C 169, 8.7.2005, p. 10 ¦ C 169, 8.7.2005, p. 26 ¦ C 169, 8.7.2005, p. 28 ¦ C 169, 8.7.2005, p. 1 ¦

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Slovak ¦ C 169, 8.7.2005, p. 10 ¦ C 169, 8.7.2005, p. 23 ¦ C 169, 8.7.2005, p. 10 ¦ C 169, 8.7.2005, p. 10 ¦ C 169, 8.7.2005, p. 26 ¦ C 169, 8.7.2005, p. 28 ¦ C 169, 8.7.2005, p. 1 ¦

Slovene ¦ C 169, 8.7.2005, p. 10 ¦ C 169, 8.7.2005, p. 23 ¦ C 169, 8.7.2005, p. 10 ¦ C 169, 8.7.2005, p. 10 ¦ C 169, 8.7.2005, p. 26 ¦ C 169, 8.7.2005, p. 28 ¦ C 169, 8.7.2005, p. 1 ¦

CONVENTION [1] ON THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS OPENED FOR SIGNATURE IN ROME ON 19 JUNE 1980

PREAMBLE

THE HIGH CONTRACTING PARTIES to the Treaty establishing the European Economic Community,

ANXIOUS to continue in the field of private international law the work of unification of law which has already been done within the Community, in particular in the field of jurisdiction and enforcement of judgments,

WISHING to establish uniform rules concerning the law applicable to contractual obligations,

HAVE AGREED AS FOLLOWS:

TITLE I

SCOPE OF THE CONVENTION

Article 1

Scope of the Convention

1. The rules of this Convention shall apply to contractual obligations in any situation involving a choice between the laws of different countries.

2. They shall not apply to:

(a) questions involving the status or legal capacity of natural persons, without prejudice to Article 11;

(b) contractual obligations relating to:

- wills and succession,

- rights in property arising out of a matrimonial relationship,

- rights and duties arising out of a family relationship, parentage, marriage or affinity, including maintenance obligations in respect of children who are not legitimate;

(c) obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;

(d) arbitration agreements and agreements on the choice of court;

(e) questions governed by the law of companies and other bodies corporate or unincorporate such as the creation, by registration or otherwise, legal capacity, internal organisation or winding up of companies and other bodies corporate or unincorporate and the personal liability of officers and members as such for the obligations of the company or body;

(f) the question whether an agent is able to bind a principal, or an organ to bind a company or body corporate or unincorporate, to a third party;

(g) the constitution of trusts and the relationship between settlors, trustees and beneficiaries;

(h) evidence and procedure, without prejudice to Article 14.

3. The rules of this Convention do not apply to contracts of insurance which cover risks situated in the territories of the Member States of the European Economic Community. In order to determine whether a risk is situated in those territories the court shall apply its internal law.

4. The preceding paragraph does not apply to contracts of re-insurance.

Article 2

Application of law of non-contracting States

Any law specified by this Convention shall be applied whether or not it is the law of a Contracting State.

TITLE II

UNIFORM RULES

Article 3

Freedom of choice

1. A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract.

2. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice under this Article or of other provisions of this Convention. Any variation by the parties of the law to be applied made after the conclusion of the contract shall not prejudice its formal validity under Article 9 or adversely affect the rights of third parties.

3. The fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law at the country which cannot be derogated from by contract, hereinafter called "mandatory rules".

4. The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 8, 9 and 11.

Article 4

Applicable law in the absence of choice

1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a separable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country.

2. Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal

place of business, the country in which that other place of business is situated.

3. Notwithstanding the provisions of paragraph 2 of this Article, to the extent that the subject matter of the contract is a right in immovable property or a right to use immovable property it shall be presumed that the contract is most closely connected with the country where the immovable property is situated.

4. A contract for the carriage of goods shall not be subject to the presumption in paragraph 2. In such a contract if the country in which, at the time the contract is concluded, the carrier has his principal place of business is also the country in which the place of loading or the place of discharge or the principal place of business of the consignor is situated, it shall be presumed that the contract is most closely connected with that country. In applying this paragraph single voyage charter-parties and other contracts the main purpose of which is the carriage of goods shall be treated as contracts for the carriage of goods.

5. Paragraph 2 shall not apply if the characteristic performance cannot be determined, and the presumptions in paragraphs 2, 3 and 4 shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country.

Article 5

Certain consumer contracts

1. This Article applies to a contract the object of which is the supply of goods or services to a person ("the consumer") for a purpose which can be regarded as being outside his trade or profession, or a contract for the provision of credit for that object.

2. Notwithstanding the provisions of Article 3, a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence:

- if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract, or

- if the other party or his agent received the consumer's order in that country, or

- if the contract is for the sale of goods and the consumer travelled from that country to another country and there gave his order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy.

3. Notwithstanding the provisions of Article 4, a contract to which this Article applies shall, in the absence of choice in accordance with Article 3, be governed by the law of the country in which the consumer has his habitual residence if it is entered into in the circumstances described in paragraph 2 of this Article.

4. This Article shall not apply to:

(a) a contract of carriage;

(b) a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence.

5. Notwithstanding the provisions of paragraph 4, this Article shall apply to a contract which, for an inclusive price, provides for a combination of travel and accommodation.

Article 6

Individual employment contracts

1. Notwithstanding the provisions of Article 3, in a contract of employment a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable under paragraph 2 in the absence of choice.

2. Notwithstanding the provisions of Article 4, a contract of employment shall, in the absence of choice in accordance with Article 3, be governed:

(a) by the law of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country; or

(b) if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is situated;

unless it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the contract shall be governed by the law of that country.

Article 7

Mandatory rules

1. When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

2. Nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract.

Article 8

Material validity

1. The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Convention if the contract or term were valid.

2. Nevertheless a party may rely upon the law of the country in which he has his habitual residence to establish that he did not consent if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in the preceding paragraph.

Article 9

Formal validity

1. A contract concluded between persons who are in the same country is formally valid if it satisfies the formal requirements of the law which governs it under this Convention or of the law of the country where it is concluded.

2. A contract concluded between persons who are in different countries is formally valid if it satisfies the formal requirements of the law which governs it under this Convention or of the law of one of those countries.

3. Where a contract is concluded by an agent, the country in which the agent acts is the relevant country for the purposes of paragraphs 1 and 2.

4. An act intended to have legal effect relating to an existing or contemplated contract is formally valid if it satisfies the formal requirements of the law which under this Convention governs or would govern the contract or of the law of the country where the act was done.

5. The provisions of the preceding paragraphs shall not apply to a contract to which Article 5 applies, concluded in the circumstances described in paragraph 2 of Article 5. The formal validity of such a contract is governed by the law of the country in which the consumer has his habitual residence.

6. Notwithstanding paragraphs 1 to 4 of this Article, a contract the subject matter of which is a right in immovable property or a right to use immovable property shall be subject to the mandatory requirements of form of the law of the country where the property is situated if by that law those requirements are imposed irrespective of the country where the contract is concluded and irrespective of the law governing the contract.

Article 10

Scope of applicable law

1. The law applicable to a contract by virtue of Articles 3 to 6 and 12 of this Convention shall govern in particular:

(a) interpretation;

(b) performance;

(c) within the limits of the powers conferred on the court by its procedural law, the consequences of breach, including the assessment of damages in so far as it is governed by rules of law;

(d) the various ways of extinguishing obligations, and prescription and limitation of actions;

(e) the consequences of nullity of the contract.

2. In relation to the manner of performance and the steps to be taken in the event of defective performance regard shall be had to the law of the country in which performance takes place.

Article 11

Incapacity

In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from another law only if the other party to the contract was aware of this incapacity at the time of the conclusion

of the contract or was not aware thereof as a result of negligence.

Article 12

Voluntary assignment

1. The mutual obligations of assignor and assignee under a voluntary assignment of a right against another person ("the debtor") shall be governed by the law which under this Convention applies to the contract between the assignor and assignee.

2. The law governing the right to which the assignment relates shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor's obligations have been discharged.

Article 13

Subrogation

1. Where a person ("the creditor") has a contractual claim upon another ("the debtor"), and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, the law which governs the third person's duty to satisfy the creditor shall determine whether the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship and, if so, whether he may do so in full or only to a limited extent.

2. The same rule applies where several persons are subject to the same contractual claim and one of them has satisfied the creditor.

Article 14

Burden of proof, etc.

1. The law governing the contract under this Convention applies to the extent that it contains, in the law of contract, rules which raise presumptions of law or determine the burden of proof.

2. A contract or an act intended to have legal effect may be proved by any mode of proof recognised by the law of the forum or by any of the laws referred to in Article 9 under which that contract or act is formally valid, provided that such mode of proof can be administered by the forum.

Article 15

Exclusion of convoi

The application of the law of any country specified by this Convention means the application of the rules of law in force in that country other than its rules of private international law.

Article 16

"Ordre public"

The application of a rule of the law of any country specified by this Convention may be refused only if such application is manifestly incompatible with the public policy ("ordre public") of the forum.

Article 17

No retrospective effect

This Convention shall apply in a Contracting State to contracts made after the date on which this Convention has entered into force with respect to that State.

Article 18

Uniform interpretation

In the interpretation and application of the preceding uniform rules, regard shall be had to their international character and to the desirability of achieving uniformity in their interpretation and application.

Article 19

States with more than one legal system

1. Where a State comprises several territorial units each of which has its own rules of law in respect of contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Convention.

2. A State within which different territorial units have their own rules of law in respect of contractual obligations shall not be bound to apply this Convention to conflicts solely between the laws of such units.

Article 20

Precedence of Community law

This Convention shall not affect the application of provisions which, in relation to particular matters, lay down choice of law rules relating to contractual obligations and which are or will be contained in acts of the institutions of the European Communities or in national laws harmonised in implementation of such acts.

Article 21

Relationship with other conventions

This Convention shall not prejudice the application of international conventions to which a Contracting State is, or becomes, a party.

Article 22

Reservations

1. Any Contracting State may, at the time of signature, ratification, acceptance or approval, reserve the right not to apply:

(a) the provisions of Article 7(1);

(b) the provisions of Article 10(1) (e).

2. [2]

3. Any Contracting State may at any time withdraw a reservation which it has made; the reservation shall cease to have effect on the first day of the third calendar month after notification of the withdrawal.

TITLE III

FINAL PROVISIONS

Article 23

1. If, after the date on which this Convention has entered into force for a Contracting State, that State wishes to adopt any new choice of law rule in regard to any particular category of contract within the scope of this Convention, it shall communicate its intention to the other signatory States through the Secretary-General of the Council of the European Communities.

2. Any signatory State may, within six months from the date of the communication made to the Secretary-General, request him to arrange consultations between signatory States in order to reach agreement. (...) [3].

3. If no signatory State has requested consultations within this period or if within two years following the communication made to the Secretary-General no agreement is reached in the course of consultations, the Contracting State concerned may amend its law in the manner indicated. The measures taken by that State shall be brought to the knowledge of the other signatory States through the Secretary-General of the Council of the European Communities.

Article 24

1. If, after the date on which this Convention has entered into force with respect to a Contracting State, that State wishes to become a party to a multilateral convention whose principal aim or

one of whose principal aims is to lay down rules of private international law concerning any of the matters governed by this Convention, the procedure set out in Article 23 shall apply. However, the period of two years, referred to in paragraph 3 of that Article, shall be reduced to one year.

2. The procedure referred to in the preceding paragraph need not be followed if a Contracting State or one of the European Communities is already a party to the multilateral convention, or if its object is to revise a convention to which the State concerned is already a party, or if it is a convention concluded within the framework of the Treaties establishing the European Communities.

Article 25

If a Contracting State considers that the unification achieved by this Convention is prejudiced by the conclusion of agreements not covered by Article 24(1), that State may request the Secretary-General of the Council of the European Communities to arrange consultations between the signatory States of this Convention.

Article 26

Any Contracting State may request the revision of this Convention. In this event a revision conference shall be convened by the President of the Council of the European Communities.

Article 27 [4]

Article 28

1. This Convention shall be open from 19 June 1980 for signature by the States party to the Treaty establishing the European Economic Community.

This Convention shall be subject to ratification, acceptance or approval by the signatory States. The instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the Council of the European Communities [5].

[6]

1. This Convention shall enter into force on the first day of the third month following the deposit of the seventh instrument of ratification, acceptance or approval.

2. This Convention shall enter into force for each signatory State ratifying, accepting or approving at a later date on the first day of the third month following the deposit of its instrument of ratification, acceptance or approval.

Article 30

1. This Convention shall remain in force for 10 years from the date of its entry into force in accordance with Article 29(1), even for States for which it enters into force at a later date.

2. If there has been no denunciation it shall be renewed tacitly every five years.

3. A Contracting State which wishes to denounce shall, not less than six months before the expiration of the period of 10 or five years, as the case may be, give notice to the Secretary-General of the Council of the European Communities. [7].

4. The denunciation shall have effect only in relation to the State which has notified it. The Convention will remain in force as between all other Contracting States.

[8]

The Secretary-General of the Council of the European Communities shall notify the States party to the Treaty establishing the European Economic Community of:

(a) the signatures;

(b) deposit of each instrument of ratification, acceptance or approval;

(c) the date of entry into force of this Convention;

(d) communications made in pursuance of Articles 23, 24, 25, 26 and 30 [9];

(e) the reservations and withdrawals of reservations referred to in Article 22.

Article 32

The Protocol annexed to this Convention shall form an integral part thereof.

[10]

This Convention, drawn up in a single original in the Danish, Dutch, English, French, German, Irish and Italian languages, these texts being equally authentic, shall be deposited in the archives of the Secretariat of the Council of the European Communities. The Secretary-General shall transmit a certified copy thereof to the Government of each signatory State.

In witness whereof the undersigned, being duly authorised thereto, having signed this Convention.

Done at Rome on the nineteenth day of June in the year one thousand nine hundred and eighty.

[Signatures of the plenipotentiaries]

[1] Text as amended by the Convention of 10 April 1984 on the accession of the Hellenic Republic - hereafter referred to as the "1984 Accession Convention" -, by the Convention of 18 May 1992 on the accession of the Kingdom of Spain and the Portuguese Republic - hereafter referred to as the "1992 Accession Convention" -, by the Convention of 29 November 1996 on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden - hereafter referred to as the "1996 Accession Convention" - and by the Convention of 14 April 2005 on the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic - hereafter referred to as the "2005 Accession Convention."

[2] Paragraph deleted by Article 2(1) of the 1992 Accession Convention.

[3] Phrase deleted by the 1992 Accession Convention.

[4] Article deleted by Article 2(1) of the 1992 Accession Convention.

[5] Ratification of the Accession Conventions is governed by the following provisions of those Conventions:

- as regards the 1984 Accession Convention, by Article 3 of that Convention, which reads as follows:

- "Article 3This Convention shall be ratified by signatory States. The instruments of ratification shall be deposited with the Secretary-General of the Council of the European Communities.",

- as regards the 1992 Accession Convention, by Article 4 of that Convention, which reads as follows:

- "Article 4This Convention shall be ratified by signatory States. The instruments of ratification shall be deposited with the Secretary-General of the Council of the European Communities.",

- as regards the 1996 Accession Convention, by Article 5 of that Convention, which reads as follows:

- "Article 5This Convention shall be ratified by signatory States. The instruments of ratification shall be deposited with the Secretary-General of the Council of the European Union.",

- as regards the 2005 Accession Convention, by Article 4 of the Convention, which reads as follows:

- "Article 4This Convention shall be ratified by signatory States. The instruments of ratification shall be deposited with the Secretary-General of the Council of the European Union.".

[6]

- Thereafter, this Convention shall enter into force, for each signatory State which subsequently ratifies it, on the first day of the third month following the deposit of its instrument of ratification.

[7] Phrase deleted by the 1992 Accession Convention.

[8]

- the dates of entry into force of this Convention for the Contracting States."

[9] Point (d) as amended by the 1992 Accession Convention.

[10]

- The text of the Convention of 1980, the Convention of 1984, the First Protocol of 1988, the Second Protocol of 1988, the Convention of 1992 and the Convention of 1996 in the Czech, Estonian, Hungarian, Latvian, Lithuanian, Maltese, Polish, Slovakian and Slovenian languages shall be authentic under the same conditions as the other texts of the Convention of 1980, the Convention of 1984, the First Protocol of 1988, the Second Protocol of 1988, the Convention of 1992 and the Convention of 1996.""ArticleThis Convention, drawn up in a single original in the Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish and Swedish languages, all twenty-one texts being equally authentic, shall be deposited in the archives of the General Secretariat of the Council of the European Union. The Secretary-General shall transmit a certified copy to the Government of each signatory state."

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AUTHOR The Member States ; Belgium ; Federal Republic of Germany ; Denmark ; Czech Republic ; Estonia ; Greece ; Spain ; France ; Ireland ; Italy ; Cyprus ; Latvia ; Lithuania ; Luxembourg ; Hungary ; Malta ; Netherlands ; Austria ; Poland ; Portugal ; Slovenia ; Slovakia ; Finland ; Sweden ; United Kingdom

FORM	Convention
TREATY	European Community
PUBREF	OJ C 334, 30.12.2005, p. 1-27 (ES, CS, DA, DE, ET, EL, EN, FR, IT, LV, LT, HU, NL, PL, PT, SK, SL, FI, SV)
PUB	2005/12/30
DOC	1980/06/19
INFORCE	1991/04/01=EV ; 1991/09/01=EV ; 1992/01/01=EV
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1980 Rome Convention on the law applicable to contractual obligations (consolidated version)

Convention on the law applicable to contractual obligations (consolidated version)

PRELIMINARY NOTE

The signing on 29 November 1996 of the Convention on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the Rome Convention on the law applicable to contractual obligations and to the two Protocols on its interpretation by the Court of Justice has made it desirable to produce a consolidated version of the Rome convention and of those two Protocols.

These texts are accompanied by three Declarations, one made in 1980 with regard to the need for consistency between measures to be adopted on choice-of-law rules by the Community and those under the Convention, a second, also made in 1980, on the interpretation of the Convention by the Court of Justice and a third, made in 1996, concerning compliance with the procedure provided for in Article 23 of the Rome Convention as regards carriage of goods by sea.

The text printed in this edition was drawn up by the General Secretariat of the Council, in whose archives the originals of the instruments concerned are deposited. It should be noted, however, that this text has no binding force. The official texts of the instruments consolidated are to be found in the following Official Journals.

Language version of the Official Journal	1980 Convention	1984 Accession	1988 First Protocol	1988 Second Protocol	1992 Accession Convention	1996 Accession Convention
German	L 266, 9. 10. 1980, p. 1	L 146, 31. 5. 1984, p. 1	L 48, 20. 2. 1989, p. 1	L 48, 20. 2. 1989, p. 17	L 333, 18. 11. 1992, p. 1	C 15, 15. 1. 1997, p. 10
English	L 266, 9. 10. 1980, p. 1	L 146, 31. 5. 1984, p. 1	L 48, 20. 2. 1989, p. 1	L 48, 20. 2. 1989, p. 17	L 333, 18. 11. 1992, p. 1	C 15, 15. 1. 1997, p. 10
Danish	L 266, 9. 10. 1980, p. 1	L 146, 31. 5. 1984, p. 1	L 48, 20. 2. 1989, p. 1	L 48, 20. 2. 1989, p. 17	L 333, 18. 11. 1992, p. 1	C 15, 15. 1. 1997, p. 10
French	L 266, 9. 10. 1980, p. 1	L 146, 31. 5. 1984, p. 1	L 48, 20. 2. 1989, p. 1	L 48, 20. 2. 1989, p. 17	L 333, 18. 11. 1992, p. 1	C 15, 15. 1. 1997, p. 10
Greek	L 146, 31. 5. 1984, p. 7	L 146, 31. 5. 1984, p. 1	L 48, 20. 2. 1989, p. 1	L 48, 20. 2. 1989, p. 17	L 333, 18. 11. 1992, p. 1	C 15, 15. 1. 1997, p. 10
Irish	Special Edition (L 266)	Special Edition (L 146)	Special Edition (L 48)	Special Edition (L 48)	Special Edition (L 333)	Special Edition (C 15)
Italian	L 266, 9. 10. 1980, p. 1	L 146, 31. 5. 1984, p. 1	L 48, 20. 2. 1989, p. 1	L 48, 20. 2. 1989, p. 17	L 333, 18. 11. 1992, p. 1	C 15, 15. 1. 1997, p. 10

Language version of the Official Journal	1980 Convention	1984 Accession	1988 First Protocol	1988 Second Protocol	1992 Accession Convention	1996 Accession Convention
Dutch	L 266, 9. 10. 1980, p. 1	L 146, 31. 5. 1984, p. 1	L 48, 20. 2. 1989, p. 1	L 48, 20. 2. 1989, p. 17	L 333, 18. 11. 1992, p. 1	C 15, 15. 1. 1997, p. 10
Spanish	Special Edition, Chapter 1, Volume 3, p. 36 (See also OJ L 333, p. 17)	Special Edition, Chapter 1, Volume 4, p. 36 (See also OJ L 333, p. 72)	L 48, 20. 2. 1989, p. 1	L 48, 20. 2. 1989, p. 17	L 333, 18. 11. 1992, p. 1	C 15, 15. 1. 1997, p. 10
Portuguese	Special Edition, Chapter 1, Volume 3, p. 36 (See also OJ L 333, p. 7)	Special Edition, Chapter 1, Volume 4, p. 72 (See also OJ L 333, p. 74)	L 48, 20. 2. 1989, p. 1	L 48, 20. 2. 1989, p. 17	L 333, 18. 11. 1992, p. 1	C 15, 15. 1. 1997, p. 10
Finnish	C 15, 15. 1. 1997, p. 70	C 15, 15. 1. 1997, p. 66	C 15, 15. 1. 1997, p. 60	C 15, 15. 1. 1997, p. 64	C 15, 15. 1. 1997, p. 68	C 15, 15. 1. 1997, p. 53
Swedish	C 15, 15. 1. 1997, p. 70	C 15, 15. 1. 1997, p. 66	C 15, 15. 1. 1997, p. 60	C 15, 15. 1. 1997, p. 64	C 15, 15. 1. 1997, p. 68	C 15, 15. 1. 1997, p. 53

ANNEX

CONVENTION on the law applicable to contractual obligations (1) opened for signature in Rome on 19 June 1980

PREAMBLE

THE HIGH CONTRACTING PARTIES to the Treaty establishing the European Economic Community,

ANXIOUS to continue in the field of private international law the work of unification of law which has already been done within the Community, in particular in the field of jurisdiction and enforcement of judgments,

WISHING to establish uniform rules concerning the law applicable to contractual obligations,

HAVE AGREED AS FOLLOWS:

TITLE I

SCOPE OF THE CONVENTION

Article 1 Scope of the Convention

1. The rules of this Convention shall apply to contractual obligations in any situation involving a choice between the laws of different countries.

2. They shall not apply to:

(a) questions involving the status or legal capacity of natural persons, without prejudice to Article 11;

(b) contractual obligations relating to:

- wills and succession,
- rights in property arising out of a matrimonial relationship,
- rights and duties arising out of a family relationship, parentage, marriage or affinity, including maintenance obligations in respect of children who are not legitimate;

(c) obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;

(d) arbitration agreements and agreements on the choice of court;

(c) questions governed by the law of companies and other bodies corporate or unincorporate such as the creation, by registration or otherwise, legal capacity, internal organization or winding up of companies and other bodies corporate or unincorporate and the personal liability of officers and members as such for the obligations of the company or body;

(f) the question whether an agent is able to bind a principal, or an organ to bind a company or body corporate or unincorporate, to a third party;

(g) the constitution of trusts and the relationship between settlors, trustees and beneficiaries;

(h) evidence and procedure, without prejudice to Article 14.

3. The rules of this Convention do not apply to contracts of insurance which cover risks situated in the territories of the Member States of the European Economic Community. In order to determine

whether a risk is situated in those territories the court shall apply its internal law.

4. The proceeding paragraph does not apply to contracts of re-insurance.

Article 2 Application of law of non-contracting States

Any law specified by this Convention shall be applied whether or not it is the law of a Contracting State.

TITLE II

UNIFORM RULES

Article 3 Freedom of choice

1. A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract.

2. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice under this Article or of other provisions of this Convention. Any variation by the parties of the law to be applied made after the conclusion of the contract shall not prejudice its formal validity under Article 9 or adversely affect the rights of third parties.

3. The fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law at the country which cannot be derogated from by contract, hereinafter called 'mandatory rules`.

4. The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 8, 9 and 11.

Article 4 Applicable law in the absence of choice

1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a separable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country.

2. Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated.

3. Notwithstanding the provisions of paragraph 2 of this Article, to the extent that the subject matter of the contract is a right in immovable property or a right to use immovable property it shall be presumed that the contract is most closely connected with the country where the immovable property is situated.

4. A contract for the carriage of goods shall not be subject to the presumption in paragraph 2. In such a contract if the country in which, at the time the contract is concluded, the carrier has his principal place of business is also the country in which the place of loading or the place

of discharge or the principal place of business of the consignor is situated, it shall be presumed that the contract is most closely connected with that country. In applying this paragraph single voyage charter-parties and other contracts the main purpose of which is the carriage of goods shall be treated as contracts for the carriage of goods.

5. Paragraph 2 shall not apply if the characteristic performance cannot be determined, and the presumptions in paragraphs 2, 3 and 4 shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country.

Article 5 Certain consumer contracts

1. This Article applies to a contract the object of which is the supply of goods or services to a person ('the consumer`) for a purpose which can be regarded as being outside his trade or profession, or a contract for the provision of credit for that object.

2. Notwithstanding the provisions of Article 3, a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence:

- if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract, or
- if the other party or his agent received the consumer's order in that country, or
- if the contract is for the sale of goods and the consumer travelled from that country to another country and there gave his order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy.

3. Notwithstanding the provisions of Article 4, a contract to which this Article applies shall, in the absence of choice in accordance with Article 3, be governed by the law of the country in which the consumer has his habitual residence if it is entered into in the circumstances described in paragraph 2 of this Article.

4. This Article shall not apply to:

(a) a contract of carriage;

(b) a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence.

5. Notwithstanding the provisions of paragraph 4, this Article shall apply to a contract which, for an inclusive price, provides for a combination of travel and accommodation.

Article 6 Individual employment contracts

1. Notwithstanding the provisions of Article 3, in a contract of employment a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable under paragraph 2 in the absence of choice.

2. Notwithstanding the provisions of Article 4, a contract of employment shall, in the absence of choice in accordance with Article 3, be governed:

(a) by the law of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country; or

(b) if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is situated;

unless it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the contract shall be governed by the law of that country.

Article 7 Mandatory rules

1. When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

2. Nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract.

Article 8 Material validity

1. The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Convention if the contract or term were valid.

2. Nevertheless a party may rely upon the law of the country in which he has his habitual residence to establish that he did not consent if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in the preceding paragraph.

Article 9 Formal validity

1. A contract concluded between persons who are in the same country is formally valid if it satisfies the formal requirements of the law which governs it under this Convention or of the law of the country where it is concluded.

2. A contract concluded between persons who are in different countries is formally valid if it satisfies the formal requirements of the law which governs it under this Convention or of the law of one of those countries.

3. Where a contract is concluded by an agent, the country in which the agent acts is the relevant country for the purposes of paragraphs 1 and 2.

4. An act intended to have legal effect relating to an existing or contemplated contract is formally valid if it satisfies the formal requirements of the law which under this Convention governs or would govern the contract or of the law of the country where the act was done.

5. The provisions of the preceding paragraphs shall not apply to a contract to which Article 5 applies, concluded in the circumstances described in paragraph 2 of Article 5. The formal validity of such a contract is governed by the law of the country in which the consumer has his habitual residence.

6. Notwithstanding paragraphs 1 to 4 of this Article, a contract the subject matter of which is a right in immovable property or a right to use immovable property shall be subject to the mandatory requirements of form of the law of the country where the property is situated if by that law those requirements are imposed irrespective of the country where the contract is concluded and irrespective of the law governing the contract.

Article 10 Scope of applicable law

1. The law applicable to a contract by virtue of Articles 3 to 6 and 12 of this Convention shall govern in particular:

(a) interpretation;

(b) performance;

(c) within the limits of the powers conferred on the court by its procedural law, the consequences of breach, including the assessment of damages in so far as it is governed by rules of law;

(d) the various ways of extinguishing obligations, and prescription and limitation of actions;

(e) the consequences of nullity of the contract.

2. In relation to the manner of performance and the steps to be taken in the event of defective performance regard shall be had to the law of the country in which performance takes place.

Article 11 Incapacity

In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from another law only if the other party to the contract was aware of this incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence.

Article 12 Voluntary assignment

1. The mutual obligations of assignor and assignee under a voluntary assignment of a right against another person ('the debter`) shall be governed by the law which under this Convention applies to the contract between the assignor and assignee.

2. The law governing the right to which the assignment relates shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor's obligations have been discharged.

Article 13 Subrogation

1. Where a person ('the creditor`) has a contractual claim upon another ('the debtor`), and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, the law which governs the third person's duty to satisfy the creditor shall determine whether the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship and, if so, whether he may do so in full or only to a limited extent.

2. The same rule applies where several persons are subject to the same contractual claim and one of them has satisfied the creditor.

Article 14 Burden of proof, etc.

1. The law governing the contract under this Convention applies to the extent that it contains, in the law of contract, rules which raise presumptions of law or determine the burden of proof.

2. A contract or an act intended to have legal effect may be proved by any mode of proof recognized by the law of the forum or by any of the laws referred to in Article 9 under which that contract or act is formally valid, provided that such mode of proof can be administered by the forum.

Article 15 Exclusion of convoi

The application of the law of any country specified by this Convention means the application of the rules of law in force in that country other than its rules of private international law.

Article 16 'Ordre public`

The application of a rule of the law of any country specified by this Convention may be refused only if such application is manifestly incompatible with the public policy ('ordre public`) of the forum.

Article 17 No retrospective effect

This Convention shall apply in a Contracting State to contracts made after the date on which this Convention has entered into force with respect to that State.

Article 18 Uniform interpretation

In the interpretation and application of the preceding uniform rules, regard shall be had to their international character and to the desirability of achieving uniformity in their interpretation and application.

Article 19 States with more than one legal system

1. Where a State comprises several territorial units each of which has its own rules of law in respect of contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Convention.

2. A State within which different territorial units have their own rules of law in respect of contractual obligations shall not be bound to apply this Convention to conflicts solely between the laws of such units.

Article 20 Precedence of Community law

This Convention shall not affect the application of provisions which, in relation to particular matters, lay down choice of law rules relating to contractual obligations and which are or will be contained in acts of the institutions of the European Communities or in national laws harmonized in implementation of such acts.

Article 21 Relationship with other conventions

This Convention shall not prejudice the application of international conventions to which a Contracting State is, or becomes, a party.

Article 22 Reservations

1. Any Contracting State may, at the time of signature, ratification, acceptance or approval, reserve the right not to apply:

(a) the provisions of Article 7 (1);

(b) the provisions of Article 10 (1) (e).

2. . . . (2)

3. Any Contracting State may at any time withdraw a reservation which it has made; the reservation shall cease to have effect on the first day of the third calendar month after notification of the withdrawal.

TITLE III

FINAL PROVISIONS

Article 23

1. If, after the date on which this Convention has entered into force for a Contracting State, that State wishes to adopt any new choice of law rule in regard to any particular category of contract within the scope of this Convention, it shall communicate its intention to the other signatory States through the Secretary-General of the Council of the European Communities.

2. Any signatory State may, within six months from the date of the communication made to the Secretary-General,

request him to arrange consultations between signatory States in order to reach agreement.

3. If no signatory State has requested consultations within this period or if within two years following the communication made to the Secretary-General no agreement is reached in the course of consultations, the Contracting State concerned may amend its law in the manner indicated. The measures taken by that State shall be brought to the knowledge of the other signatory States through the Secretary-General of the Council of the European Communities.

Article 24

1. If, after the date on which this Convention has entered into force with respect to a Contracting State, that State wishes to become a party to a multilateral convention whose principal aim or one of whose principal aims is to lay down rules of private international law concerning any of the matters governed by this Convention, the procedure set out in Article 23 shall apply. However, the period of two years, referred to in paragraph 3 of that Article, shall be reduced to one year.

2. The procedure referred to in the preceding paragraph need not be followed if a Contracting State or one of the European Communities is already a party to the multilateral convention, or if its object is to revise a convention to which the State concerned is already a party, or if it is a convention concluded within the framework of the Treaties establishing the European Communities.

Article 25

If a Contracting State considers that the unification achieved by this Convention is prejudiced by the conclusion of agreements not covered by Article 24 (1), that State may request the Secretary-General of the Council of the European Communities to arrange consultations between the signatory States of this Convention.

Article 26

Any Contracting State may request the revision of this Convention. In this event a revision conference shall be convened by the President of the Council of the European Communities.

Article 27 (3)

Article 28

1. This Convention shall be open from 19 June 1980 for signature by the States party to the Treaty establishing the European Economic Community.

2. This Convention shall be subject to ratification, acceptance or approval by the signatory States. The instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the Council of the European Communities (4).

Article 29 (5)

1. This Convention shall enter into force on the first day of the third month following the deposit

of the seventh instrument of ratification, acceptance or approval.

2. This Convention shall enter into force for each signatory State ratifying, accepting or approving at a later date on the first day of the third month following the deposit of its instrument of ratification, acceptance or approval.

Article 30

1. This Convention shall remain in force for 10 years from the date of its entry into force in accordance with Article 29 (1), even for States for which it enters into force at a later date.

2. If there has been no denunciation it shall be renewed tacitly every five years.

3. A Contracting State which wishes to denounce shall, not less than six months before the expiration of the period of 10 or five years, as the case may be, give notice to the Secretary-General of the Council of the European Communities. Denunciation may be limited to any territory to which the Convention has been extended by a declaration under Article 27 (2) (6).

4. The denunciation shall have effect only in relation to the State which has notified it. The Convention will remain in force as between all other Contracting States.

Article 31 (7)

The Secretary-General of the Council of the European Communities shall notify the States party to the Treaty establishing the European Economic Community of:

(a) the signatures;

(b) deposit of each instrument of ratification, acceptance or approval;

(c) the date of entry into force of this Convention;

(d) communications made in pursuance of Articles 23, 24, 25, 26 and 30 (8);

(e) the reservations and withdrawals of reservations referred to in Article 22.

Article 32

The Protocol annexed to this Convention shall form an integral part thereof.

Article 33 (9)

This Convention, drawn up in a single original in the Danish, Dutch, English, French, German, Irish and Italian languages, these texts being equally authentic, shall be deposited in the archives of the Secretariat of the Council of the European Communities. The Secretary-General shall transmit a certified copy thereof to the Government of each signatory State.

In witness whereof the undersigned, being duly authorized thereto, having signed this Convention.

Done at Rome on the nineteenth day of June in the year one thousand nine hundred and eighty.

[Signatures of the plenipotentiaries]

PROTOCOL (10)

The High Contracting Parties have agreed upon the following provision which shall be annexed to

the Convention:

'Notwithstanding the provisions of the Convention, Denmark, Sweden and Finland may retain national provisions concerning the law applicable to questions relating to the carriage of goods by sea and may amend such provisions without following the procedure provided for in Article 23 of the Convention of Rome. The national provisions applicable in this respect are the following:

- in Denmark, paragraphs 252 and 321 (3) and (4) of the "Solov" (maritime law),
- in Sweden, Chapter 13, Article 2 (1) and (2), and Chapter 14, Article 1 (3), of "sjölagen" (maritime law),
- in Finland, Chapter 13, Article 2 (1) and (2), and Chapter 14, Article 1 (3), of "merilaki"/"sjölagen" (maritime law).`

In witness whereof the undersigned, being duly authorized thereto, have signed this Protocol.

Done at Rome on the nineteenth day of June in the year one thousand nine hundred and eighty.

[Signatures of the Plenipotentiaries]

JOINT DECLARATION

At the time of the signature of the Convention on the law applicable to contractual obligations, the Governments of the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland,

I. anxious to avoid, as far as possible, dispersion of choice of law rules among several instruments and differences between these rules, express the wish that the institutions of the European Communities, in the exercise of their powers under the Treaties by which they were established, will, where the need arises, endeavour to adopt choice of law rules which are as far as possible consistent with those of this Convention;

II. declare their intention as from the date of signature of this Convention until becoming bound by Article 24, to consult with each other if any one of the signatory States wishes to become a party to any convention to which the procedure referred to in Article 24 would apply;

III. having regard to the contribution of the Convention on the law applicable to contractual obligations to the unification of choice of law rules within the European Communities, express the view that any State which becomes a member of the European Communities should accede to this Convention.

In witness whereof the undersigned, being duly authorized thereto, have signed this Joint Declaration.

Done at Rome on the nineteenth day of June in the year one thousand nine hundred and eighty.

[Signatures of the Plenipotentiaries]

JOINT DECLARATION

The Governments of the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland,

On signing the Convention on the law applicable to contractual obligations;

Desiring to ensure that the Convention is applied as effectively as possible;

Anxious to prevent differences of interpretation of the Convention from impairing its unifying

effect;

Declare themselves ready:

1. to examine the possibility of conferring jurisdiction in certain matters on the Court of Justice of the European Communities and, if necessary, to negotiate an agreement to this effect;

2. to arrange meetings at regular intervals between their representatives.

In witness whereof the undersigned, being duly authorized thereto, have signed this Joint Declaration.

Done at Rome on the nineteenth day of June in the year one thousand nine hundred and eighty.

[Signatures of the Plenipotentiaries]

(1) Text as amended by the Convention of 10 April 1984 on the accession of the Hellenic Republic - hereafter referred to as the '1984 Accession Convention` -, by the Convention of 18 May 1992 on the accession of the Kingdom of Spain and the Portuguese Republic - hereafter referred to as the '1992 Accession Convention` - and by the Convention on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden - hereafter referred to as the '1996 Accession Convention`.

(2) Paragraph deleted by Article 2 (1) of the 1992 Accession Convention.

(3) Article deleted by Article 2 (1) of the 1992 Accession Convention.

(4) Ratification of the Accession Conventions is governed by the following provisions of those conventions:

- as regards the 1984 Accession Convention, by Article 3 of that Convention, which reads as follows:

'Article 3

This Convention shall be ratified by the signatory States. The instruments of ratification shall be deposited with the Secretary-General of the Council of the European Communities.`,

- as regards the 1992 Accession Convention, by Article 4 of that Convention, which reads as follows:

'Article 4

This Convention shall be ratified by the signatory States. The instruments of ratification shall be deposited with the Secretary-General of the Council of the European Communities.`,

- as regards the 1996 Accession Convention, by Article 5 of that Convention, which reads as follows:

'Article 5

This Convention shall be ratified by the signatory States. The instruments of ratification shall be deposited with the Secretary-General of the Council of the European Union.`.

(5) The entry into force of the Accession Conventions is governed by the following provisions of those Conventions:

- as regards the 1984 Accession Convention, by Article 4 of that Convention, which reads as follows:

'Article 4

This Convention shall enter into force, as between the States which have ratified it, on the first day of the third month following the deposit of the last instrument of ratification by the Hellenic Republic and seven States which have ratified the Convention on the law applicable to contractual obligations.

This Convention shall enter into force for each Contracting State which subsequently ratifies it on the first day of the third month following the deposit of its instrument of ratification.`,

- as regards the 1992 Accession Convention, by Article 5 of that Convention which reads as follows:

'Article 5

This Convention shall enter into force, as between the States which have ratified it, on the first day of the third month following the deposit of the last instrument of ratification by the Kingdom of Spain or the Portuguese Republic and by one State which has ratified the Convention on the law applicable to contractual obligations.

This Convention shall enter into force for each Contracting State which subsequently ratifies it on the first day of the third month following the deposit of its instrument of ratification.`,

- as regards the 1996 Accession Convention, by Article 6 of that Convention, which reads as follows:

'Article 6

1. This Convention shall enter into force, as between the States which have ratified it, on the first day of the third month following the deposit of the last instrument of ratification by the Republic of Austria, the Republic of Finland or the Kingdom of Sweden and by one Contracting State which has ratified the Convention on the law applicable to contractual obligations.

2. This Convention shall enter into force for each Contracting State which subsequently ratifies it on the first day of the third month following the deposit of its instrument of ratification.`.

(6) Phrase deleted by the 1992 Accession Convention.

(7) Notification concerning the Accession Convention is governed by the following provisions of those Conventions:

- as regards the 1984 Accession Convention, by Article 5 of that Convention, which reads as follows:

'Article 5

The Secretary-General of the Council of the European Communities shall notify Signatory States of:

(a) the deposit of each instrument of ratification;

(b) the dates of entry into force of this Convention for the Contracting States.`,

- as regards the 1992 Accession Convention, by Article 6 of that Convention, which reads as follows:

'Article 6

The Secretary-General of the Council of the European Communities shall notify the signatory States of:

(a) the deposit of each instrument of ratification;

(b) the dates of entry into force of this Convention for the Contracting States.`,

- as regards the 1996 Accession Convention, by Article 7 of that Convention, which reads as follows:

'Article 7

The Secretary-General of the Council of the European Union shall notify the signatory States of:

(a) the deposit of each instrument of ratification;

(b) the dates of entry into force of this Convention for the Contracting States.`.

(8) Point (d) as amended by the 1992 Accession Convention.

(9) An indication of the authentic texts of the Accession Convention is to be found in the following provisions:

- as regards the 1984 Accession Convention, in Articles 2 and 6 of that Convention, which reads as follows:

'Article 2

The Secretary-General of the Council of the European Communities shall transmit a certified copy of the Convention on the law applicable to contractual obligations in the Danish, Dutch, English, French, German, Irish and Italian languages to the Government of the Hellenic Republic.

The text of the Convention on the law applicable to contractual obligations in the Greek language is annexed hereto. The text in the Greek language shall be authentic under the same conditions as the other texts of the Convention on the law applicable to contractual obligations.`

'Article 6

This Convention, drawn up in a single original in the Danish, Dutch, English, French, German, Greek, Irish and Italian languages, all eight texts being equally authentic, shall be deposited in the archives of the General Secretariat of the Council of the European Communities. The Secretary-General

shall transmit a certified copy to the Government of each Signatory State.`,

- as regards the 1992 Accession Convention, in Articles 3 and 7 of that Convention, which read as follows:

'Article 3

The Secretary-General of the Council of the European Communities shall transmit a certified copy of the Convention on the law applicable to contractual obligations in the Danish, Dutch, English, French, German, Greek, Irish and Italian languages to the Governments of the Kingdom of Spain and the Portuguese Republic.

The text of the Convention on the law applicable to contractual obligations in the Portuguese and Spanish languages is set out in Annexes I and II to this Convention. The texts drawn up in the Portuguese and Spanish languages shall be authentic under the same conditions as the other texts of the Convention on the law applicable to contractual obligations.`

'Article 7

This Convention, drawn up in a single original in the Danish, Dutch, English, French, German, Greek, Irish, Italian, Portuguese and Spanish languages, all texts being equally authentic, shall be deposited in the archives of the General Secretariat of the Council of the European Communities. The Secretary-General shall transmit a certified copy to the Government of each Signatory State.`,

- as regards the 1996 Accession Convention, in Articles 4 and 8 of that Convention, which read as follows:

'Article 4

1. The Secretary-General of the Council of the European Union shall transmit a certified copy of the Convention of 1980, the Convention of 1984, the First Protocol of 1988, the Second Protocol of 1988 and the Convention of 1992 in the Danish, Dutch, English, French, German, Greek, Irish, Italian, Spanish and Portuguese languages to the Governments of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden.

2. The text of the Convention of 1980, the Convention of 1984, the First Protocol of 1988, the Second Protocol of 1988 and the Convention of 1992 in the Finnish and Swedish languages shall be authentic under the same conditions as the other texts of the Convention of 1980, the Convention of 1984, the First Protocol of 1988, the Second Protocol of 1988 and the Convention of 1992.`

'Article 8

This Convention, drawn up in a single original in the Danish, Dutch, English, Finnish, French, German, Greek, Irish, Italian, Portuguese, Spanish and Swedish languages, all 12 texts being equally authentic, shall be deposited in the archives of the General Secretariat of the Council of the European Union. The Secretary-General shall transmit a certified copy to the Government

of each signatory State.`

(10) Text as amended by the 1996 Accession Convention.

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Instruments

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Consolidated Version
Implementation
1st Interpretation Protocol
2nd Interpretation Protocol
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CONVENTION ON THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS opened for signature in Rome on 19 June 1980 (80/934/EEC)

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PREAMBLE

THE HIGH CONTRACTING PARTIES to the Treaty establishing the European Economic Community,
ANXIOUS to continue in the field of private international law the work of unification of law which has already been done within the Community, in particular in the field of jurisdiction and enforcement of judgments, WISHING to establish uniform rules concerning the law applicable to contractual obligations,
HAVE AGREED AS FOLLOWS:

TITLE I SCOPE OF THE CONVENTION

Article 1

Scope of the Convention

1. The rules of this Convention shall apply to contractual obligations in any situation involving a choice between the laws of different countries.

2. They shall not apply to: (a) questions involving the status or legal capacity of natural persons, without prejudice to Article 11;
(b) contractual obligations relating to: - wills and succession,
- rights in property arising out of a matrimonial relationship,
- rights and duties arising out of a family relationship, parentage, marriage or affinity, including maintenance obligations in respect of children who are not legitimate;

(c) obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;
(d) arbitration agreements and agreements on the choice of court;
(e) questions governed by the law of companies and other bodies corporate or unincorporate such as the creation, by registration or otherwise, legal capacity, internal organization or winding up of companies and other bodies corporate or unincorporate and the personal liability of officers and members as such for the obligations of the company or body;
(f) the question whether an agent is able to bind a principal, or an organ to bind a company or body corporate or unincorporate, to a third party;
(g) the constitution of trusts and the relationship between settlors, trustees and beneficiaries;
(h) evidence and procedure, without prejudice to Article 14.

3. The rules of this Convention do not apply to contracts of insurance which cover risks situated in the territories of the Member States of the European Economic Community. In order to determine whether a risk is situated in these territories the court shall apply its internal law.

4. The preceding paragraph does not apply to contracts of re-insurance.

Article 2

Application of law of non-contracting States

Any law specified by this Convention shall be applied whether or not it is the law of a Contracting State.

TITLE II UNIFORM RULES

Article 3

Freedom of choice

1. A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract.

2. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice under this Article or of other provisions of this Convention. Any variation by the parties of the law to be applied made after the conclusion of the contract shall not prejudice its formal validity under Article 9 or adversely affect the rights of third parties.

3. The fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law of that country which cannot be derogated from by contract, hereinafter called "mandatory rules".

4. The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 8, 9 and 11.

Article 4

Applicable law in the absence of choice

1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a severable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country.

2. Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated.

3. Notwithstanding the provisions of paragraph 2 of this Article, to the extent that the subject matter of the contract is a right in immovable property or a right to use immovable property it shall be presumed that the contract is most closely connected with the country where the immovable property is situated.

4. A contract for the carriage of goods shall not be subject to the presumption in paragraph 2. In such a contract if the country in which, at the time the contract is concluded, the carrier has his principal place of business is also the country in which the place of loading or the place of discharge or the principal place of business of the consignor is situated, it shall be presumed that the contract is most closely connected with that country. In applying this paragraph single voyage charter-parties and other contracts the main purpose of which is the carriage of goods shall be treated as contracts for the carriage of goods.

5. Paragraph 2 shall not apply if the characteristic performance cannot be determined, and the presumptions in paragraphs 2, 3 and 4 shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country.

Article 5

Certain consumer contracts

1. This Article applies to a contract the object of which is the supply of goods or services to a person ("the consumer") for a purpose which can be regarded as being outside his trade or profession, or a contract for the provision of credit for that object.

2. Notwithstanding the provisions of Article 3, a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence:
- if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract, or
- if the other party or his agent received the consumer's order in that country, or
- if the contract is for the sale of goods and the consumer travelled from that country to another country and there gave his order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy

the purpose of inducing the consumer to buy.

3. Notwithstanding the provisions of Article 4, a contract to which this Article applies shall, in the absence of choice in accordance with Article 3, be governed by the law of the country in which the consumer has his habitual residence if it is entered into in the circumstances described in paragraph 2 of this Article.

4. This Article shall not apply to: (a) a contract of carriage;

(b) a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence.

5. Notwithstanding the provisions of paragraph 4, this Article shall apply to a contract which, for an inclusive price, provides for a combination of travel and accommodation.

Article 6

Individual employment contracts

1. Notwithstanding the provisions of Article 3, in a contract of employment a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable under paragraph 2 in the absence of choice.

2. Notwithstanding the provisions of Article 4, a contract of employment shall, in the absence of choice in accordance with Article 3, be governed:
(a) by the law of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country ; or
(b) if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is situated; unless it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the contract shall be governed by the law of that country.

Article 7

Mandatory rules

1. When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

2. Nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract.

Article 8

Material validity

1. The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Convention if the contract or term were valid.

2. Nevertheless a party may rely upon the law of the country in which he has his habitual residence to establish that he did not consent if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in the preceding paragraph.

Article 9

Formal validity

1. A contract concluded between persons who are in the same country is formally valid if it satisfies the formal requirements of the law which governs it under this Convention or of the law of the country where it is concluded.

2. A contract concluded between persons who are in different countries is formally valid if it satisfies the formal requirements of the law which governs it under this Convention or of the law of one of those countries.

3. Where a contract is concluded by an agent, the country in which the agent acts is the relevant country for the purposes of paragraphs 1 and 2.

4. An act intended to have legal effect relating to an existing or contemplated contract is formally valid if it satisfies the formal requirements of the law which under this Convention governs or would govern

if it satisfies the formal requirements of the law which under this Convention governs or would govern the contract or of the law of the country where the act was done.

5. The provisions of the preceding paragraphs shall not apply to a contract to which Article 5 applies, concluded in the circumstances described in paragraph 2 of Article 5. The formal validity of such a contract is governed by the law of the country in which the consumer has his habitual residence.

6. Notwithstanding paragraphs 1 to 4 of this Article, a contract the subject matter of which is a right in immovable property or a right to use immovable property shall be subject to the mandatory requirements of form of the law of the country where the property is situated if by that law those requirements are imposed irrespective of the country where the contract is concluded and irrespective of the law governing the contract.

Article 10

Scope of the applicable law

1. The law applicable to a contract by virtue of Articles 3 to 6 and 12 of this Convention shall govern in particular:
(a) interpretation;
(b) performance;
(c) within the limits of the powers conferred on the court by its procedural law, the consquences of breach, including the assessment of damages in so far as it is governed by rules of law;
(d) the various ways of extinguishing obligations, and prescription and limitation of actions;
(e) the consequences of nullity of the contract.

2. In relation to the manner of performance and the steps to be taken in the event of defective performance regard shall be had to the law of the country in which performance takes place.

Article 11

Incapacity

In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from another law only if the other party to the contract was aware of this incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence.

Article 12

Voluntary assignment

1. The mutual obligations of assignor and assignee under a voluntary assignment of a right against another person ("the debtor") shall be governed by the law which under this Convention applies to the contract between the assignor and assignee.

2. The law governing the right to which the assignment relates shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor's obligations have been discharged.

Article 13

Subrogation

1. Where a person ("the creditor") has a contractual claim upon another ("the debtor"), and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, the law which governs the third person's duty to satisfy the creditor shall determine whether the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship and, if so, whether he may do so in full or only to a limited extent.

2. The same rule applies where several persons are subject to the same contractual claim and one of them has satisfied the creditor.

Article 14

Burden of proof, etc.

1. The law governing the contract under this Convention applies to the extent that it contains, in the law of contract, rules which raise presumptions of law or determine the burden of proof.

2. A contract or an act intended to have legal effect may be proved by any mode of proof recognized by the law of the forum or by any of the laws referred to in Article 9 under which that contract or act is

formally valid, provided that such mode of proof can be administered by the forum.

Article 15

Exclusion of renvoi

The application of the law of any country specified by this Convention means the application of the rules of law in force in that country other than its rules of private international law.

Article 16

"Ordre public"

The application of a rule of the law of any country specified by this Convention may be refused only if such application is manifestly incompatible with the public policy ("ordre public") of the forum.

Article 17

No retrospective effect

This Convention shall apply in a Contracting State to contracts made after the date on which this Convention has entered into force with respect to that State.

Article 18

Uniform interpretation

In the interpretation and application of the preceding uniform rules, regard shall be had to their international character and to the desirability of achieving uniformity in their interpretation and application.

Article 19

States with more than one legal system

1. Where a State comprises several territorial units each of which has its own rules of law in respect of contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Convention.

2. A State within which different territorial units have their own rules of law in respect of contractual obligations shall not be bound to apply this Convention to conflicts solely between the laws of such units.

Article 20

Precedence of Community law

This Convention shall not affect the application of provisions which, in relation to particular matters, lay down choice of law rules relating to contractual obligations and which are or will be contained in acts of the institutions of the European Communities or in national laws harmonized in implementation of such acts.

Article 21

Relationship with other conventions

This Convention shall not prejudice the application of international conventions to which a Contracting State is, or becomes, a party.

Article 22

Reservations

1. Any Contracting State may, at the time of signature, ratification, acceptance or approval, reserve the right not to apply:
(a) the provisions of Article 7 (1);
(b) the provisions of Article 10 (1) (e).

2. Any Contracting State may also, when notifying an extension of the Convention in accordance with Article 27 (2), make one or more of these reservations, with its effect limited to all or some of the territories mentioned in the extension.

territories mentioned in the extension.

3. Any Contracting State may at any time withdraw a reservation which it has made ; the reservation shall cease to have effect on the first day of the third calendar month after notification of the withdrawal.

TITLE III FINAL PROVISIONS

Article 23

1. If, after the date on which this Convention has entered into force for a Contracting State, that State wishes to adopt any new choice of law rule in regard to any particular category of contract within the scope of this Convention, it shall communicate its intention to the other signatory States through the Secretary-Geneal of the Council of the European Communities.

2. Any signatory State may, within six months from the date of the communication made to the Secretary-General, request him to arrange consultations between signatory States in order to reach agreement.

3. If no signatory State has requested consultations within this period or if within two years following the communication made to the Secretary-General no agreement is reached in the course of consultations, the Contracting State concerned may amend its law in the manner indicated. The measures taken by that State shall be brought to the knowledge of the other signatory States through the Secretary-General of the Council of the European Communities.

Article 24

1. If, after the date on which this Convention has entered into force with respect to a Contracting State, that State wishes to become a party to a multilateral convention whose principal aim or one of whose principal aims is to lay down rules of private international law concerning any of the matters governed by this Convention, the procedure set out in Article 23 shall apply. However, the period of two years, referred to in paragraph 3 of that Article, shall be reduced to one year.

2. The procedure referred to in the preceding paragraph need not be followed if a Contracting State or one of the European Communities is already a party to the multilateral convention, or if its object is to revise a convention to which the State concerned is already a party, or if it is a convention concluded within the framework of the Treaties establishing the European Communities.

Article 25

If a Contracting State considers that the unification achieved by this Convention is prejudiced by the conclusion of agreements not covered by Article 24 (1), that State may request the Secretary-General of the Council of the European Communities to arrange consultations between the signatory States of this Convention.

Article 26

Any Contracting State may request the revision of this Convention. In this event a revision conference shall be convened by the President of the Council of the European Communities.

Article 27

1. This Convention shall apply to the European territories of the Contracting States, including Greenland, and to the entire territory of the French Republic.

2. Nothwithstanding paragraph 1:
(a) this Convention shall not apply to the Faroe Islands, unless the Kingdom of Denmark makes a declaration to the contrary;
(b) this Convention shall not apply to any European territory situated outside the United Kingdom for the international relations of which the United Kingdom is responsible, unless the United Kingdom makes a declaration to the contrary in respect of any such territory;
(c) this Convention shall apply to the Netherlands Antilles, if the Kingdom of the Netherlands makes a declaration to that effect.

3. Such declarations may be made at any time by notifying the Secretary-General of the Council of the European Communities.

4. Proceedings brought in the United Kingdom on appeal from courts in one of the territories referred to in paragraph 2 (b) shall be deemed to be proceedings taking place in those courts.

Article 28

1. This Convention shall be open from 19 June 1980 for signature by the States party to the Treaty

1. This Convention shall be open from 19 June 1980 for signature by the States party to the Treaty establishing the European Economic Community.

2. This Convention shall be subject to ratification, acceptance or approval by the signatory States. The instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the Council of the European Communities.

Article 29

1. This Convention shall enter into force on the first day of the third month following the deposit of the seventh instrument of ratification, acceptance or approval.

2. This Convention shall enter into force for each signatory State ratifying, accepting or approving at a later date on the first day of the third month following the deposit of its instrument of ratification, acceptance or approval.

Article 30

1. This Convention shall remain in force for 10 years from the date of its entry into force in accordance with Article 29 (1), even for States for which it enters into force at a later date.

2. If there has been no denunciation it shall be renewed tacitly every five years.

3. A Contracting State which wishes to denounce shall, not less than six months before the expiration of the period of 10 or five years, as the case may be, give notice to the Secretary-General of the Council of the European Communities. Denunciation may be limited to any territory to which the Convention has been extended by a declaration under Article 27 (2).

4. The denunciation shall have effect only in relation to the State which has notified it. The Convention will remain in force as between all other Contracting States.

Article 31

The Secretary-General of the Council of the European Communities shall notify the States party to the Treaty establishing the European Economic Community of:
(a) the signatures;
(b) the deposit of each instrument of ratification, acceptance or approval;
(c) the date of entry into force of this Convention;
(d) communications made in pursuance of Articles 23, 24, 25, 26, 27 and 30;
(e) the reservations and withdrawals of reservations referred to in Article 22.

Article 32

The Protocol annexed to this Convention shall form an integral part thereof.

Article 33

This Convention, drawn up in a single original in the Danish, Dutch, English, French, German, Irish and Italian languages, these texts being equally authentic, shall be deposited in the archives of the Secretariat of the Council of the European Communities. The Secretary-General shall transmit a certified copy thereof to the Government of each signatory State.

Til bekræftelse heraf har undertegnede behørigt befuldmægtigede underskrevet denne konvention.

Zu Urkund dessen haben die hierzu gehörig befugten Unterzeichneten ihre Unterschriften unter dieses Übereinkommen gesetzt.

In witness whereof the undersigned, being duly authorized thereto, have signed this Convention.

En foi de quoi, les soussignés, dûment autorisés à cet effet, ont signé la présente convention.

Dá fhianú sin, shínigh na daoine seo thíos, arna n-údarú go cuí chuige sin, an Coinbhinsiún seo.

In fede di che, i sottoscritti, debitamente autorizzati a tal fine, hanno firmato la presente convenzione.

Ten blijke waarvan, de ondergetekenden, daartoe behoorlijk gemachtigd, hun handtekening onder dit Verdrag hebben geplaatst.

Udfærdiget i Rom, den nittende juni nitten hundrede og firs.

Geschehen zu Rom am neunzehnten Juni neunzehnhundertachtzig.

Done at Rome on the nineteenth day of June in the year one thousand nine hundred and eighty.

Fait à Rome, le dix-neuf juin mil neuf cent quatre-vingt.

Arna dhéanamh sa Róimh, an naoú lá déag de Mheitheamh sa bhliain míle naoi gcéad ochtó.

Fatto a Roma, addì diciannove giugno millenovecentoottanta.

Gedaan te Rome, de negentiende juni negentienhonderd tachtig.

PROTOCOL

The High Contracting Parties have agreed upon the following provision which shall be annexed to the Convention:

Notwithstanding the provisions of the Convention, Denmark may retain the rules contained in Søloven (Statute on Maritime Law) paragraph 169 concerning the applicable law in matters relating to carriage of goods by sea and may revise these rules without following the procedure prescribed in Article 23 of the Convention.

Til bekræftelse heraf har undertegnede behørigt befuldmægtigede underskrevet denne protokol.

Zu Urkund dessen haben die hierzu gehörig befugten Unterzeichneten ihre Unterschriften unter dieses Protokoll gesetzt.

In witness whereof the undersigned, being duly authorized thereto, have signed this Protocol.

En foi de quoi, les soussignés, dûment autorisés à cet effet, ont signé le présent protocole.

Dá fhianú sín, shínigh na daoine seo thíos, arna n-údarú go cuí chuige sin, an Prótacal seo.

In fede di che, i sottoscritti, debitamente autorizzati a tal fine, hanno firmato il presente protocollo.

Ten blijke waarvan, de ondergetekenden, daartoe behoorlijk gemachtigd, hun handtekening onder dit Protocol hebben geplaatst.

Udfærdiget i Rom, den nittende juni nitten hundrede og firs.

Geschehen zu Rom am neunzehnten Juni neunzehnhundertachtzig.

Done at Rome on the nineteenth day of June in the year one thousand nine hundred and eighty.

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Arna dhéanamh sa Róimh, an naoú lá déag de Mheitheamh sa bhliain míle naoi gcéad ochtó.

Fatto a Roma, addì diciannove giugno millenovecentoottanta.

Gedaan te Rome, de negentiende juni negentienhonderd tachtig.

JOINT DECLARATION

At the time of the signature of the Convention on the law applicable to contractual obligations, the Governments of the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland, I. anxious to avoid, as far as possible, dispersion of choice of law rules among several instruments and differences between these rules,

express the wish that the institutions of the European Communities, in the exercise of their powers under the Treaties by which they were established, will, where the need arises, endeavour to adopt choice of law rules which are as far as possible consistent with those of this Convention;

II. declare their intention as from the date of signature of this Convention until becoming bound by Article 24, to consult with each other if any one of the signatory States wishes to become a party to any convention to which the procedure referred to in Article 24 would apply;

III. having regard to the contribution of the Convention on the law applicable to contractual obligations to the unification of choice of law rules within the European Communities, express the view that any State which becomes a member of the European Communities should accede to this Convention

Til bekræftelse heraf har undertegnede behørigt befuldmægtigede underskrevet denne

Til bekræftelse heraf har undertegnede behørigt befuldmægtigede underskrevet denne fælleserklæring.

Zu Urkund dessen haben die hierzu gehörig befugten Unterzeichneten ihre Unterschriften unter diese gemeinsame Erklärung gesetzt.

In witness whereof the undersigned, being duly authorized thereto, have signed this Joint Declaration.

En foi de quoi, les soussignés, dûment autorisés à cet effet, ont signé la présente déclaration commune.

Dá fhianú sin, shínigh na daoine seo thíos, arna n-údarú go cuí chuige sin, an Dearbhu Comhphaírteach seo.

In fede di che, i sottoscritti, debitamente autorizzati a tal fine, hanno firmato la presente dichiarazione comune.

Ten blijke waarvan, de ondergetekenden, daartoe behoorlijk gemachtigd, hun handtekening onder deze Verklaring hebben geplaatst.

Udfærdiget i Rom, den nittende juni nitten hundrede og firs.

Geschehen zu Rom am neunzehnten Juni neunzehnhundertachtzig.

Done at Rome on the nineteenth day of June in the year one thousand nine hundred and eighty.

Fait à Rome, le dix-neuf juin mil neuf cent quatre-vingt.

Arna dhéanamh sa Róimh, an naoú lá déag de Mheitheamh sa bhliain míle naoi gcéad ochtó.

Fatto a Roma, addì diciannove giugno millenovecentoottanta.

Gedaan te Rome, de negentiende juni negentienhonderd tachtig.

JOINT DECLARATION

The Governments of the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, and the United Kingdom of Great Britain and Northern Ireland,

On signing the Convention on the law applicable to contractual obligations;

Desiring to ensure that the Convention is applied as effectively as possible;

Anxious to prevent differences of interpretation of the Convention from impairing its unifying effect;

Declare themselves ready:

1. to examine the possibility of conferring jurisdicition in certain matters on the Court of Justice of the European Communities and, if necessary, to negotiate an agreement to this effect;

2. to arrange meetings at regular intervals between their representatives.

Til bekræftelse heraf har undertegnede behørigt befuldmægtigede underskrevet denne fælleserklæring.

Zu Urkund dessen haben die hierzu gehörig befugten Unterzeichneten ihre Unterschriften unter diese gemeinsame Erklärung gesetzt.

In witness whereof the undersigned, being duly authorized thereto, have signed this Joint Declaration.

En foi de quoi, les soussignés, dûment autorisés à cet effet, ont signé la présente déclaration commune.

Dá fhianú sin shínigh na daoine seo thíos, arna n-údarú go cuí chuige sin, an Dearbhu Comhpháirteach seo.

In fede di che, i sottoscritti, debitamente autorizzati a tal fine, hanno firmato la presente dichiarazione comune.

Ten blijke waarvan, de ondergetekenden, daartoe behoorlijk gemachtigd, hun handtekening onder deze Verklaring hebben geplaatst.

Udfærdiget i Rom, den nittende juni nitten hundrede og firs.

Geschehen zu Rom am neunzehnten Juni neunzehnhundertachtzig.

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80/383/EEC: Commission Opinion of 17 March 1980 concerning the draft Convention on the law applicable to contractual obligations

COMMISSION OPINION of 17 March 1980 concerning the draft Convention on the law applicable to contractual obligations (80/383/EEC)

I

The Convention on the law applicable to contractual obligations was prepared between 1969 and 1979 by experts from the Governments of the Member States and from the Commission of the European Communities in consultation with the Council and the Commission. It is to be signed in 1980 by the plenipotentiaries of the Member States meeting within the Council.

The draft is the first step towards unification and codification of general rules of conflict in the field of civil law in the Community. Unification will make it easier to determine the law applicable and will increase legal certainty. It should also ensure that all courts in the Community always apply the same substantive law to the same matter in dispute between the same parties. Where the parties are free to choose between courts in different Member States, their choice should not influence the law applicable to the action, and this should operate to prevent forum shopping. The Convention is a logical complement to the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (the Judgments Convention) (1) and to the Convention of Accession of 9 October 1978 (2) of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland to the Convention of 27 September 1968.

II

The Convention has a very wide scope of application in view of the fact that the courts of the Contracting States will always have to apply it whenever they have to decide what substantive law is applicable in an individual case, whether the choice is between the laws of several Contracting States or of several non-contracting States or of both Contracting and non-contracting States.

The uniform conflict rules created by the Convention cover in principle all types of contract. They are supplemented by special rules of conflict for certain types of contract which are contained in the Convention itself, e.g. the rules relating to contracts of carriage, or which have been adopted, or will later be adopted in Community legal instruments or in bilateral or multilateral international treaties.

The content of the Convention takes full account of the legal principles prevailing in the Member States. It has regard to developments which have taken place in case-law, legal theory and law reform in the Contracting States and outside them.

The basic rule is that the parties may themselves select the substantive law applicable to their contract except where all the elements relevant to the situation are connected with one country only. In that case, the fact that a foreign law has been chosen will not result in the exclusion of the mandatory rules of the law of that country.

If the parties have not made a choice of law, the contract is as a general rule governed by the law of the country with which it is most closely connected. There is a rebuttable presumption that this is the country where the party who is to perform the obligation which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence or, in the case of a legal person, its central administration.

III

The Commission welcomes the proposed unification of rules in the field of private international law and endorses the principles embodied in the Convention. It regrets, however, the fact that

it has not been possible in this Convention, which is the first on private international law, to cover non-contractual obligations as well. Cases will in fact frequently occur where not only contractual but also non-contractual claims form the subject-matter of the same action. Other cases will turn on the question whether a claim is to be considered as contractual or non-contractual (delictual or quais-delictual). The application of the Convention in its present form may therefore result in the situation in which if an action is brought in one (1) OJ No L 304, 30.10.1978, p. 77 (which gives the text as amended by the Convention of Accession next referred to). (2) OJ No L 304, 30.10.1978, p. 1. Contracting State it will be decided in accordance with the rules contained in the Convention, whereas if it is brought in another Contracting State it will be decided in accordance with the conflicts rules of the lex fori which have not yet been unified. This shortcoming is, however, not so serious that the Commission would wish to oppose signature of the Convention as it stands.

IV

Much more important, however, is the fact that in a number of respects the Convention does not fully succeed in creating a set of rules common to all the Member States: 1. Entry into force in all Member States is not guaranteed. Five ratifications will be sufficient for it to enter into force (Article 28).

2. It has not been concluded for an unlimited period. Its duration may be restricted to 10 years by denunciation (Article 29).

3. Uniform interpretation of the Convention is likewise not guaranteed since the Member States have so far been unable to agree on the incorporation in the Convention, or in a Protocol corresponding to the Protocol of 3 June 1971 on the interpretation of the Judgments Convention (1), of a provision based on Article 177 of the EEC Treaty. The inclusion of such a provision would confer jurisdiction on the Court of Justice of the European Communities to give preliminary rulings concerning the interpretation of the Convention.

The defects mentioned at 1 and 2 above might have the effect of preventing the creation and maintenance of a unified juridical area within the Community. They are both fundamental defects, as a result of which the Convention cannot contribute, or can contribute only temporarily, to the functioning of the common market. Another consequence is that the rights and obligations of nationals of the Member States in intra-Community and international trade and legal transactions will continue to be dissimilar. Forum shopping will still be possible. The Convention no longer has any semblance of being a "Community convention". The close connection with the Judgments Convention does in fact require that the territorial scope of both conventions be the same.

The Convention will likewise have to be applicable in all Member States if uniform interpretation by the Court of Justice is to be guaranteed. It is of course not inconceivable, nor impossible, that the Court would interpret legal instruments that are in force only in some Member States. Nevertheless, the Community's supreme judicial authority should be able, when interpreting a rule of law, to take into account the legal position in all Member States. It is debatable whether this is still possible where a rule does not apply in all those States.

Above all, however, the absence of provisions guaranteeing uniform interpretation and conferring judisdiction for that purpose on the Court of Justice is a totally unacceptable omission in a set of legal rules which aim among other things at uniform application and development of the uniform rules now prepared. It is precisely because of its numerous framework provisions and the imprecision of many of the legal concepts employed that this Convention needs to be interpreted in a uniform manner. Past experience with other conventions has shown that, without the intervention of the Court of Justice, the same text is inevitably interpreted after a short space of time in different

ways by the courts of the individual Contracting States.

The Commission has therefore repeatedly stated through its representatives that it considers the insertion of a provision based on Article 177 of the EEC Treaty to be necessary in order to guarantee uniformity of interpretation and application from the moment the Convention enters into force.

The Commission would be willing to accept that the matter be dealt with by means of a Protocol on interpretation, along the lines of the Protocol dated 3 June 1971, so that at least some national courts are empowered, or are placed under the obligation, to refer questions of interpretation to the Court of Justice for a preliminary ruling.

The Commission would not consider it satisfactory, however, that no obligation to refer to the Court of Justice be placed on national courts from whose judgments no further appeal lies under national law ; nor would it be satisfactory that those courts be allowed discretion to determine whether they refer questions of interpretation to the Court of Justice. Consistency of case-law and uniform application of the law cannot be achieved in all Contracting States unless those courts are bound to refer to the Court of Justice. This is the only way of ensuring that the law contained in the Convention, which is a law common to all the Contracting States, is not fragmented as a result of divergent interpretation by the national courts.

(1) OJ No L 304, 30.10.1978, p. 97 (text as amended by the Convention of Accession). A restriction of the jurisdiction of the Court of Justice to the giving of rulings on questions of interpretation "in the interests of the law", which have no effect on the judgments which gave rise to the reference to the Court, would, in the Commission's opinion, be completely inadequate.

V

For these reasons, the Commission delivers the following opinion pursuant to the Treaty establishing the European Economic Community, and in particular the second indent of Article 155 thereof: 1. The Commission favours the signature and ratification of the Convention on the law applicable to contractual obligations by all Member States of the European Communities, on condition that the Governments of the Member States at least express their willingness in a joint declaration made at the time of signature of the Convention to negotiate forthwith a Protocol conferring on the Court of Justice of the European Communities powers which guarantee the uniform interpretation and application of the Convention in all Member States.

2. In the absence of such a declaration, the Commission will feel free to propose that the Council adopt a legal instrument based on the EEC Treaty to attain the desired unification of private international law and thereby eliminate the defects mentioned at IV above.

3. This opinion is addressed to the Member States.

Done at Brussels, 17 March 1980.

For the Commission

Etienne DAVIGNON

Member of the Commission

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Report on the Convention on the law applicable to contractual obligations by Mario Giuliano, Professor, University of Milan, and Paul Lagarde, Professor, University of Paris I

REPORT on the Convention on the law applicable to contractual obligations (1) by Mario Giuliano Professor, University of Milan (who contributed the introduction and the comments on Articles 1, 3 to 8, 10, 12, and 13) and Paul Lagarde Professor, University of Paris I (who contributed the comments on Articles 2, 9, 11, and 14 to 33)

(1) The text of the Convention on the law applicable to contractual obligations was published in Official Journal No L 266 of 9 October 1980. The Convention, open for signature in Rome on 19 June 1980, was signed on that day by the Plenipotentiaries of the following seven Member States : Belgium, Germany, France, Ireland, Italy, Luxembourg and the Netherlands. ! PIC FILE= "T0035306"! ! PIC FILE= "T0035309"!

INTRODUCTION

1. Proposal by the Governments of the Benelux countries to the Commission of the European Communities

On 8 September 1967 the Permanent Representative of Belgium extended to the Commission, in the name of his own Government and those of the Kingdom of the Netherlands and the Grand Duchy of Luxembourg, an invitation to collaborate with the experts of the Member States, on the basis of the draft Benelux convention, in the unification of private international law and codification of the rules of conflict of laws within the Community.

The object of this proposal was to eliminate the inconveniences arising from the diversity of the rules of conflict, notably in the field of contract law. Added to this was "an element of urgency", having regard to the reforms likely to be introduced in some Member States and the consequent "danger that the existing divergences would become more marked".

In the words of Mr T. Vogelaar, Director-General for the Internal Market and Approximation of Legislation at the Commission, in his opening address as chairman of the meeting of government experts on 26 to 28 February 1969 : "This proposal should bring about a complete unification of the rules of conflict. Thus in each of our six countries, instead of the existing rules of conflict and apart from cases of application of international Agreements binding any Member State, identical rules of conflict would enter into force both in Member States' relations inter se and in relations with non-Community States. Such a development would give rise to a common corpus of unified legal rules covering the territory of the Community's Member States. The great advantage of this proposal is undoubtedly that the level of legal certainty would be raised, confidence in the stability of legal relationships fortified, agreements on jurisdiction according to the applicable law facilitated, and the protection of rights acquired over the whole field of private law augmented. Compared with the unification of substantive law, unification of the rules of conflict of laws is more practicable, especially in the field of property law, because the rules of conflict apply solely to legal relations involving an international element" (1).

2. Examination of the proposal by the Commission and its consequences

In examining the proposal by the Benelux countries the Commission arrived at the conclusion that at least in some special fields of private international law the harmonization of rules of conflict would be likely to facilitate the workings of the common market.

Mr Vogelaar's opening address reviews the grounds on which the Commission's conclusion was founded and is worth repeating here:

> "According to both the letter and spirit of the Treaty establishing the EEC, harmonization is recognized as fulfilling the function of permitting or facilitating the creation in the economic field of legal conditions similar to those governing an internal market. I appreciate that opinions

may differ as to the precise delimitation of the inequalities which directly affect the functioning of the common market and those having only an indirect effect. Yet there are still legal fields in which the differences between national legal systems and the lack of unified rules of conflict definitely impede the free movement of persons, goods, services and capital among the Member States.

Some will give preference to the harmonization or unification of substantive law rather than the harmonization of rules of conflict. As we know, the former has already been achieved in various fields. However, harmonization of substantive law does not always contrive to keep pace with the dismantling of economic frontiers. The problem of the law to be applied will therefore continue to arise as long as substantive law is not unified. The number of cases in which the question of applicable law must be resolved increases with the growth of private law relationships across frontiers.

At the same time there will be a growing number of cases in which the courts have to apply a foreign-law. The Convention signed on 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters uniformly governs the international jurisdiction of the courts within the Community. It should help to facilitate and expedite many civil actions and enforcement proceedings. It also enables the parties. in many matters, to teach agreements assigning jurisdiction and to choose among several courts. The outcome may be that preference is given to the court of a State whose law seems to offer a better solution to the proceedings. To prevent this "forum shopping", increase legal certainty, and anticipate more easily the law which will be applied, it would be advisable for the rules of conflict to be unified in fields of particular economic importance so that the same law is applied irrespective of the State in which the decision is given.

To sum up, there are three main considerations guiding our proposal for harmonizing the rules of conflict for a few well-defined types of legal relations. The first is dictated by the history of private international law : to try to unify everything is to attempt too much and would take too long. The second is the urgent necessity for greater legal certainty in some sectors of major economic importance. the third is the wish to forestall any aggravation of the differences between the rules of private international law of the various Member States' (2).

These were in fact the motives which prompted the Commission to convene a meeting of experts from the Member States in order to obtain a complete picture of the present state of the law and to decide whether and to what extent a harmonization or unification of private international law within the Community should be undertaken. The invitation was accompanied by a questionnaire designed to facilitate the discussion (3).

3. Favourable attitude of Member States to the search for uniform rules of conflict, the setting of priorities and establishment of the working group to study and work out these rules

The meeting in question took place on 26 to 28 February 1969. It produced a first survey of the situation with regard to prospects for and possible advantage of work in the field of unification of rules of conflict among Member States of the European Communities (4).

However, it was not until the next meeting on 20 to 22 October 1969 that the government experts were able to give a precise opinion both on the advisability and scope of harmonization and on the working procedure and organization of work.

As regards advisability of harmonization the Member States' delegations (with the sole exception of the German delegation) declared themselves to be fundamentally in agreement on the value of the work in making the law more certain in the Community. The German delegation, while mentioning some hesitation on this point in professional and business circles, said that this difference of opinion was not such as to affect the course of the work at the present time.

As regards the scope of harmonization, it was recognized (without prejudice to future developments) that a start should be made on matters most closely involved in the proper functioning of the common market, more specifically: 1. the law applicable to corporeal and incorporeal property;

2. the law applicable to contractual and non-contractual obligations;

3. the law applicable to the form of legal transactions and evidence;

4. general matters under the foregoing heads (renvoi, classification, application of foreign law, acquired rights, public policy, capacity, representation).

As for the legal basis of the work, it was the unanimous view that the proposed harmonization, without being specifically connected with the provisions of Article 220 of the EEC Treaty, would be a natural sequel to the Convention on jurisdiction and enforcement of judgments.

Lastly, on the procedure to be followed, all the delegations were in favour of that adopted for work on the Conventions already signed or in process of drafting under Article 220 and of seeking the most suitable ways of expediting the work (5).

The results of the meeting were submitted through the Directorate-General for the Internal Market an Approximation of Legislation to the Commission with a proposal to seek the agreement of Member States for continuance of the work and preparation of a preliminary draft Convention establishing uniformity of law in certain relevant areas of private international law.

The Commission acceded to the proposal. At its meeting on 15 January 1970 the Committee of Permanent Representatives expressly authorized the Group to continue its work on harmonization of the rules of private international law, on the understanding that the preliminary draft or drafts would give priority to the four areas previously indicated.

Following the abovementioned decision of the Permanent Representatives Committee, the Group met on 2 and 3 February 1970 and elected its chairman, Mr P. Jenard, Director of Administration in the Belgian Ministry of Foreign Affairs and External Trade, and its vice-chairman, Prof. Miccio, Counsellor to the Italian Court of Cassation.

Having regard to the decision of the previous meeting that the matters to be given priority should be divided into four sectors, the Group adopted the principle that each of the four sectors should have its own rapporteur appointed as follows, to speed up the work: 1. in the case of the law applicable to corporeal and incorporeal property, by the German delegation;

2. in the case of the law applicable to contractual and extracontractual obligations, by the Italian delegation:

3. in the case of the law applicable to the form of legal transactions and evidence, by the French delegation;

4. in general matters, by the Netherlands delegation, in agreement with the Belgian and Luxembourg delegations.

As a result the following were appointed : Prof. K. Arndt, Oberlandsgerichtspräsident a.d. ; Prof. M. Giuliano, University of Milan ; Prof. P. Lagarde, University of Paris I ; Mr T. van Sasse van Ysselt, Director in the Netherlands Ministry of Justice.

Other matters were dealt with at the same meeting, notably the kind of cenvention to be prepared, as to which the great majority of delegates favoured a universal convention not based upon reciprocity ; the method of work ; participation of observers from the Hague Conference on Private International Law and the Benelux Commission on Unification of Law (6).

4. Organization, progress and initial results of the Group's work at the end of 1972

The Group took as its starting point the examination and discussion of the questionnaires prepared by the rapporteurs, Messrs Giuliano, Lagarde and van Sasse van Ysselt in their respective fields. They were discussed at a meeting of the rapporteurs chaired by Mr Jenard on 1 to 4 June 1970. The three questionnaires were subjected to a thorough analysis, extending both to the rules of conflict (national or established by convention) in force in the Community Member States and to the evolutionary trends already apparent in case law and legal theory in certain countries or worthy of consideration in relation to certain present-day reqirements in international life. This oral analysis was further supplemented by the written replies given by each rapporteur on the basis of the statutes, case law and legal theory of his own country (of the three Benelux countries in the case of Mr van Sasse) to the questionnaires drawn up by his colleagues and himself (7).

This preliminary work and material enabled each of the rapporteurs to present an interim report, with draft articles on the matter considered, as a working basis for the Group meetings. It was agreed that these meetings would be devoted to an examination of Mr Giuliano's report on the law applicable to contractual and non-contractual obligations and to the subject matter of Mr Lagarde's and Mr van Sasse van Ysselt's report to the extent that this was relevant to Mr Giuliano's subject.

It was agreed that Mr Arndt's report on the law applicable to corporeal and incorporeal property would be discussed later, Mr Arndt having explained that a comparative study of the principal laws on security rights and interests should precede his report and that the need for such a study had been generally recognized.

Apart from the meeting of rapporteurs in June 1970, the work fully occupied 11 Group plenary sessions, each with an average duration of five days (8).

At its meeting in June 1972 the Group completed the preliminary draft convention on the law applicable to contractual and non-contractual obligations and decided that it should be submitted, together with the reports finalized at a meeting of rapporteurs on 27 and 28 September 1972, to the Permanent Representatives Commitee for transmission to the Governments of the Community Member States (9).

5. Re-examination of Group work in the light of observations by the Governments of original and new Member States of the EEC and results achieved in February 1979

It follows from the foregoing observations that the 1972 draft dealt both with the law applicable to contractual obligations and with that applicable to non-contractual obligations. At the same time it provided solutions relating to the law governing the form of legal transactions and evidence, questions of interpretation of uniform rules and their relationship with other rules of conflict of international origin, to the extent to which these were connected with the subject of the preliminary draft.

Following the accession of the United Kingdom, Denmark and Ireland to the EEC in 1973 the Commission extended the Group to include government experts from the new Member States and the Permanent Representatives Commitee authorized the enlarged Group to re-examine in the light of observations from the Governments of the original and of the new Member States of the EEC, the preliminary draft convention which the Commission had submitted to it at the end of 1972. The Group elected Prof. Philip as vice-chairman.

Nevertheless the preliminary draft was not re-examined immediately. The need to allow the experts from the new Member States time to consult their respective Governments and interested parties on the one hand and the political uncertainties in the United Kingdom concerning membership of the European Communities (which were not settled until the 1975 referendum) on the other, resulted in a significant reduction (if not suspension) of the Group's activities for about three years. It was not until the end of 1975 that the Group was able properly to resume its work and proceed with the preparation of the Convention on the law applicable to contractual obligations. In fact

the Group decided at its meeting in March 1978 to limit the present convention to contracts alone and to begin negotiations for a second Convention, on non-contractual obligations, after the first had been worked out. Most delegations thought it better for reasons of time to finish the part relating to contractual obligations first.

The original preliminary draft, with the limitation referred to, was re-examined in the course of 14 plenary sessions of the Group and three special meetings on transport and insurance contracts ; each of the plenary sessions lasted two to five days (10). At the meeting in February 1979 the Group finished the draft convention, decided upon the procedure for transmitting the draft to the Council before the end of April and instructed Professors Giuliano and Lagarde to draw up the report ; this was then finalized at a meeting of rapporteurs on 18 to 20 June 1979 in which one expert per delegation participated, and transmitted in turn to the Council and to the Governments by the chairman, Mr Jenard.

6. Finalization of the Convention within the Council of the European Communitees

On 18 May 1979 the Group's chairman, Mr Jenard, sent the draft Convention to the President of the Council of the European Communities with a request that the Governments make their comments on the draft by the end of the year so that the Convention could then be concluded during 1980.

On 20 July 1979 Mr Jenard sent the President of the Council a draft report on the Convention, which was the predecessor of this report.

The General Secretariat of the Council received written comments from the Belgian, Netherlands, Danish, Irish, German, Luxembourg and United Kingdom Governments. In addition, on 17 March 1980, the Commission adopted an opinion on the draft Convention, which was published in Official Journal of the European Communities No L 94 of 11 April 1980.

On 16 January 1980 the Permanent Representatives Commitee set up an ad hoc working party on private international law, whose terms of reference were twofold: - to finalize the Convention text in the light of the comments made by Member States' Governments,

- to consider whether, and if so within what limits, the Court of Justice of the European Communities should be given jurisdiction to interpret the Convention.

The ad hoc working party met twice, from 24 to 28 March and 21 to 25 April 1980, with Mr Brancaccio from the Italian Ministry of Justice in the chair (11). Working from the Governments' written comments and others made orally during discussions, the working party reached general agreement on the substantive provisions of the Convention and on the accompanying report.

The only problems unresolved by the working party concerned the problem of where the Convention stood in relation to the Community legal order. They arose in particular in determining the number of ratifications required for the Convention to come into force and in drafting a statement by the Governments of the Member States on the conferral of jurisdiction on the Court of Justice.

Following a number of discussions in the Permanent Representatives Committee, which gradually brought agreement within sight, the Council Presidency deemed circumstances to be ripe politically for the points of disagreement to be discussed by the Ministers of Justice with a good chance of success at a special Council meeting on 19 June 1980 in Rome.

At that meeting, a final round of negotiations produced agreement on a number of seven Member States required to ratify in order for the Convention to come into force. Agreement was also reached on the wording of a joint statement on the interpretation of the Convention by the Court of Justice, which followed word for word the matching statement made by the Governments of the original six Member States of the Community when the Convention on jurisdiction and enforcement was concluded on 27 September 1968 in Brussels. In adopting the statement, the Representatives of Governments

of the Member States, meeting within the Council, also instructed the ad hoc Council working party on private international law to consider by what means point 1 of the statement could be implemented and report back by 30 June 1981.

With these points settled, the President-in-Office of the Council, Tommaso Morlino, Italian Minister of Justice, recorded the agreement of the Representatives of the Governments of the Member States, meeting within the Council, on the following: - adoption of the text of the Convention and of the two joint statements annexed to it,

- the Convention would be open for signing from 19 June 1980,

- the Convention and accompanying report would be published in the Official Journal of the European Communities for information.

The Convention was signed on 19 June 1980 by the plenipotentiaries of Belgium, the Federal Republic of Germany, France, Ireland, Italy, Luxembourg and the Netherlands.

7. Review of the internal sources and nature of the rules in force in the EEC Member States relating to the law applicable to contractual obligations

The chief aim of the Convention is to introduce into the national laws of the EEC Member States a set of uniform rules on the law applicable to contractual obligations and on certain general points of private international law to the extent that these are linked with those obligations.

Without going here into details of positive law, though it may be necessary to return to it in the comments on the uniform rules, a short survey can now be given of the internal sources and the nature of the rules of conflict at present in force in the Community countries in the field covered by the Convention. This survey will bring out both the value and the difficulties of the unification undertaken by the Group and of which the convention is only the first fruit.

Of the nine Member States of the Community, Italy is the only one to have a set of rules of conflict enacted by the legislature covering almost all the matters with which the Convention is concerned. These rules are to be found for the most part in the second paragraph of Article 17 and in Articles 25, 26, 30 and 31 of the general provisions constituting the introduction to the 1942 Civil Code, and in Articles 9 and 10 of the 1942 Navigation Code.

In the other Member States of the Community, however, the body of rules of conflict on the law applicable to contractual obligations is founded only on customary rules or on rules originating in case law. Academic studies and writings have helped considerably to develop and harmonize these rules.

The position as just stated has not been altered substantially either by the French draft law supplementing the Civil Code in respect of private international law (1967) or by the Benelux Treaty establishing uniform rules of private international law signed in Brussels on 3 July 1969. These two texts are certainly an interesting attempt to codify the rules of conflict and also, in the case of the Benelux countries, to make these rules uniform on an inter-State level. The Group did not fail to take account of their results in its own work. However, the entry into force of the Benelux Treaty has not been pursued, and the French draft law seems unlikely to be adopted in the near future.

8. Universal application of the uniform rules

From the very beginning of its work the Group has professed itself to be in favour of uniform rules which would apply not only to the nationals of Member States and to persons domiciled or resident within the Community but also to the nationals of third States and to persons domiciled or resident therein. The provisions of Article 2 specify the universal application of the convention.

The Group took the view that its main purpose was to frame general rules such as those existing in legislative provisions currently in force in Italy and in the Benelux Treaty and the French draft law. In such a context these general rules, which would become the "common law" of each Member State for settling conflicts of laws, would not prejudice the detailed regulation of clearly delimited matters arising from other work, especially that of the Hague Conference on private international law. The application of these particular conventions is safeguarded by the provisions of Article 21.

9. On the normally general nature of the uniform rules in the Convention and their significance in the unification of laws already undertaken in the field of private international law

At the outset of its work the Group had also to determine the nature and scope of the uniform rules of conflict to be formulated. Should they be general rules, to be applied indiscriminately to all contracts, or would it be better to regulate contractual obligations by means of a series of specific rules applicable to the various categories of contract, or again should an intermediate solution be envisaged, namely by adopting general rules and supplementing them by specific rules for certain categories of contract?

Initially the rapporteur advocated the latter method. This provided that, in default of an express of implied choice by the parties, the contract would be governed (subject to specific provisions for certain categories) by one system of law.

When the Group tackled the question of whether to supplement the general rules for determining the law applicable to the contract by some specific rules for certain categories of contract it became clear that the point was no longer as significant as it had been in the context of the rapporteur's initial proposals. The Group's final version of the text of Article 4 provided satisfactory solutions for most of the contracts whose applicable law was the subject of specific rules of conflict in the rapporteur's proposals, notably because of its flexibility. The Group therefore merely provided for some exceptions to the rule contained in Article 4, notably those in Articles 5 and 6 concerning the law applicable respectively to certain consumer contracts and to contracts of employment in default of an express or implied choice by the parties.

The normally general nature of the uniform rules made it necessary to provide for a few exceptions and to allow the judge a certain discretion as to their application in each particular case. This aspect will be dealt with in the comments on a number of Articles in Chapter III of this report.

As declared in the Preamble, in concluding this Convention the nine States which are parties to the Treaty establishing the European Economic Community show their desire to continue in the field of private international law the work of unification already undertaken in the Community, particularly in matters of jurisdiction and enforcement of judgments. The question of accession by third States is not dealt with in the Convention (see page 41, penultimate paragraph).

TITLE I SCOPE OF THE CONVENTION

Article 1

Scope of the Convention

1. As provided in Article 1 (1) the uniform rules in this Convention apply generally to contractual obligations in situations involving a conflict of laws.

It must be stressed that the uniform rules apply to the abovementioned obligations only "in situations involving a choice between the laws of different countries". The purpose of this provision is to

define the true aims of the uniform rules. We know that the law applicable to contracts and to the obligations arising from them is not always that of the country where the problems of interpretation or enforcement are in issue. There are situations in which this law is not regarded by the legislature or by the case law as that best suited to govern the contract and the obligations resulting from it. These are situations which involve one or more elements foreign to the internal social system of a country (for example, the fact that one or all of the parties to the contract are foreign nationals or persons habitually resident abroad, the fact that the contract was made abroad, the fact that one or more of the obligations of the parties are to be performed in a foreign country, etc.), thereby giving the legal systems of several countries claims to apply. These are precisely the situations in which the uniform rules are intended to apply.

Moreover the present wording of paragraph 1 means that the uniform rules are to apply in all cases where the dispute would give rise to a conflict between two or more legal systems. The uniform rules also apply if those systems coexist within one State (cf. Article 19 (1)). Therefore the question whether a contract is governed by English or Scots law is within the scope of the Convention, subject to Article 19 (2).

2. The principle embodied in paragraph 1 is however subject to a number of restrictions.

First, since the Convention is concerned only with the law applicable to contractual obligations, property rights and intellectual property are not covered by these provisions. An Article in the original preliminary draft had expressly so provided. However, the Group considered that such a provision would be superfluous in the present text, especially as this would have involved the need to recapitulate the differences existing as between the various legal system of the Member States of the Community.

3. There are also the restrictions set out in paragraph 2 of Article 1.

The first of these, at (a), is the status or legal capacity of natural persons, subject to Article 11 ; then, at (b), contractual obligations relating to wills and succession, to property rights arising out of matrimonial relationships, to rights and duties arising out of family relationships, parentage, marriage or affinity, including maintenance obligations in respect of illegitimate children. The Group intended this enumeration to exclude from the scope of the Convention all matters of family law.

As regards maintenance obligations, within the meaning of Article 1 of the Hague Convention on the law applicable to maintenance obligations, the Group considered that this exclusion should also extend to contracts which parties unter a legal maintenance obligation make in performance of that obligation. All other contractual obligations, even if they provide for the maintenance of a member of the family towards whom there are no legal maintenance obligations, would fall within the scope of the Convention.

Contrary to the provisions of the second paragraph of Article 1 in the original preliminary draft, the current wording of subparagraph (b) does not in general exclude gifts. Most of the delegations favoured the inclusion of gifts where they arise from a contract within the scope of the Convention, even when made within the family, provided they are not covered by family law. Therefore the only contractual gifts left outside the scope of the uniform rules are those to which family law, the law relating to matrimonial property rights or the law of succession apply.

The Group unanimously affirmed that matters relating to the custody of children are outside the scope of the Convention, since they fall within the sphere of personal status and capacity. However, the Group thought it inappropriate to specify this exclusion in the text of the Convention itself, thereby intending to avoid an a contrario interpretation of the Convention of 27 September 1968.

To obviate any possibility of misconstruction, the present wording of subparagraphs (a) and (b) uses the same terminology as the 1968 Convention on jurisdiction and enforcement of judgments.

4. Subparagraph (c) excludes from the scope of the uniform rules in the first instance obligations arising from bills of exchange, cheques, promissary notes.

In retaining this exclusion, for which provision had already been made in the original preliminary draft, the Group took the view that the provisions of the Convention were not suited to the regulation of obligations of this kind. Their inclusion would have involved rather complicated special rules. Moreover the Geneva Conventions to which several Member States of the Community are parties govern most of these areas. Also, certain Member States of the Community regard these obligations as non-contractual.

Subparagraph (c) also excludes other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character. If a document, though the obligation under it is transferable, is not regarded as a negotiable instrument, it falls outside the exclusion. This has the effect that such documents as bills of lading, similar documents issued in connection with transport contracts, and bonds, debentures, guarantees, letters of indemnity, certificates of deposit, warrants and warehouse receipts are only excluded by subparagraph (c) if, they can be regarded as negotiable instruments ; and even then the exclusion only applies with regard to obligations arising out of their negotiable character. Furthermore, neither the contracts pursuant to which such instruments are issued nor contracts for the purchase and sale of such instruments are excluded. Whether a document is characterized as a negotiable instrument is not governed by this Convention and is a matter for the law of the forum (including its rules of private international law).

5. Arbitration agreements and agreements on the choice of court are likewise excluded from the scope of the Convention (subparagraph (d)).

There was a lively debate in the Group on whether or not to exclude agreements on the choice of court. The majority in the end favoured exclusion for the following reasons : the matter lies within the sphere of procedure and forms part of the administration of justice (exercise of State authority) ; rules on this matter might have endangered the ratification of the Convention. It was also noted that rules on jurisdiction are a matter of public policy and there is only marginal scope for freedom of contract. Each court is obliged to determine the validity of the agreement on the choice of court in relation to its own law, not in relation to the law chosen. Given the nature of these provisions and their fundamental diversity, no rule of conflict can lead to a uniform solution. Moreover, these rules would in any case be frustated if the disputes were brought before a court in a third country. It was also pointed out that so far as concerns relationships within the Community, the most important matters (valitidity of the clause and form) are governed by Article 17 of the Convention of 27 September 1968. The outstanding points, notably those relating to consent, do not arise in practice, having regard to the fact that Article 17 provides that these agreements shall be in writing. Those delegations who thought that agreements on choice of court should be included within the Convention pointed out that the validity of such an agreement would often be dealt with by the application of the same law that governed the rest of the contract in which the agreement was included and should therefore be governed by the same law as the contract. In some systems of law, agreement as to choice of court is itself regarded as a contract and the ordinary choice of law rules are applied to discover the law applicable to such a contract.

As regards arbitration agreements, certain delegations, notably the United Kingdom delegation, had proposed that these should not be excluded from the Convention. It was emphasized that an arbitration agreement does not differ from other agreements as regards the contractual aspects, and that certain international Conventions do not regulate the law applicable to arbitration agreements, while others

are inadequate in this respect. Moreover the international Conventions have not been ratified by all the Member States of the Community and, even if they had been, the problem would not be solved because these Conventions are not of universal applications. It was added that there would not be unification within the Community on this important matter in international commerce.

Other delegations, notably the German and French delegations, opposed the United Kingdom proposal, emphasizing particularly that any increase in the number of conventions in this area should be avoided, that severability is accepted in principle in the draft and the arbitration clause is independent, that the concept of "closest ties" difficult to apply to arbitration agreements, that procedural and contractual aspects are difficult to separate, that the matter is complex and the experts' proposals show great divergences ; that since procedural matters and those relating to the question whether a dispute was arbitrable would in any case be excluded, the only matter to be regulated would be consent ; that the International Chamber of Commerce - which, as everyone knows, has great experience in this matter - has not felt the need for further regulation.

Having regard to the fact that the solutions which can and have been considered generally for arbitration are very complex and show great disparity, a delegate proposed that this matter should be studied separately and any results embodied in a Protocol. The Group adopted this proposal and consequently excluded arbitration agreements from the scope of the uniform rules, subject to returning to an examination of these problems and of agreements on the choice of court once the Convention has been finally drawn up.

The exclusion of arbitration agreements does not relate solely to the procedural aspects, but also to the formation, validity and effects of such agreements. Where the arbitration clause forms an integral part of a contract, the exclusion relates only to the clause itself and not to the contract as a whole. This exclusion does not prevent such clauses being taken into consideration for the purposes of Article 3 (1).

6. Subparagraph (e) provides that the uniform rules shall not apply to questions governed by the law of companies, and other bodies corporate or unincorporate such as the creation, by registration or otherwise, legal capacity, internal organization or winding-up of companies, and other bodies corporate or unincorporate and the personal legal liability of officers and members as such for the obligations of the company or body.

This exclusion in no way implies that this aspect was considered unimportant in the economic life of the Member States of the Community. Indeed, this is an area which, by virtue of its economic importance and the place which it occupies in many provisions of the Treaty establishing the EEC, appears to have the strongest possible reasons for not being separated from Community work in the filed of unification of private international law, notably in conflicts of laws pertaining to economic relations.

Notwithstanding the foregoing considerations, the Group had thought it inadvisable, even in the original preliminary draft, to include companies, firms and legal persons within the scope of the Convention, especially in view of the work being done on this subject within the European Communities (12).

Confirming this exclusion, the Group stated that it affects all the complex acts (contractual, administrative, registration) which are necessary to the creation of a company or firm and to the regulation of its internal organization and winding-up, i.e. acts which fall within the scope of company law.

On the other hand, acts or preliminary contracts whose sole purpose is to create obligations between interested parties (promoters) with a view to forming a company or firm are not covered by the exclusion.

The subject may be a body with or without legal personality, profit-making or non-profit-making. Having regard to the differences which exist, it may be that certain relationships will be regarded as within the scope of company law or might be treated as being governed by that law (for example, société de droit civil, nicht-rechtsfähiger Verein, partnership, Vennootschap onder firma, etc.) in some countries but not in others. The rule has been made flexible in order to take account of the diversity of national laws.

Examples of "internal organization" are : the calling of meetings, the right to vote, the necessary quorum, the appointment of officers of the company or firm, etc. "Winding-up" would cover either the termination of the company or firm as provided by its constitution or by operation of law, or its disappearance by merger or other similar process.

At the request of the German delegation the Group extended the subparagraph (e) exclusion to the personal liability of members and organs, and also to the legal capacity of companies or firms. On the other hand the Group did not adopt the proposal that mergers and groupings should also be expressly mentioned, most of the delegations being of the opinion that mergers and groupings were already covered by the present wording.

As regards legal capacity, it should be made clear that the reference is to limitations, which may be imposed by law on companies and firms, for example in respect of acquisition of immovable property, not to ultra vires acts by organs of the company or firm, which fall under subparagraph (f).

7. The solution adopted in subparagraph (f) involves the exclusion from the scope of the uniform rules of the question whether an agent is able to bind a principal, or an organ to bind a company or body corporate or unincorporate, to a third party.

The exclusion affects only the relationships between the principial and third parties, more particularly the question whether the principal is bound vis-à-vis third parties by the acts of the agent in specific cases. It does not affect other aspects of the complex field of agency, which also extends to relationships between the principal and the agent and to agent-third party relationships. The exclusion is justified by the fact that it is difficult to accept the principle of freedom of contract on this point. On the other hand, principal-agent and agent-third party relationships in no way differ from other obligations and are therefore included within the scope of the Convention in so far as they are of a contractual nature.

8. The exception in subparagraph (g) concerns "trusts" in the sense in which they are understood in the common law countries. The English word "trust" is properly used to define the scope of the exclusion. On the other hand similar institutions under continental laws falls within the provisions of the Convention because they are normally contractual in origin. Nevertheless it will be open to the judge to treat them in the same way as the institutions of the common law countries when they exhibit the same characteristics.

9. Under subparagraph (h) the uniform rules do not apply to evidence and procedure, subject to Article 14.

This exclusion seems to require no comment. The scope and extent to which the exclusion is subject to limitation will be noted in the commentary on Article 14.

10. The question whether contracts of insurance should or should not be included in the sope of the uniform rules was discussed at length by the Group. The solution finally adopted was that which appears in paragraph 3.

Under this paragraph the provisions of the Convention do not apply to contracts of insurance covering risks situated in the territories of Member States of the European Economic Community. This exclusion

takes account of work being done within the Community in the field of insurance. Thus the uniform rules apply to contracts of insurance covering risks situate outside those territories. The States are nevertheless free to apply rules based on those in the Convention even to risks situate in the Community, subject to the Community rules which are to be established.

Insurance contracts, where they cover risks situate outside the Community, may also, in appropriate cases, fall under Article 5 of the Convention.

To determine whether a risk is situate in the territories of the Member States of the Community the last phrase of paragraph 3 states that the judge is required to apply his own national law. This expression means the rules in force in the judge's country, to the exclusion of the rules of private international law as stated by Article 15 of the Convention.

11. By virtue of paragraph 4 of Article 1 the exclusion provided for in paragraph 3 does not affect reinsurance contracts. In fact these contracts do not raise the same problems as contracts of insurance, where the need to protect the persons insured must necessarily be taken into account. Thus the uniform rules apply to reinsurance contracts.

Article 2

Application of law of non-Contracting States

This Article underlines the universal character of the uniform rules laid down in this Convention. The Convention does not apply only in situations involving some form of connection with one or other of the Contracting States. It is of universal application in the sense that the choice of law which it lays down may result in the law of a State not party to the Convention being applied. By way of example, under Article 3, parties to a contract may opt for the law of a third State, and in the absence of any choice, that same law may be applied to the contract under Articles 4 and 5 if it is with that State that the contract has the closest links. In other words, the Convention is a uniform measure of private international law which will replace the rules of private international law in force in each of the Contracting States, with regard to the subject matter which it covers and subject to any other convention to which the Contracting States are party (see Article 21).

The solution is consistent with that adopted in most of the Hague Conventions on private international law that deal with choice of laws (stricto sensu). The text follows that of the Hague Convention drafted during the XIIIth session (Conventions of 14 March 1978 on the law applicable to matrimonial property regimes, Article 2, and on the law applicable to agency, Article 4).

TITLE II UNIFORM RULES

Article 3

Freedom of choice

1. The rule stated in Article 3 (1) under which the contract is governed by the law chosen by the parties simply reaffirms a rule currently embodied in the private international law of all the Member States of the Community and of most other countries.

In French law the rule conferring this power (or "autonomie de la volonté" as it is called) upon the parties is founded on case law dating back to the judgment delivered on 5 December 1910 by the Court of Cassation in American Trading Company v. Quebec Steamship Company Limited. The

French draft law of 1967 to supplement the Civil Code in matters of private international law merely confirms the state of French law in this matter by providing in the first paragraph of Article 2312 : "Contracts of an international character and the obligations arising from them shall be subject to the law under which the parties intended to place themselves."

The firm establishment of the rule in French case law was accompanied by corresponding developments in legal theory. The most eminent contemporary writers declare themselves fundamentally in favour of the principle of the parties' freedom of contract in determining the law applicable to the contract, or, according to the opinion of some legal writers, the "localization" of the contract in a specific legal system (13).

The same applies to the law of the German Federal Republic, where the subject of contractual obligations was not dealt with by the legislature in the final version of the "introductory law" of 1896. The rule conferring upon the parties the power to specify the law applicable to their contract is nevertheless founded on case law which has been developed and strengthened in recent decades despite the opposition of the great majority of earlier German legal theorists. At all events present-day theory is in entire agreement with the position taken by the case law (14).

Unlike the situation in France and Germany, in Italy the principle of freedom of contract of the contracting parties was expressly enacted as early as 1865 in the preliminary provisions of the Civil Code. It is currently based upon the first paragraph of Article 25 of the preliminary provisions of the 1942 Civil Code, in which the freedom of the parties to choose the law applicable to their contract is formally accepted, as in Articles 9 and 10 of the Navigation Code, where it is provided that the power of the parties to designate the applicable law may also be exercised in seamen's contracts and in contracts fot the use of ships, boats and aircraft. According to the preponderant view of theorists and consistent decisions by the Court of Cassation, the law applicable to the contract must be determined primarily on the basis of the express will of the parties ; only in default of such a nomination will the law of the contract be determined by the connecting factors stipulated in the abovementioned provisions (15).

As regards Belgium, Luxembourg and the Netherlands, the rule that the contracting parties enjoy freedom of contract in choosing the applicable law has also been sanctioned by judicial practice and by contemporary legal writers.

In its judgment of 24 February 1938 in SA Antwerpia v. Ville d'Anvers the Belgian Court of Cassation stated for the first time, in terms clearly suggested by the French judgment of 5 December 1910, that : "the law applicable to contracts, both to their formation and their conditions and effects, (is) that adopted by the parties" (16). Several Belgian writers have contributed to the firm establishment of the rule in theory and in practice (17).

In the Netherlands the Hoge Raad put the finishing touches to the developments in case law in this field in its judgment of 13 May 1966 in the Alnati case. The previous decisions of the Supreme Court and the differing views of writers on the precise scope of the freedom of contract rule would not have permitted definition of the state of Netherlands law in this matter with sufficient certainty (18).

At all events the 1969 Benelux Treaty on uniform rules for private international law, even though the signatory States have not pursued its entry into force, is clear evidence of their present views on this subject. Article 13 (1) of the uniform law states : "Contracts shall be governed by the law chosen by the parties as regards both essential and ancillary provisions".

English law recognizes that the parties to a contract are free to choose the law which is to govern it ("the proper law of the contract"). This principle of freedom of choice is founded on judicial decisions (19). In Vita Food Products Inc. v. Unus Shipping Co. Ltd (20) Lord Wright indicated

that the parties' choice must be bona fide and legal and could be avoided on the ground of public policy. In certain areas the parties' freedom of choice is subject to limitations imposed by statute (20a), the most important of these being in the field of exemption clauses (20b).

The law of Scotland is to similar effect (20c) and Irish law draws its inspiration from the same principles as the English and Scottish legal systems.

Under English law (and the situation is similar in Scots law and Irish law), in the case where the parties have not expressly chosen the law to govern their contract (20d), the court will consider whether the parties' choice of law to be applied can be inferred from the terms of the contract. The most common case in which the court may infer a choice of the proper law is where the contract contains an arbitration or choice of jurisdiction clause naming a particular country as the seat of arbitration or litigation. Such a clause gives rise to an argument that the law of the country chosen should be applied as the proper law of the contract. This inference however is not conclusive and can be rebutted by any contrary inferences which may be drawn from the other provisions of the contract and the relevant surrounding circumstances (20e).

Finally, as regards Denmark, the principle of the freedom of contracting parties to choose the law applicable to their contract already seems to have inspired several opinions by Supreme Court judges during this century. Today at all events this principle forms the basis of Danish case law, as can be seen from the judgment in 1957 in Baltica v.M.J. Vermaas Scheepvaart bedrijf, with full support from legal writers (21).

2. The principle of the parties' freedom to choose the law applicable is also supported both by arbitration decisions and by international treaties designed to unify certain rules of conflict in relation to contracts.

The rule, which had already been cited in 1929 by the Permanent Court of International Justice in its judgment in the case of the Brazilian Loans (22), very clearly underlay the award made by the arbitration tribunal on 29 August 1958 in Saudi Arabia v. Arabian American Oil Company (Aramco) in which it was stated that the "principles of private international law to be consulted in order to find the law applicable are those relating to freedom of choice, by virtue of which, in an agreement which is international in character, the law expressly chosen by the parties must be applied first..." (23). Similarly in the arbitration findings given on 15 March 1963 in Sapphire International Petroleums Ltd v. National Iranian Oil Company, the sole arbitrator, Mr Cavin, affirmed that it is the will of the parties that determines the law applicable in matters of contract (24). The rule was reaffirmed even more recently by the sole arbitrator, Mr Dupuy, in the award which he made on 19 January 1977 in Libyan Arab Republic v. California Asiatic Oil Company and Texaco Overseas Petroleum Company (25).

As regards international treaties, the rule of freedom of choice has been adopted in the Convention on the law applicable to international sales of goods concluded at the Hague on 15 June 1955 which entered into force on 1 September 1964. Article 2 of this Convention, which is in force among several European countries, provides that : "The sale shall be governed by the internal law of the country nominated by the contracting parties."

Article VIII of the European Convention on international commercial arbitration concluded at Geneva on 21 April 1961, which entered into force on 7 January 1964, provides that the parties are free to determine the law which the arbitrators must apply in a dispute.

The same principle forms the basis of the 1965 Convention for the settlement of disputes relating to investments between States and nationals of other States, which entered into force on 14 October 1966, when it provides in Article 42 that "the Tribunal shall rule on the dispute in accordance with the rules of law adopted by the parties".

The Hague Convention of 14 March 1978 on the law applicable to agency provides in Article 5 that "the internal law chosen by the principal and the agent is to govern the agency relationship between them" (26).

3. The parties' choice must be express or be demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. This interpretation, which emerges from the second sentence of Article 3 (1), has an important consequence.

The choice of law by the parties will often be express but the Convention recognizes the possibility that the Court may, in the light of all the facts, find that the parties have made a real choice of law although this is not expressly stated in the contract. For example, the contract may be in a standard form which is known to be governed by a particular system of law even though there is no express statement to this effect, such as a Lloyd's policy of marine insurance. In other cases a previous course of dealing between the parties under contracts containing an express choice of law may leave the court in no doubt that the contract in question is to be governed by the law previously chosen where the choice of law clause has been omitted in circumstances which do not indicate a deliberate change of policy by the parties. In some cases the choice of a particular forum may show in no uncertain manner that the parties intend the contract to be governed by the law of that forum, but this must always be subject to the other terms of the cntract and all the circumstances of the case. Similarly references in a contract to specific Articles of the French Civil Code may leave the court in no doubt that the parties have deliberately chosen French law, although there is no expressly stated choice of law. Other matters that may impel the court to the conclusion that a real choice of law has been made might include an express choice of law in related transactions between the same parties, or the choice of a place where disputes are to be settled by arbitration in circumstances indicating that the arbitrator should apply the law of that place.

This Article does not permit the court to infer a choice of law that the parties might have made where they had no clear intention of making a choice. Such a situation is governed by Article 4.

4. The last sentence of Article 3 (1) acknowledges that the parties' choice of the law applicable may relate to the whole of the contract or to only part thereof. On the question whether severability (dépeçage) was to be allowed, some experts observed that the contract should in principle be governed by one law, unless that contract, although apparently a single contract, consists in reality of several contracts or parts which are separable and independent of each other from the legal and economic points of view. In the opinion of these experts, no reference to severability should have been made in the text of the Convention itself. In the view of others, on the contrary, severability is directly linked with the principle of freedom of contract and so would be difficult to prohibit. Nevertheless when the contract is severable the choice must be logically consistent, i.e. it must relate to elements in the contract which can be governed by different laws without giving rise to contradictions. For example, an "index-linking clause" may be made subject to a different law ; on the other hand it is unlikely that repudiation of the contract for non-performance would be subjected to two different laws, one for the vendor and the other for the purchaser. Recourse must be had to Article 4 of the Convention if the chosen laws cannot be logically reconciled.

In the opinion of these experts the danger that the argument of severability might be used to avoid certain mandatory provisions is eliminated by the operation of Article 7. The experts concerned also emphasized that severability should not be limited to cases of express choice of law.

The solution adopted in the last sentence of Article 3 (1) is prompted by exactly this kind of idea. The Group did not adopt the idea that the judge can use a partial choice of law as the basis for a presumption in favour of one law invoked to govern the contract in its entirety. Such an idea might be conducive to error in situations in which the parties had reached agreement on the

choice of law solely on a specific point. Recourse must be had to Article 4 in the case of partial choice.

5. The first sentence of Article 3 (2) leaves the parties maximum freedom as to the time at which the choice of applicable law can be made.

It may be made either at the time the contract is concluded or at an earlier or later date. The second sentence of paragraph 2 also leaves the parties maximum freedom as to amendment of the choice of applicable law previously made.

The solution adopted by the Group in paragraph 2 corresponds only in part to what seems to be the current state of the law on this point in the Member States of the Community.

In the Federal Republic of Germany and in France the choice of applicable law by the parties can apparently be made even after the contract has been concluded, and the courts sometimes deduce the applicable law from the parties' attitude during the proceedings when they refer with clear agreement to a specific law. The power of the parties to vary the choice of law applicable to their contract also seems to be very widely accepted (27).

Case law in the Netherlands seems to follow the same line of interpretation (28).

In Italy, however, the Court of Cassation (sitting as a full court) stated in its judgment of 28 June 1966 No 1680 in Assael Nissim v. Crespi that ; "the parties" choice of applicable law is not admissible if made after the contract has been drawn up' (29).

According to this dictum, which Italian commentators do not wholly support (30) the choice can be made only at the time the contract is concluded. Once the choice is made, the parties no longer have the option of agreeing to nominate a law other than that nominated at the time of concluding the contract.

In the laws of England and Wales, Scotland, Northern Ireland and Ireland, there is no clear authority as to the law which governs the possibility of a change in the proper law.

6. The liberal solution adopted by the Group seems to be in accordance with the requirement of logical consistency. Once the principle of freedom of contract has been accepted, and having regard to the fact that the requirement of a choice of law by the parties may arise both at the time of conclusion of the contract and after that time, it seems quite logical that the power of the parties should not be limited solely to the time of conclusion of the contract. The same applies to a change (by a new agreement between the parties) in the applicable law previously chosen.

As to the way in which the choice of law can be changed, it is quite natural that this change should be subject to the same rules as the initial choice.

If the choice of law is made or changed in the course of proceedings the question arises as to the limits within which the choice or change can be effective. However, the question falls within the ambit of the national law of procedure, and can be settled only in accordance with that law.

7. The second sentence of Article 3 (2) states that a change in the applicable law after the contract has been concluded shall not prejudice its formal validity under Article 9 or adversely affect the rights of third parties. The purpose of the reservation concerning the formal validity of the contract is to avoid a situation whereby the agreement between the parties to subject the contract to a law other than that which previously governed it could create doubts as to the validity of the contract during the period preceding the agreement between the parties. The preservation of third-party rights appears to be entirely justified. In certain legal systems, a third party may have acquired rights in consequence of a contract concluded betwen two other persons. These rights cannot be affected by a subsequent change in the choice of the applicable law.

8. Article 3 (3) provides that the choice of a foreign law by the parties, whether or not accompanied by the choice of a foreign tribunal, shall not, where all other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of the law of that country which cannot be derogated from by contract, hereinafter called "mandatory rules".

This solution is the result of a compromise between two lines of argument which have been diligently pursued within the Group : the wish on the one hand of certain experts to limit the parties' freedom of choice embodied in this Article by means of a correcting factor specifying that the choice of a foreign law would be insufficient per se to permit the application of that law if the situation at the moment of choice did not involve another foreign element, and on the other the concern of other experts, notably the United Kingdom experts, that such a correcting factor would be too great an obstacle to the freedom of the parties in situations in which their choice appeared justified, made in good faith, and capable of serving interests worthy of protection. In particular these experts emphasized that departures from the principle of the parties' freedom of choice should be authorized only in exceptional circumstances, such as the application of the mandatory rules of a law other than that chosen by the parties ; they also gave several examples of cases in which the choice of a foreign law by the parties was fully justified, although there was apparently no other foreign element in the situation.

The Group recognized that this concern was well founded, while maintaining the principle that the choice by the parties of a foreign law where all the other elements relevant to the situation at the time of the choice are connected with one country only shall not prejudice the application of the mandatory rules of the law of that country.

9. Article 3 (4) merely refers questions relating to the existence and validity of the parties' consent as to the choice of the law applicable to the provisions of Articles 8, 9 and 11. We will return to these matters in the comments on those Articles.

Article 4

Applicable law in the absence of choice

1. In default of an express or implied choice by the parties, there is at present no uniform way of determining the law applicable to contracts in the legal systems of the Member States of the Community (31).

In French and Belgian law no distinction is to be drawn between the express and hypothetical (or presumed) will of the parties. Failing an express choice of applicable law, the courts look for various "pointers" capable of showing that the contract is located in a particular country. This localization is sometimes regarded subjectively as equivalent to the probable wish of the parties had such a wish been expressed, sometimes objectively as equivalent to the country with which the transaction is most closely connected (32).

The objective concept seems to be receiving more and more support from legal writers and from case law. Following this concept, the Paris Court stated in its judgment of 27 January 1955 (Soc. Jansen v. Soc. Heurtey) that, in default of an indication of the will of the parties, the applicable law "is determined objectively by the fact that the contract is located by its context and economic aspects in a particular country, the place with which the transaction is most closely connected being that in which the contract is to be performed in fulfilment of the obligation characteristic of its nature" (33).

It is this concept of the location of the contracts that is referred to, in terms clearly modelled

on the above judgment, in the second paragraph of Article 2313 of the French draft, which states that in default of the expressed will of the parties "the contract is governed by the law with which it is most closely connected by its economic aspects, and notably by the main place of performance".

Similarly, in German law the solution adopted by the courts in determining the law of the contract in the absence of choice by the parties is based largely upon the search for "pointers" capable of showing the "hypothetischer Parteiwille", the presumed will of the parties, having regard to the general interests at stake in each particular case. If this gives no result, the law applicable to the contract according to German case law is determined by the place of performance : more precisely, by the place of performance of each of the obligations arising from the contract, because the German courts take the view that if the various contractual obligations are to be performed in different countries, each shall be governed by the law of the country in which it is performed (34).

In English law where the parties have not expressly chosen the proper law and no choice can be inferred, the law applicable to the contract is the system of law with which the transaction has its "closest and most real connection" (35). In such a case the judge does not seek to ascertain the actual intentions of the contracting parties, because that is non-existent, but seeks "to determine for the parties what is the proper law which, as just and reasonable persons, they ought to have intended if they had thought about the question when they made the contract" (36). In this inquiry, the court has to consider all the circumstances of the case. No one factor is decisive ; instead a wide range of factors must be taken into account, such as for instance, the place of residence or business of the parties, the place of performance, the place of contracting and the nature and subject-matter of the contract.

Scots law adopts a similar approach (36a), as does the law of Ireland.

In Italian law, where the presumed will of the parties plays no part, the matter is settled expressly and directly by the legislature. Failing a choice of law by the parties, the obligations arising from the contract are governed by the following: (a) contracts for employment on board foreign ships or aircraft, by the national law of the ship or aircraft (Naval Code Article 9);

(b) marine, domestic and air hiring contracts, charters and transport contracts, by the national law of the ship or aircraft (Naval Code Article 10);

(c) all other contracts, by the national law of the contracting parties, if common to both ; otherwise by the law of the place where the contract was concluded (preliminary provisions of the Civil Code, Article 25, first subparagraph).

The abovementioned laws are of subsidiary effect only ; they apply only in default of an expression of the parties' will as to the law applicable. Italian case law so holds and legal writers concur with this view (37).

To conclude this short survey, only the provisions of the third and fourth paragraphs of Article 13 of the 1969 Benelux Treaty which has not entered into force remain to be mentioned. According to the third paragraph, in default of a choice by the parties "the contract shall be governed by the law of the country with which it is most closely connected", an according to the fourth paragraph "when it is impossible to determine that country, the contract shall be governed by the law of the country in which it was concluded". One may note a tendency in Netherlands case law to formulate special rules of reference for certain types of contract (see "Journal du Droit Int. 1978, pp. 336 to 344" and "Neth. Int. Law Rev. 1974, pp. 315 to 316"), i.e. contracts of employment, agency contracts and contracts of carriage.

The foregoing survey has shown that, with the sole exception of Italy, where the subsidiary law applicable to the contract is determined once and for all by hard-and-fast connecting factors, all

the other Community countries have preferred and continue to prefer a more flexible approach, leaving the judge to select the preponderant and decisive connecting factor for determining the law applicable to the contract in each specific case among the various elements of the contract and the circumstances of the case.

2. Having considered the advantages and disadvantages of the solutions adopted by the legislatures and the case law of the Member States of the Community and after analyzing a range of ideas and alternatives advanced both by the rapporteur and by several delegates, the Group agreed upon the uniform rule embodied in Article 4.

The first paragraph of this Article provides that, in default of a choice by the parties, the contract shall be governed by the law of the country with which it has the closest connection.

In order to determine the country with which the contract is most closely connected, it is also possible to take account of factors which supervened after the conclusion of the contract.

In fact the beginning of the first paragraph does not mention default of choice by the parties ; the expression used is "to the extent that the law applicable to the contract has not been chosen in accordance with Article 3". The use of these words is justified by reference to what has been said in paragraph 4 of the commentary on Article 3.

However, the flexibility of the general principle established by paragraph 1 is substantially modified by the presumptions in paragraphs 2, 3 and 4, and by a strictly limited exception in favour of severability at the end of paragraph 1.

3. According to Article 4 (2), it is presumed that the contract has the closest connection with the country in which the party who is to effect the performance which is characteristic of the contract has his habitual residence at the time when the contract is concluded, or, in the case of a body corporate or unincorporate, its central administration. If the contract is concluded by that party in the course of his trade or profession, the country concerned is that in which his principal place of business is situated or, if the contract is to be performed through a place of business other than the principal place of business, the country in which that other place of business is situated. Article 4 (2) establishes a presumption which may be rebutted in accordance with Article 4 (5).

The kind of idea upon which paragraph 2 is based is certainly not entirely unknown to some specialists. It gives effect to a tendency which has been gaining ground both in legal writings and in case law in many countries in recent decades (38). The submission of the contract, in the absence of a choice by the parties, to the law appropriate to the characteristic performance defines the connecting factor of the contract from the inside, and not from the outside by elements unrelated to the essence of the obligation such as the nationality of the contracting parties or the place where the contract was concluded.

In addition it is possible to relate the concept of characteristic performance to an even more general idea, namely the idea that his performance refers to the function which the legal relationship involved fulfils in the economic and social life of any country. The concept of characteristic performance essentially links the contract to the social and economic environment of which it will form a part.

Identifying the characteristic performance of a contract obviously presents no difficulty in the case of unilateral contracts. By contrast, in bilateral (reciprocal) contracts whereby the parties undertake mutual reciprocal performance, the counter-performance by one of the parties in a modern economy usually takes the form of money. This is not, of course, the characteristic performance of the contract. It is the performance for which the payment is due, i.e. depending on the type of contract, the delivery of goods, the granting of the right to make use of an item of property,

the provision of a service, transport, insurance, banking operations, security, etc., which usually constitutes the centre of gravity and the socio-economic function of the contractual transaction.

As for the geographical location of the characteristic performance, it is quite natural that the country in which the party liable for the performance is habitually resident or has his central administration (if a body corporate or unincorporate) or his place of business, according to whether the performance in question is in the course of his trade or profession or not, should prevail over the country of performance where, of course, the latter is a country other than that of habitual residence, central administration or the place of business. In the solution adopted by the Group the position is that only the place of habitual residence or of the central administration or of the place of business of the party providing the essential performance is decisive in locating the contract.

Thus, for example, in a banking contract the law of the country of the banking establishment with which the transaction is made will normally govern the contract. It is usually the case in a commercial contract of sale that the law of the vendor's place of business will govern the contract. To take another example, in an agency contract concluded in France between a Belgian commercial agent and a French company, the characteristic performance being that of the agent, the contract will be governed by Belgian law if the agent has his place of business in Belgium (39).

In conclusion, Article 4 (2) gives specific form and objectivity to the, in itself, too vague concept of "closest connection". At the same time it greatly simplifies the problem of determining the law applicable to the contract in default of choice by the parties. The place where the act was done becomes unimportant. There is no longer any need to determine where the contract was concluded, with all the difficulties and the problems of classification that arise in practice. Seeking the place of performance or the different places of performance and classifying them becomes superfluous.

For each category of contract it is the characteristic performance that is in principle the relevant factor in applying the presumption for determining the applicable law, even in situations peculiar to certain contracts, as for example in the contract of guarantee where the characteristic performance is always that of the guarantor, whether in relation to the principal debtor or the creditor.

To counter the possibility of changes in the connecting factor ("conflits mobiles") in the application of paragraph 2, it has been made clear that the country of habitual residence or of the principal place of business of the party providing the characteristic performance is the country in which he is habitually resident or has his central administration or place of business, as appropriate, "at the time of conclusion of the contract".

According to the last part of paragraph 2, if the contract prescribes performance by an establishment other than the principal place of business, it is presumed that the contract has the closest connection with the country of that other establishment.

4. Article 4 (3) establishes that the presumption in paragraph 2 does not operate to the extent that the subject of the contract is a right in immovable property or a right to use immovable property. It is presumed in this case that the contract is most closely connected with the country in which the immovable property is situated.

It is advisable to state that the provision in question merely establishes a presumption in favour of the law of the country in which the immovable property is situate. In other words this is a presumption which, like that in paragraph 2, could also be rebutted if circumstances so required.

For example, this presumption could be rebutted if two persons resident in Belgium were to make a contract for renting a holiday home on the island of Elba (Italy). It might be thought in such a case that the contract was most closely connected with the country of the contracting parties'

residence, not with Italy.

Finally it should be stressed that paragraph 3 does not extend to contracts for the construction or repair of immovable property. This is because the main subject-matter of these contracts is the construction or repair rather than the immovable property itself.

5. After a long and animated discussion the Group decided to include transport contracts within the scope of the convention. However, the Group deemed it inappropriate to submit contracts for the carriage of goods to the presumption contained in paragraph 2, having regard to the peculiarities of this type of transport. The contract for carriage of goods is therefore made subject to a presumption of its own, namely that embodied in paragraph 4. This presumption may be rebutted in accordance with Article 4 (5).

According to this fourth paragraph it is presumed in the case of contracts for the carriage of goods that if the country in which the carrier has his principal place of business at the time the contract is concluded is also the country of the place of loading or unloading or of the principal place of business of the consignor, the contract is most closely connected with that country. The term "consignor" refers in general to any person who consigns goods to the carrier (Afzender, Aflader, Verzender, Mittente, Caricatore, etc.).

Thus the paragraph 4 presumption rests upon a combination of connecting factors. To counter the possibility of changes in the connecting factor in applying the paragraph, it has been made clear here also that the reference to the country in which the carrier has his principal place of business must be taken to refer to the carrier's place of business "at the time the contract is concluded".

It appears that for purposes of the application of this paragraph the places of loading and unloading which enter into consideration are those agreed at the time when the contract is concluded.

It often happens in contracts for carriage that a person who contracts to carry goods for another does not carry them himself but arranges for a third party to do so. In Article 4 (4) the term "the carrier" means the party to the contract who undertakes to carry the goods, whether or not he performs the carriage himself.

In addition, the third sentence of paragraph 4 provides that in applying that paragraph single-voyage charterparties and other contracts whose main purpose is the carriage of goods shall be treated as contracts for the carriage of goods. The wording of paragraph 4 is intended to make it clear that charterparties may be considered to be contracts for the carriage of goods in so far as that is their substance.

6. Contracts for the carriage of passengers remain subject to the general presumption, i.e. that provided for in Article 4 (2).

This solution was adopted by majority vote within the Group. Certain delegations favoured the special presumption emodied in paragraph 4, arguing that, as with other types of transport, the need was for a combination of connecting factors, in view of the fact that reference solely to the place where the carrier, who provides the characteristic performance, has his principal place of business may not be a significant connecting factor : by way of example they cited the case of transportation of French or English passengers between London and Paris by an American airline. It was also emphasized that in a mixed contract (passengers and goods) the difficulty of applying two different laws would arise.

Nevertheless the other delegations were against the special presumption, their principal arguments being : the application of several laws to passengers on the same journey would involve serious difficulties ; the formulation of paragraph 4 is such that it would hardly ever apply to carriage of passengers, so recourse would usually be had to the first paragraph of Article 4, which does

not give the judge sufficiently precise criteria for decision ; contracts of carriage normally contain a clause conferring jurisdiction on the court of the carrier's principal place of business, and paragraph 2 would operate so that the law of the court of competent jurisdiction would coincide with the applicable law.

In any event it should be stated that the judge will not be able to exclude consideration of the country in which the carrier has his principal place of business in seeking the places with which the contract is most closely connected.

Finally it is useful to note that the Group repeatedly stressed in the course of the discussions on transport problems that the international conventions took precedence in this matter.

7. Article 4 (2) does not apply when the characteristic performance connot be determined. The case then falls under paragraph 1, i.e. the contract will be governed by the law of the country with which it is most closely connected.

The first part of Article 4 (5) contains precisely that provision.

However, that paragraph also provides for the possibility of disregarding the presumptions in paragraphs 2, 3, and 4 when all the circumstances show the contract to have closer connections with another country. In this case the law of that other country is applied.

The grounds for the latter provision are as follows. Given the entirely general nature of the conflict rule contained in Article 4, the only exemptions to which are certain contracts made by consumers and contracts of employment, it seemed essential to provide for the possibility of applying a law other than those referred to in the presumptions in paragraphs 2, 3 and 4 whenever all the circumstances show the contract to be more closely connected with another country.

Article 4 (5) obviously leaves the judge a margin of discretion as to whether a set of circumstances exists in each specific case justifying the non-application of the presumptions in paragraphs 2, 3 and 4. But this is the inevitable counterpart of a general conflict rule intended to apply to almost all types of contract.

8. Article 4 (1) allows parts of the contract to be severed under certain conditions. The last sentence of this paragraph provides that if one part of the contract can be separated from the rest and is more closely connected with another country, then by way of exception the law of that other country can be applied to that part of the contract.

Discussion of the matter within the Group revealed that no delegation wished to encourage the idea of severability (dépeçage). However, most of the experts were in favour of allowing the court to effect a severance, by way of exception, for a part of the contract which is independent and separable, in terms of the contract and not of the dispute, where that part has a closer connection with another country (for example, contracts for joint venture, complex contracts).

As to whether or not the possibility of severance should be mentioned in the text of the convention itself most delegations were in favour of its being mentioned. It was emphasized in particular that mere reference to the matter in the report would be insufficient by itself, because in some Member States of the Community it is not usual to take account of the report. It was also emphasized that to include it in the text would reduce the risk of variation in the application of the convention on this point, because the text would specify the conditions under which severance was allowed.

The wording of the last sentence in paragraph 1 embodies precisely this idea. The words "by way of exception" are therefore to be interpreted in the sense that the court must have recourse to severance as seldom as possible.

9. It should be noted that the presumptions mentioned in paragraphs 2, 3 and 4 of Article 4 are

only rebuttable presumptions.

Article 5

Certain consumer contracts

1. Article 5 of the convention establishes a specific conflict rule for certain contracts made by consumers. Most of the experts who have participated in the Group's work since 1973 have taken the view that consumer protection, the present aim of several national legislatures, would entail a reversal of the connecting factor provided for in Article 4 or a modification of the principle of freedom of choice provided for in Article 3. On the one hand the choice of the parties should not adversely affect the mandatory provisions of the State in which the consumer is habitually resident ; on the other, in this type of contract it is the law of the buyer (the weaker party) which should normally prevail over that of the seller.

2. The definition of consumer contracts corresponds to that contained in Article 13 of the Convention on jurisdiction and enforcement of judgments. It should be interpreted in the light of its purpose which is to protect the weaker party and in accordance with other international instruments with the same purpose such as the Judgments Convention. Thus, in the opinion of the majority of the delegations it will, normally, only apply where the person who supplies goods or services or provides credit acts in the course of his trade or profession. Similarly, the rule does not apply to contracts made by traders, manufacturers or persons in the exercise of a profession (doctors, for example) who buy equipment or obtain services for that trade or profession. If such a person acts partly within, partly outside his trade or profession the situation only falls within the scope of Article 5 if he acts primarily outside his trade or profession. Where the receiver of goods or services or credit in fact acted primarily outside his trade or profession but the other party did not know this and, taking all the circumstances into account should not reasonably have known it, the situation falls outside the scope of Article 5. Thus if the receiver of goods or services holds himself out as a professional, e.g. by ordering goods which might well be used in his trade or profession on his professional paper the good faith of the other party is protected and the case will not be governed by Article 5.

The rule extends to credit sales as well as to cash sales, but sales of securities are excluded. The Group has specifically avoided a more precise definition of "consumer contract" in order to avoid conflict with the various definitions already given by national legislation. The rule also applies to the supply of services, such as insurance, as well as supply of goods.

3. Paragraph 2 embodies the principle that a choice of law in a consumer contract cannot deprive the consumer of the protection afforded to him by the law of the country in which he has his habitual residence. This principle shall, however, only apply under certain conditions set out in the three indents of paragraph 2.

The first indent reales to situations where the trader has taken steps to market his goods or services in the country where the consumer resides. It is intended to cover inter alia mail order and door-step selling. Thus the trader must have done certain acts such as advertising in the press, or on radio or television, or in the cinema or by catalogues aimed specifically at that country, or he must have made business proposals individually through a middleman or by canvassing. If, for example, a German makes a contract in response to an advertisement published by a French company in a German publication, the contract is covered by the special rule. If, on the other hand, the German replies to an advertisement in American publications, even if they are sold in Germany, the rule does not apply unless the advertisement appeared in special editions of the publication intended for European

countries. In the latter case the seller will have made a special advertisement intended for the country of the purchaser.

The Group expressly adopted the words "steps necessary on his part" in order to avoid the classic problem of determining the place where the contract was concluded. This is a particularly delicate matter in the situations referred to, because it involves international contracts normally concluded by correspondence. The word "steps" includes inter alia writing or any action taken in consequence of an offer or advertisement.

According to the second indent Article 5 shall apply in all situations where the trader or his agent has received the order of the consumer in the country in which the consumer has his habitual residence. This provision is a parallel to Article 3 (2) of the 1955 Hague Convention on international sales.

There is a considerable overlap between the first and the second indents. This overlap is, however, not complete. For example, the second indent applies in situations where the consumer has addressed himself to the stand of a foreign firm at a fair or exhibition taking place in the consumers country or to a permanent branch or agency of a foreign firm established in the consumer's country even though the foreign firm has not advertised in the consumer's country in a way covered by the first indent. The word "agent" is intended to cover all persons acting on behalf of the trader.

The third indent deals with a situation which is rather special but where, on the other hand, a majority of delegations found a clear need for protecting the consumer under the provisions of Article 5. It covers what one might describe as "border-crossing excursion-selling", i.e. for example, a situation where a store-owner in country A arranges one-day bus trips for consumers in a neighbouring country B with the main purpose of inducing the consumers to buy in his store. This is a practice well-known in some areas. The situation is not covered by the first indent because there it is required that the consumer has taken in his own country all the steps necessary on his part for the conclusion of the contract. The third indent is, unlike the rest of paragraph 2, limited to contracts for the sale of goods. The condition that the journey was arranged by the seller shall not be understood in the narrow way that the seller must himself have taken care of the transportation. It is sufficient that the seller has arranged the journey by way of an agreement with the transportation company.

In describing the situation in which Article 5 applies to consumer contracts, the Group has not followed the text of Article 13 (1) of the Judgments Convention as amended by the Accession Convention. On the one hand Article 5 contains no special provision for hire purchase contracts and loans on deferred terms. On the other hand, Article 13 of the Judgments Convention has no provisions parallel to the second and third indents of Article 5 (2).

4. Article 5 (3) introduces an exception to Article 4 of the Convention. According to this paragraph, notwithstanding the provisions of Article 4 and in the absence of choice in accordance with Article 3, a contract made by a consumer shall "be governed by the law of the country in which the consumer has his habitual residence if it is entered into in the circumstances described in the second paragraph of Article 5".

The wording of paragraph 3 is sufficiently clear, and calls for no additional examination.

5. Under the terms of paragraph 4 thereof, Article 5 applies neither to contracts of carriage (a) nor to contracts relating to the supply of services provided exclusively in a country other than that in which the consumer is resident (b). The exclusion of contracts of carriage is justified by the fact that the special protective measures for which provision is made in Article 5 are not appropriate for governing contracts of this type. Similarly, in the case of contracts relating to the supply of services (for example, accommodation in a hotel, or a language course) which are

supplied exclusively outside the State in which the consumer is resident, the latter cannot reasonably expect the law of his State of origin to be applied in derogation from the general rules of Articles 3 and 4. In the cases referred to under (b) the contract is more closely connected with the State in which the other contracting party is resident, even if the latter has performed one of the acts described in paragraph 2 (advertising, for example) in the State in which the consumer is resident.

6. The intention of paragraph 5 is to ensure that Article 5, notwithstanding the exclusions made in paragraph 4, shall apply to contracts providing for what is in English normally called a "package tour", i.e. an ordinary tourist arrangement consisting of a combination of travel and accommodation for an inclusive price. If a package tour starts with transportation from the country in which the consumer has his habitual residence the contract would not be excluded according to paragraph 4. The importance of paragraph 5 is, therefore, that it ensures application of Article 5 also in situations where the services provided for under a package tour start with transportation from another country. However, Article 5 of course only applies to package tours where the general conditions of paragraphs 1 and 2 are fulfilled, i.e. that the contract can be regarded as a consumer contract and that it is entered into in one of the situations mentioned in paragraph 2.

When formulating paragraph 5, the Group met with difficulty in defining a "package tour". The Group confined itself to a definition which underlines the main elements of this type of contract well known in practice, leaving it to the courts to solve any possible doubt as to the exact delimitation. The accommodation which is a part of a package tour must normally be separate from the transportation, and so paragraph 5 would not apply to the provision of a sleeper on a train.

Article 6

Individual employment contracts

1. Re-examination of the specific conflict rule in the matter of contracts of employment led the Group to make fundamental changes to this Article, which already appeared (as Article 5) in the original preliminary draft, and to harmonize its approach with that of the present Article 5 on consumer contracts.

In both cases the question was one of finding a more appropriate arrangement for matters in which the interests of one of the contracting parties are not the same as those of the other, and at the same time to secure thereby more adequate protection for the party who from the socio-economic point of view is regarded as the weaker in the contractual relationship.

2. On this basis, Article 6 (1) sets a limit on the parties' freedom to choose the applicable law, as permitted by Article 3 of the convention, affirming that this choice in contracts of employment "shall not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable under paragraph 2 in the absence of choice".

The purpose of this text is as follows:

if the law applicable pursuant to paragraph 2 grants employees protection which is greater than that resulting from the law chosen by the parties, the result is not that the choice of this law becomes completely without effect. On the contrary, in this case the law which was chosen continues in principle to be applicable. In so far as the provisions of the law applicable pursuant to paragraph 2 give employees better protection than the chosen law, for example by giving a longer period of notice, these provisions set the provisions of the chosen law aside and are applicable in their place.

The mandatory rules from which the parties may not derogate consist not only of the provisions relating to the contract of employment itself, but also provisions such as those concerning industrial safety and hygiene which are regarded in certain Member States as being provisions of public law.

It follows from this text that if the law of the country designated by Article 6 (2) makes the collective employment agreements binding for the employer, the employee will not be deprived of the protection afforded to him by these collective employment agreements by the choice of law of another State in the individual employment contract.

Article 6 applies to individual employment contracts and not to collective agreements. Consequently, the fact that an employment contract is governed by a foreign law cannot affect the powers which an employee's trade union might derive from collective agreements in its own country.

The present wording of Article 6 speaks of "contract of employment" instead of "employment relationship" as in the original preliminary draft. It should be stated, however, that the rule in Article 6 also covers the case of void contracts and also de facto employment relationships in particular those characterized by failure to respect the contract imposed by law for the protection of employees.

3. According to Article 6 (2), in the absence of choice by the parties and notwithstanding the provisions of Article 4, the contract of employment is governed as follows: (a) by the law of the country in which the employee habitually carries out his work in performance of his contract, even if he is temporarily employed in another country ; or

(b) if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is situated,

unless it appears from the cirumstances as a whole that the contract of employment is more closely connected with another country, in which case the law of that other country applies.

After a thorough examination of the various problems raised by contracts of employment in private international law, in the course of which particular consideration was given both to the draft Regulation prepared in this connection by the EEC Commission and to the latest trends in the legal literature and case law of the Member States of the Community, the Group finally adopted the following solution. If the employee habitually works in one and the same country the contract of employment is governed by the law of that country even if the employee is temporarily employed in another country. This is the rule which appears in subparagraph 2 (a). On the other hand, if the employee does not habitually work in one and the same country the contract of employment is governed by the law of the country in which the place of business through which he was engaged is situated. This is the rule which appears in subparagraph 2 (b).

These solutions obviously differ substantially from those which would have resulted from the Article 4 presumption.

However, the last sentence of Article 6 (2) provides that if it appears from the cirumstances as a whole that the contract is more closely connected with another country, the law of the latter country is applied.

4. As regards work done outside the jurisdiction of any State, the Group considered that the rule adopted in Article 6 could in principle be applied. In the case of work on an oil-rig platform on the high seas, the law of the country of the undertaking which engaged the employee should be applied.

The Group did not seek a special rule for the work of members of the crew on board a ship.

Article 7

Mandatory rules

1. The wording of Article 7 of the original preliminary draft has been considerably improved in the course of the Group's re-examination of the text of the convention since 1973, in order to permit a better interpretation in the various situations in which it will have to be applied.

The Group reiterated at its last meeting that Article 7 merely embodies principles which already exist in the laws of the Member States of the Community.

The principle that national courts can give effect under certain conditions to mandatory provisions other than those applicable to the contract by virtue of the choice of the parties or by virtue of a subsidiary connecting factor, has been recognized for several years both in legal writings and in practice in certain of our countries and elsewhere.

For example, the principle was recognized in the abovementioned 1966 judgment of the Netherlands Supreme Court in the Alnati case (cited supra, commentary on Article 3 (1)) in which the Court said that, although the law applicable to contracts of an international character can, as a matter of principle, only be that which the parties themselves have chosen, "it may be that, for a foreign State, the observance of certain of its rules, even outside its own territory, is of such importance that the courts must take account of them, and hence apply them in preference to the law of another State which may have been chosen by the parties to govern their contract".

This judgment formed the basis for the second paragraph of Article 13 of the non-entered-into-force Benelux Treaty of 1969 on uniform rules of private international law, which provides that "where the contract is manifestly connected with a particular country, the intention of the parties shall not have the effect of excluding the provisions of the law of that country which, by reason of their special nature and subject-matter, exclude the application of any other law".

The same attitude, at any event, underlies Article 16 of the Hague Convention of 14 March 1978 on the law applicable to agency, whereby, in the application of that convention, effect may be given to the mandatory rules of any State with which the situation has a significant connection, if and to the extent that, by the law of that State, those rules are applicable irrespective of the law indicated by its confluct rules.

On the other hand, despite the opinion of some jurists, it must be frankly recognized that no clear indication in favour of the principle in question seems discernible in the English cases (Ralli Bros v. Sota y Aznar ; Regazzoni v. Sethia ; Rossano v. Manufacturers Life Insurance Co.) (40).

2. The wording of Article 7 (1) specifically provides that in the application of the convention "effect may be given to the mandatory rules of the law of another country with which the situation has a close connection if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract".

The former text did not specify the nature of the "connection" which must exist between the contract and a country other than that whose law is applicable. Several experts have observed that this omission might oblige the court in certain cases to take a large number of different and even contradictory laws into account. This lack of precision could make the court's task difficult, prolong the proceedings, and lend itself to delaying tactics. Accepting the force of these observations, the Group decided that it is essential that there be a genuine connection with the other country, and that a merely vague connection is not adequate. For example, there would be a genuine connection when the contract is to be performed in that other country or when one party is resident or has his main place of

business in that other country. Among the suggested versions, the Group finally adopted the word "close" which seemed the most suitable to define the situation which it wished to cover.

The connection in question must exist between the contract as a whole and the law of a country other than that to which the contract is submitted. The Group rejected the proposal by one delegation designed to establish a connection between the point in dispute and a specific law. In fact this proposal would have given rise to a regrettable dismemberment of the contract and would have led to the application of mandatory laws not foreseeable by the parties. Nevertheless the Group preferred to replace the word "the contracts" by "the situation".

Since the former text seemed to some delegations to be lacking in clarity, the Group decided to improve the wording. In the new text it has therefore stated that the legal system of the country of which these mandatory provisions are an integral part must be examined to find out whether these provisions apply in the particular case whatever the law applicable to the contract. Furthermore, in the French text the word "loi" has been replaced by the word "droit" in order to avoid any doubts as to the scope of the rule, which is to cover both "legislative" provisions of any other country and also common law rules. Finally, after a long discussion, the majority of the Group, in view of the concern expressed by certain delegations in relation to constitutional difficulties, decided that it was preferable to allow the courts a discretion in the application of this Article.

3. Article 7 (1) adds in relation to the mandatory rules that their nature and purpose, and the consequences of their application or non-application, must be taken into account in order to decide whether effect should be given to them.

Thus the application of the mandatory provisions of any other country must be justified by their nature and by their purpose. One delegation had suggested that this should be defined by saying that the nature and purpose of the provisions in question should be established according to internationally recognized criteria (for example, similar laws existing in other countries or which serve a generally recognized interest). However, other experts pointed out that these international criteria did not exist and that consequently difficulties would be created for the court. Moreover this formula would touch upon the delicate matter of the credit to be given to foreign legal systems. For these reasons the Group, while not disapproving this idea, did not adopt this drafting proposal.

Additionally, in considering whether to give effect to these mandatory rules, regard must be had to "the consequences of their application or non-application".

Far from weakening the rule this subsequent element - which did not appear in the original preliminary draft - defines, clarifies and strengthens it. In fact, the judge must be given a power of discretion, in particular in the case where contradictory mandatory rules of two different countries both purport simultaneously to be applicable to one and the same situation, and where a choice must necessarily be made between them.

To complete the comments on Article 7 (1) it only remains to emphasize that the words "effect may be given" impose on the court the extremely delicate task of combining the mandatory provisions with the law normally applicable to the contract in the particular situation in question. The novelty of this provision, and the fear of the uncertainty to which it could give rise, have led some delegations to ask that a reservation may be entered on Article 7 (1) (see Article 22 (1) (a)).

4. Article 7 (2) states that "nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract".

The origin of this paragraph is found in the concern of certain delegations to safeguard the rules of the law of the forum (notably rules on cartels, competition and restrictive practices, consumer

protection and certain rules concerning carriage) which are mandatory in the situation whatever the law applicable to the contract may be.

Thus the paragraph merely deals with the application of mandatory rules (lois d'application immédiate ; leggi di applicazione necessaria ; etc) in a different way from paragraph 1 (40a).

Article 8

Material validity

1. Article 8 (1) provides that the existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Convention if the contract or term were valid.

The paragraph is intended to cover all aspects of formation of the contract other than general validity. As we have emphasized previously in paragraph 9 of the comments on Article 3, this provision is also applicable with regard to the existence and validity of the parties' consent as to choice of the law applicable.

The word "term" has been adopted to cover cases in which there is a dispute as to the validity of a term of the contract, such as a choice of law clause.

2. Notwithstanding the general rule in paragraph 1, paragraph 2 provides a special rule which relates only to the existence and not to the validity of consent.

According to this special rule a party may rely upon the law of the country in which he has his habitual residence to establish that he did not consent if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in paragraph 1.

The solution adopted by the Group in this respect is designed inter alia to solve the problem of the implications of silence by one party as to the formation of the contract.

The word "conduct" must be taken to cover both action and failure to act by the party in question ; it does not, therefore, relate solely to silence.

The words "if it appears from the circumstances" mean that the court must have regard to all the circumstances of the case, not solely to those in which the party claiming that he has not consented to the contract has acted. The Court will give particular consideration to the practices followed by the parties inter se as well as their previous business relationships.

According to the circumstances, the words "a party" can relate either to the offeror or to the offeree.

The application of paragraph 2 can result in a decision releasing a party who would have been bound under the terms of paragraph 1, but it can never produce the opposite effect of holding that a contract exists which is non-existent by its proper law.

Article 9 (4) contains a special rule relating to acts intended to have legal effect, such as, in accordance with the law of many countries, an offer. Such acts have not been mentioned in Article 8. Nonetheless, the rules in Article 8 apply to such acts by way of analogy.

Article 9

Formal validity

Article 9 deals with the formal validity of contracts and acts intended to have legal effect. The first four paragraphs lay down rules governing all contracts and acts intended to have legal effect. The last two paragraphs lay down special rules peculiar to certain types of contract. I. General rules (paragraphs 1 to 4 inclusive)

The scope of these general rules needs to be specified before indicating the various laws which they declare to be applicable. A. The scope of the general rules 1. Acts to which they apply

Article 9 applies to contracts and unilateral acts intended to have legal effect. The preliminary draft of 1972 used only the term "act intended to have legal effect" (acte juridique) which, in the terminology originating from Roman law, includes both categories. The inclusion in Article 9 of both contracts and acts intended to have legal effect, mentioned successively, is due merely to a wish to ensure clarity, since the rules to be applied are based on the same principles in both cases.

Unilateral acts intended to have legal effect which fall within the scope of the Article are those which are related to an existing or contemplated contract. Acts relating to a concluded contract can be extremely varied : notice of termination, remission of a debt, declaration of rescission or repudiation, etc.

But the act must be connected with a contract. A unilateral undertaking, unconnected with a contract, as for example, in some legal systems, a recognition of a debt not arising under a contract, or a unilateral act creating, transferring or extinguishing a right in rem, would not fall within the scope of Article 9 or of any other provision in the Convention since the latter is concerned only with contractual obligations.

Such an act must also, quite clearly, relate to a contract falling within the scope of the convention. Article 9 does not apply to the formal validity of acts relating to contracts excluded from the convention under Article 1 (2) and (3).

There is no provision expressly referring to "public acts". This omission is intentional. First, the concept of a public act is not recognized in all the legal systems and could raise awkward problems of definition. Moreover, it seems wrong for there to be special provisions governing the formal validity of private law acts concluded before public officials. Indeed, as has recently been pointed out (41), it is because a public official can draw up an instrument only in accordance with the law from which he derives his authority that the formal validity for the act concluded before him is necessarily subject to that law. If, for example, a notary has not observed the law from which he derives his authority, the contract he has drawn up will not of course be a valid notarial act. But it will not be entirely void if the law which governs its substance (and which may also determine its formal validity by virtue of Article 9) does not require a special form for that type of contract.

The general rules accordingly apply to "public acts". This has the advantage of validating acts drawn up by a public official who has thought it appropriate, as happens in the Netherlands, to follow the forms laid down by the foreign law which governs the substance of the contract.

2. Article 9 does not define what is to be understood by the "formal validity" of acts. It seemed realistic to leave open this difficult problem of definition, especially as its importance has been slightly reduced in consequence of the solutions found for the problem of the connecting factor

which to some extent equate formal and material validity.

It is nevertheless permissible to consider "form", for the purposes of Article 9, as including every external manifestation required on the part of a person expressing the will to be legally bound, and in the absence of which such expression of will would not be regarded as fully effective (42). This definition does not include the special requirements which have to be fulfilled where there are persons under a disability to be protected, such as the need in French law for the consent of a family council to an act for the benefit of a minor, or where an act is to be valid against third parties, for example the need in English law for a notice of a statutory assignment of a chose in action.

B. Laws to be applied 1. The principle of applying in the alternative the lex causae or the lex loci actus.

The system contained in Article 9 is a compromise between favor negotii, which tends to take a liberal attitude regarding the formalities required for acts, and the due observance of formalities which, most often, is merely giving effect to requirements of substance.

In supporting the former attitude, it did not seem possible to follow the example of the Hague Convention of 5 October 1961 concerning conflict of laws with regard to testamentary dispositions. Favor testamenti is justified by the fact that a will is an act of final disposition which by definition cannot be reenacted if its validity is challenged after the testator's death. This consideration does not affect other acts intended to have legal effect in the case of which excessive freedom with regard to formalities would result in robbing of all effect the requirements in this field which are specified by the various legal systems, very often with a legitimate aim in view. Moreover, the connection between questions of form and questions of evidence (Article 14) makes it desirable to limit the number of laws applicable to formal validity.

On the other hand, in order to avoid parties being caught unawares by the annulment of their act on the ground of an unexpected formal defect, Article 9 has, nonetheless, laid down a fairly flexible system based on applying in the alternative either the law of the place where the contract was entered into (or in the case of a unilateral act the law of the country where the act was done) or else the law which governs its substance.

This choice of applicable laws appears to be sufficient and this is why the possibility of applying the law of the common nationality or habitual residence of the parties was rejected (43). On the other hand no priority has been accorded either to the lex causae or to the lex loci actus. If the act is valid to one of these two laws, that is enough to prevent defects of form under the other from affording grounds for nullity (44).

The Group did not examine the question of which of the two laws would apply to an action brought to annul the contract for formal defect in a case where the contract would be null and void according to both these laws. If, for example, the limitation period for bringing an action for annulment on the ground of a formal defect is not the same in the two legal systems, it may seem to be in keeping with the spirit of this Article to apply the law which provides for the shorter period and, in this respect, is more favourable than the other to the validity of the act.

Renvoi must be rejected as regards formal validity as in all other matters governed by the Convention (cf. Article 15).

2. Problems raised by applying the law governing the substance of the contract to the question of formal validity

The lex causae is already recognized as applicable, either as the principal law or as a subsidiary option, to the question of formal validity by the law of the Contracting States and its application

is fully justified by the logical connection between substance and form (45).

The law governing the substance of the contract must be determined by reference to Articles 3, 4 and 6 of the Convention (for contracts provided for under Article 5, see II below, Special rules peculiar to certain contracts). Article 3 (2) specifically governs the formal consequences of a voluntary change by the parties in the law governing the substance of the contract. This text means that, on this assumption of changes in the connecting facts, it is enough for the contract to be formally valid in accordance with one or other of the laws successively called upon to govern the substance of the contract.

A difficulty will arise when a contract is subject to several laws, either because the parties have selected the law applicable to a part only of their contract (Article 3 (1)), or because the court itself, by way of exception, has proceeded to sever the contract (Article 4 (1)). Which of the laws governing the substance of the contract is to determine its formal validity ? In such a case it would seem reasonable to apply the law applicable to the part of the contract most closely connected with the disputed condition on which its formal validity depends.

Article 8 (1), dealing with material validity, says that the existence and validity of a contract or of any term of a contract shall be determined by the law which would govern it under the Convention if the contract or term were valid. This is to avoid the circular argument that where there is a choice of the applicable law no law can be said to be applicable until the contract is found to be valid. A similar point arises in relation to formal validity under Article 9, and although the text does not expressly say so it is intended that "the law which governs it under this Convention" should be the law which would govern the contract if it were formally valid.

3. Problems raised by applying the locus regit actum rule to the question of formal validity

The application of the law of the country in which a contract was entered into or in which a unilateral act was done, in order to determine the formal validity of the contract or act, results from the age-old maxim locus regit actum, recognized alike, usually as a principal rule, by the law of the Contracting States (46).

However a classic difficulty arises in determining the country in which the contract was entered into when the contract has been made between persons in different countries.

To resolve this difficulty it is first necessary to describe exactly what is meant by persons being or not being in the same country. Where the contract is concluded through the offices of one or more agents, Article 9 (3) indicates clearly that the place to be taken into consideration is where the agents are acting at the time when the contract is concluded. If the parties' agents (or one party and the agent of the other) meet in a given country and conclude the contract there, this contract is considered, within the meaning of paragraph 1, to be concluded between persons in that country, even if the party or parties represented were in another country at the time. Similarly, if the parties' agents (or one party and the agent of the other) are in different countries at the time when they conclude the contract, this contract is considered, within the meaning of paragraph 2, to be concluded between persons in different countries even if both the parties represented were in fact in the same country at the time.

The question of finding which law is the law of the place where the contract was entered into and therefore determines the formal validity of a contract made between persons in different countries, in the sense just indicated, has been very widely debated. Solutions consisting in fixing the conclusion of the contract either in the place where the offer was made or in the place where the acceptance was made have been rejected as rather artificial (47). The solution consisting in applying to offer and acceptance separately the law of the country in which each was made, directly based on the Frankenstein draft for a European code of private international law and retained in the preliminary draft of

1972, and by the 1978 Swiss draft of Federal law on private international law, Article 125 (2), was also rejected. It is clear that there are numerous requirements as to formal validity which are laid down with regard to the contract itself, taken as a whole and not stage by stage. This is the case where, for example, two signatures are required or where the contract has to be made in duplicate. Accordingly, rather than split the law determining the formal validity of a contract, it seemed preferable to look for a law which would be applicable to the formal validity of the contract as a whole.

The choice was therefore between a liberal solution, retaining the application in the alternative of the law of one or other of the countries which the persons concluding the contract were at the time it was entered into, and a strict solution, requiring the cumulative application of these various laws. The liberal solution was adopted by Article 9 (2). When a contract is concluded between persons in different countries, it is formally valid if it satisfies the requirements as to form laid down by the law of one of those countries or of the law governing the substance of the contract.

4. Reservation regarding mandatory rules

Article 7 of the Convention, which contains a reservation in favour of the application of mandatory rules, may lead to the rejection of the liberal system based on the application in the alternative of either the law governing the substance of the contract or the law of the place where it was entered into. It may happen that certain formal requirements laid down by the law of the country with which a contract or act has a close connection have a mandatory character so marked that they could be applied even though the law of that country is not one of those which would normally determine formal validity under Article 9.

In this connection mention was made of the rules regarding form laid down by the law of the country where an employment contract is to be carried out, especially the requirement that a non-competition clause should be in writing, even though the oral form is permitted by the law of the place where the contract was entered into or under the law chosen by the parties.

Of course, under the system established by Article 7, it will be for the court hearing the case to decide whether it is appropriate to give effect to these mandatory provisions and consequently to disregard the rules laid down in Article 9.

II. Special rules peculiar to certain contracts (paragraphs 5 and 6)

Paragraphs 5 and 6 provide special rules for the formal validity of certain contracts made by consumers and of contracts the subject matter of which is a right in immovable property or a right to use immovable property. It would have been conceivable with regard to such contracts merely to apply Article 7 quite simply and, as an exception to Article 9, to allow, for example, the application of certain formal provisions for consumer protection laid down by the law of the consumer's habitual place of residence, or of certain mandatory requirements as to form imposed by the law of the country where the immovable property is situated.

This solution, however, was not thought adequate to ensure the effective application of these laws because of the discretionary power which Article 7 gives to the court hearing the case. It was accordingly decided to exclude the first four paragraphs of Article 9 completely in the case of contracts of these kinds.

The fifth paragraph of Article 9 deals with the contracts mentioned in Article 5 (1), entered into in the circumstances described in Article 5 (2), taking into account Article 5 (4) and (5).

Just as Article 5 protects the consumer, despite any choice of law specified in the contract, by imposing, as regards substance, the mandatory rules of the law of the country in which he has his habitual residence (Article 5 (3)), Article 9 (5) imposes the rules of that same country with

regard to formal validity. This is justified by the very close connection, in the context of consumer protection, between mandatory rules of form and rules of substance.

For the same reasons, it might have been expected that the formal validity of employment contracts would also have been made subject to mandatory attachment to the rules of a particular national law.

This idea, though at first contemplated, was finally rejected. Indeed, contrary to Article 5 which provides explicitly that consumer contracts, in the absence of any choice by the parties, shall be subject as regards formal validity to the law of the country where the consumer has his habitual residence, for the purpose of determining the connecting factors applying to employment contracts Article 6 of the Convention only introduces rebuttable presumptions which must be disregarded in cases where it appears from the circumstances that the employment contract is more closely connected with a country other than that indicated by these presumptions. Consequently, if it had been decided that the law governing the substance of the contract should be mandatory for determining the formal validity of employment contracts, it would have been impossible, at the time a contract was entered into, to determine the law governing its formal validity because of the uncertainty caused by Article 6. Therefore no special rule was laid down regarding the formal validity of employment contracts, but thanks to Article 7, it is to be expected that the mandatory rules regarding formal validity laid down by the law of the country where the work is to be carried out will frequently be found to apply.

The sixth paragraph of Article 9 deals with contracts the subject matter of which is a right in immovable property or a right to use immovable property. Such contracts are not subject to a mandatory connecting factor as regards substance, Article 4 (3) merely raising a presumption in favour of the law of the country where the immovable property is situated. It is clear, however, that if the law of the country where the immovable property is situated lays down mandatory rules determining formal validity, these must be applied to the contract, but only in the probably rather rare cases where, according to that law, these formal rules must be applied even when the contract has been entered into abroad and is governed by a foreign law.

The scope of this provision is the same as that of Article 4 (3).

Article 10

Scope of the applicable law

1. Article 10 defines the scope of the law applicable to the contract under the terms of this Convention (48).

The original preliminary draft contained no specific rule on this point. It confined itself to the provision in Article 15 that the law which governs an obligation also governs the conditions for its performance, the various ways in which it can be discharged, and the consequences of non-performance. However, since Article 11 of the preliminary draft defined in detail the scope of the law applicable to non-contractual obligations, the principal subject of Article 15 was the scope of the law of the contract.

2. Article 10 (1) lists the matters which fall within the scope of the law applicable to the contract. However, this list is not exhaustive, as is indicated by the words "in particular".

The law applicable to the contract under the terms of his Convention governs firstly its interpretation (subparagraph (a)).

Secondly the law applicable to the contract governs the performance of the obligations arising from the contract (subparagraph (b)).

This appears to embrace the totality of the conditions, resulting from the law or from the contract, in accordance with which the act is essential for the fulfilment of an obligation must be performed, but not the manner of its performance (in so far as this is referred to in the second paragraph of Article 10 or the conditions relating to the capacity of the persons who are to perform it (capacity being a matter excluded from the scope of the uniform rules, subject to the provisions of Article 11) or the conditions relating to the form of the act which is to be done in performance of the obligation.

The following therefore fall within the provisions of the first paragraph of Article 10 : the diligence with which the obligation must be performed ; conditions relating to the place and time of performance ; the extent to which the obligation can be performed by a person other than the party liable ; the conditions as to performance of the obligation both in general and in relation to certain categories of obligation (joint and several obligations, alternative obligations, divisible and indivisible obligations, pecuniary obligations) ; where performance consists of the payment of a sum of money, the conditions relating to the discharge of the debtor who has made the payment, the appropriation of the payment, the receipt, etc.

Within the limits of the powers conferred upon the court by its procedural law, the law applicable to the contract also governs the consequences of total or partial failure to perform these obligations, including the assessment of damages insofar as this is governed by rules of law.

The assessment of damages has given rise to some difficulties. According to some delegations the assessment of the amount of damages is a question of fact and should not be covered by the Convention. To determine the amount of damages the court is obliged to take account of economic and social conditions in its country ; there are some cases in which the amount of damages is fixed by a jury ; some countries use methods of calculation which might not be accepted in others.

Other delegations countered these arguments, however, by pointing out that in several legal systems there are rules for determining the amount of damages ; some international conventions fix limits as to the amount of compensation (for example, conventions relating to carriage) ; the amount of damages in case of non-performance is often prescribed in the contract and grave difficulties would be created for the parties if these amounts had to be determined later by the court hearing the action.

By way of compromise the Group finally decided to refer in subparagraph (c) solely to rules of law in matters of assessment of damages, given that questions of fact will always be a matter for the court hearing the action.

The expression "consequences of breach" refers to the consequences which the law or the contract attaches to the breach of a contractual obligation, whether it is a matter of the liability of the party to whom the breach is attributable or of a claim to terminate the contract for breach. Any requirement of service of notice on the party to assume his liability also comes within this context.

According to subparagraph 1 (d), the law applicable to the contract governs the various ways of extinguishing obligations, and prescription and limitation of actions. This Article must be applied with due regard to the limited admission of severability (dépeçage) in Articles 3 and 4.

Subparagraph (e) also makes the consequences of nullity subject to the applicable law. The working party's principal objective in introducing this provision was to make the refunds which the parties have to pay each other subsequent to a finding of nullity of the contract subject to the applicable law.

Some delegations have indicated their opposition to this approach on the grounds that, under their legal systems, the consequences of nullity of the contract are non-contractual in nature. The majority of delegations have nevertheless said they are in favour of including such consequences within the scope of the law of contracts, but in order to take account of the opposition expressed provision had been made for any Contracting State to enter a reservation on this matter (Article 22 (1) (b)).

3. Article 10 (2) states that in relation to the manner of performance and the steps to be taken in the event of defective performance regard shall be had to the law of the country in which performance takes place.

This is a restriction which is often imposed in the national law of many countries as well as in several international conventions. Many jurists have supported and continue to support this restriction on the scope of the law applicable to the contract even when the contractual obligation is performed in a country other than that whose law is applicable.

What is meant, however, by "manner of performance" of an obligation ? It does not seem that any precise and uniform meaning is given to this concept in the various laws and in the differing views of learned writers. The Group did not for its part wish to give a strict definition of this concept. It will consequently be for the lex fori to determine what is meant by "manner of performance". Among the matters normally falling within the description of "manner of performance", it would seem that one might in any event mention the rules governing public holidays, the manner in which goods are to be examined, and the steps to be taken if they are refused (49).

Article 10 (2) says that a court may have regard to the law of the place of performance. This means that the court may consider whether such law has any relevance to the manner in which the contract should be performed and has a discretion whether to apply it in whole or in part so as to do justice between the parties.

Article 11

Incapacity

The legal capacity of natural persons or of bodies corporate or unincorporate is in principle excluded from the scope of the Convention (Article 1 (2) (a) and (e)). This exclusion means that each Contracting State will continue to apply its own system of private international law to contractual capacity.

However, in the case of natural persons, the question of capacity is not entirely excluded. Article 11 is intended to protect a party who in good faith believed himself to be contracting with a person of full capacity and who, after the contract has been entered into, is confronted by the incapacity of the other contracting party. This anxiety to protect a party in good faith against the risk of a contract being held voidable or void on the ground of the other party's incapacity on account of the application of a law other than that of the place where the contract was concluded is clearly present in the countries which subject capacity to the law of the nationality (50).

A rule of the same kind is also thought necessary in the countries which make capacity subject to the law of the country of domicile. The only countries which could dispense with it are those wich subject capacity to the law of the place where the contract was entered into or to the law governing the substance of the contract.

Article 11 subjects the protection of the other party to the contract to very stringent conditions.

First, the contract must be concluded between persons who are in the same country. The Convention does not wish to prejudice the protection of a party under a disability where the contract is concluded at a distance, between persons who are in different countries, even if, under the law governing the contract, the latter is deemed to have been concluded in the country where the party with full capacity is.

Secondly, Article 11 is only to be applied where there is a conflict of laws. The law which, according to the private international law of the court hearing the case, governs the capacity of the person claiming to be under a disability must be different from the law of the country where the contract was concluded.

Thirdly, the person claiming to be under a disability must be deemed to have full capacity by the law of the country where the contract was concluded. This is because it is only in this case that the other party may rely on apparent capacity.

In principle these three conditions are sufficient to prevent the incapacitated person from pleading his incapacity against the other contracting party. This will not however be so "if the other party to the contract was aware of his incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence". This wording implies that the burden of proof lies on the incapacitated party. It is he who must establish that the other party knew of his incapacity or should have known of it.

Article 12

Voluntary assignment

1. The subject of Article 12 is the voluntary assignment of rights.

Article 12 (1) provides that the mutual obligations of assignor and assignee under a voluntary assignment of a right against another person (the debtor) shall be governed by the law which under this Convention applies to the contract between the assignor and assignee.

Interpretation of this provision gives rise to no difficulty. It is obvious that according to this paragraph the relationship between the assignor and assignee of a right is governed by the law applicable to the agreement to assign.

Although the purpose and meaning of the provision leave hardly any room for doubt, one wonders why the Group did not draft it more simply and probably more elegantly. For example, why not say that the assignment of a right by agreement shall be governed in relations between assignor and assignee by the law applicable to that agreement.

Such a form of words had in fact been approved initially by most of the delegations, but it was subsquently abandoned because of the difficulties of interpretation which might have arisen in German law, where the expression "assignment" of a right by agreement includes the effects of it upon the debtor : this was expressly excluded by Article 12 (2).

The present wording was in fact finally adopted precisely to avoid a form which might lead to the idea that the law applicable to the agreement for assignment in a legal system in which it is understood as "Kausalgeschäft" also determines the conditions of validity of the assignment with respect to the debtor.

2. On the contrary, under the terms of Article 12 (2) it is the law governing the right to which the assignment relates which determines its assignability, the relationship between the assignee

and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor's obligations have been discharged.

The words "conditions under which the assignment can be invoked" cover the conditions of transferability of the assignment as well as the procedures required to give effect to the assignment in relation to the debtor.

Notwithstanding the provisions of paragraph 2, the matters which it covers, with the sole exception of assignability, are governed, as regards relations between assignor and debtor if a contract exists between them, by the law which governs their contract in so far as the said matters are dealt with in that contract.

Subrogation

1. The substitution of one creditor for another may result both from the voluntary assignment of a right (or assignment properly so called) referred to in Article 12 and from the assignment of a right by operation of law following a payment made by a person other than the debtor.

According to the legislation in various Member States of the Community, "subrogration" involves the vesting of the creditor's rights in the person who, being obliged to pay the debt with or on behalf of others, had an interest in satisfying it : this is so under Article 1251-3 of the French Civil Code and Article 1203-3 of the Italian Civil Code. For example, in a contract of guarantee the guarantor who pays instead of the debtor succeeds to the rights of the creditor. The same occurs when a payment is made by one of a number of debtors who are jointly and severally liable or when an indivisible obligation is discharged.

Article 13 of the Convention embodies the conflict rule in matters of subrogation of a third party to the rights of a creditor. Having regard to the fact that the Convention applies only to contractual obligations, the Group thought it proper to limit the application of the rule adopted in Article 13 to assignments of rights which are contractual in nature. Therefore this rule does not apply to subrogation by operation of law when the debt to be paid has its origin in tort (for example, where the insurer succeeds to the rights of the insured against the person causing damage).

2. According to the wording of Article 13 (1), where a person (the creditor) has a contractual claim upon another (the debtor), and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, the law which governs the third person's duty to satisfy the creditor shall determine whether the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship and, if so, whether he may do so in full or only to a limited extent.

The law which governs the third person's duty to satisfy the creditor (for example, the law applicable to the contract of guarantee, where the guarantor has paid instead of the debtor) will therefore determine whether and to what extent the third person is entitled to exercise the rights of the creditor against the debtor according to the law governing their contractual relations.

In formulating the rule under analysis the Group made a point of considering situations in which a person has paid without being obliged so to do by contract or by law but having an economic interest recognized by law as anticipated by Article 1251-3 of the French Civil Code and Article 1203-3 of the Italian Civil Code. In principle the same rule applies to these situations, but the court has a discretion in this respect.

As regards the possibility of a partial subrogation such as that provided for by Article 1252 of the French Civil Code and by Article 1205 of the Italian Civil Code, it seems right that this should be subject to the law applicable to the subrogation.

In addition, when formulating Article 13 the Group envisaged the possibility that the legal relationship

between the third party and the debtor was governed by a contract. This contract will obviously be governed by the law which is applicable to it by the terms of this Convention. Article 13 in no way affects this aspect of the relationship between the third party and the debtor.

3. Article 13 (2) extends the same rule in paragraph 1 to cases in which several person are liable for the same contractual obligation (co-debtors) and the creditor's interest has been discharged by one of them.

4. As well as the problem of voluntary assignment of rights and the problem of assignment of rights by operation of law (Articles 12 and 13), there exists the problem of assignment of duties. However, the Group did not wish to resolve this problem, because it is new and because there are still many uncertainties as to the solution to be given.

Article 14

Burden of proof, etc.

Article 14 deals with the law to be applied to certain questions of evidence.

There is no rule of principle dealing with evidence in general. In the legal systems of the Contracting States, except as regards the burden of proof, questions of evidence (both as regards facts and acts intended to have legal effect and as regards foreign law) are in principle subject to the law of the forum. This principle is, however, subject to a certain number of exceptions which are not the same in all these legal systems. Since it was decided that only certain questions of evidence should be covered in Article 14, it was thought better not to bind the interpretation thereof by a general provision making the rules of evidence subject to the law of the forum on questions not decided by the Convention, such as, for example, the taking of evidence abroad or the evidential value of legal acts. In order that there should be no doubt as to the freedom retained by the States regarding questions of evidence not decided by the Convention, Article 1 (2) (h) excludes evidence and procedure from the scope of the Convention, expressly without prejudice to Article 14.

Two major questions have been covered and are each the subject of a separate paragraph. These are the burden of proof on the one hand and the recognition of modes of proving acts intended to have legal effect on the other. After considerable hesitation the Group decided not to deal with the problem of evidential value. A. Burden of proof

The first paragraph of Article 14 provides for the application of the law of the contract "to the extent that it contains, in the law of contract, rules which raise presumptions of law or determine the burden of proof". Presumptions of law, relieving the party in whose favour they operate from the necessity of producing any evidence, are really rules of substance which in the law of contract contribute to making clear the obligations of the parties and therefore cannot be separated from the law which governs the contract. By way of example, where Article 1731 of the French Civil Code provides that "where no inventory of the state of the premises has been taken, the lessee shall be deemed to have received them in good tenantable repair and must, in the absence of proof to the contrary, restore them in such condition", the Article is in reality determining the obligation of the lessee to restore the let premises. It is therefore logical that the law of the contract should apply here.

The same observation applies to rules determining the burden of proof. By way of example, Article 1147 of the French Civil Code provides that a debtor who has failed to fulfil his obligation shall be liable for damages "unless he shows that this failure is due to an extraneous cause outside his control". This text determines the burden of proof between the parties. The creditor must prove

that the obligation has not been fulfilled, the debtor must prove that the failure is due to an extraneous cause. But in dividing the burden, the text establishes the debtor's obligations on a vital point, since the debtor is liable for damages even if the failure to fulfil is not due to a proven fault on his part. The rule is accordingly a rule of substance which can only be subject to the law of the contract.

Nevertheless the text of the first paragraph of Article 14 does contain a restriction. The burden of proof is not totally subject to the law of the contract. It is only subject to it to the extent that the law of the contract determines it with regard to contractual obligations ("in the law of contract"), that is to say only to the extent to which the rules relating to the burden of proof are in effect rules of substance.

This is not always the case. Some legal systems recognize rules relating to the burden of proof, sometimes even classed as presumptions of law, which clearly are part of procedural law and which it would be wrong to subject to the law of the contract. This is the case, for example, with the rule whereby the claim of a party who appears is deemed to be substantiated if the other party fails to appear, or the rule making silence on the part of a party to an action with regard to facts alleged by the other party equivalent to an admission of those facts.

Such rules do not form part of "the law of contract" and accordingly do not fall within the choice of law rule established by Article 14 (1).

B. Admissibility of modes of proving acts intended to have legal effect

Paragraph 2 of Article 14 deals with the admissibility of modes of proving acts intended to have legal effect (in the sense of voluntas negotium).

The text provides for the application in the alternative of the law of the forum or of the law which determines the formal validity of the act. This liberal solution favouring proof of the act is already recognized in France and in the Benelux countries (51). It seems to be the only solution capable of reconciling the requirements of the law of the forum with the desire to respect the legitimate expectations of the parties at the time of concluding their act.

The law of the forum is normally employed to determine the means which may be used for proving an act intended to have legal effect, which in this context includes a contract. If, for example, that law allows a contract to be proved by witnesses, it should be followed, irrespective of any more stringent provisions on the point contained in the law governing the substance or formal validity of the act.

On the other hand, in the opposite case, if the law governing the formal validity of the act only requires oral agreement and allows such an agreement to be proved by witnesses, the expectations of parties who had relied on that law would be disappointed if such proof were to be held inadmissible solely on the ground that the law of the trial court required written evidence of all acts intended to have legal effect. The parties must therefore be allowed to employ the modes of proof recognized by the law governing formal validity.

Nevertheless this liberalism should not lead to imposing on the trial court modes of proof which its procedural law does not enable it to administer. Article 14 does not deal with the administration of modes of proof, which the legal system of each Contracting State makes subject to the law of the trial court. Admitting the application of a law other than that of the forum to modes of proof ought not to lead to the rules of the law of the forum, as regards the administration of the modes of proof, being rendered nugatory.

This is the explanation of the proviso which in substance enables a court, without reference to public policy, to disregard modes of proof which the law of procedure cannot generally allow, such

as an affidavit, the testimony of a party or common knowledge. Consideration was also given to the case of rights subject to registration in a public register, holding that the authority charged with keeping that register could, owing to that provision, only recognize the modes of proof provided for by its own law.

Such being the general system adopted, a proviso had to be added regarding the law determining formal validity applicable as an alternative to the law of the forum.

The text refers to "any of the laws referred to in Article 9 under which that contract or act is formally valid". This expression means that if, for example, the act is formally valid under the law governing the substance of the contract but is not formally valid under the law of the place where it was done, the parties may employ only the modes of proof provided for by the first of these two laws, even if the latter is more liberal as regards proof. The reference in Article 14 (2) to the law governing formal validity is clearly based on the assumption that the law governing formal validity has been observed. On the other hand, if the act is formally valid according to both laws (lex causae and lex loci actus) mentioned in Article 9, the parties will be able to employ the modes of proof provided for by either of those laws.

C. There is no provision dealing with the evidential value of acts intended to have legal effect. The preliminary draft of 1972 contained a provision covering two questions derived, in Roman law countries, from the concept of evidential value ; the question how far a written document affords sufficient evidence of the obligations contained in it and the question of the modes of proof to add to or contradict the contents of the document - "outside and against the content" of such a document, according to the old phraseology of the Code Napoléon (Article 1341). Despite long discussion, no agreement could be reached between the delegations and it was therefore decided to leave the question of evidential value outside the scope of the Convention.

Article 15

Exclusion of renvoi

This Article excludes renvoi.

It is clear that there is no place for renvoi in the law of contract if the parties have chosen the law to be applied to their contract. If they have made such a choice, it is clearly with the intention that the provisions of substance in the chosen law shall be applicable ; their choice accordingly excludes any possibility of renvoi to another law (52).

Renvoi is also excluded where the parties have not chosen the law to be applied. In this case the contract is governed, in accordance with Article 4 (1), by the law of the country with which it is most closely connected. Paragraph 2 introduces a presumption that that country is the country where the party who is to effect the performance which is characteristic of the contract has his habitual residence. It would not be reasonable for a court, despite this express localization, to subject the contract to the law of another country by introducing renvoi, solely because the rule of conflict of laws in the country where the contract was localized contained other connecting factors. This is equally so where the last paragraph of Article 4 applies and the court has decided the place of the contract with the aid of indications which seem to it decisive.

More generally, the exclusion of renvoi is justified in international conventions regarding conflict of laws. If the Convention attempts as far as possible to localize the legal situation and to determine the country with which it is most closely connected, the law specified by the conflicts rule in the Convention should not be allowed to question this determination of place. Such, moreover, has

been the solution adopted since 1951 in the conventions concluded at The Hague.

Article 16

"Ordre public"

Article 16 contains a precise and restrictively worded reservation in favour of public policy ("ordre public").

First it is expressly stated that, in the abstract and taken as a whole, public policy is not to affect the law specified by the Convention. Public policy is only to be taken into account where a certain provision of the specified law, if applied in an actual case, would lead to consequences contrary to the public policy ("ordre public") of the forum. It may therefore happen that a foreign law, which might in the abstract be held to be contrary to the public policy of the forum, could nevertheless be applied, if the actual result of its being applied does not in itself offend the public policy of the forum.

Secondly, the result must be "manifestly" incompatible with the public policy of the forum. This condition, which is to be found in all the Hague Conventions since 1956, requires the court to find special grounds for upholding an objection (53).

Article 16 provides that it is the public policy of the forum which must be offended by the application of the specified law. It goes without saying that this expression includes Community public policy, which has become an integral part of the public policy ("ordre public") of the Member States of the European Community.

Article 17

No retrospective effect

Article 17 means that the Convention has no retrospective effect on contracts already in existence. It applies only to contracts concluded after it enters into force, but the entry into force must be considered separately for each State since the Convention will not enter into force simultaneously in all the contracting States (see Article 29). Of course, there is no provision preventing a court of a contracting State with respect to which the Convention has not yet entered into force from applying it in advance unter the concept of ratio scripta.

Article 18

Uniform interpretation

This Article is based on a formula developed by the United Nations Commission on International Trade Law.

The draft revision of the uniform law on international sales and the preliminary draft of the Convention on prescription and limitation of actions in international sales contained the following provision : "In the interpretation and application of this Convention, regard shall be had to its international character and to the necessity of promoting uniformity". This provision, whose wording was slightly amended, has been incorporated in the United Nations Convention on contracts for the international

sale of goods (Article 7) signed in Vienna on 11 April 1980.

Article 18 operates as a reminder that in interpreting an international convention regard must be had to its international character and that, consequently, a court will not be free to assimilate the provisions of the Convention, in so far as concerns their interpretation, to provisions of law which are purely domestic. It seemed that one of the advantages of this Article might be to enable parties to rely in their actions on decisions given in other countries.

It is within the spirit of this Article that a solution must be found to the problem of classification, for which, following the example of the Benelux uniform law, the French draft and numerous conventions of The Hague, the Convention has refrained from formulating a special rule.

Article 18 will retain its importance even if a protocol subjecting the interpretation of the Convention to the Court of Justice of the European Communities is drawn up pursuant to the Joint Declaration of the Representatives of the Governments made when the Convention was opened for signature on 19 June 1980.

Article 19

States with more than one legal system

This Article is based on similar provisions contained in some of the Hague Conventions (see, for example, the Convention on the law applicable to matrimonial property regimes, Articles 17 and 18 and the Convention on the law applicable to agency, Articles 19 and 20).

According to the first paragraph, where a State has several territorial units each with its own rules of law in respect of contractual obligations, each of those units will be considered as a country for the purposes of the Convention. If, for example, in the case of Article 4, the party who is to effect the performance which is characteristic of the contract has his habitual residence in Scotland, it is with Scottish law that the contract will be deemed to be most closely connected.

Paragraph 2, which is of special concern to the United Kingdom, covers the case where the situation is connected with several territorial units in a single country but not with another State. In such a case there is a conflict of laws, but it is a purely domestic matter for the State concerned which consequently is under no obligation to resolve it by applying the rules of the Convention.

Article 20

Precedence of Community law

This Article is intended to avoid the possibility of conflict between this Convention and acts of the Community institutions, by according precedence to the latter. The text is based on that of Article 52 (2) of the Convention of 27 September 1968 as revised by the Accession Convention of 9 October 1978.

The Community provisions which will have precedence over the Convention are, as regards their object, those which, in relation to particular matters, lay down rules of private international law with regard to contractual obligations. For example, the Regulation on conflict of laws with respect to employment contracts will, when it has been finally adopted, take precedence over the Convention.

The Governments of the Member States have, nevertheless, in a joint declaration, expressed the wish that these Community instruments will be consistent with the provisions of the Convention.

As regards the form which these instruments are to take, the Community provisions contemplated by Article 20 are not only acts of the institutions of the European Communities, that is to say principally the Regulations and the Directives as well as the Conventions concluded by those Communities, but also national laws harmonized in implementation of such acts. A law or regulation adopted by a State in order to make its legislation comply with a Directive borrows, as it were, from the Directive its Community force, thus justifying the precedence accorded to it over this Convention.

Finally, the precedence which Article 20 accords to Community law applies not only to Community law in force at the date when this Convention enters into force, but also to that adopted after the Convention has entered into force.

Article 21

Relationship with other Conventions

This Article, which has its equivalent in the Hague Conventions on the law applicable to matrimonial property regimes (Article 20) and on the law applicable to agency (Article 22) means that this Convention will not prejudice the application of any other international agreement, present or future, to which a Contracting State is or becomes party, for example, to Conventions relating to carriage. This leaves open the possibility of a more far-reaching international unificatin with regard to all or part of the ground covered by this Convention.

This provision does not of course eliminate all possibility of difficulty arising from the combined application of this Convention and another concurrent Convention, especially if the latter contains a provision similar to that in Article 21. But the States which are parties to several Conventions must seek a solution to these difficulties of application without jeopardizing the observance of their international obligations.

Moreover, Article 21 must be read in conjunction with Articles 24 and 25. The former specifies the conditions under which a contracting State may become a party to a multilateral Convention after the date on which this Convention enters into force with respect thereto. The latter deals with the case where the conclusion of other Conventions would prejudice the unification achieved by this Convention.

Article 22

Reservations

This Article indicates the reservations which may be made to the Convention, the reasons for which have been set out in this report as regards Articles 7 (1) and 10 (1) (e). Following the practice generally applied, in particular in the Hague Conventions, it lays down the procedure by means of which these reservations can be made or withdrawn.

TITLE III FINAL PROVISIONS

Article 23

Unilateral adoption by a contracting State of a new choice of law rule

Article 23 is an unusual text since it allows the contracting States to make unilateral derogations from the rules of the Convention. This weakening of its mandatory force was thought desirable because of the very wide scope of the Convention and the very general character of most of its rules. The case was envisaged where a State found it necessary for political, economic or social reasons to amend a choice of law rule and it was thought desirable to find a solution sufficiently flexible to enable States to ratify the Convention without having to denounce it as soon as they were forced to disregard its rules on a particular point.

The possibility of making unilateral derogations from the Convention is, however, subject to certain conditions and restrictions.

First, derogation is only possible if it consists in adopting a new choice of law rule in regard to a particular category of contract. For example, Article 23 would not authorize a State to abandon the general principle of the Convention. But it would enable it to adopt, under the conditions specified, a particular choice of law rule different from that of the Convention with respect, for example, to contracts made by travel agencies or to contracts for correspondence courses where the specialist nature of the contract could justify this derogation from the common rule. It is of course understood that the derogation procedure shall only be imposed on States if the contract for which they wish to adopt a new choice of law rule falls within the scope of the Convention.

Secondly, such a derogation is subject to procedural conditions. The State which wishes to derogate from the Convention must inform the other signatory States through the Secretary-General of the Council of the European Communities. The latter shall, if a State so requests, arrange for consultation between the signatory States in order to reach unanimous agreement. If, within a period of two years, no State has requested consultation or no agreement has been able to be reached, the State may then amend its law in the manner indicated.

The Group considered whether this procedure should apply to situations where the contracting States would wish to adopt a rule of the kind referred to in Article 7 of the Convention, i.e. a mandatory rule which must be applied whatever the law applicable to the contract. It was considered that the States should not be bound to submit themselves to the Article 23 procedure before adopting such a rule. But to escape the application of Article 23 the rule in question must meet the criteria of Article 7 and be explicable by the strong mandatory character of the rule of substantive law which it lays down. It is not the intention that the contracting States should be able to avoid the conditions of Article 23 by disguising under the form of a mandatory rule of the Article 7 kind a rule of conflict dealing with matters whose absolute mandatory nature is not established.

Articles 24 and 25

New Conventions

The procedure for consultation imposed under Article 23 on a State intending to derogate from the Convention by amending its national law is also imposed on a State which wishes to derogate from the Convention on becoming a party to another Convention.

This system of "freedom under supervision" imposed on contracting States applies only to conventions whose main object or whose principal aim or one of whose principal aims is to lay down rules of private international law concerning any of the matters governed by this Convention. Consequently the States are free to accede to a Convention which consolidates the material law of such and such

a contract, with regard, for example, to transport and which contains, as an ancillary provision, a rule of private international law. But, within the area thus defined, the consultation procedure applies even to Conventions which were open for signature before the entry into force of the present Convention.

Article 24 (2) further restricts the scope of the obligation imposed on the States by specifying that the procedure in the first paragraph need not apply: 1. if the object of the new Convention is to revise a former Convention. The opposite solution would have had the unfortunate effect of obstructing the modernization of existing Conventions;

2. if one or more contracting States or the European Communities are already parties to the new Convention;

3. if the new Convention is concluded within the framework of the European Treaties particularly in the case of a multilateral Convention to which one of the Communities is already party. These rules are in harmony with the precedence of Community law provided for under Article 20.

Article 24 therefore establishes a clear distinction between Conventions to which contracting States may freely become parties and those to which they may become parties only upon condition that they submit to consultation procedure.

For Conventions of the former class, Article 25 provides for the case where the conclusion of such agreements prejudiced the unification achieved by this Convention. If a contracting State considers that such is the case, it may request the Secretary-General of the Council of the European Communities to open consultation procedure. The text of the Article implies that the Secretary-General of the Council possesses a certain discretionary power. The Joint Declaration annexed to this Convention in fact provides that, even before the entry into force of this Convention, the States will confer together if one of them wishes to become a party to such a Convention.

For Conventions of the latter class, the consultation procedure is the same as that of Article 23 except that the period of two years is here reduced to one year.

Article 26

Revision

This Article provides for a possible revision of the Convention. It is identical with Article 67 of the Convention of 27 September 1968.

Articles 27 to 33

Usual protocol clauses

Article 27 defines the territories of the Member States to which the Convention is to apply (cf. Article 60 of the revised Convention of 27 September 1968). Articles 28 and 29 deal with the opening for signature of the Convention and its ratification. Article 28 does not make any statement on the methods by which each contracting State will incorporate the provisions of the Convention into its national law. This is a matter which by international custom is left to the sovereign discretion of States. Each contracting State may therefore give effect to the Convention either by giving it force of law directly or by including its provisions into its own national legislation in a form appropriate to that legislation. The most noteworthy provision is that of Article 29 (1) which provides for entry into force after seven ratifications. It appeared that to require ratification by all nine contracting States might result in delaying entry into force for too long a period.

Article 30 lays down a duration of 10 years, automatically renewable for five-year periods. For States which ratify the Convention after its entry into force, the period of 10 years or five years to be taken into consideration is that which is running for the first States in respect of which the Convention entered into force (Article 29 (1)). Article 30 (3) makes provision for denunciation in manner similar to the Hague Conventions (see for example Article 28 Agency Convention). Such a denunciation will take effect on expiry of the period of 10 years or five years as the case may be (cf. Article 30 (3)). This Article has no equivalent in the Convention of 27 September 1968. The difference is explained by the fact that this Convention, unlike that of 1968, is not directly based on Article 220 of the Treaty of Rome. It is a Convention freely concluded between the States of the Community and not imposed by the Treaty.

Articles 31 and 33 entrust the management of the Convention (deposit of the Convention and notification to the signatory States) to the Secretary-General of the Council of the European Communities.

No provision is made for third States to accede to the Convention. The question was discussed by the Group but it was unable to reach agreement. In these circumstances, if a third State asked to accede to the Convention, there would have to be consultation among the Member States.

On the other hand a solution was found to the position, vis-à-vis the Convention, of States which might subsequently become members of the European Community.

The Group considered that the Convention itself could not deal with this question as it is a matter which falls within the scope of the Accession Convention with new members. Accordingly it simply drew up a joint declaration by the contracting States expressing the view that new Member States should be under an obligation also to accede to this Convention.

Protocol relating to the Danish Statute on Maritime Law - Article 169

The Danish Statute on Maritime Law is a uniform law common to the Scandinavian countries. Due to the method applied in Scandinavian legal cooperation it is not based upon a Convention but a result of the simultaneous introduction in the Parliaments of identical bills.

Article 169 of the Statute embodies a number of choice of law rules. These rules are partly based upon the bills of lading Convention 1924 as amended by the 1968 Protocol (The Hague - Visby rules). To the extent that that is the case, they are upheld as a result of Article 21 of the present Convention, even after its ratification by Denmark.

The rule in Article 169, however, provides certain additional choice of law rules with respect to the applicable law in matters of contracts of carriage by sea. These could have been retained by Denmark under Article 21 if the Scandinavian countries had cooperated by means of Conventions. It has been accepted that the fact that another method of cooperation has been followed should not prevent Denmark from retaining this result of Scandinavian cooperation in the field of uniform legislation. The rule in the Protocol permitting revision of Article 169 without following the procedure prescribed in Article 23 corresponds to the rule in Article 24 (2) of the Convention with respect to revision of other Conventions to which the States party to this Convention are also party.

NOTES relating to the report on the Convention on the law applicable to contractual obligations

(1) Minutes of the meeting of 26 to 28 February 1969. (2) Minutes of the meeting of 26 to 28 February 1969, pages 3, 4 and 9. (3) Commission document 12.665/XIV/68. (4) Minutes of the meeting of 26 to 28 February 1969. (5) Minutes of the meeting of 20 to 22 October 1969. (6) Minutes of the meeting of 2 and 3 February 1970. (7) See the following Commission documents : 12.153. XIV. 70 (questionnaire prepared by Professor Giuliano and replies of the rapporteurs) ; 6.975/XIV/70 (questionnaire prepared by Mr Van Sasse van Ysselt and replies of the rapporteurs) ; 15.393/XIV/70

(questionnaire prepared by Professor Lagarde and replies of the rapporteurs). (8) The meetings were held on the following dates : 28 September to 2 October 1970 ; 16 to 20 November 1970 ; 15 to 19 February 1971 ; 15 to 19 March 1971 ; 28 June to 2 July 1971 ; 4 to 8 October 1971 ; 29 November to 3 December 1971 ; 31 January to 3 February 1972 ; 20 to 24 March 1972 ; 29 to 31 May 1972 ; 21 to 23 June 1972. (9) Minutes of the meeting of 21 to 23 June 1972, page 29 et seq. (10) The meetings were held on the following dates : 22 to 23 September 1975 ; 17 to 19 December 1975 ; 1 to 5 March 1976 ; 23 to 30 June 1976 ; 16 to 17 December 1976 ; 21 to 23 February 1977 ; 3 to 6 May 1977 ; 27 to 28 June 1977 ; 19 to 23 September 1977 ; 12 to 15 December 1977 ; 6 to 10 March 1978 ; 5 to 9 June 1978 ; 25 to 28 September 1978 ; 6 to 10 November 1978 ; 15 to 16 January 1979 ; 19 to 23 February 1979. (11) The list of government experts who took part in the work of this ad hoc working party or in the work of the working party chaired by Mr Jenard is attached to this report. (12) The work done on company law by the European Communities falls into three categories. The first category consists of the Directives provided for by Article 54 (3) (g) of the EEC Treaty. Four of these Directives are already in force. The first, issued on 9 March 1968 (OJ No L 65, 14.3.1968), concerns disclosure, the extent to which the company is bound by acts done on its behalf, and nullity, in relation to public limited companies. The second, issued on 13 December 1976 (OJ No L 26, 31.1.1977), concerns the formation of public limited companies and the maintenance and alteration of their capital. The third, issued on 9 October 1978 (OJ No L 295, 20.10.1978), deals with company mergers, and the fourth, issued on 25 July 1978 (OJ No L 222, 14.8.1978), relates to annual accounts. Four other proposals for Directives made by the Commission are currently before the Council. They concern the structure of "sociétés anonymes" (OJ No C 131, 13.12. 1972), the admission of securities to quotation (OJ No C 131, 13.12.1972), consolidated accounts (OJ No C 121, 2.6.1976) and the minimum qualifications of persons who carry out legal audits of company accounts (OJ No C 112, 13.5. 1978). The second category comprises the Conventions provided for by Article 220 of the EEC Treaty. One of these concerns the mutual recognition of companies and legal persons. It was signed at Brussels on 29 February 1968 (the text was published in Supplement No 2 of 1969 to the Bulletin of the European Communities). The draft of a second Convention will shortly
be submitted to the Council ; it concerns international mergers. Finally, work has progressed with a view to creating a Statute for European companies. This culminated in the proposal for a Regulation on the Statute for European companies, dated 30 June 1970 (OJ No C 124, 10.10.1970). (13) For the text of the judgment, see : Rev. crit., 1911, p. 395 ; Journal dr. int. privé, 1912, p. 1156. For comments, cf. Batiffol and Lagarde, Droit international privé (2 vol.), sixth edition, Paris, 1974-1976, II, No 567-573, pp. 229-241. (14) Kegel, Internationales Privatrecht : Ein Studienbuch, third edition, München-Berlin, 1971, º 18, pp. 253-257 ; Kegel, Das IPR im Einführungsgesetz zum BGB, in Soergel/Siebert, Kommentar zum BGB (Band 7), 10th edition, 1970, Margin Notes 220-225 ; Reithmann, Internationales Vertragsrecht. Das internationale Privatrecht der Schuldverträge, third edition, Köln, 1980, margin notes 5 and 6 Drobnig, American-German Private International Law, second edition, New York, 1972, pp. 225-232. (15) Morelli, Elementi di diritto internazionale privato italiano, 10th edition, Napoli, 1971, Nos 97-98, pp. 154-157 ; Vitta, Op. cit., III, pp. 229-290. (16) Rev. crit., 1938, p. 661. (17) Frederic, La vente en droit international privé, in Recueil des Cours de l'Ac. de La Haye, Tome 93 (1958-I), pp. 30-48 ; Rigaux, Droit international privé, Bruxelles, 1968, Nos 348-349 ; Vander Elst, Droit international privé. Règles générales des conflits de lois dans les différentes matières de droit privé, Bruxelles, 1977, No 56, p. 100 et seq. (18) The text of the judgement in the Alnati case (Nederlandse Jurisprudentie 1967, p. 3) is published in the French in Rev. crit., 1967, p. 522. (Struycken note on the Alnati decision). For the views of legal writers : cf. : J.E.J. Th. Deelen, Rechtskeuze in het Nederlands internationaal contractenrecht, Amsterdam, 1965 ; W.L.G. Lemaire, Nederlands internationaal privaatrecht, 1968, p. 242 et ss. ; Jessurun d'Oliveira, Kotting, Bervoets en De Boer, Partij-invloed in het Internationaal Privaatrecht, Amsterdam 1974. (19) The principle of freedom of choice has been recognized in England

since at least 1796 : Gienar v. Mieyer (1796), 2 Hy. Bl. 603. (20) [1939] A.C. 277, p. 290. (20a) See, e.g., the Employment Protection (Consolidation Act 1978, s. 153 (5) and the Trade Union and Labour Relations Act 1974, s. 30 (6)). (20b) Unfair Contract Terms Act 1977, s. 27 (2). (20c) Anton, Private International Law, pp. 187-192. (20d) This includes cases where the parties have attempted to make an express choice but have not done so with sufficient clarity. (20e) Compagnie d'Armement Maritime SA v. Compagnie Tunisienne de Navigation SA [1971] A.C. 572, at pp. 584, 587 to 591, 596 to 600, 604 to 607. (21) Lando, Contracts, in International Encyclopedia of Comparative Law, vol. III, Private International Law (Lipstein, Chief editor), sections 51 and 54, pp. 28 to 29 ; Philip, Dansk International Privat-og Procesret, second edition, Copenhagen, 1972, p. 291. (22) C.P.J.I., Publications, Série A, Nos 20 to 21, p. 122. (23) International Law Reports, vol. 27, pp. 117 to 233, p. 165 ; Riv. dir. int., 1963, pp. 230 to 249, p. 244. (24) For a summary of this award, including extensive quotations, see : Lalive, Un récent arbitrage suisse entre un organisme d'Etat et une
société privée étrangère, in Annuaire suisse de dr. int., 1963, pp. 273 to 302, especially pp. 284 to 288. (25) Int. Legal Mat., 1979, pp. 3 to 37, at p. 11 ; Riv. dir. int., 1978, pp. 514 to 517, at p. 518. (26) The first Convention, dated 1 October 1976, was in force between the following eight European countries : Belgium, Denmark, Finland, France, Italy, Norway, Sweden, Switzerland. The Republic of Niger also acceded to the convention. For the text of the second and third conventions, see : Associazione Italiana per l'Arbitrato, Conventions multilaterales et autres instruments en matière d'arbitrage, Roma, 1974, pp. 86 to 114. For the text of the fourth convention see : Conf. de La Haye de droit international privé, Recueil des conventions (1951- 1977), p. 252. For the state of ratifications and accessions to these Conventions at 1 February 1976, see : Giuliano, Pocar and Treves, Codice delle convenzioni di diritto internazionale privato e processuale, Milano, 1977, pp. 1404, 1466 et seq., 1497 et seq. (27) Kegel, Das IPR cit., margin notes 269 to 273 and notes 1 and 3 ; Batiffol and Lagarde, Droit international privé cit. II, No 592, p. 243 ; judgment of the French Cour de Cassation of 18 November 1959 in Soc. Deckardt c. Etabl. Moatti, in Rev. crit., 1960, p. 83. (28) Cf. Trib. Rotterdam, 2 April 1963, S º S 1963, 53 ; Kollewijn, De rechtskeuse achteraf, Neth. Int. Law Rev. 1964 225 ; Lemaire Nederlands Internationaal Privaatrecht, 1968, 265. (29) Riv. dir. int. priv. proc., 1967, pp. 126 et seq. (30) V. Treves T., Sulla volontà delle parti di cui all'art. 25 delle preleggi e sul momento del suo sorgere, in Riv. dir. int. priv. proc., 1967, pp. 315 et seq. (31) For a comparative survey cf. Rabel, The Conflict of Laws. A comparative study, II, second edition, Ann Arbor, 1960, Chapter 30, pp. 432 to 486. (32) Batiffol and Lagarde. Droit international privé, cit., II, Nos 572 et seq., pp. 236 et seq., and the essay of Batiffol, Subjectivisme et objectivisme dans le droit international privé des contrats, reproduit dans choix d'articles rassemblés par ses amis, Paris 1976, pp. 249 to 263. (33) Rev. crit., 1955, p. 330. (34) According to German case law, "hypothetischer-Parteiwille" does not involve seeking the supposed intentions of the parties, but evaluating the interests involved reasonably and equitably, on an objective basis, with a view to determing the law applicable (BGH, 14 April 1953, in IPRspr., 1952-53, No 40, pp. 151 et seq.). According to another case, "in making this evaluation of the interests involved, the essential question is where the centre of gravity of the contractual relationship is situated" (BGH, 14 July 1955, in IPRspr., 1954-1955, No 67, pp. 206 et seq.). The following may be consulted on this concept : Kegel, Internationales Privatrecht ct. º 18, pp. 257 et seq. ; Kegel, Das IPR cit., Nos 240 to 268, and the numerous references to judicial decisions given in the notes ; Reithmann, Internationales Vertragsrecht, cit., pp. 42 et seq. (35) See Bonython v. Commonwealth of Australia [1951] A.C. 201 at p. 219 ; Tomkinson v. First Pennsylvania Banking and Trust Co. [1961] A.C. 1007 at pp. 1068, 1081 and 1082 ; James Miller and Partners Ltd v. Whitworth Street Estates (Manchester) Ltd [1970] A.C. 583 at pp. 603, 605 and 606, 601 to 611 ; Compagnie d'Armement Maritime SA v. Compagnie Tunisienne de
Navigation SA [1971] A.C. 572 at pp. 583, 587, 603 ; Coast Lines Ltd v. Hudig and Veder Chartering NV, [1972] 2 Q.B. 34 at pp. 44, 46, 50. (36) Mount Albert Borough Council v. Australian Temperance

and General Mutual Life Assurance Society [1938] A.C. 224 at p. 240 per Lord Wright ; The Assunzione [1974] P. 150 at pp. 175 and 179 per Singleton L.J. (36a) Anton, Private International Law, pp. 192 to 197. (37) See to this effect : Cour de Cassation, judgment of 28 March 1953 (n. 827), supra ; Cour de Cassation (full court), judgment of 28 June 1966 (n. 1680), supra ; Cour de Cassation, judgment of 30 April 1969 (n. 1403), in Officina Musso c. Société Sevplant (Riv. dir. int. priv. proc., 1970, pp. 332 et seq. For comments : Morelli, Elementi di diritto internazionale privato, cit. n. 97, p. 155 ; Vitta. Dir. intern. privato (3 V) Torino 1972-1975 III, pp. 229 to 290. (38) See especially Vischer, Internationales Vertragsrecht, Bern, 1962, especially pp. 89 to 144. This work also contains a table of the decisions in which this connection has been upheld. See also the judgment of 1 April 1970 of the Court of Appeal of Amsterdam, in NAP NV v. Christophery. (39) This is the solution adopted by the Court of Limoges in its judgment of 10 November 1970, and by the Tribunal de commerce of Paris in its judgment of 4 December 1970 (Rev. crit., 1971, pp. 703 et seq.). The same principle underlies the judgment of the Supreme Court of the Netherlands of 6 April 1973 (N.I. 1973 N. 371). See also Article 6 of the Hague Convention of 14 March 1978 on the law applicable to agency. (40) For the judgments mentioned in the text see : Rev. crit. 1967 pp. 521 to 523 ; [1920] 2 K.B. 287 ; [1958] A.C. 301 ; [1963] 2 Q.B. 352 and more recently : R. Van Rooij, De positie van publiekrechtelijke regels op het terrein van het internationaal privaatrecht, 1976, 236 et seq. ; L. Strikwerda, Semipubliekrecht in het conflictenrecht, 1978, 76 et seq. (40a) On this Article, see the reflections of Vischer, The antagonism between legal security and search of justice in the field of contract, in Recueil de l'Académie de La Haye, Tome 142 (1974 II) pp. 21 to 30 ; Lando op. cit. n. 200 to 203 pp. 106 to 110 ; Segre (T), Il diritto comunitario della concorrenza come legge d'applicazione necessaria, in Riv. dir. int. priv. et proc. 1979 pp. 75 to 79 ; Drobnig, comments on Article 7 of the draft convention in European Private International Law of obligations edited by Lando - Von Hoffman-Siehr, Tübingen 1975, pp. 88 et seq. (41) V. Delaporte, Recherches sur la forme des actes juridiques en droit international privé. Thesis Paris I, 1974, duplicated, No 123 et seq. (42) V. Delaporte, op. cit., No III. (43) The possibility of applying a common national law is expressly provided for by Article 26 of the preliminary provisions to the Italian Civil Code. See also Article 2315 of the French draft of 1967. (44) The solution adopted has been influenced by that approved, though in a wider setting, by the Corte di Cassazione italiana, 30 April 1969, Riv. dir. int. priv. e pro. 1970, 332 et seq. It is contrary to that given by the Cour de Cassation of France, 10 December 1974, Rev. crit. dr. inter. pr. 1975, 474, note A.P. The alternative solution also prevails in the United Kingdom, Van Grutten v. Digby (1862), 31 Beav. 561 ; cf. Cheshire and North, P.I.L. 10th edition, p. 220. (45) Solution adopted in German (principal law), Article 11 E.G.B.G.B. ; in Italy (subsidiary) Article 26 prel. pro. and in France (Cour de Cassation 26 May 1963, Rev. crit. dr. int. pr. 1964, 513, note Loussouarn ; 10 December 1974 see note 44 above), and implicitly allowed by the Benelux Treaty (Article 19). (46) Se references cited in the previous note. (47) See, for example, Article 13 (4) of the Benelux Treaty 1969 which has not entered into force. (48) For a comparative outline on this subject, see : Toubiana : Le domaine de la loi du contrat en droit international privé (contrats internationaux et dirigisme économique) Paris 1972, spec. pp. 1 to 146 ; Lando : Contracts in International Encyclopedia of Comparative Law, vol. III, Private international law (Lipstein, chief editor) sections 199 to 231 pp. 106 to 125. (49) See on this subject Article 4 of the Hague Convention of 1955 on the law applicable to international sales of corporeal movables. (50) See the Benelux Treaty 1969 (Article 2) not entered into force, the preliminary provisions of the Italian Civil Code (Article 1), the law introducing the German Civil Code (Article 7) and French judicial decisions. Rec. 16 January 1861, Lizardi, D.P. 1861.1.193, S. 1861.1.305. (51) See Article 20 (3) of the Benelux Treaty 1969 not entered into force and, in France, Cass. 24 February 1959 (Isaac), D. 1959 J. 485 ; 12 February 1963 (Ruffini v. Sylvestre), Rev. crit. d.i.p., 1964, p. 121. (52) Cf. Kegel, IPR, fourth edition, p. 173 ; Batiffol and Lagarde, sixth

edition, p. 394 ; Article 2 of the Convention of 15 June 1955 on the law applicable to international sales of corporeal movables ; Article 5 of the Convention of 14 March 1978 on the law applicable to agency. Dicey and Morris, ninth edition pp. 723 to 724. (53) See Acts and Documents of the Hague Conference, IXth Session vol. III, Wills (1961) explanatory report, p. 170.

LIST OF PARTICIPANTS (1)

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Text of the 1st Interpretation Protocol

First Protocol on the interpretation of the 1980 Convention by the Court of Justice (consolidated version) / 1980 Rome Convention

Official Journal C 027 , 26/01/1998 p. 0047 - 0051

PRELIMINARY NOTE

The signing on 29 November 1996 of the Convention on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the Rome Convention on the law applicable to contractual obligations and to the two Protocols on its interpretation by the Court of Justice has made it desirable to produce a consolidated version of the Rome convention and of those two Protocols.

These texts are accompanied by three Declarations, one made in 1980 with regard to the need for consistency between measures to be adopted on choice-of-law rules by the Community and those under the Convention, a second, also made in 1980, on the interpretation of the Convention by the Court of Justice and a third, made in 1996, concerning compliance with the procedure provided for in Article 23 of the Rome Convention as regards carriage of goods by sea.

The text printed in this edition was drawn up by the General Secretariat of the Council, in whose archives the originals of the instruments concerned are deposited. It should be noted, however, that this text has no binding force. The official texts of the instruments consolidated are to be found in the following Official Journals.

ANNEX

FIRST PROTOCOL (1) on the interpretation by the Court of Justice of the European Communities of the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980

THE HIGH CONTRACTING PARTIES TO THE TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY,

HAVING REGARD to the Joint Declaration annexed to the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980,

HAVE DECIDED to conclude a Protocol conferring jurisdiction on the Court of Justice of the European Communities to interpret that Convention, and to this end have designated as their Plenipotentiaries:

[Plenipotentiaries designated by the Member States]

WHO, meeting within the Council of the European Communities, having exchanged their full powers, found in good and due form,

HAVE AGREED AS FOLLOWS:

Article 1

The Court of Justice of the European Communities shall have jurisdiction to give rulings on the interpretation of:

(a) the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980, hereinafter referred to as 'the Rome Convention`;

(b) the Convention on accession to the Rome Convention by the States which have become Members of the European Communities since the date on which it was opened for signature;

(c) this Protocol.

Article 2

Any of the courts referred to below may request the Court of Justice to give a preliminary ruling on a question raised in a case pending before it and concerning interpretation of the provisions contained in

question raised in a case pending before it and concerning interpretation of the provisions contained in the instruments referred to in Article 1 if that court considers that a decision on the question is necessary to enable it to give judgment:

(a) - in Belgium:
'la Cour de cassation` ('het Hof van Cassatie`) and 'le Conseil d'État` ('de Raad van State`),
- in Denmark:
'Højesteret`,
- in the Federal Republic of Germany:
'die obersten Gerichtshöfe des Bundes`,
- in Greece:
'Ôá áíþôáôá Äéêáióôþñéá`,
- in Spain:
'el Tribunal Supremo`,
- in France:
'la Cour de cassation` and 'le Conseil d'État`,
- in Ireland:
the Supreme Court,
- in Italy:
'la Corte suprema di cassazione` and 'il Consiglio di Stato`,
- in Luxembourg:
'la Cour Supérieure de Justice`, when sitting as 'Cour de cassation`,
- in Austria:
the 'Oberste Gerichtshof`, the 'Verwaltungsgerichtshof` and the 'Verfassungsgerichtshof`,
- in the Netherlands:
'de Hoge Raad`,
- in Portugal:
'o Supremo Tribunal de Justiça` and 'o Supremo Tribunal Administrativo`,
- in Finland:
'korkein oikeus/högsta domstolen`, 'korkein hallinto-oikeus/högsta förvaltningsdomstolen`, 'markkinatuomioistuin/marknadsdomstolen` and 'työtuomioistuin/arbetsdomstolen`,
- in Sweden:
'Högsta domstolen`, 'Regeringsrätten`, 'Arbetsdomstolen` and 'Marknadsdomstolen`,
- in the United Kingdom:
the House of Lords and other courts from which no further appeal is possible;
(b) the courts of the Contracting States when acting as appeal courts.

Article 3

1. The competent authority of a Contracting State may request the Court of Justice to give a ruling on a question of interpretation of the provisions contained in the instruments referred to in Article 1 if judgments given by courts of that State conflict with the interpretation given either by the Court of Justice or in a judgment of one of the courts of another Contracting State referred to in Article 2. The provisions of this paragraph shall apply only to judgments which have become res judicata.

2. The interpretation given by the Court of Justice in response to such a request shall not affect the judgments which gave rise to the request for interpretation.

3. The Procurators-General of the Supreme Courts of Appeal of the Contracting States, or any other authority designated by a Contracting State, shall be entitled to request the Court of Justice for a ruling on interpretation in accordance with paragraph 1.

4. The Registrar of the Court of Justice shall give notice of the request to the Contracting States, to the Commission and to the Council of the European Communities; they shall then be entitled within two months of the notification to submit statements of case or written observations to the Court.

5. No fees shall be levied or any costs or expenses awarded in respect of the proceedings provided for in this Article.

Article 4

1. Except where this Protocol otherwise provides, the provisions of the Treaty establishing the European Economic Community and those of the Protocol on the Statute of the Court of Justice annexed thereto, which are applicable when the Court is requested to give a preliminary ruling, shall also apply to any proceedings for the interpretation of the instruments referred to in Article 1.

2. The Rules of Procedure of the Court of Justice shall, if necessary, be adjusted and supplemented in accordance with Article 188 of the Treaty establishing the European Economic Community.

Article 5 (2)

This Protocol shall be subject to ratification by the Signatory States. The instruments of ratification shall be deposited with the Secretary-General of the Council of the European Communities.

Article 6 (3)

1. To enter into force, this Protocol must be ratified by seven States in respect of which the Rome Convention is in force. This Protocol shall enter into force on the first day of the third month following the deposit of the instrument of ratification by the last such State to take this step. If, however, the Second Protocol conferring on the Court of Justice of the European Communities certain powers to interpret the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980, concluded in Brussels on 19 December 1988 (4) enters into force on a later date, this Protocol shall enter into force on the date of entry into force of the Second Protocol.

2. Any ratification subsequent to the entry into force of this Protocol shall take effect on the first day of the third month following the deposit of the instrument of ratification, provided that the ratification, acceptance or approval of the Rome Convention by the State in question has become effective.

Article 7 (5)

The Secretary-General of the Council of the European Communities shall notify the Signatory States of:

(a) the deposit of each instrument of ratification;

(b) the date of entry into force of this Protocol;

(c) any designation communicated pursuant to Article 3 (3);

(d) any communication made pursuant to Article 8.

Article 8

The Contracting States shall communicate to the Secretary-General of the Council of the European Communities the texts of any provisions of their laws which necessitate an amendment to the list of courts in Article 2 (a).

Article 9

This Protocol shall have effect for as long as the Rome Convention remains in force under the conditions laid down in Article 30 of that Convention.

Article 10

Any Contracting State may request the revision of this Protocol. In this event, a revision conference shall be convened by the President of the Council of the European Communities.

Article 11 (6)

This Protocol, drawn up in a single original in the Danish, Dutch, English, French, German, Greek, Irish, Italian, Portuguese and Spanish languages, all 10 texts being equally authentic, shall be deposited in the archives of the General Secretariat of the Council of the European Communities. The Secretary-General shall transmit a certified copy to the Government of each Signatory State.

In witness whereof, the undersigned Plenipotentiaries have affixed their signatures below this Protocol.

Done at Brussels on the nineteenth day of December in the year one thousand nine hundred and eighty-eight.

[Signatures of the Plenipotentiaries]

JOINT DECLARATIONS

Joint Declaration

The Governments of the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Portuguese Republic and the United Kingdom of Great Britain and Northern Ireland,

On signing the First Protocol on the interpretation by the Court of Justice of the European Communities of the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980,

Desiring to ensure that the Convention is applied as effectively and as uniformly as possible,

Declare themselves ready to organize, in cooperation with the Court of Justice of the European Communities, an exchange of information on judgments which have become res judicata and have

Communities, an exchange of information on judgments which have become res judicata and have been handed down pursuant to the Convention on the law applicable to contractual obligations by the courts referred to in Article 2 of the said Protocol. The exchange of information will comprise:

- the forwarding to the Court of Justice by the competent national authorities of judgments handed down by the courts referred to in Article 2 (a) and significant judgments handed down by the courts referred to in Article 2 (b),

- the classification and the documentary exploitation of these judgments by the Court of Justice including, as far as necessary, the drawing up of abstracts and translations, and the publication of judgments of particular importance,

- the communication by the Court of Justice of the documentary material to the competent national authorities of the States parties to the Protocol and to the Commission and the Council of the European Communities.

In witness whereof, the undersigned Plenipotentiaries have affixed their signature below this Joint Declaration.

Done at Brussels on the nineteenth day of December in the year one thousand nine hundred and eighty-eight.

[Signatures of the Plenipotentiaries]

Joint Declaration

The Governments of the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Portuguese Republic and the United Kingdom of Great Britain and Northern Ireland,

On signing the First Protocol on the interpretation by the Court of Justice of the European Communities of the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980,

Having regard to the Joint Declaration annexed to the Convention on the law applicable to contractual obligations,

Desiring to ensure that the Convention is applied as effectively and as uniformly as possible,

Anxious to prevent differences of interpretation of the Convention from impairing its unifying effect,

Express the view that any State which becomes a member of the European Communities should accede to this Protocol.

In witness whereof, the undersigned Plenipotentiaries have affixed their signatures below this Joint Declaration.

Done at Brussels on the nineteenth day of December in the year one thousand nine hundred and eighty-eight.

[Signatures of the Plenipotentiaries]

(1) Text as amended by the 1996 Accession Convention.

(2) Ratification of the Accession Conventions is governed by the following provisions of those conventions:

- as regards the 1984 Accession Convention, by Article 3 of that Convention, which reads as follows:

'Article 3

This Convention shall be ratified by the signatory States. The instruments of ratification shall be deposited with the Secretary-General of the Council of the European Communities.`,

- as regards the 1992 Accession Convention, by Article 4 of that Convention, which reads as follows:

'Article 4

This Convention shall be ratified by the signatory States. The instruments of ratification shall be deposited with the Secretary-General of the Council of the European Communities.`,

- as regards the 1996 Accession Convention, by Article 5 of that Convention, which reads as follows:

- as regards the 1996 Accession Convention, by Article 8 of that Convention, which reads as follows:

'Article 5

This Convention shall be ratified by the signatory States. The instruments of ratification shall be deposited with the Secretary-General of the Council of the European Union.`.

(3) The entry into force of the Accession Conventions is governed by the following provisions of those Conventions:

- as regards the 1984 Accession Convention, by Article 4 of that Convention, which reads as follows:

'Article 4

This Convention shall enter into force, as between the States which have ratified it, on the first day of the third month following the deposit of the last instrument of ratification by the Hellenic Republic and seven States which have ratified the Convention on the law applicable to contractual obligations.

This Convention shall enter into force for each Contracting State which subsequently ratifies it on the first day of the third month following the deposit of its instrument of ratification.`,

- as regards the 1992 Accession Convention, by Article 5 of that Convention which reads as follows:

'Article 5

This Convention shall enter into force, as between the States which have ratified it, on the first day of the third month following the deposit of the last instrument of ratification by the Kingdom of Spain or the Portuguese Republic and by one State which has ratified the Convention on the law applicable to contractual obligations.

This Convention shall enter into force for each Contracting State which subsequently ratifies it on the first day of the third month following the deposit of its instrument of ratification.`,

- as regards the 1996 Accession Convention, by Article 6 of that Convention, which reads as follows:

'Article 6

1. This Convention shall enter into force, as between the States which have ratified it, on the first day of the third month following the deposit of the last instrument of ratification by the Republic of Austria, the Republic of Finland or the Kingdom of Sweden and by one Contracting State which has ratified the Convention on the law applicable to contractual obligations.

2. This Convention shall enter into force for each Contracting State which subsequently ratifies it on the first day of the third month following the deposit of its instrument of ratification.`.

(4) Text is amended by the 1996 Accession Convention.

(5) Notification concerning the Accession Convention is governed by the following provisions of those Conventions:

- as regards the 1984 Accession Convention, by Article 5 of that Convention, which reads as follows:

'Article 5

The Secretary-General of the Council of the European Communities shall notify Signatory States of:

(a) the deposit of each instrument of ratification;

(b) the dates of entry into force of this Convention for the Contracting States.`,

- as regards the 1992 Accession Convention, by Article 6 of that Convention, which reads as follows:

'Article 6

The Secretary-General of the Council of the European Communities shall notify the signatory States of:

(a) the deposit of each instrument of ratification;

(b) the dates of entry into force of this Convention for the Contracting States.`,

- as regards the 1996 Accession Convention, by Article 7 of that Convention, which reads as follows:

'Article 7

The Secretary-General of the Council of the European Union shall notify the signatory States of:

(a) the deposit of each instrument of ratification;

(b) the dates of entry into force of this Convention for the Contracting States.`.

(6) An indication of the authentic texts of the Accession Convention is to be found in the following provisions:

- as regards the 1984 Accession Convention, in Articles 2 and 6 of that Convention, which reads as follows:

'Article 2

The Secretary-General of the Council of the European Communities shall transmit a certified copy of the Convention on the law applicable to contractual obligations in the Danish, Dutch, English, French, German, Irish and Italian languages to the Government of the Hellenic Republic.

The text of the Convention on the law applicable to contractual obligations in the Greek language is annexed hereto. The text in the Greek language shall be authentic under the same conditions as the other texts of the Convention on the law applicable to contractual obligations.`

'Article 6

This Convention, drawn up in a single original in the Danish, Dutch, English, French, German, Greek, Irish and Italian languages, all eight texts being equally authentic, shall be deposited in the archives of the General Secretariat of the Council of the European Communities. The Secretary-General shall transmit a certified copy to the Government of each Signatory State.`,

- as regards the 1992 Accession Convention, in Articles 3 and 7 of that Convention, which read as follows:

'Article 3

The Secretary-General of the Council of the European Communities shall transmit a certified copy of the Convention on the law applicable to contractual obligations in the Danish, Dutch, English, French, German, Greek, Irish and Italian languages to the Governments of the Kingdom of Spain and the Portuguese Republic.

The text of the Convention on the law applicable to contractual obligations in the Portuguese and Spanish languages is set out in Annexes I and II to this Convention. The texts drawn up in the Portuguese and Spanish languages shall be authentic under the same conditions as the other texts of the Convention on the law applicable to contractual obligations.`

'Article 7

This Convention, drawn up in a single original in the Danish, Dutch, English, French, German, Greek, Irish, Italian, Portuguese and Spanish languages, all texts being equally authentic, shall be deposited in the archives of the General Secretariat of the Council of the European Communities. The Secretary-General shall transmit a certified copy to the Government of each Signatory State.`,

- as regards the 1996 Accession Convention, in Articles 4 and 8 of that Convention, which read as follows:

'Article 4

1. The Secretary-General of the Council of the European Union shall transmit a certified copy of the Convention of 1980, the Convention of 1984, the First Protocol of 1988, the Second Protocol of 1988 and the Convention of 1992 in the Danish, Dutch, English, French, German, Greek, Irish, Italian, Spanish and Portuguese languages to the Governments of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden.

2. The text of the Convention of 1980, the Convention of 1984, the First Protocol of 1988, the Second Protocol of 1988 and the Convention of 1992 in the Finnish and Swedish languages shall be authentic under the same conditions as the other texts of the Convention of 1980, the Convention of 1984, the First Protocol of 1988, the Second Protocol of 1988 and the Convention of 1992.`

'Article 8

This Convention, drawn up in a single original in the Danish, Dutch, English, Finnish, French, German,

Greek, Irish, Italian, Portuguese, Spanish and Swedish languages, all 12 texts being equally authentic, shall be deposited in the archives of the General Secretariat of the Council of the European Union. The Secretary-General shall transmit a certified copy to the Government of each signatory State.`

Instruments

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Second Protocol conferring on the Court of Justice powers to interpret the 1980 Convention (consolidated version) / 1980 Rome Convention

Official Journal C 027 , 26/01/1998 p. 0052 - 0053

PRELIMINARY NOTE

The signing on 29 November 1996 of the Convention on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the Rome Convention on the law applicable to contractual obligations and to the two Protocols on its interpretation by the Court of Justice has made it desirable to produce a consolidated version of the Rome convention and of those two Protocols.

These texts are accompanied by three Declarations, one made in 1980 with regard to the need for consistency between measures to be adopted on choice-of-law rules by the Community and those under the Convention, a second, also made in 1980, on the interpretation of the Convention by the Court of Justice and a third, made in 1996, concerning compliance with the procedure provided for in Article 23 of the Rome Convention as regards carriage of goods by sea.

The text printed in this edition was drawn up by the General Secretariat of the Council, in whose archives the originals of the instruments concerned are deposited. It should be noted, however, that this text has no binding force. The official texts of the instruments consolidated are to be found in the following Official Journals.

ANNEX

SECOND PROTOCOL conferring on the Court of Justice of the European Communities certain powers to interpret the Convention on the law applicable to contractual obligations; opened for signature in Rome on 19 June 1980

THE HIGH CONTRACTING PARTIES TO THE TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY,

WHEREAS the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980, hereinafter referred to as 'the Rome Convention`, will enter into force after the deposit of the seventh instrument of ratification, acceptance or approval;

WHEREAS the uniform application of the rules laid down in the Rome Convention requires that machinery to ensure uniform interpretation be set up and whereas to that end appropriate powers should be conferred upon the Court of Justice of the European Communities, even before the Rome Convention enters into force with respect to all the Member States of the European Economic Community,

HAVE DECIDED to conclude this Protocol and to this end have designated as their Plenipotentiaries:

[Plenipotentiaries designated by the Member States]

WHO, meeting within the Council of the European Communities, having exchanged their full powers; found in good and due form,

HAVE AGREED AS FOLLOWS:

Article 1

1. The Court of Justice of the European Communities shall, with respect to the Rome Convention, have the jurisdiction conferred upon it by the First Protocol on the interpretation by the Court of Justice of the European Communities of the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980, concluded in Brussels on 19 December 1988. The Protocol on the Statute of the Court of Justice of the European Communities and the Rules of Procedure of the Court of Justice shall apply.

2. The Rules of Procedure of the Court of Justice shall be adapted and supplemented as necessary in accordance with Article 188 of the Treaty establishing the European Economic Community.

Article 2 (1)

This Protocol shall be subject to ratification by the Signatory States. The instruments of ratification shall be deposited with the Secretary-General of the Council of the European Communities.

Article 3 (2)

This Protocol shall enter into force on the first day of the third month following the deposit of the instrument of ratification of the last Signatory State to complete that formality.

Article 4 (3)

This Protocol, drawn up in a single original in the Danish, Dutch, English, French, German, Greek, Irish, Italian, Portuguese and Spanish languages, all 10 texts being equally authentic, shall be deposited in the archives of the General Secretariat of the Council of the European Communities. The Secretary-General shall transmit a certified copy to the Government of each signatory.

In witness whereof, the undersigned Plenipotentiaries have affixed their signature below this Protocol.

Done at Brussels on the nineteenth day of December in the year one thousand nine hundred and eighty-eight.

[Signatures of the Plenipotentiaries]

(1) Ratification of the Accession Conventions is governed by the following provisions of those conventions:

- as regards the 1984 Accession Convention, by Article 3 of that Convention, which reads as follows:

'**Article 3**

This Convention shall be ratified by the signatory States. The instruments of ratification shall be deposited with the Secretary-General of the Council of the European Communities.`,

- as regards the 1992 Accession Convention, by Article 4 of that Convention, which reads as follows:

'**Article 4**

This Convention shall be ratified by the signatory States. The instruments of ratification shall be deposited with the Secretary-General of the Council of the European Communities.`,

- as regards the 1996 Accession Convention, by Article 5 of that Convention, which reads as follows:

'**Article 5**

This Convention shall be ratified by the signatory States. The instruments of ratification shall be deposited with the Secretary-General of the Council of the European Union.`.

(2) The entry into force of the Accession Conventions is governed by the following provisions of those Conventions:

- as regards the 1984 Accession Convention, by Article 4 of that Convention, which reads as follows:

'**Article 4**

This Convention shall enter into force, as between the States which have ratified it, on the first day of the third month following the deposit of the last instrument of ratification by the Hellenic Republic and seven States which have ratified the Convention on the law applicable to contractual obligations.

This Convention shall enter into force for each Contracting State which subsequently ratifies it on the first day of the third month following the deposit of its instrument of ratification.`,

- as regards the 1992 Accession Convention, by Article 5 of that Convention which reads as follows:

'**Article 5**

This Convention shall enter into force, as between the States which have ratified it, on the first day of the third month following the deposit of the last instrument of ratification by the Kingdom of Spain or the Portuguese Republic and by one State which has ratified the Convention on the law applicable to contractual obligations.

This Convention shall enter into force for each Contracting State which subsequently ratifies it on the first day of the third month following the deposit of its instrument of ratification.`,

- as regards the 1996 Accession Convention, by Article 6 of that Convention, which reads as follows:

'**Article 6**

1. This Convention shall enter into force, as between the States which have ratified it, on the first day of the third month following the deposit of the last instrument of ratification by the Republic of Austria, the Republic of Finland or the Kingdom of Sweden and by one Contracting State which has ratified the Convention on the law applicable to contractual obligations.

2. This Convention shall enter into force for each Contracting State which subsequently ratifies it on the first day of the third month following the deposit of its instrument of ratification.`.

(3) An indication of the authentic texts of the Accession Convention is to be found in the following provisions:

- as regards the 1984 Accession Convention, in Articles 2 and 6 of that Convention, which reads as follows:

'**Article 2**

The Secretary-General of the Council of the European Communities shall transmit a certified copy of the Convention on the law applicable to contractual obligations in the Danish, Dutch, English, French, German, Irish and Italian languages to the Government of the Hellenic Republic.

The text of the Convention on the law applicable to contractual obligations in the Greek language is annexed hereto. The text in the Greek language shall be authentic under the same conditions as the other texts of the Convention on the law applicable to contractual obligations.`

'**Article 6**

This Convention, drawn up in a single original in the Danish, Dutch, English, French, German, Greek, Irish and Italian languages, all eight texts being equally authentic, shall be deposited in the archives of the General Secretariat of the Council of the European Communities. The Secretary-General shall transmit a certified copy to the Government of each Signatory State.`,

- as regards the 1992 Accession Convention, in Articles 3 and 7 of that Convention, which read as follows:

'**Article 3**

The Secretary-General of the Council of the European Communities shall transmit a certified copy of the Convention on the law applicable to contractual obligations in the Danish, Dutch, English, French, German, Greek, Irish and Italian languages to the Governments of the Kingdom of Spain and the Portuguese Republic.

The text of the Convention on the law applicable to contractual obligations in the Portuguese and Spanish languages is set out in Annexes I and II to this Convention. The texts drawn up in the Portuguese and Spanish languages shall be authentic under the same conditions as the other texts of the Convention on the law applicable to contractual obligations.`

'**Article 7**

This Convention, drawn up in a single original in the Danish, Dutch, English, French, German, Greek, Irish, Italian, Portuguese and Spanish languages, all texts being equally authentic, shall be deposited in the archives of the General Secretariat of the Council of the European Communities. The Secretary-General shall transmit a certified copy to the Government of each Signatory State.`,

- as regards the 1996 Accession Convention, in Articles 4 and 8 of that Convention, which read as follows:

'**Article 4**

1. The Secretary-General of the Council of the European Union shall transmit a certified copy of the Convention of 1980, the Convention of 1984, the First Protocol of 1988, the Second Protocol of 1988 and the Convention of 1992 in the Danish, Dutch, English, French, German, Greek, Irish, Italian, Spanish and Portuguese languages to the Governments of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden.

2. The text of the Convention of 1980, the Convention of 1984, the First Protocol of 1988, the Second Protocol of 1988 and the Convention of 1992 in the Finnish and Swedish languages shall be authentic under the same conditions as the other texts of the Convention of 1980, the Convention of 1984, the

under the same conditions as the other texts of the Convention of 1980, the Convention of 1984, the First Protocol of 1988, the Second Protocol of 1988 and the Convention of 1992.`

'**Article 8**

This Convention, drawn up in a single original in the Danish, Dutch, English, Finnish, French, German, Greek, Irish, Italian, Portuguese, Spanish and Swedish languages, all 12 texts being equally authentic, shall be deposited in the archives of the General Secretariat of the Council of the European Union. The Secretary-General shall transmit a certified copy to the Government of each signatory State.`

I

(Information)

COUNCIL

REPORT ON THE PROTOCOLS

on the interpretation by the Court of Justice of the Rome Convention of 19 June 1980 on the law applicable to contractual obligations

(signed in Brussels on 19 December 1988)

by Antonio TIZZANO,

Professor of European Community Law at the University of Naples

Official Journal No. C 219, 1990, Item 1
(1990/C 219/01)

*** Table Omitted ***

CONTENTS

INTRODUCTION

1. Some eight years after the signing of the Rome Convention on the law applicable to contractual obligations, and while the Convention has still not entered into force, the Member States of the European Communities have finally followed up the intentions they stated at the time and have given the Court of Justice specific powers to interpret the Convention [FN 1].

In their "joint declaration' attached to the Convention the Member States "desiring to ensure that the Convention is applied as effectively as possible' had said that they were "anxious to prevent differences of interpretation of the Convention from impairing its unifying effect'. Consequently, they declared themselves ready "to examine the possibility of conferring jurisdiction in certain matters on the Court of Justice of the European Communities and, if necessary, to negotiate an agreement to this effect' (and "to arrange meetings at regular intervals between their representatives').

Negotiations were set in hand immediately, but only on 19 December 1988 did the Member States sign, in Brussels, two Protocols on the matter, viz.: "the first Protocol on the interpretation by the Court of Justice of the European Communities of the Convention' and "the second Protocol conferring on the Court of Justice of the European Communities certain powers to interpret the Convention' (OJ No L 48, 20. 2. 1989).

Thus the Rome Convention too, like other "Community' Conventions, was provided in advance with the formal instrument needed to give the Court of Justice of the European Communities interpretative powers and so strengthen the possibility of its uniform application.

At the same time, and indeed because of this, practical effect could be given to the Convention's "Community' connection, i.e. to its institutional link with the Community legal system. In this particular

instance this result was even more significant, since the Rome Convention, unlike the precedents in the matter, falls outside the scope of application of Article 220 of the EEC Treaty.

Finally, it proved possible to give continuity and substance to a now increasingly significant procedure in this field and indeed to provide it with openings for further possibilities of development, thanks to the originality of the solutions adopted.

However, as for the precedents referred to, drawing up the Protocols on the interpretative powers of the Court of Justice in respect of the Rome Convention did not prove to be at all easy. Everything was discussed at length: the need and/or the desirability of providing for such powers; the technique to be followed in the matter; the scope and conditions for exercising such powers; the involvement of all the Member States, etc. The duration and the vicissitudes of the negotiations, the use of two separate legal instruments, the specific solutions outlined within them, and so on, are clear confirmation of such difficulties.

However, while certain even quite important aspects of the two Protocols betray these difficulties and raise a number of doubts, the final result of the lengthy and tortuous negotiations may be considered favourable overall. This is not only because the way has nonetheless been cleared for interpretative action by the Court of Justice, with the more general implications which have been mentioned and which will be returned to, but also because such a result was achieved in respect of a more complex and controversial situation than those tackled in the past. In addition, the danger of a lull in the development of the procedure referred to has been avoided and indeed, in some respects, a contribution has been made to actually consolidating and strengthening the procedure.

2. In order to give a clearer picture of the special nature of the solution adopted in the Protocols under review this Report is divided into two parts. Part One (sections 3 to 30) looks back over the practice followed prior to the Protocols and discards the terms of the negotiations and the motives that led the Member States to make substantial changes vis-à-vis that practice. Part Two (sections 31 to 41) comments on the separate articles of the two Protocols.

PART ONE

PRELIMINARY REMARKS

I. THE PRACTICE PRIOR TO THE PROTOCOLS

A. Origins and development

3. Precisely because the two Protocols being examined fall in with a practice which is unvarying with respect to its aims although multifarious in its outward forms, it would appear advisable to begin with a brief summary of the development of that practice.

It will be recalled that the practice concerned began to emerge in the 1960s, at the time of the negotiations for the preparation of certain Conventions between Member States in the framework of Article 220 of the EEC Treaty, in particular the Convention on the mutual recognition of companies and legal persons, the Convention on jurisdiction and the

enforcement of judgements in civil and commercial matters and the Convention on bankruptcy, winding-up arrangements, compositions and similar proceedings.

As known, of these Conventions only the second is in force. The first, signed in Brussels by the then six Member States of the European Communities on 29 February 1968, subsequently came to grief over the ratification procedures. Negotiations on the third Convention led to an extensive preliminary draft in 1970, but after various ups and downs (some of which we shall shortly return to) these negotiations were shelved [FN 2].

The second Convention, however, was more successful, as already mentioned. After being signed in Brussels on 27 September 1968 by the original Member States, it was progressively extended to the new Member States with the Luxembourg Convention of 9 October 1978 for the accession of Denmark, the United Kingdom and Ireland; with the Luxembourg Convention of 25 October 1982 for the accession of Greece; and finally with the Donostia-San Sebastian Convention of 26 May 1989 for the accession of Spain and Portugal [FN 3].

4. In all the instances mentioned so far, a Declaration was attached to the Conventions (or draft Conventions) in which the Signatory States, in terms and for purposes substantially similar to those of the Declaration attached to the Rome Convention, said that they were ready "to examine the possibility of conferring jurisdiction in certain matters on the Court of Justice of the Eruopean Communities and, if necessary, to negotiate an agreement to this effect'.

This subsequently happened for the two Brussels Conventions referred to of 29 February and 27 September 1968 as a result of the signing of the two Luxembourg Protocols of 3 June 1971, only one of which, as is known, has entered into force, viz. the Protocol to the Brussels Convention on the enforcement of judgements [FN 4].

In both Protocols, however, the powers of the Court of Justice to interpret the texts of the Agreements are defined in accordance with the scheme laid out in Article 177 of the EEC Treaty. Indeed, the Protocol to the first of the Conventions in question involves barely more than a straightforward transposition of that provision. For the other, however, some modifications had to be made, for reasons not unlike those underlying the innovations introduced by the Protocols being examined.

5. Following the precedents referred to, further opportunities arose for providing that such powers be given to the Court of Justice in draft conventions and conventions drawn up subsequently, including some whose subject-matter lay outside the scope of Article 220 of the EEC Treaty.

This is the case, in particular, for the draft Convention on bankruptcy, winding-up arrangements, compositions and similar proceedings, established in 1980 as a subsequent development of the preliminary draft of 1970 mentioned above. However, instead of the aforementioned Declaration attached to the preliminary draft on the powers of the Court of Justice to interpret the Convention, the 1980 draft makes use of the precedent constituted by the 1971 Luxembourg Protocol and inserts directly in the Convention itself provisions corresponding almost word for word to those of the Protocol (Articles

70 to 74). As said, however, negotiations on the Community Convention on bankruptcy are deadlocked for the time being [FN 5].

This is also the case for the Community Patent Convention, signed in Luxembourg on 15 December 1975 (OJ No L 17, 26. 1. 1976), which directly embodies a provision giving the Court of Justice powers to interpret the Convention (Article 73). As is known, however, the entry into force of the Convention ran into numerous difficulties, with the result that in order to improve the chances of success it was considered desirable to make certain changes and additions to the Convention at conferences held in Luxembourg from 4 to 18 December 1985 and from 11 to 15 December 1989. The latter led to the Agreement on the Community patent, concluded in Luxembourg on 15 December 1989 [FN 6].

As regards the aspect which interests us here, these recent additions also have a significant bearing on the Court of Justice's interpretative powers, which are now partially replaced by those of the Common Appeal Court, set up on that occasion. The latter is, however, also required, in certain cases, to submit questions for preliminary rulings to the Court of Justice, while in other cases the national courts have the responsibility for so doing, in accordance with the schemes defined in the 1971 Luxembourg Protocol (Articles 2 to 5 of the 1989 Agreement). It should also be pointed out that the idea-subsequently taken over and actually put into effect for the Rome Convention-of providing for not one but two separate texts on the powers of the Court of Justice was first defined precisely in connection with the Community Patent Convention, and for exactly the same reasons as will be seen later in respect of the Protocols being examined.

B. Reasons

6. The reasons underlying the practice referred to above are so obvious that they require no more than a brief reference.

As is known, this practice has been developing mainly in relation to "Community' Conventions, the term used roughly to describe those Conventions between Member States intended to achieve objectives of importance for the European Communities. It is also known that while they may deal with matters which are not directly the subject of Community treaties and while they retain essential characteristics peculiar to international agreements of the traditional kind, there are aspects to those Conventions which link them to the Community legal system in a special way. They are in fact aimed at setting up between the Member States of the European Communities a complex of common rules (substantive or procedural), which in a way seek to supplement the system of rules already established or to be established pursuant to the Community Treaties and "secondary' legislation, in line with, and with a view to, the general process of integration, in respect of which the creation of as uniform a "legal area' as is possible obviously constitutes a useful and, in some respects, indispensable instrument.

It is unlikely that this will be disputed as regards the Conventions which refer to Article 220, since the same rule links them to the Community legal system by making provision for them to be concluded between all Member States (and only between them) "so far as is necessary', i.e. in accordance with the achievement of the objectives of the EEC.

The same may, however, be said in respect of other Conventions between Member States which, although they go beyond the provisions of Article 220, may also be regarded as contributing towards the achievement of Community objectives. This is particularly so if such objectives are understood in a broad sense and in the dynamic and evolving prospect of the process of Community integration. In fact, in the light of the developments which have taken place in that process over a period and of its obvious tendency to grow, the listing of fields given in Article 220 appears less and less crucial for a Convention to be described as a "Community' Convention.

Moreover, various indications, albeit of different kinds and degrees of importance, provide evidence of the Community link in such Conventions. Reference may be made, for example, to the Commission's role in taking the initiative and providing a constant impetus for negotiations in this respect (in the case of the Rome Convention, that role has even taken the form of the Commission adopting official positions) [FN 7].

It may also be recalled that such Conventions are concluded between all the Member States, between the Member States alone and between the Member States "meeting within the Council'. Attention may also be drawn to the tendency to seek legal bases in the Treaty itself in order to provide rules on the matter by a Community act rather than through the Convention (see references in the Commission opinion referred to above as regards the harmonization of private international law; the trend has, however, already affected other sectors).

Finally, these links are also formally confirmed by those Community texts in which express reference is made, in addition to the Conventions provided for in Article 220 of the EEC Treaty, to "Conventions ... that are inseparable from the attainment of the objectives' of the Treaty "and thus linked to the Community legal order' [FN 8].

7. But above all what stands out, in respect of the aims mentioned, is the tendency to give the Court of Justice specific powers to interpret the Conventions referred to.

Such a trend undoubtedly corresponds in the first place to a requirement common to uniform-law Conventions. It is in fact generally acknowledged that the interpretation of such Conventions must take account of their international nature and of their specific unifying function. In the case of the Rome Convention, but not only for that Convention, the requirement mentioned above is actually expressed formally in a provision [FN 9].

It is also known, however, that despite this the effective application of those Conventions and their unifying function are often at risk of being thwarted as a result of differences in the way they are interpreted in the national legal systems of the Contracting States. The specific features of national legal traditions, the tendency of judges to use the legal categories most familiar to them, variations in the different language versions, the different techniques for transposing a Convention into the national legal systems, to mention only the main reasons, invariably lead to differences in the interpretative process, with the unfortunate consequences referred to. Hence the usefulness of setting up machinery capable of ensuring that the Conventions concerned are interpreted in terms which are as uniform as possible.

The point, however, which needs to be given most emphasis here is that in the cases being discussed giving the Court jurisdiction is not intended merely to meet such concerns. The aim is in fact also, if not above all, to give formal expression and authentic substance to that aforementioned Community connection in the Conventions being examined. The aim is then not merely the general one of setting up a single centre for interpretation, but above all to entrust that task to the body which is the main guarantor of the uniform interpretation of the entire Community legal system and which, because of its position in the institutional hierarchy and the nature of its functions, is more capable than any other body of ensuring the organic link between the Conventions and that system. Moreover, it is precisely because of the role thus given the Court in this matter that in legal doctrine there is a growing tendency to construe Conventions and Community law as a single body of rules, in the sense that the Conventions become incorporated as fully-fledged elements in the Community legal system, as sub-systems present in it [FN 10].

If we then add to all these considerations the positive experiences gained over the past few years in the practical application both of Article 177 of the EEC Treaty and of the 1971 Protocol, the reasons for the growing trend to give the Court of Justice jurisdiction in the matter will appear more obvious still [FN 11].

C. Attempts to provide an institutional framework

8. As has been said, approval for such a trend was already apparent on the occasion of the two 1968 Brussels Conventions. The fact that with these Conventions the era of the Conventions based on Article 220 was beginning (or was thought to be beginning) and that the problem of the powers of the Court arose simultaneously for two Conventions even raised the question whether it was preferable to take a decision on conferring those powers on a case-by-case basis or to draw up a general act applicable to all Conventions concluded or to be concluded on the basis of Article 220 [FN 12].

The latter hypothesis was rejected because it was thought preferable to define the Court's powers in each case according to its specific requirements.

However, the idea that continuity and stability should be given to the procedure remained and indeed grew stronger with the emergence of new requirements: the extension of Community Conventions beyond the area defined by Article 220; the recurrent difficulty in achieving the consensus of the Member States; the existence of problems peculiar to some States, and so on.

9. Amongst the first pressing requests along these lines were those made by the Court of Justice itself, which on various occasions expressed an opinion in favour of being given the powers in question, as it considered them necessary to "ensure both the unified nature of Community jurisdiction and the uniform application of Conventions in all Member States'.

Nor did the Court seem to be discouraged by the well-known difficulties deriving from the increasing workload with which it was already faced at that time. Indeed, the clearest indication of support for those powers in the terms just referred to was officially expressed in a memorandum which the Court sent to the Council of the European Communities on 21 July

1978 to ask for a series of measures to be taken which were needed to improve the way the Court operated, with a view, likewise, to the conferring on it of such powers.

The Court's request met with immediate sympathy within the Council, in which the German delegation proposed endowing the Court of Justice with general jurisdiction in the field of private and commercial law Conventions to which all the Member States were parties, but not third countries, and which were related to the aims of the Community. The Council took note of the proposal at its meeting on 9 Oktober 1978, but no further action was taken.

10. The idea that such powers should be conferred in general terms, albeit under arrangements to be defined, was not, however, abandoned. It reappeared on various occasions, even in official texts.

Thus the "Solemn Declaration on European Union', approved by the European Council in Stuttgart on 19 June 1983, proclaimed in point 2.5 that "taking account of the respective constitutional provisions in their States, the Heads of State or Government agree to consider, on a case-by-case basis, the inclusion, as appropriate, in international Conventions between Member States, of a clause conferring on the Court of Justice appropriate jurisdiction with regard to the interpretation of the texts'.

In turn, the report prepared by the ad hoc Committee for Institutional Affairs (the "Dooge' Committee) suggested that the Court of Justice "must be given jurisdiction for the interpretation of agreements concluded within the ambit of the Treaties as far as possible by means of a standard clause' (point III, paragraph D).

Finally, the idea also resurfaced to some extent during the Intergovernmental Conference which drew up the Single European Act, where there was talk of following up the statements mentioned.

But in the end no proposals were put forward in this connection.

11. The preparatory work for the Protocols being examined was thus carried out without any opportunity to refer, for those aspects just mentioned, to a legal framework already defined in general terms. Consequently the usual problems in the matter had to be faced, although obviously the abovementioned procedure had significant effects.

II. NEGOTIATIONS ON THE TWO PROTOCOLS

A. Introductory comments

12. In point of fact the first signs of the difficulties attending the negotiations were already apparent before the signing of the Rome Convention. When work on the draft Convention was finally concluded, after more than 10 years' discussions, the text contained no reference to the Court's jurisdiction, nor did it have annexed to it, as the other "Community' Conventions did, the aforementioned joint declaration on that jurisdiction.

The Commission then considered it necessary to draw up an opinion on the matter (see section 6), drawing attention to a number of shortcomings in the draft and especially the one just mentioned. In particular it said that it regarded it as essential not only that the Court be given jurisdiction, but also that the rules governing that jurisdiction be

enacted in the body of the Convention by incorporating a provision based on Article 177 of the EEC Treaty. It was willing to accept a Protocol on the lines of that of 1971 concerning the Brussels Convention on jurisdiction and enforcement only as an alternative.

13. The Joint Declaration was adopted in partial accommodation of the Commission's request. However, as is normally the case, it contains no commitment on the part of the Member States to confer jurisdiction on the Court of Justice but merely a statement of their readiness to do so.

Specific negotiations were therefore necessary to give practical effect to the declared readiness; these began in June 1980, immediately after the signing of the Rome Convention and extended over many years in the various Council bodies, in particular the ad hoc Working Party on Private International Law.

14. Certain differences which proved difficult to bridge emerged during the negotiations, even though the Court of Justice itself, whose opinion had been expressly sought, had from the outset been favourable to extending the solution adopted for the 1971 Luxembourg Protocol to this case.

Moreover, certain Member States made it clear that they would not ratify the Convention until it was certain that jurisdiction would be conferred on the Court of Justice.

After various vicissitudes and periods of stalemate, the deadlock was finally broken in 1987. It was then possible fairly rapidly to draw up the two Protocols and for them to be signed at the end of 1988.

B. General problems

15. Some of the problems discussed during the negotiations bore specifically on the Protocols under examination or were posed in specific terms in relation to them; however, others were substantially the same as those that had arisen over the previous Protocols and had thus already been solved.

This meant that the discussion of those problems could be circumscribed and indeed in a number of cases the problems taken as solved.

16. Firstly, there was little doubt about whether conferral on the Court of Justice of powers not provided for in the Treaties required recourse to the relevant procedure for revision of the EEC Treaty laid down in Article 236, or whether other means could be used, in particular that of unanimous agreement among the Member States.

This issue had already arisen during negotiations on the 1971 Luxembourg Protocol and the solution then adopted had been that recourse to Article 236 was unnecessary. It was considered that application of Article 236 was necessary only where there was direct amendment to the text of the Treaty and/or an effect on the structure and operation of the Court. In this case, there was to be no amendment to the Treaty provisions relating to the Court of Justice, but rather an "extension' of the Court's jurisdiction: something was thus being "added', but the existing situation was not being changed. This also applied to the nature and subject of the jurisdiction being established, since this was wholly consistent with another already existing jurisdiction and related to a Convention which bore on the objectives of the EEC Treaty [FN 13].

It must, however, be objected that this solution appears somewhat forced and shows scant regard for Article 4 of the EEC Treaty ("each institution shall act within the limits of the powers conferred upon it by this Treaty'). Indeed, it seems difficult to deny the existence, in the cases under scrutiny, of an actual change in the overall picture of the Court's powers as defined by the EEC Treaty, since the powers being conferred are "new', "different' and far from insubstantial. On a more general level too the subtle and arguable distinction between "changing' and "extending' the Court's powers led to the risk, given its ambiguity, of making the interpretation of Article 236 still more uncertain, and even of restricting its scope. It is, however, a well-known fact that the Court of Justice favours the broadest application of that provision, inasmuch as the procedure it establishes offers specific institutional guarantees and lies wholly within the Community system [FN 14].

Nevertheless, the above solution, adopted for the 1971 Protocol, prevailed, in particular because of the scope it allows for procedural simplification. It should be emphasized that this solution subsequently received general acceptance, i.e. irrespective of the connection between the Conventions concerned and Article 220, which could also to some extent have mitigated the requirement to apply Article 236. It is for this reason that it has been extended, without further discussion, to the subsequent agreements and hence also to the Protocols under examination.

17. Neither has there been any challenge to the principle whereby even where an ad hoc agreement is used rather than the Article 236 procedure, powers are conferred on the Court of Justice by all Member States, since the powers of a Community institution, as defined by the Treaty, are affected.

While there were some reservations on the argument that Conventions in the areas mentioned in Article 220 of the EEC Treaty (and a fortiori others) may, if it is impossible to proceed under the terms of that Article, be concluded within the time specified between Member States only, it is undisputed that the unanimous agreement of the Member States is required for Court of Justice jurisdiction to be established. However, this does not preclude, as will be seen for the Protocols under examination, more sophisticated solutions in cases where unanimity is more difficult to achieve.

18. In the absence of a general solution regarding the techniques for conferring jurisdiction on the Court of Justice (see section 8 et seq.), account was taken of the specific nature of the case and as a result here, too, the procedure was to draw up special Protocols.

There was also in fact a suggestion that an ad hoc provision should be inserted in the body of the Rome Convention. This was the solution openly favoured by the Commission itself in its opinion of 17 March 1980 (see section 6), and there was no lack of precedents for it (see section 5).

However, this idea was soon dismissed: in view of the continuing reservations on the proposed establishment of Court of Justice jurisdiction it seemed advisable not to prejudice the negotiations on the Rome Convention for the sake of a point which clearly required further discussion and consideration.

19. Lastly, as regards the arrangements and conditions governing the exercise by the Court of the jurisdiction conferred on it, the possibility of merely extending Article 177 of the EEC Treaty, as was substantially the case for the Convention on the mutual recognition of companies and

legal persons, was not even considered.

It was decided instead to follow the precedent of the 1971 Protocol to the Brussels Convention on jurisdiction and enforcement, which contains various adaptations to the model provided by Article 177 of the EEC Treaty. The Protocols under examination in fact depart even more substantially from that model, as we shall see.

C. Problems specific to the Rome Convention

20. As already noted, however, the Member States' discussions on the preparation of the Protocols under scrutiny focused not so much on the general questions so far presented as on issues more strictly related to the special nature of the case in point, and in particular the following :

(a) whether it was necessary or desirable to confer on the Court of Justice the task of uniform interpretation of the Rome Convention; and, if so, on what particular conditions to effect the conferral so as to take account of the specific nature of the Convention;

(b) how to overcome some Member States' objective difficulties in agreeing to that conferral; these related to problems which were not new but which were rendered more complex by certain aspects of this case, in particular the fact that there was no connection between the Rome Convention and Article 220.

21. (a) On this first point it has already been stated that from the outset, in the negotiations on the preparation of the Convention, the misgivings on the proposal to provide for Court of Justice jurisdiction had been stronger than in other cases. The last-minute addition of the oft-mentioned Joint Declaration smoothed out the immediate difficulties but did not remove a number of Member States' reservations.

22. Apart from reservations regarding the premature nature of the exercice (the Rome Convention was not, and is still not, in force), the main objection raised was that the Convention did not fall within the scope of Article 220 of the EEC Treaty. Thus the connection with Community objectives was to be considered more tenuous and above all it appeared less urgent to provide for interpretative machinery to reflect that connection than had been the case for the 1971 Protocols which related to Conventions based on Article 220.

It was argued in reply to this objection that the choices made with regard to those Protocols had not been exclusively, or indeed even chiefly, based on the relationship between the individual Conventions and Article 220, because the main purpose seemed to be to ensure the uniform interpretation of the Convention and to achieve this through the Court of Justice. Subsequent practice has in fact confirmed the justice of this view, since there has been a growing tendency, also as regards the aspects examined here, to narrow the differences between Conventions based on Article 220 and those which are not so based but nevertheless relate to the achievement of Community objectives (see section 6 et seq.). It has also been seen that in the proposals under discussion here regarding institutionalization of the Court's jurisdiction, no distinction was made between those Conventions (see section 8 et seq.).

A more specific argument was that the Rome Convention was "the logical complement' to the Brussels Convention on jurisdiction and enforcement and that it was "precisely because of the numerous framework provisions and the imprecision of many of the legal concepts employed' that it needed to

be interpreted in a uniform manner [FN 15].

23. Another, more specific, objection was that the subject and characteristics of the Rome Convention made provision for Court of Justice jurisdiction undesirable.

In particular, it was pointed out that the Convention was universal in nature (Article 2), i.e. it was also applicable to contracts having no connection with the Community Member States, except in that the disputes arising from them were subject to the Courts of one of those States. The jurisdiction of the Court of Justice should not therefore be imposed on parties who might not even be aware of the Court's existence.

In some way related to this objection were the fears expressed by some Member States that the tendency, widespread in international commercial practice, to accord their courts jurisdiction in disputes relating to "international contracts' might be undermined. It was thought that the prospect of such disputes having to undergo further trial (i.e. in the Court of Justice) might encourage traditional clients of those Community fora to go elsewhere in order to avoid more protracted, expensive and risky proceedings.

To counter the first of these objections, it was argued that the situations envisaged were in principle to be regarded as exceptional and did not constitute the Convention's main frame of reference.

In reply to both objections, it was pointed out that while they could lead, as in fact they did, to a search for appropriate solutions to the difficulties raised, they could not be allowed to result in failure to meet the requirements necessitating the conferral of jurisdiction on the Court of Justice.

24. Less weight was given to certain objections which had received particularly close attention during the negotiations on the 1971 Luxembourg Protocol.

We refer in particular to the fear that Court of Justice intervention might give scope for the parties to engage in delaying tactics or for other abuse and lead to overly-protracted proceedings. In practice, the application of the 1971 Protocol had already shown such fears to be groundless.

We also refer to the objections that had led the authors of the 1971 Protocol to exclude referrals to the Court of Justice by courts of first instance. The main purpose of that exclusion had been to prevent too many cases, unimportant rulings and minor points being submitted for the Court's interpretation [FN 16]. Although legal authors had countered point by point the grounds for those fears, and the Commission and some delegations challenged the wisdom of the exclusion, it was virtually never seriously questioned for the Protocols under examination [FN 17].

25. (b) The other problem referred to [section 20(b)] arose from the difficulties encountered by some Member States in agreeing to the conferral of the new jurisdiction on the Court of Justice.

This was the case, in particular, for Ireland; the Irish Constitution [Article 34(1)] is generally interpreted to mean that it is not possible to refer to courts other than the national courts (hence also to supranational courts) matters which fall within the jurisdiction of the

national courts.

This problem had, when the Treaties were ratified, been expressly resolved with regard to the jurisdiction conferred on the Court of Justice under the Community Treaties but of course only insofar as that jurisdiction was concerned. In the case of the 1971 Luxembourg Protocol, it had been possible to rely on the fact that this referred to a Convention formally based on the EEC Treaty. This reasoning could clearly not be used for the Rome Convention, nor for all the other Conventions (e.g. the Community Patent Convention) which likewise have no formal connection with Article 220 or any other Treaty provision which could constitute their legal basis. Nor did it seem feasible to regard the Rome Convention for these purposes as a mere extension of the Brussels Convention.

The problem thus appeared difficult to solve, since on the one hand amendment of the Irish Constitution did not, and does not, seem an immediate possibility (see section 36) and on the other, the Court's jurisdiction under discussion could only be established, as already mentioned (see section 17), with the unanimous agreement of the Member States.

D. Solutions proposed

26. In the course of the long negotiations, various solutions were proposed, nearly all comprising variants, to overcome the difficulties described above.

(a) On the first of the above mentioned problems, as referrals to the Court of Justice by courts of first instance were excluded and as everyone accepted the procedure of petition for review in the interest of the law, discussion focused on possible referral by courts of last instance and appeal courts.

There were naturally attempts to put forward again as such the solution adopted in the 1971 Protocol (mandatory referral for the former, only optional referral for the latter). However, these came up against the difficulties described earlier and, despite the persistence of certain delegations, it was very soon apparent that they had no real chance of success.

Attention focused instead on the search for solutions which could reconcile the coherence of the system established by that Protocol with the need to overcome the objections to its extension to this case. In this connection it did in fact become immediately clear that some delegations were willing to withdraw their reservations only if the demands they had put forward (see section 23) were suitably met. These involved either restricting the range of courts empowered to refer a question of interpretation to the Court of Justice, or limiting the number of situations in which such referral was compulsory, and in any event making referral conditional on the prior agreement of the parties to the proceedings.

Various solutions were proposed, viz. that such agreement should be required only in the case of appeal courts and/or courts of last instance; that compulsory referral should apply only to the latter category of courts or not at all; that in the context of a general system along the lines of that of the 1971 Protocol, the agreement of the parties should be required only in the case of courts of the common-law States and for a limited, 10-year period, hence with scope for review of the derogation

with a view to possible alignment on the general system; that the agreement of the parties should be required in all Member States and limited to Supreme Courts, where neither of the parties was resident in a Contracting State of the Convention, etc.

A further solution was proposed for the problem under consideration, which was also designed to help solve the difficulty referred to in the preceding section; although it would not necessarily be an alternative to those indicated. This consisted in conferring on the Court of Justice the task of delivering opinions or non-binding decisions, rather than interpretative rulings which would be formally binding on the referring court. This solution could also perhaps involve strengthening the normal machinery for petitions for review in the interest of the law, with the Member States jointly appointing another body competent on the same footing as national bodies to lodge such appeals.

(b) Turning now to the second problem mentioned, when it came to considering practicalities (principally in the final stages of the negotiations), the most convincing solution was that which had been suggested and developed in relation to other Community Conventions in preparation which had raised or were raising similar difficulties. This was the idea of providing for two separate legal instruments: one to confer the jurisdiction in question on the Court of Justice, which, as noted earlier (see section 17), required ratification by all the Member States; the other, an instrument accepting that jurisdiction, admitting of a more limited number of ratifications.

27. However, the solutions proposed met with strong resistance, particularly from the delegations favouring the "traditional' system.

First and foremost, many Member States considered it contrary to the principles of their legal systems and to the actual authority of the judiciary to make judges' decisions formally conditional on the prior consent of the parties. Moreover, such a condition appeared to be at odds with the principle of cooperation between Member States' judiciaries and the Court of Justice, which underlay Article 177 of the EEC Treaty and the 1971 Protocol.

The proposal that courts of last resort should merely have the option of referral appeared less liable to "subvert' the system after the Cilfit judgement, which had given those courts greater scope to exercise their discretion [FN 18]. However, that judgement had also attenuated the urgent need, which lay behind the proposal, to allow those courts a wider margin of discretion.

The idea of establishing a separate system for the common-law States prompted the comment that this amounted to introducing, without clear objective grounds, a major exception to the general system, which would also have institutional repercussions. Moreover, such a derogation was at variance with the "universal' nature of the Rome Convention and liable to encourage the practice of "forum shopping'.

The idea that the Court of Justice should be reduced to a sort of consultative body was vigorously rejected not only by the Court of Justice and the Commission but also by most Member States. It was felt that this solution would in general be liable to weaken the role of the Court and was in practice ill-suited to achieving uniform interpretation of the Convention, given that any pronouncements by the Court of Justice would bear little weight in relation to the referring judge's decisions [FN 19].

28. In addition to these specific objections, there were also some important general points of concern.

These resulted primarily from a reluctance to amend the system laid down in the 1971 Protocol, which had proved its worth, had not given rise to any abuse and had by now become familiar to national courts. This reluctance was reinforced by the fear of creating a precedent which would pave the way for the proliferation of formulae other than the formulae laid down in the Protocol. Moreover, as has already been stated, both the Court of Justice and the Commission had openly endorsed these assessments.

To this was then added the consideration that all the solutions envisaged would have had the ultimate effect of substantially restricting the scope of the unifying activities of the Court of Justice and consequently the overall efficiency of the system. In fact, the courts of first instance were already excluded from the system. In addition, it was now being suggested that the highest courts should simply have the option of referring cases, and furthermore that such referral should be subject to the consensus of the parties. Under these circumstances, the cases of "authorized' evasion of the Court's jurisdiction would obviously increase considerably.

This would be all the more likely to happen if the two-Protocol system were used. In fact Member States who were parties to the Convention would then, if they ratified only the general Protocol, be entitled not to accept the Court's jurisdiction and therefore to prevent their own courts having any possibility of referral. This would also cause undesirable differentiation between Member States and encourage forum shopping.

29. For a long time the approval of several delegations hinged on the abovementioned objections. More or less wholehearted agreement was reached only at the last minute, thanks to a number of arguments put forward in support of the solution being proposed.

It was pointed out first of all that such a solution appeared to be the only practicable one in the circumstances and that the alternative would be simply not to establish the Court's jurisdiction.

Furthermore, unlike the 1968 Brussels Convention which established a system applicable only between the Member States, The Rome Convention is based, as has been pointed out many times, on universally applicable rules.

In addition, the purpose of the, so to speak, optional nature of one of the two Protocols was not to establish a permanent situation in advance, but merely to allow the system to get started, so as to encourage the later accession of such States as might have declined to joint it. After all, even for the Rome Convention, entry into force was subject to only seven ratifications.

Lastly, it was pointed out, in keeping with the conclusions shared by most of the interpretations of Article 177 of the EEC Treaty and of the 1971 Protocol, that the rulings of the Court of Justice have a "persuasive effect' which transcends individual cases. The Court itself had stated that its interpretation of a Community Convention should be applied generally and uniformly [FN 20]. Practice has confirmed this trend, as shown by the attention generally given even by courts of first instance to the Court's interpretative rulings. In its turn the Rome Convention made a certain contribution to this trend, because Article 18 of that Convention

is clearly also based on the Court's jurisprudence.

In other words, failure to ratify the first Protocol rules out the possibility of referral to the Court, but not the Court's interpretative jurisdiction and above all the general and indirect effects of exercising such jurisdiction, which tend to favour that uniform application of the Convention which the second Protocol itself states to be necessary. Therefore, in conclusion, serious problems of differentiation for certain Member States should not arise, provided, of course, that they have ratified the Rome convention.

E. Summary of solutions adopted

30. The reasons for the particular nature of the Protocols under examination cannot be grasped without having the terms of the discussions at hand in summary form. To avoid the difficulties mentioned and to achieve at least in part (and certainly as far as the principles are concerned) the desired result, it became necessary to work out comprise solutions, sometimes relating to key aspects of the problem.

The result is a system which presents a number of original features. Limiting ourselves to the main elements, and subject to further analytical examination, it may be summarized as follows:

(a) The jurisdiction of the Court is governed by two distinct Protocols, for the purposes and within the terms already mentioned. In the case of the Protocol establishing this jurisdiction, ratification by all the Member States is needed; in the other case, a minimum of seven ratifications is required, the same number as that necessary for the entry into force of the Rome Convention.

    The nature of the Court's jurisdiction is defined in the latter Protocol.

(b) Referral to the Court is optional not only for appeal Courts, but also for Courts of last instance, with the further important stipulations which we will deal with later. It is not open to judges of first instance.

    Courts of last instance are, here too, designated by name.

(c) The procedure governing petition for review in the interest of the law remains unchanged.

(d) Likewise, the system of exchange of information on the application of the Convention on the part of national courts is retained.

PART TWO

COMMENTARY

I. THE FIRST PROTOCOL

A. Introduction

31. This Protocol defines the scope of the Court's jurisdiction and the conditions under which that jurisdiction is exercised.

To this end, it reproduces in very general terms the arrangements for referrals for a preliminary ruling first set out in Article 177 of the EEC Treaty and subsequently in the Luxembourg Protocol of 1971, but it adds

further important changes to the innovations already introduced into the original system by that 1971 Protocol.

This will be seen clearly from the following analysis; it should be noted that, for any aspect also applying to the 1971 Protocol, reference will in principle be made to the comments made on that Protocol and the later adjustments to it (see note 3).

B. Preamble

32. The preamble to the Protocol is substantially the same as the preambles to the Luxembourg Protocol of 1971: it refers to the Joint Declaration annexed to the Rome Convention, and expresses the decision to draw up the Protocol.

C. Scope of the Court's jurisdiction

33. Article 1 defines the scope of the jurisdiction of the Court of Justice in terms analogous to the precedents mentioned.

The following may therefore be the subject of interpretation by the Court: first of all, the Rome Convention, including the Protocol annexed thereto, which forms an integral part of it (Article 32 of the Convention); then the Conventions on the accession of the Member States to the Rome Convention [such as the Luxembourg Convention of 10 April 1984 concerning the accession of Greece: (see note 1)]; lastly, the Protocol actually under consideration (however, there is no mention of the second Protocol).

It should be emphasized here, however, that the references made in subsequent Articles to the abovementioned acts as a subject of interpretation by the Court of Justice are expressed in unusual detail compared with the precedents on the subject. In defining the questions of interpretation which may be put to the Court of Justice, the first sentence of Article 2 and paragraph 1 of Article 3 of the Protocol do not confine themselves, as do the precedents, to providing that such questions must concern the interpretation of the texts listed in Article 1, but refer to "the provisions contained in the instruments referred to in Article 1'.

This difference in wording relates to a question which is in fact not new and not confined to the Protocol under scrutiny; this question arose in the course of the negotiations with reference to a specific situation.

In certain Member States domestic law is, in fact, adapted to international Conventions through the issuing of appropriate laws wich reproduce the content of the Conventions, adapting them to the particular style of the national legislation if necessary. This, of course, raises a few problems from our point of view, since, for judges in the States in question, the reference will be dictated more often by the national law than the Convention, with the consequent risk of excluding the actual premises for action by the Court of Justice [FN 21].

In the case of the Protocol under examination the question arose in connection with the procedure followed by the Federal Republic of Germany for incorporating the Rome Convention into domestic law. The rules of the Convention were not absorbed in their organic entirety but were distributed, so to speak, among the introductory provisions of the Civil Code in accordance with the system applied to those provisions, and were also adjusted as regards their content.

The Commission of the European Communities was concerned about the repercussions of this approach, when it was still at the planning stage, and sent the Federal Republic an appropriate recommendation on 15 January 1985 (see note 7).

In the recommendation it stated that this approach could undermine full and integral compliance with the Rome Convention, prejudicing the uniformity of the interpretation and application of the Convention and even the exercise of the powers which were intended to be conferred on the Court of Justice. National judges would have to identify one by one the provisions derived from the Convention on which it might be necessary to seek an interpretative ruling from the Court.

The Commission's action did not change the Federal Republic's decisions. The law ratifying the Convention expressly excluded the direct effect of the rules of the Convention (Law of 25 July 1986, BGBl. 1986, II, 809); these rules were distributed among the introductory provisions mentioned above when these were simultaneously amended (BGBl. 1986, I, 1142) [FN 22].

During negotiations on the Protocol in question, however, it was the German delegation itself that suggested wording Articles 2 and 3 of the Protocol along the lines indicated above, omitting any direct reference to the Convention. As the german delegation subsequently explained in a statement in the minutes, the aim of this was precisely to overcome the problem already mentioned. The statement in fact says that by virtue of the wording proposed "if a question relates directly to the interpretation of a national rule which has transposed into national law a provision of one of the instruments referred to in Article 1 or corresponds to such a provision, the indirectly related question of interpretation of the rule on which the provision is based may be submitted to the Court of Justice for a preliminary ruling. The Rome Convention does not stipulate how the individual Contracting States have to transpose the provisions of the Convention into national law. This is a question which, according to international practice, it is left to the responsability of the States concerned to settle. Any Contracting State may therefore bring the Rome Convention into force either by directly giving it force of law or by adopting its provisions in appropriate form in its national legislation'. The statement also points out that Article 36 of the introductory provisions to the German Civil Code explicitly provides that those introductory provisions which concern contractual obligations based on the rules of the Convention must be interpreted and applied in a uniform manner.

The wording proposed by the German delegation was subsequently approved by the other Member States, leading eventually to the text as it now stands.

D. Conditions for referral and courts empowered to do so

34. Article 2 states the conditions under which a question of interpretation may be referred to the Court of Justice and lists the national courts which are allowed to make such referrals.

On both points the provisions restates nearly all the amendments to the system outlined in Article 177 of the EEC Treaty which were already made by the Luxembourg Protocol of 1971 (Articles 2 and 3). This applies in particular to the analytical list of courts of last instance, the inversion of the order of presentation between these and the others, and the exclusion -

mentioned several times already- of the courts of first instance.

The Protocol differs from its immediate predecessor in other respects as well.

(a) The most substantial differences concern the conditions of referral to the Court of Justice.

The main difference, pointed out several times already, clearly lies in the fact that in this connection it does away with the usual distinction between national courts of last instance and the others, in the sense that even the former now merely have the option of making referrals, not an obligation to do so.

The reasons for this change and the concerns which underlie it have already been indicated (see section 26 et seq.) and so there is no need to return to them. Rather it may be noted that the fact that the aforementioned diversity of system has been removed means that the conditions of referral are now laid down in a single provision for all the relevant courts, rather than in two separate provisions, as is done both in Article 177 of the EEC Treaty (second and third paragraphs) and, in reverse order, in the 1971 Protocol [Article 3(1) and (2)].

Otherwise, the conditions in question are not substantively different from the usual ones: the question requiring interpretation must have arisen in a case pending before one of the courts mentioned; it must concern the interpretation of the legal instruments mentioned in Article 1 or rather-as stated in the previous paragraph-the "provisions contained' in those instruments; the court making the referral must consider that a preliminary ruling from the Court on the question put is necessary to enable it to give its own judgment.

On this last point it should be noted, in connection with the discussions held on this subject during the preparatory work (see sections 23, 26 et seq.), that in agreeing on the solution adopted in the Protocol, the representatives of the Member States said that they wanted to ensure that the courts empowered to apply to the Court of Justice for a preliminary ruling were allowed a discretionary power which they would exercise taking into consideration - subject to the national rules governing their operation - any appropriate factor, such as the position of the parties on the question of referral to the Court of Justice.

(b) As to the indication of the courts empowered to apply to the Court of Justice, Article 2 of the Protocol gives a specific list of courts of last instance.

To a large extent the list reproduces the list in Article 2 of the 1971 Protocol, as adjusted following the various accessions. Attention should also be drawn to the following differences:

- In the case of Italy, there has now been added a reference to the Consiglio di Stato, since it was considered that the provisions of the Rome Convention could also be invoked before the highest administrative court.

- For the United Kingdom, in addition to the House of Lords, reference is now made to "other courts from which no further appeal is possible', in such a way as to give the Protocol a broader field of application.

The fact that a distinction is no longer made between courts which are obliged to make a referral and those which simply have the option of doing so has not invalidated the listing of the courts of last instance. This is because this listing fulfils other requirements and, in particular, is intended to remove the doubts which had arisen with regard to the interpretation of Article 177 of the EEC Treaty in respect of the identification of those courts, and which had led to the changes introduced by the 1971 Protocol.

As regards appeal courts, it need only be pointed out that, as was already made clear in the report on this last Protocol, it is not the formal description which matters but the fact that the above courts act as appeal courts in this specific case.

It should also be pointed out with regard to the United Kingdom that, subject to a declaration to the contrary by that State, the courts empowered to hear appeals should exclude those which rule on appeals against decisions handed down by courts operating in European territories situated outside the United Kingdom, for the international relations of which that country is responsible [see Article 27 (2) (b) and (4) of the Rome Convention].

Finally, as previously stated, Article 2 of the Protocol makes no mention of courts of first instance, despite the strong criticism which this same omission had provoked in respect of the 1971 Luxembourg Protocol (see section 24), especially because of the potential risks which this might involve for the uniform interpretation of the Convention.

It was at least partly to meet this concern that the provision concerning "petition for review in the interest of the law', referred to in Article 3 of the Protocol in question and Article 4 of the 1971 Protocol, was introduced. It is in fact no accident that no provision has been made for such a procedure either in Article 177 of the EEC Treaty or in the 1971 Protocol, relating to the Convention on the mutual recognition of companies (see section 4), both of which permit the referral of cases by courts of first instance.

E. "Petition for review in the interest of the law' - Other rules applicable

35. Articles 3 and 4 of the Protocol concern respectively "petition for review in the interest of the law' and the applicability of the rules of the EEC Treaty and the Court of Justice Protocol, as well as possible adjustments to the Rules of Procedure.

Both the provisions reiterate word-for-word the corresponding provisions of the 1971 Protocol (Articles 4 and 5) and there is therefore no need to comment at length.

With regard to petition for review in the interest of the law, suffice it to point out that despite what has just been said about its specific aims (see previous section), it has never yet been applied in practice. It should also be remembered that the Protocol under scrutiny does not merely rule out reference to the Court for courts of first instance; it also makes such referral optional for courts of last instance. And that could increase the likelihood of petition for review in the interest or the law.

As for Article 4 of the Protocol, it should be considered that it also includes the applicability, for the proceedings instituted by virtue of

the Protocol itself, of Article 20 of the Court's Statute. This means, among other things, that even the Member States that have not ratified the Protocol can submit statements of case or written observations during these proceedings.

F. Ratification and entry into force of the Protocol

36. Articles 5 and 6 are concerned respectively with the ratification and entry into force of the Protocol. The first corresponds exactly to Article 7 of the 1971 Protocol and does not require further comment.

Article 6, however, represents a considerable innovation with respect to Article 8 of that Protocol, for the reasons mentioned several times. The entry into force of the Protocol in hand is now linked not to ratification by all the Member States, but by seven of those States in respect of which the Rome Convention is in force (the Convention itself, of course, requiring the same minimum number of ratifications).

This enables the entry into force of the Protocol to be linked to that of the Convention (and successive ratifications must apply to both), while also permitting circumvention of the requirement for unanimity, which raises grave difficulties in this case, as has been noted, although other difficulties might be created by the solution adopted (see sections 25 and 28).

In fact, at the signing of the Protocols, the Irish delegation made the following statement:

> 'At the time of signature of the First Protocol on the interpretation by the Court of Justice of the European Communities of the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980, the Irish delegation states that because of certain provisions of the Constitution of Ireland concerning the jurisdiction of, and the administration of justice by, the Courts of Ireland, Ireland is not at present in a position to ratify this Protocol, adherence to which is not an obligation of the Treaties establishing the European Communities, and will not be in a position to proceed to ratification until such time as the constitutional impediment has been removed.'

Of course, in view of the fact that this Protocol cannot become effective if the Court's jurisdiction has not been established by unanimous agreement among the Member States, its entry into force is conditional on that of the second Protocol.

G. Other standard clauses - Duration of the Protocol

37. Articles 7 to 11 contain standard clauses, or clauses which in any event already exist in almost identical terms in the 1971 Luxembourg Protocol.

Article 9, however, differs from the corresponding provision in that Protocol. Whereas the latter was concluded for an unlimited period like the Brussels Convention to which it refers (Article 12), this Protocol follows the model of the Rome Convention, which was concluded for ten years with tacit renewal every five years if there has been no denunciation (Article 30 of the Convention).

H. The question of territorial scope

38. It should be noted that, like the second Protocol, this Protocol contains no clause on the field of its territorial scope, whereas the Rome Convention does include a special provision on the subject (Article 27).

The absence of any such provision from the two Protocols is in fact in line with more recent practice in Community conventions and those associated with them. Indeed, the Convention of Accession of Spain and Portugal to the 1968 Brussels Convention not only contains no clause on territorial application, but also deletes those contained in the Brussels Convention itself (Article 60) and in the 1971 Protocol (Article 6) (see respectively Article 21 and Articles 26 and 27 of the Donostia-San Sebastian Convention). A similar omission is to be found in the 1988 Lugano Convention (see note 3).

In considering the implications of this lack of any definition of the scope of the Protocols, it is sufficient to refer to the reports on the aforementioned Conventions of Donostia-San Sebastian and Lugano, given their similarity.

The fact that the Rome Convention contains a territorial clause should not have any repercussion for the two Protocols in hand, in terms of authorizing any extension of the scope of the Convention to the Protocols. In fact, although closely linked, these contractual instruments are formally independent. In any event, in cases where it was desired that the territorial scope of a Protocol should coincide with that of the "main' Convention, appropriate clauses were inserted into both texts (as indeed occured with the Brussels Convention and the Protocol relating to it, before the aforementioned deletion).

I. Accession of new members

39. The Protocol also omits any provision on the accession of any new members of the EEC, whereas Article 9 of the 1971 Protocol requires them to accede. This is because the Rome Convention is not based on Article 220 of the EEC Treaty and so, unlike the Brussels Convention, it necessarily left open the matter of the accession of future Community members. However, the Protocol resembles the Rome Convention in having a "Joint Declaration' annexed to it, in which the signatory countries state their conviction that "any State which becomes a member of the European Communities should accede to this Protocol'.

It should be noted that the Protocol was also signed by Spain and Portugal, which are not yet parties to the Rome Convention.

J. Exchange of information

40. Lastly, it is worth pointing out that this Protocol, like the 1971 Protocol, has annexed to it a "Joint Declaration' in which Member States declare themselves ready to organize an exchange of information on judgements which have become res judicata and have been handed down pursuant to the Rome Convention by the courts referred to in Article 2 of this Protocol.

However, in relation to the corresponding Declaration annexed to the Luxembourg Protocol, the Declaration currently being considered gives a far more analytical description of the information concerned. It is likely that this was achieved to some extent thanks to the specific precedent provided by Article 2(1) of Protocol 2 annexed to the abovementioned 1988 Lugano Convention.

II. THE SECOND PROTOCOL

41. The examination of this Protocol requires little comment.

The preamble describes the reasons why the instrument was drawn up. It refers to the fact that the Rome Convention enters into force after the seventh ratification and stresses that, even before its entry into force, in order to ensure uniform application of the Convention, a mechanism needs to be introduced in order to ensure its uniform interpretation, and that this could be achieved by conferring the appropriate powers on the Court of Justice.

Article 1 therefore confers those powers according to the terms and conditions laid down in the first Protocol. The reference to the application of the Protocol on the Statute of the Court of Justice and of the Rules of Procedure, and to any necessary adaptation of the latter, is restated here, although already included in the First Protocol, in order to base the provision on the unanimous agreement of the Member States.

With regard to Articles 2 to 4, it only needs to be stressed that, for the reasons given on a number of occasions, the Protocol can enter into force only after ratification by all the Member States (Article 3).

NOTES

FOOTNOTES

1- As is known, the Rome Convention was concluded on 19 June 1980. On that occasion it was signed by seven States at that time Members of the Community. Denmark signed on 10 March 1981 and the United Kingdom on 7 december of the same year. (The text of the Convention can be found in OJ No L 266, 9. 10. 1980. The report on the Convention by Professors Giuliano and Lagarde was published in OJ No C 282, 31. 10. 1980). Seven ratifications are required for the Convention to enter into force. So far, six countries have ratified it, in order of date: France, Italy, Denmark, Luxembourg, Federal Republic of Germany and Belgium.
After Greece's entry into the Community, the Convention for the accession of that State to the Rome Convention (OJ No L 146, 31. 5. 1984) was signed in Luxembourg on 10 April 1984. Its entry into force is dependent on it being ratified by Greece and at least seven other signatory States. So far, the following have deposited the instruments of ratification, in order of date: France, Italy, Denmark, Luxembourg, Greece, Federal Republic of Germany.
Spain and Portugal are required by Article 3(2) of the Act of Accession of those States to the Community to accede, with whatever adjustments may be necessary, to the "Community' Conventions (see OJ No L 302, 15. 11. 1985, also below, note 6). Up to now, however, negotiations for accession to the Rome Convention have not yet begun.
On the subject of that Convention see in particular - already shortly after it was signed - T. Treves (ed.), Verso una disciplina comunitaria della xlegge applicabile ai contratti, Cedam, Padua, 1983; and more recently, with ample bibliography, M. Virgos Soriano, El Convenio de Roma de 19 de junio 1980 sobre la ley aplicable a las obligaciones contractuales, in E. García de Enterria, J. D. González Campos and S. Muñoz Machado,Tratado de Derecho Comunitario Europeo, Civitas, Madrid, 1986, vol. III, pp. 753 et seq.

Specifically on the Protocols covered by this report, see M. Virgos Soriano,
La interpretación del Convenio de Roma de 1980 sobre la ley aplicable a las obligaciones contractuales y el Tribunal de Justicia de las Comunidades Europeas, in Noticias/CEE 1990, pp. 83 et seq.

2- See note 5 below. For the text of the preliminary draft, see
Les problèmes internationaux de la faillite et le Marché Commun, Cedam, Padua, 1971, which covers the proceedings of a conference held in Milan on 12 to 15 June 1970. For the aspect which is of interest here, see, in the same volume, A. Tizzano,
La déclaration commune et la compétence de la Cour de Justice des Communautés européennes, pp. 170 et seq.

3- The texts of the Brussels Convention of 1968 and the Luxembourg Conventions of 1978 and 1982 all in force can be found respectively in OJ No L 299, 31. 12. 1972; OJ No L 304, 30. 10. 1978 and OJ No L 388, 31. 12. 1982.
The Donostia-San Sebastian Convention was published in OJ No L 285, 3. 10. 1989. It will enter into force after ratification by two States, of which one must be the Kingdom of Spain or the Portuguese Republic.
A consolidated text has been published in OJ No C 189, 28. 7. 1990.
The reports on the above Conventions were drawn up by, in order of date: Mr Jenard (OJ No C 59, 5. 3. 1979), Mr Schlosser (ibid), Messrs Evrigenis and Kerameus (OJ No C 298, 24. 11. 1986); Messrs Almeida Cruz, Desantes Real and Jenard (OJ No C 189, 28. 7. 1990).
To complete the picture, it should be pointed out that a Convention on jurisdiction and the enforcement of judgements in civil and commercial matters (OJ No L 319, 25. 11. 1988, p. 9) was opened for signature by the Member States of the European Communities and EFTA in Lugano on 16 September 1988. This so-to-speak parallel Convention to the Brussels Convention of 1968 has been signed by seven Member States of the European Communities (Belgium, Denmark, Greece, Italy, Luxembourg, Netherlands and Portugal) and five Member States of EFTA (Finland, Iceland, Norway, Sweden and Switzerland). It will enter into force after the deposit of the instruments of ratification of two signatory States, one a member of the European Communities and the other of EFTA. The report on the Convention was drawn up by Messrs Jenard and Möller (OJ No C 189, 28. 7. 1990).

4- See OJ No L 204, 2. 8. 1975. The Protocol entered into force on 1 September 1975 for the original six Member States of the European Communities. For the others, accession to the Protocol proceeded pari passu with accession to the Brussels Convention (see previous note). Similarly, the reports on the Protocol are incorporated in those on the Brussels Convention and on the other Conventions which have amended it (ibid).
The Protocol relating to the Convention on the mutual recognition of companies, on the other hand, suffered the same fate as that Convention which, as has been noted, never gained the required number of ratifications.

5- The hypothesis now under consideration by the Member States, given the difficulties still existing in this matter, involves adopting the Convention in preparation within the Council of Europe "on certain international aspects of insolvency' and subsequently carrying out further harmonization within the Community framework.
For the text of the 1980 draft see Bulletin of the European Communities,

Supplement 2/82, which also contains the report of the Chairman of the Working Party, Mr Lemontey (ibid). For a more recent analysis, see also L. Daniele, Il fallimento nel diritto internazionale privato e processuale, Cedam, Padua, 1987, pp. 22 et seq.

6- See OJ No L 401, 31. 12. 1989. For the first of the abovementioned conferences see the volume published by the Council of the European Communities: Texts established by the Luxembourg Conference on the Community Patent 1985, Luxembourg, 1985.

7- In particular: with the opinion of 17 March 1980 regarding the draft Convention (OJ No L 94, 11. 4. 1980, p. 39), to which we shall return later (but see especially note 12) and the recommendation of 15 January 1985 regarding the Convention (OJ No L 44, 14. 2. 1985, p. 42) (on which see section 33).

8- These are the terms defining, in its own preamble, the Convention on the Community patent of 15 December 1975 (see note 5). But these are also the terms defining, in Article 3(2) of the Act of accession of Spain and Portugal to the European Communities, the conventions to which, in addition to the conventions based on Article 220, those two States undertake to accede.

9- The reference is of course to Article 18, according to which "In the interpretation and application of the preceding uniform rules, regard shall be had to their international character and to the desirability of achieving uniformity in their interpretation and application'. On the significance of such rules and on analogous provisions in other uniform law conventions [see the Giuliano and Lagarde Report, pp. 37 et seq. (see note 1)].

10- L'interpretazione della Convenzione e il problema della competenza della Corte di Giustizia delle Comunità in T. Treves (ed.), Verso una disciplina comunitaria della legge applicabile ai contratti (op cit., pp. 58 et seq. and 62).

11- The Protocol on Interpretation of the EEC Convention on jurisdiction and enforcement of judgements: Over 10 years in legal practice (1975-to 1985), in Netherlands International Law Rev., 1986, pp. 84 et seq.

12- See the Jenard Report, point 2, note 3 above.

13- See the Jenard Report, point 4.

14- Defrenne/Sabena, Court Reports 1976, p. 478 ("... apart from any specific provisions, the Treaty can only be modified by means of the amendment procedure carried out in accordance with Article 236').

15- Thus, inter alia, the Commission in the opinion of 17 March 1980 cited above (note 7), and, with abundant examples, M. Virgos Soriano, La interpretación ..., pp. 89 et seq.
Note also that the Court of Justice had, albeit indirectly, already had occasion to interpret the Rome Convention; see the Judgements of 26 May 1982, Case 133/81, Ivenel/Schwab, Court Reports 1982, p. 1900; and 8 March 1988, Case 9/87, Arcado/Haviland, Court Reports 1988, p. 1555. See also the Judgement of 15 February 1989, Case 32/88, Six Constructions/Humbert, not yet published.

16- See the Jenard Report, point 11. See also T. Cathala, L'interprétation uniforme des conventions conclues entre États membres de la CEE en matière de droit privé, in Recueil Dalloz Sirey 1972, Chronique VII, pp. 32 et seq.

17- On this point, see also section 34. On the cjriticism referred to in the text, see inter alia H. Rasmussen, A New Generation of Community Law?, in Common Market Law Rev., XV, 1978, pp. 249 et seq.; F. Pocar, Il protocollo sull'interpretazione uniforme della Convenzione di Bruxelles sulla competenza giurisdizionale e l'esecuzione delle sentenze, in Rivista di diritto internazionale privato e processuale 1978, pp. 281 et seq. and pp. 285 et seq.; E. Metzger, note in Revue critique de droit international privé 1979, pp. 130 et seq.

18- See the Judgments of 6 October 1982, Case 283/81,Court Reports 1982, pp. 3415 et seq. and pp. 3429 et seq.
In this judgement, of course, the Court began by confirming that, in the framework of Article 177 of the EEC Treaty, even courts of last instance may use their discretion to decide whether an interpretative pronouncement from the Court of Justice is necessary for deciding the case pending before them. But above all, it stated that such courts may, albeit with all due circumspection, refrain from referral where the Community law to be applied has such a clear meaning as not to raise any doubt in reality as to its interpretation.

19- See again the opinion of 17 March 1980 cited above [FN 7], and R. Luzzatto [FN10], pp. 65 et seq.

20- See especially the Judgment of 14 July 1977, joined Cases 9 and 10/77, Bavaria Fluggesellschaft and Germanair/Eurocontrol, Court Reports 1977, p. 1517, in which the Court states that "The principle of legal certainty in the Community legal system and the objectives of the Brussels Convention (of 1968) in accordance with Article 220 of the EEC Treaty, which is at its origin, require in all Member States a uniform application of the legal concepts and legal classifications developed by the Court in the context of the Brussels Convention.'

21- See the Schlosser Report, p. 144, point 256, note 3 above.

22- In this connection see E. Jayne and C. Kohler, Das internationale Privat- und Verfahrensrecht der Europäischen Gemeinschaft. Jüngste Entwicklungen, in IPRax 1988, n. 3, pp. 133 et seq. and pp. 137 et seq.

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Text of the Greece acession convention

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Convention on the accession of the Hellenic Republic to the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980 (84/297/EEC)

Official Journal L 146 , 31/05/1984 p. 0001 - 0016
Spanish special edition...: Chapter 1 Volume 4 p. 72
Portuguese special edition Chapter 1 Volume 4 p. 72

THE HIGH CONTRACTING PARTIES TO THE TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY,

CONVENIO

CONSIDERING that the Hellenic Republic, in becoming a Member of the Community, undertook to accede to the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980,

HAVE DECIDED to conclude this Convention, and to this end have designated as their plenipotentiaries:

(84/297/CEE)

HIS MAJESTY THE KING OF THE BELGIANS:

LAS ALTAS PARTES CONTRATANTES DEL TRATADO CONSTITUTIVO DE LA COMUNIDAD ECONOMICA EUROPEA ,

Paul de KEERSMAEKER

State Secretary for European Affairs and Agriculture,

Deputy to the Minister for External Affairs

SU MAJESTAD EL REY DE LOS BELGAS :

HER MAJESTY THE QUEEN OF DENMARK:

Paul DE KEERSMAEKER ,

Uffe ELLEMANN-JENSEN

Minister for Foreign Affairs of Denmark

THE PRESIDENT OF THE FEDERAL REPUBLIC OF GERMANY:

Hans-Werner LAUTENSCHLAGER

Minister of State for Foreign Affairs of the Federal Republic of Germany

THE PRESIDENT OF THE HELLENIC REPUBLIC:

Theodoros PANGALOS

Secretary of State for Foreign Affairs of the Hellenic Republic

THE PRESIDENT OF THE FRENCH REPUBLIC:

Roland DUMAS

Minister for European Affairs of the French Republic

THE PRESIDENT OF IRELAND:

Peter BARRY

Minister for Foreign Affairs of Ireland

THE PRESIDENT OF THE ITALIAN REPUBLIC:

Giulio ANDREOTTI

Minister for Foreign Affairs of the Italian Republic

HIS ROYAL HIGHNESS THE GRAND DUKE OF LUXEMBOURG:

Colette FLESCH

Minister for Foreign Affairs of the Government of the Grand Duchy of Luxembourg

HER MAJESTY THE QUEEN OF THE NETHERLANDS:

W.F. van EEKELEN

Secretary of State for Foreign Affairs of the Netherlands

H.J. Ch. RUTTEN

Ambassador Extraordinary and Plenipotentiary

Permanent Representative of the Netherlands

HER MAJESTY THE QUEEN OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND:

The Right Honourable Sir Geoffrey HOWE QC, MP

Secretary of State for Foreign and Commonwealth Affairs

WHO, meeting within the Council, having exchanged their full powers, found in good and due form,

HAVE AGREED AS FOLLOWS:

Article 1

The Hellenic Republic hereby accedes to the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980.

Article 2

The Secretary-General of the Council of the European Communities shall transmit a certified copy of the Convention on the law applicable to contractual obligations in the Danish, Dutch, English, French, German, Irish and Italian languages to the Government of the Hellenic Republic.

The text of the Conventionon the law applicable to contractual obligations in the Greek language is annexed hereto. The text in the Greek language shall be authentic under the same conditions as the other texts of the Convention on the law applicable to contractual obligations.

Article 3

This Convention shall be ratified by the Signatory States. The instruments of ratification shall be deposited with the Secretary-General of the Council of the European Communities.

Article 4

This Convention shall enter into force, as between the States which have ratified it, on the first day of the third month following the deposit of the last instrument of ratification by the Hellenic Republic and seven States which have ratified the Convention on the law applicable to contractual obligations.

ThisConvention shall enter into force for each Contracting State which subsequently ratifies it on the first day of the third month following the deposit of its instrument of ratification.

Article 5

El presente Convenio entrara en vigor , en las relaciones entre los Estados que lo hayan ratificado , el primer dia del tercer mes siguiente al deposito del ultimo instrumento de ratificacion por la Republica Helénica y siete Estados que hayan ratificado el Convenio sobre la ley aplicable a las obligaciones contractuales .

The Secretary-General of the Council of the European Communities shall notify the Signatory States of: (a) the deposit of each instrument of ratification;

(b) the dates of entry into force of this Convention for the Contracting States.

Article 6

This Convention, drawn up in a single original in the Danish, Dutch, English, French, German, Greek-, Irish and Italian languages, all eight texts being equally authentic, shall be deposited in the archives of the General Secretariat of the Council of the European Communities. The Secretary-General shall transmit a certified copy to the Government of each Signatory State.

Til bekræftelse heraf har undertegnede behørigt befuldmægtigede underskrevet denne konvention.

contratantes .

Zu Urkund dessen haben die hierzu gehörig befugten unterzeichneten Bevollmächtigten ihre Unterschriften unter dieses Übereinkommen gesetzt.

In witness whereof the undersigned plenipotentiaries, being duly authorized thereto, have hereunto set their hands.

En foi de quoi, les plénipotentiaires soussignés, dûment autorisés à cet effet, ont apposé leurs signatures au bas de la présente convention.

Dá fhianú sin, chuir na Lánchumhachtaigh thíos-sínithe, arna n-údarú go cuí chuige sin, a lámh leis an gCoinbhinsiún seo.

In fede di che, i plenipotenziari sottoscritti, debitamente a ciò autorizzati, hanno apposto le loro firme alla presente convenzione.

Ten blijke waarvan de ondergetekenden, daartoe behoorlijk gemachtigd, hun handtekening onder dit Verdrag hebben geplaatst.

Udfærdiget i Luxembourg, den tiende april nitten hundrede og fireogfirs.

Geschehen zu Luxemburg am zehnten April neunzehnhundertvierundachtzig.

Da fhianu sin , chuir na Lanchumhachtaigh thios-sinithe , arna n-udaru go cui chuige sin , a lamh leis an gCoinbhinsiun seo .

Done at Luxembourg, on the tenth day of April in the year one thousand nine hundred and eighty-four.

Fait à Luxembourg, le dix avril mil neuf cent quatre-vingt-quatre.

Arna dhéanamh i Lucsamburg, an deichiú lá de mhí Aibreáin, sa bhliain míle naoi gcéad ochtó a ceathair.

Fatto a Lussemburgo, addì dieci aprile millenovecentottantaquattro.

Gedaan te Luxemburg, de tiende april negentienhonderd vierentachtig.

Pour Sa Majesté le roi des Belges

Voor Zijne Majesteit de Koning der Belgen

For Hendes Majestaet Danmarks Dronning

Fuer den Praesidenten der Bundesrepublik Deutschland

Pour le président de la République française

Thar ceann Uachtaran na hEireann

Per il presidente della Repubblica italiana

Pour Son Altesse Royale le grand-duc de Luxembourg

Voor Hare Majesteit de Koningin der Nederlanden

For Her Majesty the Queen of the United Kingdom of Great Britain and Northern Ireland

Text of the Spain and Portugal acession convention

92/529/EEC: Convention on the accession of the Kingdom of Spain and the Portuguese Republic to the Convention on the Law applicable to Contractual Obligations, opened for signature in Rome on 19 June 1980

Official Journal L 333 , 18/11/1992 p. 0001 - 0025

THE HIGH CONTRACTING PARTIES TO THE TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY,
CONSIDERING that the Kingdom of Spain and the Portuguese Republic, in becoming Members of the Community, undertook to accede to the Convention on the Law applicable to Contractual Obligations, opened for signature in Rome on 19 June 1980,
HAVE DECIDED to conclude this Convention, and to this end have designated as their plenipotentiaries:
HIS MAJESTY THE KING OF THE BELGIANS:
Melchior WATHELET,
Deputy Prime Minister, Minister for Justice and Economic Affairs
HER MAJESTY THE QUEEN OF DENMARK:
Michael BENDIK,
Minister for Justice
THE PRESIDENT OF THE FEDERAL REPUBLIC OF GERMANY:
Wolfgang HEYDE,
Ministerial Director in the Federal Ministry for Justice
THE PRESIDENT OF THE HELLENIC REPUBLIC:
Michalis PAPACONSTANTINOU,
Minister for Justice
HIS MAJESTY THE KING OF SPAIN:
Tomás DE LA QUADRA-SALCEDO Y FERNÁNDEZ DEL CASTILLO,
Minister for Justice
THE PRESIDENT OF THE FRENCH REPUBLIC:
Michel VAUZELLE,
Keeper of the Seals, Minister for Justice
THE PRESIDENT OF IRELAND:
Pádraig FLYNN,
Minister for Justice
THE PRESIDENT OF THE ITALIAN REPUBLIC:
Giovanni BATTISTINI,
Ambassador in Lisbon
HIS ROYAL HIGHNESS THE GRAND DUKE OF LUXEMBOURG:
Charles ELSEN,
First Councillor of the Government
HER MAJESTY THE QUEEN OF THE NETHERLANDS:
E. M. H. HIRSCH BALLIN,
Minister for Justice
THE PRESIDENT OF THE PORTUGUESE REPUBLIC:
Álvaro José BRILHANTE LABORINHO LÚCIO,
Minister for Justice
HER MAJESTY THE QUEEN OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND:
John Mark TAYLOR,
Parliamentary Under-Secretary of State for the Lord Chancellor's Department
WHO, meeting within the Council, having exchanged their full powers, found in good and due form,
HAVE AGREED AS FOLLOWS:

Article 1

The Kingdom of Spain and the Portuguese Republic hereby accede to the Convention on the Law applicable to Contractual Obligations, opened for signature in Rome on 19 June 1980.

Article 2

The Convention on the Law applicable to Contractual Obligations is hereby amended as follows:

1. Article 22 (2), Article 27 and the second sentence of Article 30 (3) shall be deleted;

2. the following shall be substituted for Article 31 (d):

'(d) communications made in pursuance of Articles 23, 24, 25, 26 and 30`.

Article 3

The Secretary-General of the Council of the European Communities shall transmit a certified copy of the Convention on the Law applicable to Contractual Obligations in the Danish, Dutch, English, French, German, Greek, Irish and Italian languages to the Governments of the Kingdom of Spain and the Portuguese Republic.

The text of the Convention on the Law applicable to Contractual Obligations in the Portuguese and Spanish languages is set out in Annexes I and II to this Convention. The texts drawn up in the Portuguese and Spanish languages shall be authentic under the same conditions as the other texts of the Convention on the Law applicable to Contractual Obligations.

Article 4

This Convention shall be ratified by the Signatory States. The instruments of ratification shall be deposited with the Secretary-General of the Council of the European Communities.

Article 5

This Convention shall enter into force, as between the States which have ratified it, on the first day of the third month following the deposit of the last instrument of ratification by the Kingdom of Spain or the Portuguese Republic and by one State which has ratified the Convention on the Law applicable to Contractual Obligations.

This Convention shall enter into force for each Contracting State which subsequently ratifies it on the first day of the third month following the deposit of its instrument of ratification.

Article 6

The Secretary-General of the Council of the European Communities shall notify the signatory States of:

(a) the deposit of each instrument of ratification

(b) the dates of entry into force of this Convention for the Contracting States.

Article 7

This Convention, drawn up in a single original in the Danish, Dutch, English, French, German, Greek, Irish, Italian, Portuguese and Spanish languages, all texts being equally authentic, shall be deposited in the archives of the General Secretariat of the Council of the European Communities. The Secretary-General shall transmit a certified copy to the Government of each Signatory State.

ANEXO I / BILAG I / ANHANG I / ÐÁÑÁÑÔÇÌÁ I / ANNEX I / ANNEXE I / IARSCRÍBHINN I / ALLEGATO I / BIJLAGE I / ANEXO I

CONVENIO Sobre la ley aplicable a las obligaciones contractuales abierto a la firma en Roma el 19 de junio de 1980

PREÁMBULO

LAS ALTAS PARTES CONTRATANTES DEL TRATADO CONSTITUTIVO DE LA COMUNIDAD ECONÓMICA EUROPEA,

PREOCUPADAS por proseguir, en el ámbito del Derecho internacional privado, la obra de unificación jurídica ya emprendida en la Comunidad, especialmente en materia de competencia judicial y de ejecución de resoluciones judiciales,

DESEANDO establecer unas normas uniformes relativas a la ley aplicable a las obligaciones contractuales,

HAN CONVENIDO LAS DISPOSICIONES SIGUIENTES:

TÍTULO I ÁMBITO DE APLICACIÓN

Artículo 1

Ámbito de aplicación

1. Las disposiciones del presente Convenio serán aplicables, en las situaciones que impliquen un conflicto de leyes, a las obligaciones contractuales.

2. N° se aplicarán:

a) al estado civil y a la capacidad de las personas físicas, sin perjuicio de lo dispuesto en el artículo 11;

b) a las obligaciones contractuales relativas a:

- los testamentos y sucesiones;

- los regímenes matrimoniales;

- los derechos y deberes derivados de relaciones de familia, de parentesco, de matrimonio o de afinidad, incluidas las obligaciones de dar alimentos respecto a los hijos no matrimoniales;

c) a las obligaciones derivadas de letras de cambio, cheques y pagarés, así como de otros instrumentos negociables en la medida en que las obligaciones surgidas de estos otros instrumentos se deriven de su carácter negociable;

d) a los convenios de arbitraje y de elección de foro;

e) a las cuestiones pertenecientes al Derecho de sociedades, asociaciones y personas jurídicas, tales como la constitución, la capacidad jurídica, el funcionamiento interno y la disolución de las sociedades, asociaciones y personas jurídicas, así como la responsabilidad personal legal de los socios y de los órganos por las deudas de la sociedad, asociación o persona jurídica;

f) a la cuestión de saber si un intermediario puede obligar frente a terceros a la persona por cuya cuenta pretende actuar, o si un órgano de una sociedad, de una asociación o una persona jurídica puede obligar frente a terceros a esta sociedad, asociación o persona jurídica;

g) a la constitución de trusts, a las relaciones que se creen entre quienes lo constituyen, los trusts y los beneficiarios;

h) a la prueba y al processo, sin perjuicio del artículo 14.

3. Las disposiciones del presente Convenio no se aplicarán a los contratos de seguros que cubran riesgos situados en los territorios de los Estados miembros de la Comunidad Económica Europea. Para determinar si un riesgo está situado en estos territorios, el juez aplicará su ley interna.

4. El apartado precedente no se refiere a los contratos de reaseguro.

Artículo 2

Carácter universal

La ley designada por el presente Convenio se aplicará incluso si tal ley es la de un Estado no contratante.

TÍTULO II NORMAS UNIFORMES

Artículo 3

Libertad de elección

1. Los contratos se regirán por la ley elegida por las partes. Esta elección deberá ser expresa o resultar de manera cierta de los términos del contrato o de las circunstancias del caso. Para esta elección, las partes podrán designar la ley aplicable a la totalidad o solamente a una parte del contrato.

2. Las partes podrán, en cualquier momento, convenir que se rija el contrato por una ley distinta de la que lo regía con anterioridad bien sea en virtud de una elección anterior según el presente artículo, o bien en virtud de otras disposiciones del presente Convenio. Toda modificación relativa a la determinación de la ley aplicable, posterior a la celebración del contrato, no obstará a la validez formal del contrato a efectos del artículo 9 y no afectará a los derechos de terceros.

3. La elección por las partes de una ley extranjera, acompañada o no de la de un tribunal extranjero, no podrá afectar, cuando todos los demás elementos de la situación estén localizados en el momento de esta elección en un solo país, a las disposiciones que la ley de ese país no permita derogar por contrato, denominadas en lo sucesivo «disposiciones imperativas».

4. La existencia y la validez del consentimiento de las Partes en cuanto a la elección de la ley aplicable se regirán por las disposiciones establecidas en los artículos 8, 9 y 11.

Artículo 4

Ley aplicable a falta de elección

1. En la medida en que la ley aplicable al contrato no hubiera sido elegida conforme a las disposiciones del artículo 3, el contrato se regirá por la ley del país con el que presente los vínculos más estrechos. N° obstante, si una parte del contrato fuera separable del resto del contrato y presenta una vinculación más estrecha con otro país, podrá aplicarse, con carácter excepcional, a esta parte del contrato la ley de este otro país.

2. Sin perjuicio del apartado 5, se presumirá que el contrato presenta los vínculos más estrechos con el país en que la parte que deba realizar la prestación característica tenga, en el momento de la celebración del contrato, su residencia habitual o, si se tratare de una sociedad, asociación o persona jurídica, su administración central. N° obstante, si el contrato se celebrare en el ejercicio de la actividad profesional de esta parte, este país será aquél en que esté situado su establecimiento principal o si, según el contrato, la prestación tuviera que ser realizada por un establecimiento distinto del establecimiento principal, aquél en que esté situado este otro establecimiento.

3. N° obstante lo dispuesto en el apartado 2, en la medida en que el contrato tenga por objeto un derecho real inmobiliario o un derecho de utilización de un inmueble, se presumirá que el contrato presenta los vínculos más estrechos con el país en que estuviera situado el inmueble.

4. El contrato de transporte de mercancías no estará sometido a la presunción del apartado 2. En este contrato, si el país en el que el transportista tiene su establecimiento principal en el momento de la celebración del contrato fuere también aquél en que esté situado el lugar de carga o de descarga o el establecimiento principal del expedidor, se presumirá que el contrato tiene sus vínculos más estrechos con este país. Para la aplicación del presente apartado, se considerarán como contratos de transporte de mercancías los contratos de fletamento para un solo viaje u otros contratos cuyo objeto principal sea el de realizar un transporte de mercancías.

5. N° se aplicará el apartado 2 cuando no pueda determinarse la prestación característica. Las presunciones de los apartados 2, 3 y 4 quedan excluidas cuando resulte del conjunto de circunstancias que el contrato presenta vínculos más estrechos con otro país.

Artículo 5

Contratos celebrados por los consumidores

1. El presente artículo se aplicará a los contratos que tengan por objeto el suministro de bienes muebles corporales o de servicios a una persona, el consumidor, para un uso que pueda ser considerado como ajeno a su actividad profesional, así como a los contratos destinados a la financiación de tales suministros.

2. Sin perjuicio de lo dispuesto en el artículo 3, la elección por las partes de la ley aplicable no podrá producir el resultado de privar al consumidor de la protección que le aseguren las disposiciones imperativas de la ley del país en que tenga su residencia habitual:

- si la celebración del contrato hubiera sido precedida, en ese país, por una oferta que le haya sido especialmente dirigida o por publicidad, y si el consumidor hubiera realizado en ese país los actos necesarios para la celebración del contrato, o

- si la otra parte contratante o su representante hubiera el encargo del consumidor en ese país, o

- si el contrato fuera una venta de mercancías y el consumidor se hubiera desplazado de este país a un país extranjero y allí hubiera realizado el encargo, siempre que el viaje hubiera sido organizado por el vendedor con la finalidad de incitar al consumidor a concluir una venta.

3. N° obstante lo dispuesto en el artículo 4, y en defecto de elección realizada conforme al artículo 3, estos contratos se regirán por la ley del país en que el consumidor su residencia habitual, si concurrieran las circunstancias descritas en el apartado 2 del presente artículo.

4. El presente artículo no se aplicará:

a) a los contratos de transporte;

b) a los contratos de suministro de servicios cuando los servicios deban prestarse al consumidor, exclusivamente, en un país distinto de aquél en que tenga su residencia habitual.

5. N° obstante lo dispuesto en el apartado 4, el presente artículo se aplicará a los contratos que, por un precio global, comprendan prestaciones combinadas de transporte y alojamiento.

Artículo 6

Contracto individual de trabajo

1. N° obstante lo dispuesto en el artículo 3, en el contrato de trabajo, la elección por las partes de la ley aplicable no podrá tener por resultado el privar al trabajador de la protección que le proporcionen las disposiciones imperativas de la ley que sería aplicable, a falta de elección, en virtud del apartado 2 del presente artículo.

2. N° obstante lo dispuesto en el artículo 4 y a falta de elección realizada de conformidad con el artículo 3, el contrato de trabajo se regirá:

a) por la ley del país en que el trabajador, en ejecución del contrato, realice habitualmente su trabajo, aun cuando, con carácter temporal, haya sido enviado a otro país, o

b) si el trabajador no realiza habitualmente su trabajo en un mismo país, por la ley del país en que se encuentre el establecimiento que haya contratado al trabajador,

a menos que, del conjunto de circunstancias, resulte que el contrato de trabajo tenga vínculos más estrechos con otro país, en cuyo caso será aplicable la ley de este otro país.

Artículo 7

Leyes de policía

1. Al aplicar, en virtud del presente Convenio, la ley de un país determinado, podrá darse efecto a las disposiciones imperativas de la ley de otro país con el que la situación presente un vínculo estrecho, si y en la medida en que, tales disposiciones, según el derecho de este último país, son aplicables cualquiera que sea la ley que rija el contrato. Para decidir si se debe dar efecto a estas disposiciones imperativas, se tendrá en cuenta su naturaleza y su objeto, así como las consecuencias que se derivarían de su aplicación o de su inaplicación.

2. Las disposiciones del presente Convenio no podrán afectar a la aplicación de las normas de la ley del país del juez que rijan imperativamente la situación, cualquiera que sea la ley aplicable al contrato.

Artículo 8

Consentimiento y validez de fondo

1. La existencia y la validez del contrato, o de cualquiera de sus disposiciones, estarán sometidas a la ley que sería aplicable en virtud del presente Convenio si el contrato o la disposición fueran válidos.

2. Sin embargo, para establecer que no ha dado su consentimiento, cualquiera de las partes podrá referirse a la ley del país en que tenga su residencia habitual si de las circunstancias resulta que no sería razonable determinar el efecto del comportamiento de tal parte según la ley prevista en el apartado precedente.

Artículo 9

Forma

1. Un contrato celebrado entre personas que se encuentren en un mismo país será válido en cuanto a la forma si reúne las condiciones de forma de la ley que lo rija en cuanto al fondo en virtud del presente Convenio o de la ley del país en el que se haya celebrado.

2. Un contrato celebrado entre personas que se encuentren en países diferentes será válido en cuanto a la forma si reúne las condiciones de forma de la ley que lo rija en cuanto al fondo en virtud del presente Convenio o de la ley de uno de estos países.

3. Cuando se celebre el contrato por medio de un representante, el país en el que se encuentre el representante en el momento de actuar será el que se considere para la aplicación de los apartados 1 y 2.

4. Un acto jurídico unilateral relativo a un contrato celebrado o por celebrar será válido en cuanto a la forma si reúne las condiciones de forma de la ley que rija o regirá el fondo del contrato en virtud del presente Convenio o de la ley del país en el que se efectúe dicho acto.

5. Las disposiciones de los apartados precedentes no se aplicarán a los contratos que entren en el ámbito de aplicación del artículo 5 celebrados en las circunstancias descritas en su apartado 2. La forma de estos contratos se regirá por la ley del país en el que tenga su residencia habitual el consumidor.

6. N° obstante lo dispuesto en los cuatro primeros apartados del presente artículo, todo contrato que tenga por objeto un derecho real inmobiliario o un derecho de utilización de un inmueble estará sometido, en cuanto a la forma, a las normas imperativas de la ley del país en que el inmueble esté sito, siempre que según esta ley sean aplicables independientemente del lugar de celebración del contrato y de la ley que lo rija en cuanto al fondo.

Artículo 10

Ámbito de la ley del contrato

1. La ley aplicable al contrato en virtud de los artículos 3 a 6 y del artículo 12 del presente Convenio regirá en particular:

a) su interpretación;

b) el cumplimiento de las obligaciones que genere;

c) dentro de los límites de los poderes atribuidos al tribunal por sus leyes procesales, las consecuencias del incumplimiento total o parcial de estas obligaciones, incluida la evaluación del daño en la medida en que la gobiernen normas jurídicas;

d) los diversos modos de extinción de las obligaciones, así como la prescripción y la caducidad basadas en la expiración de un plazo;

e) las consecuencias de la nulidad del contrato.

2. En lo que se refiere a las modalidades del cumplimiento y a las medidas que debe tomar al acreedor en caso de cumplimiento defectuoso, se tendrá en cuenta la ley del país donde tenga lugar el cumplimiento.

Artículo 11

Incapacidad

En los contratos celebrados entre personas que se encuentren en un mismo país, las personas físicas que gocen de capacidad de conformidad con la ley de ese país sólo podrán invocar su incapacidad resultante de otra ley si, en el momento de la celebración del contrato, la otra parte hubiera conocido tal incapacidad o la hubiera ignorado en virtud de imprudencia por su parte.

Artículo 12

Cesión de crédito

1. Las obligaciones entre el cedente y el cesionario de un crédito se regirán por la ley que, en virtud del presente Convenio, se aplique al contrato que les ligue.

2. La ley que rija el crédito cedido determinará el carácter transferible del mismo, las relaciones entre el cesionario y el deudor, las condiciones de oponibilidad de la cesión al deudor y el carácter liberatorio de la prestación hecha por el deudor.

Artículo 13

Subrogación

1. Cuando, en virtud de un contrato, una persona, el acreedor, tenga derechos con respecto a otra persona, el deudor, y un tercero tenga la obligación de satisfacer al acreedor o haya satisfecho, de hecho, al acreedor en ejecución de esa obligación, la ley aplicable a esta obligación del tercero determinará si éste puede ejercer en su totalidad o en parte los derechos que el acreedor tenía contra el deudor según la ley que rija sus relaciones.

2. La misma regla se aplicará cuando varias personas estén obligadas por la misma obligación contractual y el acreedor haya sido satisfecho por una de ellas.

Artículo 14

Prueba

1. La ley que rija el contrato en virtud del presente Convenio se aplicará en la medida en que, en materia de obligaciones contractuales, establezca presunciones legales o reparta la carga de la prueba.

2. Los actos jurídicos podrán ser acreditados por cualquier medio de prueba admitido bien por la ley

2. Los actos jurídicos podrán ser acreditados por cualquier medio de prueba admitido bien por la ley del foro, o bien por cualquiera de las leyes contempladas en el artículo 9, conforme a la cual el acto sea válido en cuanto a la forma, siempre que tal medio de prueba pueda ser empleado ante el tribunal que esté en conocimiento del asunto.

Artículo 15

Exclusión del reenvío

Cuando el presente Convenio prescriba la aplicación de la ley de un país, se entenderá por tal las normas jurídicas en vigor en ese país, con exclusión de las normas de Derecho internacional privado.

Artículo 16

Orden público

N° podrá excluirse la aplicación de una disposición de la ley designada por el presente Convenio salvo cuando sea manifiestamente incompatible con el orden público del foro.

Artículo 17

Aplicación en el tiempo

El Convenio se aplicará en cada Estado contratante a los contratos celebrados después de su entrada en vigor en tal Estado.

Artículo 18

Interpretación uniforme

Para la interpretación y la aplicación de las reglas uniformes que preceden, se tendrán en cuenta su carácter internacional y la conveniencia de conseguir que se interpreten y apliquen de manera uniforme.

Artículo 19

Sistemas no unificados

1. Cuando un Estado comprenda varias unidades territoriales y cada una de ellas tenga sus propias normas en materia de obligaciones contractuales, cada unidad territorial se considerará como un país para la determinación de la ley aplicable según el presente Convenio.

2. Un Estado cuyas diferentes unidades territoriales tengan sus propias normas jurídicas en materia de obligaciones contractuales no estará obligado a aplicar el presente Convenio a los conflictos de leyes que interesen únicamente a esas unidades territoriales.

Artículo 20

Prioridad del Derecho comunitario

El presente Convenio se entiende sin perjuicio de la aplicación de las disposiciones que, en materias específicas, regulen los conflictos de leyes en materia de obligaciones contractuales y que estén o estarán contenidas en los actos derivados de las instituciones de las Comunidades Europeas o en las legislaciones nacionales armonizadas en ejecución de estos actos.

Artículo 21

Relaciones con otros convenios

El presente Convenio no afectará a la aplicación de los convenios internacionales de los que un Estado contratante sea o pase a ser parte.

Artículo 22

Reservas

1. Cualquier Estado contratante, en el momento de la firma, de la ratificación, de la aceptación o de la aprobación, podrá reservarse el derecho de no aplicar:

a) el apartado 1 del artículo 7;

b) la letra e) del apartado 1 del artículo 10.

2. Cualquier Estado contratante podrá hacer igualmente, notificando una ampliación del Convenio de conformidad con el apartado 2 del artículo 27, una o varias de estas reservas con efecto limitado a los territorios o a ciertos territorios mencionados en la ampliación.

3. Cualquier Estado contratante podrá retirar, en cualquier momento, una reserva que hubiera efectuado; el efecto de la reserva cesará el primer día del tercer mes natural siguiente a la notificación de la retirada.

TÍTULO III CLÁUSULAS FINALES

Artículo 23

1. Si un Estado contratante, después de la fecha de entrada en vigor del presente Convenio con respecto a él, desease adoptar una nueva norma de conflicto de leyes para una categoría específica de contratos que entren en el ámbito de aplicación del convenio, comunicará su intención a los demás Estados signatarios por medio del secretario general del Consejo de las Comunidades Europeas.

2. En un plazo de seis meses a partir de la comunicación hecha al secretario general, cualquier Estado signatario podrá solicitar a éste que organice unas consultas entre Estados signatarios con el fin de llegar a un acuerdo.

3. Si, en este plazo, ningún Estado signatario hubiera solicitado la consulta, o si, en los dos años siguientes a la comunicación hecha al secretario general, no se hubiere llegado a ningún acuerdo como consecuencia de las consultas, el Estado contratante podrá modificar su derecho. La medida tomada por este Estado se pondrá en conocimiento de los demás Estados signatarios por mediación del secretario general del Consejo de las Comunidades Europeas.

Artículo 24

1. Si un Estado contratante, después de la fecha de entrada en vigor del presente Convenio con respecto a él, deseare formar parte de un convenio multilateral cuyo objeto principal, o uno de los objetos principales, fuera una regulación de Derecho internacional privado en una de las materias regidas por el presente Convenio, se aplicará el procedimento previsto en el artículo 23. N° obstante, el plazo de dos años, previsto en el apartado 3 del artículo 23, se reducirá a un año.

2. N° se seguirá el procedimiento previsto en el apartado precedente si un Estado contratante o una de las Comunidades Europeas ya fueran parte del convenio multilateral o si el objeto de éste fuera revisar un convenio del que fuera ya parte el Estado interesado o si se tratase de un convenio celebrado en el marco de los Tratados constitutivos de las Comunidades Europeas.

Artículo 25

Cuando un Estado contratante considere que la unificación realizada por el presente Convenio se ve comprometida por la celebración de acuerdos no previstos en el apartado 1 del artículo 24, este Estado podrá solicitar al secretario general del Consejo de las Comunidades Europeas que organice una consulta entre los Estados signatarios del presente Convenio.

Artículo 26

Cualquier Estado contratante podrá solicitar la revisión del presente Convenio. En tal caso, el presidente del Consejo de las Comunidades Europeas convocará una conferencia de revisión.

Artículo 27

1. El presente Convenio se aplicará en el territorio europeo de los Estados contratantes, comprendida Groenlandia, y en la totalidad del territorio de la República Francesa.

2. N° obstante lo dispuesto en el apartado 1:

a) el presente Convenio no se aplicará a las islas Feroe, salvo declaración en contrario del Reino de Dinamarca;

b) el presente Convenio no se aplicará a los territorios europeos situados fuera del Reino Unido y cuyas relaciones internacionales hubiera asumido éste, salvo declaración en contrario del Reino Unido para tal territorio;

c) el presente Convenio se aplicará a las Antillas neerlandesas, si el Reino de los Países Bajos hiciese una declaración en ese sentido.

3. Estas declaraciones podrán efectuarse en cualquier momento, mediante notificación al secretario general del Consejo de las Comunidades Europeas.

4. Los procesos de apelación interpuestos en el Reino Unido contra resoluciones de los tribunales situados en uno de los territorios mencionados en la letra b) del apartado 2 serán considerados como procesos que se desarrollan ante estos tribunales.

Artículo 28

1. El presente Convenio estará abierto a partir del 19 de junio de 1980 a la firma de los Estados partes del Tratado constitutivo de la Comunidad Económica Europea.

2. El presente Convenio será ratificado, aceptado o aprobado por los Estados signatarios. Los instrumentos de ratificación, de aceptación o de aprobación se depositarán ante la Secretaría General del Consejo de las Comunidades Europeas.

Artículo 29

1. El presente Convenio entrará en vigor el primer día del tercer mes siguiente al depósito del séptimo instrumento de ratificación, de aceptación o de aprobación.

2. El Convenio entrará en vigor, para cada Estado signatario que lo ratifique, acepte o apruebe con posterioridad, el primer día del tercer mes siguiente al depósito de su instrumento de ratificación, de aceptación o de aprobación.

Artículo 30

1. El Convenio tendrá una vigencia de diez años a partir de la fecha de su entrada en vigor conforme al apartado 1 del artículo 29, incluso para los Estados para los que entrase en vigor con posterioridad.

2. El Convenio será renovado tácitamente por períodos de cinco años, salvo denuncia.

3. La denuncia será notificada, al menos seis meses antes de la expiración del plazo de diez años o de cinco años, según los casos, al secretario general del Consejo de las Comunidades Europeas. Podrá limitarse esta denuncia a uno de los territorios a los que se hubiera extendido el Convenio en aplicación del apartado 2 del artículo 27.

4. La denuncia sólo tendrá efectos para el Estado que la hubiere notificado. El Convenio permanecerá vigente para los demás Estados contratantes.

Artículo 31

El secretario general del Consejo de las Comunidades Europeas notificará a los Estados partes del Tratado constitutivo de la Comunidad Económica Europea:

a) las firmas;

b) el depósito de cualquier instrumento de ratificación, aceptación o aprobación;

c) la fecha de entrada en vigor del presente Convenio;

d) las comunicaciones realizadas en aplicación de los artículos 23, 24, 25, 26, 27 y 30;

e) las reservas y retiradas de reservas mencionadas en el artículo 22.

Artículo 32

El Protocolo anexo al presente Convenio forma parte integrante del mismo.

Artículo 33

El presente Convenio, redactado en un ejemplar único en lenguas alemana, danesa, francesa, inglesa, irlandesa, italiana y neerlandesa, dando fe por igual todos los textos, se depositará en los archivos de la Secretaría General del Consejo de las Comunidades Europeas. El secretario general remitirá una copia autenticada conforme a cada uno de los Gobiernos de los Estados signatarios.

Til bekraeftelse heraf har undertegnede behoerigt befuldmaegtigede underskrevet denne konvention.

Zu Urkund dessen haben die hierzu gehoerig befugten Unterzeichneten ihre Unterschriften unter dieses UEbereinkommen gesetzt.

In witness whereof the undersigned, being duly authorized thereto, have signed this Convention.

En foi de quoi, les soussignés, dûment autorisés à cet effet, ont signé la présente convention.

Dá fhianú sin, shínigh na daoine seo thíos, arna n-údarú go cuí chuige sin, an Coinbhinsiún seo.

In fede di che, i sottoscritti, debitamente autorizzati a tal fine, hanno firmato la presente convenzione.

Ten blijke waarvan de ondergetekenden, daartoe behoorlijk gemachtigd, hun handtekening onder dit Verdrag hebben geplaatst.

Udfaerdiget i Rom, den nittende juni nitten hundrede og firs.

Geschehen zu Rom am neunzehnten Juni neunzehnhundertachtzig.

Done at Rome on the nineteenth day of June in the year one thousand nine hundred and eighty.

Fait à Rome, le dix-neuf juin mil neuf cent quatre-vingt.

Arna dhéanamh sa Róimh, an naoú lá déag de Mheitheamh sa bhliain míle naoi gcéad ochtó.

Fatto a Roma, addì diciannove giugno millenovecentottanta.

Gedaan te Rome, de negentiende juni negentienhonderd tachtig.

Pour le royaume de Belgique

Voor het Koninkrijk België

Paa Kongeriget Danmarks vegne

Fuer die Bundesrepublik Deutschland

Pour la République française

Thar ceann na hÉireann

Per la Repubblica italiana

Pour le grand-duché de Luxembourg

Voor het Koninkrijk der Nederlanden

For the United Kingdom of Great Britain and Northern Ireland

PROTOCOLO

Las Altas Partes Contratantes han acordado la disposición que sigue, que se incorporará como Anexo al Convenio:

N° obstante lo dispuesto en el Convenio, Dinamarca podrá conservar la disposición incluida en el artículo 169 de la «Soelov» (legislación marítima) relativo a la ley aplicable a las cuestiones sobre transporte marítimo de mercancías y podrá modificar esta disposición sin atenerse al procedimiento previsto en el artículo 23 del Convenio.

Til bekraeftelse heraf har undertegnede behoerigt befuldmaegtigede underskrevet denne protokol.

Zu Urkund dessen haben die hierzu gehoerig befugten Unterzeichneten ihre Unterschriften unter dieses Protokoll gesetzt.

In witness whereof the undersigned, being duly authorized thereto, have signed this Protocol.

En foi de quoi, les soussignés, dûment autorisés à cet effet, ont signé le présent protocole.

Dá fhianú sin, shínigh na daoine seo thíos, arna n-údarú go cuí chuige sin, an Prótacal seo.

In fede di che, i sottoscritti, debitamente autorizzati a tal fine, hanno firmato il presente protocollo.Ten blijke waarvan de ondergetekenden, daartoe behoorlijk gemachtigd, hun handtekening onder dit Protocol hebben geplaatst.

Udfaerdiget i Rom, den nittende juni nitten hundrede og firs.

Geschehen zu Rom am neunzehnten Juni neunzehnhundertachtzig.

Done at Rome on the nineteenth day of June in the year one thousand nine hundred and eighty.

Fait à Rome, le dix-neuf juin mil neuf cent quatre-vingt.

Arna dhéanamh sa Róimh, an naoú lá déag de Mheitheamh sa bhliain míle naoi gcéad ochtó.

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Per la Repubblica italiana

Pour le grand-duché de Luxembourg

Voor het Koninkrijk der Nederlanden

For the United Kingdom of Great Britain and Northern Ireland

DECLARACIÓN COMÚN

En el momento de proceder a la firma del Convenio sobre la ley aplicable a las obligaciones contractuales, los Gobiernos del Reino de Bélgica, del Reino de Dinamarca, de la República Federal de Alemania, de la República Francesa, de Irlanda, de la República Italiana, del Gran Ducado de Luxemburgo, del Reino de los Países Bajos, del Reino Unido de Gran Bretaña e Irlanda del Norte,

I. PREOCUPADOS por evitar, en toda la medida de lo posible la dispersión de las normas de conflictos de leyes en una multiplicidad de instrumentos y las divergencias entre tales reglas, desean que las instituciones de las Comunidades Europeas, en el ejercicio de sus competencias sobre la base de los Tratados que las han constituido, se esfuercen, cuando proceda, por adoptar normas de conflictos que, en lo posible, estén en armonía con las del Convenio;

II. DECLARAN su intención de proceder, desde la firma del Convenio y a la espera de quedar vinculadas por el artículo 24 del Convenio, a consultas recíprocas en el caso de que uno de los Estados firmantes desease formar parte de un convenio a que debiera aplicarse el procedimiento previsto en el citado artículo;

III. CONSIDERANDO la contribución del Convenio sobre la ley aplicable a las obligaciones contractuales a la unificación de las normas de conflictos en el seno de las Comunidades Europeas, expresan la opinión de que cualquier Estado que se convierta en miembro de las Comunidades Europeas debería adherirse a este Convenio.

Til bekraeftelse heraf har undertegnede behoerigt befuldmaegtigede underskrevet denne faelleserklaering.

Zu Urkund dessen haben die hierzu gehoerig befugten Unterzeichneten ihre Unterschriften unter diese gemeinsame Erklaerung gesetzt.

In witness whereof the undersigned, being duly authorized thereto, have signed this Joint Declaration.

En foi de quoi, les soussignés, dûment autorisés à cet effet, ont signé la présente déclaration commune.

Dá fhianú sin, shínigh na daoine seo thíos, arna n-údarú go cuí chuige sin, an Dearbhú Comhphaírteach seo.

In fede di che, i sottoscritti, debitamente autorizzati a tal fine, hanno firmato la presente dichiarazione comune.

Ten blijke waarvan de ondergetekenden, daartoe behoorlijk gemachtigd, hun handtekening onder

deze verklaring hebben geplaatst.

Udfaerdiget i Rom, den nittende juni nitten hundrede og firs.

Geschehen zu Rom am neunzehnten Juni neunzehnhundertachtzig.

Done at Rome on the nineteenth day of June in the year one thousand nine hundred and eighty.

Fait à Rome, le dix-neuf juin mil neuf cent quatre-vingt.

Arna dhéanamh sa Róimh, an naoú lá déag de Mheitheamh sa bhliain míle naoi gcéad ochtó.

Fatto a Roma, addì diciannove giugno millenovecentottanta.

Gedaan te Rome, de negentiende juni negentienhonderd tachtig.

Pour le gouvernment du royaume de Belgique

Voor de Regering van het Koninkrijk België

Paa Kongeriget Danmarks vegne

Fuer die Regierung der Bundesrepublik Deutschland

Pour le gouvernement de la République française

Thar ceann Rialtas na hÉireann

Per il governo della Repubblica italiana

Pour le gouvernement du grand-duché de Luxembourg

Voor de Regering van het Koninkrijk der Nederlanden

For the Government of the United Kingdom of Great Britain and Northern Ireland

ANEXO II / BILAG II / ANHANG II / ÐÁÑÁÑÔÇÌÁ ÉÉ / ANNEX II / ANNEXE II / IARSCRÍBHINN II / ALLEGATO II / BIJLAGE II / ANEXO II

CONVENÇÃO Sobre a lei aplicável às obrigações contratuais aberta à assinatura em Roma em 19 de Junho de 1980

PREÂMBULO

AS ALTAS PARTES CONTRATANTES NO TRATADO QUE INSTITUI A COMUNIDADE ECONÓMICA EUROPEIA,

PREOCUPADAS em prosseguir, no domínio do direito internacional privado, a obra de unificação jurídica já empreendida na Comunidade, nomeadamente em matéria de competência judiciária e de execução de decisões,

DESEJANDO estabelecer regras uniformes relativamente à lei aplicável às obrigações contratuais,

ACORDARAM NO SEGUINTE:

TÍTULO I ÂMBITO DE APLICAÇÃO

Artigo 1o.

Âmbito de aplicação

1. O disposto na presente convenção é aplicável às obrigações contratuais nas situações que impliquem um conflito de leis.

2. Não se aplica:

a) Ao estado e à capacidade das pessoas singulares, sem prejuízo do artigo 11o.;

b) Às obrigações contratuais relativas a:

- testamentos e sucessões por morte,

- regimes de bens no matrimónio,

- direitos e deveres decorrentes de relações de família, de parentesco, de casamento ou de afinidade, incluindo obrigações alimentares relativamente aos filhos nascidos fora do casamento;

c) Às obrigações decorrentes de letras, cheques, livranças, bem como de outros títulos negociáveis, na medida em que as obrigações surgidas desses outros títulos resultem do seu carácter negociável;

d) Às convenções de arbitragem e de eleição do foro;

e) Às convenções respeitantes ao direito das sociedades, associações e pessoas colectivas, tais como a constituição, a capacidade jurídica, o funcionamento interno e a dissolução das sociedades, associações e pessoas colectivas, bem como a responsabilidade pessoal legal dos associados e dos órgãos relativamente às dívidas da sociedade, associação ou pessoa colectiva;

f) À questão de saber se um intermediário pode vincular, em relação a terceiros, a pessoa por conta da qual pretende agir ou se um órgão de uma sociedade, de uma associação ou de uma pessoa colectiva pode vincular, em relação a terceiros, essa sociedade, associação ou pessoa colectiva;

g) À constituição de «trusts» e às relações entre os constituintes, os «trustees» e os beneficiários;

h) À prova e ao processo, sem prejuízo do artigo 14o.

3. O disposto na presente convenção não se aplica a contratos de seguro que cubram riscos situados nos territórios dos Estados-membros da Comunidade Económica Europeia. Para determinar se um risco se situa nestes territórios, o tribunal aplicará a sua lei interna.

4. O número anterior não se aplica aos contratos de resseguro.

Artigo 2o.

Carácter universal

A lei designada nos termos da presente convenção é aplicável, mesmo que essa lei seja de um Estado não contratante.

TÍTULO II REGRAS UNIFORMES

Artigo 3o.

Liberdade de escolha

1. O contrato rege-se pela lei escolhida pelas partes. Esta escolha deve ser expressa ou resultar de modo inequívoco das disposições do contrato ou das circunstâncias da causa. Mediante esta escolha, as partes podem designar a lei aplicável à totalidade ou apenas a uma parte do contrato.

2. Em qualquer momento, as partes podem acordar em sujeitar o contrato a uma lei diferente da que antecedentemente o regulava, quer por força de uma escolha anterior nos termos do presente artigo, quer por força de outras disposições da presente convenção. Qualquer modificação, quanto à determinação da lei aplicável, acorrida posteriormente à celebração do contrato, não afecta a validade formal do contrato, na acepção do disposto no artigo 9o., nem prejudica os direitos de terceiros.

3. A escolha pelas partes de uma lei estrangeira, acompanhada ou não da escolha de um tribunal estrangeiro, não pode, sempre que todos os outros elementos da situação se localizem num único país no momento dessa escolha, prejudicar a aplicação das disposições não derrogáveis por acordo, nos termos da lei desse país, e que a seguir se denominam por «disposições imperativas».

4. A existência e a validade do consentimento das partes, quanto à escolha da lei aplicável, são reguladas pelo disposto nos artigos 8o. 9o.e 11o.

Artigo 4o.

Lei aplicável na falta de escolha

1. Quando a lei aplicável ao contrato não tiver sido escolhida nos termos do artigo 3o., o contrato é regulado pela lei do país com o qual apresente uma conexão mais estreita. Todavia, se uma parte do contrato for separável do resto do contrato e apresentar uma conexão mais estreita com um outro país, a essa parte poderá aplicar-se, a título excepcional, a lei desse outro país.

2. Sem prejuízo do disposto no no. 5, presume-se que o contrato apresenta uma conexão mais estreita com o país onde a parte que está obrigada a fornecer a prestação característica do contrato tem, no momento da celebração do contrato, a sua residência habitual ou, se se tratar de uma sociedade, associação ou pessoa colectiva, a sua administração central. Todavia, se o contrato for celebrado no exercício da actividade económica ou profissional dessa parte, o país a considerar será aquele em que se situa o seu estabelecimento principal ou, se, nos termos do contrato, a prestação deverá ser fornecida por estabelecimento diverso do estabelecimento principal, o da situação desse estabelecimento.

3. Quando o contrato tiver por objecto um direito real sobre um bem imóvel, ou um direito de uso de um bem imóvel, presume-se, em derrogação do disposto no no. 2, que o contrato apresenta uma conexão mais estreita com o país onde o imóvel se situa.

4. A presunção do no. 2 não é admitida quanto ao contrato de transporte de mercadorias. Presume-se que este contrato apresente uma conexão mais estreita com o país em que, no momento da celebração do contrato, o transportador tem o seu estabelecimento principal, se o referido país coincidir com aquele em que se situa o lugar da carga ou da descarga ou do estabelecimento principal do expedidor. Para efeitos de aplicação do presente número, são considerados como contratos de transporte de mercadorias os contratos de fretamento relativos a uma única viagem ou outros contratos que tenham por objecto principal o transporte de mercadorias.

5. O disposto no no. 2 não se aplica se a prestação característica não puder ser determinada. As presunções dos no.s 2, 3 e 4 não serão admitidas sempre que resulte do conjunto das circunstâncias, que o contrato apresenta uma conexão mais estreita com outro país.

Artigo 5o.

Contratos celebrados por consumidores

1. O presente artigo aplica-se aos contratos que tenham por objecto o fornecimento de bens móveis corpóreos ou de serviços a uma pessoa, o «consumidor», para uma finalidade que pode considerar-se estranha à sua actividade profissional, bem como aos contratos destinados ao financiamento desse fornecimento.

2. Não obstante o disposto no artigo 3o., a escolha pelas partes da lei aplicável não pode ter como consequência privar o consumidor da protecção que lhe garantem as disposições imperativas da lei do país em que tenha a sua residência habitual:

- se a celebração do contrato tiver sido precedida, nesse país, de uma proposta que lhe foi especialmente dirigida ou de anúncio publicitário e se o consumidor tiver executado nesse país todos os actos necessários à celebração do contrato ou

- se a outra parte ou o respectivo representante tiver recebido o pedido do consumidor nesse país ou

- se o contrato consistir numa venda de mercadorias e o consumidor se tiver deslocado desse país a um outro país e aí tiver feito o pedido, desde que a viagem tenha sido organizada pelo vendedor com o objectivo de incitar o consumidor a comprar.

3. Não obstante o disposto no artigo 4o. e na falta de escolha feita nos termos do artigo 3o., esses contratos serão regulados pela lei do país em que o consumidor tiver a sua residência habitual, se se verificarem as circunstâncias referidas no no. 2 do presente artigo.

4. O presente artigo, não se aplica:

a) Ao contrato de transporte;

b) Ao contrato de prestação de serviços quando os serviços devidos ao consumidor devam ser prestados exclusivamente num país diferente daquele em que este tem a sua residência habitual.

5. Em derrogação do disposto no no. 4, o presente artigo aplica-se ao contrato que estabeleça, por um preço global, prestações combinadas de transporte e de alojamento.

Artigo 6o.

Contrato individual de trabalho

1. Sem prejuízo do disposto no artigo 3o., a escolha pelas partes da lei aplicável ao contrato de trabalho, não pode ter como consequência privar o trabalhador da protecção que lhe garantem as disposições imperativas da lei que seria aplicável, na falta de escolha, por força do no. 2 do presente artigo.

2. Não obstante o disposto no artigo 4o. e na falta de escolha feita nos termos do artigo 3o., o contrato de trabalho é regulado:

a) Pela lei do país em que o trabalhador, no cumprimento do contrato, presta habitualmente o seu trabalho, mesmo que tenha sido destacado temporariamente para outro país, ou

b) Se o trabalhador não prestar habitualmente o seu trabalho no mesmo país, pela lei do país em que esteja situado o estabelecimento que contratou o trabalhador,

a não ser que resulte do conjunto das circunstâncias que o contrato de trabalho apresenta uma conexão mais estreita com um outro país, sendo em tal caso aplicável a lei desse outro país.

Artigo 7o.

Disposições imperativas

1. Ao aplicar-se, por força da presente convenção, a lei de um determinado país, pode ser dada prevalência às disposições imperativas da lei de outro país com o qual a situação apresente uma conexão estreita se, e na medida em que, de acordo com o direito deste último país, essas disposições forem aplicáveis, qualquer que seja a lei reguladora do contrato. Para se decidir se deve ser dada prevalência a estas disposições imperativas, ter-se-á em conta a sua natureza e o seu objecto, bem como as consequências que resultariam da sua aplicação ou da sua não aplicação.

2. O disposto na presente convenção não pode prejudicar a aplicação das regras do país do foro que regulem imperativamente o caso concreto, independentemente da lei aplicável ao contrato.

Artigo 8o.

Existência e validade substancial

1. A existência e a validade do contrato ou de uma disposição deste, estão sujeitas à lei que seria aplicável, por força da presente convenção, se o contrato ou a disposição fossem válidos.

2. Todavia, um contraente, para demonstrar que não deu o seu acordo, pode invocar a lei do país em que tenha a sua residência habitual, se resultar das circunstâncias que não seria razoável que o valor do comportamento desse contraente fosse determinado pela lei prevista no número anterior.

Artigo 9o.

Requisitos de forma

1. Um contrato celebrado entre pessoas que se encontram no mesmo país é formalmente válido desde que preencha os requisitos de forma prescritos pela lei reguladora da substância, aplicável por força da presente convenção ou da lei do país em que foi celebrado.

2. Um contrato celebrado entre pessoas que se encontram em países diferentes é formalmente válido, desde que preencha os requisitos de forma prescritos pela lei reguladora da substância, aplicável por força da presente convenção ou da lei de um desses países.

3. Quando o contrato é celebrado por um representante, o país a tomar em consideração para efeitos de aplicação dos dos no.s 1 e 2, é o país em que os poderes representativos são exercidos.

4. Um acto jurídico unilateral relativo a um contrato celebrado ou a celebrar é formalmente válido, desde que preencha os requisitos de forma prescritos pela lei que regular a substância do contrato, aplicável por força da presente convenção ou da lei do país em que esse acto é praticado.

5. O disposto nos números anteriores não se aplica aos contratos que caem no âmbito de aplicação do artigo 5o., celebrados nas circunstâncias enunciadas no no. 2 desse artigo. A forma desses contratos é regulada pela lei do país em que o consumidor tem a sua residência habitual.

6. Em derrogação do disposto nos no.s 1 a 4, qualquer contrato que tenha por objecto um direito real sobre um imóvel ou um direito de uso de um imóvel está sujeito, quanto à forma, às disposições imperativas da lei do país em que o imóvel está situado, desde que, nos termos desta lei, essas regras se apliquem independentemente do lugar de celebração e da lei reguladora da substância do contrato.

Artigo 10o.

Âmbito de aplicação da lei do contrato

1. A lei aplicável ao contrato por força dos artigos 3o. a 6o. e do artigo 12o. da presente convenção, regula, nomeadamente:

a) A sua interpretação;

b) O cumprimento das obrigações dele decorrentes;

b) O cumprimento das obrigações dele decorrentes;

c) Nos limites dos poderes atribuídos ao tribunal pela respectiva lei do processo, as consequências do incumprimento total ou parcial dessas obrigações, incluindo a avaliação do dano, na medida em que esta seja regulada pela lei;

d) As diversas causas de extinção das obrigações, bem como a prescrição e a caducidade fundadas no decurso de um prazo;

e) As consequências da invalidade do contrato.

2. Quanto aos modos de cumprimento e às medidas que o credor deve tomar no caso de cumprimento defeituoso, atender-se-á à lei do país onde é cumprida a obrigação.

Artigo 11o.

Incapacidade

Num contrato celebrado entre pessoas que se encontram no mesmo país, uma pessoa singular considerada capaz segundo a lei desse país só pode invocar a sua incapacidade que resulte de uma outra lei se, no momento da celebração do contrato, o outro contraente tinha conhecimento dessa incapacidade ou a desconhecia por imprudência da sua parte.

Artigo 12o.

Cessão de créditos

1. As obrigações entre o cedente e o cessionário de um crédito são reguladas pela lei que, por força da presente convenção, for aplicável ao contrato que os liga.

2. A lei que regula o crédito cedido determina a natureza cedível deste, as relações entre o cessionário e o devedor, as condições de oponibilidade da cessão ao devedor e a natureza liberatória da prestação feita pelo devedor.

Artigo 13o.

Sub-rogação

1. Sempre que, por força de um contrato, uma pessoa, o «credor», tenha direitos relativamente a outra pessoa, o «devedor» e um terceiro tenha a obrigação de satisfazer o direito do credor, ou ainda, se o terceiro tiver realizado a prestação devida em cumprimento dessa obrigação, a lei aplicável a esta obrigação do terceiro determina se este pode exercer, no todo ou em parte, os direitos do credor contra o devedor, segundo a lei que regula as suas relações.

2. A mesma regra aplica-se quando várias pessoas estão adstritas à mesma obrigação contratual e o credor tenha sido satisfeito por uma delas.

Artigo 14o.

Prova

1. A lei que regula o contrato, por força da presente convenção, aplica-se na medida em que, em matéria de obrigações contratuais, estabeleça presunções legais ou reparta o ónus da prova.

2. Os actos jurídicos podem ser provados mediante qualquer meio de prova admitido, quer pela lei do foro quer por uma das leis referidas no artigo 9o., segundo a qual o acto seja formalmente válido, desde que a prova possa ser produzida desse modo no tribunal a que a causa foi submetida.

Artigo 15o.

Exclusão do reenvio

Por aplicação da lei de um país determinado pela presente convenção entende-se a aplicação das normas de direito em vigor nesse país, com exclusão das normas de direito internacional privado.

Artigo 16o.

Ordem pública

A aplicação de uma disposição da lei designada pela presente convenção só pode ser afastada se essa aplicação for manifestamente incompatível com a ordem pública do foro.

Artigo 17o

Artigo 17o.

Aplicação no tempo

A convenção aplica-se num Estado contratante aos contratos celebrados após a sua entrada em vigor nesse Estado.

Artigo 18o.

Interpretação uniforme

Na interpretação e aplicação das regras uniformes que antecedem, deve ser tido em conta o seu carácter international e a conveniência de serem interpretadas e aplicadas de modo uniforme.

Artigo 19o.

Ordenamentos jurídicos plurilegislativos

1. Sempre que um Estado englobe várias unidades territoriais, tendo cada uma as suas regras próprias em matéria de obrigações contratuais, cada unidade territorial é considerada como um país, para fins de determinação da lei aplicável por força da presente convenção.

2. Um Estado, em que diferentes unidades territoriais tenham as suas regras de direito próprias em matéria de obrigações contratuais, não será obrigado a aplicar a presente convenção aos conflitos de leis que respeitem exclusivamente a essas unidades territoriais.

Artigo 20o.

Primado do direito comunitário

A presente convenção não prejudica a aplicação das disposições que, em matérias especiais, regulam os conflitos de leis em matéria de obrigações contratuais e que são ou venham a ser estabelecidas em actos das instituições das Comunidades Europeias ou nas legislações nacionais harmonizadas em execução desses actos.

Artigo 21o.

Relações com outras convenções

A presente convenção não prejudica a aplicação das convenções internacionais de que um Estado contratante seja ou venha a ser parte.

Artigo 22o.

Reservas

1. Qualquer Estado contratante pode, no momento da assinatura, da ratificação, da aceitação ou da aprovação reservar-se o direito de não aplicar:

a) O no. 1 do artigo 7o.;

b) O no. 1, alínea e), do artigo 10o.

2. Qualquer Estado contratante pode igualmente, ao notificar a extensão da Convenção, nos termos do no. 2 do artigo 27o., fazer uma ou várias destas reservas, com efeito limitado aos territórios ou a alguns dos territórios abrangidos pela extensão.

3. Qualquer Estado contratante pode, em qualquer momento, retirar uma reserva que tenha feito; o efeito da reserva cessará no primeiro dia do terceiro mês do calendário após a notificação da retirada da reserva.

TÍTULO III DISPOSIÇÕES FINAIS

Artigo 23o.

1. Se um Estado contratante, após a data de entrada em vigor da presente convenção no que a ele se refere, desejar adoptar uma nova norma de conflito de leis relativamente a uma categoria especial de contratos abrangidos pela convenção, comunicará a sua intenção aos outros Estados signatários, através do secretário-geral do Conselho das Comunidades Europeias.

2. N° prazo de seis meses a contar da data da comunicação feita ao secretário-geral, qualquer Estado signatário pode pedir àquele que organize consultas entre os Estados signatários de modo a

chegarem a um acordo.

3. Se, nesse prazo, nenhum Estado signatário tiver pedido consultas ou se, nos dois anos seguintes à comunicação feita ao secretário-geral, não se tiver chegado a nenhum acordo no seguimento das consultas, o Estado contratante pode modificar o seu direito. As medidas tomadas por esse Estado serão levadas ao conhecimento dos outros Estados signatários, através do secretário-geral do Conselho das Comunidades Europeias.

Artigo 24o.

1. Se um Estado contratante, após a data de entrada em vigor da presente convenção no que a ele se refere, desejar ser parte numa convenção multilateral, cujo objecto principal ou um dos objectos principais seja o estabelecimento de normas de direito internacional privado relativamente a uma das matérias reguladas pela presente convenção, aplicar-se-á o procedimento previsto no artigo 23o. Todavia, o prazo de dois anos, previsto no no. 3 do artigo 23o., será reduzido para um ano.

2. Não é necessário observar o procedimento previsto no número anterior se um Estado contratante ou uma das Comunidades Europeias já for parte na convenção multilateral ou se o seu objecto for a revisão de uma convenção de que o Estado interessado seja parte ou se se tratar de uma convenção concluída na âmbito dos Tratados que instituem as Comunidades Europeias.

Artigo 25o.

Se um Estado contratante considerar que a unificação realizada pela presente convenção é comprometida pela conclusão de acordos não previstos no no. 1 do artigo 24o., esse Estado pode pedir ao secretário-geral do Conselho das Comunidades Europeias que organize consultas entre os Estados signatários da presente convenção.

Artigo 26o.

Qualquer Estado contratante pode pedir a revisão da presente convenção. Nesse caso, será convocada uma conferência de revisão pelo presidente do Conselho das Comunidades Europeias.

Artigo 27o.

1. A presente convenção aplica-se ao território europeu dos Estados contratantes, incluindo a Gronelândia, e a todo o território da República Francesa.

2. Em derrogação do disposto no no.1:

a) A presente convenção não se aplica às ilhas Faroé, salvo declaração em contrário de Reino da Dinamarca;

b) A presente convenção não se aplica aos territórios europeus situados fora do Reino Unido e cujas relações internacionais sejam asseguradas pelo Reino Unido, salvo declaração em contrário do Reino Unido em relação a qualquer um desses territórios;

c) A presente convenção não se aplica às Antilhas Neerlandesas, se o Reino dos Países Baixos fizer uma declaração nesse sentido.

3. Estas declarações podem ser feitas em qualquer momento mediante notificação ao secretário-geral do Conselho das Comunidades Europeias.

4. Os processos de recurso interpostos no Reino Unido de decisões proferidas por tribunais situados num dos territórios indicados na alínea b) do no. 2 serão considerados como processos pendentes nesses tribunais.

Artigo 28o.

1. A presente convenção estará aberta à assinatura dos Estados partes no Tratado que institui a Comunidade Económica Europeia, a partir de 19 de Junho de 1980.

2. A presente convenção será ratificada, aceite ou aprovada pelos Estados signatários. Os instrumentos de ratificação, de aceitação ou de aprovação serão depositados junto do Secretariado-Geral do Conselho das Comunidades Europeias.

Artigo 29o.

1. A presente convenção entrará em vigor no primeiro dia do terceiro mês seguinte ao do depósito do sétimo instrumento de ratificação, de aceitação ou de aprovação.

2. A presente convenção entrará em vigor relativamente a cada Estado signatário que a ratifique, aceite ou aprove posteriormente, no primeiro dia do terceiro mês seguinte ao do depósito do seu

instrumento de ratificaçao, de aceitaçao ou de aprovaçao.

Artigo 30o.

1. A presente convenção terá um período de vigência de dez anos a partir da data da sua entrada em vigor, nos termos do no. 1 do artigo 29o., mesmo relativamente aos Estados em que entre posteriormente em vigor.

2. A convenção será renovada tacitamente de cinco em cinco anos, salvo denúncia.

3. A denúncia deve ser notificada, pelo menos, seis meses antes de decorrido o prazo de dez anos ou de cinco anos, conforme o caso, ao secretário-geral do Conselho das Comunidades Europeias. A denúncia pode ser limitada a um dos territórios a que a convenção se tenha tornado extensiva, por aplicação do no. 2 do artigo 27o.

4. A denúncia só terá efeito em relação ao Estado que a tenha notificado. A convenção manter-se-á em vigor relativamente aos outros Estados contratantes.

Artigo 31o.

O secretário-geral do Conselho das Comunidades Europeias notificará os Estados partes no Tratado que institui a Comunidade Económica Europeia:

a) Das assinaturas;

b) Do depósito de qualquer instrumento de ratificação, de aceitação ou de aprovação;

c) Da data de entrada em vigor da presente convenção;

d) Das comunicações feitas em aplicação dos artigos 23o., 24o., 25o., 26o., 27o. e 30o.;

e) Das reservas e das retiradas de reservas referidas no artigo 22o.

Artigo 32o.

O protocolo anexo à presente convenção faz dela parte integrante.

Artigo 33o.

A presente convenção, redigida num único exemplar nas línguas alemã dinamarquesa, francesa, inglesa, irlandesa, italiana e neerlandesa, fazendo fé qualquer dos textos, será depositada nos arquivos do Secretariado-Geral do Conselho das Comunidades Europeias. O secretário-geral remeterá uma cópia autenticada da presente convenção a cada um dos Governos dos Estados signatários.

Til bekraeftelse heraf har undertegnede behoerigt befuldmaegtigede underskrevet denne konvention.

Zu Urkund dessen haben die hierzu gehoerig befugten Unterzeichneten ihre Unterschriften unter dieses UEbereinkommen gesetzt.

In witness whereof the undersigned, being duly authorized thereto, have signed this Convention.

En foi de quoi, les soussignés, dûment autorisés à cet effet, ont signé la présente convention.

Dá fhianú sin, shínigh na daoine seo thíos, arna n-údarú go cuí chuige sin, an Coinbhinsiún seo.

In fede di che, i sottoscritti, debitamente autorizzati a tal fine, hanno firmato la presente convenzione.

Ten blijke waarvan de ondergetekenden, daartoe behoorlijk gemachtigd, hun handtekening onder dit Verdrag hebben geplaatst.

Udfaerdiget i Rom, den nittende juni nitten hundrede og firs.

Geschehen zu Rom am neunzehnten Juni neunzehnhundertachtzig.

Done at Rome on the nineteenth day of June in the year one thousand nine hundred and eighty.

Fait à Rome, le dix-neuf juin mil neuf cent quatre-vingt.

Arna dhéanamh sa Róimh, an naoú lá déag de Mheitheamh sa bhliain míle naoi gcéad ochtó.

Fatto a Roma, addì diciannove giugno millenovecentottanta.

Fatto a Roma, addì diciannove giugno millenovecentottanta.

Gedaan te Rome, de negentiende juni negentienhonderd tachtig.

Pour le royaume de Belgique

Voor het Koninkrijk België

Paa Kongeriget Danmarks vegne

Pour la République française

Thar ceann na hÉireann

Per la Repubblica italiana

Pour le grand-duché de Luxembourg

Voor het Koninkrijk der Nederlanden

For the United Kingdom of Great Britain and Northern Ireland

PROTOCOLO

As altas partes contratantes acordaram na disposição seguinte que vem anexa à convenção.

Em derrogação do disposto na convenção, a Dinamarca pode manter em aplicação o disposto no artigo 169o. da «Soloven» (legislação marítima) respeitante à lei aplicável em matéria de transporte de mercadorias por via marítima e pode modificar esta disposição sem ter de observar o procedimento previsto no artigo 23o. da convenção.

Til bekraeftelse heraf har undertegnede behoerigt befuldmaegtigede underskrevet denne protokol.

Zu Urkund dessen haben die hierzu gehoerig befugten Unterzeichneten ihre Unterschriften unter dieses Protokoll gesetzt.

In witness whereof the undersigned, being duly authorized thereto, have signed this Protocol.

En foi de quoi, les soussignés, dûment autorisés à cet effet, ont signé le présent protocole.

Dá fhianú sin, shínigh na daoine seo thíos, arna n-údarú go cuí chuige sin, an Prótacal seo.

In fede di che, i sottoscritti, debitamente autorizzati a tal fine, hanno firmato il presente protocollo.

Ten blijke waarvan de ondergetekenden, daartoe behoorlijk gemachtigd, hun handtekening onder dit Protocol hebben geplaatst.

Undfaerdiget i Rom, den nittende juni nitten hundrede og firs.

Geschehen zu Rom am neunzehnten Juni neunzehnhundertachtzig.

Done at Rome on the nineteenth day of June in the year one thousand nine hundred and eighty.

Fait à Rome, le dix-neuf juin mil neuf cent quatre-vingt.

Arna dhéanamh sa Róimh, an naoú lá déag de Mheitheamh sa bhliain míle naoi gcéad ochtó.

Fatto a Roma, addí diciannove giugno millenovecentottanta.

Gedaan te Rome, de negentiende juni negentienhonderd tachtig.

Pour le royaume de Belgique

Voor het Koninkrijk België

Paa Kongeriget Danmarks vegne

Fuer die Bundesrepublik Deutschland

Pour la République française

Thar ceann na hEireann

Pour le grand-duché de Luxembourg

Voor het Koninkrijk der Nederlanden

For the United Kingdom of Great Britain and Northern Ireland

DECLARAÇÃO COMUM

Aquando da assinatura da Convenção sobre a lei aplicável às obrigações contratuais os governos do Reino da Bélgica, do Reino da Dinamarca, da República Italiana, do Grão-Ducado do Luxemburgo, do Reino dos Países Baixos e do Reino Unido da Grã-Bretanha e da Irlanda do Norte,

I. PREOCUPADOS em evitar, tanto quanto possível, a dispersão das normas de conflitos de leis entre múltiplos instrumentos e as divergências entre estas normas, desejam que as instituições das Comunidades Europeias, no exercício das suas competências, com base nos Tratados que as instituiu, se esforcem, sempre que necessário, por adoptar normas de conflitos que estejam, tanto quanto possível, em concordância com as da convenção;

II. DECLARAM a sua intenção de proceder, imediatamente após a assinatura da convenção e enquanto não estão vinculados pelo artigo 24o. da convenção, a consultas recíprocas no caso de um dos Estados signatários desejar ser parte numa convenção à qual se aplicaria o procedimento previsto no referido artigo;

III. CONSIDERANDO a contribuição da Convenção sobre a lei aplicável às obrigações contratuais para a unificação das normas de conflitos nas Comunidades Europeias, expressam a opinião de que qualquer Estado que se torne membro das Comunidades Europeias deveria aderir a esta convenção.

Til bekraeftelse heraf har undertegnede behoerigt befuldmaegtigede underskrevet denne faelleserklaering.

Zu Urkund dessen haben die hierzu gehoerig befugten Unterzeichneten ihre Unterschriften unter diese gemeinsame Erklaerung gesetzt.

In witness whereof the undersigned, being duly authorized thereto, have signed this Joint Declaration.

En foi de quoi, les soussignés, dûment autorisés à cet effet, ont signé la présente déclaration commune.

Dá fhianú sin, shínigh na daoine seo thíos arna n-údarú go cuí chuige sin, an Dearbhú Comhphaírteach seo.

In fede di che, i sottoscritti, debitamente autorizzati a tal fine, hanno firmato la presente dichiarazione comune.

Ten blijke waarvan de ondergetekenden, daartoe behoorlijk gemachtigd, hun handtekening onder deze Verklaring hebben geplaatst.

Udfaerdiget i Rom, den nittende juni nitten hundrede og firs.

Geschehen zu Rom am neunzehnten Juni neunzehnhundertachtzig.

Done at Rome on the nineteenth day of June in the year one thousand nine hundred and eighty.

Fait à Rome, le dix-neuf juin mil neuf cent quatre-vingt.

Arna dhéanamh sa Róimh, an naoú lá déag de Mheitheamh sa bhliain míle naoi gcéad ochtó.

Fatto a Roma, addì diciannove giugno millenovecentottanta.

Gedaan te Rome, de negentiende juni negentienhonderd tachtig.

Pour le gouvernment du royaume de Belgique

Voor de Regering van het Koninkrijk België

Paa Kongeriget Danmarks vegne

Fuer die Regierung der Bundesrepublik Deutschland

Pour le gouvernement de la République française

Thar ceann Rialtas na hEireann

Per il governo della Repubblica italiana

Pour le gouvernement du grand-duché de Luxembourg

Voor de Regering van het Koninkrijk der Nederlanden

For the Government of the United Kingdom of Great Britain and Northern Ireland

Text of the AFS acession convention

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Convention on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the Convention on the Law applicable to Contractual Obligations, opened for signature in Rome on 19 June 1980, and to the First and Second Protocols on its interpretation by the Court of Justice (97/C 15/02)

Official Journal C 015 , 15/01/1997 p. 0010 - 0015

THE HIGH CONTRACTING PARTIES TO THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY,
CONSIDERING that the Republic of Austria, the Republic of Finland and the Kingdom of Sweden, in becoming Members of the European Union, undertook to accede to the Convention on the Law applicable to Contractual Obligations, opened for signature in Rome on 19 June 1980, and to the First and Second Protocols on its interpretation by the Court of Justice,
HAVE AGREED AS FOLLOWS:

TITLE I General provisions

Article 1

The Republic of Austria, the Republic of Finland and the Kingdom of Sweden hereby accede to:

(a) the Convention on the Law applicable to Contractual Obligations, opened for signature in Rome on 19 June 1980, hereinafter referred to as 'the Convention of 1980`, as it stands following incorporation of all the adjustments and amendments made thereto by:
- the Convention signed in Luxembourg on 10 April 1984, hereinafter referred to as 'the Convention of 1984`, on the accession of the Hellenic Republic to the Convention on the Law applicable to Contractual Obligations,
- the Convention signed in Funchal on 18 May 1992, hereinafter referred to as 'the Convention of 1992`, on the accession of the Kingdom of Spain and the Portuguese Republic to the Convention on the Law applicable to Contractual Obligations;

(b) the First Protocol, signed on 19 December 1988, hereinafter referred to as 'the First Protocol of 1988`, on the interpretation by the Court of Justice of the European Communities of the Convention on the Law applicable to Contractual Obligations;

(c) the Second Protocol, signed on 19 December 1988, hereinafter referred to as 'the Second Protocol of 1988`, conferring on the Court of Justice of the European Communities certain powers to interpret the Convention on the Law applicable to Contractual Obligations.

TITLE II

Adjustments to the Protocol annexed to the Convention of 1980

Article 2

The Protocol annexed to the Convention of 1980 is hereby replaced by the following:
'Notwithstanding the provisions of the Convention, Denmark, Sweden and Finland may retain national provisions concerning the law applicable to questions relating to the carriage of goods by sea and may amend such provisions without following the procedure provided for in Article 23 of the Convention of Rome. The national provisions applicable in this respect are the following:
- in Denmark, paragraphs 252 and 321 (3) and (4) of the "Soelov" (maritime law),
- in Sweden, Chapter 13, Article 2 (1) and (2), and Chapter 14, Article 1 (3), of "sjoelagen" (maritime law),
- in Finland, Chapter 13, Article 2 (1) and (2), and Chapter 14, Article 1 (3), of "merilaki"/"sjoelagen" (maritime law).`

TITLE III

Adjustments to the First Protocol of 1988

Article 3

The following indents shall be inserted in Article 2 (a) of the First Protocol of 1988:
(a) between the 10th and 11th indents:
'- in Austria:
the Oberste Gerichtshof, the Verwaltungsgerichtshof and the Verfassungsgerichtshof,`;
(b) between the 11th and 12th indents:
'- in Finland:
korkein oikeus/hoegsta domstolen, korkein hallinto-oikeus/hoegsta foervaltningsdomstolen, markkinatuomioistuin/marknadsdomstolen and tyoetuomioistuin/arbetsdomstolen,
- in Sweden:
Hoegsta domstolen, Regeringsraetten, Arbetsdomstolen and Marknadsdomstolen,`.

TITLE IV

Final provisions

Article 4

1. The Secretary-General of the Council of the European Union shall transmit a certified copy of the Convention of 1980, the Convention of 1984, the First Protocol of 1988, the Second Protocol of 1988 and the Convention of 1992 in the Danish, Dutch, English, French, German, Greek, Irish, Italian, Spanish and Portuguese languages to the Governments of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden.

2. The text of the Convention of 1980, the Convention of 1984, the First Protocol of 1988, the Second Protocol of 1988 and the Convention of 1992 in the Finnish and Swedish languages shall be authentic under the same conditions as the other texts of the Convention of 1980, the Convention of 1984, the First Protocol of 1988, the Second Protocol of 1988 and the Convention of 1992.

Article 5

This Convention shall be ratified by the signatory States. The instruments of ratification shall be deposited with the Secretary-General of the Council of the European Union.

Article 6

1. This Convention shall enter into force, as between the States which have ratified it, on the first day of the third month following the deposit of the last instrument of ratification by the Republic of Austria, the Republic of Finland or the Kingdom of Sweden and by one Contracting State which has ratified the Convention on the Law applicable to Contractual Obligations.

2. This Convention shall enter into force for each Contracting State which subsequently ratifies it on the first day of the third month following the deposit of its instrument of ratification.

Article 7

The Secretary-General of the Council of the European Union shall notify the signatory States of:
(a) the deposit of each instrument of ratification;
(b) the dates of entry into force of this Convention for the Contracting States.

Article 8

This Convention, drawn up in a single original in the Danish, Dutch, English, Finnish, French, German, Greek, Irish, Italian, Portuguese, Spanish and Swedish languages, all 12 texts being equally authentic, shall be deposited in the archives of the General Secretariat of the Council of the European Union. The Secretary-General shall transmit a certified copy to the Government of each signatory State.

Hecho en Bruselas, el veintinueve de noviembre de mil novecientos noventa y seis.

Udfaerdiget i Bruxelles, den niogtyvende november nitten hundrede og seksoghalvfems.

Geschehen zu Bruessel am neunundzwanzigsten November neunzehnhundertsechsundneunzig.

¸ãéíaa óôéò ÂñõîÝëëaaò, óôéò aassêïóé aaííÝá Íïaaìâñssïõ ÷ssëéá aaííéáêUEóéá aaíaaíÞíôá Ýîé.

Done at Brussels on the twenty-ninth day of November in the year one thousand nine hundred and ninety-six.

Fait à Bruxelles, le vingt-neuf novembre mil neuf cent quatre-vingt-seize.

Arna dhéanamh sa Bhruiséil, an naoú lá is fiche de Shamhain, míle naoi gcéad nócha a sé.

Fatto a Bruxelles, addi ventinove novembre millenovecentonovantasei.

Gedaan te Brussel, de negenentwintigste november negentienhonderd zesennegentig.

Feito em Bruxelas, em vinte e nove de Novembro de mil novecentos e noventa e seis.

Tehty Brysselissae kahdentenakymmenentenaeyhdeksaentenae paeivaenae marraskuuta vuonna tuhatyhdeksaensataayhdeksaenkymmentaekuusi.

Som skedde i Bryssel den tjugonionde november nittonhundranittiosex.

Pour le gouvernement du royaume de Belgique

Voor de Regering van het Koninkrijk België

Fuer die Regierung des Koenigreichs Belgien

For regeringen for Kongeriget Danmark

Fuer die Regierung der Bundesrepublik Deutschland

Ãéá ôçí êõâÝñíçóç ôçò ΑΑëëçíéêÞò ΑΕçìïêñáôssáò

Por el Gobierno del Reino de España

Pour le gouvernement de la République française

Thar ceann Rialtas na hÉireann

For the Government of Ireland

Per il governo della Repubblica italiana

Pour le gouvernement du Grand-Duché de Luxembourg

Voor de Regering van het Koninkrijk der Nederlanden

Fuer die Regierung der Republik OEsterreich

Pelo Governo da República PortugUEsa

Suomen hallituksen puolesta

Paa finska regeringens vaegnar

Paa svenska regeringens vaegnar

For the Government of the United Kingdom of Great Britain and Northern Ireland

Joint Declaration

The High Contracting Parties having examined the terms of the Protocol annexed to the Convention of Rome of 1980, as amended by the Convention of Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the Convention of 1980, and to the First and Second Protocols of 1988, take note that Denmark, Sweden and Finland state their readiness to examine the extent to which they will be able to ensure that any future amendment concerning their national law applicable to questions relating to the carriage of goods by sea complies with the procedure provided for in Article 23 of the Convention of Rome of 1980.

41997Y0623(02) Official Journal C 191 , 23/06/1997 p. 0011 - 0012 1

Explanatory Report on the Convention on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the Convention on the Law applicable to Contractual Obligations, opened for signature in Rome on 19 June 1980, and to the first and second Protocols on its interpretation by the Court of Justice (Text approved by the Council on 26 May 1997)

EXPLANATORY REPORT on the Convention on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the Convention on the Law applicable to Contractual Obligations, opened for signature in Rome on 19 June 1980, and to the first and second Protocols on its interpretation by the Court of Justice (Text approved by the Council on 26 May 1997) (97/C 191/02)

INTRODUCTION

The Convention on the Law applicable to Contractual Obligations, opened for signature in Rome on 19 June 1980 (Rome Convention of 1980), lays down uniform choice-of-law rules to apply within its specific area of application. These rules constitute an important supplement to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968 (1968 Brussels Convention). Pursuant to Article 28 of the Rome Convention of 1980, that Convention may be signed (only) by States party to the Treaty establishing the European Economic Community.

In order that the rules thus uniformized may be also applied to the new Member States which, in acceding to the European Union, undertook to accede also to the Rome Convention of 1980, the Permanent Representatives Committee agreed on 1 February 1996 to set up a working party to prepare the accession of the three new Member States to the 1968 Brussels and the 1980 Rome Conventions and the Protocols thereto as adapted and amended by subsequent accession conventions. Over two meetings, the Working Party drafted the technical amendments necessary for the accession of the three States in question.

A technical adjustment is also made to the first Protocol on the interpretation by the Court of Justice of the European Communities of the Convention on the Law applicable to Contractual Obligations, signed on 19 December 1988, hereafter referred to as the 'first Protocol of 1988`, listing the supreme courts in the acceding States.

The first Protocol of 1988 and the Protocol conferring on the Court of Justice of the European Communities Certain Powers to Interpret the Convention on the Law applicable to Contractual Obligations signed on 19 December 1988 and hereafter referred to as the 'second Protocol of 1988` (together commonly referred to as the '1988 interpretative protocols`), are designed to ensure uniform interpretation of the Rome Convention of 1980. They have not yet entered into force.

Austria's proposal that the Accession Convention be used as an opportunity to extend the consumer protection provisions in Article 5 of the Rome Convention of 1980 aroused interest in the Working Party. However, it emerged that this was a rather complex issue that would require detailed consideration, and would therefore hold up completion of the proceedings. When adopting the Accession Convention on 29 November 1996, the Conference of Governments of the Member States accordingly approved a declaration by the Austrian delegation advocating early consideration of this question. That declaration was annexed to the minutes of the Conference.

The Accession Convention contains final provisions. Lastly, the Accession Convention contains an adjustment to the Protocol annexed to the Rome Convention of 1980 which, in addition to Denmark, now also allows Sweden and Finland to retain their national provisions concerning the law applicable to the carriage of goods by sea.

TITLE I

General provisions

Article 1

This provision expressly provides for the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and specifies the three instruments concerned, namely the Rome Convention of 1980 and the first and second Protocols of 1988.

The Rome Convention of 1980 was amended by two previous accession conventions: the Convention, hereafter referred to as the '1984 Accession Convention` signed in Luxembourg on 10 April 1984 on the Accession of the Hellenic Republic, and the Convention, hereafter referred to as the '1992 Accession Convention` signed in Funchal on 18 May 1992 on the Accession of the Kingdom of Spain and the Portuguese Republic. It is to this amended version of the Rome Convention of 1980 that the three new Member States are acceding.

TITLE II

Adjustments to the Protocol annexed to the Rome Convention of 1980

Article 2

Article 21 of the Rome Convention of 1980 allows Member States to retain diverging national provisions if they are based on an international convention to which the State in question is a party. The Danish choice-of-law rules on the carriage of goods by sea diverge from the Rome Convention of 1980 but accord with legislation in the other Nordic countries. However, the uniformization of provisions achieved amongst the Nordic countries in this sphere was (in the customary manner) not based on an international convention, but secured through the simultaneous enactment of identically worded laws by those countries' parliaments, so that Article 21 does not apply in this case, although the uniformization thus achieved is entirely similar in effect to that resulting from an international convention. To enable Denmark to retain these common provisions, a Protocol to that effect was annexed to the Rome Convention of 1980.

As Sweden and Finland took part in the Nordic countries' uniformization of rules and should therefore be treated in the same manner as Denmark, Article 2 now extends this Protocol to Sweden and Finland, and the references to the relevant Danish provisions are updated.

However, the Member States thought it advisable to make a joint declaration, which is annexed to the Convention, in which they take note that Denmark, Finland and Sweden state their readiness to examine the extent to which they will be able to ensure that any future amendment concerning their national law applicable to questions relating to the carriage of goods by sea complies with the procedure provided for in Article 23 of the Rome Convention of 1980.

TITLE III

Adjustments to the first Protocol of 1988

Article 3

Article 2 (a) of the first Protocol of 1988 lists the supreme courts in the Member States which may submit questions of interpretation to the Court of Justice of the European Communities for a preliminary ruling. The supreme courts in the new Member States are now added to that list.

TITLE IV

Final provisions

Articles 4 to 8

The final provisions, modelled on the 1984 and 1992 Accession Conventions, give the Finnish and Swedish versions of the Rome Convention of 1980 and the First and Second Protocols of 1988 the same legal status as the other language versions, stipulate the need for ratification of the Accession Convention by the Signatory States, contain provisions on its entry into force, and specify that the Accession Convention is equally authentic in all 12 official languages.

When the Accession Convention was signed, the texts of the Rome Convention of 1980, the first and second Protocols thereto, and the amendments resulting from subsequent accessions, were drawn up in Finnish and Swedish.

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REGULATION (EC) No 593/2008 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 17 June 2008

on the law applicable to contractual obligations (Rome I)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and the second indent of Article 67(5) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee ([1]),

Acting in accordance with the procedure laid down in Article 251 of the Treaty ([2]),

Whereas:

(1) The Community has set itself the objective of maintaining and developing an area of freedom, security and justice. For the progressive establishment of such an area, the Community is to adopt measures relating to judicial cooperation in civil matters with a cross-border impact to the extent necessary for the proper functioning of the internal market.

(2) According to Article 65, point (b) of the Treaty, these measures are to include those promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction.

(3) The European Council meeting in Tampere on 15 and 16 October 1999 endorsed the principle of mutual recognition of judgments and other decisions of judicial authorities as the cornerstone of judicial cooperation in civil matters and invited the Council and the Commission to adopt a programme of measures to implement that principle.

(4) On 30 November 2000 the Council adopted a joint Commission and Council programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters ([3]). The programme identifies measures relating to the harmonisation of conflict-of-law rules as those facilitating the mutual recognition of judgments.

(5) The Hague Programme ([4]), adopted by the European Council on 5 November 2004, called for work to be pursued actively on the conflict-of-law rules regarding contractual obligations (Rome I).

(6) The proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought.

(7) The substantive scope and the provisions of this Regulation should be consistent with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ([5]) (Brussels I) and Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) ([6]).

(8) Family relationships should cover parentage, marriage, affinity and collateral relatives. The reference in Article 1(2) to relationships having comparable effects to marriage and other family relationships should be interpreted in accordance with the law of the Member State in which the court is seised.

(9) Obligations under bills of exchange, cheques and promissory notes and other negotiable instruments should also cover bills of lading to the extent that the obligations under the bill of lading arise out of its negotiable character.

(10) Obligations arising out of dealings prior to the conclusion of the contract are covered by Article 12 of Regulation (EC) No 864/2007. Such obligations should therefore be excluded from the scope of this Regulation.

(11) The parties' freedom to choose the applicable law should be one of the cornerstones of the system of conflict-of-law rules in matters of contractual obligations.

(12) An agreement between the parties to confer on one or more courts or tribunals of a Member State exclusive jurisdiction to determine disputes under the contract should be one of the factors to be taken into account in determining whether a choice of law has been clearly demonstrated.

(13) This Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention.

([1]) OJ C 318, 23.12.2006, p. 56.

([2]) Opinion of the European Parliament of 29 November 2007 (not yet published in the Official Journal) and Council Decision of 5 June 2008.

([3]) OJ C 12, 15.1.2001, p. 1.

([4]) OJ C 53, 3.3.2005, p. 1.

([5]) OJ L 12, 16.1.2001, p. 1. Regulation as last amended by Regulation (EC) No 1791/2006 (OJ L 363, 20.12.2006, p. 1).

([6]) OJ L 199, 31.7.2007, p. 40.

(14) Should the Community adopt, in an appropriate legal instrument, rules of substantive contract law, including standard terms and conditions, such instrument may provide that the parties may choose to apply those rules.

(15) Where a choice of law is made and all other elements relevant to the situation are located in a country other than the country whose law has been chosen, the choice of law should not prejudice the application of provisions of the law of that country which cannot be derogated from by agreement. This rule should apply whether or not the choice of law was accompanied by a choice of court or tribunal. Whereas no substantial change is intended as compared with Article 3(3) of the 1980 Convention on the Law Applicable to Contractual Obligations ([1]) (the Rome Convention), the wording of this Regulation is aligned as far as possible with Article 14 of Regulation (EC) No 864/2007.

(16) To contribute to the general objective of this Regulation, legal certainty in the European judicial area, the conflict-of-law rules should be highly foreseeable. The courts should, however, retain a degree of discretion to determine the law that is most closely connected to the situation.

(17) As far as the applicable law in the absence of choice is concerned, the concept of 'provision of services' and 'sale of goods' should be interpreted in the same way as when applying Article 5 of Regulation (EC) No 44/2001 in so far as sale of goods and provision of services are covered by that Regulation. Although franchise and distribution contracts are contracts for services, they are the subject of specific rules.

(18) As far as the applicable law in the absence of choice is concerned, multilateral systems should be those in which trading is conducted, such as regulated markets and multilateral trading facilities as referred to in Article 4 of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments ([2]), regardless of whether or not they rely on a central counterparty.

(19) Where there has been no choice of law, the applicable law should be determined in accordance with the rule specified for the particular type of contract. Where the contract cannot be categorised as being one of the specified types or where its elements fall within more than one of the specified types, it should be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence. In the case of a contract consisting of a bundle of rights and obligations capable of being categorised as falling within more than one of the specified types of contract, the characteristic performance of the contract should be determined having regard to its centre of gravity.

(20) Where the contract is manifestly more closely connected with a country other than that indicated in Article 4(1) or (2), an escape clause should provide that the law of that other country is to apply. In order to determine that country, account should be taken, *inter alia*, of whether the contract in question has a very close relationship with another contract or contracts.

(21) In the absence of choice, where the applicable law cannot be determined either on the basis of the fact that the contract can be categorised as one of the specified types or as being the law of the country of habitual residence of the party required to effect the characteristic performance of the contract, the contract should be governed by the law of the country with which it is most closely connected. In order to determine that country, account should be taken, *inter alia*, of whether the contract in question has a very close relationship with another contract or contracts.

(22) As regards the interpretation of contracts for the carriage of goods, no change in substance is intended with respect to Article 4(4), third sentence, of the Rome Convention. Consequently, single-voyage charter parties and other contracts the main purpose of which is the carriage of goods should be treated as contracts for the carriage of goods. For the purposes of this Regulation, the term 'consignor' should refer to any person who enters into a contract of carriage with the carrier and the term 'the carrier' should refer to the party to the contract who undertakes to carry the goods, whether or not he performs the carriage himself.

(23) As regards contracts concluded with parties regarded as being weaker, those parties should be protected by conflict-of-law rules that are more favourable to their interests than the general rules.

(24) With more specific reference to consumer contracts, the conflict-of-law rule should make it possible to cut the cost of settling disputes concerning what are commonly relatively small claims and to take account of the development of distance-selling techniques. Consistency with Regulation (EC) No 44/2001 requires both that there be a reference to the concept of directed activity as a condition for applying the consumer protection rule and that the concept be interpreted harmoniously in Regulation (EC) No 44/2001 and this Regulation, bearing in mind that a joint declaration by the Council and the Commission on Article 15 of Regulation (EC) No 44/2001 states that 'for Article 15(1)(c) to be applicable it is not sufficient for an undertaking to target its activities at the Member State of the consumer's residence, or at a number of Member States including that Member State; a contract must also be concluded within the framework of its activities'. The declaration also states that 'the mere fact that an Internet site is accessible is not sufficient for Article 15 to be applicable, although a factor will be that this Internet site solicits the conclusion of distance contracts and that a contract has actually been concluded at a distance, by

([1]) OJ C 334, 30.12.2005, p. 1.

([2]) OJ L 145, 30.4.2004, p. 1. Directive as last amended by Directive 2008/10/EC (OJ L 76, 19.3.2008, p. 33).

whatever means. In this respect, the language or currency which a website uses does not constitute a relevant factor.'.

(25) Consumers should be protected by such rules of the country of their habitual residence that cannot be derogated from by agreement, provided that the consumer contract has been concluded as a result of the professional pursuing his commercial or professional activities in that particular country. The same protection should be guaranteed if the professional, while not pursuing his commercial or professional activities in the country where the consumer has his habitual residence, directs his activities by any means to that country or to several countries, including that country, and the contract is concluded as a result of such activities.

(26) For the purposes of this Regulation, financial services such as investment services and activities and ancillary services provided by a professional to a consumer, as referred to in sections A and B of Annex I to Directive 2004/39/EC, and contracts for the sale of units in collective investment undertakings, whether or not covered by Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) ([1]), should be subject to Article 6 of this Regulation. Consequently, when a reference is made to terms and conditions governing the issuance or offer to the public of transferable securities or to the subscription and redemption of units in collective investment undertakings, that reference should include all aspects binding the issuer or the offeror to the consumer, but should not include those aspects involving the provision of financial services.

(27) Various exceptions should be made to the general conflict-of-law rule for consumer contracts. Under one such exception the general rule should not apply to contracts relating to rights *in rem* in immovable property or tenancies of such property unless the contract relates to the right to use immovable property on a timeshare basis within the meaning of Directive 94/47/EC of the European Parliament and of the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis ([2]).

(28) It is important to ensure that rights and obligations which constitute a financial instrument are not covered by the general rule applicable to consumer contracts, as that could lead to different laws being applicable to each of the instruments issued, therefore changing their nature and preventing their fungible trading and offering. Likewise, whenever such instruments are issued or offered, the contractual relationship established between the issuer or the offeror and the consumer should not necessarily be subject to the mandatory application of the law of the country of habitual residence of the consumer, as there is a need to ensure uniformity in the terms and conditions of an issuance or an offer. The same rationale should apply with regard to the multilateral systems covered by Article 4(1)(h), in respect of which it should be ensured that the law of the country of habitual residence of the consumer will not interfere with the rules applicable to contracts concluded within those systems or with the operator of such systems.

(29) For the purposes of this Regulation, references to rights and obligations constituting the terms and conditions governing the issuance, offers to the public or public take-over bids of transferable securities and references to the subscription and redemption of units in collective investment undertakings should include the terms governing, *inter alia*, the allocation of securities or units, rights in the event of over-subscription, withdrawal rights and similar matters in the context of the offer as well as those matters referred to in Articles 10, 11, 12 and 13, thus ensuring that all relevant contractual aspects of an offer binding the issuer or the offeror to the consumer are governed by a single law.

(30) For the purposes of this Regulation, financial instruments and transferable securities are those instruments referred to in Article 4 of Directive 2004/39/EC.

(31) Nothing in this Regulation should prejudice the operation of a formal arrangement designated as a system under Article 2(a) of Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems ([3]).

(32) Owing to the particular nature of contracts of carriage and insurance contracts, specific provisions should ensure an adequate level of protection of passengers and policy holders. Therefore, Article 6 should not apply in the context of those particular contracts.

(33) Where an insurance contract not covering a large risk covers more than one risk, at least one of which is situated in a Member State and at least one of which is situated in a third country, the special rules on insurance contracts in this Regulation should apply only to the risk or risks situated in the relevant Member State or Member States.

(34) The rule on individual employment contracts should not prejudice the application of the overriding mandatory provisions of the country to which a worker is posted in accordance with Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services ([4]).

([1]) OJ L 375, 31.12.1985, p. 3. Directive as last amended by Directive 2008/18/EC of the European Parliament and of the Council (OJ L 76, 19.3.2008, p. 42).

([2]) OJ L 280, 29.10.1994, p. 83.

([3]) OJ L 166, 11.6.1998, p. 45.

([4]) OJ L 18, 21.1.1997, p. 1.

(35) Employees should not be deprived of the protection afforded to them by provisions which cannot be derogated from by agreement or which can only be derogated from to their benefit.

(36) As regards individual employment contracts, work carried out in another country should be regarded as temporary if the employee is expected to resume working in the country of origin after carrying out his tasks abroad. The conclusion of a new contract of employment with the original employer or an employer belonging to the same group of companies as the original employer should not preclude the employee from being regarded as carrying out his work in another country temporarily.

(37) Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions. The concept of 'overriding mandatory provisions' should be distinguished from the expression 'provisions which cannot be derogated from by agreement' and should be construed more restrictively.

(38) In the context of voluntary assignment, the term 'relationship' should make it clear that Article 14(1) also applies to the property aspects of an assignment, as between assignor and assignee, in legal orders where such aspects are treated separately from the aspects under the law of obligations. However, the term 'relationship' should not be understood as relating to any relationship that may exist between assignor and assignee. In particular, it should not cover preliminary questions as regards a voluntary assignment or a contractual subrogation. The term should be strictly limited to the aspects which are directly relevant to the voluntary assignment or contractual subrogation in question.

(39) For the sake of legal certainty there should be a clear definition of habitual residence, in particular for companies and other bodies, corporate or unincorporated. Unlike Article 60(1) of Regulation (EC) No 44/2001, which establishes three criteria, the conflict-of-law rule should proceed on the basis of a single criterion; otherwise, the parties would be unable to foresee the law applicable to their situation.

(40) A situation where conflict-of-law rules are dispersed among several instruments and where there are differences between those rules should be avoided. This Regulation, however, should not exclude the possibility of inclusion of conflict-of-law rules relating to contractual obligations in provisions of Community law with regard to particular matters.

This Regulation should not prejudice the application of other instruments laying down provisions designed to contribute to the proper functioning of the internal market in so far as they cannot be applied in conjunction with the law designated by the rules of this Regulation. The application of provisions of the applicable law designated by the rules of this Regulation should not restrict the free movement of goods and services as regulated by Community instruments, such as Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) ([1]).

(41) Respect for international commitments entered into by the Member States means that this Regulation should not affect international conventions to which one or more Member States are parties at the time when this Regulation is adopted. To make the rules more accessible, the Commission should publish the list of the relevant conventions in the *Official Journal of the European Union* on the basis of information supplied by the Member States.

(42) The Commission will make a proposal to the European Parliament and to the Council concerning the procedures and conditions according to which Member States would be entitled to negotiate and conclude, on their own behalf, agreements with third countries in individual and exceptional cases, concerning sectoral matters and containing provisions on the law applicable to contractual obligations.

(43) Since the objective of this Regulation cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of this Regulation, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary to attain its objective.

(44) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Ireland has notified its wish to take part in the adoption and application of the present Regulation.

(45) In accordance with Articles 1 and 2 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, and without prejudice to Article 4 of the said Protocol, the United Kingdom is not taking part in the adoption of this Regulation and is not bound by it or subject to its application.

(46) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark is not taking part in the adoption of this Regulation and is not bound by it or subject to its application,

([1]) OJ L 178, 17.7.2000, p. 1.

HAVE ADOPTED THIS REGULATION:

CHAPTER I

SCOPE

Article 1

Material scope

1. This Regulation shall apply, in situations involving a conflict of laws, to contractual obligations in civil and commercial matters.

It shall not apply, in particular, to revenue, customs or administrative matters.

2. The following shall be excluded from the scope of this Regulation:

(a) questions involving the status or legal capacity of natural persons, without prejudice to Article 13;

(b) obligations arising out of family relationships and relationships deemed by the law applicable to such relationships to have comparable effects, including maintenance obligations;

(c) obligations arising out of matrimonial property regimes, property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage, and wills and succession;

(d) obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;

(e) arbitration agreements and agreements on the choice of court;

(f) questions governed by the law of companies and other bodies, corporate or unincorporated, such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies, corporate or unincorporated, and the personal liability of officers and members as such for the obligations of the company or body;

(g) the question whether an agent is able to bind a principal, or an organ to bind a company or other body corporate or unincorporated, in relation to a third party;

(h) the constitution of trusts and the relationship between settlors, trustees and beneficiaries;

(i) obligations arising out of dealings prior to the conclusion of a contract;

(j) insurance contracts arising out of operations carried out by organisations other than undertakings referred to in Article 2 of Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance [1] the object of which is to provide benefits for employed or self-employed persons belonging to an undertaking or group of undertakings, or to a trade or group of trades, in the event of death or survival or of discontinuance or curtailment of activity, or of sickness related to work or accidents at work.

3. This Regulation shall not apply to evidence and procedure, without prejudice to Article 18.

4. In this Regulation, the term 'Member State' shall mean Member States to which this Regulation applies. However, in Article 3(4) and Article 7 the term shall mean all the Member States.

Article 2

Universal application

Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.

CHAPTER II

UNIFORM RULES

Article 3

Freedom of choice

1. A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.

2. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice made under this Article or of other provisions of this Regulation. Any change in the law to be applied that is made after the conclusion of the contract shall not prejudice its formal validity under Article 11 or adversely affect the rights of third parties.

3. Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.

4. Where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the

[1] OJ L 345, 19.12.2002, p. 1. Directive as last amended by Directive 2008/19/EC (OJ L 76, 19.3.2008, p. 44).

parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.

5. The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 10, 11 and 13.

Article 4

Applicable law in the absence of choice

1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows:

(a) a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence;

(b) a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence;

(c) a contract relating to a right *in rem* in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated;

(d) notwithstanding point (c), a tenancy of immovable property concluded for temporary private use for a period of no more than six consecutive months shall be governed by the law of the country where the landlord has his habitual residence, provided that the tenant is a natural person and has his habitual residence in the same country;

(e) a franchise contract shall be governed by the law of the country where the franchisee has his habitual residence;

(f) a distribution contract shall be governed by the law of the country where the distributor has his habitual residence;

(g) a contract for the sale of goods by auction shall be governed by the law of the country where the auction takes place, if such a place can be determined;

(h) a contract concluded within a multilateral system which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments, as defined by Article 4(1), point (17) of Directive 2004/39/EC, in accordance with non-discretionary rules and governed by a single law, shall be governed by that law.

2. Where the contract is not covered by paragraph 1 or where the elements of the contract would be covered by more than one of points (a) to (h) of paragraph 1, the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence.

3. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.

4. Where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is most closely connected.

Article 5

Contracts of carriage

1. To the extent that the law applicable to a contract for the carriage of goods has not been chosen in accordance with Article 3, the law applicable shall be the law of the country of habitual residence of the carrier, provided that the place of receipt or the place of delivery or the habitual residence of the consignor is also situated in that country. If those requirements are not met, the law of the country where the place of delivery as agreed by the parties is situated shall apply.

2. To the extent that the law applicable to a contract for the carriage of passengers has not been chosen by the parties in accordance with the second subparagraph, the law applicable shall be the law of the country where the passenger has his habitual residence, provided that either the place of departure or the place of destination is situated in that country. If these requirements are not met, the law of the country where the carrier has his habitual residence shall apply.

The parties may choose as the law applicable to a contract for the carriage of passengers in accordance with Article 3 only the law of the country where:

(a) the passenger has his habitual residence; or

(b) the carrier has his habitual residence; or

(c) the carrier has his place of central administration; or

(d) the place of departure is situated; or

(e) the place of destination is situated.

3. Where it is clear from all the circumstances of the case that the contract, in the absence of a choice of law, is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.

Article 6

Consumer contracts

1. Without prejudice to Articles 5 and 7, a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another

person acting in the exercise of his trade or profession (the professional) shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional:

(a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or

(b) by any means, directs such activities to that country or to several countries including that country,

and the contract falls within the scope of such activities.

2. Notwithstanding paragraph 1, the parties may choose the law applicable to a contract which fulfils the requirements of paragraph 1, in accordance with Article 3. Such a choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1.

3. If the requirements in points (a) or (b) of paragraph 1 are not fulfilled, the law applicable to a contract between a consumer and a professional shall be determined pursuant to Articles 3 and 4.

4. Paragraphs 1 and 2 shall not apply to:

(a) a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence;

(b) a contract of carriage other than a contract relating to package travel within the meaning of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours [1];

(c) a contract relating to a right *in rem* in immovable property or a tenancy of immovable property other than a contract relating to the right to use immovable properties on a timeshare basis within the meaning of Directive 94/47/EC;

(d) rights and obligations which constitute a financial instrument and rights and obligations constituting the terms and conditions governing the issuance or offer to the public and public take-over bids of transferable securities, and the subscription and redemption of units in collective investment undertakings in so far as these activities do not constitute provision of a financial service;

(e) a contract concluded within the type of system falling within the scope of Article 4(1)(h).

[1] OJ L 158, 23.6.1990, p. 59.

Article 7

Insurance contracts

1. This Article shall apply to contracts referred to in paragraph 2, whether or not the risk covered is situated in a Member State, and to all other insurance contracts covering risks situated inside the territory of the Member States. It shall not apply to reinsurance contracts.

2. An insurance contract covering a large risk as defined in Article 5(d) of the First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance [2] shall be governed by the law chosen by the parties in accordance with Article 3 of this Regulation.

To the extent that the applicable law has not been chosen by the parties, the insurance contract shall be governed by the law of the country where the insurer has his habitual residence. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country, the law of that other country shall apply.

3. In the case of an insurance contract other than a contract falling within paragraph 2, only the following laws may be chosen by the parties in accordance with Article 3:

(a) the law of any Member State where the risk is situated at the time of conclusion of the contract;

(b) the law of the country where the policy holder has his habitual residence;

(c) in the case of life assurance, the law of the Member State of which the policy holder is a national;

(d) for insurance contracts covering risks limited to events occurring in one Member State other than the Member State where the risk is situated, the law of that Member State;

(e) where the policy holder of a contract falling under this paragraph pursues a commercial or industrial activity or a liberal profession and the insurance contract covers two or more risks which relate to those activities and are situated in different Member States, the law of any of the Member States concerned or the law of the country of habitual residence of the policy holder.

Where, in the cases set out in points (a), (b) or (e), the Member States referred to grant greater freedom of choice of the law applicable to the insurance contract, the parties may take advantage of that freedom.

[2] OJ L 228, 16.8.1973, p. 3. Directive as last amended by Directive 2005/68/EC of the European Parliament and of the Council (OJ L 323, 9.12.2005, p. 1).

To the extent that the law applicable has not been chosen by the parties in accordance with this paragraph, such a contract shall be governed by the law of the Member State in which the risk is situated at the time of conclusion of the contract.

4. The following additional rules shall apply to insurance contracts covering risks for which a Member State imposes an obligation to take out insurance:

(a) the insurance contract shall not satisfy the obligation to take out insurance unless it complies with the specific provisions relating to that insurance laid down by the Member State that imposes the obligation. Where the law of the Member State in which the risk is situated and the law of the Member State imposing the obligation to take out insurance contradict each other, the latter shall prevail;

(b) by way of derogation from paragraphs 2 and 3, a Member State may lay down that the insurance contract shall be governed by the law of the Member State that imposes the obligation to take out insurance.

5. For the purposes of paragraph 3, third subparagraph, and paragraph 4, where the contract covers risks situated in more than one Member State, the contract shall be considered as constituting several contracts each relating to only one Member State.

6. For the purposes of this Article, the country in which the risk is situated shall be determined in accordance with Article 2(d) of the Second Council Directive 88/357/EEC of 22 June 1988 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services [1] and, in the case of life assurance, the country in which the risk is situated shall be the country of the commitment within the meaning of Article 1(1)(g) of Directive 2002/83/EC.

Article 8

Individual employment contracts

1. An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3. Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article.

2. To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country.

3. Where the law applicable cannot be determined pursuant to paragraph 2, the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated.

4. Where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraphs 2 or 3, the law of that other country shall apply.

Article 9

Overriding mandatory provisions

1. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.

2. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.

3. Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

Article 10

Consent and material validity

1. The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid.

2. Nevertheless, a party, in order to establish that he did not consent, may rely upon the law of the country in which he has his habitual residence if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in paragraph 1.

Article 11

Formal validity

1. A contract concluded between persons who, or whose agents, are in the same country at the time of its conclusion is

[1] OJ L 172, 4.7.1988, p. 1. Directive as last amended by Directive 2005/14/EC of the European Parliament and of the Council (OJ L 149, 11.6.2005, p. 14).

formally valid if it satisfies the formal requirements of the law which governs it in substance under this Regulation or of the law of the country where it is concluded.

2. A contract concluded between persons who, or whose agents, are in different countries at the time of its conclusion is formally valid if it satisfies the formal requirements of the law which governs it in substance under this Regulation, or of the law of either of the countries where either of the parties or their agent is present at the time of conclusion, or of the law of the country where either of the parties had his habitual residence at that time.

3. A unilateral act intended to have legal effect relating to an existing or contemplated contract is formally valid if it satisfies the formal requirements of the law which governs or would govern the contract in substance under this Regulation, or of the law of the country where the act was done, or of the law of the country where the person by whom it was done had his habitual residence at that time.

4. Paragraphs 1, 2 and 3 of this Article shall not apply to contracts that fall within the scope of Article 6. The form of such contracts shall be governed by the law of the country where the consumer has his habitual residence.

5. Notwithstanding paragraphs 1 to 4, a contract the subject matter of which is a right *in rem* in immovable property or a tenancy of immovable property shall be subject to the requirements of form of the law of the country where the property is situated if by that law:

(a) those requirements are imposed irrespective of the country where the contract is concluded and irrespective of the law governing the contract; and

(b) those requirements cannot be derogated from by agreement.

Article 12

Scope of the law applicable

1. The law applicable to a contract by virtue of this Regulation shall govern in particular:

(a) interpretation;

(b) performance;

(c) within the limits of the powers conferred on the court by its procedural law, the consequences of a total or partial breach of obligations, including the assessment of damages in so far as it is governed by rules of law;

(d) the various ways of extinguishing obligations, and prescription and limitation of actions;

(e) the consequences of nullity of the contract.

2. In relation to the manner of performance and the steps to be taken in the event of defective performance, regard shall be had to the law of the country in which performance takes place.

Article 13

Incapacity

In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from the law of another country, only if the other party to the contract was aware of that incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence.

Article 14

Voluntary assignment and contractual subrogation

1. The relationship between assignor and assignee under a voluntary assignment or contractual subrogation of a claim against another person (the debtor) shall be governed by the law that applies to the contract between the assignor and assignee under this Regulation.

2. The law governing the assigned or subrogated claim shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment or subrogation can be invoked against the debtor and whether the debtor's obligations have been discharged.

3. The concept of assignment in this Article includes outright transfers of claims, transfers of claims by way of security and pledges or other security rights over claims.

Article 15

Legal subrogation

Where a person (the creditor) has a contractual claim against another (the debtor) and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, the law which governs the third person's duty to satisfy the creditor shall determine whether and to what extent the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship.

Article 16

Multiple liability

If a creditor has a claim against several debtors who are liable for the same claim, and one of the debtors has already satisfied the claim in whole or in part, the law governing the debtor's obligation towards the creditor also governs the debtor's right to

claim recourse from the other debtors. The other debtors may rely on the defences they had against the creditor to the extent allowed by the law governing their obligations towards the creditor.

Article 17

Set-off

Where the right to set-off is not agreed by the parties, set-off shall be governed by the law applicable to the claim against which the right to set-off is asserted.

Article 18

Burden of proof

1. The law governing a contractual obligation under this Regulation shall apply to the extent that, in matters of contractual obligations, it contains rules which raise presumptions of law or determine the burden of proof.

2. A contract or an act intended to have legal effect may be proved by any mode of proof recognised by the law of the forum or by any of the laws referred to in Article 11 under which that contract or act is formally valid, provided that such mode of proof can be administered by the forum.

CHAPTER III

OTHER PROVISIONS

Article 19

Habitual residence

1. For the purposes of this Regulation, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration.

The habitual residence of a natural person acting in the course of his business activity shall be his principal place of business.

2. Where the contract is concluded in the course of the operations of a branch, agency or any other establishment, or if, under the contract, performance is the responsibility of such a branch, agency or establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence.

3. For the purposes of determining the habitual residence, the relevant point in time shall be the time of the conclusion of the contract.

Article 20

Exclusion of *renvoi*

The application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law, unless provided otherwise in this Regulation.

Article 21

Public policy of the forum

The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum.

Article 22

States with more than one legal system

1. Where a State comprises several territorial units, each of which has its own rules of law in respect of contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation.

2. A Member State where different territorial units have their own rules of law in respect of contractual obligations shall not be required to apply this Regulation to conflicts solely between the laws of such units.

Article 23

Relationship with other provisions of Community law

With the exception of Article 7, this Regulation shall not prejudice the application of provisions of Community law which, in relation to particular matters, lay down conflict-of-law rules relating to contractual obligations.

Article 24

Relationship with the Rome Convention

1. This Regulation shall replace the Rome Convention in the Member States, except as regards the territories of the Member States which fall within the territorial scope of that Convention and to which this Regulation does not apply pursuant to Article 299 of the Treaty.

2. In so far as this Regulation replaces the provisions of the Rome Convention, any reference to that Convention shall be understood as a reference to this Regulation.

Article 25

Relationship with existing international conventions

1. This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to contractual obligations.

2. However, this Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them in so far as such conventions concern matters governed by this Regulation.

Article 26

List of Conventions

1. By 17 June 2009, Member States shall notify the Commission of the conventions referred to in Article 25(1). After that date, Member States shall notify the Commission of all denunciations of such conventions.

2. Within six months of receipt of the notifications referred to in paragraph 1, the Commission shall publish in the *Official Journal of the European Union*:

(a) a list of the conventions referred to in paragraph 1;

(b) the denunciations referred to in paragraph 1.

Article 27

Review clause

1. By 17 June 2013, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Regulation. If appropriate, the report shall be accompanied by proposals to amend this Regulation. The report shall include:

(a) a study on the law applicable to insurance contracts and an assessment of the impact of the provisions to be introduced, if any; and

(b) an evaluation on the application of Article 6, in particular as regards the coherence of Community law in the field of consumer protection.

2. By 17 June 2010, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the question of the effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over a right of another person. The report shall be accompanied, if appropriate, by a proposal to amend this Regulation and an assessment of the impact of the provisions to be introduced.

Article 28

Application in time

This Regulation shall apply to contracts concluded after 17 December 2009.

CHAPTER IV

FINAL PROVISIONS

Article 29

Entry into force and application

This Regulation shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

It shall apply from 17 December 2009 except for Article 26 which shall apply from 17 June 2009.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

Done at Strasbourg, 17 June 2008.

For the European Parliament	*For the Council*
The President	*The President*
H.-G. PÖTTERING	J. LENARČIČ

Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I)

[pic] ¦ COMMISSION OF THE EUROPEAN COMMUNITIES ¦

Brussels, 15.12.2005

COM(2005) 650 final

2005/0261 (COD)

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND THE COUNCIL

on the law applicable to contractual obligations (Rome I)

(presented by the Commission)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

1.1. Background and objective

The Brussels Convention of 1968 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters contains options enabling a claimant to choose between specified courts, which generates the risk that a party will choose the courts in one Member State rather than another simply because the law is more favourable to his cause. To reduce the risk, the Member States, acting on the same legal basis, signed in 1980 the Rome Convention on the law applicable to contractual obligations.

The Amsterdam Treaty gave a new impetus to private international law of Community origin. That was the legal basis on which the Community adopted what is known as the Brussels I Regulation[1] to replace the Brussels Convention of 1968 in relations between Member States. On 22 July 2003 the Commission presented a proposal for a Regulation on the law applicable to non-contractual obligations (Rome II).[2] The Rome Convention is now the only Community private international law instrument that remains in international treaty form. The drawbacks that this represents are all the less acceptable as Brussels I, Rome II and the Rome Convention of 1980 form an indissoluble set of Community rules of private international law relating to contractual and non-contractual obligations civil and commercial matters.

1.2. Grounds for the proposal

The importance of compatibility between conflict-of-laws rules for achieving the objective of mutual recognition of judicial decisions was acknowledged in the Vienna Action Plan.[3] The 2000 Mutual Recognition Programme[4] sets forth measures to harmonise the conflict-of-laws rules as accompanying measures to facilitate the implementation of the mutual recognition principle. More recently, in the Hague Programme, the European Council[5] restated that work on the conflict-of-laws rules regarding contractual obligations (Rome I) should be actively pursued. The Council and Commission action plan to give effect to that programme provides for a Rome I proposal to be adopted by 2005.[6]

2. OUTCOME OF CONSULTATIONS OF INTERESTED PARTIES AND OTHER INSTITUTIONS - IMPACT ANALYSIS

This proposal has been preceded by extensive consultation of the Member States, the other institutions and civil society, in particular via the Green Paper of 14 January 2003[7] and the public hearing on it in Brussels on 7 January 2004. The 80 or so replies to the Green Paper,[8] received from

governments, universities, the legal professions and a variety of economic actors, confirmed that the Rome Convention is not only a widely-known instrument but also highly appreciated in relevant circles, who by a large majority supported its conversion into a Community Regulation while also confirming the need to modernise certain of its rules. On 4 and 5 November 1999 the Commission also organised a public hearing on Electronic Commerce: jurisdiction and applicable law, receiving about 75 written contributions.

In their Opinions dated 29 January[9] and 12 February 2004[10] respectively, the European Economic and Social Committee and the European Parliament came out in favour of converting the Convention into a Community Regulation and modernising it.

On 17 February 2005, the Member States' experts met to consider a preliminary draft Rome I Regulation prepared in the Commission.

Given the limited impact of this proposal on the existing body of legislation and the relevant circles, the Commission has decided to refrain from making a formal impact assessment. The proposal does not set out to establish a new set of legal rules but to convert an existing convention into a Community instrument. But some of the amendments made will help to modernise certain provisions of the Rome Convention and make them clearer and more precise, thus boosting certainty as to the law without bringing in new elements such as would substantially change the existing legal situation. All the changes proposed here are based on the results of the Commission's extensive consultations, which were widely accessible to the public. For further details of the nature and impact of the changes, see the specific commentaries on the individual articles (point 4.2 below).

3. LEGAL ASPECTS OF THE PROPOSAL

3.1. Legal basis

Since the Amsterdam Treaty entered into force, the conflict-of-laws rules have come under Article 61(c) of the TEC. Under Article 67 of the TEC, as amended by the Treaty of Nice, the Regulation is to be adopted by the codecision procedure of Article 251 of the TEC. Article 65(b) provides: Measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Article 67 and in so far as necessary for the proper functioning of the internal market, shall include:... promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction. The Community legislature thus has some room for manoeuvre in deciding whether a measure is necessary for the proper functioning of the internal market. Harmonisation of the conflict-of-laws rules relating to contractual obligations is necessary for the proper functioning of the internal market.

Title IV of the TEC, which is the basis for the matters covered by this proposal, does not apply to Denmark by reason of the Protocol applicable to it. Nor does it apply to Ireland and the United Kingdom, unless those countries exercise their right to opt into this initiative as provided by the Protocol annexed to the Treaty.

3.2. Principles of subsidiarity and proportionality

The objective of the proposal - the adoption of uniform rules on the law applicable to contractual obligations to make judicial decisions more easily foreseeable - cannot be adequately attained by the Member States, who cannot lay down uniform Community rules, and can therefore, by reason of its effects throughout the Community, be better achieved at Community level, the Community can take measures, in accordance with the subsidiarity principle set out in Article 5 of the Treaty. And the measures respect the proportionality principle set out in that Article, by increasing certainty in the law without requiring harmonisation of the substantive rules of domestic law.

Point 6 of the Protocol on the application of the principles of subsidiarity and proportionality

provides that Other things being equal, directives should be preferred to regulations... For this proposal, however, the Regulation would seem to be preferable as its provisions lay down uniform rules on the applicable law that are detailed, precise and unconditional and require no measures for their transposal into domestic law. If the Member States enjoyed some room for manoeuvre in transposing, the uncertainty as to the law which the aim is to abolish would be restored.

4. ARTICLE-BY-ARTICLE COMMENTARY

4.1. Adaptations linked to the nature of the instrument

Apart from the changes of substance (point 4.2), the obvious differences between the legal nature of the Rome Convention (the Convention) and the Regulation warrant a number of adaptations: apart from the purely formal adaptations, there are those that allowed contracting States to enter reservations (article 22), to adopt new conflict rules after a notification procedure (article 23) or the limited duration of the Convention (article 30). Likewise the two Protocols annexed to the Convention concerning interpretation by the Court of Justice are now superfluous.

4.2. Adaptations to modernise the Rome Convention rules

Given the similarity between the Convention and the proposed Regulation, only changes of substance from the Convention are considered here.

Article 1 - Scope

The proposed changes seek to align the scope of the future Rome I instrument on that of the Brussels I Regulation and to reflect the work done by the Council and the European Parliament on the proposed Rome II Regulation. Point (e) confirms the exclusion of arbitration agreements and agreements on the choice of court as the majority of the replies to the Green Paper felt that the former was already covered by satisfactory international regulations and that the question of the law applicable to the choice-of-forum clause should ultimately be settled by the Brussels I Regulation. Point (f) combines the rules of point (e) and the company-law aspects of point (f) of the Convention. The first sentence of point (f) of the Convention has been deleted as there is a specific rule on agency (Article 7). Point (i) proposes a specific rule for pre-contractual obligations which, according to the contributions, confirms the analysis of the majority of legal systems in the Union and the restrictive concept of the contract adopted by the Court of Justice in its judgments concerning Article 5(1) of the Brussels I Regulation: for the purposes of private international law, they would be treated as a matter of tort/delict and governed by the future Rome II instrument.

Article 2 - Application of law of non-member States

The discussions of the Rome II draft revealed that the title of Article 2 of the Convention (Universal application) was a source of confusion: it has therefore been changed for the sake of clarity.

Article 3 - Freedom of choice

The proposed changes to the second and third subparagraphs of paragraph 1 require the courts to ascertain the true tacit will of the parties rather than a purely hypothetical will: they suggest that the parties' conduct be taken into account and seek to clarify the impact of the choice of court, so as to reinforce the foreseeability of the law.

To further boost the impact of the parties' will, a key principle of the Convention, paragraph 2 authorises the parties to choose as the applicable law a non-State body of law. The form of words used would authorise the choice of the UNIDROIT principles, the Principles of European Contract Law or a possible future optional Community instrument, while excluding the lex mercatoria , which is not precise enough, or private codifications not adequately recognised by the international community. Like Article 7(2) of the Vienna Convention on the international sale of goods, the text shows

what action should be taken when certain aspects of the law of contract are not expressly settled by the relevant body of non-State law.

Paragraph 4 addresses the issue of fraudulent evasion of the law, referring not only to binding international provisions within the meaning of Article 8 but also the mandatory provisions in the domestic law of a legal system. Paragraph 5 aims to prevent fraudulent evasion of Community law.

Article 4 -Applicable law in the absence of choice

The rule in the Convention, whereby the applicable law is the law of the place where the party performing the service characterising the contract has his habitual residence, is preserved, but the proposed changes seek to enhance certainty as to the law by converting mere presumptions into fixed rules and abolishing the exception clause. Since the cornerstone of the instrument is freedom of choice, the rules applicable in the absence of a choice should be as precise and foreseeable as possible so that the parties can decide whether or not to exercise their choice.

Regarding the solutions for the different categories of contracts, only those proposed at points (g) and (h) have come up for discussion and prompted court decisions in the Member States in relation to determination of the characteristic performance. The solutions are based on the fact that Community law seeks to protect the franchisee and the distributor as the weaker parties.

Paragraph 2 retains the characteristic performance criterion for contracts for which paragraph 1 lays down no special rule, such as complex contracts that are not easy to categorise or contracts involving mutual performance by the parties in terms that can be regarded as characteristic on both sides.

Article 5 - Consumer contracts

Paragraph 1 proposes a new, simple and foreseeable conflict rule consisting of applying only the law of the place of the consumer's habitual residence, without affecting the substance of the professional's room for manoeuvre in drawing up his contracts. The solution adopted in the Convention was widely criticised in the responses to the Green Paper as it often produced hybrid solutions in which the law applicable to the professional and the mandatory provisions of the law applicable to the consumer were applied in parallel. In the event of a dispute, this complex solution entails additional procedural costs that are all the less justified as the consumer's claim will tend to be quite small. There are two possible solutions to prevent this hybrid situation - full application of the law applicable to the professional or the law applicable to the consumer - only the latter would be truly compatible with the high level of protection for the consumer demanded by the Treaty. It also seems fair in economic terms: a consumer will make cross-border purchases only occasionally whereas most traders operating across borders will be able to spread the cost of learning about one or more legal systems over a large range of transactions. Finally, in practice this solution does not substantially modify the situation of the professional, for whom the initial difficulty in drafting standard contracts is to comply with the mandatory provisions of the law in the country of consumption; under the Convention, the mandatory provisions are already those of the country of the consumer's habitual residence. Regarding other clauses, which the parties are free to draft as they wish, the freedom of the parties to draft their own contract is the rule that continues to prevail; it therefore matters little whether they are governed by the law of one or other party.

Paragraph 2 specifies the conditions for applying the special rule. The first subparagraph now recalls that the consumer's contracting partner, a concept defined in some detail by the Court of Justice, is a professional. As requested in the great majority of contributions in response to the Green Paper, the second subparagraph replaces the conditions of Article 5(2) and (4)(b) of the Convention by the targeted activity criterion, already present in Article 15 of the Brussels I Regulation to take account of developments in distance selling techniques without substantially

changing the scope of the special rule. When the Brussels I Regulation was adopted, a joint declaration by the Council and the Commission[11] specified that, for the consumer protection provisions to be applicable, it was not enough for a firm to target its activities on the Member State where the consumer was domiciled a contract must also have been concluded in the exercise of his trade or profession. The mere fact that an Internet site is accessible is not sufficient for Article 15 to be applicable, although a factor will be that this Internet site solicits the conclusion of distance contracts and that a contract has actually been concluded at a distance, by whatever means. In this respect, the language or currency which a website uses does not constitute a relevant factor. The sites to which this declaration refers are not necessarily interactive sites: a site inviting buyers to fax an order aims to conclude distance contracts. On the other hand, a site which offers information to potential consumers all over the world but refers them to local distributor or agent for the purposes of concluding the actual contract does not aim to conclude distance contracts. Unlike Article 5(2) of the Convention, the proposed Regulation does not require the consumer to have done the acts needed to conclude the contract in the country of his habitual residence, as this is a superfluous condition in terms of contracts concluded via the Internet. On the other hand, the last subparagraph of this paragraph brings in a safeguard clause to protect the professional, for example where he has agreed to enter into a contract with a consumer who has lied about his habitual residence; for a contract concluded via the Internet, it will up to the professional to ensure that his standard form makes it possible to identify where the consumer lives.

The proposed Regulation no longer contains a list of contracts to which the special rule applies; its material scope is accordingly extended to all contracts with consumers except those expressly excluded by paragraph 3.

Article 6 - Individual employment contracts

The basic rule in paragraph 2(a) has been amplified and the reference is now to the country in or from which... to take account of the law as stated by the Court of Justice in relation to Article 18 of the Brussels I Regulation and its broad interpretation of the habitual place of work. This change will make it possible to apply the rule to personnel working on board aircraft, if there is a fixed base from which work is organised and where the personnel perform other obligations in relation to the employer (registration, safety checks). Paragraph 2(b) will thus apply more rarely. The text then provides additional guidance as to whether an employee posted abroad is temporarily employed there, though there is no rigid definition. The courts are to have regard to the intentions of the parties.

Article 7 - Contracts concluded by an agent

Among the three legal relationships that arise from a contract concluded by an agent - between principal and agent, between agent and third party and between principal and third party - only the first two are covered by the Convention. The question of the agent's powers is excluded by Article 1(2)(f); the reasons for the exclusion are the diversity of the national conflict rules when the Convention was negotiated and the existence of the Hague Convention of 14 March 1978 on the law applicable to agency. As only three Member States have signed and/or ratified the Convention and national solutions have come closer into line with each other, the exclusion is no longer warranted. The proposed Regulation brings together in a single Article all the rules governing legal relationship arising from agency contracts.

Article 8 - Mandatory provisions

Paragraph 1 proposes a definition of international mandatory provisions for the purposes of Article 8 which is inspired by the Court of Justice's judgment in Arblade.[12] Paragraph 31 of that judgment holds that the fact that national rules are categorised as mandatory provisions legislation does

not mean that they are exempt from compliance with the provisions of the Treaty: the considerations underlying such national legislation can be taken into account by Community law only in terms of the exceptions to Community freedoms expressly provided for by the Treaty. Paragraph 3 specifies the criteria that may be used by the courts to decide whether it should apply the mandatory provisions of another Member State. The replies to the Green Paper having enabled decisions referring to the concept of foreign mandatory provisions, including those of the Member States that had entered reservations on Article 7(1) of the Convention, to be identified, the utility of the rule would seem to be confirmed, especially as the Brussels I Regulation sometimes provides for alternative grounds of jurisdiction; it is therefore essential in a genuine European justice area for the courts to be able to have regard to another Member State's mandatory provisions where there is a close connection with the case and where a court action has already been brought by the claimant.

Article 10 - Formal validity

Given the growing frequency of distance contracts, the rules in the Convention governing formal validity of contracts are now clearly too restrictive. To facilitate the formal validity of contracts or unilateral acts, further alternative connecting factors are introduced. The specific rules for contracts concluded by an agent have been incorporated in paragraphs 1 and 2.

Article 13 - Voluntary assignment and contractual subrogation

Voluntary assignment and contractual subrogation perform a similar economic function and are now covered by a single Article. Paragraph 3 introduces a new conflict rule relating to the possibility of pleading an assignment of a claim against a third party; the solution is the one recommended by the great majority of respondents, which was also adopted in the 2001 UNCITRAL Convention on the assignment of receivables in international trade.

Article 14 - Statutory subrogation

Voluntary subrogation is now covered by Article 13, so Article 14 applies solely to statutory subrogation as provided, for instance, where an insurer who has compensated a person who has suffered a loss is subrogated to the victim's rights against the person who caused the loss. The amendment reflects the work done by the Council and the European Parliament on the Rome II proposal to explain this mechanism, unknown in certain legal systems, in terms that are easier to understand.

Article 15 - Multiple debtors

The amendment reflects the same work so as to cover subrogation and multiple debtors by two separate provisions and present the conflict rules relating to multiple debtors in simpler terms. The final sentence clarifies the situation of a debtor enjoying special protection.

Article 16 - Statutory offsetting

The contributions confirmed the analysis in the Green Paper regarding the usefulness of a rule governing statutory offsetting, given that contractual offsetting is by definition subject to the general rules in Articles 3 and 4. The aim of the solution adopted here is to make offsetting easier while respecting the legitimate concerns of the person who did not take the initiative.

Article 18 - Assimilation to habitual residence

Like the Rome II proposal, Article 18 contains a definition of habitual residence, in particular for legal persons.

Article 21 - States with more than one legal system

Where a State consists of several territorial units each with its own substantive law of contractual obligations, this Regulation must also apply to conflicts of laws between those territorial units

so as to ensure foreseeability and certainty on the law and the uniform application of European rules to all conflict situations.

Article 22 - Relationship with other provisions of Community law

Like Article 20 of the Convention, Article 22 determines the relationship with other provisions of Community law. Point a) covers the conflict-of-laws rules in instruments of Community secondary legislation in the specific subject-areas listed in Annex 1. The purpose of point b) is to secure consistency with a possible optional instrument in the context of the European Contract Law project. The relationship between the proposed Regulation and the rules to promote the smooth operation of the internal market is governed by point c).

Article 23 - Relationship with existing international conventions

The purpose of the proposed amendments is to strike a balance between compliance with the Member States' international commitments and the objective of establishing a genuine European judicial area while enhancing the transparency of the body of law in force by publishing the conventions to which the Member States are Parties. Paragraph 2 sets out the basic rule that international conventions take precedence over the proposed Regulation. But there is an exception where at the time of conclusion of the contract all material aspects of the situation are located in one or more Member States. The co-existence of two parallel schemes - application of conventions rules for Member States which have ratified and application of the proposed regulation elsewhere - would be contrary to the smooth operation of the internal market. Paragraph 3 specifically refers to bilateral conventions concluded between the new Member States.

2005/0261 (COD)

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND THE COUNCIL

on the law applicable to contractual obligations (Rome I)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 61(c) and the second indent of Article 67(5) thereof,

Having regard to the proposal from the Commission[13],

Having regard to the Opinion of the European Economic and Social Committee[14],

Acting in accordance with the procedure provided for by Article 251 of the Treaty[15],

Whereas:

(1) The Union has set itself the objective of establishing an area of freedom, security and justice. To that end the Community must adopt measures relating to judicial cooperation in civil matters with a cross-border impact to the extent necessary for the proper functioning of the internal market, including measures promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws.

(2) For the purposes of effectively implementing the relevant provisions of the Amsterdam Treaty, the Council (Justice and Home Affairs) on 3 December 1998 adopted a plan of action on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice,[16] stressing the importance of promoting the compatibility of conflict-of-law rules in order to attain the objective of mutual recognition of judgments and calling for the revision, where necessary, of certain provisions of the Convention on the Law applicable to contractual obligations, taking

into account special provisions on conflict-of-law rules in other Community instruments.

(3) The Tampere European Council on 15 and 16 October 1999 approved the principle of mutual recognition of judgments as a priority matter in the establishment of a European judicial- area. The programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters[17] specifies that the accompanying measures relating to harmonisation of conflict-of-law rules actually do help facilitate the mutual recognition of judgments. In the Hague Programme,[18] the European Council restated that work on the conflict of laws regarding contractual obligations should be actively pursued.

(4) The proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law and the free movement of judgments, for the rules of conflict of laws in the Member States to designate the same national law irrespective of the country of the court in which an action is brought. For the same reasons there is a need to achieve the greatest harmony between three instruments - this Regulation, Council Regulation (EC) No 2001/44 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I)[19] and Parliament and Council Regulation (EC) No [...] on the law applicable to non-contractual obligations (Rome II).

(5) The concern for transparency in Community legislation is such that the largest possible number of conflict-of-laws rules should be brought together in a single instrument or at least that this Regulation should contain a list of special rules laid down by sectoral instruments.

(6) The scope of the Regulation must be determined in such a way as to be consistent with Regulation (EC) No 44/2001 and Parliament and Council Regulation (EC) No [...] on the law applicable to non-contractual obligations (Rome II).

(7) Freedom for the parties to choose the applicable law must be one of the cornerstone of the system of conflict-of-laws rules in matters of contractual obligations.

(8) To contribute to the general objective of the instrument - certainty as to the law in the European judicial area - the conflict rules must be highly foreseeable. But the courts must retain a degree of discretion to determine the law that is most closely connected to the situation in a limited number of hypothetical cases.

(9) As regards contracts concluded with parties regarded as being weaker, those parties should be protected by conflict rules that are more favourable to their interests than the general rules.

(10) With more specific reference to consumer contracts, the conflict rule must make it possible to cut the cost of settling disputes on what are commonly relatively small claims and to take account of the development of distance-selling techniques. Harmony with Regulation (EC) No 44/2001 requires both that there be a reference to the concept of targeted activity as a condition for applying the consumer-protection rule and that the concept be interpreted harmoniously in the two instruments, bearing in mind that a joint declaration by the Council and the Commission on Article 15 of Regulation No 44/2001[20] states that for Article 15(1)(c) to be applicable it is not sufficient for an undertaking to target its activities at the Member State of the consumer's residence, or at a number of Member States including that Member State; a contract must also be concluded within the framework of its activities. The declaration also states that the mere fact that an Internet site is accessible is not sufficient for Article 15 to be applicable, although a factor will be that this Internet site solicits the conclusion of distance contracts and that a contract has actually been concluded at a distance, by whatever means. In this respect, the language or currency which a website uses does not constitute a relevant factor.

(11) Regarding individual employment contracts, the conflict rule should make it possible to identify

the centre of gravity of the employment relationship, looking beyond appearances. This rule does not prejudge the application of the mandatory rules of the country to which a worker is posted in accordance with Directive 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services.[21]

(12) Regarding contracts concluded by agents, conflict rules should be laid down to govern the three legal relationships between the principal, the agent and the third party. A contract concluded between the principal and the third party would remain subject to the general rules of this Regulation.

(13) Respect for the public policy (ordre public) of the Member States requires specific rules concerning mandatory rules and the exception on grounds of public policy. Such rules must be applied in a manner compatible with the Treaty.

(14) For the sake of certainty as to the law there should be a clear definition of habitual residence, in particular for bodies corporate. Unlike Article 60(1)(c) of Regulation (EC) No 44/2001, which establishes three criteria, the conflict-of-laws rule should proceed on the basis of a single criterion; otherwise, it would remain impossible for parties to foresee the law applicable to their situation.

(15) The relationship between this Regulation and certain other provisions of Community law should be spelled out.

(16) Respect for international commitments entered into by the Member States means that this Regulation should not affect conventions relating to specific matters to which the Member States are parties. However, where at the time of conclusion of the contract material aspects of the situation are located in one or more Member States, the application of certain international conventions to which only some of the Member States are Parties would be contrary to the objective of a genuine European judicial area. The rule set out in this Regulation should accordingly be applied. To make the rules easier to read, the Commission will publish the list of the relevant conventions in the Official Journal of the European Union on the basis of information supplied by the Member States.

(17) Since the objective of the proposed action, namely better foreseeability of court judgments requiring genuinely uniform rules on the law applicable to contractual obligations determined by a mandatory and directly applicable Community legal instrument, cannot be adequately attained by the Member States, who cannot lay down uniform Community rules, and can therefore, by reason of its effects throughout the Community, be better achieved at Community level, the Community can take measures, in accordance with the subsidiarity principle set out in Article 5 of the Treaty. In accordance with the proportionality principle set out in that Article, a Regulation, which increases certainty in the law without requiring harmonisation of the substantive rules of domestic law, does not go beyond what is necessary to attain that objective.

(18) [In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and the Treaty establishing the European Community, these Member States have stated their intention of participating in the adoption and application of this Regulation. / In accordance with Articles 1 and 2 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and the Treaty establishing the European Community, these Member States are not participating in the adoption of this Regulation, which will accordingly not be binding on those Member States.]

(19) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and the Treaty establishing the European Community, that Member State is not participating in the adoption of this Regulation, which will accordingly not be binding on that Member State,

HAVE ADOPTED THIS REGULATION:

Chap ter One - Scope

Article 1 - Scope

1. This Regulation shall apply, in any situation involving a conflict of laws, to contractual obligations in civil and commercial matters.

It shall not extend, in particular, to revenue, customs or administrative matters.

2. The Regulation shall not apply to:

(a) questions involving the status or legal capacity of natural persons, without prejudice to Article 12;

(b) contractual obligations relating to a family relationship or a relationship which, in accordance with the law applicable to it, has similar effects, including maintenance obligations;

(c) obligations arising out a matrimonial relationship or a property ownership scheme which, under the law applicable to it, has similar effects to a marriage, wills and successions;

(d) obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;

(e) arbitration agreements and agreements on the choice of court;

(f) questions governed by the law of companies and other bodies corporate or unincorporate such as the creation, by registration or otherwise, legal capacity, internal organisation or winding up of companies and other bodies corporate or unincorporate, the personal liability of officers and members as such for the obligations of the company or body and the question whether a management body of a company or other body corporate or unincorporated can bind the company or body in relation to third parties;

(g) the constitution of trusts and the relationship between settlers, trustees and beneficiaries;

(h) evidence and procedure, without prejudice to Article 17;

(i) obligations arising out of a pre-contractual relationship.

3. In this Regulation, the term Member State shall mean Member States with the exception of Denmark [,Ireland and the United Kingdom].

Article 2 - Application of law of non-member States

Any law specified by this Convention shall be applied whether or not it is the law of a Member State.

Chap ter II -Uniform rules

Article 3 - Freedom of choice

1. Without prejudice to Articles 5, 6 and 7, a contract shall be governed by the law chosen by the parties.

The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract behaviour of the parties or the circumstances of the case. If the parties have agreed to confer jurisdiction on one or more courts or tribunals of a Member State to hear and determine disputes that have arisen or may arise out of the contract, they shall also be presumed to have chosen the law of that Member State.

By their choice the parties can select the law applicable to the whole or a part only of the contract.

2. The parties may also choose as the applicable law the principles and rules of the substantive law of contract recognised internationally or in the Community.

However, questions relating to matters governed by such principles or rules which are not expressly settled by them shall be governed by the general principles underlying them or, failing such principles, in accordance with the law applicable in the absence of a choice under this Regulation.

3. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice under this Article or of other provisions of this Regulation. Any change in the law to be applied that is made after the conclusion of the contract shall not prejudice its formal validity under Article 10 or adversely affect the rights of third parties.

4. The fact that the parties have chosen a foreign law in accordance with paragraphs 1 or 2, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law of that country which cannot be derogated from by contract, hereinafter called mandatory rules.

5. Where the parties choose the law of a non-member State, that choice shall be without prejudice to the application of such mandatory rules of Community law as are applicable to the case.

6. The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 9, 10 and 12.

Article 4 - Applicable law in the absence of choice

1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law determined as follows:

(a) a contract of sale shall be governed by the law of the country in which the seller has his habitual residence;

(b) a contract for the provision of services shall be governed by the law of the country in which the service provider has his habitual residence;

(c) a contract of carriage shall be governed by the law of the country in which the carrier has his habitual residence;

(d) a contract relating to a right in rem or right of user in immovable property shall be governed by the law of the country in which the property is situated;

(e) notwithstanding point (d), a lease for the temporary personal use of immovable property for a period of no more than six consecutive months shall be governed by the law of the country in which the owner has his habitual residence, provided the tenant is a natural person and has his habitual residence in the same country;

(f) a contract relating to intellectual or industrial property rights shall be governed by the law of the country in which the person who transfers or assigns the rights has his habitual residence;

(g) a franchise contract shall be governed by the law of the country in which the franchised person has his habitual residence;

(h) a distribution contract shall be governed by the law of the country in which the distributor has his habitual residence.

2. Contracts not specified in paragraph 1 shall be governed by the law of the country in which

the party who is required to perform the service characterising the contract has his habitual residence at the time of the conclusion of the contract. Where that service cannot be identified, the contract shall be governed by the law of the country with which it is most closely connected.

Article 5 - Consumer contracts

1. Consumer contracts within the meaning and in the conditions provided for by paragraph 2 shall be governed by the law of the Member State in which the consumer has his habitual residence.

2. Paragraph 1 shall apply to contracts concluded by a natural person, the consumer, who has his habitual residence in a Member State for a purpose which can be regarded as being outside his trade or profession with another person, the professional, acting in the exercise of his trade or profession.

It shall apply on condition that the contract has been concluded with a person who pursues a trade or profession in the Member State in which the consumer has his habitual residence or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities, unless the professional did not know where the consumer had his habitual residence and this ignorance was not attributable to his negligence.

3. Paragraph 1 shall not apply to:

1. a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence;

2. contracts of carriage other than contracts relating to package travel within the meaning of Directive 90/314/EEC of 13 June 1990;

3. contracts relating to a right in rem or right of user in immovable property other than contracts relating to a right of user on a timeshare basis within the meaning of Directive 94/47/EC of 26 October 1994.

Article 6 - Individual employment contracts

1. Notwithstanding the provisions of Article 3, in a contract of employment a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded him by the mandatory rules of the law which would be applicable under this Article in the absence of choice.

2. A contract of employment shall, in the absence of choice in accordance with Article 3, be governed:

4. by the law of the country in or from which the employee habitually carries out his work in performance of the contract. The place of performance shall not be deemed to have changed if he is temporarily employed in another country. Work carried out in another country shall be regarded as temporary if the employee is expected to resume working in the country of origin after carrying out his tasks abroad. The conclusion of a new contract of employment with the original employer or an employer belonging to the same group of companies as the original employer does not preclude the employee from being regarded as carrying out his work in another country temporarily;

5. if the employee does not habitually carry out his work in or from any one country, or he habitually carries out his work in or from a territory subject to no national sovereignty, by the law of the country in which the place of business through which he was engaged is situated.

3. The law designated by paragraph 2 may be excluded where it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the contract shall be governed by the law of that country.

Article 7 - Contracts concluded by an agent

1. In the absence of a choice under Article 3, a contract between principal and agent shall be governed by the law of the country in which the agent has his habitual residence, unless the agent exercises or is to exercise his main activity in the country in which the principal has his habitual residence, in which case the law of that country shall apply.

2. The relationship between the principal and third parties arising out of the fact that the agent has acted in the exercise of his powers, in excess of his powers or without power, shall be governed by the law of the country in which the agent had his habitual residence when he acted. However, the applicable law shall be the law of the country in which the agent acted if either the principal on whose behalf he acted or the third party has his habitual residence in that country or the agent acted at an exchange or auction.

3. Notwithstanding paragraph 2, where the law applicable to a relationship covered by that paragraph has been designated in writing by the principal or the agent and expressly accepted by the other party, the law thus designated shall be applicable to these matters.

4. The law designated by paragraph 2 shall also govern the relationship between the agent and the third party arising from the fact that the agent has acted in the exercise of his powers, in excess of his powers or without power.

Article 8 - Mandatory rules

1. Mandatory rules are rules the respect for which is regarded as crucial by a country for safeguarding its political, social or economic organisation to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.

2. Nothing in this Regulation shall restrict the application of the rules of the law of the forum in a situation where they are mandatory.

3. Effect may be given to the mandatory rules of the law of another country with which the situation has a close connection. In considering whether to give effect to these mandatory rules, courts shall have regard to their nature and purpose in accordance with the definition in paragraph 1 and to the consequences of their application or non-application for the objective pursued by the relevant mandatory rules and for the parties.

Article 9 - Consent and material validity

1. The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid.

2. Nevertheless a party may rely upon the law of the country in which he has his habitual residence to establish that he did not consent if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in the preceding paragraph.

Article 10 - Formal validity

1. A contract is formally valid if it satisfies the formal requirements of the law which governs it in substance under this Regulation or the law of the country in which one or other of the parties or his agent is when it is concluded or the law of the country in which one or other of the parties has his habitual residence at that time.

2. A unilateral act intended to have legal effect relating to an existing or contemplated contract is formally valid if it satisfies the formal requirements of the law which governs or would govern the contract in substance under this Regulation or of the law of the country in which the act is performed or the law of the country in which the person who drafted it has his habitual residence at that time.

3. Paragraphs 1 and 2 of this Article shall not apply to contracts that fall within the scope of Article 5. The form of such contracts shall be governed by the law of the country in which the consumer has his habitual residence.

4. Notwithstanding paragraphs 1 to 3 of this Article, a contract the subject matter of which is a right in immovable property or a right to use immovable property shall be subject to the mandatory requirements of form of the law of the country where the property is situated if by that law those requirements are mandatory provisions within the meaning of Article 8.

Article 11 - Scope of applicable law

1. The law applicable to a contract by virtue of this Regulation shall govern in particular:

6. interpretation;

7. performance;

8. within the limits of the powers conferred on the court by its procedural law, the consequences of the total or partial breach of obligations, including the assessment of damages in so far as it is governed by rules of law;

9. the various ways of extinguishing obligations, and prescription and limitation of actions;

10. the consequences of nullity of the contract.

2. In relation to the manner of performance and the steps to be taken in the event of defective performance regard shall be had to the law of the country in which performance takes place.

Article 12 - Incapacity

In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from another law only if the other party to the contract was aware of this incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence.

Article 13 - Voluntary assignment and contractual subrogation

1. The mutual obligations of assignor and assignee under a voluntary assignment or contractual subrogation of a right against another person shall be governed by the law which under this Regulation applies to the contract between the assignor and assignee.

2. The law governing the original contract shall determine the effectiveness of contractual limitations on assignment as between the assignee and the debtor, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and whether the debtor's obligations have been discharged.

3. The question whether the assignment or subrogation may be relied on against third parties shall be governed by the law of the country in which the assignor or the author of the subrogation has his habitual residence at the material time.

Article 14 - Statutory subrogation

Where a person has a contractual claim upon another and a third person has a duty to satisfy the creditor, the law which governs the third person's duty to satisfy the creditor shall determine whether the third person is entitled to proceed against the debtor.

Article 15 - Multiple liability

Where a creditor has a claim upon several debtors who are jointly liable and one of those debtors has in fact satisfied the creditor, the law of the obligation of this debtor towards the creditor

governs the right of this debtor to claim against the other debtors. Where the law applicable to a debtor's obligation to the creditor provides for rules to protect him against actions to ascertain his liability, he may also rely on them against other debtors.

Article 16 - Statutory offsetting

1. Statutory offsetting shall be governed by the law applicable to the obligation in relation to which the right to offset is asserted.

Article 17 - Burden of proof

1. The law governing the contract under this Regulation shall apply to the extent that it contains, in the law of contract, rules which raise presumptions of law or determine the burden of proof.

2. A contract or an act intended to have legal effect may be proved by any mode of proof recognized by the law of the forum or by any of the laws referred to in Article 10 under which that contract or act is formally valid, provided that such mode of proof can be administered by the forum.

Chapter III - Other provisions

Article 18 - Assimilation to habitual residence

1. For companies or firms and other bodies or incorporate or unincorporate, the principal establishment shall be considered to be the habitual residence for the purposes of this Regulation.

Where the contract is concluded in the course of operation of a subsidiary, a branch or any other establishment, or if, under the contract, performance is the responsibility of such an establishment, this establishment shall be considered the habitual residence.

2. For the purposes of this Regulation, where the contract is concluded in the course of the business activity of a natural person, that natural person's establishment shall be considered the habitual residence.

Article 19 - Exclusion of renvoi

The application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law.

Article 20 - Ordre public

The application of a rule of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum.

Article 21 - States with more than one legal system

Where a State comprises several territorial units each of which has its own rules of law in respect of contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation.

Article 22 - Relationship with other provisions of Community law

This Regulation shall not prejudice the application or adoption of acts of the institutions of the European Communities which:

11. in relation to particular matters, lay down choice-of-law rules relating to contractual obligations; a list of such acts currently in force is provided in Annex 1; or

12. govern contractual obligations and which, by virtue of the will of the parties, apply in conflict-of-law situations; or

13. lay down rules to promote the smooth operation of the internal market, where such rules cannot apply at the same time as the law designated by the rules of private international law.

Article 23 - Relationship with existing international conventions

1. The Member States shall notify the Commission, no later than six months after the entry into force of this Regulation, of the list of multilateral conventions governing conflicts of laws in specific matters relating to contractual obligations to which they are Parties. The Commission shall publish the list in the Official Journal of the European Union within six months thereafter.

After that date, the Member States shall notify the Commission of all denunciations of such conventions, which the Commission shall publish in the Official Journal of the European Union within six months after receiving them.

2. This Regulation shall not prejudice the application of international conventions referred to in paragraph 1. However, where, at the time of conclusion of the contract, material aspects of the situation are located in one or more Member States, this Regulation shall take precedence over the following Conventions:

- the Hague Convention of 15 June 1955 on the law applicable to international sales of goods;

- the Hague Convention of 14 March 1978 on the law applicable to agency.

3. This Regulation shall take precedence over bilateral international conventions concluded between Member States and listed in Annex II if they concern matters governed by this Regulation.

Chapter IV - Final provisions

Article 24 - Entry into force and application in time

This Regulation shall enter into force on the twentieth day following its publication in the Official Journal of the European Union .

This Regulation shall apply from [one year after entry into force].

It shall apply to contractual obligations arising after its entry into application. However, for contractual obligations arising before its entry into application, this Regulation shall apply where its provisions have the effect of making the same law applicable as would have been applicable under the Rome Convention of 1980.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the European Parliament For the Council

The President The President

ANNEX 1: List of instruments mentioned in Article 22(a)

- Directive on the return of cultural objects unlawfully removed from the territory of a Member State (Directive 7/1993/EC of 15.3.1993)

- Directive concerning the posting of workers in the framework of the provision of services (Directive 71/1996/EC of 16.12.1996)

- Second non-life insurance Directive (Directive 357/1988/EEC of 22.6.1988, as amplified and amended by Directives 49/1992/EC and 13/2002/EC)

- Second life assurance Directive (Directive 619/1990/EEC of 8.1.1990 as amplified and amended by Directives 96/1992/EC and 12/2002/EC)

- ANNEX II: List of bilateral conventions mentioned in Article 23(3)

[...]

[1] Council Regulation (CE) No 44/2001 of 22.12.2000, OJ L 12, 16.1.2001, p. 1.

[2] COM (2003) 427 final.

[3] OJ C 19, 23.1.1999, p. 1, point 40 (c).

[4] OJ C 12, 15.1.2001, p. 8.

[5] The Hague Programme, Presidency Conclusions, 5.11.2004, point 3.4.2.

[6] Point 4.3.c).

[7] COM (2002) 654 final.

[8] Accessible at:http:europa.eu.int/comm/justice_home/news/consulting_public/rome_i/news_summary_rome1_en.htm

[9] Opinion of the European Economic and Social Committee on the Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation. INT/176, 29.01.2004

[10] European Parliament Resolution on the prospects for approximating civil procedural law in the European Union (COM(2002) 654 - COM(2002) 746 - C5-0201/2003 - 2003/2087(INI)), A5-0041/2004.

[11] Accessible at: http:europa.eu.int/comm/justice_home/unit/civil/justciv_conseil/justciv_en.pdf.

[12] Cases C-369/96 and C-374/96 (judgment given on 23.11.1999).

[13] OJ C , , p..

[14] OJ C , , p..

[15] OJ C , , p..

[16] OJ C 19, 23.1.1999, p. 1.

[17] OJ C 12, 15.1.2001, p. 1.

[18] Annex 1 to Presidency Conclusions, 5.11.2004.

[19] OJ L 12, 16.1.2001, p. 1. Regulation as last amended by Regulation (EC) No 2245/2004 (OJ L 381, 28.12.2004, p. 10).

[20] Accessible at: http:europa.eu.int/comm/justice_home/unit/civil/justciv_conseil/justciv_en.pdf.

[21] OJ L 18, 21.1.1997, p. 1.

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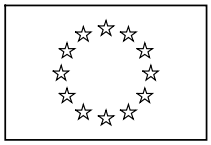

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 14.1.2003
COM(2002) 654 final

GREEN PAPER

on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation

(presented by the Commission)

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GREEN PAPER

on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation

The purpose of this Green Paper is to launch a wide-ranging consultation of interested parties on a number of legal questions on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations ("the Rome Convention" or "the Convention") into a Community instrument and its modernisation.

It sets out the general context of the debate and presents a number of options.

The Commission invites interested parties to send reasoned replies to the questions raised in this Green Paper and listed on page 3. The questions are, obviously, not restrictive and more general comments will be appreciated. In addition, for each question interested parties are asked to provide the Commission with whatever information they can on the impact that the various options would have on:

i. business life in general;

ii. small business in particular;

iii. relations between businesses and consumers/workers.

The Commission will take account of comments received in the case it prepares a proposal for a Community instrument.

It must be stressed that the Commission has neither taken a decision in respect of the necessity to modernise the Rome Convention nor in respect of its conversion into a Community instrument.

The present document does not intend to examine the relationship between a possible future instrument and the Internal Market rules. For the Commission it is clear, however, that such an instrument should leave intact the principles of the Internal Market laid down in the Treaty or in secondary legislation.

Interested parties are requested to send their answers and comments before 15 September 2003 to the following address:

European Commission
Directorate-General for Justice and Home Affairs,
Unit A3 - Cooperation in Civil Matters
B-1049 Brussels
Fax: + 32 (2) 299,64 57
E-MAIL: jai-coop-jud-civil@cec.eu.int

Interested parties are requested to chose one single means of communication (electronic mail, fax or ordinary mail) to send their contributions. In the absence of formal instructions to the contrary, respondents' answers and comments may be published on the Commission's website.

The Commission plans to organise a public hearing on the subject in the last quarter of 2003.

LIST OF THE QUESTIONS

Question 1: **Do you have information concerning economic actors' and legal practitioners' actual knowledge of the Rome Convention of 1980 and of its rules, in particular the rule allowing parties to freely choose the law applicable to their contract? If you consider that such knowledge in sufficient, do you think that this situation has a negative impact on the parties' conduct in their contractual relations or on court proceedings?**

Question 2: **Do you believe the Rome Convention of 1980 should be converted into a Community instrument? What are your arguments for or against such a conversion?**

Question 3: **Are you aware of difficulties encountered because of the proliferation and dispersal of rules having an impact on the applicable law in several horizontal and sectoral instruments of secondary legislation? If so, what do you think is the best way of remedying them?**

Question 4: **Do you think a possible future instrument should contain a general clause guaranteeing the application of a Community minimum standard when all elements, or at least certain highly significant elements, of the contract are located within the Community? Does the wording proposed at 3.1.2.2 allow the objective pursued to be attained?**

Question 5: **Do you have comments on the guidelines with regard to the relationship between a possible Rome instrument and existing international conventions?**

Question 6: **Do you think one should envisage conflict rules applicable to arbitration and choice of forum clauses?**

Question 7: **How do you evaluate the current rules on insurance? Do you think that the current treatment of hypotheses (a) and (c) is satisfactory? How would you recommend resolving the difficulties that have been met (if any)?**

Question 8: **Should the parties be allowed to directly choose an international convention, or even general principles of law? What are the arguments for or against this solution?**

Question 9: **Do you think that a future Rome I instrument should contain more precise information regarding the definition of a tacit choice of applicable law or would conferring jurisdiction on the Court of Justice suffice to ensure certainty as to the law?**

Question 10: **Do you believe that Article 4 should be redrafted to compel the court to begin by applying the presumption of paragraph 2 and to rule out the law thus obtained only if it is obviously unsuited to the instant case? If so, how do you think it would be best drafted?**

Question 11: **Do you believe one should create a specific rule on short-term holiday tenancy, along the lines of the second subparagraph of Article 22(1) of the Brussels I Regulation, or do you consider the present solution satisfactory?**

Question 12: **Evaluation of the consumer protection rules:**

A. How do you evaluate the current rules on consumer protection? Are they still appropriate, in particular in the light of the development of electronic commerce?

B. Do you have information on the impact of the current rule on a) companies in general; b) small and medium-sized enterprises; c) consumers?

C. Among the proposed solutions, which do you prefer, and why? Are other solutions possible?

D. In your view, what would be the impact of the various possible solutions on a) companies in general; b) small and medium-sized enterprises; c) consumers?

Question 13: **Should the future Rome I instrument specify the meaning of "mandatory provisions" in Articles 3, 5, 6 and 9 and in Article 7?**

Question 14: **Should Article 6 be clarified as regards the definition of "temporary employment"? If so, how?**

Question 15: **Do you think that Article 6 should be amended on other points?**

Question 16: **Do you believe there should be rules concerning foreign mandatory rules in the meaning of Article 7? Would it be desirable for the future instrument to be more precise on the conditions for applying such rules?**

Question 17: **Do you think that the conflict rule on form should be modernised?**

Question 18: **Do you believe that a future instrument should specify the law applicable to the conditions under which the assignment may be invoked against third parties ? If so, what conflict rule do you recommend?**

Question 19: **Would it be useful to specify the respective scope of Articles 12 and 13? Do you believe that there should be a conflict rule for subrogation payments made in the absence of an obligation?**

Question 20: **In your view, would it be useful to specify the law applicable to legal compensation? If so, what conflict rule do you recommend?**

Introduction

1.1. The creation of an area of freedom, security and justice

One of the consequences of expanding trade and travel in the world in general and the European Union in particular is the increased risk that European citizens or companies established in a Member State may be involved in a dispute of which all the elements are not confined to the State where they have their habitual residence. An example might be a Greek consumer who bought an electronic instrument in Germany from a catalogue or via the Internet and now wants to sue the manufacturer because it has a serious defect that the manufacturer refuses to repair, or a German company which wants to sue its English trading partner for failure to perform its contract.

Parties are often discouraged from asserting their rights in a foreign country by the incompatibility or complexity of national legal and administrative systems. This applies particularly to private individuals or small businesses, who generally do not have the financial resources to secure the services of an international network of lawyers.

But in the European Union there cannot be a genuine internal market, envisaging free movement of goods, persons, services and capital, without a common law-enforcement area in which all citizens can assert their rights not only in their home country but also in other Member States.

The Tampere European Council on 15 and 16 October 1999[1] set three main lines of priority action for the creation of such an area, one of which is the strengthening of the mutual recognition of court orders and judgments.

Harmonisation of the rules of private international law is essential for attaining this objective.

1.2. The role of private international law in the creation of a European judicial area

Private international law[2] is made up of mechanisms to facilitate the settlement of international disputes. It answers three questions:

– which country's courts have jurisdiction in a dispute; this question refers to the determination of "international jurisdiction" or "conflicts of jurisdiction";

– which country's substantive law is to be applied by the court hearing the case; the problem of applicable law goes by the name of "conflict of laws";

– can the decision given by the court which declared that it had jurisdiction be recognised and, if necessary, enforced in another Member State; this question, designated by the expressions "effect of foreign judgments" or "mutual recognition and enforcement of foreign judgments", is especially important if the losing party has no assets in the country where the judgment was given.

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1 Presidency conclusions of 16.10.1999, points 28 to 39.

2 Private international law does not have the same meaning in all Member States. In German or Portuguese law, for example, it only designates the rules concerning conflict of laws, whereas in other systems it also includes the rules concerning the international jurisdiction of the courts and the recognition of foreign judgments. In this document, the term is used in its broad sense.

Practically speaking, where a court action is to be brought in an international dispute, the first question is which country's courts have international jurisdiction. Once this has been determined, this court will decide which law is applicable to the dispute. It is only when this court has given judgment that the problem of enforcement abroad will arise.

Traditionally, each Member State has its own national rules of private international law. But this entails the major inconvenience of a lack of uniformity and legal certainty and also the risk that the parties or one of them might take advantage of the fact that their case has links with various legal systems to escape the law normally applicable to them. To return to the example of the Greek consumer and the German seller, just imagine that the sales contract between them contains a clause choosing the law of a third country that has no consumer protection provisions. This practice, if it were valid, would be repugnant as it would deprive the consumer of the protection provided for by both Greek and German law.

To combat such inconvenience and practices, the Member States have therefore chosen to harmonise their rules of private international law. So far they have concentrated on contractual and non-contractual obligations in civil and commercial matters.

1.3. The Rome Convention, the Brussels I Regulation and the future Rome II instrument - three complementary instruments

No picture of the objectives of the Rome Convention is complete without a reminder of its predecessor, the Brussels Convention of 1968 (replaced since 1 March 2002, except for Denmark, by the Brussels I Regulation).[3] This was drawn up on the idea, already described in the EC Treaty, that a common market implies the possibility of having a judgment given in another Member State recognised and enforced with the minimum of difficulty. To facilitate this objective, the Brussels Convention begins with rules determining the Member State whose courts have jurisdiction.[4]

But merely having rules on jurisdiction does not fully exclude arbitrary factors in settling the dispute on the substance. The Brussels Convention and the Regulation which replaces it contain a number of options enabling the claimant to choose between this or that court. The risk is that parties will opt for the courts of one Member State rather than another simply because the applicable law in this state would be more favourable to them. This practice is known as "forum-shopping". By unifying the Member States' rules on conflict of laws, the Rome Convention ensures that the same solution will be applied as to the substance irrespective of the court hearing the case and thus reduces the risk of forum-shopping in the European Union.

But there is a great difference between the scope of the Brussels Convention and the scope of the Rome Convention: the first covers both contractual and non-contractual obligations, whereas the second covers only the former. Should the work on a future Rome II instrument on the law applicable to non-contractual relations[5] succeed, this instrument will therefore be

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3 Council Regulation (EC) No 44/2001 of 22.12.2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, replacing the Brussels Convention of 1968, the consolidated version of which was published in the OJ C 27, 26.1.1998, p. 1. But the Brussels Convention of 1968 remains in force for relations between Denmark and the other Member States.

4 The rules on jurisdiction in the 1968 Convention and the Brussels I Regulation are not basically what this Green Paper is about, but we refer to some of them when considering the various conflict rules (point 3).

5 On 3 May 2002 the Commission launched a wide-ranging consultation on a preliminary draft proposal for a Council Regulation on the law applicable to non-contractual obligations in order to collect the

the natural extension of the work on unifying the private international law rules on contractual and non-contractual obligations of a civil and commercial nature in the Community.

Before looking in closer detail at the conflict rules of the Rome Convention, it is worth briefly describing their objectives.

1.4. Objectives of the rules concerning conflict of laws as regards contracts

For each conflict of laws rule, the legislature has a number of options. To explain why one or other option is preferred, we should begin by reviewing two principles – the principle of the proper law and the principle of freedom of choice.

The principle of the proper law is that a situation should be governed by the legal order which has the closest connection with it. This principle is particularly significant as regards international jurisdiction, for example when a dispute concerns a building or a traffic accident: the court for the place of where the building is situated or the place where the accident occurred is generally best placed to assess the facts and gather evidence. The principle of freedom of choice is that the parties may themselves choose the law which will govern relations between them, this solution being easily comprehensible in one of the example quoted above – the contract between two companies, German and English. This is the dominant principle in contract cases, enshrined in the positive law almost everywhere.

In the last twenty years or so, another principle has come to the fore, that of the protection of the weaker party. In the example of the Greek consumer and the German supplier quoted above, the two parties are not on equal footing. If there are no limits on the principle of free will, consumers may well have to accept a law which is unfavourable to them, thus depriving them of the protection which they are entitled to expect when they buy consumer goods, even abroad. The same reasoning applies to the relationship between employer and employee.

All these principles are present in the rules of the Rome Convention of 1980.

1.5. Outline of the rules of the Rome Convention

The uniform rules of the Rome Convention "*apply to contractual obligations in any situation involving a choice between the laws of different countries*",[6] i.e. in situations in which all the elements are not connected to the legal order of one and the same State. For instance, the parties to the contract may be of different nationality or domiciled in different States, or the contract may be made or performed in different countries or in a country different from that of the court hearing the case.

The Rome Convention is what is known as a "universal" convention,[7] i.e. the conflict rules that it enacts can lead to the application of the law of a non-EU State.

The Convention also provides for the exclusion of the following: the status or legal capacity of natural persons; the law governing family economic matters (wills, successions, marriage settlements, contracts covering maintenance responsibility); obligations arising from negotiable instruments (bills of exchange, cheques, promissory notes); the law governing

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comments of the interested parties. The text is available at the following address: http://europa.eu.int/comm/dgs/justice_home/index_en.htm.

6 Article 1.

7 Article 2.

companies, associations and other legal entities; arbitration agreements and agreements on the choice of court; trusts; evidence and procedure.[8]

The keystone of the system is freedom of choice (Article 3), a principle which allows the parties to chose the law applicable to their contract. The freedom left to parties is not unlimited: they may choose any law, even if it has no objective connection with the contract; they may choose the law governing the contract after its conclusion and change their choice at any time during the life of the contract, in certain Member States even in the course of proceedings. Regarding the form of the choice, it "must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case", which can be ascertained from an explicit clause in the contract or alternatively from other elements of the contractual environment, the court being left the task of checking whether there is a tacit or implicit choice of law.

In the absence of a choice of law by the parties, the Convention retains the principle of the proper law, the contract then being governed by the law of the country with which it is most closely connected (Article 4). The contract is presumed to be most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has his habitual residence. The "characteristic performance" is what makes it possible to distinguish one contract from another (e.g. the obligation of the vendor to transfer the property, in a sales contract; the obligation of a carrier to transport a good or a person, in a contract of carriage; etc.); the obligation to pay an amount of money does not therefore constitute the characteristic performance for the purposes of Article 4, though there may be exceptions. The Convention then provides for other presumptions as regards property rights and the carriage of goods. But the court can disregard these presumptions "*if it appears from the circumstances as a whole that the contract is more closely connected with another country*."

Under certain conditions the Rome Convention, like the so-called "Brussels I" Regulation, contains special rules for weaker parties (consumers and workers, Articles 5 and 6). The choice of a law by the parties to the contract may not deprive a consumer or an employee of the protection of the mandatory provisions of the law which would be normally applicable to them – as designated in accordance with the general rules of the Convention – in the absence of a choice of law. In the absence of a choice of law, a consumer contract is governed by the law of the country of the consumer's habitual residence, and an employment contract is governed by the law of the place in which the employee habitually carries out his work in performance of the contract or in the absence of such a place, the law of the place in which he was engaged.

The Convention lays down special rules for certain matters (in particular assignment of claims and subrogation). It covers the law of contract in a very broad sense, since it governs the interpretation of the contract and its performance or non-performance as well as its extinction and nullity.

1.6. Connection with the "European contract law" project

There are those who are already considering the link between Rome I and the European contract law project.[9]

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[8] Subject to Article 14 of the Convention.

The Commission communication of 2 July 2001 aimed at broadening the discussion on the future of European contract law at Community level and on the need for a change of approach regarding the substantive law.[10] In this paper the Commission in particular raised the issue of coherence of the EC *acquis* in the area of contract law and whether divergences in contract law between the Member States may hinder the proper functioning of the internal market. One of the options put forward, if a new approach turned out to be needed, was the adoption of a new Community instrument contributing to further approximation of the substantive law of contracts. Thus some commentators already called into question the value of working on rules prescribing the application of one or the other national rule.

There is, however, no reason for such questioning. In the Commission's opinion, the "European contract law" project does neither aim at the uniformisation of contract law nor at the adoption of a European civil law code. The Commission had already announced that a follow-up document would be published early in 2003. In addition, even assuming that one day there will be closer harmonisation of contract law in the Community, it is quite possible that this will concern only certain particularly important aspects and that the applicable law will still have to be determined for the non-harmonised aspects. Conflict of laws' rules will therefore lose none of their importance for Community cross-border transactions, today and in the future.

Accordingly, the European contract law project does not detract in any way from the arguments for considering a possible modernisation of the Rome Convention. On the contrary, both projects complement each other and will be conducted in parallel.

1.7. Initiatives already taken

To prepare the discussions on modernising the Convention, the Commission provided finance under the GROTIUS CIVIL 2000 programme for a project submitted by the Academy of European Law in Trier for establishment of a database accessible on line relating to the implementation of the Convention by the courts of the Member States. This web site[11] already contains a number of references to case law.

In addition, on 4 and 5 November 1999, when preparing Regulation (EC) No 44/2000 (Brussels I), DG JAI organised a hearing covering the private international law and electronic commerce. It received 74 written contributions from professional bodies, consumers' associations, public institutions, companies and researchers. A major part of the comments covers the question of the law applicable to contracts concluded via Internet.

Lastly, the EUROPEAN GROUP FOR PRIVATE INTERNATIONAL LAW (GEDIP) has been working on possible improvements to the Convention, culminating in specific proposals for amendment of the current text.[12]

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9 Commission communication to the Council and Parliament concerning the European contract law (OJ C 255, 13.9.2001, p.1).

10 The substantive law of contracts rules questions such as the validity, the conclusion and the performance of the contract, in contrast with private international law of contracts which only deals with the question of the law applicable to a contract.

11 http://www.rome-convention.org.

12 The results are accessible at http://www.drt.ucl.ac.be/gedip.

Before considering whether the conflict of laws rules in the Convention should be modernised (part 3), the reasons which could possibly justify its conversion into a Community instrument should be analysed (part 2).

But first of all, the Commission wishes to take the opportunity to gather precise information concerning what economic actors – companies, consumers and workers as well as legal practitioners – actually know about the existence of the Rome Convention and the rules it contains. The Commission also wonders how this knowledge or the lack of it influences the parties' practical conduct in their contractual relations or court proceedings.

Question 1:	**Do you have information concerning economic actors' and legal practitioners' actual knowledge of the Rome Convention of 1980 and of its rules, in particular the rule allowing parties to freely choose the law applicable to their contract? If you consider that such knowledge in sufficient, do you think that this situation has a negative impact on the parties' conduct in their contractual relations or on court proceedings?**

2. CONVERTING THE ROME CONVENTION OF 1980 INTO A COMMUNITY INSTRUMENT

At Community level, the Rome Convention is the only private international law instrument still in the form of an international Treaty. Therefore the question of its conversion into a Community instrument has been raised.

Converting the Convention into a Community instrument could have a number of advantages, the first of which would be greater consistency in Community legislation on private international law (point 2.2), based on Article 61(c) of the Treaty (point 2.1). It would, in addition, entail conferring on the Court of Justice the jurisdiction to interpret it in the best conditions (point 2.3) and would facilitate the application of the standardised conflict rules in the new Member States (point 2.4).

2.1. A new legal basis: Article 61 c) of the EC Treaty as amended at Amsterdam gave a new impetus to Community-based private international law

While Community instruments on private international law were adopted on the basis of Article 293 (formerly Article 220) of the Treaty (Brussels Convention of 1968) or have the same status as instruments adopted on this basis (Rome Convention of 1980), since the entry into force of the Treaty of Amsterdam, this field is governed by the first pillar of the European Union.

In addition, on the basis of Article 61(c) of the Treaty, the Community has adopted several new Regulations for judicial cooperation in civil matters (Brussels II,[13] Bankruptcy,[14] Service of documents[15] and Evidence[16]) and converted the Brussels Convention of 1968 into a

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13 Council Regulation (EC) 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility for children of both spouses, OJ L160, 30.6.2000, p. 19.

14 Council Regulation (EC) 1346/2000 of 29 May 2000 on insolvency proceedings, OJ L160, 30.6.2000, p. 1.

15 Council Regulation (EC) 1348/2000 of on 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, OJ L160, 30.6.2000, p. 37.

Regulation. The Commission is currently preparing a Community instrument on the law applicable to non-contractual obligations (Rome II). The Vienna Action Plan[17] of the Council and the Commission, adopted by the Council in 1998, refers specifically to the compatibility of the conflict rules. Point 40(c) calls for "revision, where necessary, of certain provisions of the Convention on the Law applicable to contractual obligations, taking into account special provisions on conflict of law rules in other Community instruments". The Mutual Recognition Programme[18] specifies that measures to harmonise conflict of laws rules constitute supporting measures, facilitating implementation of the principle of mutual recognition of judgments in civil and commercial matters.

Upon entry into force of the Nice Treaty, the "co-decision" procedure which provides for a stronger participation of the European Parliament to the legislative process will apply to cooperation in civil matters, except for family law.

2.2. Consistency of Community legislation as regards private international law

Since the rules on jurisdiction and choice of law applying to contractual and non-contractual obligations of a civil or commercial nature form an entity, the fact that the Rome Convention takes a different form from the other Community instruments of private international law does not improve the consistency of this entity.

In addition, since the Rome Convention takes the form of an international Treaty, it contains a number of provisions that will have to be reviewed in the light of the concern for consistency in Community legislative policy, among them:

- the right of the Member States, under Article 22, to enter reservations (relating to Articles 7(1) and 10(1)(e);

- the right of the Member States, under Article 23, to adopt new choice of law rules in regard to any particular category of contract;

- the right of the Member States, under Article 24, to accede to multilateral Conventions on conflict of laws; and

- the limited (though renewable) duration of the Convention (Article 30).

It needs to be examined whether these provisions are compatible with the aim of establishing a genuine area of justice.

2.3. Interpretation of the Convention by the Court of Justice

An analysis of the first judgments given by national courts that certain Articles of the Convention are not always being applied uniformly, in particular because the national courts tend to interpret the Convention in the light of previous solutions, either to fill in gaps in the Convention or to modify the interpretation of certain flexible provisions. Examples of these differences can be found in Article 1(1) (material scope: definition of contract, for example

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16 Regulation (EC) No 1206/2001 of the Council of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, OJ L 174, 27.6.2001, p. 1.

17 OJ C 19, 23.1.1999, p. 1, point 51(c).

18 OJ C 12, 15.1.2001, p. 8.

the question whether contract chains should be included) or Article 3(1) (definition of tacit choice: what about the reference to a legal concept specific to a given legal system).[19]

There is no doubt that uniform interpretation of the Rome Convention by the Court of Justice would improve the consistency of the interpretation of conflict of laws' rules at EC level.

In a Joint Declaration,[20] the Member States stated that they were ready to examine the possibility of conferring jurisdiction in certain matters on the Court of Justice, and the Convention has been supplemented by two Protocols conferring jurisdiction on the Court of Justice to interpret the Convention. But they are not yet in force.[21]

Converting the Convention into a Community instrument would ensure that the Court of Justice would have identical jurisdiction over all the Community private international law instruments. The Court of Justice could therefore ensure that the legal concepts common to the Rome Convention and the Brussels I Regulation[22] are interpreted in the same manner.

Here one should also bear in mind that the jurisdiction conferred on the Court of Justice under Title IV could well expand in the future. However, the ratification of the two protocols to the Rome Convention remains important for contracts concluded before the entry into force of a possible future "Rome I" instrument which would continue to be governed by the Rome Convention. The latter will therefore remain the relevant text for an important number of existing contracts.

2.4. The application of the standardised conflict rules in the new Member States

The Rome Convention of 1980 is part of the '*acquis* communautaire'. From the point of view of enlargement of the Union, the adoption of a Community instrument would prevent the entry into force of the uniform conflict rules from being delayed by ratification procedures in the applicant countries.

To illustrate this remark it is enough to recall that the Conventions of Funchal[23] and Rome,[24] concerning the accession of Spain and Portugal and Austria, Finland and Sweden, have still not been ratified by all the Member States. As the initial text was amended slightly on this occasion, two different versions of the Rome Convention therefore coexist today.[25]

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19 Another source of divergent interpretations is that certain Member States have chosen to incorporate the provisions of the Convention in their national legislation by statute, sometimes amending the original text.

20 The consolidated text of the Convention as amended by the various Conventions of Accession, and the declarations and protocols annexed to it, is published in OJ C 27, 26.1.1998, p. 34.

21 Ratification of the second protocol by Belgium is still needed for the first protocol conferring jurisdiction on the Court of Justice to enter into force in all the Member States which have ratified it (i.e. all Member States except Belgium and Ireland); for progress with ratifications, see: http://ue.eu.int/Accords/default.asp?lang=en.

22 The concept of consumer, for example.

23 OJ L 333, 18.11.1992, p. 1.

24 OJ C 15, 15.1.1997, p. 10.

25 The amendment made by the Funchal Convention mainly concerned the deletion of Article 27 on the geographical scope of the Convention.

2.5. The choice of instrument: regulation or directive?

For the choice of the type of measure to be adopted - a regulation or a directive - it must be borne in mind that, in accordance with the Mutual Recognition Programme, the harmonisation of the conflict rules contributes to the mutual recognition of court judgments in the Union.

One should also take into consideration that the point is not to regulate one or the other aspect of a matter – as is the case of sectoral Directives – but to harmonise an entire subject-matter – the private international law of obligations.

It seems that this objective can more easily be reached if a possible future Rome I instrument is in the form of a regulation, the instrument being directly applicable and its application avoiding the uncertainties of the transposal of a directive.

Question 2:	**Do you believe the Rome Convention of 1980 should be converted into a Community instrument? What are your arguments for or against doing this?**

3. IS THERE A NEED FOR MODERNISING THE ROME CONVENTION OF 1980?

Since a good many of the substantive conflict rules entered into force barely eleven years ago, many will be surprised by the question. But there are several arguments for doing so.

First of all, the Member States undertook to consider the advisability of revising Article 5 concerning consumer protection at the time of Austrian accession to the Rome Convention: the explanatory report on the Convention of Accession specifies that this must be done in the near future and a declaration to this effect was annexed to the Final Act of the Conference of the Governments of the Member States.[26]

Then there is the close link between the Rome Convention and the related instrument in matters of conflicts of jurisdiction – the Brussels Convention. When this was converted into a Community Regulation, some of its articles were changed, too[27]. Some point out that the consistency of the Community private international law demands that these amendments be reflected in the instrument that deals with conflict of laws.

Moreover, there is a body of case law covering a period that is longer than the period during which the Convention has been in force. Several signatory States had already incorporated its provisions into their national legislation unilaterally before it actually entered into force.[28] In other Member States, the Convention inspired judges even before it entered into force.

It is manifest in this case law that certain essential rules of the Convention are criticised on grounds of insufficient precision. But it must be borne in mind that this is not one of those areas where strict precision is always possible, and a balance must be sought between rules that would give the judges complete freedom to determine the applicable law and, on the other hand, rigid rules that leave no opportunity for flexibility in the case in question.

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[26] OJ C 191, 23.6.1997, p. 11, 12.

[27] Namely Articles 5, 15 et 22 § 1.

[28] Denmark, Luxembourg, Germany and Belgium.

Consequently, the value of revising the substance cannot therefore lie in clarifying in minute detail all the points on which divergent interpretations are possible but in sorting out the most debatable points. Before considering these points Article by Article (at point 3.2), there are broader questions concerning the general balance of the Convention (point 3.1).

3.1. The general balance of the Convention

3.1.1. Link between the general conflict rules of the Rome Convention and the rules in sectoral instruments that have an impact on the applicable law

3.1.1.1. The proliferation of rules in sectoral instruments that have an impact on the applicable law

The proliferation of sectoral instruments of Community secondary legislation containing isolated conflict rules[29] or of rules that determine the scope of territorial application of community law and therefore having an impact on the applicable law[30] has aroused extensive comment. The effect of Article 20 of the Convention and the general principles of law[31] is that these special rules governing specific matters derogate from Convention rules of general scope. In most cases, the sectoral rules meet the aim to strengthen the protection of weaker parties (cf. point 3.2.6, *infra*).[32]

But their proliferation is a source of concern. According to some, this is likely to harm the consistency of the body of conflict rules applicable in the Union. An example often cited is the rules have an impact on the applicable law in the consumer protection Directives, which use a mechanism differing from that of the conflict rules as such[33] and also contain formulas that vary slightly from one instrument to another. In addition, transposal by the Member States does not always reflect the spirit of the Directives, in particular when a bilateral rule becomes unilateral.[34]

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29 In particular: Directive on the return of cultural objects unlawfully removed from the territory of a Member State (1993/7, 15.3.1993); Directive concerning the posting of workers in the framework of the provision of services (1996/71, 16.12.1996); Directive 1944/44 of 25 May 1999 on certain aspects of sale and of the guarantees of the consumer goods. There is also a coherent set of conflict rules applicable to insurance in the following Directives: second non-life insurance Directive (1988/357 of 22 June 1988), as supplemented and amended by Directives 1992/49 and 2002/13; second life assurance Directive (1990/619 of 8 November 1990), as supplemented and amended by Directives 1992/96 and 2002/12.

30 A certain number of directives contain a provision that, although not being a conflict of laws' rule, have an impact on the applicable law to a contract. If the contract has a direct link to the territory of one or more Member States, these provisions provide for the application of Community law even if the parties chose the law of a third country. The following instruments contain such a clause: Unfair terms Directive (1993/13, 5.4.1993); Timeshare Directive (1994/47, 26.10.1994); Directive 97/7 of 20 May 1997 on the protection of consumers in respect of distance contracts; Directive on the sale and guarantees of consumption goods (1999/44, 25.5.1999); Directive on distance sales of financial services (2002/65, 23.9.2002)

31 "*Generalia specialibus derogant*" – special laws derogate from general laws.

32 The provisions concerning the territorial scope of the consumer directives find their reason in the fact that the protection given by Article 5 of the Convention is not always considered as being sufficient; cf. pint 3.2.7, *infra*

33 Cf. note 34, *supra*.

34 Most of the rules of conflict of laws are bilateral, i.e. they can designate either a foreign law or the law of the forum. For example, there is a French rule according to which the court must determine a child's affiliation on the basis of the law of the mother's nationality. If the mother is French, the French court will apply French law; if she is Italian, it will apply Italian law. According to the unilateralist method, each state is satisfied with determining the cases where its own law is applicable in order not to give

Other commentators argue that this dispersal of the conflict rules make it very difficult for the reader, and in particular for the expert, to determine what text is applicable, in the context of the broader debate in progress in the European Union on codification of the '*acquis communautaire'* to improve transparency.[35]

3.1.1.2. Possible solutions

Several solutions are currently under discussion, ranging from measures enabling experts to find their way more easily around the mass of existing legislation to genuine codification of the Community conflict rules:

i. existing legislation might be more reader-friendly if there were an annex to the future instrument, listing the references of sectoral instruments of secondary legislation containing conflict rules and updated each time an instrument is adopted;

ii. special rules could be incorporated in the future Community instrument. The real question would then be whether the aim is to move towards a general instrument covering all the Community conflict rules in contractual matters. This de facto raises the question of codification of the '*acquis* communautaire';

iii. the rules in the sectoral instruments that have an impact on the applicable law aim in general at better protection for weaker parties. However, the present Green paper precisely takes up some reflections currently under discussion among academic writers in order to, on the one hand, introduce a general clause that guarantees the application of a Community minimum standard (cf. point 3.1.2., infra) and, on the other hand, to modernise Article 5 of the Convention on consumer contracts (cf. point 3.2.7, *infra).* If these amendments were made, some have already suggested to repeal the rules in sectoral instruments.

Question 3:	**Are you aware of difficulties encountered because of the proliferation and dispersal of rules having an impact on the applicable law in several horizontal and sectoral instruments of secondary legislation? If so, what do you think is the best way of remedying them?**

3.1.2. Envisage a clause to guarantee the use of the Community minimum standard when all the elements or some of the elements of the contract are located in the Community

3.1.2.1. The risk that Community law is not applied although all the elements of the case are located in the Union

There are and always will be situations in which a weaker party does not enjoy the benefit of the protective rules of the Convention owing to the specific circumstances of the case. The parties' autonomy can thus lead to the application of the law of a third State. If all parties involved are Community nationals, such a result goes against the spirit of the Convention and of Community law in general.

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jurisdiction to the law of another State in a case where that state does not want it to be applied. Based on the idea that private international law serves to resolve conflicts of sovereignty, such rules are the exception nowadays. An example is Article 3 subparagraph 3 of the French Civil Code: "t*he laws on the status and capacity of persons govern French persons, even those residing abroad*".

[35] Cf. Commission communication to Parliament and the Council on Codification of the *Acquis communautaire*, COM (2001) 645 final, 21.11.2001.

As will be seen (point 3.2.7, *infra*), it may happen that a "mobile" consumer is unprotected against the application of the law of a third country. For example, where a Portuguese consumer goes to Belgium to make a purchase, no provision of the Rome Convention forbids the seller from submitting the contract to the law of a non-European country which has no consumer protection rules.[36]

Admittedly, one could point to the fact that the protection of weaker parties is also and in particular contained in a number of Directives that comprise rules on the scope of application in order to avoid that a choice of law of a third state leads to their non-application. (point 3.1.1, *supra*). However, some argue that such a mechanism is not sufficient: apart from making it more difficult to identify the applicable rule, the sectoral Directives, as their title indicates, do not apply across the full range of civil law but only in certain areas of it. Lastly, the sectoral Directive technique is also unsatisfactory in that the consumer cannot rely on the provisions of a Directive that has not been transposed or has been incorrectly transposed.[37]

3.1.2.2. Possible solutions

The modernisation of articles 5 and 6, as discussed under point 3.2.7 infra, would admittedly allow to correct some shortcomings of their current wording. But consideration should be given to another solution– a clause to guarantee the Community minimum standard where all elements, or the very characteristic elements, of the contract are located in the Community.

Such a clause could be based on Article 3(3) of the present Convention, which specifies that "*where all the other elements relevant to the situation at the time of the choice are connected with one country only*", the fact that the parties have chosen a foreign law may not prejudice the application of that country's mandatory rules of law.

Likewise, the future Rome I instrument could specify that, if a directive imposes the respect for minimum standards, the parties cannot circumvent this by virtue of the rules on conflict of laws by choosing the law of a third country for contracts that are purely internal to the Community. A provision along the following lines has been suggested: "The fact that the parties have chosen the law of a non-member country shall not prejudice the application of the mandatory rules of Community law where all the other elements relevant to the situation at the time when the contract is signed are connected with one or more Member States."[38]

This proposal has to be seen also in the light of the *Ingmar* decision of the European Court of Justice. Despite the fact that not all elements of this case were situated within the Community – the principal was established in the US – the Court of Justice held that certain articles of the Directive 86/653 on commercial agents apply because the commercial agent had exercised his activity in a Member State[39].

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36 There remain obviously the safety-nets in the form of public-order legislation – the rules that the court can apply whatever the law applicable to the contract (cf. point 3.2.8, *infra*). This device, however, is burdensome: there are only few rules that can be clearly identified as such – the foreseeability of the judicial solution is thus far from being guaranteed.

37 Because directives do not have horizontal direct effect. Thus the German *Gran Canaria* jurisprudence has its origins in the non-transposition of the Directive 85/577 of 20.12.1985 by Spain (cf. note 61, *infra*).

38 As to the notion "mandatory rules", cf. point 3.2.8., *infra*

39 Case 381/98 *Ingmar GB Ltd c/ Eato Lonard Technologies Inc* [2000] ECR 263 (judgment given 9.11.2000).

Question 4:	**Do you think a possible future instrument should contain a general clause guaranteeing the application of a Community minimum standard when all elements, or at least certain highly significant elements, of the contract are located within the Community? Does the wording proposed at 3.1.2.2 allow the objective pursued to be attained?**

3.1.3. Relationship with existing international conventions

Even a Community instrument could make it possible for Member States to continue implementing conflict rules contained in international conventions to which they are currently Parties. The point of this would be to avoid conflicts between the rules in those Conventions and the rules in the Community instrument. And Member States which are already Parties to such Conventions would not have to denounce them.

This solution has the disadvantage of enabling these States to apply rules diverging from those provided for by the Community instrument, which would detract from the creation of a genuine common law-enforcement area. But this is only a slight risk, as the content of these rules is already perfectly known and the Member States would no longer be able to accede individually to other Conventions once the proposed Community instrument is adopted. Under the rule in AETR,[40] the adoption of a Community instrument standardising the rules of conflict of laws relating to civil and commercial contracts would confer exclusive power on the Community to negotiate and adopt international instruments on such matters.

This possibility could be accompanied by an obligation for the Member States to notify the relevant international conventions so as to guarantee transparency and certainty as to the law. The list could be reproduced in an annex to a Rome I instrument.

Question 5:	**Do you have comments on the guidelines identified above?**

3.2. Problems met in the implementation of various Articles

3.2.1. Scope of the Convention - exclusion of arbitration and choice of forum clauses (Article 1(2)(d))

Arbitration clauses – which provide for the designation of an arbitrator or an arbitration board rather than a court in the event of a dispute – and choice of forum clauses – i.e. clauses designating the court having jurisdiction in the event of a dispute – are excluded from the scope of the Convention.

The exclusion of arbitration agreements is not a problem, as there are a number of treaties on the matter. But they more often concern the recognition and enforcement of arbitral awards than the law applicable to the arbitration agreement itself.

Regarding choice of forum clauses, Article 23 of the Brussels I Regulation does contain material rules, directly laying down certain conditions for the validity of such clauses, but the Article does not settle all aspects of the matter.

Question 6:	**Do you think one should envisage conflict rules applicable to arbitration and choice of forum clauses?**

[40] Case 22/70 *Commission v Council* [1971] ECR 263 (judgment given on 31.3.1971).

3.2.2. Rules applicable to insurance contracts (Article 1(3))

3.2.2.1. The current situation

Insurance contracts covering risks located on the territory of the Union are excluded from the scope of the Convention. The reason for this exclusion is that, in parallel with the negotiations for the Rome Convention, another group of experts was working on private international law and freedom to provide services as regards insurance. Several sectoral Directives[41] govern the conflict of laws specifically for insurance.

Accordingly, three hypothetical situations need to be distinguished depending, whether on the risk is or is not located in a Member State and whether the insurer is or is not established in the Community:

a) the risk is located outside the territory of the Union: the applicable law is determined according to the rules of the Convention, whether the insurer is established in the Community or not; under the general rules of the Convention (Article 4), in the absence of a choice of law, the contract is presumed to be most closely connected with the country in which the insurer is established;

b) the risk is located in the Union and is covered by an insurer established in the Community: the applicable law is determined in accordance with the rules of the insurance directives, which differ appreciably from the general solutions of the Convention. Directive 90/619 on life insurance lays down the general rule that the law of the state where the policy-holder habitually resides apply if the policy-holder is a private individual. This solution, which treats the policy-holder effectively as a consumer, corresponds to the one applied in most non-member countries;

c) the risk is located in the Union and is covered by an insurer not established in the Community: the applicable law is determined in accordance with the national conflict rules of each Member State; there is no harmonised solution for the Union.

3.2.2.2. Questions regarding the current situation

The current situation has been criticised by specialists in private international law, in particular because it is not strictly compatible with the concern for transparency in Community law; insurance law specialists can identify the applicable rules, but the more general public cannot always do so.

Then there is the question whether situation (a), in which the insurer's law is applied, is in line with the general aim, also described in the Brussels I Regulation,[42] of ensuring a high level of protection where the policy-holder is a private individual.

Lastly, it may seem surprising that there are no harmonised conflict rules for situation (c) (risk located in the European Union covered by an insurer established outside the Community). But insurance specialists stress that in practice there is no need to worry about hypothesis (c), as

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41 The Directives mentioned in footnote 29 above. It should be noted that on 27 May 2002 the Council adopted a joint position for the adoption of a consolidated version of the life assurance Directives (OJ C 170 E, 16.7.2002, p. 45). Work is also in hand to consolidate the Directives on non-life insurance, to be completed in 2003.

42 Section 3 of the Brussels Convention of 1968 already contained special rules on jurisdiction.

the rules concerning freedom to provide services require the non-Community service provider to declare an address for service in the Union, which brings them under Community law.

3.2.2.3. Possible solutions

The following avenues could be explored:

i. Do the Convention's general rules, applying in situation (a), adequately reflect the specific nature of insurance contracts. Would it not be preferable to envisage a special conflict rule, like the Brussels I Regulation? Or should the Community, like most other countries, ignore risks which are not located on its territory?

ii. To improve the transparency of Community legislation, the special rules on insurance might conceivably be incorporated in a future Rome I instrument. But if the instrument was a Regulation, this is not necessarily the appropriate legislative technique for rules concerning insurance: when the insurance directives were prepared, the Community legislature wished to leave the Member States some room for manoeuvre regarding connecting factors to allow the law of the policy-holder to apply, and such freedom is not compatible with a regulation. Most Member States, responding to the Commission's work on insurance and electronic commerce, expressed their wish not to incorporate the conflict rules in the Rome Convention or the instrument which will replace it.

iii. The annex giving a regular update of the conflict rules in sectoral instruments (point 3.1.1.2., *supra*) would make it possible to improve the legibility and transparency of the applicable rules.

Question 7:	**How do you evaluate the current rules on insurance? Do you think that the current treatment of hypotheses (a) and (c) is satisfactory? How would you recommend resolving the difficulties that have been met (if any)?**

3.2.3. Freedom of choice (Article 3(1)) - Questions regarding the choice of non-state rules

It is common practice in international trade for the parties to refer not to the law of one or other state but direct to the rules of an international convention such as the Vienna Convention of 11 April 1980 on contracts for the international sale of goods, to the customs of international trade, to the general principles of law, to the *lex mercatoria* or to recent private codifications such as the UNIDROIT Principles of International Commercial Contracts.

In the minds of the authors of the Convention, such a choice does not constitute a choice of law within the meaning of Article 3, which can only be choice of a body of state law: a contract containing such a choice would be governed by the law applicable in the absence of a choice (Article 4), and it would fall to this law to determine the role to be played by the non-state rules chosen by the parties.[43] Traditionally, most academic writers have ruled out the possibility of choosing non-state rules, particularly because there is not yet a full and consistent body of such rules.

[43] Cf. P. Lagarde, Le nouveau droit international privé des contrats après l'entrée en vigueur de la Convention de Rome du 19 juin 1980, RCDIP, 1980.287.

Others would prefer the choice of non-state law to constitute a choice of law for the purposes of Article 3 of the Rome Convention.[44] One of the reasons brought forward to this is that one should not refuse a practice before the court that is already admitted (in many countries) before arbitrators.

Concerning more specifically the parties' choice of the rules of the Vienna Convention of 11 April 1980, the Dutch courts have twice ruled on situations in which the Convention did not apply directly pursuant to its Article 1(1).[45] According to the Hoge Raad, the Dutch Supreme Court, the parties were free to designate this Convention as the law applicable to their contract. There is still the question of the effects of such a designation: if the contract had been purely internal, the rules of the Convention could not have derogated from the mandatory rules of the law applicable in the absence of a choice. But since the contract was an international contract, the Court acknowledged that the choice of the Convention ruled out the mandatory rules of the law applicable in the absence of a choice.[46] It did not refer to the law which would have been applicable in the absence of a choice to ascertain the role that it would confer on the Vienna Convention. In other words the parties themselves had genuinely chosen this Convention.

Question 8:	**Should the parties be allowed to directly choose an international convention, or even the general principles of law? What are the arguments for or against this solution?**

3.2.4. Freedom of choice – tacit choice (Article 3(1))

3.2.4.1. The legislature's intention

Once the principle of freedom of choice is accepted, it must be ensured that the parties actually exercise this right to choose the law applicable to their contract. According to the second sentence of Article 3(2), "the choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case". However, some translations of the Convention seem to be more flexible than others[47], and it is not impossible that this difference is at the root of divergent interpretations in the countries concerned.

The legislature's intention was to admit a clear choice, even if it was tacit. In addition to the frequent case of a deliberate clause inserted in the contract, the choice of law can therefore be ascertained either from other provisions of the contract or from aspects of the contractual environment: the first situation would include, for example, acceptance of a standard-form contract governed by a specific legal system, even in the absence of any deliberate clarification as to the applicable law, the text leaving it to the court to check that the choice, though tacit, is real, or a reference to provisions of a given law without this law being designated in the aggregate. Regarding the "circumstances of the case", a contract might be

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44 Cf. K. Boele-Woelki, Principles and Private International Law - The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: How to Apply Them to International Contracts, Uniform Law Review, 1996.652.

45 Article 1(1) of the Convention specifies that it applies "*to contracts of sale of goods between parties whose places of business are in different States: a) when the States are Contracting States; or b) when the rules of private international law lead to the application of the law of a Contracting State*."

46 Hoge Raad, 26.5.1989, NJ 1992.105 and 5.1.2001, NJ 2001.391.

47 Instead of "with reasonable certainty" and "mit hinreichender Sicherheit" in the English and German version, the French version asks for "de façon certaine".

closely connected with an earlier contract in which there had been a deliberate choice of law, or it might be part of a series of operations, the law having been chosen only for the basic contract underlying the general operation.[48]

Article 3(2) on the other hand excludes the purely hypothetical choice deduced from excessively ambiguous contractual clauses. This boils down to the hypothesis of the absence of a choice by the parties, and the court will apply the presumptions of Article 4.

3.2.4.2. Difficulties encountered in applying this Article

The borderline between the tacit choice and the purely hypothetical choice is rather vague. Analysis of the case-law reveals a major difference of the solutions regarding this point: the German and English courts, perhaps under the influence of a slightly more flexible form of words, and under the influence of their previous solutions, are less strict about discerning a tacit choice than their European counterparts.

One of the recurring questions is how far an arbitration or choice of court clause can constitute an implicit choice of the law of the country whose courts or arbitrators are designated. The question arises in particular when the court is confronted with such a clause without further argument in favour of this choice. Divergences have also emerged regarding the role to be given to the parties' reference to technical standards or legal concepts belonging to the law of a given country.

3.2.4.3. Possible solutions

The legislature's intention having been to leave the court with considerable room for manoeuvre in interpreting the parties' choice, Article 3, which is a key provision of the Convention, is voluntarily written in general terms. This means that the question of revision must be approached very cautiously:

i. If the Convention is converted into a Community instrument, the Court of Justice would automatically have jurisdiction to interpret it. Admittedly, since Decisions would then be taken on a case-by-case basis, the fact that jurisdiction is conferred on the Court of Justice, which decides points of law and not of fact, would not mean that the concrete solution can be predicted in advance. But the court can reasonably be expected to define at least the general framework for the interpretation of Article 3(1), thus reducing the most glaring uncertainties;[49]

ii. The future instrument could itself give more precise information regarding the definition and the minimum requirements for there to be a tacit choice;

iii. To strengthen the uniform implementation of the Convention, it seems preferable to align the various language versions of the text.

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48 Cf. examples given by the explanatory report on the Convention by Mr Guiliano and Mr Lagarde, OJ C 282, 31.10.1980.

49 The Court of Justice might also, for example, hold that the mere fact of designating the courts of a country does not constitute a choice of law if this choice is not corroborated by other factors.

Question 9:	**Do you think that a future Rome I instrument should contain more precise information regarding the definition of a tacit choice of applicable law or would conferring jurisdiction on the Court of Justice suffice to ensure certainty as to the law?**

3.2.5. What is the strength of the general presumption laid down by Article 4(2)

3.2.5.1. Current situation

Which law should be applied when the parties have made no explicit or tacit choice of the law applicable to their contract? The Convention follows the principle of the proper law: according to Article 4(1) the contract is governed by the law of the country with which it is most closely connected. The formula is deliberately vague: the court has to weigh up the factors that help to reveal the "centre of gravity" of the contract. That is sometimes a difficult task, and there is a risk of uncertainty as to the solution selected.

To strengthen certainty as to the law and help the court to determine the applicable law, Article 4(2) then establishes a general presumption that "*the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence*".[50] The "*characteristic*" performance is what constitutes the centre of gravity of the contract, basically that which must be paid for depending on the type of contract – the obligation to transfer property in a sales contract, to provide a service in a service contract, to transport in a contract of carriage, to insure in an insurance contract, and so on. Art. 4 thus leads, in principle, to the application of the law of the seller or the service provider.

But the court can disregard this presumption "*if it appears from the circumstances as a whole that the contract is more closely connected with another country*" (Article 4(5)). It then applies the general rule of identifying the law with which the contract is most closely connected. This mechanism making it possible to return to the general rule is known as the "exception clause".

3.2.5.2. Difficulties encountered

In the spirit of many comments on the Convention, the exception clause of Article 4(5) must be used carefully and rarely since its frequent application leads to unforeseeability as to the applicable law – an unforeseeability that the presumptions of Art. 4 are precisely intended to reduce.

Thus, an analysis of the case-law reveals that in several cases the courts have applied the exception clause *ab initio*, seeking immediately the law that is most closely connected, without beginning with the presumption of Article 4(2).

3.2.5.3. Possible solution

The solution is closely bound up with the objective that one wishes to pursue with the conflict rule: is it to ensure the closest possible connection, which would encourage a flexible clause

[50] For certain types of contract (immovable property, contract for carriage of goods), the Convention establishes special presumptions (Article 4(3) and (4)).

such as Article 4(5), or the highest degree of certainty as to the law, which would encourage the strict application of the presumption provided for in Article 4(2)?

Given the letter and spirit of the Convention, the courts might reasonably be expected to begin with the presumption of Article 4(2). Only if it emerged that the law designated is not appropriate because other circumstances clearly militate in favour of another law would the court then use the "exception clause". This is precisely the rule laid down in a Decision of the Dutch Hoge Raad, whereby the court must first apply the presumption of Article 4(2) and rule out the law thus obtained only if it is obviously unsuited to the instant case.[51]

To clarify the text on this point, it would be possible to review the drafting of Article 4. One possibility would be purely and simply to delete paragraph 1 so as to emphasise the exceptional character of paragraph 5. Another solution would be to amend paragraph 5 itself. Thus the future Rome I instrument could take as a starting point the preliminary draft proposal for a Council Regulation on the law applicable to non-contractual obligations (Rome II), the exception clause in Article 3(3) of which introduces two new conditions in relation to the Rome Convention: it is required that there be "a substantially closer connection [between the tortious/delictual act and] another country" and also that "*there is no significant connection between the non-contractual obligation and the country whose law would be the applicable law under paragraphs 1 and 2*."

Question 10: Do you believe that Article 4 should be redrafted to compel the court to begin by applying the presumption of paragraph 2 and to rule out the law thus obtained only if it is obviously unsuited to the instant case? If so, how do you think it would be best drafted?

3.2.6. Application of the special presumption in property matters to holiday leasing agreements (Article 4(3))

3.2.6.1. Current solution

When the subject matter of the contract is a right in immovable property or a right to use immovable property (sale contract, deed or lease of an apartment, for example), it is presumed be most closely connected with the law of the place where the property is situated (Article 4(3)). The reason for this rule is that States traditionally want buildings located in their territory to be governed by their own law, in particular owing to the importance of property for the social and economic organisation of the country.

3.2.6.2. Difficulties encountered in the application of this Article

The special presumption in property matters also covers contracts for very short-term holiday accommodation. For instance, a German landlord, being a private individual or a travel agency, owns a house in the South of Spain and rents it to German private individuals. The tenants are not satisfied with the state of the house and wish to recover part of the rent. As this

[51] *Nouvelles des Papeteries de l' Aa v. BV Machinenfabriek BOA*, Hoge Raad, 25 September 1992: when the characteristic performance could be ascertained, § 2 contained the main rule and the exception to that rule contained in § 5 should therefore be interpreted restrictively. In other words, § 2 should be disapplied only if, in the light of special factors, the country of habitual residence of the party carrying out the characteristic performance had "no real value as a connecting factor".

contract concluded between two Germans concerns immovable property, it would be governed by the Spanish law under Article 4(3).[52]

It was already suggested in the explanatory report on the Convention that in such circumstances the courts could apply the exception clause in Article 4(5). Some courts have already done so.[53]

Some authors do however not approve the frequent use of the exception clause in article 4 (5) because it leads to uncertainty with respect to the outcome of a procedure.

In addition, this solution may be incompatible with the Brussels I Regulation, Article 22 of which contains - unlike the Brussels Convention of 1968 - a specific rule on "tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months". Under certain circumstances the parties are then allowed to derogate from the exclusive jurisdiction of the courts of the place where the immovable property is situated and to bring proceedings in the courts of the Member state of the landlord's and tenant's common domicile.

3.2.6.3. Possible solution

The EUROPEAN GROUP FOR PRIVATE INTERNATIONAL LAW suggested Article 4 (3) should contain a specific rule on short-term holiday tenancy, along the lines of the second subparagraph of Article 22 of the Brussels I Regulation. The wording could be the following: "However, contracts which have as their object tenancies of immovable property concluded for a temporary private use for a maximum period of six consecutive months will be governed by the laws of the country in which the lessor is domiciled, provided that the tenant is a natural person and that the landlord and the tenant are domiciled in the same country."[54] Should such a clause be inserted to article 4 (3), the judge would still be allowed to apply the exception clause of article 4 (5) to compensate for the rigidity of such a rule.

Question 11: Do you believe on should create a specific rule on short-term holiday tenancy, along the lines of the second subparagraph of Article 22(1) of the Brussels I Regulation, or the present solution is it satisfactory?

3.2.7. The protection of consumers (Article 5)

3.2.7.1. Summary of the contents and scope of the protective rules of Article 5

Since the 1970s a new special body of law – consumer law – has emerged to reflect the imbalance between consumers and professionals. Special rules, such as the nullity of unfair terms or the right to withdraw from a contract unilaterally within a certain time, now protect the consumer against rash commitments.

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52 Article 5 does not apply if the lessor himself is a private individual. If the lessor is a professional, Article 5 (4) provides that the consumer protecting rules do not apply in a contract for the supply of services "where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence".

53 BGH, 12 October 1998, IPRAX 1990,318: application of the German law to a contract in which a German travel agency supplied its German customers with holiday houses in France.

54 Care will have to be taken with the consistency of legal terminology in the future instrument, as Article 22 of the Brussels I Regulation introduces the concept of "natural person", which might appear less restrictive than "consumer".

But the protective rules in force in the country of the consumer's habitual residence, i.e. those on which the consumer basically relies for protection, would be rendered ineffective in international or intra-Community trade if they could be excluded merely by choosing a foreign law. To reassure consumers, who have a vital role to play in an internal market which has no hope of success without their active participation, the Rome Convention envisages special conflict rules.

But Article 5 also aims to preserve a degree of balance between the parties. That is why it states the conditions for its application precisely.

Article 5 lays down a double rule: on the one hand, in the absence of choice, the contract is governed by the law of the country in which the consumer has his habitual residence (Article 5(3)). Moreover, "*a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence*" (Article 5(2)). The application of this provision leads to a situation described as "dépeçage", i.e. different parts of a same contract are ruled by the laws of two ore even more countries. Thus a contract between a consumer residing in country A and a business established in country B will contain very often a clause for making the law of country B applicable; when the conditions of Article 5 are met, the court must nevertheless give effect to certain provisions of the law of country A, those which relate to public policy and protect the consumer.[55] The court must accordingly apply two distinct laws to the same contract.

Regarding the conditions for application of Article 5, the scope of the protective rules is confined to certain types of contracts,[56] concluded with consumers, this concept being strictly defined, in quite precise circumstances. There are three of these circumstances, and they can be summarised by saying that, as a general rule and apart from the case of cross-border excursions organised by the vendor, there is no protection for the "mobile consumer", i.e. a consumer who travels to a country other than that of habitual residence to make a purchase or receive a service.[57] For the mobile consumer, the general conflict rules of Articles 3 and 4 apply, and they generally make the law of the seller's or service provider's residence applicable.

3.2.7.2. Difficulties encountered

The solution in Article 5, which was written at a time when consumer law and distance selling techniques were in their infancy, has come in for some criticism. Austria, for instance, made its accession to the Rome Convention conditional on consideration being given to revision of this Article.[58]

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55 This involves in particular the right of the consumer to withdraw from the contract and to be protected against unfair terms, such as those releasing the professional from liability in the event of damage.

56 The contracts to which Article 5 applies are contracts for the supply of tangible goods or services and contracts to finance such supplies.

57 More precisely, the following three hypotheses are concerned. First, where the signing of the contract was preceded in the country of the consumer's habitual residence by a specific proposal (for example the sending of a catalogue or of an offer of contract) or advertising (via radio, television, newspaper, mail, whatever) if the consumer performed in this country the measures needed to conclude the contract. Second, where the professional received the order in the country of the consumer's habitual residence. Third, more specific, where the tradesman organised a "cross-border excursion" with the aim of prompting the consumer to conclude sale.

58 Cf. footnote 26, *supra* .

Article 5 is regarded by several academic writers as not giving the mobile consumer proper protection. It is clear from an analysis of the case law that, since the contract is not within the situations envisaged by this Article, a consumer contract can be governed by a foreign law which has no consumer protection provisions. His situation is still worsened when, as in an important German case, he finds himself also deprived of the benefit of the mandatory rules of article 7.[59]

Admittedly, thanks to a large number of EC directives, all consumers residing in the European Union now enjoy the benefit of a Community minimum protection standard.[60] But it must be borne in mind that these directives cover only certain aspects of legal rules which protect the consumer. In addition, there can still be differences from one country to another, in particular where a Member State fails to transpose a directive: since directives do not have horizontal direct effect, the consumer cannot rely on a provision not transposed into national law in his relations with his contracting partners.[61] Lastly, a certain number of EC directives introduce only a minimum standard of protection which falls short of the consumer protection given in certain Member States.

Article 5 is also criticised for the criteria on the basis of which it distinguishes consumers eligible for specific protection from those subject to the general system. These are the conditions for application of Article 5.[62] The criteria selected no longer seem adapted to the development of new distance selling techniques. To determine whether or not a contract is within the scope of Article 5, it is always necessary to locate it in space by reference to an aspect such as advertising, the signing of a contract or the receipt of an order (Article 5(2)). In addition, this solution is no longer in harmony with Article 15 of the Brussels I Regulation, under which consumer protection provisions apply where a company directs its business activities towards the Member State of the consumer's residence and a contract is concluded within the framework of these activities, whatever distance selling technique is used.[63]

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59 Cf. judgment of the German BGH of 19.3.1997, quoted in footnote 61, *infra.* On the contrary, the French Cour de cassation recently decided that some of the rules on overindebtedness contained in the French Code de Consommation are mandatory within the meaning of Article 7 (Civ I, 10.7.2001, Bull. n° 210, N° 000-04-104).

60 Cf. point 3.1.2, *supra*.

58 Such a failure to transpose a Community Directive was at the source of two sets of cases (*Gran Canaria*) in the German courts, which culminated in a judgment of the Bundesgerichtshof. In the first set of cases, German tourists on holiday on the Spanish island of Gran Canaria were the victims of a German company manufacturing bed linen. It had an agreement with a local Spanish company which organised free bus excursions to a bird reserve. During the trip it advertised the products of the German company and gave the tourists a "sales contract" form, which they signed without paying anything immediately. It was stated that on returning to Germany the customers would receive confirmation of their orders from the German company. Disputes arose when, on their return to Germany, some of these tourists refused to pay the price invoiced by the German company and claimed to exert their right of withdrawal under German law, enacted under Directive 85/577. The legal question was whether the law applicable to these disputes was the German law, favourable to the customers, or Spanish law, specified as the applicable law by the contract, which, as Spain had not transposed part of the Directive at the material time, did not acknowledge the right to withdraw. In the second set of cases, German consumers travelling in the Canary Islands were subjected to hard-sell sessions and induced to sign contracts for the purchase of a timeshare in a holiday apartment. The contracts - some subject to the law of the Isle of Man, others to Spanish law - contained a non-withdrawal clause although withdrawal was possible in German law and Community law. The question was whether the consumers could rely on German law against the law chosen in the contract. The BGH ruled out any attempt to justify the application of the protective German law, even as mandatory rule of the forum within the meaning of Article 7.

62 Cf. note 57, *supra* .

63 Cf. joint declaration by the Commission and the Council concerning Articles 15 and 73 of the Brussels I Regulation, accessible at http://europa.eu.int/comm/justice_home/unit/civil_en.htm.

Lastly, some wonder about the use of the dépeçage mechanism. It raises theoretical questions,[64] and it will also be necessary to ascertain whether practical difficulties arise with its use in the courts.

3.2.7.3. Possible solutions

When consideration is given to the revision of Article 5, the general concerns for the protection for the consumer, in particular when all the facts of the case are located in the Union, and the need to preserve balance in the interests of the parties must be borne in mind. Future rules should be clear, general and as broad as possible, so that the parties can know clearly in advance what law will apply to their contractual relationship.

Consideration will extend to the nature of the protection given to the consumer (application of one or other law) and to the criteria for identifying the consumers actually eligible for the protective provisions, i.e. the conditions for application of them.

The following are some possible guidelines for the debate:

i. Maintenance of the current solution, with a general clause guaranteeing the use of the Community minimum protection standard (point 3.1.2, *supra*): This solution would make it possible to remedy situations in which the lack of Community consumer protection is the most blatant. But while such a clause would state that certain provisions of Community law must be adhered to, it would not itself determine the applicable law. This solution would therefore involve a mechanism very different from that of the other conflict rules and it might remain exceptional. In particular, EC directives do not yet cover all the aspects of consumer law, so protection via national law remains important;

ii. Maintenance of the current solution, but changing the conditions for application to include the mobile consumer and possibly the types of contracts currently excluded, on the grounds that the current solution is basically satisfactory, and that all that is needed is to enlarge its scope (point vi, *infra*);

iii. Generalisation of Articles 3 and 4 of the Convention, the law of the place of the business being applied in exchange for generalised application of the mandatory rules of the state of the consumer's residence: The EUROPEAN GROUPING OF PRIVATE INTERNATIONAL LAW proposes applying Articles 3 and 4 of the Convention to consumer contracts, in combination with an extension of the rule currently provided for in Article 5(2). In practice this would mean that the consumer contract would be governed by the law of the place where the business is established, whether or not the parties choose it, but that the court would in either event apply the mandatory rules of protection of the law of the consumer's place of residence. This solution would have the advantage of making it easier for the supplier to foresee the applicable law. To further increase this foreseeability, the solution could be supplemented by a provision that the mandatory rules of law of the consumer's place of residence are applied provided the supplier is actually in a position to know where that is (point vii, *infra*). But this would increase the

[64] One of the questions raised by the dépeçage mechanism is what happens when the consumer's protective provisions are more favourable in country B than in country A. The answer to this question depends on the view taken of consumer protection: does it consist of applying a law that is known to the consumer and therefore matches his legitimate expectations or a law which is actually more favourable to him?

number of cases of dépeçage and the potential practical difficulties will have to be weighed up;

iv. Options ii and iii require the identification of the "mandatory rules" of the consumer's habitual place of residence. For legal matters already harmonised at Community level, it was suggested that the consumer protection rules of the law chosen by the parties should apply (in general, the law of the place where the business is established). Only in matters not harmonised at EC level, the consumer should not be deprived of the protection through the "mandatory rules" of the law of the country of his habitual residence;

v. Systematic application of the law of the consumer's place of residence: This would be a neat and clear solution and would make it unnecessary to split the contract. This in turn would enhance certainty as to the law and would enable proceedings to be handled more quickly and more cheaply; both parties stand to gain. But here again, there is the question of the conditions for application of the rule (point vi, *infra*);

vi. With respect to solutions ii, iii or v, there will always be a need to examine the conditions of their application to make a distinction between consumers who are eligible for specific protection in cross-border transactions and those who are not.[65] The traditional approach, adopted in the Brussels Convention of 1968 and the Rome Convention, was to look at the question from the consumer's angle, withholding protection from those who had knowingly taken the "risk of foreign trade". But, as has already been seen, this criterion, requiring locating measures taken by the parties, is not well adapted to the era of the new distance selling techniques (Pay-TV, Internet). Another solution might be to analyse the conduct by the business to determine the conditions for application of the protective provisions of Article 5. Thus the future Rome I instrument could take as a starting point Article 15 of the Brussels I Regulation, which combines two conditions to decide whether a consumer is eligible for the protective rules[66]: firstly, that the business directs its activities towards the State of the consumer's residence and, secondly, that a contract is concluded at a distance within the framework of these activities. This Green Paper could also be the occasion to reflect on the need to introduce a Community definition of the expression to "direct an activity towards another State"; for instance, such definition could be composed of a range of facts.

vii. The introduction of elements involving the theory of appearance provides a variant on solution (vi), still with the objective of specifying the conditions for application of the consumer protection provisions. Thus a future instrument could provide that the place of

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65 There are hypotheses in which the application of the consumer's law is not reasonably possible, for example when a Belgian tourist travelling in Portugal enters a local shop there and buys a video cassette that turns out to be defective.

66 Cf. statement by the Commission and the Council on Article 15 of the Brussels I Regulation (available at http://europa.eu.int/comm/justice_home/unit/civil/justciv_conseil/justciv_en.pdf), specifies that for the consumer protection provisions to be applicable, it is not sufficient for an undertaking to target its activities at the Member State of the consumer's residence; a contract must also be concluded within the framework of its activities. "*... the mere fact that an Internet site is accessible is not sufficient for Article 15 to be applicable, although a factor will be that this Internet site solicits the conclusion of distance contracts and that a contract has actually been concluded at a distance, by whatever means. In this respect, the language or currency which a website uses does not constitute a relevant factor.*" The statement does not necessarily refer only to interactive sites: the aim of a site asking the visitor to send an order by fax is to conclude a distance contract. But a site does not aim to conclude a distance contract if, while addressing the consumers of the whole world with in the intention of providing information on a product, it then refers them to a local distributor for the purpose of signing a contract.

the consumer's residence would be a relevant factor only if the supplier was aware of it or should have been aware of it on the ground of the consumer's conduct. The supplier would be protected from the application of a foreign law if the consumer did not provide him with any means of knowing at least the country – but not necessarily the exact address – of his residence, on the understanding that it is for the supplier to give the consumer the opportunity to do so.[67]

viii. A completely different approach would be not to distinguish any more between consumers which are eligible for specific protection and those who are not, but to introduce one single rule applicable to all consumers. For instance, a future instrument might permit, for all consumer contracts, the choice of a law which is not that of the consumer's habitual residence, but it would be a very limited choice, since the parties could only chose the law of the country where the business is established. For this choice being valid, it would be for the business to prove that the consumer made an informed choice and that he had advance information on all the rights and obligations conferred on him by that law (right of withdrawal, exchange of product, duration and terms of the guarantee, etc If the business failed to do so, the court would apply either the consumer's law or the mandatory provisions of that law. Such a solution, being justified by the existence of a Community minimum standard of consumer protection, would obviously be applicable only if the business was domiciled in a Member State. Non-Community businesses, in exchange for the choice of a law other than that of the consumer, would remain subject to its mandatory provisions and must accept the dépeçage of the contract;

Whatever the solution selected, it must be remembered that consumer disputes only seldom come before the courts, as they tend to be small claims. The question of the law applicable to a consumer contract should accordingly be seen in the context of current efforts both in the Member States and at the European Commission to encourage alternative, including electronic, dispute resolution procedures.[68]

Question 12: Evaluation of the consumer protection rules:

A. How do you evaluate the current rules on consumer protection? Are they still appropriate, in particular in the light of the development of electronic commerce?

B. Do you have information on the impact of the current rule on a) companies in general; b) small and medium-sized enterprises; c) consumers?

C. Among the proposed solutions, which do you prefer, and why? Are other solutions possible?

D. In your view, what would be the impact of the various possible solutions on a) companies in general; b) small and medium-sized enterprises; c) consumers?

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[67] For a contract concluded via the Internet, for example, it is up to the business to make sure that its standard form enables it to identify the place of the consumer's residence.

[68] Cf. Green Paper on alternative dispute resolution in civil and commercial matters, COM(2002)196 (01).

3.2.8. Questions regarding the definition of the term "mandatory provisions"

3.2.8.1. The concept of mandatory provision covers a multiform reality

The Convention refers to the applicability of mandatory provisions in Articles 3(3), 5, 6, 7 and 9. What does this mean? In national law, there are numerous mandatory provisions designed to guarantee a country's social and economic order, also called "public policy" rules. The reference here is to rules from which the parties cannot derogate by contract, in particular those aiming to protect weaker parties (consumers, workers, authors in publishing contracts, minors, commercial agents).[69] However, in a contract subject to a foreign law, a weak party cannot automatically expect his own country's public policy provisions to apply unless the special rules of the Convention (Articles 5 and 6) so provide.

The mandatory provisions within the meaning of Article 7, also designated by the term "overriding rules" by English writers, are a different matter, and they are involved only in an international context: this involves provisions to which a state attaches such importance that it requires them to be applied whenever there is a connection between the legal situation and its territory, whatever law is otherwise applicable to the contract. What is special about the mandatory rules within the meaning of Article 7 is that the court does not even apply its conflict rules to see what law would be applicable and assess whether its content might be repugnant to the values of the forum[70] but automatically applies its own law. Article 7 does not enumerate overriding mandatory rules, each court must decide on the basis of its own legal system whether this or that provision is a mandatory rule within the meaning of Article 7, and the answer is not always obvious.

This difference can be illustrated by the French law on redundancy. This is indisputably an internal public policy law, which means that any contract between a French employer and a French employed whereby the employee waived his rights to redundancy pay or agreed to shorter than normal periods of notice without compensation would be null and void. On the other hand, the French courts have held that it is not an "overriding mandatory rule" within the meaning of Article 7, applicable whatever the law applicable to the contract.[71] Accordingly, a French employee whose employment contract is validly subject to a foreign law (point 3.2.9, *infra*) cannot expect French redundancy legislation to apply automatically.

3.2.8.2. Difficulties encountered

There are those[72] who express doubts about the combination between the mandatory provisions of Article 5 and those of Article 7: they argue that Article 5 is a special application of Article 7 as the two aim to displace the normally applicable law. Accordingly, when the conditions of Article 5 are not met, Article 7 would also be inoperative. This interpretation would deprive a mobile consumer, who already does not enjoy the protection of Article 5, of the safety valve offered by the public order acts. The German case law has followed the same line,[73] but most academic writers are sharply critical.

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69 For example, in employment law, the rules concerning safety and health at work, minimum wages, paid leave or sick leave.

70 This is the public-policy exception, provided for by Article 16 of the Convention.

71 Paris Court of Appeal, 22.3.1990, D. 1990, Somm., p. 176.

72 P. Lagarde, Cf. P. Lagarde, Le nouveau droit international privé des contrats après l'entrée en vigueur de la Convention de Rome du 19 juin 1980, RCDIP, 1991,316.

73 Bundesgerichtshof, 19 March 1997 (Case VIII ZR 316/96): German consumers travelling in the Canary Islands were induced by dubious practices to sign contracts for the purchase of a timeshare in a holiday

Generally, the use of the same expression for very different concepts generates confusion in the interpretation of the Convention.

3.2.8.3. Possible solutions

A future instrument could specify that the scope of the two Articles is not identical. Article 5 designates an objectively applicable law (in the circumstances that it defines) whose mandatory protective provisions (as defined by national law) must be complied with. But it does not interfere with the possible application of overriding mandatory rules, provided for by Article 7 as regards laws which regard their provisions as internationally mandatory and which can thus provide complementary protection when their conditions for application in geographical terms are satisfied.

The future Rome I instrument could therefore propose a definition of the concept of mandatory rules within the meaning of Article 7, based on the decision of the Court of Justice in *Arblade*,[74] according to which this term means "*national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State*."

In response to the Court's decision in *Ingmar GB Ltd v Eaton Loenard Technologies Inc*.,[75] some have also suggested specifying in the future instrument that there cannot be mandatory provision within the meaning of Article 7 when a rule aims only to protect purely private interests, as opposed to legislation protecting the state's political, economic or social order.

According to the *Ingmar* decision, not only national provisions but also provisions of Community legislation may be mandatory within the meaning of Article 7. This idea could be incorporated into a future "Rome I" instrument, along the lines of Article 11 (3) of the draft proposal for a Council Regulation on the law applicable to non-contractual obligations ("Rome II").[76]

Question 13: Should a future Rome I instrument specify the meaning of "mandatory provisions" in Articles 3, 5, 6 and 9 and in Article 7?

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apartment. The contracts - some subject to the law of the Isle of Man, others to Spanish law - contained a non-withdrawal clause although withdrawal was possible in German law and Community law. When they returned to Germany, certain tourists wished nevertheless to exercise the right of withdrawal provided for by German law. Being eligible as "mobile" consumers for the consumer protection measures of Article 5, the lower courts argued that the right of withdrawal under German law was conferred by public-order legislation within the meaning of Article 7(2) of the Convention. This argument was rejected by the Supreme Court on the ground that German law could be applied under Article 7 only if the conditions as to connection with the territory provided for by Article 5(2) for contracts governed by this Article were met. Consumer protection in such a case is now given by Community sectoral Directives.

74 Cases C-369/96 and C-374/96 (judgment given on 23.11.1999).

75 Case C-381/98 (judgment given on 9.11.2000).

76 Cf. note 5, *supra*.

3.2.9. Uncertainties relating to the interpretation of "temporary employment" of employees in Article 6

3.2.9.1. The law applicable to employment contract

Out of the same concern for workers' protection as for consumers, the authors of the Convention derogated from the general rules of Articles 3 and 4. Article 6(1) is built on the same model as the first subparagraph of Article 5(2): freedom of choice is not abolished, which is not negligible for contracts negotiated by managers. This freedom is limited, however, in that the choice of another law than that which would be objectively applicable in the absence of a choice cannot have the effect of depriving the worker of the protection enjoyed under the mandatory provisions of the objectively applicable law.

But the spirit behind the determination of the objectively applicable law in Article 6(2) is different from Article 5: while for Article 5, the applicable law is that of the consumer's residence, which is the law that the consumer generally knows and on the protection of which he relies, Article 6(2) tries to determine the law with which the contract is most closely connected. It distinguishes according to whether the worker habitually carries out his work under the contract in the same country or not.

In the first case, the law of the country in which the worker habitually carries out his work is applicable. The Article specifies that this is also the case when the worker "*is temporarily employed in another country*": the law applicable to the contract of a worker sent abroad for a given duration or for the needs of a specific job does not change, whereas expatriation entails the application of the law of the new country as that is now the country in which the worker habitually carries out his work.

When, on the other hand, the worker does not habitually carry out his work in the same country,[77] the applicable law is that of *"the country in which the place of business through which he was engaged is situated*".

In both cases, whether or not the worker habitually carries out his work in the same country, the objective connection defined by the Convention can be overridden by an exception clause (end of Article (2)), which for the worker avoids the harmful consequences of rigid connection of the contract to the law of the place of performance.[78]

3.2.9.2. Difficulties encountered

Practitioners and academic writers generally consider that the rules of Article 6 are relatively well drafted. Consequently, the decided cases tend to focus on the circumstances of the case, often complex and open to interpretation. But there are a few difficulties that should be pointed out. First there are those already referred to in relation to Articles 3, 4 and 5, pertaining in particular to determination of the tacit choice, to frequent use of the exception clause and the interaction between the mandatory provisions provided for in Article 6 and the public-order legislation referred to in Article 7, to which we will not return here.

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77 Examples would include a worker in a mobile construction crew and a sales agent active in several States.

78 For example, a contract concluded in France between a French employer and a French employee for a two-year work in an African country, possibly with the promise of further employment in France on the expiry of the contract, can be assumed to be governed by the law not of the African country of the place of performance but by French law, with which it is most closely connected.

Close attention must be paid, on the other hand, to the "temporary employment" concept. For one thing, an analysis of the decided cases reveals that the definition of "temporary" raises problems in private international law, and for another, account must be taken of the definition of "posting" in Directive 1996/71 of 16 December 1996.

To begin with the private international law angle, the Convention leaves it to the court to determine the duration beyond which employment ceases to be temporary. Solutions are thus not easily foreseeable and can vary from country to country. However, this absence of rigidity regarding the applicable law also enables the court to take have fuller regard to the facts of the case, as "temporary employment" can refer to a great variety of situations. Temporary employment within a group of companies raises questions. What happens when the worker is sent to a company in the same group, with which he concludes a local employment contract? Sometimes, the companies of a group enjoy genuine autonomy and it may be that the transfer really corresponds to a new contract. In other situations, the worker is engaged by the management of the group before being transferred by decision of the same management; the new contract then corresponds merely to administrative requirements (need to obtain a work permit, for example).

To continue with the link with the directive on "posting of workers",[79] Article 6 brings our attention back to the question of the interaction between the general conflict rule of the Rome Convention and the rule affecting the applicable law in the sectoral Directive. Apart from being difficult for practitioners wishing to identify the applicable law, the two instruments do not use the same terminology.

The purpose of Directive 96/71 is to guarantee that certain mandatory provisions of the host Member State are applied in the event of an employee being sent to work there temporarily. This particularly concerns minimum wage regulations but also health and safety requirements. A superficial reading might suggest that the Directive does not follow the same logic as the Convention, Article 6 of which stipulates that the employee's status does not have to be changed because of a temporary assignment. But it is clear from a more detailed analysis that the two instruments sit well together. In the event of a temporary assignment, the Directive by no means aims to amend the law applicable to the employment contract but determines a "focal point" of mandatory rules to be complied with throughout the period of assignment to the host Member State, "*whatever the law applicable to the working relationship"*. The Directive must therefore be regarded as an implementation of Article 7 of the Rome Convention, concerning overriding mandatory rules". The instrument thus aims to guaranty faire competition and the respect for employees' rights on the labour market in the Union.[80]

There is a risk of confusion in that the two instruments do not use the same terminology.

Article 1(3) of the Directive 96/71 specifies that its rules apply provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting. From the moment the employee concludes a new employment contract, there is no posting in the sense of the Directive. But it has been seen that for the purposes of

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79 Directive 1996/71 of 16 December 1996, OJ L 18, 21.1.1997, p. 1.

80 It must be remembered that the rules of the Directive also apply to the non-Community workers and employers, so that there is no differentiated treatment according to whether the sending company is established in a Member State or not. The text specifies that companies established in a non-member state may not be treated more favourably than companies established in a Member State. Accordingly the legislation of Member States transposing the Directive applies without discrimination to workers seconded to their territory whatever the country of origin of the worker or of the employer.

the Convention, on the contrary, there can be a temporary assignment even if the employee concludes a new employment contract in the host country, for example within a group of companies. For the purpose of the Convention it is the criterion of duration which decides whether the employee finds himself in the situation of "temporary assignment" in the sense of Article 6, whereas the criterion of duration is not relevant for the purposes of the Directive.

The Rome Convention and the Directive not having the same objectives, there is no inconsistency between these instruments. However, the present situation does not add to the transparency of Community legislation.

3.2.9.3. Possible solutions

To ensure that the duration of the temporary assignment for the purposes of Article 6 of the Rome Convention is not assessed on a purely case by case basis, thus creating an unforeseeable solution, several solutions can be envisaged:

i. appraisal of the assignment's temporary nature in the light of the intention of the parties, in that an assignment planned for a given duration or a given project would be temporary. This solution, which would mean that the duration of the assignment was assessed *ex ante*, has been proposed by the EUROPEAN GROUPING OF PRIVATE INTERNATIONAL LAW;

ii. another solution would be for the court to assess the duration *ex post*, on the basis of the actual duration, on a case by case basis, possibly on the basis of a period set by a future instrument. The EUROPEAN GROUPING OF PRIVATE INTERNATIONAL LAW stresses, however, that this step, though having the advantage of foreseeability, would inevitably be arbitrary and probably too rigid in view of the diversity of situations;

iii. the Convention could further specify that a new contract concluded with an employer of the same group does not exclude this being considered as a temporary assignment.

Question 14: Should Article 6 be clarified as regards the definition of "temporary employment" ? If so, how?

3.2.10. Other questions concerning Article 6

The Convention does not specify the position of employees carrying out their work at a place not subject to national sovereignty (sailors, pilots). The courts tend to prefer the law of the place where the employee was engaged rather than locating somewhat artificially the place where work is carried out in one country or another.

Certain Member States have special rules, sometimes unilateral, that are detrimental to uniformity of solutions (for example, a conflict rule designating the law of the flag for sailors on board ship).

One could also question the relevance of the connection of the contract to the law of the place of performance of the work in the case of cross-border home-working. Its connection to the place where the interests of the employing business are located or to the place where the work

is delivered might, under certain circumstances, be more protective[81] of the employee's interests. It seems that the last paragraph of Article 6 permits the connection of the contract to these latter laws, but some academic writers suggest this Article should contain more precise indications with respect of the country with which "the contract is most closely connected" to expressly mention the situation of home-working.

Question 15: Do you think that Article 6 should be amended on other points?

3.2.11. Application of foreign mandatory rules (Article 7(1))

In addition to applying the overriding mandatory rules of the forum (point 3.2.8, *supra*), the Convention sometimes allows the court to give effect to mandatory rules of other countries with which the situation is closely connected, including states which are not members of the European Union. This is a highly innovatory provision, expressing the concern of the Member States to respect the legislative policy of other states, including non-member countries. Foreign overriding mandatory rules can be applicable in a variety of situations. By way of example, there is a Decision of the House of Lords of 1958 which had regard to Indian legislation prohibiting jute exports to South Africa in a case concerning a contract governed by English law.[82]

There have so far been very few court decisions on Article 7(1).

Article 22(1) of the Convention stipulates that Member States not wishing to adopt Article 7(1) relating to foreign overriding mandatory rules may reserve the right not to apply it, and the United Kingdom, Luxembourg and Germany have actually done so. This does not preclude the courts there from taking foreign mandatory rules into account, but they would then be acting outside the Convention and the additional details that it contains.

Should the Rome Convention be converted into a Community instrument, and if so may be even into a regulation which would not be compatible with reservations, the question of the future of this Article will have to be addressed

Question 16: Do you believe there should be rules concerning foreign mandatory rules in the meaning of Article 7? Would it be desirable for the future instrument to be more precise on the conditions for applying such rules?

3.2.12. Law applicable to formal validity of contracts (Article 9)

3.2.12.1.Current solution

The form of the contract means any external behaviour imposed by law on the author of a legal transaction, such as the requirement of a written document, a hand-written endorsement or a deed. To encourage the validity of the contract as to form, the Convention lays down an alternative rule: it is enough for the measure to be valid according to one of two laws – the law applicable as to substance, determined in accordance with the general rules of the

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81 For instance, in case of application of the rules of the country where the business is established regarding collective dismissal, the protection of employees' rights in case of business transfer or bankruptcy of the business.

82 *Regazzoni v Sethia* 1958 [AC] 301. The court does not seem to have referred specifically to the concept of foreign public-order legislation, as the case substantially predated the Rome Convention, but the situation was precisely the kind of situation to which Article 7(1) applies.

Convention, and the law of the place where the contract was concluded. As regards contracts concluded at a distance (by fax, mail or e-mail, for example), there is a place of conclusion for each party in the contract, which further multiplies the chances that the contract is valid as to form. This solution has made it unnecessary to take a more or less artificial decision on the location of a contract between distant parties.

3.2.12.2. Difficulties encountered

Article 9 was thought up before contracts concluded by e-mail had become common practice. But how is the place of conclusion to be determined for each party, this being one of the branches of the alternative proposed when offer and acceptance are done by a simple exchange of e-mails?

3.2.12.3. Possible solutions

It might be possible to provide a subsidiary rule where it is not possible to determine the place where the contractual intention was expressed. The alternative rule in Article 9 could contain an additional branch by adding the law of the habitual residence of the author of the statement of intention to contract to the law governing it as to substance and the law of the place of conclusion. It will be enough, therefore, for the statement to satisfy the formal requirements of one of the three laws to be valid as to form. This rule will apply without discrimination to contracts concluded by electronic means and to other contracts concluded at a distance.

Question 17: Do you think that the conflict rule on form should be modernised?

3.2.13. Law applicable to the voluntary assignment of legal rights (Article 12)

3.2.13.1. Current solution

Assignment is a mechanism widely used, in particular in banking practice, for carrying out various credit or factoring operations. There is an agreement whereby a creditor, called the assignor, transfers his claim against his debtor, called the assigned debtor, to a contractor, called the assignee. An example might be a parts supplier (the "assignor") who has claims on his own customers, the car manufacturers (the "assigned debtors"). Instead of waiting for manufacturers to pay him, the supplier assigns these claims to his bank (the "assignee") to obtain the amounts on his invoices immediately.

Like any triangular operation, assignment raises many questions in private international law since there are three distinct legal relations, each of which can be subject to its own law. In the above example, the first contractual link chronologically is between the parts supplier and the car manufacturers. It is this claim, called the "original claim" that will subsequently be assigned. It is subject to its own law, determined in accordance with Articles 3 (freedom of choice) and 4 (closest connection) of the Convention.

The "assignment contract" or "transfer contract" is then made between the assignor, in our example the parts supplier, and the assignee, here the bank. According to Article 12(1) of the Convention, the applicable law is again determined in accordance with the general rules of the Convention (Articles 3 and 4). In the absence of a choice,[83] the applicable law is often

[83] Some writers argue that an assignment contract contains a tacit choice for the law of the claim assigned. This solution has the advantage of submitting the claim and the assignment to the same law. On the

therefore that of the assignee, who provides the characteristic performance.[84] The third legal relationship is between the assigned debtor, in our example the car manufacturer, and the assignee bank. According to the Convention, this contract is governed by the same law as the original claim. Thus the Convention aims to protect the assigned debtor by ensuring that his obligations remain governed by the same law, the only one which can reasonably be expected, and that he does not owe the bank more than he owed the supplier.

3.2.13.2 Difficulties encountered

The Rome Convention does not deal explicitly with the question under which conditions the assignment can be invoked against third parties. The question is important because it determines the effectiveness of the assignment of the claim and the transfer of the property. It may happen, in the example aforementioned, that the parts supplier did not pay his own creditor, who then wishes to seize his assets and claims, including the claims which were assigned to the bank. The question then arises who – the new creditor or the bank – owns the relevant claims. The supplier may also have assigned his claims to two different banks to obtain credit fraudulently. The question is then which of the two banks owns the claims.[85] Since the Member States do not all answer these questions in the same way, it would be preferable for them to apply the same law to discourage forum-shopping.

But as neither the Convention nor the Bankruptcy Regulation[86] enacts conflict rules explicitly covering the question of the conditions under which the assignments can be invoked against third parties, each Member State applies its own rules here, and the solution varies widely from one court to another. The disparities are all the more marked as the courts of certain Member States consider that, while the question is not treated explicitly by the Convention, it nevertheless contains implicit rules.

3.2.13.3 Possible solutions

The future instrument could specify the law applicable to the question of assignments being invoked against third parties. Several options are possible:

i. application of Article 12(1) (application of the same law as to the transfer contract): this solution has been adopted by the Dutch courts.[87] It has unquestionable advantages in legal systems which do not usually distinguish between the validity of the transfer contract and the effectiveness of the transfer of ownership of the claim;

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other hand, in the event of a multiple assignment, this solution is likely to submit the assignments between assignor and assignee to different laws even though they are a single business operation.

84 In certain complex operations, for example a large-scale credit operation, the characteristic performance could also be that of the assignee. The Convention therefore leaves certain room for manoeuvre so that the courts can take account of specific situations.

85 In more technical terms, what this question boils down to is whether the Convention covers only the contract law aspects or whether it also includes the property law aspects (what law determines the question whether the measures of information for the debtor serve only to protect him or also to make the transfer of property effective).

86 Regulation (EC) No 1346/2000 of 29 May 2000 relating to insolvency proceedings, which came into force on 31 May 2002. This Regulation does not contain conflict rules, but Article 5 establishes that a insolvency proceeding initiated in a Member State does not affect rights in rem in assets located in other Member States. These rights in rem include "the exclusive right to have a claim met" (Article 5(2)(b)). It must be specified that according to Article 2(g) of the Regulation, a claim is located "in the Member State within the territory of which the third party required to meet them has the centre of his main interests".

87 Hoge Raad, 16 May 1997, Nederlands International Privatrecht 1997, No 209.

ii. application of Article 12(1) (application of the same law as to the original claim): this was the solution in the preliminary draft Convention but not in the final text. It is also the solution applied by the German courts.[88] The position here is that the fate of third parties in general, such as a creditor of the transferor or a second assignee of the same claim, should not be dissociated from that of the assigned debtor; the law applicable to the question whether the contract can be pleaded would be the same in both cases, ensuring a degree of consistency in the treatment of the assignment operation as a whole;

iii. application of the law of the place of residence of the assignment debtor: since the assignor's creditors are not always familiar with the law applicable to the original claim, some propose that the question whether the contract can be pleaded should be governed by the law of the place of residence of the assignment debtor. This solution has the advantage that third parties will be familiar with this law, but it would further complicate the multiple business credit assignments when debtors are resident abroad, a single business operation being subject to several laws;

iv. application of the law of the assignor's residence: this is the solution best capable of satisfying the criterion of foreseeability for third parties. Thus was this solution adopted by the United Nations Convention on the assignment of claims in international trade;[89]

v. all the solutions except point (ii) have the disadvantage of making the question whether the assignment can be invoked against the assigned debtor and against other third parties subject to different laws, which could in certain circumstances lead to deadlock. It has therefore been suggested that there might be a material rule giving priority to whoever brings the first action while taking into account the good or bad faith of the competing creditors.

Question 18: Do you believe that a future instrument should specify the law applicable to the conditions under which the assignment may be invoked against third parties ? If so, what conflict rule do you recommend?

3.2.14. Respective scope of Articles 12 and 13 relating to the assignment of claims and subrogation

3.2.14.1. Subrogation in the Rome Convention

This is a mechanism which is not known in all the Member States. As in the case of assignment, it involves a triangular operation transferring an obligation. There is subrogation where a person paying a creditor acquires his rights and becomes the debtor's creditor in his place. There can be either a contract between the parties or a legal provision which automatically activates it in relation to certain measures. The Rome Convention does not cover liberalities, but only subrogation payments made by a third party under the terms of an obligation. The question whether this third party is then subrogated to the creditor's rights is theoretically governed by the same law as this obligation (Article 13).[90]

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88 Bundesgerichtshof, 8 December 1998, XI ZR 302/97, IPRAX, 2000, p. 124.

89 Adopted by the General Assembly on 31 January 2002. This Convention has not yet been signed or ratified by any of the Member States. It does not provide for an "opt-out" mechanism for Article 22 concerning the possibility of relying on the assignment against third parties, contrary to the other conflict rules.

90 A payment made by a guarantor is a typical case of subrogation and it is therefore the law of the contract of guarantee which governs subrogation.

3.2.14.2. Difficulties encountered

There is an important business law mechanism, factoring, called contractual subrogation in certain countries and credit transfer in others. Since there are conflicts of terminology, it has not been possible to apply the Convention uniformly. In addition, some writers argue that Article 13 applies only to the subrogation by operation of law, contractual subrogation being covered by Article 12.

Since the rules of Articles 12 and 13 are very similar, it is not clear whether the conflict of terminology has any real practical effect. But the question remains whether there is a clear rule that is easy for the practitioner to apply.

Lastly, some would like subrogation payments made in the absence of an obligation to be within the scope of the Convention.

3.2.14.3. Possible solutions

The future Rome I instrument could specify the respective scope of Articles 12 and 13. Another solution would be to merge Articles 12 and 13. In the absence of a clear provision, the question will be settled by the Court of Justice.

Question 19: Would it be useful to specify the respective scope of Articles 12 and 13? Do you believe that there should be a conflict rule for subrogation payments made in the absence of an obligation?

3.2.15. Absence of conflict rule relating to offsetting of claims

3.2.15.1. The offsetting mechanism

The offsetting mechanism means that when two parties are each other's creditor and debtor, their respective debts are reduced to the amount of the smallest one. For example, if Paul owes Peter €20 and Peter owes Paul €10, the offsetting mechanism operates automatically so that Peter is released from his debt and Paul owes Peter €10. This is a mechanism for extinguishing obligations and is of great importance in daily business life.

Offsetting may be either by operation of law (legal offsetting), when certain conditions are met, or by the desire for the parties (contractual offsetting).[91]

3.2.15.2. Difficulties encountered

Under Article 10(d) of the Convention, the various methods of extinguishing obligations, of which offsetting is one, are governed by the same law as the relevant obligation. But this provision does not reflect the difficulties inherent in the legal offsetting mechanism applied to two obligations subject to different laws. Here each Member State would apply its own conflict rule. As these rules differ, there is uncertainty as to the law in this matter.

3.2.15.3. Possible solutions

The Convention could specify the law applicable to legal offsetting:

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[91] For contractual offsetting, the applicable law is determined in accordance with the general rules of the Convention (Article 3 and 4).

i. cumulative application of the two laws involved: this rule protects the interests of the parties but is very restrictive;

ii. application of the law which governs the credit to be offset.

The Bankruptcy Regulation,[92] which entered into force on 31 May 2002, contains no conflict rules concerning offsetting as such, but even so it has an impact on this question. Article 6 treats offsetting in the same way as Article 5 treats assignments: when, under the normally applicable conflict rules, the right to offset is subject to a different national law from the insolvency procedure, Article 6 enables the creditor to preserve this possibility as an acquired right in the insolvency procedure. But the Convention gives it only if offsetting is allowed by the law applicable to the claim by the insolvent debtor (passive credit) and thus opts for the solution (ii) above.

These rules apply, obviously, only where offsetting is invoked in an insolvency proceeding and leave open the question of the applicable law in other circumstances.

Question 20: In your view, would it be useful to specify the law applicable to legal compensation? If so, what conflict rule do you recommend?

92 Council Regulation (EC) No 1346/2000 of 29 May relating to insolvency proceedings.

Annex 1

Private international law: a glossary

Applicable law/lex causae:	When a legal relationship between private individuals has an international character (for example, because they are of different nationality, do not reside in the same country, are parties to an international commercial transaction, etc), it is necessary to determine which of the laws involved govern the situation. The applicable law is determined according to the conflict rules.
Bilateral conflict rule:	Most of the rules of conflict of laws are bilateral, i.e. they can designate either a foreign law or the law of the forum. For example, there is a French rule according to which the court must determine a child's affiliation on the basis of the law of the mother's nationality. If the mother is French, the French court will apply French law; if she is Italian, it will apply Italian law. The bilateral conflict rules are opposed to unilateral rules.
Dépeçage:	Situation in which different parts of an international contract are governed by the laws of several states (for example, a sales contract may be governed by German law except for the guarantee clause, which is governed by English law).
Domestic public policy:	A set of mandatory national rules the objective of which is to guarantee the social and economic order of a state. This concerns rules from which parties cannot derogate by contract, for example those aiming to protect weaker parties (consumers, workers, minors, etc).
Forum:	The court to which an international dispute was referred.
Forum-shopping:	The attitude of a person involved in an international dispute who takes his case to the court of a particular country not because it is best placed to hear the dispute but only because, under its rules on conflict of laws, it would apply the law giving the most advantageous result for this person.
Freedom of choice:	The right of private individuals to choose the law applicable to their legal situation.
International jurisdiction:	When a dispute is international (for example, because the parties are of different nationalities or do not reside in the same country), several courts may have jurisdiction in the same case. The rules of international jurisdiction determine the country whose courts have jurisdiction in a given dispute.

International public policy:	After having determined the law applicable to a given legal situation in accordance with its conflict rules, the court may consider that the application of this law entails a result not compatible with the values of the forum. Accordingly, it rules out the normally applicable foreign law and applies its own law.
Mandatory provision:	In the Rome Convention, the expression "mandatory provision" covers multiple realities: it designates at the same time overriding mandatory rules in the meaning of Article 7, a concept specific to private international law, and public-policy rules of national law.
Overriding mandatory rule:	Cf. Article 7 of the Convention. Concept of private international law which designates the provisions to which a state attaches such importance that it requires them to be applied wherever the legal situation is connected with its territory, whatever law is otherwise applicable to the situation. Unlike the mechanism of the international public-policy exception, the court does not look to its conflict rules to ascertain the applicable law and evaluate whether its content may be incompatible with the system of values of the forum but automatically applies its own rules.
Rule of conflict of laws:	When a legal relation one between private individuals has an international element, the laws of several countries can compete with each other to govern the situation. To decide which of the laws involved applies to this situation, the courts apply the conflict rules.
Substantial law:	Substantial law is opposed to the private international law of a state. It means the national rules determining the rights and obligations of a person in a given legal situation (for example, the rule that there cannot be a contract if the assent of one of the parties was vitiated).
Unilateral conflict rule:	According to the unilateralist method, each state is satisfied with determining the cases where its own law is applicable. Such rules are the exception nowadays. An example is Article 3 subparagraph 3 of the French Civil Code: "*the laws on the status and capacity of persons govern French persons, even those residing abroad"* (but this rule is "bilateralised" by the case law).

Annex 2

List of Rules of conflict of laws

and rules affecting the applicable law[93] in contractual matters

in sectoral instruments of secondary legislation

- Directive on the return of cultural objects unlawfully removed from the territory of a Member State (1993/7, 15.3.1993)
- Directive on unfair terms (1993/13, 5.4.1993)
- Directive on time-sharing (1994/47, 26.10.1994)
- Directive concerning the posting of workers in the framework of the provision of services (1996/71, 16.12.1996)
- Directive 97/7, 20.5.1997 on the protection of consumers in respect of distance contracts
- Directive 1999/44, 25.5.1999 on certain aspects of the sale of consumer goods and associated guarantees
- Second non-life insurance Directive (1988/357, 22.6.1988) as supplemented and amended by Directive 1992/49 and 2002/13
- Second life assurance Directive (1990/619, 8.11.1990) as supplemented and amended by Directives 1992/96 and 2002/12

[93] I.e. conflict of laws' rules, on the one hand, and rules specifying the territorial scope of Community legislation on the other hand. Cf. notes 31 and 32.

Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)

Regulation (EC) No 864/2007 of the European Parliament and of the Council

of 11 July 2007

on the law applicable to non-contractual obligations (Rome II)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 61(c) and 67 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee [1],

Acting in accordance with the procedure laid down in Article 251 of the Treaty in the light of the joint text approved by the Conciliation Committee on 25 June 2007 [2],

Whereas:

(1) The Community has set itself the objective of maintaining and developing an area of freedom, security and justice. For the progressive establishment of such an area, the Community is to adopt measures relating to judicial cooperation in civil matters with a cross-border impact to the extent necessary for the proper functioning of the internal market.

(2) According to Article 65(b) of the Treaty, these measures are to include those promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction.

(3) The European Council meeting in Tampere on 15 and 16 October 1999 endorsed the principle of mutual recognition of judgments and other decisions of judicial authorities as the cornerstone of judicial cooperation in civil matters and invited the Council and the Commission to adopt a programme of measures to implement the principle of mutual recognition.

(4) On 30 November 2000, the Council adopted a joint Commission and Council programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters [3]. The programme identifies measures relating to the harmonisation of conflict-of-law rules as those facilitating the mutual recognition of judgments.

(5) The Hague Programme [4], adopted by the European Council on 5 November 2004, called for work to be pursued actively on the rules of conflict of laws regarding non-contractual obligations (Rome II).

(6) The proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought.

(7) The substantive scope and the provisions of this Regulation should be consistent with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [5] (Brussels I) and the instruments dealing with the law applicable to contractual obligations.

(8) This Regulation should apply irrespective of the nature of the court or tribunal seised.

(9) Claims arising out of acta iure imperii should include claims against officials who act on

behalf of the State and liability for acts of public authorities, including liability of publicly appointed office-holders. Therefore, these matters should be excluded from the scope of this Regulation.

(10) Family relationships should cover parentage, marriage, affinity and collateral relatives. The reference in Article 1(2) to relationships having comparable effects to marriage and other family relationships should be interpreted in accordance with the law of the Member State in which the court is seised.

(11) The concept of a non-contractual obligation varies from one Member State to another. Therefore for the purposes of this Regulation non-contractual obligation should be understood as an autonomous concept. The conflict-of-law rules set out in this Regulation should also cover non-contractual obligations arising out of strict liability.

(12) The law applicable should also govern the question of the capacity to incur liability in tort/delict.

(13) Uniform rules applied irrespective of the law they designate may avert the risk of distortions of competition between Community litigants.

(14) The requirement of legal certainty and the need to do justice in individual cases are essential elements of an area of justice. This Regulation provides for the connecting factors which are the most appropriate to achieve these objectives. Therefore, this Regulation provides for a general rule but also for specific rules and, in certain provisions, for an "escape clause" which allows a departure from these rules where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country. This set of rules thus creates a flexible framework of conflict-of-law rules. Equally, it enables the court seised to treat individual cases in an appropriate manner.

(15) The principle of the lex loci delicti commissi is the basic solution for non-contractual obligations in virtually all the Member States, but the practical application of the principle where the component factors of the case are spread over several countries varies. This situation engenders uncertainty as to the law applicable.

(16) Uniform rules should enhance the foreseeability of court decisions and ensure a reasonable balance between the interests of the person claimed to be liable and the person who has sustained damage. A connection with the country where the direct damage occurred (lex loci damni) strikes a fair balance between the interests of the person claimed to be liable and the person sustaining the damage, and also reflects the modern approach to civil liability and the development of systems of strict liability.

(17) The law applicable should be determined on the basis of where the damage occurs, regardless of the country or countries in which the indirect consequences could occur. Accordingly, in cases of personal injury or damage to property, the country in which the damage occurs should be the country where the injury was sustained or the property was damaged respectively.

(18) The general rule in this Regulation should be the lex loci damni provided for in Article 4(1). Article 4(2) should be seen as an exception to this general principle, creating a special connection where the parties have their habitual residence in the same country. Article 4(3) should be understood as an escape clause' from Article 4(1) and (2), where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country.

(19) Specific rules should be laid down for special torts/delicts where the general rule does not allow a reasonable balance to be struck between the interests at stake.

(20) The conflict-of-law rule in matters of product liability should meet the objectives of fairly spreading the risks inherent in a modern high-technology society, protecting consumers' health, stimulating innovation, securing undistorted competition and facilitating trade. Creation of a

cascade system of connecting factors, together with a foreseeability clause, is a balanced solution in regard to these objectives. The first element to be taken into account is the law of the country in which the person sustaining the damage had his or her habitual residence when the damage occurred, if the product was marketed in that country. The other elements of the cascade are triggered if the product was not marketed in that country, without prejudice to Article 4(2) and to the possibility of a manifestly closer connection to another country.

(21) The special rule in Article 6 is not an exception to the general rule in Article 4(1) but rather a clarification of it. In matters of unfair competition, the conflict-of-law rule should protect competitors, consumers and the general public and ensure that the market economy functions properly. The connection to the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected generally satisfies these objectives.

(22) The non-contractual obligations arising out of restrictions of competition in Article 6(3) should cover infringements of both national and Community competition law. The law applicable to such non-contractual obligations should be the law of the country where the market is, or is likely to be, affected. In cases where the market is, or is likely to be, affected in more than one country, the claimant should be able in certain circumstances to choose to base his or her claim on the law of the court seised.

(23) For the purposes of this Regulation, the concept of restriction of competition should cover prohibitions on agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition within a Member State or within the internal market, as well as prohibitions on the abuse of a dominant position within a Member State or within the internal market, where such agreements, decisions, concerted practices or abuses are prohibited by Articles 81 and 82 of the Treaty or by the law of a Member State.

(24) "Environmental damage" should be understood as meaning adverse change in a natural resource, such as water, land or air, impairment of a function performed by that resource for the benefit of another natural resource or the public, or impairment of the variability among living organisms.

(25) Regarding environmental damage, Article 174 of the Treaty, which provides that there should be a high level of protection based on the precautionary principle and the principle that preventive action should be taken, the principle of priority for corrective action at source and the principle that the polluter pays, fully justifies the use of the principle of discriminating in favour of the person sustaining the damage. The question of when the person seeking compensation can make the choice of the law applicable should be determined in accordance with the law of the Member State in which the court is seised.

(26) Regarding infringements of intellectual property rights, the universally acknowledged principle of the lex loci protectionis should be preserved. For the purposes of this Regulation, the term intellectual property rights' should be interpreted as meaning, for instance, copyright, related rights, the sui generis right for the protection of databases and industrial property rights.

(27) The exact concept of industrial action, such as strike action or lock-out, varies from one Member State to another and is governed by each Member State's internal rules. Therefore, this Regulation assumes as a general principle that the law of the country where the industrial action was taken should apply, with the aim of protecting the rights and obligations of workers and employers.

(28) The special rule on industrial action in Article 9 is without prejudice to the conditions relating to the exercise of such action in accordance with national law and without prejudice to the legal status of trade unions or of the representative organisations of workers as provided for in the law of the Member States.

(29) Provision should be made for special rules where damage is caused by an act other than a tort/delict, such as unjust enrichment, negotiorum gestio and culpa in contrahendo.

(30) Culpa in contrahendo for the purposes of this Regulation is an autonomous concept and should not necessarily be interpreted within the meaning of national law. It should include the violation of the duty of disclosure and the breakdown of contractual negotiations. Article 12 covers only non-contractual obligations presenting a direct link with the dealings prior to the conclusion of a contract. This means that if, while a contract is being negotiated, a person suffers personal injury, Article 4 or other relevant provisions of this Regulation should apply.

(31) To respect the principle of party autonomy and to enhance legal certainty, the parties should be allowed to make a choice as to the law applicable to a non-contractual obligation. This choice should be expressed or demonstrated with reasonable certainty by the circumstances of the case. Where establishing the existence of the agreement, the court has to respect the intentions of the parties. Protection should be given to weaker parties by imposing certain conditions on the choice.

(32) Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions. In particular, the application of a provision of the law designated by this Regulation which would have the effect of causing non-compensatory exemplary or punitive damages of an excessive nature to be awarded may, depending on the circumstances of the case and the legal order of the Member State of the court seised, be regarded as being contrary to the public policy (ordre public) of the forum.

(33) According to the current national rules on compensation awarded to victims of road traffic accidents, when quantifying damages for personal injury in cases in which the accident takes place in a State other than that of the habitual residence of the victim, the court seised should take into account all the relevant actual circumstances of the specific victim, including in particular the actual losses and costs of after-care and medical attention.

(34) In order to strike a reasonable balance between the parties, account must be taken, in so far as appropriate, of the rules of safety and conduct in operation in the country in which the harmful act was committed, even where the non-contractual obligation is governed by the law of another country. The term "rules of safety and conduct" should be interpreted as referring to all regulations having any relation to safety and conduct, including, for example, road safety rules in the case of an accident.

(35) A situation where conflict-of-law rules are dispersed among several instruments and where there are differences between those rules should be avoided. This Regulation, however, does not exclude the possibility of inclusion of conflict-of-law rules relating to non-contractual obligations in provisions of Community law with regard to particular matters.

This Regulation should not prejudice the application of other instruments laying down provisions designed to contribute to the proper functioning of the internal market in so far as they cannot be applied in conjunction with the law designated by the rules of this Regulation. The application of provisions of the applicable law designated by the rules of this Regulation should not restrict the free movement of goods and services as regulated by Community instruments, such as Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) [6].

(36) Respect for international commitments entered into by the Member States means that this Regulation should not affect international conventions to which one or more Member States are parties at the time this Regulation is adopted. To make the rules more accessible, the Commission should publish

the list of the relevant conventions in the Official Journal of the European Union on the basis of information supplied by the Member States.

(37) The Commission will make a proposal to the European Parliament and the Council concerning the procedures and conditions according to which Member States would be entitled to negotiate and conclude on their own behalf agreements with third countries in individual and exceptional cases, concerning sectoral matters, containing provisions on the law applicable to non-contractual obligations.

(38) Since the objective of this Regulation cannot be sufficiently achieved by the Member States, and can therefore, by reason of the scale and effects of this Regulation, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity set out in Article 5 of the Treaty. In accordance with the principle of proportionality set out in that Article, this Regulation does not go beyond what is necessary to attain that objective.

(39) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and to the Treaty establishing the European Community, the United Kingdom and Ireland are taking part in the adoption and application of this Regulation.

(40) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark does not take part in the adoption of this Regulation, and is not bound by it or subject to its application,

HAVE ADOPTED THIS REGULATION:

CHAPTER I

SCOPE

Article 1

Scope

1. This Regulation shall apply, in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters. It shall not apply, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (acta iure imperii).

2. The following shall be excluded from the scope of this Regulation:

(a) non-contractual obligations arising out of family relationships and relationships deemed by the law applicable to such relationships to have comparable effects including maintenance obligations;

(b) non-contractual obligations arising out of matrimonial property regimes, property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage, and wills and succession;

(c) non-contractual obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;

(d) non-contractual obligations arising out of the law of companies and other bodies corporate or unincorporated regarding matters such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies corporate or unincorporated, the personal liability of officers and members as such for the obligations of the company or body and

the personal liability of auditors to a company or to its members in the statutory audits of accounting documents;

(e) non-contractual obligations arising out of the relations between the settlors, trustees and beneficiaries of a trust created voluntarily;

(f) non-contractual obligations arising out of nuclear damage;

(g) non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.

3. This Regulation shall not apply to evidence and procedure, without prejudice to Articles 21 and 22.

4. For the purposes of this Regulation, "Member State" shall mean any Member State other than Denmark.

Article 2

Non-contractual obligations

1. For the purposes of this Regulation, damage shall cover any consequence arising out of tort/delict, unjust enrichment, negotiorum gestio or culpa in contrahendo.

2. This Regulation shall apply also to non-contractual obligations that are likely to arise.

3. Any reference in this Regulation to:

(a) an event giving rise to damage shall include events giving rise to damage that are likely to occur; and

(b) damage shall include damage that is likely to occur.

Article 3

Universal application

Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.

CHAPTER II

TORTS/DELICTS

Article 4

General rule

1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.

2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.

3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

Article 5

Product liability

1. Without prejudice to Article 4(2), the law applicable to a non-contractual obligation arising out of damage caused by a product shall be:

(a) the law of the country in which the person sustaining the damage had his or her habitual residence when the damage occurred, if the product was marketed in that country; or, failing that,

(b) the law of the country in which the product was acquired, if the product was marketed in that country; or, failing that,

(c) the law of the country in which the damage occurred, if the product was marketed in that country.

However, the law applicable shall be the law of the country in which the person claimed to be liable is habitually resident if he or she could not reasonably foresee the marketing of the product, or a product of the same type, in the country the law of which is applicable under (a), (b) or (c).

2. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraph 1, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

Article 6

Unfair competition and acts restricting free competition

1. The law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected.

2. Where an act of unfair competition affects exclusively the interests of a specific competitor, Article 4 shall apply.

3. (a) The law applicable to a non-contractual obligation arising out of a restriction of competition shall be the law of the country where the market is, or is likely to be, affected.

(b) When the market is, or is likely to be, affected in more than one country, the person seeking compensation for damage who sues in the court of the domicile of the defendant, may instead choose to base his or her claim on the law of the court seised, provided that the market in that Member

State is amongst those directly and substantially affected by the restriction of competition out of which the non-contractual obligation on which the claim is based arises; where the claimant sues, in accordance with the applicable rules on jurisdiction, more than one defendant in that court, he or she can only choose to base his or her claim on the law of that court if the restriction of competition on which the claim against each of these defendants relies directly and substantially affects also the market in the Member State of that court.

4. The law applicable under this Article may not be derogated from by an agreement pursuant to Article 14.

Article 7

Environmental damage

The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred.

Article 8

Infringement of intellectual property rights

1. The law applicable to a non-contractual obligation arising from an infringement of an intellectual property right shall be the law of the country for which protection is claimed.

2. In the case of a non-contractual obligation arising from an infringement of a unitary Community intellectual property right, the law applicable shall, for any question that is not governed by the relevant Community instrument, be the law of the country in which the act of infringement was committed.

3. The law applicable under this Article may not be derogated from by an agreement pursuant to Article 14.

Article 9

Industrial action

Without prejudice to Article 4(2), the law applicable to a non-contractual obligation in respect of the liability of a person in the capacity of a worker or an employer or the organisations representing their professional interests for damages caused by an industrial action, pending or carried out, shall be the law of the country where the action is to be, or has been, taken.

CHAPTER III

UNJUST ENRICHMENT, NEGOTIORUM GESTIO AND CULPA IN CONTRAHENDO

Article 10

Unjust enrichment

1. If a non-contractual obligation arising out of unjust enrichment, including payment of amounts wrongly received, concerns a relationship existing between the parties, such as one arising out of a contract or a tort/delict, that is closely connected with that unjust enrichment, it shall be governed by the law that governs that relationship.

2. Where the law applicable cannot be determined on the basis of paragraph 1 and the parties have their habitual residence in the same country when the event giving rise to unjust enrichment occurs, the law of that country shall apply.

3. Where the law applicable cannot be determined on the basis of paragraphs 1 or 2, it shall be the law of the country in which the unjust enrichment took place.

4. Where it is clear from all the circumstances of the case that the non-contractual obligation arising out of unjust enrichment is manifestly more closely connected with a country other than that indicated in paragraphs 1, 2 and 3, the law of that other country shall apply.

Article 11

Negotiorum gestio

1. If a non-contractual obligation arising out of an act performed without due authority in connection with the affairs of another person concerns a relationship existing between the parties, such as one arising out of a contract or a tort/delict, that is closely connected with that non-contractual obligation, it shall be governed by the law that governs that relationship.

2. Where the law applicable cannot be determined on the basis of paragraph 1, and the parties have their habitual residence in the same country when the event giving rise to the damage occurs, the law of that country shall apply.

3. Where the law applicable cannot be determined on the basis of paragraphs 1 or 2, it shall be the law of the country in which the act was performed.

4. Where it is clear from all the circumstances of the case that the non-contractual obligation arising out of an act performed without due authority in connection with the affairs of another person is manifestly more closely connected with a country other than that indicated in paragraphs 1, 2 and 3, the law of that other country shall apply.

Article 12

Culpa in contrahendo

1. The law applicable to a non-contractual obligation arising out of dealings prior to the conclusion of a contract, regardless of whether the contract was actually concluded or not, shall be the law that applies to the contract or that would have been applicable to it had it been entered into.

2. Where the law applicable cannot be determined on the basis of paragraph 1, it shall be:

(a) the law of the country in which the damage occurs, irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occurred; or

(b) where the parties have their habitual residence in the same country at the time when the event giving rise to the damage occurs, the law of that country; or

(c) where it is clear from all the circumstances of the case that the non-contractual obligation arising out of dealings prior to the conclusion of a contract is manifestly more closely connected with a country other than that indicated in points (a) and (b), the law of that other country.

Article 13

Applicability of Article 8

For the purposes of this Chapter, Article 8 shall apply to non-contractual obligations arising from an infringement of an intellectual property right.

CHAPTER IV

FREEDOM OF CHOICE

Article 14

Freedom of choice

1. The parties may agree to submit non-contractual obligations to the law of their choice:

(a) by an agreement entered into after the event giving rise to the damage occurred;

or

(b) where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occurred.

The choice shall be expressed or demonstrated with reasonable certainty by the circumstances of the case and shall not prejudice the rights of third parties.

2. Where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.

3. Where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in one or more of the Member States, the parties' choice of the law applicable other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.

CHAPTER V

COMMON RULES

Article 15

Scope of the law applicable

The law applicable to non-contractual obligations under this Regulation shall govern in particular:

(a) the basis and extent of liability, including the determination of persons who may be held liable for acts performed by them;

(b) the grounds for exemption from liability, any limitation of liability and any division of liability;

(c) the existence, the nature and the assessment of damage or the remedy claimed;

(d) within the limits of powers conferred on the court by its procedural law, the measures which a court may take to prevent or terminate injury or damage or to ensure the provision of compensation;

(e) the question whether a right to claim damages or a remedy may be transferred, including by inheritance;

(f) persons entitled to compensation for damage sustained personally;

(g) liability for the acts of another person;

(h) the manner in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement, interruption and suspension of a period of prescription or limitation.

Article 16

Overriding mandatory provisions

Nothing in this Regulation shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation.

Article 17

Rules of safety and conduct

In assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability.

Article 18

Direct action against the insurer of the person liable

The person having suffered damage may bring his or her claim directly against the insurer of the person liable to provide compensation if the law applicable to the non-contractual obligation or the law applicable to the insurance contract so provides.

Article 19

Subrogation

Where a person (the creditor) has a non-contractual claim upon another (the debtor), and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, the law which governs the third person's duty to satisfy the creditor shall determine whether, and the extent to which, the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship.

Article 20

Multiple liability

If a creditor has a claim against several debtors who are liable for the same claim, and one of the debtors has already satisfied the claim in whole or in part, the question of that debtor's right to demand compensation from the other debtors shall be governed by the law applicable to that debtor's non-contractual obligation towards the creditor.

Article 21

Formal validity

A unilateral act intended to have legal effect and relating to a non-contractual obligation shall be formally valid if it satisfies the formal requirements of the law governing the non-contractual obligation in question or the law of the country in which the act is performed.

Article 22

Burden of proof

1. The law governing a non-contractual obligation under this Regulation shall apply to the extent that, in matters of non-contractual obligations, it contains rules which raise presumptions of law or determine the burden of proof.

2. Acts intended to have legal effect may be proved by any mode of proof recognised by the law of the forum or by any of the laws referred to in Article 21 under which that act is formally valid, provided that such mode of proof can be administered by the forum.

CHAPTER VI

OTHER PROVISIONS

Article 23

Habitual residence

1. For the purposes of this Regulation, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration.

Where the event giving rise to the damage occurs, or the damage arises, in the course of operation of a branch, agency or any other establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence.

2. For the purposes of this Regulation, the habitual residence of a natural person acting in the course of his or her business activity shall be his or her principal place of business.

Article 24

Exclusion of renvoi

The application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law.

Article 25

States with more than one legal system

1. Where a State comprises several territorial units, each of which has its own rules of law in respect of non-contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation.

2. A Member State within which different territorial units have their own rules of law in respect of non-contractual obligations shall not be required to apply this Regulation to conflicts solely between the laws of such units.

Article 26

Public policy of the forum

The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum.

Article 27

Relationship with other provisions of Community law

This Regulation shall not prejudice the application of provisions of Community law which, in relation to particular matters, lay down conflict-of-law rules relating to non-contractual obligations.

Article 28

Relationship with existing international conventions

1. This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to non-contractual obligations.

2. However, this Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them in so far as such conventions concern matters governed by this Regulation.

CHAPTER VII

FINAL PROVISIONS

Article 29

List of conventions

1. By 11 July 2008, Member States shall notify the Commission of the conventions referred to in Article 28(1). After that date, Member States shall notify the Commission of all denunciations of such conventions.

2. The Commission shall publish in the Official Journal of the European Union within six months of receipt:

(i) a list of the conventions referred to in paragraph 1;

(ii) the denunciations referred to in paragraph 1.

Article 30

Review clause

1. Not later than 20 August 2011, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Regulation. If necessary, the report shall be accompanied by proposals to adapt this Regulation. The report shall include:

(i) a study on the effects of the way in which foreign law is treated in the different jurisdictions and on the extent to which courts in the Member States apply foreign law in practice pursuant to this Regulation;

(ii) a study on the effects of Article 28 of this Regulation with respect to the Hague Convention of 4 May 1971 on the law applicable to traffic accidents.

2. Not later than 31 December 2008, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a study on the situation in the field of the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality, taking into account rules relating to freedom of the press and freedom of expression in the media, and conflict-of-law issues related to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [7].

Article 31

Application in time

This Regulation shall apply to events giving rise to damage which occur after its entry into force.

Article 32

Date of application

This Regulation shall apply from 11 January 2009, except for Article 29, which shall apply from 11 July 2008.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

Done at Strasbourg, 11 July 2007.

For the European Parliament

The President

H.-G. Pöttering

For the Council

The President

M. Lobo Antunes

[1] OJ C 241, 28.9.2004, p. 1.

[2] Opinion of the European Parliament of 6 July 2005 (OJ C 157 E, 6.7.2006, p. 371), Council Common Position of 25 September 2006 (OJ C 289 E, 28.11.2006, p. 68) and Position of the European Parliament of 18 January 2007 (not yet published in the Official Journal). European Parliament Legislative Resolution of 10 July 2007 and Council Decision of 28 June 2007.

[3] OJ C 12, 15.1.2001, p. 1.

[4] OJ C 53, 3.3.2005, p. 1.

[5] OJ L 12, 16.1.2001, p. 1. Regulation as last amended by Regulation (EC) No 1791/2006 (OJ L 363, 20.12.2006, p. 1).

[6] OJ L 178, 17.7.2000, p. 1.

[7] OJ L 281, 23.11.1995, p. 31.

Commission Statement on the review clause (Article 30)

The Commission, following the invitation by the European Parliament and the Council in the frame of Article 30 of the "Rome II" Regulation, will submit, not later than December 2008, a study on the situation in the field of the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality. The Commission will take into consideration all aspects of the situation and take appropriate measures if necessary.

Commission Statement on road accidents

The Commission, being aware of the different practices followed in the Member States as regards the level of compensation awarded to victims of road traffic accidents, is prepared to examine the specific problems resulting for EU residents involved in road traffic accidents in a Member State other than the Member State of their habitual residence. To that end the Commission will make available to the European Parliament and to the Council, before the end of 2008, a study on all options, including insurance aspects, for improving the position of cross-border victims, which would pave the way for a Green Paper.

Commission Statement on the treatment of foreign law

The Commission, being aware of the different practices followed in the Member States as regards the treatment of foreign law, will publish at the latest four years after the entry into force of the "Rome II" Regulation and in any event as soon as it is available a horizontal study on the application of foreign law in civil and commercial matters by the courts of the Member States, having regard to the aims of the Hague Programme. It is also prepared to take appropriate measures if necessary.

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Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("ROME II")
/* COM/2003/0427 final - COD 2003/0168 */

Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND THE COUNCIL ON THE LAW APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS ("ROME II")

(presented by the Commission)

EXPLANATORY MEMORANDUM

1. INTRODUCTION

1.1. Context

By Article 2 of the Treaty on European Union, the Member States set themselves the objective of maintaining and developing the Union as an area of freedom, security and justice, in which the free movement of persons is assured and litigants can assert their rights in the courts and before the authorities of all the Member States, enjoying facilities equivalent to those they enjoy in their own country.

To establish a genuine European law-enforcement area, the Community, under Articles 61(c) and 65 of the Treaty establishing the European Community, is to adopt measures in the field of judicial cooperation in civil matters in so far as necessary for the proper functioning of the internal market. The Tampere European Council on 15 and 16 October 1999 [1] acknowledged the mutual recognition principle as the cornerstone of judicial cooperation in the Union. It asked the Council and the Commission to adopt, by December 2000, a programme of measures to implement the mutual recognition principle.

[1] Presidency conclusions of 16 October 1999, points 28 to 39.

The joint Commission and Council programme of measures to implement the principle of mutual recognition of decisions in civil and commercial matters, adopted by the Council on 30 November 2000, [2] states that measures relating to harmonisation of conflict-of-law rules, which may sometimes be incorporated in the same instruments as those relating to jurisdiction and the recognition and enforcement of judgments, actually do help facilitate the mutual recognition of judgments. The fact that the courts of the Member States apply the same conflict rules to determine the law applicable to a practical situation reinforces the mutual trust in judicial decisions given in other Member States and is a vital element in attaining the longer-term objective of the free movement of judgments without intermediate review measures.

[2] OJ C 12, 15.1.2001, p. 1.

1.2. Complementarity with instruments of private international law already in force in the Community

This initiative relates to the Community harmonisation of private international law in civil and commercial matters that began late in the 1960s. On 27 September 1968 the six Member States of the European Economic Community concluded a Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the "Brussels Convention") on the basis of the fourth indent of Article 293 (formerly 220) of the EC Treaty. This was drawn up on the idea, already described in the EC Treaty, that the establishment of a common market implied the possibility of having a judgment given in any Member State recognised and enforced as easily as possible. To facilitate the attainment of that objective, the Brussels Convention begins by setting out rules identifying the Member State whose courts have jurisdiction to hear and determine a cross-border dispute.

The mere fact that there are rules governing the jurisdiction of the courts does not generate reasonable foreseeability as to the outcome of a case being heard on the merits. The Brussels Convention and the "Brussels I" Regulation that superseded it on 1 March 2001 [3] contain a number of options enabling claimants to prefer this or that court. The risk is that parties will opt for the courts of one Member State rather than another simply because the law applicable in the courts of this state would be more favourable to them.

[3] Council Regulation (EC) No 44/2001 of 22 December 2000, OJ L 12, 16.1.2001, p. 1, replacing the Brussels Convention of 1968, of which a consolidated version was published in OJ C 27, 26.1.1998, p. 1. But the Brussels Convention remains in force for relations between Denmark and the other Member States.

That is why work began on codifying the rules on conflicts of laws in the Community in 1967. The Commission convened two meetings of experts in 1969, at which it was agreed to focus initially on questions having the greatest impact on the operation of the common market the law applicable to tangible and intangible property, contractual and non-contractual obligations and the form of legal documents. On 23 June 1972, the experts presented a first preliminary draft convention on the law applicable to contractual and non-contractual obligations. Following the accession of the United Kingdom, Ireland and Denmark, the group was expanded in 1973, and that slowed progress. In March 1978, the decision was taken to confine attention to contractual obligations so that negotiations could be completed within a reasonable time and to commence negotiations later for a second convention on non-contractual obligations.

In June 1980 the Convention on the law applicable to contractual obligations (the "Rome Convention") was opened for signature, and it entered into force on 1 April 1991. [4] As there was no proper legal basis in the EC Treaty at the time of its signing, the convention takes the traditional form of an international treaty. But as it was seen as the indispensable adjunct to the Brussels Convention, the complementarity being referred to expressly in the Preamble, it is treated in the same way as the instruments adopted on the basis of Article 293 (ex-220) and is an integral part of the Community acquis.

[4] The consolidated text of the Convention as amended by the various Conventions of Accession, and the declarations and protocols annexed to it, is published in OJ C 27, 26.1.1998, p. 34.

Given the substantial difference in scope between the Brussels and Rome Conventions the former covers both contractual and non-contractual obligations whereas the latter covers only contractual obligations the proposed Regulation, commonly known as "Rome II", will be the natural extension of the unification of the rules of private international law relating to contractual and non-contractual obligations in civil or commercial matters in the Community.

1.3. Resumption of work in the 1990s under the Maastricht and Amsterdam Treaties

Article K.1(6) of the Union Treaty in the Maastricht version classified judicial cooperation in civil matters in the areas of common interest to the Member States of the European Union. In its Resolution of 14 October 1996 laying down the priorities for cooperation in the field of justice and home affairs for the period from 1 July 1996 to 30 June 1998, [5] the Council stated that, in pursuing the objectives set by the European Council, it intended to concentrate during the above period on certain priority areas, which included the "launching of discussions on the necessity and possibility of drawing up... a convention on the law applicable to extra-contractual obligations".

[5] OJ C 319, 26 October 1996, p. 1.

In February 1998 the Commission sent the Member States a questionnaire on a draft convention on the law applicable to non-contractual obligations. The Austrian Presidency held four working

meetings to examine the replies to the questionnaire. It was established that all the Member States supported the principle of an instrument on the law applicable to non-contractual obligations. At the same time the Commission financed a Grotius project [6] presented by the European Private International Law Group (Gedip) to examine the feasibility of a European Convention on the law applicable to non-contractual obligations, which culminated in a draft text. [7] The Council' s ad hoc "Rome II" Working Party continued to meet throughout 1999 under the German and Finnish Presidencies, examining the draft texts presented by the Austrian Presidency and by Gedip. An initial consensus emerged on a number of conflict rules, which this proposal for a Regulation duly reflects.

[6] Project No GR/97/051.

[7] Accessible at http:www.drt.ucl.ac.be/gedip/ gedip_documents.html.

The Amsterdam Treaty, which entered into force on 1 May 1999, having moved cooperation in civil matters into the Community context, the Justice and Home Affairs Council on 3 December 1998 adopted the Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice. [8] It recalls that principles such as certainty in the law and equal access to justice require among other things "clear designation of the applicable law" and states in paragraph 40 that "The following measures should be taken within two years after the entry into force of the Treaty:... b) drawing up a legal instrument on the law applicable to non-contractual obligations (Rome II)".

[8] OJ C 19, 23.1.1999, p. 1.

On 3 May 2002, the Commission launched consultations with interested circles on an initial preliminary draft proposal for a "Rome II" Regulation prepared by the Directorate-General for Justice and Home Affairs. The consultations prompted a very wide response, and the Commission received 80 or so written contributions from the Member States, academics, representatives of industry and consumers' associations. [9] The written consultation procedure was followed by a public hearing in Brussels on 7 January 2003. This proposal duly reflects the comments received.

[9] The contributions received by the Commission can be consulted at: http:europa.eu.int/comm/justice_home/ news/consulting_public/rome_ii/news_summary_rome2_en.htm.

2. PROPOSAL FOR A EUROPEAN PARLIAMENT AND COUNCIL REGULATION

2.1. General purpose - to improve the foreseeability of solutions regarding the applicable law

The purpose of this proposal for a regulation is to standardise the Member States' rules of conflict of laws regarding non-contractual obligations and thus extend the harmonisation of private international law in relation to civil and commercial obligations which is already well advanced in the Community with the "Brussels I" Regulation and the Rome Convention of 1980.

The harmonisation of conflict rules, which must be distinguished from the harmonisation of substantive law, seeks to harmonise the rules whereby the law applicable to an obligation is determined. This technique is particularly suitable for settling cross-border disputes, as, by stating with reasonable certainty the law applicable to the obligation in question irrespective of the forum, it can help to develop a European area of justice. Instead of having to study often widely differing conflict rules of all the Member States' courts that might have jurisdiction in a case, this proposal allows the parties to confine themselves to studying a single set of conflict rules, thus reducing the cost of litigation and boosting the foreseeability of solutions and certainty as to the law.

These general observations are particularly apt in the case of non-contractual obligations, the importance of which for the internal market is clear from sectoral instruments, in force or in preparation, governing this or that specific aspect (product liability or environmental liability, for example).

The approximation of the substantive law of obligations is no more than embryonic. Despite common principles, there are still major divergences between Member States, in particular as regards the following questions: the boundary between strict liability and fault-based liability; compensation for indirect damage and third-party damage; compensation for non-material damage, including third-party damage; compensation in excess of actual damage sustained (punitive and exemplary damages); the liability of minors; and limitation periods. During the consultations undertaken by the Commission, several representatives of industry stated that these divergences made it difficult to exercise fundamental freedoms in the internal market. They realised that harmonisation of the substantive law was not a short-term prospect and stressed the importance of the rules of conflict of laws to improve the foreseeability of solutions.

A comparative law analysis of the rules of conflict of laws reveals that the present situation does not meet economic operators' need for foreseeability and that the differences are markedly wider than was the case for contracts before the harmonisation achieved by the Rome Convention. Admittedly, the Member States virtually all give pride of place to the lex loci delicti commissi, whereby torts/delicts are governed by the law of the place where the act was committed. The application of this rule is problematic, however, in the case of what are known as "complex" torts/delicts, where the harmful event and the place where the loss is sustained are spread over several countries. [10] There are variations between national laws as regards the practical impact of the lex loci delicti commissi rule in the case of cross-border non-contractual obligations. While certain Member States still take the traditional solution of applying the law of the country where the event giving rise to the damage occurred, recent developments more commonly tend to support the law of the country where the damage is sustained. But to understand the law in force in a Member State, it is not enough to ascertain whether the harmful event or the damage sustained is the dominant factor. The basic rule needs to be combined with other criteria. A growing number of Member States allow a claimant to opt for the law that is most favourable to him. Others leave it to the courts to determine the country with which the situation is most closely connected, either as a basic rule or exceptionally where the basic rule turns out to be inappropriate in the individual case. Generally speaking most Member States use a sometimes complex combination of the different solutions. Apart from the diversity of solutions, their legibility is not improved by the fact that only some of the Member States have codified their conflict-of-laws rules; in the others, solutions emerge gradually from the decisions of the courts and often remain uncertain, particularly as regards special torts/delicts.

[10] See the decision of the Court of Justice in the following notes as regards the account to be taken of this spreading of factors for the international jurisdiction of the courts.

There is no doubt that replacing more than fifteen national systems of conflict rules [11] by a single set of uniform rules would represent considerable progress for economic operators and the general public in terms of certainty as to the law.

[11] There are more than fifteen national systems because the United Kingdom does not have a unitary system.

The next need is to analyse the conflict rules in the context of the rules governing the international jurisdiction of the courts. Apart from the basic jurisdiction of the courts for the place of the defendant' s habitual residence, provided for by Article 2 of the "Brussels I" Regulation, Article 5(3) provides for a special head of jurisdiction in relation to torts/delicts and quasi-delict in the form of "the courts for the place where the harmful event occurred...". The Court of Justice has always held that where the place where the harmful act occurred and the place where the loss is sustained are not the same, the defendant can be sued, at the claimant's choice, in the courts either of the place where the harmful act occurred or of the place where the loss is sustained. [12] Admittedly, the Court acknowledged that each of the two places could constitute a meaningful

connecting factor for jurisdiction purposes, since each could be of significance in terms of evidence and organisation of the proceedings, but it is also true that the number of forums available to the claimant generates a risk of forum-shopping.

[12] Case 21/76 Mines de Potasse d' Alsace [1976] ECR 1735 (judgment given on 30.11.1976).

This proposal for a Regulation would allow parties to determine the rule applicable to a given legal relationship in advance, and with reasonable certainty, especially as the proposed uniform rules will receive a uniform interpretation from the Court of Justice. This initiative would accordingly help to boost certainty in the law and promote the proper functioning of the internal market. It is also in the Commission's programme of measures to facilitate the extra-judicial settlement of disputes, since the fact that the parties have a clear vision of their situation makes it all the easier to come to an amicable agreement.

2.2. Legal basis

Since the Amsterdam Treaty came into force, conflict rules have been governed by Article 61(c) of the EC Treaty. Under Article 67 of the EC Treaty, as amended by the Nice Treaty that entered into force on 1 February 2003, the Regulation will be adopted by the codecision procedure laid down by Article 251 of the EC Treaty.

Article 65(b) provides: "Measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken ... in so far as necessary for the proper functioning of the internal market, shall include: promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws ..."

The Community legislature has the power to put flesh on the bones of this Article and the discretion to determine whether a measure is necessary for the proper functioning of the internal market. The Council exercised this power when adopting the Vienna action plan of 3 December 1998 [13] on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice, point 40(c) of which calls expressly for a "Rome II" instrument.

[13] OJ C 19, 23.1.1999, p. 1.

Harmonisation of the conflict rules helps to promote equal treatment between economic operators and individuals involved in cross-border litigation in the internal market. It is the necessary adjunct to the harmonisation already achieved by the "Brussels I" Regulation as regards the rules governing the international jurisdiction of the courts and the mutual recognition of judgments. Given that there are more than fifteen different systems of conflict rules, two firms in distinct Member States, A and B, bringing the same dispute between them and a third firm in country C before their respective courts would have different conflict rules applied to them, which could provoke a distortion of competition. Such a distortion could also incite operators to go forum-shopping.

But the harmonisation of the conflict rules also facilitates the implementation of the principle of the mutual recognition of judgments in civil and commercial matters. The mutual recognition programme [14] calls for the reduction and ultimately the abolition of intermediate measures for recognition of a judgment given in another Member State. But the removal of all intermediate measures calls for a degree of mutual trust between Member States which is not conceivable if their courts do not all apply the same conflict rule in the same situation.

[14] OJ C 12, 15.1.2001, p. 8.

Title IV of the EC Treaty, which covers the matters to which this proposal for a Regulation applies, does not apply to Denmark by virtue of the Protocol concerning it. Nor does it apply to the United Kingdom or Ireland, unless those countries exercise their option of joining the initiative (opt-in clause) on the conditions set out in the Protocol annexed to the Treaty. At

the Council meeting (Justice and Home Affairs) on 12 March 1999, these two Member States announced their intention of being fully associated with Community activities in relation to judicial cooperation in civil matters. They were also fully associated with the work of the ad hoc Council working party before the Amsterdam Treaty entered into force.

2.3. Justification for proposal in terms of proportionality and subsidiarity principles

The technique of harmonising conflict-of-laws rules fully respects the subsidiarity and proportionality principles since it enhances certainty in the law without demanding harmonisation of the substantive rules of domestic law.

As for the choice of instrument, point 6 of the Protocol on the application of the principles of subsidiarity and proportionality provides that "Other things being equal, directives should be preferred to regulations and framework directives to detailed measures." But for the purposes of this proposal a Regulation is the most appropriate instrument. It lays down uniform rules for the applicable law. These rules are detailed, precise and unconditional and require no measures by the Member States for their transposal into national law. They are therefore self-executing. The nature of these rules is the direct result of the objective set for them, which is to enhance certainty in the law and the foreseeability of the solutions adopted as regards the law applicable to a given legal relationship. If the Member States had room for manoeuvre in transposing these rules, uncertainty would be reintroduced into the law, and that is precisely what the harmonisation is supposed to abolish. The Regulation is therefore the instrument that must be chosen to guarantee uniform application in the Member States.

3. INDIVIDUAL PROVISIONS

Article 1 - Material scope

Like the Brussels Convention and the "Brussels I" Regulation, the proposed Regulation covers civil and commercial obligations. This is an autonomous concept of Community law that has been interpreted by the Court of Justice. The reference to this makes it clear that the "Brussels I" Regulation, the Rome Convention and the Regulation proposed here constitute a coherent set of instruments covering the general field of private international law in matters of civil and commercial obligations.

The scope of the Regulation covers all non-contractual obligations except those in matters listed in paragraph 2. Non-contractual obligations are in two major categories, those that arise out of a tort or delict and those that do not. The first category comprises obligations relating to tort or delict, and the second comprises obligations relating to what in some jurisdictions is termed "quasi-delict" or "quasi-contract", including in particular unjust enrichment and agency without authority or negotiorum gestio. The latter category is governed by section 2. But the demarcation line between contractual obligations and obligations based on tort or delict is not identical in all the Member States, and there may be doubts as to which instrument the Rome Convention or the proposed Regulation should be applied in a given dispute, for example in the event of pre-contractual liability, of culpa in contrahendo or of actions by creditors to have certain transactions by their debtors declared void as prejudicial to their interests. The Court of Justice, in actions under Articles 5(1) and (3) of the Brussels Convention, has already had occasion to rule that tort/delict cases are residual in relation to contract cases, which must be defined in strict terms. [15] It will no doubt refine its analysis when interpreting the proposed Regulation.

[15] Case 34/82 Martin Peters [1983] ECR I-987 (judgment given on 22 March 1983); Case C-26/91 Jacob Handte [1992] ECR I-3697 (judgment given on 17 June 1992); Case C-334/00 Fonderie Officine Meccaniche Tacconi [202] ECR I-7357 (judgment given on 17.9.2002).

The proposed Regulation would apply to all situations involving a conflict of laws, i.e. situations in which there are one or more elements that are alien to the domestic social life of a country that entail applying several systems of law. Under Article 1(2), the following are excluded from the scope of the proposed Regulation:

a) non-contractual obligations arising out of family or similar relationships: family obligations do not in general arise from a tort or delict. But such obligations can occasionally appear in the family context, as is the case of an action for compensation for damage caused by late payment of a maintenance obligation. Some commentators have suggested including these obligations within the scope of the Regulation on the grounds that they are governed by the exception clause in Article 3(3), which expressly refers to the mechanism of the "secondary connection" that places them under the same law as the underlying family relationship. Since there are so far no harmonised conflict-of-laws rules in the Community as regards family law, it has been found preferable to exclude non-contractual obligations arising out of such relationships from the scope of the proposed Regulation.

b) Non-contractual obligations arising in connection with matrimonial property regimes and successions: these are excluded for similar reasons to those given at point a).

c) Non-contractual obligations arising out of bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character; this point is taken over from Article 1(2)(c) of the Rome Convention. It is incorporated here for the same reasons as are given in the Giuliano-Lagarde Report, [16] namely that the Regulation is not the proper instrument for such obligations, that the Geneva Conventions of 7 June 1930 and 19 March 1931 regulate much of this matter and that these obligations are not dealt with uniformly in the Member States.

[16] Report on the Convention on the law applicable to contractual obligations, OJ C 282, 31.10.1980, p. 1.

d) The personal legal liability of officers and members as such for the debts of a company or firm or other body corporate or unincorporate, and the personal legal liability of persons responsible for carrying out the statutory audits of accounting documents: this question cannot be separated from the law governing companies or firms or other bodies corporate or unincorporate that is applicable to the company or firm or other body corporate or unincorporate in connection with whose management the question of liability arises.

e) Non-contractual obligations among the settlers, trustees and beneficiaries of a trust: trusts are a sui generis institution and should be excluded from the scope of this Regulation as previously from the Rome Convention.

f) non-contractual obligations arising out of nuclear damage: this exclusion is explained by the importance of the economic and State interests at stake and the Member States' contribution to measures to compensate for nuclear damage in the international scheme of nuclear liability established by the Paris Convention of 29 July 1960 and the Additional Convention of Brussels of 31 January 1963, the Vienna Convention of 21 May 1963, the Convention on Supplementary Compensation of 12 September 1997 and the Protocol of 21 September 1988.

These being exceptions, the exclusions will have to be interpreted strictly.

The proposed Regulation does not take over the exclusion in Article 1(2)(h) of the Rome Convention, which concerns rules of evidence and procedure. It is clear from Article 11 that, subject to the exceptions mentioned, these rules are matters for the lex fori. They would be out of place in a list of non-contractual obligations excluded from the scope of this Regulation.

Article 2 - Universal application

Under Article 2, this is a universal Regulation, meaning that the uniform conflict rules can designate the law of a Member State of the European Union or of a third country.

This is a firmly-rooted principle of the law concerning conflict of laws and already exists in the Rome Convention, the conventions concluded in the Hague Conference and the domestic law of the Member States.

Given the complementarily between "Brussels I" and the proposed Regulation, the universal nature of the latter is necessary for the proper functioning of the internal market as avoiding distortions of competition between Community litigants. If the "Brussels I" Regulation distinguishes a priori between situations in which the defendant is habitually resident in the territory of a Member State and those in which he is habitually resident in a third country, [17] it still governs both purely "intra-Community" situations and situations involving a "foreign" element. For the rules of recognition and enforcement, first of all, all judgments given by a court in a Member State that are within the scope of the "Brussels I" Regulation qualify for the simplified recognition and enforcement scheme; the law under which the judgment was given the law of a Member State or of a third country therefore has very little impact. As for the rules of jurisdiction, the "Brussels I" Regulation also applies where the defendant is habitually resident outside Community territory: this is the case where the dispute is within an exclusive jurisdiction rule, [18] where the jurisdiction of the court proceeds from a jurisdiction clause, [19] where the defendant enters an appearance [20] and where the lis pendens rule applies; [21] in general, Article 4(2) specifies that where the defendant is habitually resident in a third country, the claimant, if habitually resident in a Member States, may rely on exorbitant rules of the law of the country where he is habitually resident, irrespective of his nationality. It follows from all these provisions that the "Brussels I" Regulation applies both to "intra-Community" situations and to situations involving an "extra-Community" element.

[17] Article 2(1).

[18] Article 22.

[19] Article 23.

[20] Article 24.

[21] Article 27.

What must be sought, therefore, is equal treatment for Community litigants, even in situations that are not purely "intra-Community". If there continue to be more than fifteen different systems of conflict rules, two firms in distinct Member States, A and B, bringing the same dispute between them and a third firm in country C before their respective courts, would have different conflict rules applied to them, which could provoke a distortion of competition as in purely intra-Community situations.

Moreover, the separation between "intra-Community" and "extra-Community" disputes is by now artificial. How, for instance, are we to describe a dispute that initially concerns only a national of a Member State and a national of a third country but subsequently develops into a dispute concerning several Member States, for instance where the Community party joins an insurer established in another Member State or the debt in issue is assigned. Given the extent to which economic relations in the internal market are now intertwined, all disputes potentially have an intra-Community nature.

And on purely practical grounds, evidence presented to the Commission by the legal professions - both bench and bar - in the course of the written consultation emphasised that private international law in general and the conflict rules in particular are perceived as highly complex. This complexity would be even greater if this measure had the effect of doubling the sources of conflict rules and if practitioners now had to deal not only with Community uniform rules but also with distinct national

rules in situations not connected as required with Community territory. The universal nature of the proposed Regulation accordingly meets the concern for certainty in the law and the Union' s commitment in favour of transparent legislation.

Article 3 - General rules

Article 3 lays down general rules for determining the law applicable to non-contractual obligations arising out of a tort or delict. It covers all obligations for which the following Articles lay down no special rule.

The Commission' s objectives in confirming the lex loci delicti commissi rule are to guarantee certainty in the law and to seek to strike a reasonable balance between the person claimed to be liable and the person sustaining the damage. The solutions adopted here also reflect recent developments in the Member States' conflict rules.

Paragraph 1 - General rule

Article 3(1) takes as the basic rule the law of the place where the direct damage arises or is likely to arise. In most cases this corresponds to the law of the injured party's country of residence. The expression "is likely to arise" shows that the proposed Regulation, like Article 5(3) of the "Brussels I" Regulation, also covers preventive actions such as actions for a prohibitive injunction.

The place or places where indirect damage, if any, was sustained are not relevant for determining the applicable law. In the event of a traffic accident, for example, the place of the direct damage is the place where the collision occurs, irrespective of financial or non-material damage sustained in another country. In a Brussels Convention case the Court of Justice held that the "place where the harmful event occurred" does not include the place where the victim suffered financial damage following upon initial damage arising and suffered by him in another Contracting State. [22]

[22] Case C-364/93 Marinari v Lloyds Bank [1995] ECR I -2719 (judgment given on 19.9.1995).

The rule entails, where damage is sustained in several countries, that the laws of all the countries concerned will have to be applied on a distributive basis, applying what is known as "Mosaikbetrachtung" in German law.

The proposed Regulation also reflects recent developments in the Member States' conflict rules. While the absence of codification in several Member States makes it impossible to give a clear answer for the more than fifteen systems, the connection to the law of the place where the damage was sustained has been adopted by those Member States where the rules have recently been codified. The solution applies to the Netherlands, the United Kingdom and France, but also in Switzerland. In Germany, Italy and Poland, the victim may opt for this law among others.

The solution in Article 3(1) meets the concern for certainty in the law. It diverges from the solution in the draft Convention of 1972, which takes as its basic rule the place where the "harmful event" occurred. But the Court of Justice has held that the "harmful event" covers both the act itself and the resultant damage. This solution reflects the specific objectives of international jurisdiction but it does not enable the parties to foresee the law that will be applicable to their situation with reasonable certainty.

The rule also reflects the need to strike a reasonable balance between the various interests at stake. The Commission has not adopted the principle of favouring the victim as a basic rule, which would give the victim the option of choosing the law most favourable to him. It considers that this solution would go beyond the victim' s legitimate expectations and would reintroduce uncertainty in the law, contrary to the general objective of the proposed Regulation. The solution in Article 3 is therefore a compromise between the two extreme solutions of applying the law of the place where the event giving rise to the damage occurs and giving the victim the option.

Article 3(1), which establishes an objective link between the damage and the applicable law, further reflects the modern concept of the law of civil liability which is no longer, as it was in the first half of the last century, oriented towards punishing for fault-based conduct: nowadays, it is the compensation function that dominates, as can be seen from the proliferation of no-fault strict liability schemes.

But the application of the basic rule might well be inappropriate where the situation has only a tenuous connection with the country where the damage occurs. The following paragraphs therefore exclude it in specified circumstances.

Paragraph 2 - Law of the common place of residence

Paragraph 2 introduces a special rule where the person claimed to be liable and the person who has allegedly sustained damage are habitually resident in the same country, the law of that country being applicable. This is the solution adopted by virtually all the Member States, either by means of a special rule or by the rule concerning connecting factors applied in the courts. It reflects the legitimate expectations of the two parties.

Paragraph 3 - General exception and secondary connection

Like Article 4(5) of the Rome Convention, paragraph 3 is a general exception clause which aims to bring a degree of flexibility, enabling the court to adapt the rigid rule to an individual case so as to apply the law that reflects the centre of gravity of the situation.

Since this clause generates a degree of unforeseeability as to the law that will be applicable, it must remain exceptional. Experience with the Rome Convention, which begins by setting out presumptions, has shown that the courts in some Member States tend to begin in fact with the exception clause and seek the law that best meets the proximity criterion, rather than starting from these presumptions. [23] That is why the rules in Article 3(1) and (2) of the proposed Regulation are drafted in the form of rules and not of mere presumptions. To make clear that the exception clause really must be exceptional, paragraph 3 requires the obligation to be "manifestly more closely connected" with another country.

[23] Cf. point 3.2.5 of the Green Paper on converting the Convention of Rome of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation.

Paragraph 3 then allows the court to be guided, for example, by the fact that the parties are already bound by a pre-existing relationship. This is a factor that can be taken into account to determine whether there is a manifestly closer connection with a country other than the one designated by the strict rules. But the law applicable to the pre-existing relationship does not apply automatically, and the court enjoys a degree of discretion to decide whether there is a significant connection between the non-contractual obligations and the law applicable to the pre-existing relationship.

The text states that the pre-existing relationship may consist of a contract that is closely connected with the non-contractual obligations in question. This solution is particularly interesting for Member States whose legal system allows both contractual and non-contractual obligations between the same parties. But the text is flexible enough to allow the court to take account of a contractual relationship that is still only contemplated, as in the case of the breakdown of negotiations or of annulment of a contract, or of a family relationship. By having the same law apply to all their relationships, this solution respects the parties' legitimate expectations and meets the need for sound administration of justice. On a more technical level, it means that the consequences of the fact that one and the same relationship may be covered by the law of contract in one Member State and the law of tort/delict in another can be mitigated, until such time as the Court of Justice comes up with its own autonomous response to the situation. The same reasoning applies to the consequences

of the nullity of a contract, already covered by a special rule in Article 10(1)(e) of the Rome Convention. Certain Member States having expressed a reservation as to this Article, the use of the secondary connection mechanism will overcome the difficulties that might flow from the application of two separate instruments.

But where the pre-existing relationship consists of a consumer or employment contract and the contract contains a choice-of-law clause in favour of a law other than the law of the consumer' s habitual place of residence, the place where the employment contract is habitually performed or, exceptionally, the place where the employee was hired, the secondary connection mechanism cannot have the effect of depriving the weaker party of the protection of the law otherwise applicable. The proposed Regulation does not contain an express rule to this effect since the Commission considers that the solution is already implicit in the protective rules of the Rome Convention: Articles 5 and 6 would be deflected from their objective if the secondary connection validated the choice of the parties as regards non-contractual obligations but their choice was at least partly invalid as regards their contract.

Article 4 - Product liability

Article 4 introduces a specific rule for non-contractual obligations in the event of damage caused by a defective product. For the definition of product and defective product for the purposes of Article 4, Articles 2 and 6 of Directive 85/374 will apply. [24]

[24] Council Directive 85/374/EEC of 25.7.1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (OJ L 210, 7.8.1985, p. 29), as amended by Directive 1999/34/EC of 10 May 1999 (OJ L 141, 4.6.1999, p. 20).

Directive 85/374 approximated the Member States' substantive law regarding strict liability, i.e. no-fault liability. But there is no full harmonisation, as the Member States are authorised to exercise certain options. The Directive does not affect national law concerning fault-based liability, which the victim can always rely on, and covers only certain types of damage. The scope of the special rule in Article 4 is consequently broader than the scope of Directive 85/374, as it also applies to actions based on purely national provisions governing product liability that do not emanate from the Directive.

Apart from respecting the parties' legitimate expectations, the conflict rule regarding product liability must reflect also the wide scatter of possible connecting factors (producer's headquarters, place of manufacture, place of first marketing, place of acquisition by the victim, victim' s habitual residence), accentuated by the development of international trade, tourism and the mobility of persons and goods in the Union. Connection solely to the place of the direct damage is not suitable here as the law thus designated could be unrelated to the real situation, unforeseeable for the producer and no source of adequate protection for the victim. [25]

[25] Such a case might be a German tourist buying French-made goods in Rome airport to take to an African country, where they explode and cause him to sustain damage.

Countries in which there are special rules thus tend to provide for a rule requiring several elements to be present in the same country for that country' s law to be applicable. This is also the approach taken in the Hague Convention 1973 on the law applicable to products liability, in force in five Member States. [26] Under Article 25 of the proposed Regulation, the Convention will remain in force in the Member States that have ratified it when the Regulation comes into force. The 1973 Convention determines the law applicable to the liability of manufacturers, producers, suppliers and repairers on the basis of the following factors, whether distributed or combined on a complex basis: the place of damage, place of the habitual residence of the victim, principal place of business

of the manufacturer or producer, place where the product was acquired.

[26] Finland, France, Luxembourg the Netherlands and Spain. The convention is also in force in Norway, Croatia, Macedonia, Slovenia and Yugoslavia.

The proposed Regulation acknowledges the specific constraints inherent in the subject-matter in issue but nevertheless proceeds from the need for a rule to avoid being unnecessarily complex.

Under Article 4, the applicable law is basically the law of the place of where the person sustaining damage has his habitual residence. But this solution is conditional on the product having been marketed in that country with the consent of the person claimed to be liable. In the absence of consent, the applicable law is the law of the country in which the person claimed to be liable has his habitual residence. Article 3(2) (common habitual residence) and (3) (general exception clause) also apply.

The fact that this is a simple and predictable rule means that it is particularly suitable in an area where the number of out-of-court settlements is very high, partly because insurers are so often involved. Article 4 strikes a reasonable balance between the interests in issue. Given the requirement that the product be marketed in the country of the victim's habitual residence for his law to be applicable, the solution is foreseeable for the producer, who has control over his sales network. It also reflects the legitimate interests of the person sustaining damage, who will generally have acquired a product that is lawfully marketed in his country of residence.

Where the victim acquires the product in a country other than that of his habitual residence, perhaps while travelling, two hypotheses need to be distinguished: the first is where the victim acquired abroad a product also marketed in their country of residence, for instance in order to enjoy a special offer. In this case the producer had already foreseen that his activity might be evaluated by the yardstick of the rules in force in that country, and Article 4 designates the law of that country, since both parties could foresee that it would be applicable.

In the second hypothesis, by contrast, where the victim acquired abroad a product that is not lawfully marketed in their country of habitual residence, none of the parties would have expected that law to be applied. A subsidiary rule is consequently needed. The two connecting factors discussed during the Commission' s consultations were the place where the damage is sustained and the habitual residence of the person claimed to be liable. Since the large-scale mobility of consumer goods means that the connection to the place where the damage is sustained no longer meets the need for certainty in the law or for protection of the victim, the Commission has opted for the second solution.

The rule in Article 4 corresponds not only to the parties' expectations but also to the European Union's more general objectives of a high level of protection of consumers' health and the preservation of fair competition on a given market. By ensuring that all competitors on a given market are subject to the same safety standards, producers established in a low-protection country could no longer export their low standards to other countries, which will be a general incentive to innovation and scientific and technical development.

The expression "person claimed to be liable" does not necessarily mean the manufacturer of a finished product; it might also be the producer of a component or commodity, or even an intermediary or a retailer. Anybody who imports a product into the Community is considered in certain conditions to be responsible for the safety of the products in the same way as the producer. [27]

[27] Directive 85/374, Article 3(2).

Article 5 - Unfair competition

Article 5 provides for an autonomous connection for actions for damage arising out of an act of unfair competition.

The purpose of the rules against unfair competition is to protect fair competition by obliging all participants to play the game by the same rules. Among other things they outlaw acts calculated to influence demand (misleading advertising, forced sales, etc.), acts that impede competing supplies (disruption of deliveries by competitors, enticing away a competitor's staff, boycotts), and acts that exploit a competitor's value (passing off and the like). The modern competition law seeks to protect not only competitors (horizontal dimension) but also consumers and the public in general (vertical relations). This three-dimensional function of competition law must be reflected in a modern conflict-of-laws instrument.

Article 5 reflects this triple objective since it refers to the effect on the market in general, the effect on competitors' interests and the effect on the broad and rather vague interests of consumers (as opposed to the individual interests of a specific consumer). This last concept is taken over from a number of Community consumer-protection directives, in particular Directive 98/27 of 19 May 1998. [28] This is not to say that the concept relates solely to actions brought by a consumers' association; given the triple objective of competition law, virtually any act of unfair competition also affects the collective interests of consumers, and it is neither here nor there whether the action is brought by a competitor or an association. But Article 5 applies also to actions for injunctions brought by consumer associations. The proposed Regulation thus sits well with recent decisions of the Court of Justice on the Brussels Convention holding, for instance, that "a preventive action brought by a consumer protection organisation for the purpose of preventing a trader from using terms considered to be unfair in contracts with private individuals is a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of that convention". [29]

[28] Parliament and Council Directive 98/27/EC of 19 May 1998 on injunctions for the protection of consumers' interests: OJ L 166, 11.6.1998, p. 51.

[29] Case C-167/2000 Henkel (judgment given on 1.10.2002).

Comparative analysis of the Member States' private international law shows that there is a broad consensus in favour of applying the law of the country in which the market is distorted by competitive acts. This result is obtained either through the general principle of the lex loci delicti or by a specific connection (Austria, Netherlands, Spain and also Switzerland) and corresponds to recommendations extensively made by academic writers and by the Ligue internationale du droit de la concurrence en matière de publicité. [30] The current situation, however, is one of uncertainty, particularly in countries where the courts have not had an opportunity to rule on how the lex loci delicti rule should operate in practice. The establishment of a uniform conflict rule here would thus enhance the foreseeability of court decisions.

[30] Resolution passed at the Amsterdam congress in October 1992, published in the Revue internationale de la concurrence 1992 (No 168), p. 51, this Resolution having also called for an effort to harmonise the substantive rules here.

Article 5 provides for connection to the law of the State in whose territory "competitive relations or the collective interests of consumers are affected or are likely to be affected" by "an act of unfair competition". This is the market where competitors are seeking to gain the customer's favour. This solution corresponds to the victims' expectations since the rule generally designates the law governing their economic environment. But it also secures equal treatment for all operators on the same market. The purpose of competition law is to protect a market; it pursues a macro-economic objective. Actions for compensation are purely secondary and must be dependent on the overall judgement of how the market functions.

Regarding the assessment of the impact on the market, academic writers generally acknowledge that only the direct substantial effects of an act of unfair competition should be taken into account.

This is particularly important in international situations since anti-competitive conduct commonly has an impact on several markets and gives rise to the distributive application of the laws involved.

The need for a special rule here is sometimes disputed on the ground that it would lead to the same solution as the general rule in Article 3, the damage for which compensation is sought being assimilated to the anti-competitive effect on which the application of competition law depends. While the two very often coincide in territorial terms, they will not automatically do so: for instance, the question of the place where the damage is sustained is tricky where two firms from State A both operate on market B. Moreover, the rules of secondary connection, of the common residence and the exception clause are not adapted to this matter in general.

Paragraph 2 deals with situations where an act of unfair competition targets a specific competitor, as in the case of enticing away a competitor's staff, corruption, industrial espionage, disclosure of business secrets or inducing breach of contract. It is not entirely excluded that such conduct may also have a negative impact on a given market, but these are situations that have to be regarded as bilateral. There is consequently no reason why the victim should not enjoy the benefit of Article 3 relating to the common residence or the general exception clause. This solution is in conformity with recent developments in private international law: there is a similar provision in section 4(2) of the Dutch Act of 2001 and section 136(2) of the Swiss Act. The German courts take the same approach.

Article 6 - Violations of privacy and rights relating to the personality

The Regulation follows the approach generally taken by the law of the Member States nowadays and classifies violations of privacy and rights relating to the personality, particularly in the event of defamation by the mass media, in the category of non-contractual obligations rather than matters of personal status, except as regards rights to the use of a name.

There are specific provisions on respect for privacy and freedom of expression and information, also covering respect for media freedom and pluralism, in the Charter of Fundamental Rights of the European Union and in the Council of Europe Convention on the Protection of Human Rights and Fundamental Freedoms. The Community institutions and the Member States are required to respect these fundamental values. The European Court of Human Rights has already given valuable pointers to how to reconcile the two principles in the event of defamation proceedings. International conventions have helped to approximate the rules governing freedom of the press in the Member States, but differences remain as regards the practical application of that freedom. Operators regard the foreseeability of the law applicable to their business as of the greatest importance.

A study of the conflict rules in the Member States shows that there is not only a degree of diversity in the solutions adopted but also considerable uncertainty as to the law. In the absence of codification, court decisions laying down general rules are still lacking in many Member States. [31] The connecting factors in the other Member States vary widely: the publisher' s headquarters or the place where the product was published (Germany and Italy, at the victim' s option); the place where the product was distributed and brought to the knowledge of third parties (Belgium, France, Luxembourg); the place where the victim enjoys a reputation, presumed to be his habitual residence (Austria). Other Member States follow the principle of favouring the victim, by giving the victim the option (Germany, Italy), or applying the law of the place where the damage is sustained where the lex loci delicti does not provide for compensation (Portugal). The UK solution is very different from the solutions applied in other Member States, for it differentiates depending whether the publication is distributed in the UK or elsewhere: in the former case the only law applicable is the law of the place of distribution; in the latter case the court applies both the law of the place of distribution and the lex fori ("double actionability rule"). This rule protects the national press, as the English courts cannot give judgment against it if there is no provision for this in English law. [32]

[31] Denmark, Finland, Greece, Ireland (doctrine of the "proper law of the tort"), Netherlands, Spain and Sweden.

[32] Some academic writers in England doubt, however, whether invasions of privacy are also covered by this rule.

Given the diversity and the uncertainties of the current situation, harmonising the conflict rule in the Community will increase certainty in the law.

The content of the uniform rule must reflect the rules of international jurisdiction in the "Brussels I" Regulation. The effect of the Mines de Potasse d'Alsace and Fiona Shevill judgments [33] is that the victim may sue for damages either in the courts of the State where the publisher of the defamatory material is established, which have full jurisdiction to compensate for all damage sustained, or in the courts of each State in which the publication was distributed and the victim claims to have suffered a loss of reputation, with jurisdiction to award damages only for damage sustained in their own State. Consequently, if the victim decides to bring the action in a court in a State where the publication is distributed, that court will apply its own law to the damage sustained in that State. But if the victim brings the action in the court for the place where the publisher is headquartered, that court will have jurisdiction to rule on the entire claim for damages: the lex fori will then govern the damage sustained in that country and the court will apply the laws involved on a distributive basis if the victim also claims compensation for damage sustained in other States.

[33] Case C 68/93 Fiona Shevill and others v Press Alliance SA [1995] ECR I - 415 (judgment given on 7 March 1995).

In view of the practical difficulties in the distributive application of several laws to a given situation, the Commission proposed, in its draft proposal for a Council Regulation of May 2002, that the law of the victim' s habitual residence be applied. But there was extensive criticism of this during the consultations, one of the grounds being that it is not always easy to ascertain the habitual residence of a celebrity and another being that the combination of rules of jurisdiction and conflict rules could produce a situation in which the courts of the State of the publisher' s establishment would have to give judgment against the publisher under the law of the victim' s habitual residence even though the product was perfectly in conformity with the rules of the publisher's State of establishment and no single copy of the product was distributed in the victim' s State of residence. The Commission has taken these criticisms on board and reviewed its proposal.

Article 6(1) of the proposed Regulation now provides for the law applicable to violations of privacy and rights relating to the personality to be determined in accordance with the rules in Article 3, which posit the law of the place where the direct damage is sustained, unless the parties reside in the same State or the dispute is more closely connected with another country.

In Fiona Shevill the Court of Justice ruled on the actual determination of the place where the damage was sustained in the event of defamation by the press, opting for the "State in which the publication was distributed and where the victim claims to have suffered injury to his reputation". The place where a publication is distributed is the place where it comes to the knowledge of third parties and a person' s reputation is liable to be harmed. This solution is in conformity with the victim's legitimate expectations without neglecting those of media firms. A publication can be regarded as distributed in a country only if is actually distributed there on a commercial basis.

But the Commission has been sensitive to concerns expressed both in the press and by certain Member States regarding situations in which a court in Member State A might be obliged to give judgment against a publisher with its own nationality A under the laws of Member State B, or even a third country, even though the publication in dispute was perfectly in conformity with the rules applicable

in Member State A. It has been pointed out that the application of law B could be unconstitutional in country A as violating the freedom of the press. Given that this is a sensitive issue, where the Member States' constitutional rules diverge quite considerably, the Commission has felt that Article 6(1) should make it explicitly clear that the law designated by Article 3 must be disapplied in favour of the lex fori if it is incompatible with the public policy of the forum in relation to freedom of the press.

The law designated by Article 6(1) does not seem to provide a proper basis for settling the question whether and in what conditions the victim can oblige the publisher to issue a corrected version and exercise a right of reply. Paragraph 2 accordingly provides that the right of reply and equivalent measures will be governed by the law of the country in which the broadcaster or publisher is established.

Article 7 - Violation of the environment

Article 7 lays down a special rule for civil liability in relation to violations of the environment. Reflecting recent developments in the substantive law, the rule covers both damage to property and persons and damage to the ecology itself, provided it is the result of human activity.

European or even international harmonisation is particularly important here as so many environmental disasters have an international dimension. But the instruments adopted so far deal primarily with questions of substantive law or international jurisdiction rather than with harmonisation of the conflict rules. And they address only selected types of cross-border pollution. In spite of this gradual approximation of the substantive law, not only in the Community, major differences subsist - for example in determining the damage giving rise to compensation, limitation periods, indemnity and insurance rules, the right of associations to bring actions and the amounts of compensation. The question of the applicable law has thus lost none of its importance.

Analysis of the current conflict rules shows that the solutions vary widely. The lex fori and the law of the place where the dangerous activity is exercised play a certain role, particularly in the international Conventions, but the most commonly applied solution is the law of the place where the loss is sustained (France, United Kingdom, Netherlands, Spain, Japan, Switzerland, Romania, Turkey, Quebec) or one of the variants of the principle of the law that is most favourable to the victim (Germany, Austria, Italy, Czech Republic, Yugoslavia, Estonia, Turkey, Nordic Convention of 1974 on the protection of the environment, Convention between Germany and Austria of 19 December 1967 concerning nuisances generated by the operation of Salzburg airport in Germany). The Hague Conference has also put an international convention on cross-border environmental damage on its work programme, and preparatory work seems to be moving towards a major role for the place where the damage is sustained, though the merits of the principle of favouring the victim are acknowledged.

The uniform rule proposed in Article 7 takes as its primary solution the application of the general rule in Article 3(1), applying the law of the place where the damage is sustained but giving the victim the option of selecting the law of the place where the event giving rise to the damage occurred.

The basic connection to the law of the place where the damage was sustained is in conformity with recent objectives of environmental protection policy, which tends to support strict liability. The solution is also conducive to a policy of prevention, obliging operators established in countries with a low level of protection to abide by the higher levels of protection in neighbouring countries, which removes the incentive for an operator to opt for low-protection countries. The rule thus contributes to raising the general level of environmental protection.

But the exclusive connection to the place where the damage is sustained would also mean that a victim in a low-protection country would not enjoy the higher level of protection available in neighbouring countries. Considering the Union' s more general objectives in environmental matters, the point is not only to respect the victim's legitimate interests but also to establish a legislative policy

that contributes to raising the general level of environmental protection, especially as the author of the environmental damage, unlike other torts or delicts, generally derives an economic benefit from his harmful activity. Applying exclusively the law of the place where the damage is sustained could give an operator an incentive to establish his facilities at the border so as to discharge toxic substances into a river and enjoy the benefit of the neighbouring country' s laxer rules. This solution would be contrary to the underlying philosophy of the European substantive law of the environment and the "polluter pays" principle.

Article 7 accordingly allows the victim to make his claim on the basis of the law of the country in which the event giving rise to the damage occurred. It will therefore be for the victim rather than the court to determine the law that is most favourable to him. The question of the stage in proceedings at which the victim must exercise his option is a question for the procedural law of the forum, each Member State having its own rules to determine the moment from which it is no longer possible to file new claims.

A further difficulty regarding civil liability for violations of the environment lies in the close link with the public-law rules governing the operator's conduct and the safety rules with which he is required to comply. One of the most frequently asked questions concerns the consequences of an activity that is authorised and legitimate in State A (where, for example, a certain level of toxic emissions is tolerated) but causes damage to be sustained in State B, where it is not authorised (and where the emissions exceed the tolerated level). Under Article 13, the court must then be able to have regard to the fact that the perpetrator has complied with the rules in force in the country in which he is in business.

Article 8 - Infringement of intellectual property rights

Article 8 lays down special rules for non-contractual obligations flowing from an infringement of intellectual property rights. According to Recital 14 the term intellectual property rights means copyright, related rights, sui generis right for protection of databases and industrial property rights.

The treatment of intellectual property was one of the questions that came in for intense debate during the Commission' s consultations. Many contributions recalled the existence of the universally recognised principle of the lex loci protectionis, meaning the law of the country in which protection is claimed on which e.g. the Bern Convention for the Protection of Literary and Artistic Works of 1886 and the Paris Convention for the Protection of Industrial Property of 1883 are built. This rule, also known as the "territorial principle", enables each country to apply its own law to an infringement of an intellectual property right which is in force in its territory: counterfeiting an industrial property right is governed by the law of the country in which the patent was issued or the trade mark or model was registered; in copyright cases the courts apply the law of the country where the violation was committed. This solution confirms that the rights held in each country are independent.

The general rule contained in Article 3(1) does not appear to be compatible with the specific requirements in the field of intellectual property. To reflect this incompatibility, two approaches were discussed in the course of preparatory work. The first is to exclude the subject from the scope of the proposed Regulation, either by means of an express exclusion in Article 1 or by means of Article 25, which preserves current international conventions. The second is to lay down a special rule, and this is the approach finally adopted by the Commission with Article 8.

Article 8(1) enshrines the lex loci protectionis principle for infringements of intellectual property rights conferred under national legislation or international conventions.

Paragraph 2 concerns infringements of unitary Community rights such as the Community trade mark,

Community designs and models and other rights that might be created in future such as the Community patent for which the Commission has adopted a proposal for a Council regulation [34] on 1 August 2000. The locus protectionis referring to the Community as a whole, the non contractual obligations that are covered by the present proposal for a regulation are directly governed by the unitary Community law. In case of infringements and where for a specific question the Community instrument neither contains a provision of substantive law nor a special conflict of laws' rule, Article 8(2) of the proposed regulation contains a subsidiary rule according to which the applicable law is the law of the Member State in which an act of infringement of the Community right has been committed.

[34] OJ C 337 E, 28.11.2000, p. 78.

Article 9 - Law applicable to non-contractual obligations arising out of an act other than a tort or delict

In all the Member States' legal systems there are obligations that arise neither out of a contract nor out of a tort or delict. The situations that are familiar to all the Member States are payments made by mistake and services rendered by a person that enable another person to avoid sustaining personal injury or loss of assets.

Since these obligations are clearly distinguished by their own features from torts and delicts, it has been decided that there should be a special section for them.

To reflect the wide divergences between national systems here, technical terms need to be avoided. This Regulation refers therefore to "non-contractual obligations arising out of an act other than a tort or delict". In most Member States there are sub-categories for repayment of amounts wrongly received or unjust enrichment on the one hand and agency without authority (negotiorum gestion) on the other. Both the substantive law and the conflict rules are still evolving rapidly in most of the Member States, which means that the law is far from certain. The uniform conflict rule must reflect the divergences in the substantive rules. The difficulty is in laying down rules that are neither so precise that they cannot be applied in a Member State whose substantive law makes no distinction between the various relevant hypotheses nor so general that they might be open to challenge as serving no obvious purpose. Article 9 seeks to overcome the problem by laying down specific rules for the two sub-categories, unjust enrichment and agency without authority, while leaving the courts with sufficient flexibility to adapt the rule their national systems.

The secondary connection technique, confirmed by paragraph 1, is particularly important here, for example where an agent exceeds his authority or where a third-party debt is settled. The rule is accordingly a strict one. The obligation is so closely connected with the pre-existing relationship between the parties that it is preferable for the entire legal situation to be governed by the same law. As in the case of the general exception clause in Article 3(3), the expression "pre-existing relationship" applies particularly to pre-contractual relationships and to void contracts.

Paragraph 2 reflects the legitimate expectations of the parties where they are habitually resident in the same country.

Paragraph 3 concerns unjust enrichment in the absence of a pre-existing relationship between the parties, in which case the non-contractual obligation is governed by the law of the country in which the enrichment occurs. The proposed rule is a conventional one, found also in the GEDIP draft and the Swiss legislation.

Paragraph 4, concerning negotiorum gestio (agency without authority), distinguishes between measures to be described as assistance and measures that might be described as interference. Measures of assistance mean one-off initiatives taken on an exceptional basis by the "agent", who deserves special protection since he acted in order to preserve the interests of the "principal", which justifies

a local connection to the law of the property or person assisted. In the case of measures of interference in the assets of another person, as in the case of payment of a third-party debt, it is the "principal" who deserves protection. The applicable law is therefore generally the law of the latter' s place of habitual residence.

Paragraph 5, like the first sentence of Article 3, provides an exception clause.

To ensure that several different laws are not applicable to one and the same dispute, paragraph 6 excludes from this Article non-contractual obligations relating to intellectual property, to which Article 8 alone applies. E.g. an obligation based on unjust enrichment arising from an infringement of an intellectual property right is accordingly governed by the same law as the infringement itself.

Article 10 - Freedom of choice

Paragraph 1 allows the parties to choose the law applicable to the non-contractual obligation after the dispute has arisen. The proposed Regulation thus follows recent developments in national private international law, which likewise tend to encourage greater freedom of will, [35] even if the situation is less frequent that in contract cases. For this reason, the rule is based on objective connecting factors, unlike the Rome Convention.

[35] Examples include section 6 of the Dutch Act of 11 April 2001 and section 42 of the German EGBGB.

Freedom of will is not accepted, however, for intellectual property, where it would not be appropriate.

As in Article 3 of the Rome Convention, it is stated that the choice must either be explicit or emerge clearly from the circumstances of the case. Since the proposed Regulation does not allow an ex ante choice, there is no need for special provisions to protect a weaker party.

Paragraph 1 further specifies that the parties' choice may not affect the rights of third parties. The typical example is the insurer's obligation to reimburse damages payable by the insured.

Paragraph 2 puts a restriction on freedom of will, which is inspired by Article 3(3) of the Rome Convention and applies where all the elements of the situation (except the choice of law) are located in a country other than the one whose law is chosen. In reality this is a purely internal situation regarding a Member State and is within the scope of the Regulation only because the parties have agreed on a choice of law. The choice by the parties is not deactivated, but it may not operate to the detriment of such mandatory provisions of the law which might otherwise be applicable.

In this Article the concept of "mandatory rules", unlike the overriding mandatory rules referred to in Article 12, refers to a country' s rules of internal public policy. These are rules from which the parties cannot derogate by contract, particularly those designed to protect weaker parties. But internal public policy rules are not necessarily mandatory in an international context. They must be distinguished from the rules of international public policy of the forum referred to in Article 22 and from the overriding mandatory rules referred to in Article 12.

Paragraph 3 represents an extension by analogy of the limit provided for by paragraph 2 and applies where all the elements of the case apart from the choice of law are located in two or more Member States. It has the same objective, i.e. to prevent the parties frustrating the application of mandatory rules of Community law through the choice of the law of a third country.

Article 11 - Scope of the law applicable to non-contractual obligations

Article 11 defines the scope of the law determined under Articles 3 to 10 of the proposed Regulation. It lists the questions to be settled by that law. The approach taken in the Member States is not entirely uniform: while certain questions, such as the conditions for liability, are generally governed by the applicable law, others, such as limitation periods, the burden of proof, the measure of damages

etc., may fall to be treated by the lex fori. Like Article 10 of the Rome Convention, Article 11 accordingly lists the questions to be settled by the law that is actually designated.

In line with the general concern for certainty in the law, Article 11 confers a very wide function on the law designated. It broadly takes over Article 10 of the Rome Convention, with a few changes of detail:

a) "The conditions and extent of liability, including the determination of persons who are liable for acts performed by them"; the expression "conditions... of liability" refers to intrinsic factors of liability. The following questions are particularly concerned: nature of liability (strict or fault-based); the definition of fault, including the question whether an omission can constitute a fault; the causal link between the event giving rise to the damage and the damage; the persons potentially liable; etc. "Extent of liability" refers to the limitations laid down by law on liability, including the maximum extent of that liability and the contribution to be made by each of the persons liable for the damage which is to be compensated for. The expression also includes division of liability between joint perpetrators.

b) "The grounds for exemption from liability, any limitation of liability and any division of liability": these are extrinsic factors of liability. The grounds for release from liability include force majeure; necessity; third-party fault and fault by the victim. The concept also includes the inadmissibility of actions between spouses and the exclusion of the perpetrator' s liability in relation to certain categories of persons.

c) "The existence and kinds of damage for which compensation may be due": this is to determine the damage for which compensation may be due, such as personal injury, damage to property, moral damage and environmental damage, and financial loss or loss of an opportunity.

d) "the measures which a court has power to take under its procedural law to prevent or terminate damage or to ensure the provision of compensation": this refers to forms of compensation, such as the question whether the damage can be repaired by payment of damages, and ways of preventing or halting the damage, such as an interlocutory injunction, though without actually obliging the court to order measures that are unknown in the procedural law of the forum.

e) "the measure of damages in so far as prescribed by law": if the applicable law provides for rules on the measure of damages, the court must apply them.

f) "the question whether a right to compensation may be assigned or inherited": this is self-explanatory. In succession cases, the designated law governs the question whether an action can be brought by a victim's heir to obtain compensation for damage sustained by the victim. [36] In assignment cases, the designated law governs the question whether a claim is assignable [37] and the relationship between assignor and debtor.

[36] It goes without saying that the law governing the injured party's succession applies to the determination of the heirs, this being a preliminary to the main action.

[37] Article 12(2) of the Rome Convention.

g) The law that is designated will also determine the "persons entitled to compensation for damage sustained personally": this concept particularly refers to the question whether a person other than the "direct victim" can obtain compensation for damage sustained on a "knock-on" basis, following damage sustained by the victim. Such damage might be non-material, as in the pain and suffering caused by a bereavement, or financial, as in the loss sustained by the children or spouse of a deceased person.

h) "liability for the acts of another person": this concept concerns provisions in the law designated for vicarious liability. It covers the liability of parents for their children and of principals

for their agents.

i) "the manners in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement of a period of prescription or limitation and the interruption and suspension of the period"; the law designated governs the loss of a right following failure to exercise it, on the conditions set by the law.

Article 12 - Overriding mandatory rules

This Article closely follows the corresponding Article of the Rome Convention.

In Arblade, the Court of Justice gave an initial definition of overriding mandatory rules (also called public-order legislation) as "national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State". [38] What is specific about them is that the courts do not even apply their own conflict rules to determine the law applicable to a given situation and to evaluate in practical terms whether its content would be repugnant to the values of the forum, but they apply their own rules as a matter of course. [39]

[38] Cases C-369/96 and C-376/96 [1999] ECR I-8453 (judgment given on 23.11.1999).

[39] This is the international public policy exception, to which Article 22 is devoted.

Paragraph 2 allows the courts to apply the overriding mandatory rules of the forum. As the Court also held in Arblade, in intra-Community relations the application of the mandatory rules of the forum must be compatible with the fundamental freedoms of the internal market. [40]

[40] Paragraph 31 of the judgment states that "The fact that national rules are categorised as public-order legislation does not mean that they are exempt from compliance with the provisions of the Treaty" and that "The considerations underlying such national legislation can be taken into account by Community law only in terms of the exceptions to Community freedoms expressly provided for by the Treaty and, where appropriate, on the ground that they constitute overriding reasons relating to the public interest".

Paragraph 1 refers to foreign mandatory rules, where the court enjoys considerable discretion if there is a close connection with the situation, depending on its nature, its purposes and the consequences of applying it. Under the Rome Convention, Germany, Luxembourg and the United Kingdom have exercised their right to refrain from applying Article 7(1), relating to foreign mandatory rules. But the Commission like most of the contributors during the written consultations sees no reason to exclude this possibility since references to foreign mandatory rules have been perfectly exceptional hitherto.

Article 13 - Rules of safety and conduct

Where the law that is designated is not the law of the country in which the event giving rise to the damage occurred, Article 13 of the proposed Regulation requires the court to take account of the rules of safety and conduct which were in force at the place and time of the relevant event.

This article is based on the corresponding articles of the Hague Conventions on traffic accidents (Article 7) and product liability (Article 9). There are equivalent principles in the conflict systems of virtually all the Member States, either in express statutory provisions or in the decided cases.

The rule in Article 13 is based on the fact that the perpetrator must abide by the rules of safety and conduct in force in the country in which he operates, irrespective of the law applicable to the civil consequences of his action, and that these rules must also be taken into consideration when ascertaining liability. Taking account of foreign law is not the same thing as applying it:

the court will apply only the law that is applicable under the conflict rule, but it must take account of another law as a point of fact, for example when assessing the seriousness of the fault or the author' s good or bad faith for the purposes of the measure of damages.

Article 14 - Direct action

Article 14 determines the law applicable to the question whether the person sustaining damage may bring a direct action against the insurer of the person liable. The proposed rule strikes a reasonable balance between the interests at stake as it protects the person sustaining damage by giving him the option, while limiting the choice to the two laws which the insurer can legitimately expect to be applied the law applicable to the non-contractual obligation and the law applicable to the insurance contract.

At all events, the scope of the insurer's obligations is determined by the law governing the insurance contract.

As in Article 7, relating to the environment, the form of words used here will avert the risk of doubts where the victim does not exercise his right of option.

Article 15 - Subrogation and multiple liability

This Article is identical to Article 13 of the Rome Convention.

It applies in particular to the relationship between insurer and perpetrator to determine whether the form has a right of action by way of subrogation against the latter.

Where there are several perpetrators, it also applies where one of the joint and several debtors makes a payment.

Article 16 - Formal validity

Article 16 is inspired by Article 9 of the Rome Convention.

Although the concept of formal validity plays a minor role in the creation of non-contractual obligations, an obligation can well arise as a result of a unilateral act by one or other of the parties.

To promote the validity of such acts, Article 16 provides for an alternative rule along the lines of Article 9 of the Rome Convention, whereby the act is formally valid if it satisfies the formal requirements of the law which governs the non-contractual obligation in question or the law of the country in which this act is done.

Article 17 - Burden of proof

Article 17 is identical to Article 14 of the Rome Convention.

It provides that the law governing non-contractual obligations applies to the extent that it contains, in matters of non-contractual obligations, rules which raise presumptions of law or determine the burden of proof. This is a useful provision as questions relating to evidence are basically matters for the procedural law of the lex fori.

Paragraph 2 concerns the admissibility of modes of proving acts intended to have legal effect referred to in Article 16. It does not cover evidence of legal facts, which is also covered by the lex fori. The very liberal system of Article 14(2) of the Rome Convention is used here, providing for the alternative application of the lex fori and the law governing the form of the relevant act.

Article 18 - Assimilation to the territory of a State

Article 18 applies to situations in which one or more of the connecting factors in the conflict rules of the proposed Regulation relate to an area that is not subject to territorial sovereignty.

The text proposed by the Commission in the written consultation procedure in May 2002 contained a special conflict rule. One of the difficulties with this rule lay in the diversity of the situations concerned. It is by no means certain that a single rule will adequately cover the position of a collision between ships on the high seas, the explosion of an electronic device or the breakdown of negotiations in an aircraft in flight, pollution caused by a ship at sea etc.

The contributions received by the Commission have made it aware that the proposed rule made it all too easy to designate the law of a flag of convenience, which would be contrary to the more general objectives of Community policy. Many contributors had doubts about the value added by a rule which, where two or more laws are potentially involved, as in collision cases, merely refers to the principle of the closest connection.

Rather than introducing a special rule here, Article 18 offers a definition of the "territory of a State". This solution is founded on the need to strike a reasonable balance between divergent interests by means of the different conflict rules in the proposed Regulation where one or more connecting factors are located in an area subject to no sovereignty. The general rule in Article 3 and the special conflict rules accordingly apply.

The definitions in the proposed text are inspired by section 1 of the Dutch Act on conflicts of laws in relation to obligations arising out of unlawful acts (11 April 2001).

Article 19 - Assimilation to habitual residence

This article deals with the concept of habitual residence for companies and firms and other bodies corporate or unincorporate and for natural persons exercising a liberal profession or business activity in a self-employed capacity.

In general terms the proposed Regulation is distinguished from the "Brussels I" Regulation by the fact that, in accordance with the generally accepted solution in conflict matters, the criterion used here is not domicile but the more flexible criterion of habitual residence.

With regard to companies and firms and other bodies corporate or unincorporate, simply taking over the alternative rule in Article 60 of the "Brussels I" Regulation, whereby the domicile of a body corporate is either its registered office, or its central administration, or its principal establishment, would not make the applicable law adequately foreseeable.

Article 19(1) accordingly provides that the principal establishment of a company or firms or other body corporate or unincorporate is considered to be its habitual residence. However, the second sentence of paragraph 1 states that where the event giving rise to the damage occurs or the damage is sustained in the course of operation of a subsidiary, a branch or any other establishment, the establishment takes the place of the habitual residence. Like Article 5(5) of the "Brussels I" Regulation, the purpose of this is to respect the legitimate expectations of the parties.

Paragraph 2 determines the habitual residence of a natural person exercising a liberal profession or business activity in a self-employed capacity, for whom the professional establishment operates as habitual residence.

Article 20 - Exclusion of renvoi

This Article is identical to Article 15 of the Rome Convention.

To avoid jeopardising the objective of certainty in the law that is the main inspiration for the conflict rules in the proposed Regulation, Article 20 excludes renvoi. Consequently, designating a law under uniform conflict rules means designating the substantive rules of that law but not its rules of private international law, even where the law thus designated is that of a third country.

Article 21 - States with more than one legal system

This Article is identical to Article 19 of the Rome Convention.

The uniform rules also apply where several legal systems coexist in a single State. Where a State has several territorial units each with its own rules of law, each of those units is considered a country for the purposes of private international law. Examples of those States are the United Kingdom, Canada, the United States and Australia. For example, if damage is sustained in Scotland, the law designated by Article 3(1) is Scots law.

Article 22 - Public policy of the forum

This Article corresponds to Article 16 of the Rome Convention relating to the mechanism of the public policy exception. Like the Rome Convention, this concerns a State's public policy in the private international law sense, a more restrictive concept than public policy in the domestic law sense. The words "of the forum" have been added to distinguish the rules of public policy in the private international law sense, which proceed solely from the national law of a State, from those flowing from Community law, to which the specific rule of Article 23 applies.

The mechanism of the public policy exception allows the court to disapply rules of the foreign law designated by the conflict rule and to replace it by the lex fori where the application of the foreign law in a given case would be contrary to the public policy of the forum. This is distinguished from overriding mandatory rules: in the latter case, the courts apply the law of the forum automatically, without first looking at the content of the foreign law. The word "manifestly" incompatible with the public policy of the forum means that the use of the public policy exception must be exceptional.

In a Brussels Convention case the Court of Justice held that the concept of public policy remains a national concept and that "...it is not for the Court to define the content of the public policy of a Contracting State...", but it must none the less "review the limits within which the courts of a Contracting State may have recourse to that concept for the purpose of refusing recognition of a judgment emanating from another Contracting State". [41]

[41] Case C-38/98 Renault v Maxicar [2000] ECR I-2973 (judgment given on 11.5.2000).

Article 23 - Relationship with other provisions of Community law

Paragraph 1 refers to the traditional mechanisms of private international law that can be found in the treaties and the secondary legislation and entail special conflict rules in specific matters, mandatory rules of Community and the Community public policy exception.

Paragraph 2 refers more particularly to the specific principles of the internal market relating to the free movement of goods and services, commonly known as the "mutual recognition" and "home-country control" principles.

Article 24 - Non-compensatory damages

Article 24 is the practical application of the Community public policy exception provided for by the third indent of Article 23(1) in the form of a special rule.

In the written consultation, many contributors expressed concern at the idea of applying the law of a third country providing for damages not calculated to compensate for damage sustained. It was suggested that it would be preferable to adopt a specific rule rather than to apply the public policy exception of the forum, as is the case of section 40-III of the German EGBGB.

The effect of Article 24 is accordingly that application of a provision of the law designated by this Regulation which has the effect of causing non-compensatory damages, such as exemplary or punitive damages, to be awarded will be contrary to Community public policy.

The words used are descriptive rather than technical legal terms, too loosely tied to a specific

legal system. Compensatory damages serve to compensate for damage sustained by the victim or liable to be sustained by him at a future date. Non-compensatory damages serve a punitive or deterrent function.

Article 25 - Relationship with existing international conventions

Article 25 allows Member States to go on applying choice of law rules laid down in international conventions to which they are party when this Regulation is adopted.

These conventions include the Hague Conventions on traffic accidents (4 May 1971) and product liability (2 October 1973).

Article 26 - List of conventions referred to in Article 25

To make it easier to identify the conventions to which Article 25 applies, Article 26 provides that the Member States are to notify the Commission of the list, which the Commission is then to publish in the Official Journal of the European Union. The Member States are also to notify the Commission of denunciations of these conventions so that it can update the list.

2003/0168 (COD)

Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND THE COUNCIL ON THE LAW APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS ("ROME II")

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in Article 61(c) thereof,

Having regard to the proposal from the Commission, [42]

[42] OJ C [...], [...] , p. [...].

Having regard to the opinion of the European Economic and Social Committee, [43]

[43] OJ C [...], [...] , p. [...].

Acting in accordance with the procedure laid down in Article 251 of the Treaty, [44]

[44] Opinion of the European Parliament of [...] (OJ C [...], [...] , p. [...].

Whereas:

(1) The Union has set itself the objective of establishing an area of freedom, security and justice. To that end the Community must adopt measures relating to judicial cooperation in civil matters with a cross-border impact to the extent necessary for the proper functioning of the internal market, including measures promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction.

(2) For the purposes of effectively implementing the relevant provisions of the Amsterdam Treaty, the Council (Justice and Home Affairs) on 3 December 1998 adopted a plan of action specifying that the preparation of a legal instrument on the law applicable to non-contractual obligations is among the measures to be taken within two years following the entry into force of the Amsterdam Treaty. [45]

[45] Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice: OJ C 19, 23.1.1999.

(3) The Tampere European Council on 15 and 16 October 1999 [46] approved the principle of mutual recognition of judgments as a priority matter in the establishment of a European law-enforcement area. The Mutual Recognition Programme [47] states that measures relating to harmonisation

of conflict-of-law rules are measures that "actually do help facilitate the implementation of the principle".

[46] Presidency conclusions of 16 October 1999, points 28 to 39.

[47] OJ C 12, 15.1.2001, p. 1.

(4) The proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law and the free movement of judgments, for the rules of conflict of laws in the Member States to designate the same national law irrespective of the country of the court in which an action is brought.

(5) The scope of the Regulation must be determined in such a way as to be consistent with Regulation (EC) No 44/2001 [48] and the Rome Convention of 1980. [49]

[48] OJ L 12, 16.1.2001, p. 1.

[49] The consolidated text of the Convention as amended by the various Conventions of Accession, and the declarations and protocols annexed to it, is published in OJ C 27, 26.1.1998, p. 34.

(6) Only uniform rules applied irrespective of the law they designate can avert the risk of distortions of competition between Community litigants.

(7) The principle of the lex loci delicti commissi is the basic solution for non-contractual obligations in virtually all the Member States, but the practical application of the principle where the component factors of the case are spread over several countries is handled differently. This situation engenders uncertainty in the law.

(8) The uniform rule must serve to improve the foreseeability of court decisions and ensure a reasonable balance between the interests of the person claimed to be liable and the person who has sustained damage. A connection with the country where the direct damage occurred (lex loci delicti commissi) strikes a fair balance between the interests of the person causing the damage and the person sustaining the damage, and also reflects the modern approach to civil liability and the development of systems of strict liability.

(9) Specific rules should be laid down for special torts/delicts where the general rule does not allow a reasonable balance to be struck between the interests at stake.

(10) Regarding product liability, the conflict rule must meet the objectives of fairly spreading the risks inherent in a modern high-technology society, protecting consumers' health, stimulating innovation, securing undistorted competition and facilitating trade. Connection to the law of the place where the person sustaining the damage has his habitual residence, together with a foreseeability clause, is a balanced solution in regard to these objectives.

(11) In matters of unfair competition, the conflict rule must protect competitors, consumers and the general public and ensure that the market economy functions properly. The connection to the law of the relevant market generally satisfies these objectives, though in specific circumstances other rules might be appropriate.

(12) In view of the Charter of Fundamental Rights of the European Union and the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, the conflict must strike a reasonable balance as regards violations of privacy and rights in the personality. Respect for the fundamental principles that apply in the Member States as regards freedom of the press must be secured by a specific safeguard clause.

(13) Regarding violations of the environment, Article 174 of the Treaty, which provides that there must a high level of protection based on the precautionary principle and the principle that preventive

action must be taken, the principle of priority for corrective action at source and the principle that the polluter pays, fully justifies the use of the principle of discriminating in favour of the person sustaining the damage.

(14) Regarding violations of intellectual property rights, the universally acknowledged principle of the lex loci protectionis should be preserved. For the purposes of the present Regulatio, the term intellectual property rights means copyright, related rights, sui generis right for the protection of databases and industrial property rights.

(15) Similar rules should be provided for where damage is caused by an act other than a tort or delict, such as unjust enrichment and agency without authority.

(16) To preserve their freedom of will, the parties should be allowed to determine the law applicable to a non-contractual obligation. Protection should be given to weaker parties by imposing certain conditions on the choice.

(17) Considerations of the public interest warrant giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory rules.

(18) The concern to strike a reasonable balance between the parties means that account must be taken of the rules of safety and conduct in operation in the country in which the harmful act was committed, even where the non-contractual obligations is governed by another law.

(19) The concern for consistency in Community law requires that this Regulation be without prejudice to provisions relating to or having an effect on the applicable law, contained in the treaties or instruments of secondary legislation other than this Regulation, such as the conflict rules in specific matters, overriding mandatory rules of Community origin, the Community public policy exception and the specific principles of the internal market. Furthermore, this regulation is not intended to create, nor shall its application lead to obstacles to the proper functioning of the internal market, in particular free movement of goods and services.

(20) Respect for international commitments entered into by the Member States means that this Regulation should not affect conventions relating to specific matters to which the Member States are parties. To make the rules easier to read, the Commission will publish the list of the relevant conventions in the Official Journal of the European Union on the basis of information supplied by the Member States.

(21) Since the objective of the proposed action, namely better foreseeability of court judgments requiring genuinely uniform rules determined by a mandatory and directly applicable Community legal instrument, cannot be adequately attained by the Member States, who cannot lay down uniform Community rules, and can therefore, by reason of its effects throughout the Community, be better achieved at Community level, the Community can take measures, in accordance with the subsidiarity principle set out in Article 5 of the Treaty. In accordance with the proportionality principle set out in that Article, a Regulation, which increases certainty in the law without requiring harmonisation of the substantive rules of domestic law, does not go beyond what is necessary to attain that objective.

(22) [In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and the Treaty establishing the European Community, these Member States have stated their intention of participating in the adoption and application of this Regulation. / In accordance with Articles 1 and 2 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and the Treaty establishing the European Community, these Member States are not participating in

the adoption of this Regulation, which will accordingly not be binding on those Member States.]

(23) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and the Treaty establishing the European Community, that Member State is not participating in the adoption of this Regulation, which will accordingly not be binding on that Member State,

HAVE ADOPTED THIS REGULATION:

Chapter I - Scope

Article 1 - Material scope

1. This Regulation shall apply, in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters.

It shall not apply to revenue, customs or administrative matters.

2. The following are excluded from the scope of this Regulation:

a) non-contractual obligations arising out of family relationships and relationships deemed to be equivalent, including maintenance obligations;

b) non-contractual obligations arising out of matrimonial property regimes and successions;

c) obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;

d) the personal legal liability of officers and members as such for the debts of a company or firm or other body corporate or incorporate, and the personal legal liability of persons responsible for carrying out the statutory audits of accounting documents;

e) non-contractual obligations among the settlers, trustees and beneficiaries of a trust;

f) non-contractual obligations arising out of nuclear damage.

3. For the purposes of this Regulation, "Member State" means any Member State other than [the United Kingdom, Ireland or] Denmark.

Article 2 - Universal application

Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.

Chapter II - Uniform rules

Section 1 Rules applicable to non-contractual obligations arising out of a tort or delict

Article 3 - General rule

1. The law applicable to a non-contractual obligation shall be the law of the country in which the damage arises or is likely to arise, irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event arise.

2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country when the damage occurs, the non-contractual obligation shall be governed by the law of that country.

3. Notwithstanding paragraphs 1 and 2, where it is clear from all the circumstances of the case that the non-contractual obligation is manifestly more closely connected with another country, the

law of that other country shall apply. A manifestly closer connection with another country may be based in particular on a pre-existing relationship between the parties, such as a contract that is closely connected with the non-contractual obligation in question.

Article 4 - Product liability

Without prejudice to Article 3(2) and (3), the law applicable to a non-contractual obligation arising out of damage or a risk of damage caused by a defective product shall be that of the country in which the person sustaining the damage is habitually resident, unless the person claimed to be liable can show that the product was marketed in that country without his consent, in which case the applicable law shall be that of the country in which the person claimed to be liable is habitually resident.

Article 5 - Unfair competition

1. The law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where competitive relations or the collective interests of consumers are or are likely to be directly and substantially affected.

2. Where an act of unfair competition affects exclusively the interests of a specific competitor, Article 3(2) and (3) shall apply.

Article 6 - Violations of privacy and rights relating to the personality

1. The law applicable to a non-contractual obligation arising out of a violation of privacy or rights relating to the personality shall be the law of the forum where the application of the law designated by Article 3 would be contrary to the fundamental principles of the forum as regards freedom of expression and information.

2. The law applicable to the right of reply or equivalent measures shall be the law of the country in which the broadcaster or publisher has its habitual residence.

Article 7 - Violation of the environment

The law applicable to a non-contractual obligation arising out of a violation of the environment shall be the law determined by the application of Article 3(1), unless the person sustaining damage prefers to base his claim on the law of the country in which the event giving rise to the damage occurred.

Article 8 - Infringement of intellectual property rights

1. The law applicable to a non-contractual obligation arising from an infringement of a intellectual property right shall be the law of the country for which protection is sought.

2. In the case of a non-contractual obligation arising from an infringement of a unitary Community industrial property right, the relevant Community instrument shall apply. For any question that is not governed by that instrument, the applicable law shall be the law of the Member State in which the act of infringement is committed.

Section 2 Rules applicable to non-contractual obligations arising out of an act other than a tort or delict

Article 9 - Determination of the applicable law

1. If a non-contractual obligation arising out of an act other than a tort or delict concerns a relationship previously existing between the parties, such as a contract closely connected with the non-contractual obligation, it shall be governed by the law that governs that relationship.

2. Without prejudice to paragraph 1, where the parties have their habitual residence in the same country when the event giving rise to the damage occurs, the law applicable to the non-contractual

obligation shall be the law of that country.

3. Without prejudice to paragraphs 1 and 2, a non-contractual obligation arising out of unjust enrichment shall be governed by the law of the country in which the enrichment takes place.

4. Without prejudice to paragraphs 1 and 2, the law applicable to a non-contractual obligation arising out of actions performed without due authority in connection with the affairs of another person shall be the law of the country in which the beneficiary has his habitual residence at the time of the unauthorised action. However, where a non-contractual obligation arising out of actions performed without due authority in connection with the affairs of another person relates to the physical protection of a person or of specific tangible property, the law applicable shall be the law of the country in which the beneficiary or property was situated at the time of the unauthorised action.

5. Notwithstanding paragraphs 1, 2, 3 and 4, where it is clear from all the circumstances of the case that the non-contractual obligation is manifestly more closely connected with another country, the law of that other country shall apply.

6. Nowithstanding the present Article, all non-contractual obligations in the field of intellectual property shall be governed by Article 8.

Section 3 Common rules applicable to non-contractual obligations arising out of a tort or delict and out of an act other than a tort or delict

Article 10 - Freedom of choice

1. The parties may agree, by an agreement entered into after their dispute arose, to submit non-contractual obligations other than the obligations to which Article 8 applies to the law of their choice. The choice must be expressed or demonstrated with reasonable certainty by the circumstances of the case. It may not affect the rights of third parties.

2. If all the other elements of the situation at the time when the loss is sustained are located in a country other than the country whose law has been chosen, the choice of the parties shall be without prejudice to the application of rules of the law of that country which cannot be derogated from by contract.

3. The parties' choice of the applicable law shall not debar the application of provisions of Community law where the other elements of the situation were located in one of the Member States of the European Community at the time when the loss was sustained.

Article 11 - Scope of the law applicable to non-contractual obligations

The law applicable to non-contractual obligations under Articles 3 to 10 of this Regulation shall govern in particular:

a) the conditions and extent of liability, including the determination of persons who are liable for acts performed by them;

b) the grounds for exemption from liability, any limitation of liability and any division of liability;

c) the existence and kinds of injury or damage for which compensation may be due;

d) within the limits of its powers, the measures which a court has power to take under its procedural law to prevent or terminate injury or damage or to ensure the provision of compensation;

e) the assessment of the damage in so far as prescribed by law;

f) the question whether a right to compensation may be assigned or inherited;

g) persons entitled to compensation for damage sustained personally;

h) liability for the acts of another person;

i) the manners in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement of a period of prescription or limitation and the interruption and suspension of the period.

Article 12 - Overriding mandatory rules

1. Where the law of a specific third country is applicable by virtue of this Regulation, effect may be given to the mandatory rules of another country with which the situation is closely connected, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the non-contractual obligation. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

2. Nothing in this Regulation shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation.

Article 13 - Rules of safety and conduct

Whatever may be the applicable law, in determining liability account shall be taken of the rules of safety and conduct which were in force at the place and time of the event giving rise to the damage.

Article 14 - Direct action against the insurer of the person liable

The right of persons who have suffered damage to take direct action against the insurer of the person claimed to be liable shall be governed by the law applicable to the non-contractual obligation unless the person who has suffered damage prefers to base his claims on the law applicable to the insurance contract.

Article 15 - Subrogation and multiple liability

1. Where a person ("the creditor") has a non-contractual claim upon another ("the debtor"), and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, the law which governs the third person's duty to satisfy the creditor shall determine whether the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship in whole or in part.

2. The same rule shall apply where several persons are subject to the same claim and one of them has satisfied the creditor.

Article 16 - Formal validity

A unilateral act intended to have legal effect and relating to a non-contractual obligation is formally valid if it satisfies the formal requirements of the law which governs the non-contractual obligation in question or the law of the country in which this act is done.

Article 17 - Burden of proof

1. The law governing a non-contractual obligation under this Regulation applies to the extent that, in matters of non-contractual obligations, it contains rules which raise presumptions of law or determine the burden of proof.

2. Acts intended to have legal effect may be proved by any mode of proof recognised by the law of the forum or by any of the laws referred to in Article 16 under which that act is formally valid,

provided that such mode of proof can be administered by the forum.

Chapter III - Other provisions

Article 18 - Assimilation to the territory of a State

For the purposes of this Regulation, the following shall be treated as being the territory of a State:

a) installations and other facilities for the exploration and exploitation of natural resources in, on or below the part of the seabed situated outside the State' s territorial waters if the State, under international law, enjoys sovereign rights to explore and exploit natural resources there;

b) a ship on the high seas which is registered in the State or bears lettres de mer or a comparable document issued by it or on its behalf, or which, not being registered or bearing lettres de mer or a comparable document, is owned by a national of the State;

c) an aircraft in the airspace, which is registered in or on behalf of the State or entered in its register of nationality, or which, not being registered or entered in the register of nationality, is owned by a national of the State.

Article 19 - Assimilation to habitual residence

1. For companies or firms and other bodies or incorporate or unincorporate, the principal establishment shall be considered to be the habitual residence. However, where the event giving rise to the damage occurs or the damage arises in the course of operation of a subsidiary, a branch or any other establishment, the establishment shall take the place of the habitual residence.

2. Where the event giving rise to the damage occurs or the damage arises in the course of the business activity of a natural person, that natural person's establishment shall take the place of the habitual residence.

3. For the purpose of Article 6 (2), the place where the broadcaster is established within the meaning of the directive 89/552/EEC, as amended by the directive 97/36/EC, shall take the place of the habitual residence.

Article 20 - Exclusion of renvoi

The application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law.

Article 21 - States with more than one legal system

1. Where a State comprises several territorial units, each of which has its own rules of law in respect of non-contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation.

2. A State within which different territorial units have their own rules of law in respect of non-contractual obligations shall not be bound to apply this Regulation to conflicts solely between the laws of such units.

Article 22 - Public policy of the forum

The application of a rule of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy ("ordre public") of the forum.

Article 23 - Relationship with other provisions of Community law

1. This Regulation shall not prejudice the application of provisions contained in the Treaties establishing the European Communities or in acts of the institutions of the European Communities which:

- in relation to particular matters, lay down choice-of-law rules relating to non-contractual obligations; or

- lay down rules which apply irrespective of the national law governing the non-contractual obligation in question by virtue of this Regulation; or

- prevent application of a provision or provisions of the law of the forum or of the law designated by this Regulation.

2. This regulation shall not prejudice the application of Community instruments which, in relation to particular matters and in areas coordinated by such instruments, subject the supply of services or goods to the laws of the Member State where the service-provider is established and, in the area coordinated, allow restrictions on freedom to provide services or goods originating in another Member State only in limited circumstances.

Article 24 - Non-compensatory damages

The application of a provision of the law designated by this Regulation which has the effect of causing non-compensatory damages, such as exemplary or punitive damages, to be awarded shall be contrary to Community public policy.

Article 25 - Relationship with existing international conventions

This Regulation shall not prejudice the application of international conventions to which the Member States are parties when this Regulation is adopted and which, in relation to particular matters, lay down conflict-of-law rules relating to non-contractual obligations.

Chapter IV - Final provisions

Article 26 - List of conventions referred to in Article 25

1. The Member States shall notify the Commission, no later than 30 June 2004, of the list of conventions referred to in Article 25. After that date, the Member States shall notify the Commission of all denunciations of such conventions.

2. The Commission shall publish the list of conventions referred to in paragraph 1 in the Official Journal of the European Union within six months of receiving the full list.

Article 27 - Entry into force and application in time

This Regulation shall enter into force on 1 January 2005.

It shall apply to non-contractual obligations arising out of acts occurring after its entry into force.

This Regulation shall be binding in its entirety and directly applicable in all Member States in accordance with the Treaty establishing the European Community.

Done at Brussels, [...].

For the European Parliament For the Council

The President The President

DOCNUM 52003PC0427

AUTHOR	European Commission
FORM	Proposal for a regulation
TREATY	European Community
TYPDOC	5 ; preparatory documents ; 2003 ; PC
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MISCINF	COD 2003/0168
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I

(Information)

COUNCIL

CONVENTION

ON THE ACCESSION OF THE CZECH REPUBLIC, THE REPUBLIC OF ESTONIA, THE REPUBLIC OF CYPRUS, THE REPUBLIC OF LATVIA, THE REPUBLIC OF LITHUANIA, THE REPUBLIC OF HUNGARY, THE REPUBLIC OF MALTA, THE REPUBLIC OF POLAND, THE REPUBLIC OF SLOVENIA AND THE SLOVAK REPUBLIC TO THE CONVENTION ON THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS OPENED FOR SIGNATURE IN ROME ON 19 JUNE 1980, AND TO THE FIRST AND SECOND PROTOCOLS ON ITS INTERPRETATION BY THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

(2005/C 169/01)

THE HIGH CONTRACTING PARTIES TO THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY,

BEARING IN MIND the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic, and the adjustments to the Treaties on which the European Union is founded, and in particular Article 5(2) thereof,

RECALLING that by becoming Members of the European Union, the new Member States undertook to accede to the Convention on the Law applicable to Contractual Obligations, opened for signature in Rome on 19 June 1980, and to the First and Second Protocols on its interpretation by the Court of Justice as modified by the Convention signed in Luxembourg on 10 April 1984, on the accession of the Hellenic Republic, the Convention signed in Funchal on 18 May 1992 on the accession of the Kingdom of Spain and the Portuguese Republic, and the Convention signed in Brussels on 29 November 1996 on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden,

HAVE AGREED AS FOLLOWS:

TITLE I

GENERAL PROVISIONS

Article 1

The Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic hereby accede to:

(a) the Convention on the Law applicable to Contractual Obligations, opened for signature in Rome on 19 June 1980, hereinafter referred to as 'the Convention of 1980', as it stands following incorporation of the adjustments and amendments made thereto by:

— the Convention signed in Luxembourg on 10 April 1984, hereinafter referred to as 'the Convention of 1984', on the accession of the Hellenic Republic to the Convention on the Law applicable to Contractual Obligations,

— the Convention signed in Funchal on 18 May 1992, hereinafter referred to as 'the Convention of 1992', on the accession of the Kingdom of Spain and the Portuguese Republic to the Convention on the Law applicable to Contractual Obligations,

— the Convention signed in Brussels on 29 November 1996, hereinafter referred to as 'the Convention of 1996', on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the Convention on the Law applicable to Contractual Obligations;

(b) the First Protocol, signed on 19 December 1988, hereinafter referred to as 'the First Protocol of 1988' on the interpretation by the Court of Justice of the European Communities of the Convention on the Law applicable to Contractual Obligations, as it stands following incorporation of the adjustments and amendments made thereto by the Convention of 1992 and the Convention of 1996;

(c) the Second Protocol, signed on 19 December 1988, hereinafter referred to as 'the Second Protocol of 1988', conferring on the Court of Justice of the European Communities certain powers to interpret the Convention on the Law applicable to Contractual Obligations.

TITLE II

ADJUSTMENTS TO THE FIRST PROTOCOL OF 1988

Article 2

The following indents shall be inserted in Article 2(a):

(a) between the first and the second indents:

'– in the Czech Republic:

Nejvyšší soud České republiky

Nejvyšší správní soud'

(b) between the third and the fourth indents:

'– in Estonia:

Riigikohus'

(c) between the eighth and the ninth indents:

'– in Cyprus:

Ανώτατο Δικαστήριο

– in Latvia:

Augstākās Tiesas Senāts

– in Lithuania:

Lietuvos Aukščiausiasis Teismas

Lietuvos vyriausiasis administracinis teismas'

(d) between the ninth and the tenth indents:

'– in Hungary:

Legfelsõbb Bíróság

– in Malta:

Qorti ta' l-Appell'

(e) between the eleventh and the twelfth indents:

'– in Poland:

Sąd Najwyższy

Naczelny Sąd Administracyjny'

(f) between the twelfth and the thirteenth indents:

'– in Slovenia:

Ustavno sodišče Republike Slovenije

Vrhovno sodišče Republike Slovenije

– in Slovakia:

Najvyšší súd Slovenskej republiky'.

TITLE III

FINAL PROVISIONS

Article 3

1. The Secretary-General of the Council of the European Union shall transmit a certified copy of the Convention of 1980, the Convention of 1984, the First Protocol of 1988, the Second Protocol of 1988, the Convention of 1992 and the Convention of 1996 in the Danish, Dutch, English, Finnish, French, German, Greek, Irish, Italian, Portuguese, Spanish and Swedish languages to the Governments of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic.

2. The texts of the Convention of 1980, the Convention of 1984, the First Protocol of 1988, the Second Protocol of 1988, the Convention of 1992 and the Convention of 1996 in the Czech, Estonian, Hungarian, Latvian, Lithuanian, Maltese, Polish, Slovakian and Slovenian languages shall be authentic under the same conditions as the other texts of the Convention of 1980, the Convention of 1984, the First Protocol of 1988, the Second Protocol of 1988, the Convention of 1992 and the Convention of 1996.

Article 4

This Convention shall be ratified by the signatory States. The instruments of ratification shall be deposited with the Secretary-General of the Council of the European Union.

Article 5

1. This Convention shall enter into force between the States which have ratified it, on the first day of the third month following the deposit of the second instrument of ratification.

2. Thereafter, this Convention shall enter into force, for each signatory State which subsequently ratifies it, on the first day of the third month following the deposit of its instrument of ratification.

Article 6

The Secretary-General of the Council of the European Union shall notify the signatory States of:

(a) the deposit of each instrument of ratification;

(b) the dates of entry into force of this Convention for the Contracting States.

Article 7

This Convention, drawn up in a single original in the Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovene, Spanish and Swedish languages, all 21 texts being equally authentic, shall be deposited in the archives of the General Secretariat of the Council of the European Union. The Secretary-General shall transmit a certified copy to the Government of each signatory state.

Hecho en Luxemburgo, el catorce de abril de dos mil cinco.

V Lucemburku dne čtrnáctého dubna dva tisíce pět.

Udfærdiget i Luxembourg den fjortende april to tusind og fem.

Geschehen zu Luxemburg am vierzehnten April zweitausendfünf.

Kahe tuhande viienda aasta aprillikuu neljateistkümnendal päeval Luxembourgis.

Έγινε στο Λουξεμβούργο, στις δέκα τέσσερις Απριλίου δύο χιλιάδες πέντε.

Done at Luxembourg on the fourteenth day of April in the year two thousand and five.

Fait à Luxembourg, le quatorze avril deux mille cinq.

Arna déanamh i Lucsamburg, an ceathrú lá déag d'Aibreán sa bhliain dhá mhíle is a cúig.

Fatto a Lussemburgo, addì quattordici aprile duemilacinque.

Luksemburgā, divi tūkstoši piektā gada četrpadsmitajā aprīlī.

Priimta du tūkstančiai penktų metų balandžio keturioliktą dieną Liuksemburge.

Kelt Luxembourgban, a kettőezer-ötödik év április tizennegyedik napján.

Magħmul fil-Lussemburgu, fl-erbatax-il jum ta' April tas-sena elfejn u ħamsa.

Gedaan te Luxemburg, de veertiende april tweeduizend vijf.

Sporządzono w Luksemburgu dnia czternastego kwietnia roku dwa tysiące piątego.

Feito no Luxemburgo, em catorze de Abril de dois mil e cinco.

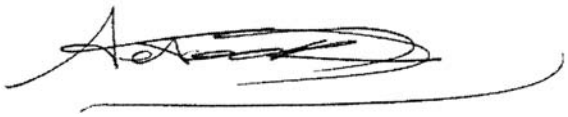
V Luxembourgu, štirinajstega aprila leta dva tisoč pet.

V Luxemburgu dňa štrnásteho apríla dvetisícpäť.

Tehty Luxemburgissa neljäntenätoista päivänä huhtikuuta vuonna kaksituhattaviisi.

Som skedde i Luxemburg den fjortonde april tjugohundrafem.

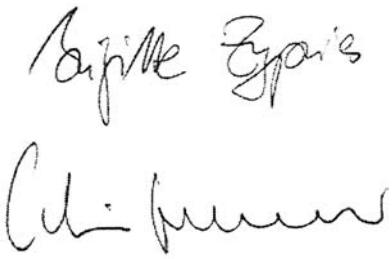
Pour le gouvernement du Royaume de Belgique
Voor de regering van het Koninkrijk België
Für die Regierung des Königreichs Belgien



Za vládu České republiky

For regeringen for Kongeriget Danmark

Für die Regierung der Bundesrepublik Deutschland



Eesti Vabariigi valitsuse nimel

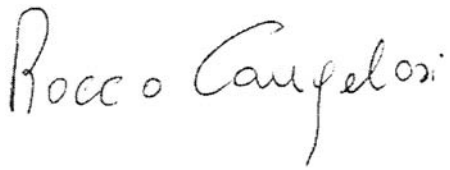
Για την κυβέρνηση της Ελληνικής Δημοκρατίας

Por el Gobierno del Reino de España

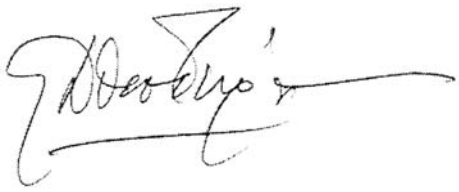
Pour le gouvernement de la République française

Thar ceann Rialtas na hÉireann
For the Government of Ireland

Per il governo della Repubblica italiana



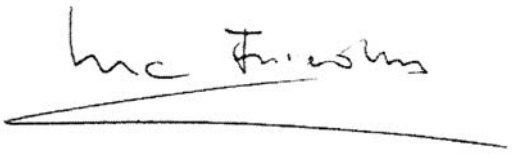
Για την κυβέρνηση της Κυπριακής Δημοκρατίας



Latvijas Republikas valdības vārdā

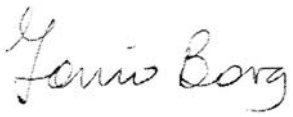
Lietuvos Respublikos Vyriausybės vardu

Pour le gouvernement du Grand-Duché de Luxembourg



A Magyar Köztársaság kormánya részéről

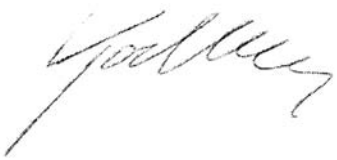
Għall-Gvern tar-Repubblika ta' Malta



Voor de regering van het Koninkrijk der Nederlanden

Für die Regierung der Republik Österreich

W imieniu Rządu Rzeczypospolitej Polskiej



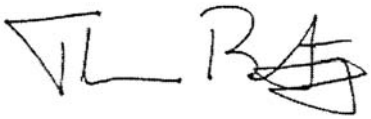
Pelo Governo da República Portuguesa

Za vlado Republike Slovenije

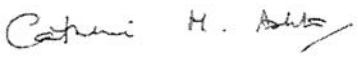
Za vládu Slovenskej republiky

Suomen hallituksen puolesta
På finska regeringens vägnar

På svenska regeringens vägnar



For the Government of the United Kingdom of Great Britain and Northern Ireland



Joint declaration by the High Contracting Parties concerning the deadlines set for ratification of the Accession Convention

'The High Contracting Parties, meeting in the Council at the time of the signature of the Convention on the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the 1980 Rome Convention on the law applicable to contractual obligations, declare that they will take the necessary steps to ratify this Convention within a reasonable time and, if possible, before December 2005.'

Declaration by the Member States concerning the timing of the submission of a proposal for a Regulation on the law applicable to contractual obligations

'The Member States request that the Commission submit, as soon as possible and at the latest by the end of 2005, a proposal for a Regulation on the law applicable to contractual obligations.'

Joint Declaration by the Member States on the exchange of information

The Governments of the Kingdom of Belgium, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland,

On signing the 2005 Convention on accession to the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980, and to the First and Second Protocols on interpretation by the Court of Justice of the European Communities, as amended,

Desiring to ensure that the provisions of the First Protocol are applied as effectively and as uniformly as possible,

Declare themselves ready to organise, in cooperation with the Court of Justice of the European Communities, an exchange of information on judgments which have become *res judicata* and have been handed down pursuant to the Convention on the law applicable to contractual obligations by the courts referred to in Article 2 of the said Protocol. The exchange of information will comprise:

— the forwarding to the Court of Justice by the competent national authorities of judgments handed down by the courts referred to in Article 2(a) of the First Protocol and significant judgments handed down by the courts referred to in Article 2(b) of that Protocol,

— the classification and the documentary exploitation of these judgments by the Court of Justice including, as far as necessary, the drawing up of abstracts and translations, and the publication of judgments of particular importance,

— the communication by the Court of Justice of the documentary material to the competent national authorities of the States parties to the Protocol and to the Commission and the Council of the European Communities.

2007/856/EC: Council Decision of 8 November 2007 concerning the accession of the Republic of Bulgaria and of Romania to the Convention on the Law applicable to Contractual Obligations, opened for signature in Rome on 19 June 1980

20071108

Council Decision

of 8 November 2007

concerning the accession of the Republic of Bulgaria and of Romania to the Convention on the Law applicable to Contractual Obligations, opened for signature in Rome on 19 June 1980

(2007/856/EC)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Act of Accession of 2005, and in particular Article 3(4) thereof,

Having regard to the Recommendation from the Commission,

Having regard to the Opinion of the European Parliament [1],

Whereas:

(1) The Convention on the Law applicable to Contractual Obligations (hereinafter referred to as the Convention of 1980) was opened for signature in Rome on 19 June 1980 and entered into force on 1 April 1991.

(2) The Convention of 1980 was supplemented by the First and Second Protocols of 19 December 1988 on its interpretation by the Court of Justice of the European Communities [2] (hereinafter referred to as First and Second Protocols of 1988).

(3) The Hellenic Republic acceded to the Convention of 1980 by the Convention of 10 April 1984 [3] (hereinafter referred to as the Convention of 1984), which entered into force on 1 April 1991.

(4) The Kingdom of Spain and the Portuguese Republic acceded to the Convention of 1980 by the Convention of 18 May 1992 [4] (hereinafter referred to as the Convention of 1992), which entered into force on 1 September 1993.

(5) The Republic of Austria, the Republic of Finland and the Kingdom of Sweden acceded to the Convention of 1980 by the Convention of 29 November 1996 [5] (hereinafter referred to as the Convention of 1996), which entered into force on 1 October 1998.

(6) Following the accession to the European Union of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic, a Convention was signed on 14 April 2005 on the accession of these new Member States to the Convention of 1988 and to the First and Second Protocols of 1988 [6] (hereinafter referred to as the Convention of 2005), which has not yet entered into force among all the Member States.

(7) Article 3(3) of the Act of Accession of 2005 provides that the Republic of Bulgaria and of Romania accede to the conventions and protocols listed in Annex I, as amended by Council Decision 2007/857/EC [7], which comprises, inter alia, the Convention of 1980 and the First and Second Protocols of 1988 together with the Conventions on accession of 1984, 1992, 1996 and 2005. They are to enter into force in relation to the Republic of Bulgaria and of Romania on the date determined by the Council.

(8) In accordance with Article 3(4) of the Act of Accession of 2005 the Council is to make all adjustments required by reason of the accession of the Republic of Bulgaria and of Romania to those conventions and protocols,

HAS DECIDED AS FOLLOWS:

Article 1

Article 2(a) of the First Protocol of 1988 on the interpretation by the Court of Justice of the European Communities of the Convention of 1980 is hereby amended as follows:

(a) between the second and third indents, the following indent shall be inserted:

- "- in Bulgaria:

et

,";

(b) between the 20th and 21st indents, the following indent shall be inserted:

- "- in Romania:

".

Article 2

1. The Convention of 1980 and the First and Second Protocols of 1988, together with the Conventions of 1984, 1992 and 1996, as amended by this Decision, shall enter into force between the Republic of Bulgaria, Romania and the other Member States on the 15 January 2008.

2. The Convention of 2005 shall enter into force between the Republic of Bulgaria, Romania and the Member States for which it entered into force before the 15 January 2008 on that date.

3. The Convention of 2005 shall enter into force between the Republic of Bulgaria, Romania and the Member States for which it has not yet entered into force on the date laid down in Article 5(2) of that Convention.

Article 3

The texts of the Convention of 1980 and the First and Second Protocols of 1988, together with the Conventions of 1984, 1992, 1996 and 2005, drawn up in the Bulgarian and Romanian languages and annexed to this Decision, shall be authentic under the same conditions as the other language versions of these Conventions and Protocols.

A single original of these texts in the Bulgarian and Romanian languages shall be deposited in the archives of the General Secretariat of the Council of the European Union with the other authentic language versions.

The Secretary-General shall transmit to the Governments of the Republic of Bulgaria and Romania a certified copy of the Conventions and Protocols referred to in the first subparagraph in the

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovak, Slovenian, Spanish and Swedish languages.

Article 4

This Decision shall take effect on the day following that of its publication in the Official Journal of the European Union.

Done at Brussels, 8 November 2007.

For the Council

The President

R. Pereira

[1] Opinion delivered on 11 October 2007 (not yet published in the Official Journal).

[2] OJ L 48, 20.2.1989, p. 1 and OJ L 48, 20.12.1989, p. 17.

[3] OJ L 146, 31.5.1984, p. 1.

[4] OJ L 333, 18.11.1992, p. 1.

[5] OJ C 15, 15.1.1997, p. 10.

[6] OJ C 169, 8.7.2005, p. 1.

[7] See page 3 of this Official Journal.

DOCNUM	32007D0856
AUTHOR	Council
FORM	Decision sui generis
TREATY	European Community
PUBREF	OJ L 347, 29.12.2007, p. 1-36 (BG, RO) OJ L 347, 29.12.2007, p. 1-2 (ES, CS, DA, DE, ET, EL, EN, FR, IT, LV, LT, HU, MT, NL, PL, PT, SK, SL, FI, SV)
PUB	2007/12/29
DOC	2007/11/08
INFORCE	2007/12/30=EV
ENDVAL	9999/99/99

LEGBASE	12005SA003
LEGCIT	41997A0115(02)
MODIFIES	41989A0128 Amendment Completion Article 2 from 30/12/2007 41989A0129 Relation 41998A0126(02) Relation 41998A0126(03) Relation 52007PC0217 Adoption
SUB	General provisions ; Accession
REGISTER	01200000;01300000
PREPWORK	RC;COMM;CO 2007/0217 FIN PCONS;; AV;PE;RENDU 11/10/2007
MISCINF	CNS 2007/0077
DATES	of document: 08/11/2007 of effect: 30/12/2007; Entry into force Date pub. + 1 See Art 4 end of validity: 99/99/9999

2007/857/EC: Council Decision of 8 November 2007 amending Annex I to the 2005 Act of Accession

20071108

Council Decision

of 8 November 2007

amending Annex I to the 2005 Act of Accession

(2007/857/EC)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the 2005 Act of Accession, and in particular Article 3(6) thereof,

Having regard to the proposal from the Commission,

Whereas:

(1) Article 3(3) of the 2005 Act of Accession provides that the Republic of Bulgaria and Romania accede to the conventions and protocols listed in Annex I.

(2) The Member States signed on 14 April 2005 a Convention on the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980, and to the First and Second Protocols on its interpretation by the Court of Justice of the European Communities [1].

(3) Provision should be made for the accession of the Republic of Bulgaria and Romania to the Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980, and to the First and Second Protocols on its interpretation by the Court of Justice of the European Communities, as amended by the Convention of 14 April 2005. To this end, that Convention should be added to Annex I to the 2005 Act of Accession,

HAS DECIDED AS FOLLOWS:

Article 1

The following indent shall be added to point 1 of Annex I to the 2005 Act of Accession:

- "- Convention of 14 April 2005 on the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980, and to the First and Second Protocols on its interpretation by the Court of Justice of the European Communities (OJ C 169, 8.7.2005, p. 1)."

Article 2

This Decision shall take effect on the day following its publication in the Official Journal of the European Union.

Done at Brussels, 8 November 2007.

For the Council

The President

R. Pereira

[1] OJ C 169, 8.7.2005, p. 1.

DOCNUM	32007D0857
AUTHOR	Council
FORM	Decision sui generis
TREATY	European Community
PUBREF	OJ L 347, 29.12.2007, p. 37-37 (BG, RO) OJ L 347, 29.12.2007, p. 3-3 (ES, CS, DA, DE, ET, EL, EN, FR, IT, LV, LT, HU, MT, NL, PL, PT, SK, SL, FI, SV) OJ L 347, 29.12.2007, p. 1-1 (GA)
PUB	2007/12/29
DOC	2007/11/08
INFORCE	2007/12/30=EV
ENDVAL	9999/99/99
LEGBASE	12005SA003
LEGCIT	42005A0708(01)
MODIFIES	12005SAN01 Amendment Completion PT1 from 30/12/2007 52007PC0839(02) Adoption
SUB	Principles, objectives and tasks of the Treaties ; Taxation ; Approximation of laws ; Accession
REGISTER	01100000;09202000;09203000
PREPWORK	PR;COMM;CO 2007/0839 FIN
DATES	of document: 08/11/2007 of effect: 30/12/2007; Entry into force Date pub. + 1 See Art 2

end of validity: 99/99/9999

ACT

concerning the conditions of accession of the Republic of Bulgaria and Romania and the adjustments to the treaties on which the European Union is founded

In accordance with Article 2 of the Treaty of Accession, this Act shall be applicable in the event that the Treaty establishing a Constitution for Europe is not in force on 1 January 2007 until the date of entry into force of the Treaty establishing a Constitution for Europe.

PART ONE

PRINCIPLES

Article 1

For the purposes of this Act:

— the expression 'original Treaties' means:

(a) the Treaty establishing the European Community ('EC Treaty') and the Treaty establishing the European Atomic Energy Community ('EAEC Treaty'), as supplemented or amended by treaties or other acts which entered into force before accession,

(b) the Treaty on European Union ('EU Treaty'), as supplemented or amended by treaties or other acts which entered into force before accession;

— the expression 'present Member States' means the Kingdom of Belgium, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland;

— the expression 'the Union' means the European Union as established by the EU Treaty;

— the expression 'the Community' means one or both of the Communities referred to in the first indent, as the case may be;

— the expression 'new Member States' means the Republic of Bulgaria and Romania;

— the expression 'the institutions' means the institutions established by the original Treaties.

Article 2

From the date of accession, the provisions of the original Treaties and the acts adopted by the institutions and the European Central Bank before accession shall be binding on Bulgaria and Romania and shall apply in those States under the conditions laid down in those Treaties and in this Act.

Article 3

1. Bulgaria and Romania accede to the decisions and agreements adopted by the Representatives of the Governments of the Member States meeting within the Council.

2. Bulgaria and Romania are in the same situation as the present Member States in respect of declarations or resolutions of, or other positions taken up by, the European Council or the Council and in respect of those concerning the Community or the Union adopted by common agreement of the Member States; they will accordingly observe the principles and guidelines deriving from those declarations, resolutions or other positions and will take such measures as may be necessary to ensure their implementation.

3. Bulgaria and Romania accede to the conventions and protocols, listed in Annex I. Those conventions and protocols shall enter into force in relation to Bulgaria and Romania on the date determined by the Council in the decisions referred to in paragraph 4.

4. The Council, acting unanimously on a recommendation by the Commission and after consulting the European Parliament, shall make all adjustments required by reason of

accession to the conventions and protocols referred to in paragraph 3 and publish the adapted text in the Official Journal of the European Union.

5. Bulgaria and Romania undertake in respect of the conventions and protocols referred to in paragraph 3 to introduce administrative and other arrangements, such as those adopted by the date of accession by the present Member States or by the Council, and to facilitate practical cooperation between the Member States' institutions and organisations.

6. The Council, acting unanimously on a proposal from the Commission, may supplement Annex I with those conventions, agreements and protocols signed before the date of accession.

Article 4

1. The provisions of the Schengen acquis as integrated into the framework of the European Union by the Protocol annexed to the Treaty on European Union and to the Treaty establishing the European Community (hereinafter referred to as the 'Schengen Protocol'), and the acts building upon it or otherwise related to it, listed in Annex II, as well as any further such acts adopted before the date of accession, shall be binding on and applicable in Bulgaria and Romania from the date of accession.

2. Those provisions of the Schengen acquis as integrated into the framework of the European Union and the acts building upon it or otherwise related to it not referred to in paragraph 1, while binding on Bulgaria and Romania from the date of accession, shall only apply in each of those States pursuant to a Council decision to that effect after verification in accordance with the applicable Schengen evaluation procedures that the necessary conditions for the application of all parts of the acquis concerned have been met in that State.

The Council shall take its decision, after consulting the European Parliament, acting with the unanimity of its members representing the Governments of the Member States in respect of which the provisions referred to in this paragraph have already been put into effect and of the representative of the Government of the Member State in respect of which those provisions are to be put into effect. The members of the Council representing the Governments of Ireland and of the United Kingdom of Great Britain and Northern Ireland shall take part in such a decision insofar as it relates to the provisions of the Schengen acquis and the acts building upon it or otherwise related to it in which these Member States participate.

Article 5

Bulgaria and Romania shall participate in Economic and Monetary Union from the date of accession as Member States with a derogation within the meaning of Article 122 of the EC Treaty.

Article 6

1. The agreements or conventions concluded or provisionally applied by the Community or in accordance with Article 24 or Article 38 of the EU Treaty, with one or more third States, with an international organisation or with a national of a third State, shall, under the conditions laid down in the original Treaties and in this Act, be binding on Bulgaria and Romania.

2. Bulgaria and Romania undertake to accede, under the conditions laid down in this Act, to the agreements or conventions concluded or signed by the present Member States and the Community, acting jointly.

The accession of Bulgaria and Romania to the agreements or conventions concluded or signed by the Community and the present Member States acting jointly with particular third countries or international organisations shall be agreed by the conclusion of a protocol to such agreements or conventions between the Council, acting unanimously on behalf of the Member States, and the third country or countries or international organisation concerned. The Commission shall negotiate these protocols on behalf of the Member States on the basis of negotiating directives approved by the Council, acting unanimously, and in consultation with a committee comprised of the representatives of the Member States. It shall submit a draft of the protocols for conclusion to the Council.

This procedure is without prejudice to the exercise of the Community's own competences and does not affect the allocation of powers between the Community and the Member States as regards the conclusion of such agreements in the future or any other amendments not related to accession.

3. Upon acceding to the agreements and conventions referred to in paragraph 2 Bulgaria and Romania shall acquire the same rights and obligations under those agreements and conventions as the present Member States.

4. As from the date of accession, and pending the entry into force of the necessary protocols referred to in paragraph 2, Bulgaria and Romania shall apply the provisions of the agreements or conventions concluded jointly by the present Member States and the Community before accession, with the exception of the agreement on the free movement of persons concluded with Switzerland. This obligation also applies to those agreements or conventions which the Union and the present Member States have agreed to apply provisionally.

Pending the entry into force of the protocols referred to in paragraph 2, the Community and the Member States, acting jointly as appropriate in the framework of their respective competences, shall take any appropriate measure.

5. Bulgaria and Romania accede to the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part [1], signed in Cotonou on 23 June 2000.

6. Bulgaria and Romania undertake to accede, under the conditions laid down in this Act, to the Agreement on the European Economic Area [2], in accordance with Article 128 of that Agreement.

7. As from the date of accession, Bulgaria and Romania shall apply the bilateral textile agreements and arrangements concluded by the Community with third countries.

The quantitative restrictions applied by the Community on imports of textile and clothing products shall be adjusted to take account of the accession of Bulgaria and Romania to the Community. To that effect, amendments to the bilateral agreements and arrangements referred to above may be negotiated by the Community with the third countries concerned prior to the date of accession.

Should the amendments to the bilateral textile agreements and arrangements not have entered into force by the date of accession, the Community shall make the necessary adjustments to its rules for the import of textile and clothing products from third countries to take into account the accession of Bulgaria and Romania.

8. The quantitative restrictions applied by the Community on imports of steel and steel products shall be adjusted on the basis of imports of Bulgaria and Romania over recent years of steel products originating in the supplier countries concerned.

To that effect, the necessary amendments to the bilateral steel agreements and arrangements concluded by the Community with third countries shall be negotiated prior to the date of accession.

Should the amendments to the bilateral agreements and arrangements not have entered into force by the date of accession, the provisions of the first subparagraph shall apply.

9. Fisheries agreements concluded before accession by Bulgaria or Romania with third countries shall be managed by the Community.

The rights and obligations resulting for Bulgaria and Romania from those agreements shall not be affected during the period in which the provisions of those agreements are provisionally maintained.

As soon as possible, and in any event before the expiry of the agreements referred to in the first subparagraph, appropriate decisions for the continuation of fishing activities resulting from those agreements shall be adopted in each case by the Council acting by qualified majority on a proposal from the Commission, including the possibility of extending certain agreements for periods not exceeding one year.

10. With effect from the date of accession, Bulgaria and Romania shall withdraw from any free trade agreements with third countries, including the Central European Free Trade Agreement.

To the extent that agreements between Bulgaria, Romania or both those States on the one hand, and one or more third countries on the other, are not compatible with the obligations arising from this Act, Bulgaria and Romania shall take all appropriate steps to eliminate the incompatibilities established. If Bulgaria or Romania encounters difficulties in adjusting an agreement concluded with one or more third countries before accession, it shall, according to the terms of the agreement, withdraw from that agreement.

11. Bulgaria and Romania accede under the conditions laid down in this Act to the internal agreements concluded by the present Member States for the purpose of implementing the agreements or conventions referred to in paragraphs 2, 5 and 6.

12. Bulgaria and Romania shall take appropriate measures, where necessary, to adjust their position in relation to international organisations, and to those international agreements to which the Community or to which other Member States are also parties, to the rights and obligations arising from their accession to the Union.

They shall in particular withdraw at the date of accession or the earliest possible date thereafter from international fisheries agreements and organisations to which the Community is also a party, unless their membership relates to matters other than fisheries.

Article 7

1. The provisions of this Act may not, unless otherwise provided herein, be suspended, amended or repealed other than by means of the procedure laid down in the original Treaties enabling those Treaties to be revised.

2. Acts adopted by the institutions to which the transitional provisions laid down in this Act relate shall retain their status in law; in particular, the procedures for amending those acts shall continue to apply.

[1] OJ L 317, 15.12.2000, p. 3.

[2] OJ L 1, 3.1.1994, p. 3.

3. Provisions of this Act the purpose or effect of which is to repeal or amend acts adopted by the institutions, otherwise than as a transitional measure, shall have the same status in law as the provisions which they repeal or amend and shall be subject to the same rules as those provisions.

Article 8

The application of the original Treaties and acts adopted by the institutions shall, as a transitional measure, be subject to the derogations provided for in this Act.

PART TWO

ADJUSTMENTS TO THE TREATIES

TITLE I

INSTITUTIONAL PROVISIONS

Article 9

1. The second paragraph of Article 189 of the EC Treaty and the second paragraph of Article 107 of the EAEC Treaty shall be replaced by the following:

'The number of Members of the European Parliament shall not exceed 736.'

2. With effect from the start of the 2009-2014 term, in Article 190(2) of the EC Treaty and in Article 108(2) of the EAEC Treaty, the first subparagraph shall be replaced by the following:

'2. The number of representatives elected in each Member State shall be as follows:

Belgium	22
Bulgaria	17
Czech Republic	22
Denmark	13
Germany	99
Estonia	6
Greece	22
Spain	50
France	72
Ireland	12
Italy	72
Cyprus	6
Latvia	8
Lithuania	12
Luxembourg	6
Hungary	22
Malta	5
Netherlands	25
Austria	17
Poland	50
Portugal	22
Romania	33
Slovenia	7
Slovakia	13
Finland	13
Sweden	18
United Kingdom	72.'

Article 10

1. Article 205(2) of the EC Treaty and Article 118(2) of the EAEC Treaty shall be replaced by the following:

'2. Where the Council is required to act by a qualified majority, the votes of its members shall be weighted as follows:

Belgium	12
Bulgaria	10
Czech Republic	12
Denmark	7
Germany	29
Estonia	4
Greece	12

Spain	27
France	29
Ireland	7
Italy	29
Cyprus	4
Latvia	4
Lithuania	7
Luxembourg	4
Hungary	12
Malta	3
Netherlands	13
Austria	10
Poland	27
Portugal	12
Romania	14
Slovenia	4
Slovakia	7
Finland	7
Sweden	10
United Kingdom	29

Acts of the Council shall require for their adoption at least 255 votes in favour cast by a majority of the members where this Treaty requires them to be adopted on a proposal from the Commission.

In other cases, for their adoption acts of the Council shall require at least 255 votes in favour, cast by at least two-thirds of the members.'

2. In Article 23(2) of the EU Treaty, the third subparagraph shall be replaced by the following:

'The votes of the members of the Council shall be weighted in accordance with Article 205(2) of the Treaty establishing the European Community. For their adoption, decisions shall require at least 255 votes in favour cast by at least two-thirds of the members. When a decision is to be adopted by the Council by a qualified majority, a member of the Council may request verification that the Member States constituting the qualified majority represent at least 62 % of the total population of the Union. If that condition is shown not to have been met, the decision in question shall not be adopted.'

3. Article 34(3) of the EU Treaty shall be replaced by the following:

'3. Where the Council is required to act by a qualified majority, the votes of its members shall be weighted as laid down in Article 205(2) of the Treaty establishing the European Community, and for their adoption acts of the Council shall require at least 255 votes in favour, cast by at least two-thirds of the members. When a decision is to be adopted by the Council by a qualified majority, a member of the Council may request verification that the Member States constituting the qualified majority represent at least 62 % of the total population of the Union. If that condition is shown not to have been met, the decision in question shall not be adopted.'

Article 11

1. Article 9, first paragraph, of the Protocol annexed to the EU Treaty, the EC Treaty and the EAEC Treaty on the Statute of the Court of Justice shall be replaced by the following:

'When, every three years, the Judges are partially replaced, fourteen and thirteen Judges shall be replaced alternately.'.

2. Article 48 of the Protocol annexed to the EU Treaty, the EC Treaty and the EAEC Treaty on the Statute of the Court of Justice shall be replaced by the following:

'Article 48

The Court of First Instance shall consist of twenty-seven Judges.'.

Article 12

The second paragraphs of Article 258 of the EC Treaty and Article 166 of the EAEC Treaty on the composition of the Economic and Social Committee shall be replaced by the following:

'The number of members of the Committee shall be as follows:

Belgium	12
Bulgaria	12
Czech Republic	12
Denmark	9
Germany	24
Estonia	7
Greece	12
Spain	21
France	24

Ireland	9
Italy	24
Cyprus	6
Latvia	7
Lithuania	9
Luxembourg	6
Hungary	12
Malta	5
Netherlands	12
Austria	12
Poland	21
Portugal	12
Romania	15
Slovenia	7
Slovakia	9
Finland	9
Sweden	12
United Kingdom	24.'

Article 13

The third paragraph of Article 263 of the EC Treaty on the composition of the Committee of the Regions shall be replaced by the following:

'The number of members of the Committee shall be as follows:

Belgium	12
Bulgaria	12
Czech Republic	12
Denmark	9
Germany	24
Estonia	7
Greece	12
Spain	21
France	24
Ireland	9
Italy	24
Cyprus	6
Latvia	7
Lithuania	9
Luxembourg	6
Hungary	12
Malta	5
Netherlands	12
Austria	12
Poland	21
Portugal	12
Romania	15
Slovenia	7
Slovakia	9
Finland	9
Sweden	12
United Kingdom	24.'

Article 14

The Protocol on the Statute of the European Investment Bank, annexed to the EC Treaty, is hereby amended as follows:

1. In Article 3, the following shall be inserted between the entries for Belgium and the Czech Republic:

   '— the Republic of Bulgaria,'

   and, between the entries for Portugal and Slovenia:

   '— Romania,'

2. In Article 4(1), first subparagraph:

   (a) the introductory sentence shall be replaced by the following:

   '1. The capital of the Bank shall be EUR 164 795 737 000, subscribed by the Member States as follows (*):

   (*) The figures quoted for Bulgaria and Romania are indicative and based on the 2003 data published by Eurostat.'

(b) the following shall be inserted between the entries for Ireland and Slovakia:

'Romania 846 000 000'; and

(c) the following shall be inserted between the entries for Slovenia and Lithuania:

'Bulgaria 296 000 000'.

3. In Article 11(2) the first, second and third paragraphs shall be replaced by the following:

'2. The Board of Directors shall consist of twenty-eight directors and eighteen alternate directors.

The directors shall be appointed by the Board of Governors for five years, one nominated by each Member State, and one nominated by the Commission.

The alternate directors shall be appointed by the Board of Governors for five years as shown below:

— two alternates nominated by the Federal Republic of Germany,

— two alternates nominated by the French Republic,

— two alternates nominated by the Italian Republic,

— two alternates nominated by the United Kingdom of Great Britain and Northern Ireland,

— one alternate nominated by common accord of the Kingdom of Spain and the Portuguese Republic,

— one alternate nominated by common accord of the Kingdom of Belgium, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands,

— two alternates nominated by common accord of the Kingdom of Denmark, the Hellenic Republic, Ireland and Romania,

— two alternates nominated by common accord of the Republic of Estonia, the Republic of Latvia, the Republic of Lithuania, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden,

— three alternates nominated by common accord of the Republic of Bulgaria, the Czech Republic, the Republic of Cyprus, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic,

— one alternate nominated by the Commission.'.

Article 15

Article 134(2), first subparagraph, of the EAEC Treaty on the composition of the Scientific and Technical Committee shall be replaced by the following:

'2. The Committee shall consist of forty-one members, appointed by the Council after consultation with the Commission.'

TITLE II

OTHER ADJUSTMENTS

Article 16

The last sentence of Article 57(1) of the EC Treaty shall be replaced by the following:

'In respect of restrictions existing under national law in Bulgaria, Estonia and Hungary, the relevant date shall be 31 December 1999.'

Article 17

Article 299(1) of the EC Treaty shall be replaced by the following:

'1. This Treaty shall apply to the Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, the Hellenic Republic, the

Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland.'

Article 18

1. The second paragraph of Article 314 of the EC Treaty shall be replaced by the following:

'Pursuant to the Accession Treaties, the Bulgarian, Czech, Danish, English, Estonian, Finnish, Greek, Hungarian, Irish, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish versions of this Treaty shall also be authentic.'

2. The second paragraph of Article 225 of the EAEC Treaty shall be replaced by the following:

'Pursuant to the Accession Treaties, the Bulgarian, Czech, Danish, English, Estonian, Finnish, Greek, Hungarian, Irish, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish versions of this Treaty shall also be authentic.'

3. The second paragraph of Article 53 of the EU Treaty shall be replaced by the following:

'Pursuant to the Accession Treaties, the Bulgarian, Czech, Estonian, Finnish, Hungarian, Latvian, Lithuanian, Maltese, Polish, Romanian, Slovak, Slovenian and Swedish versions of this Treaty shall also be authentic.'

PART THREE

PERMANENT PROVISIONS

TITLE I

ADAPTATIONS TO ACTS ADOPTED BY THE INSTITUTIONS

Article 19

The acts listed in Annex III to this Act shall be adapted as specified in that Annex.

Article 20

The adaptations to the acts listed in Annex IV to this Act made necessary by accession shall be drawn up in conformity with the guidelines set out in that Annex.

TITLE II

OTHER PROVISIONS

Article 21

The measures listed in Annex V to this Act shall be applied under the conditions laid down in that Annex.

Article 22

The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may make the adaptations to the provisions of this Act relating to the common agricultural policy which may prove necessary as a result of a modification in Community rules.

PART FOUR

TEMPORARY PROVISIONS

TITLE I

TRANSITIONAL MEASURES

Article 23

The measures listed in Annexes VI and VII to this Act shall apply in respect of Bulgaria and Romania under the conditions laid down in those Annexes.

TITLE II

INSTITUTIONAL PROVISIONS

Article 24

1. By way of derogation from the maximum number of Members of the European Parliament fixed in the second paragraph of Article 189 of the EC Treaty and in the second paragraph of Article 107 of the EAEC Treaty, the number of Members of the European Parliament shall be increased to take account of accession of Bulgaria and Romania with the following number of Members from those countries for the period running from the date of accession until the beginning of the 2009-2014 term of the European Parliament:

Bulgaria	18
Romania	35.

2. Before 31 December 2007, Bulgaria and Romania shall each hold elections to the European Parliament, by direct universal suffrage of their people, for the number of Members fixed in paragraph 1, in accordance with the provisions of the Act concerning the election of the Members of the European Parliament by direct universal suffrage [1].

3. By way of derogation from Article 190(1) of the EC Treaty and Article 108(1) of the EAEC Treaty, if elections are held after the date of accession, the Members of the European Parliament representing the peoples of Bulgaria and Romania for the period running from the date of accession until each of the elections referred to in paragraph 2, shall be appointed by the Parliaments of those States within themselves in accordance with the procedure laid down by each of those States.

TITLE III

FINANCIAL PROVISIONS

Article 25

1. From the date of the accession, Bulgaria and Romania shall pay the following amounts corresponding to their share of the capital paid in for the subscribed capital as defined in Article 4 of the Statute of the European Investment Bank [2]:

Bulgaria	EUR 14 800 000
Romania	EUR 42 300 000.

These contributions shall be paid in eight equal instalments falling due on 31 May 2007, 31 May 2008, 31 May 2009, 30 November 2009, 31 May 2010, 30 November 2010, 31 May 2011 and 30 November 2011.

[1] OJ L 278, 8.10.1976, p. 5. Act as last amended by Council Decision 2002/772/EC, Euratom (OJ L 283, 21.10.2002, p. 1).

[2] The figures quoted are indicative and based on the 2003 data published by Eurostat.

2. Bulgaria and Romania shall contribute, in eight equal instalments falling due on the dates referred to in paragraph 1, to the reserves and provisions equivalent to reserves, as well as to the amount still to be appropriated to the reserves and provisions, comprising the balance of the profit and loss account, established at the end of the month preceding accession, as entered on the balance sheet of the Bank, in amounts corresponding to the following percentages of the reserves and provisions ([1]):

Bulgaria	0,181 %
Romania	0,517 %.

3. The capital and payments provided for in paragraphs 1 and 2 shall be paid in by Bulgaria and Romania in cash in euro, save by way of derogation decided unanimously by the Board of Governors.

Article 26

1. Bulgaria and Romania shall pay the following amounts to the Research Fund for Coal and Steel referred to in Decision 2002/234/ECSC of the Representatives of the Governments of the Member States, meeting within the Council, of 27 February 2002 on the financial consequences of the expiry of the ECSC Treaty and on the Research Fund for Coal and Steel ([2]):

(EUR million, current prices)

Bulgaria	11,95
Romania	29,88.

2. The contributions to the Research Fund for Coal and Steel shall be made in four instalments starting in 2009 and paid as follows, in each case on the first working day of the first month of each year:

2009: 15 %

2010: 20 %

2011: 30 %

2012: 35 %.

([1]) The figures quoted are indicative and based on the 2003 data published by Eurostat.

([2]) OJ L 79, 22.3.2002, p. 42.

Article 27

1. Tendering, contracting, implementation and payments for pre-accession assistance under the Phare programme ([3]), the Phare CBC programme ([4]) and for assistance under the Transition Facility referred to in Article 31 shall be managed by implementing agencies in Bulgaria and Romania as of the date of accession.

The ex-ante control by the Commission over tendering and contracting shall be waived by a Commission decision to that effect, following an accreditation procedure conducted by the Commission and a positively assessed Extended Decentralised Implementation System (EDIS) in accordance with the criteria and conditions laid down in the Annex to Council Regulation (EC) No 1266/1999 of 21 June 1999 on coordinating aid to the applicant countries in the framework of the pre-accession strategy and amending Regulation (EEC) No 3906/89 ([5]) and in Article 164 of the Financial Regulation applicable to the general budget of the European Communities ([6]).

If this Commission decision to waive ex-ante control has not been taken before the date of accession, any contracts signed between the date of accession and the date on which the Commission decision is taken shall not be eligible for pre-accession assistance.

However, exceptionally, if the Commission decision to waive ex-ante control is delayed beyond the date of accession for reasons not attributable to the authorities of Bulgaria or Romania, the Commission may accept, in duly justified cases, eligibility for pre-accession assistance of contracts signed between the date of accession and the date of the Commission decision, and the continued implementation of pre-accession assistance for a limited period, subject to ex-ante control by the Commission over tendering and contracting.

2. Financial commitments made before accession under the pre-accession financial instruments referred to in paragraph 1 as well as those made under the Transition Facility referred to in Article 31 after accession, including the conclusion and registration of subsequent individual legal commitments and payments made after accession shall continue to be governed by the rules and regulations of the pre-accession financing

([3]) Council Regulation (EEC) No 3906/89 of 18.12.1989 on economic aid to certain countries of Central and Eastern Europe (OJ L 375, 23.12.1989, p. 11). Regulation as last amended by Regulation (EC) No 769/2004 (OJ L 123, 27.4.2004, p. 1).

([4]) Commission Regulation (EC) No 2760/98 of 18.12.1998 concerning the implementation of a programme for cross-border cooperation in the framework of the PHARE programme (OJ L 345, 19.12.1998, p. 49). Regulation as last amended by Regulation (EC) No 1822/2003 (OJ L 267, 17.10.2003, p. 9).

([5]) OJ L 161, 26.6.1999, p. 68.

([6]) Council Regulation (EC, Euratom) No 1605/2002 of 25.6.2002 (OJ L 248, 16.9.2002, p. 1).

instruments and be charged to the corresponding budget chapters until closure of the programmes and projects concerned. Notwithstanding this, public procurement procedures initiated after accession shall be carried out in accordance with the relevant Community Directives.

3. The last programming exercise for the pre-accession assistance referred to in paragraph 1 shall take place in the last year preceding accession. Actions under these programmes will have to be contracted within the following two years. No extensions shall be granted for the contracting period. Exceptionally and in duly justified cases, limited extensions in terms of duration may be granted for execution of contracts.

Notwithstanding this, pre-accession funds to cover administrative costs, as defined in paragraph 4, may be committed in the first two years after accession. For audit and evaluation costs, pre-accession funds may be committed up to five years after accession.

4. In order to ensure the necessary phasing out of the pre-accession financial instruments referred to in paragraph 1 and of the ISPA programme ([1]), the Commission may take all appropriate measures to ensure that the necessary statutory staff is maintained in Bulgaria and Romania for a maximum of nineteen months following accession. During this period, officials, temporary staff and contract staff assigned to posts in Bulgaria and Romania before accession and who are required to remain in service in those States after the date of accession shall benefit, as an exception, from the same financial and material conditions as were applied by the Commission before accession in accordance with the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of the European Communities laid down in Council Regulation (EEC, Euratom, ECSC) No 259/68 ([2]). The administrative expenditure, including salaries for other staff necessary shall be covered by the heading 'Phasing-out of pre-accession assistance for new Member States' or equivalent under the appropriate policy area of the general budget of the European Communities dealing with enlargement.

([1]) Council Regulation (EC) No 1267/1999 of 21.6.1999 establishing an Instrument for Structural Policies for Pre-Accession (OJ L 161, 26.6.1999, p. 73). Regulation as last amended by Regulation (EC) No 769/2004 (OJ L 123, 27.4.2004, p. 1).

([2]) OJ L 56, 4.3.1968, p. 1. Regulation as last amended by Regulation (EC, Euratom) No 723/2004 (OJ L 124, 27.4.2004, p. 1).

Article 28

1. Measures which on the date of accession have been the subject of decisions on assistance under Regulation (EC) No 1267/1999 establishing an Instrument for Structural Policies for Pre-accession and the implementation of which has not been completed by that date shall be considered to have been approved by the Commission under Council Regulation (EC) No 1164/94 of 16 May 1994 establishing a Cohesion Fund ([3]). Amounts which still have to be committed for the purpose of implementing such measures shall be committed under the Regulation relating to the Cohesion Fund in force at the date of accession and allocated to the chapter corresponding to that Regulation under the general budget of the European Communities. Unless stated otherwise in paragraphs 2 to 5, the provisions governing the implementation of measures approved pursuant to the latter Regulation shall apply to those measures.

2. Any procurement procedure relating to a measure referred to in paragraph 1 which on the date of accession has already been the subject of an invitation to tender published in the Official Journal of the European Union shall be implemented in accordance with the rules laid down in that invitation to tender. However, the provisions contained in Article 165 of the Financial Regulation applicable to the general budget of the European Communities shall not apply. Any procurement procedure relating to a measure referred to in paragraph 1 which has not yet been the subject of an invitation to tender published in the Official Journal of the European Union shall be in keeping with the provisions of the Treaties, with the instruments adopted pursuant thereto and with Community policies, including those concerning environmental protection, transport, trans-European networks, competition and the award of public contracts.

3. Payments made by the Commission under a measure referred to in paragraph 1 shall be posted to the earliest open commitment made in the first instance pursuant to Regulation (EC) No 1267/1999, and then pursuant to the Regulation relating to the Cohesion Fund then in force.

4. For the measures referred to in paragraph 1, the rules governing the eligibility of expenditure pursuant to Regulation (EC) No 1267/1999 shall remain applicable, except in duly justified cases to be decided on by the Commission at the request of the Member State concerned.

5. The Commission may decide, in exceptional and duly justified cases, to authorise specific exemptions from the rules applicable pursuant to the Regulation relating to the Cohesion Fund in force at the date of accession for the measures referred to in paragraph 1.

([3]) OJ L 130, 25.5.1994. Regulation as last amended by the 2003 Act of Accession (OJ L 236, 23.9.2003, p. 33).

Article 29

Where the period for multiannual commitments made under the SAPARD programme ([1]) in relation to afforestation of agricultural land, support for the establishment of producer groups or agri-environment schemes extends beyond the final permissible date for payments under SAPARD, the outstanding commitments will be covered within the 2007-2013 rural development programme. Should specific transitional measures be necessary in this regard, these shall be adopted in accordance with the procedure laid down in Article 50(2) of Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds ([2]).

Article 30

1. Bulgaria having closed — in line with its commitments — definitively for subsequent decommissioning Unit 1 and Unit 2 of the Kozloduy Nuclear Power Plant before the year 2003, commits to the definitive closure of Unit 3 and Unit 4 of this plant in 2006 and to subsequent decommissioning of these units.

2. During the period 2007-2009, the Community shall provide Bulgaria with financial assistance in support of its efforts to decommission and to address the consequences of the closure and decommissioning of Units 1 to 4 of the Kozloduy Nuclear Power Plant.

The assistance shall, inter alia, cover: measures in support of the decommissioning of Units 1 to 4 of the Kozloduy Nuclear Power Plant; measures for environmental upgrading in line with the acquis; measures for the modernisation of the conventional energy production, transmission and distribution sectors in Bulgaria; measures to improve energy efficiency, to enhance the use of renewable energy sources and to improve security of energy supply.

For the period 2007-2009, the assistance shall amount to EUR 210 million (2004 prices) in commitment appropriations, to be committed in equal annual tranches of EUR 70 million (2004 prices).

The assistance, or parts thereof, may be made available as a Community contribution to the Kozloduy International Decommissioning Support Fund, managed by the European Bank for Reconstruction and Development.

3. The Commission may adopt rules for implementation of the assistance referred to in paragraph 2. The rules shall be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission ([3]). To this end, the Commission shall be assisted by a committee. Articles 4 and 7 of Decision 1999/468/EC shall apply. The period laid down in Article 4(3) of Decision 1999/468/EC shall be six weeks. The committee shall adopt its rules of procedure.

Article 31

1. For the first year of accession, the Union shall provide temporary financial assistance, hereinafter referred to as the 'Transition Facility', to Bulgaria and Romania to develop and strengthen their administrative and judicial capacity to implement and enforce Community legislation and to foster exchange of best practice among peers. This assistance shall fund institution-building projects and limited small-scale investments ancillary thereto.

2. Assistance shall address the continued need for strengthening institutional capacity in certain areas through action which cannot be financed by the Structural Funds or by the Rural Development funds.

3. For twinning projects between public administrations for the purpose of institution building, the procedure for call for proposals through the network of contact points in the Member States shall continue to apply, as established in the Framework Agreements with the Member States for the purpose of pre-accession assistance.

The commitment appropriations for the Transition Facility, at 2004 prices, for Bulgaria and Romania, shall be EUR 82 million in the first year after accession to address national and horizontal priorities. The appropriations shall be authorised by the budgetary authority within the limits of the financial perspective.

4. Assistance under the Transition Facility shall be decided and implemented in accordance with Council Regulation (EEC) No 3906/89 on economic aid to certain countries of Central and Eastern Europe.

([1]) Council Regulation (EC) No 1268/1999 of 21.6.1999 on Community support for pre-accession measures for agriculture and rural development in the applicant countries of Central and Eastern Europe in the pre-accession period (OJ L 161, 26.6.1999, p. 87). Regulation as last amended by Regulation (EC) No 2008/2004 (OJ L 349, 25.11.2004, p. 12).

([2]) OJ L 161, 26.6.1999, p. 1. Regulation as last amended by the 2003 Act of Accession (OJ L 236, 23.9.2003, p. 33).

([3]) OJ L 184, 17.7.1999, p. 23.

Article 32

1. A Cash-flow and Schengen Facility is hereby created as a temporary instrument to help Bulgaria and Romania between the date of accession and the end of 2009 to finance actions at the new external borders of the Union for the implementation of the Schengen acquis and external border control and to help improve cash-flow in national budgets.

2. For the period 2007-2009, the following amounts (2004 prices) shall be made available to Bulgaria and Romania in the form of lump-sum payments under the temporary Cash-flow and Schengen Facility:

(EUR million, 2004 prices)

	2007	2008	2009
Bulgaria	121,8	59,1	58,6
Romania	297,2	131,8	130,8

3. At least 50 % of each country allocation under the temporary Cash-flow and Schengen Facility shall be used to support Bulgaria and Romania in their obligation to finance actions at the new external borders of the Union for the implementation of the Schengen acquis and external border control.

4. One twelfth of each annual amount shall be payable to Bulgaria and Romania on the first working day of each month in the corresponding year. The lump-sum payments shall be used within three years from the first payment. Bulgaria and Romania shall submit, no later than six months after expiry of this three-year period, a comprehensive report on the final execution of the lump-sum payments under the Schengen part of the temporary Cash-flow and Schengen Facility with a statement justifying the expenditure. Any unused or unjustifiably spent funds shall be recovered by the Commission.

5. The Commission may adopt any technical provisions necessary for the operation of the temporary Cash-flow and Schengen Facility.

Article 33

1. Without prejudice to future policy decisions, the overall commitment appropriations for structural actions to be made available for Bulgaria and Romania over the three-year period 2007-2009 shall be as follows:

(EUR million, 2004 prices)

	2007	2008	2009
Bulgaria	539	759	1 002
Romania	1 399	1 972	2 603

2. During the three years 2007-2009, the scope and nature of the interventions within these fixed country envelopes shall be determined on the basis of the provisions then applicable to structural actions expenditure.

Article 34

1. In addition to the regulations concerning rural development in force on the date of accession, the provisions laid down in Sections I to III of Annex VIII shall apply to Bulgaria and Romania for the period 2007-2009 and the specific financial provisions laid down in Section IV of Annex VIII shall apply to Bulgaria and Romania throughout the programming period 2007-2013.

2. Without prejudice to future policy decisions, commitment appropriations from the EAGGF Guarantee Section for rural development for Bulgaria and Romania over the three-year period 2007-2009 shall amount to EUR 3 041 million (2004 prices).

3. Implementing rules, where necessary, for the application of the provisions of Annex VIII shall be adopted in accordance with the procedure laid down in Article 50(2) of Regulation (EC) No 1260/1999.

4. The Council, acting by a qualified majority on a proposal from the Commission, and after consulting the European Parliament, shall make any adaptations to the provisions of Annex VIII where necessary to ensure coherence with the regulations concerning rural development.

Article 35

The amounts referred to in Articles 30, 31, 32, 33 and 34 shall be adjusted by the Commission each year in line with movements in prices as part of the annual technical adjustments to the financial perspective.

TITLE IV

OTHER PROVISIONS

Article 36

1. If, until the end of a period of up to three years after accession, difficulties arise which are serious and liable to persist in any sector of the economy or which could bring about serious deterioration in the economic situation of a given area, Bulgaria or Romania may apply for authorisation to take protective measures in order to rectify the situation and adjust the sector concerned to the economy of the internal market.

In the same circumstances, any present Member State may apply for authorisation to take protective measures with regard to Bulgaria, Romania, or both those States.

2. Upon request by the State concerned, the Commission shall, by emergency procedure, determine the protective measures which it considers necessary, specifying the conditions and modalities under which they are to be put into effect.

In the event of serious economic difficulties and at the express request of the Member State concerned, the Commission shall act within five working days of the receipt of the request accompanied by the relevant background information. The measures thus decided on shall be applicable forthwith, shall take account of the interest of all parties concerned and shall not entail frontier controls.

3. The measures authorised under paragraph 2 may involve derogations from the rules of the EC Treaty and this Act to such an extent and for such periods as are strictly necessary in order to attain the objectives referred to in paragraph 1. Priority shall be given to such measures as will least disturb the functioning of the internal market.

Article 37

If Bulgaria or Romania has failed to implement commitments undertaken in the context of the accession negotiations, causing a serious breach of the functioning of the internal market, including any commitments in all sectoral policies which concern economic activities with cross-border effect, or an imminent risk of such breach the Commission may, until the end of a period of up to three years after accession, upon motivated request of a Member State or on its own initiative, take appropriate measures.

Measures shall be proportional and priority shall be given to measures which least disturb the functioning of the internal market and, where appropriate, to the application of the existing sectoral safeguard mechanisms. Such safeguard measures shall not be invoked as a means of arbitrary discrimination or a disguised restriction on trade between Member States. The safeguard clause may be invoked even before accession on the basis of the monitoring findings and the measures adopted shall enter into force as of the first day of accession unless they provide for a later date. The measures shall be maintained no longer than strictly necessary and, in any case, shall be lifted when the relevant commitment is implemented. They may however be applied beyond the period specified in the first paragraph as long as the relevant commitments have not been fulfilled. In response to progress made by the new Member State concerned in fulfilling its commitments, the Commission may adapt the measures as appropriate. The Commission shall inform the Council in good time before revoking the safeguard measures, and it shall take duly into account any observations of the Council in this respect.

Article 38

If there are serious shortcomings or any imminent risks of such shortcomings in Bulgaria or Romania in the transposition, state of implementation, or the application of the framework decisions or any other relevant commitments, instruments of cooperation and decisions relating to mutual recognition in the area of criminal law under Title VI of the EU Treaty and Directives and Regulations relating to mutual recognition in civil matters under Title IV of the EC Treaty, the Commission may, until the end of a period of up to three years after accession, upon the motivated request of a Member State or on its own initiative and after consulting the Member States, take appropriate measures and specify the conditions and modalities under which these measures are put into effect.

These measures may take the form of temporary suspension of the application of relevant provisions and decisions in the relations between Bulgaria or Romania and any other Member State or Member States, without prejudice to the continuation of close judicial cooperation. The safeguard clause may be invoked even before accession on the basis of the monitoring findings and the measures adopted shall enter into force as of the first day of accession unless they provide for a later date. The measures shall be maintained no longer than strictly necessary and, in any case, shall be lifted when the shortcomings are remedied. They may however be applied beyond the period specified in the first paragraph as long as these shortcomings persist. In response to progress made by the new Member State concerned in rectifying the identified shortcomings, the Commission may adapt the measures as appropriate after consulting the Member States. The Commis-

sion shall inform the Council in good time before revoking the safeguard measures, and it shall take duly into account any observations of the Council in this respect.

Article 39

1. If, on the basis of the Commission's continuous monitoring of commitments undertaken by Bulgaria and Romania in the context of the accession negotiations and in particular the Commission's monitoring reports, there is clear evidence that the state of preparations for adoption and implementation of the acquis in Bulgaria or Romania is such that there is a serious risk of either of those States being manifestly unprepared to meet the requirements of membership by the date of accession of 1 January 2007 in a number of important areas, the Council may, acting unanimously on the basis of a Commission recommendation, decide that the date of accession of that State is postponed by one year to 1 January 2008.

2. Notwithstanding paragraph 1, the Council may, acting by qualified majority on the basis of a Commission recommendation, take the decision mentioned in paragraph 1 with respect to Romania if serious shortcomings have been observed in the fulfilment by Romania of one or more of the commitments and requirements listed in Annex IX, point I.

3. Notwithstanding paragraph 1, and without prejudice to Article 37, the Council may, acting by qualified majority on the basis of a Commission recommendation and after a detailed assessment to be made in the autumn of 2005 of the progress made by Romania in the area of competition policy, take the decision mentioned in paragraph 1 with respect to Romania if serious shortcomings have been observed in the fulfilment by Romania of the obligations undertaken under the Europe Agreement [1] or of one or more of the commitments and requirements listed in Annex IX, point II.

4. In the event of a decision taken under paragraph 1, 2 or 3, the Council shall, acting by qualified majority, decide immediately upon such adjustments to this Act, including its Annexes and Appendices, as have become indispensable by reason of the postponement decision.

[1] Europe Agreement establishing an association between the European Economic Communities and their Member States, of the one part, and Romania, of the other part (OJ L 357, 31.12.1994, p 2).

Article 40

In order not to hamper the proper functioning of the internal market, the enforcement of Bulgaria's and Romania's national rules during the transitional periods referred to in Annexes VI and VII shall not lead to border controls between Member States.

Article 41

If transitional measures are necessary to facilitate the transition from the existing regime in Bulgaria and Romania to that resulting from the application of the common agricultural policy under the conditions set out in this Act, such measures shall be adopted by the Commission in accordance with the procedure referred to in Article 25(2) of Council Regulation (EC) No 1784/2003 of 29 September 2003 on the common organisation of the market in cereals [2] or, as appropriate, in the corresponding Articles of the other Regulations on the common organisation of agricultural markets or the relevant procedure as determined in the applicable legislation. The transitional measures referred to in this Article may be adopted during a period of three years following the date of accession and their application shall be limited to that period. The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may extend this period.

The transitional measures relating to implementation of the instruments concerning the common agricultural policy not specified in this Act which are required as a result of accession shall be adopted prior to the date of accession by the Council acting by a qualified majority on a proposal from the Commission or, where they affect instruments initially adopted by the Commission, they shall be adopted by the Commission in accordance with the procedure required for adopting the instruments in question.

Article 42

If transitional measures are necessary to facilitate the transition from the existing regime in Bulgaria and Romania to that resulting from the application of the Community veterinary, phytosanitary and food safety rules, such measures shall be adopted by the Commission in accordance with the relevant procedure as determined in the applicable legislation. These measures shall be taken during a period of three years following the date of accession and their application shall be limited to that period.

[2] OJ L 270, 21.10.2003, p. 78.

PART FIVE

PROVISIONS RELATING TO THE IMPLEMENTATION OF THIS ACT

TITLE I

SETTING UP OF THE INSTITUTIONS AND BODIES

Article 43

The European Parliament shall make such adaptations to its Rules of Procedure as are rendered necessary by accession.

Article 44

The Council shall make such adaptations to its Rules of Procedure as are rendered necessary by accession.

Article 45

A national of each new Member State shall be appointed to the Commission as from the date of accession. The new Members of the Commission shall be appointed by the Council, acting by qualified majority and by common accord with the President of the Commission, after consulting the European Parliament.

The terms of office of the Members thus appointed shall expire at the same time as those of the Members in office at the time of accession.

Article 46

1. Two Judges shall be appointed to the Court of Justice and two Judges shall be appointed to the Court of First Instance.

2. The term of office of one of the Judges of the Court of Justice appointed in accordance with paragraph 1 shall expire on 6 October 2009. This Judge shall be chosen by lot. The term of office of the other Judge shall expire on 6 October 2012.

The term of office of one of the Judges of the Court of First Instance appointed in accordance with paragraph 1 shall expire on 31 August 2007. This Judge shall be chosen by lot. The term of office of the other Judge shall expire on 31 August 2010.

3. The Court of Justice shall make such adaptations to its Rules of Procedure as are rendered necessary by accession.

The Court of First Instance, in agreement with the Court of Justice, shall make such adaptations to its Rules of Procedure as are rendered necessary by accession.

The Rules of Procedure as adapted shall require the approval of the Council, acting by a qualified majority.

4. For the purpose of judging cases pending before the Courts on the date of accession in respect of which oral proceedings have started before that date, the full Courts or the Chambers shall be composed as before accession and shall apply the Rules of Procedure in force on the day preceding the date of accession.

Article 47

The Court of Auditors shall be enlarged by the appointment of two additional members for a term of office of six years.

Article 48

The Economic and Social Committee shall be enlarged by the appointment of 27 members representing the various economic and social components of organised civil society in Bulgaria and Romania. The terms of office of the members thus appointed shall expire at the same time as those of the members in office at the time of accession.

Article 49

The Committee of the Regions shall be enlarged by the appointment of 27 members representing regional and local bodies in Bulgaria and Romania, who either hold a regional or local authority electoral mandate or are politically accountable to an elected assembly. The terms of office of the members thus appointed shall expire at the same time as those of the members in office at the time of accession.

Article 50

Adaptations to the rules of the Committees established by the original Treaties and to their rules of procedure, necessitated by the accession, shall be made as soon as possible after accession.

Article 51

1. New members of the committees, groups or other bodies created by the Treaties or by an act of the institutions shall be appointed under the conditions and according to the procedures laid down for the appointment of members of these committees, groups or other bodies. The terms of office of the newly appointed members shall expire at the same time as those of the members in office at the time of accession.

2. The membership of committees or groups created by the Treaties or by an act of the institutions with a number of members fixed irrespective of the number of Member States shall be completely renewed upon accession, unless the terms of office of the present members expire within the year following accession.

TITLE II

APPLICABILITY OF THE ACTS OF THE INSTITUTIONS

Article 52

Upon accession, Bulgaria and Romania shall be considered as being addressees of directives and decisions within the meaning of Article 249 of the EC Treaty and of Article 161 of the EAEC Treaty, provided that those directives and decisions have been addressed to all the present Member States. Except with regard to directives and decisions which have entered into force pursuant to Article 254(1) and (2) of the EC Treaty, Bulgaria and Romania shall be considered as having received notification of such directives and decisions upon accession.

Article 53

1. Bulgaria and Romania shall put into effect the measures necessary for them to comply, from the date of accession, with the provisions of directives and decisions within the meaning of Article 249 of the EC Treaty and of Article 161 of the EAEC Treaty, unless another time limit is provided for this Act. They shall communicate those measures to the Commission at the latest by the date of accession or, where appropriate, by the time limit provided for in this Act.

2. To the extent that amendments to directives within the meaning of Article 249 of the EC Treaty and of Article 161 of the EAEC Treaty introduced by this Act require modification of the laws, regulations or administrative provisions of the present Member States, the present Member States shall put into effect the measures necessary to comply, from the date of accession, with the amended directives, unless another time limit is provided for in this Act. They shall communicate those measures to the Commission by the date of accession or, where later, by the time limit provided for in this Act.

Article 54

Provisions laid down by law, regulation or administrative action designed to ensure the protection of the health of workers and the general public in the territory of Bulgaria and Romania against the dangers arising from ionising radiations shall, in accordance with Article 33 of the EAEC Treaty, be communicated by those States to the Commission within three months of accession.

Article 55

At the duly substantiated request of Bulgaria or Romania submitted to the Commission no later than the date of accession, the Council acting on a proposal from the Commission, or the Commission, if the original act was adopted by the Commission, may take measures consisting of temporary derogations from acts of the institutions adopted between 1 October 2004 and the date of accession. The measures shall be adopted according to the voting rules governing the adoption of the act from which a temporary derogation is sought. Where these derogations are adopted after accession they may be applied as from the date of accession.

Article 56

Where acts of the institutions adopted prior to accession require adaptation by reason of accession, and the necessary adaptations have not been provided for in this Act or its Annexes, the Council, acting by a qualified majority on a proposal from the Commission, or the Commission, if the original act was adopted by the Commission, shall to this end adopt the necessary acts. Where these adaptations are adopted after accession they may be applied as from the date of accession.

Article 57

Unless otherwise stipulated, the Council, acting by a qualified majority on a proposal from the Commission, shall adopt the necessary measures to implement the provisions of this Act.

Article 58

The texts of the acts of the institutions, and of the European Central Bank, adopted before accession and drawn up by the Council, the Commission or the European Central Bank in the Bulgarian and Romanian languages shall, from the date of accession, be authentic under the same conditions as the texts drawn up in the present official languages. They shall be published in the Official Journal of the European Union if the texts in the present languages were so published.

TITLE III

FINAL PROVISIONS

Article 59

Annexes I to IX and the Appendices thereto shall form an integral part of this Act.

Article 60

The Government of the Italian Republic shall remit to the Governments of the Republic of Bulgaria and Romania a certified copy of the Treaty on European Union, the Treaty establishing the European Community and of the Treaty establishing the European Atomic Energy Community, and the Treaties amending or supplementing them, including the Treaty concerning the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland, the Treaty concerning the accession of the Hellenic Republic, the Treaty concerning the accession of the Kingdom of Spain and the Portuguese Republic, the Treaty concerning the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden, and the Treaty concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic in the Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovak, Slovenian, Spanish and Swedish languages.

The texts of those Treaties, drawn up in the Bulgarian and Romanian languages, shall be annexed to this Act. Those texts shall be authentic under the same conditions as the texts of the Treaties referred to in the first paragraph, drawn up in the present languages.

Article 61

A certified copy of the international agreements deposited in the archives of the General Secretariat of the Council of the European Union shall be remitted to the Governments of the Republic of Bulgaria and Romania by the Secretary General.

ANNEX I

List of conventions and protocols to which Bulgaria and Romania accede upon accession (referred to in Article 3(3) of the Act of Accession)

1. Convention of 19 June 1980 on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (OJ L 266, 9.10.1980, p. 1)

   — Convention of 10 April 1984 on the accession of the Hellenic Republic to the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980 (OJ L 146, 31.5.1984, p. 1)

   — First Protocol of 19 December 1988 on the interpretation by the Court of Justice of the European Communities of the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980 (OJ L 48, 20.2.1989, p. 1)

   — Second Protocol of 19 December 1988 conferring on the Court of Justice of the European Communities certain powers to interpret the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980 (OJ L 48, 20.2.1989, p. 17)

   — Convention of 18 May 1992 on the accession of the Kingdom of Spain and the Portuguese Republic to the Convention on the Law applicable to Contractual Obligations, opened for signature in Rome on 19 June 1980 (OJ L 333, 18.11.1992, p. 1)

   — Convention of 29 November 1996 on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the Convention on the Law applicable to Contractual Obligations, opened for signature in Rome on 19 June 1980, and to the First and Second Protocols on its interpretation by the Court of Justice (OJ C 15, 15.1.1997, p. 10)

2. Convention of 23 July 1990 on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (OJ L 225, 20.8.1990, p. 10)

   — Convention of 21 December 1995 on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (OJ C 26, 31.1.1996, p. 1)

   — Protocol of 25 May 1999 amending the Convention of 23 July 1990 on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (OJ C 202, 16.7.1999, p. 1)

3. Convention of 26 July 1995, drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests (OJ C 316, 27.11.1995, p. 49)

   — Protocol of 27 September 1996, drawn up on the basis of Article K.3 of the Treaty on European Union, to the Convention on the protection of the European Communities' financial interests (OJ C 313, 23.10.1996, p. 2)

   — Protocol of 29 November 1996, drawn up on the basis of Article K.3 of the Treaty on European Union, on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the protection of the European Communities' financial interests (OJ C 151, 20.5.1997, p. 2)

— Second Protocol of 19 June 1997, drawn up on the basis of Article K.3 of the Treaty on European Union, to the Convention, on the protection of the European Communities' financial interests (OJ C 221, 19.7.1997, p. 12)

4. Convention of 26 July 1995, based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention) (OJ C 316, 27.11.1995, p. 2)

— Protocol of 24 July 1996, drawn up on the basis of Article K.3 of the Treaty on European Union, on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the establishment of a European Police Office (OJ C 299, 9.10.1996, p. 2)

— Protocol of 19 June 1997, drawn up on the basis of Article K.3 of the Treaty on European Union and Article 41 (3) of the Europol Convention, on the privileges and immunities of Europol, the members of its organs, the deputy directors and employees of Europol (OJ C 221, 19.7.1997, p. 2)

— Protocol of 30 November 2000, drawn up on the basis of Article 43(1) of the Convention on the establishment of a European Police Office (Europol Convention) amending Article 2 and the Annex to that Convention (OJ C 358, 13.12.2000, p. 2)

— Protocol of 28 November 2002 amending the Convention on the establishment of a European Police Office (Europol Convention) and the Protocol on the privileges and immunities of Europol, the members of its organs, the deputy directors and the employees of Europol (OJ C 312, 16.12.2002, p. 2)

— Protocol of 27 November 2003, drawn up on the basis of Article 43(1) of the Convention on the Establishment of a European Police Office (Europol Convention), amending that Convention (OJ C 2, 6.1.2004, p. 3)

5. Convention of 26 July 1995, drawn up on the basis of Article K.3 of the Treaty on European Union, on the use of information technology for customs purposes (OJ C 316, 27.11.1995, p. 34)

— Protocol of 29 November 1996, drawn up on the basis of Article K.3 of the Treaty on European Union, on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the use of information technology for customs purposes (OJ C 151, 20.5.1997, p. 16)

— Protocol of 12 March 1999, drawn up on the basis of Article K.3 of the Treaty on European Union, on the scope of the laundering of proceeds in the Convention on the use of information technology for customs purposes and the inclusion of the registration number of the means of transport in the Convention (OJ C 91, 31.3.1999, p. 2)

— Protocol of 8 May 2003, established in accordance with Article 34 of the Treaty on European Union, amending, as regards the creation of a customs files identification database, the Convention on the use of information technology for customs purposes (OJ C 139, 13.6.2003, p. 2)

6. Convention of 26 May 1997, drawn up on the basis of Article K.3(2)(c) of the Treaty on European Union, on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (OJ C 195, 25.6.1997, p. 2)

7. Convention of 18 December 1997, drawn up on the basis of Article K.3 of the Treaty on European Union, on mutual assistance and cooperation between customs administrations (OJ C 24, 23.1.1998, p. 2)

8. Convention of 17 June 1998, drawn up on the basis of Article K.3 of the Treaty on European Union, on driving disqualifications (OJ C 216, 10.7.1998, p. 2)

9. Convention of 29 May 2000, established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union (OJ C 197, 12.7.2000, p. 3)

— Protocol of 16 October 2001, established by the Council in accordance with Article 34 of the Treaty on European Union, to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (OJ C 326, 21.11.2001, p. 2)

DSK nr 11400 af 18/06/1990 Gældende
Offentliggørelsesdato: 25-09-1997
Justitsministeriet

Den fulde tekst

Datasammenskrivning af Lov og gennemførelse af konvention om, hvilken lov der skal anvendes på kontraktlige forpligtelser, m.v.

Denne datasammenskrivning omfatter lov nr. 188 af 9. maj 1984 om gennemførelse af konvention om, hvilken lov der skal anvendes på kontraktlige forpligtelser, m.v. med de ændringer der følger af lov nr. 305 af 16. maj 1990

§ 1. Bestemmelserne i artiklerne 1-16, 18 og 19, stk. 1, i konvention af 19. juni 1980 om, hvilken lov der skal anvendes på kontraktlige forpligtelser, jfr. bilaget til denne lov (* 1), gælder her i landet.

Stk. 2. Uanset konventionens artikel 1, stk. 3, skal konventionens bestemmelser anvendes på forsikringsaftaler, som dækker risici beliggende i Det europæiske økonomiske Fællesskabs medlemsstater.

Stk. 3. Justitsministeren kan fastsætte bestemmelser til gennemførelse af lovvalgsregler i EF-direktiver. Det kan i den forbindelse fastsættes, at disse lovvalgsregler finder anvendelse i stedet for bestemmelserne i konventionen og i denne lov.

Stk. 4. Konventionens bestemmelser finder ikke anvendelse i det omfang, særlige lovvalgsregler er fastsat i andre retsforskrifter.

§ 2. I det omfang der gælder forskellige retsregler vedrørende kontraktlige forpligtelser i forskellige dele af det danske rige, skal konventionens bestemmelser i samme omfang som nævnt i § 1 anvendes ved afgørelsen af, hvilken landsdels regler der skal anvendes.

§ 3. I lov nr. 122 af 15. april 1964 om, hvilket lands retsregler der skal anvendes på løsørekøb af international karakter, indsættes i § 1, stk. 2, som nyt litra d:

»d. forbrugerkøb, jfr. købelovens § 4 a.«

§ 4. Loven træder i kraft den 1. juli 1984.

Stk. 2. Konventionens bestemmelser, jfr. §§ 1 og 2, finder med undtagelse af artikel 5 og artikel 6, stk. 1, også anvendelse på aftaler, som er indgået før lovens ikrafttræden. § 3 finder anvendelse på køb, som er indgået efter lovens ikrafttræden.

§ 5. Loven gælder ikke for Færøerne og Grønland, men kan ved kgl. anordning sættes i kraft for disse landsdele med de afvigelser, som de særlige færøske og grønlandske forhold tilsiger.

Lov nr. 305 af 16. maj 1990 indeholder følgende ikrafttrædelsesbestemmelse:

Stk. 1. § 1, nr. 2, 3, 5-11, 13-17, 22, 24-32, 34, 36, 38, 43, 47-50 og 53-56, samt § 3, nr. 1-10, 14 og 18, træder i kraft dagen efter bekendtgørelsen i Lovtidende.

Stk. 2. § 1, nr. 1, 4, 12, 18-21, 23, 33, 35, 37, 39-42, 44-46, 51 og 52, og § 2 samt § 3, nr. 11-13, 15-17 og 19, træder i kraft den 1. juli 1990.

Officielle noter

Ingen

LOV nr 442 af 31/05/2000 Gældende
Offentliggørelsesdato: 02-06-2000
Justitsministeriet

Senere ændringer til forskriften

- LBK nr 699 af 17/07/2000
- LOV nr 451 af 09/06/2004

Den fulde tekst

Lov om ændring af lov om visse forbrugeraftaler, markedsføringsloven og visse andre love[1)]

(Gennemførelse af EU-regler om fjernsalg, uanmodet markedsføring m.v. og metoden til beregning af årlige omkostninger i procent samt gennemførelse af protokoller om Domstolens fortolkningskompetence vedrørende konventionen om, hvilken lov der skal anvendes på kontraktlige forpligtelser m.v.)

VI MARGRETHE DEN ANDEN, af Guds Nåde Danmarks Dronning, gør vitterligt:
Folketinget har vedtaget og Vi ved Vort samtykke stadfæstet følgende lov:

§ 1

I lov om visse forbrugeraftaler (dørsalg m.v., fjernsalg og løbende tjenesteydelser), jf. lovbekendtgørelse nr. 886 af 23. december 1987, som ændret ved lov nr. 262 af 6. maj 1993 og lov nr. 1098 af 21. december 1994, foretages følgende ændringer:

1. Efter § 2 indsættes:

»**§ 2 a.** Ved henvendelse som nævnt i § 2, stk. 2, skal forbrugeren ved begyndelsen af samtalen have oplyst den erhvervsdrivendes navn, samt at henvendelsen sker med henblik på straks eller senere at opnå tilbud eller accept af tilbud om indgåelse af aftale.«

2. I *§ 4* indsættes som *2. pkt.:*

»Udfører en erhvervsdrivende en tjenesteydelse for forbrugeren uden dennes forudgående anmodning, kan forbrugeren ikke blive forpligtet til at betale vederlag herfor.«

3. I *§ 6, stk. 1,* ændres ordet »ugedagen« til: »14 dage«.

4. I *§ 6, stk. 5,* ændres ordet »ugedagen« til: »14 dage«.

5. Overskriften til *kapitel 4* affattes således:

»Regler om fjernsalg«.

6. *Kapitel 4* affattes efter overskriften hertil således:

»Anvendelsesområde

§ 10. Reglerne i dette kapitel gælder med de i §§ 10 c-e nævnte undtagelser for fjernsalg og henvendelser med henblik på fjernsalg.

§ 10 a. Som fjernsalg betegnes aftale om køb af varer, om tjenesteydelser eller om løbende levering af varer eller tjenesteydelser, når aftalen

1) indgås ved brug af fjernkommunikation og uden, at parterne mødes, og

2) indgås som led i et system for fjernsalg, som drives af den erhvervsdrivende.

§ 10 b. Ved fjernkommunikation forstås i denne lov enhver kommunikation, der foregår, uden at forbrugeren og den erhvervsdrivende mødes fysisk.

§ 10 c. Reglerne i dette kapitel gælder ikke ved aftaler og henvendelser med henblik på indgåelse af aftale

1) om finansielle tjenesteydelser, herunder modtagelse af indlån, kreditgivning, betalingsformidling, forsikringsvirksomhed og kapitalforvaltning,

2) om opførelse af bygning,

3) som giver brugsret til fast ejendom, når aftalen er omfattet af lov om forbrugeraftaler, der giver brugsret til fast ejendom på timesharebasis, jf. dog stk. 3,

4) om andre rettigheder over fast ejendom med undtagelse af lejeaftaler,

5) der indgås ved hjælp af vareautomater eller lignende automater eller fra automatiserede forretningslokaler, og

6) om brug af offentligt tilgængelig telefonboks, når aftalen med udbyderen af telekommunikation indgås ved benyttelsen af boksen.

Stk. 2. Reglerne i dette kapitel gælder ikke for auktionssalg, der er tilrettelagt således, at en væsentlig del af de bydende normalt er til stede på auktionsstedet.

Stk. 3. Uanset stk. 1 gælder reglerne i § 12 d for de i stk. 1, nr. 3, nævnte aftaler.

§ 10 d. Reglerne i §§ 11 og 11 a om information gælder ikke ved aftaler og henvendelser om indgåelse af aftaler om

1) køb af levnedsmidler og andre varer til husholdningens løbende forbrug, der skal leveres til forbrugeren på dennes bopæl eller arbejdsplads som led i organiseret og regelmæssig vareudbringning,

2) indkvartering, transport, forplejning, herunder servering og catering, hvis det fremgår af aftalen, hvilken dag eller inden for hvilken bestemt periode den pågældende tjenesteydelse skal udføres, og

3) rekreative fritidsaktiviteter, herunder underholdnings-, idræts- og lignende kulturbegivenheder, hvis det fremgår af aftalen, hvilken dag eller inden for hvilken bestemt periode den pågældende tjenesteydelse skal udføres.

§ 10 e. Reglerne i §§ 12-12 c om fortrydelsesret gælder ikke ved de i § 10 d nævnte aftaler samt ved aftaler om

1) spil og lotteri og

2) tegning af abonnement på aviser, ugeblade og tidsskrifter.

Stk. 2. Uanset stk. 1, nr. 2, gælder reglerne om fortrydelsesret ved tegning af abonnement under eller i forbindelse med den erhvervsdrivendes telefoniske henvendelse til forbrugeren uden dennes forudgående anmodning.

Information m.v.

§ 11. Inden der indgås en aftale, skal den erhvervsdrivende give forbrugeren oplysning om

1) den erhvervsdrivendes navn og adresse,

2) varens eller tjenesteydelsens karakter og væsentligste egenskaber,

3) prisen for varen eller tjenesteydelsen, inklusive moms og alle andre afgifter,

4) vilkår om betaling, levering eller anden opfyldelse af aftalen samt om en eventuel uopsigelighedsperiode,

5) eventuelle leveringsomkostninger,

6) eventuel fortrydelsesret efter denne lov,

7) det beløb, forbrugeren skal betale for at bruge den pågældende kommunikationsteknik, hvis beløbet ikke beregnes efter grundtaksten, og

8) hvor længe oplysningerne gælder, herunder hvor længe varen eller tjenesteydelsen udbydes til den anførte pris.

Stk. 2. De i stk. 1 nævnte oplysninger skal gives i rimelig tid, inden der indgås en aftale, og oplysningerne skal være klare, tydelige og forståelige. Det skal fremgå klart, at oplysningerne gives med henblik på indgåelse af aftale, og oplysningerne skal gives på en måde, der er egnet under hensyn til den anvendte kommunikationsteknik, og som tager særligt hensyn til umyndige personer.

Stk. 3. Justitsministeren kan fastsætte nærmere regler om oplysningernes indhold og form. Justitsministeren kan endvidere fastsætte regler om yderligere oplysninger, som den erhvervsdrivende skal give.

§ 11 a. Indgås der en aftale om fjernsalg, skal de oplysninger, der er nævnt i § 11, stk. 1, nr. 1-6, meddeles forbrugeren læsbart på papir eller på et andet varigt medium, som forbrugeren råder over og har adgang til, medmindre forbrugeren allerede har modtaget oplysningerne på denne måde. Den erhvervsdrivende skal endvidere på den anførte måde give oplysning om

1) en fysisk adresse, hvor forbrugeren kan henvende sig med eventuelle klager,

2) betingelserne for brug af foreliggende garantitilsagn og reparations- og vedligeholdelsesservice og

3) tydelig oplysning om eventuel fortrydelsesret i medfør af denne lov, herunder om betingelserne for og fremgangsmåden ved brug af fortrydelsesretten samt om reglerne i § 12, stk. 2 og 3.

Stk. 2. Den erhvervsdrivende skal endvidere på den i stk. 1 nævnte måde give tydelig oplysning om vilkårene for forbrugerens opsigelse af aftalen, hvis aftalen gælder i mere end et år, eller det ikke er bestemt i aftalen, hvor længe den gælder. Ved aftaler som nævnt i kapitel 5 skal den erhvervsdrivende give oplysning om opsigelsesretten efter § 14, stk. 1-3, jf. endvidere § 14, stk. 4.

Stk. 3. De i stk. 1 og 2 nævnte oplysninger skal gives snarest muligt. Ved køb af varer, der skal overgives til forbrugeren, skal oplysningerne meddeles senest ved overgivelsen.

Stk. 4. Justitsministeren kan fastsætte regler om oplysningernes indhold og form. Justitsministeren kan endvidere fastsætte regler om yderligere oplysninger, som den erhvervsdrivende skal give.

Stk. 5. Stk. 1-4 gælder ikke ved aftale om tjenesteydelse, hvor bestilling og udførelse af tjenesteydelsen sker på én gang ved brug af fjernkommunikation, når vederlaget for ydelsen opkræves af udbyderen af det anvendte kommunikationsmiddel. Forbrugeren skal dog på begæring have den i stk. 1, nr. 1, nævnte oplysning.

Fortrydelsesret

§ 12. Ved fjernsalg kan forbrugeren træde tilbage fra aftalen i overensstemmelse med §§ 12 a og 12 b (fortrydelsesret).

Stk. 2. Ved fjernsalg af tjenesteydelser samt ved fjernsalg af varer, der skal fremstilles eller tilpasses efter forbrugerens individuelle behov, gælder den i stk. 1 nævnte fortrydelsesret kun, indtil udførelsen, fremstillingen eller tilpasningen begynder, når forbrugeren forinden har givet samtykke til, at den erhvervsdrivende kunne begynde udførelsen m.v. inden fortrydelsesfristens udløb. Denne begrænsning i fortrydelsesretten gælder dog ikke, hvis den pågældende aftale vedrører løbende levering og er indgået under eller i forbindelse med den erhvervsdrivendes telefoniske henvendelse til forbrugeren uden dennes forudgående anmodning.

Stk. 3. Ved aftale om køb af lyd- eller billedoptagelser eller edb-programmer gælder den i stk. 1 nævnte fortrydelsesret kun, så længe forbrugeren ikke har brudt forseglingen.

§ 12 a. Vil forbrugeren ved køb af varer eller aftale om løbende levering af varer bruge fortrydelsesretten, skal forbrugeren opfylde de betingelser, der er anført i stk. 3, 1. og 2. pkt., henholdsvis stk. 5, 1. og 2. pkt., senest 14 dage efter det seneste af følgende tidspunkter:

1) Den dag, forbrugeren fik varen, det første parti heraf eller den første levering i hænde, eller

2) den dag, forbrugeren modtog oplysninger i overensstemmelse med § 11 a, stk. 1, 2 og 4, jf. dog stk. 2.

Stk. 2. Den i stk. 1 nævnte frist udløber senest 3 måneder efter den dag, forbrugeren fik varen, det første parti heraf eller den første levering i hænde.

Stk. 3. Med undtagelse af de i stk. 5 nævnte tilfælde skal forbrugeren ved aftale om køb af varer eller løbende levering af varer tilbagesende eller tilbagegive det modtagne til den erhvervsdrivende. Benytter forbrugeren forsendelse, er det tilstrækkeligt, at han inden fortrydelsesfristens udløb har overgivet det modtagne til en fragtfører, som har påtaget sig forsendelsen til den

erhvervsdrivende. Forbrugeren kan endvidere bruge fortrydelsesretten ved at undlade at modtage eller indløse den erhvervsdrivendes forsendelse.

Stk. 4. Omkostningerne ved at sende varen tilbage til den erhvervsdrivende påhviler forbrugeren. Har den erhvervsdrivende i henhold til aftalen leveret en erstatningsvare, fordi den pågældende vare som helhed ikke kunne leveres, påhviler omkostningerne ved tilbagesendelse dog den erhvervsdrivende.

Stk. 5. Har den erhvervsdrivende påtaget sig at afhente varen hos forbrugeren, såfremt denne bruger sin fortrydelsesret, skal forbrugeren underrette sælgeren om, at han vil bruge fortrydelsesretten. Det samme gælder ved aftale om løbende levering af varer, der er beregnet til engangsbrug, jf. stk. 3. § 6, stk. 3, finder tilsvarende anvendelse. Forbrugeren kan endvidere bruge fortrydelsesretten ved at undlade at modtage eller indløse den erhvervsdrivendes forsendelse.

Stk. 6. I de i stk. 3 nævnte tilfælde er fortrydelsesretten betinget af, at det modtagne overgives til den erhvervsdrivende på dennes forretningssted i væsentlig samme stand og mængde, hvori det var, da forbrugeren fik det i hænde. § 8, stk. 1, 2. pkt., og stk. 2, finder tilsvarende anvendelse.

Stk. 7. I de i stk. 5, 1. pkt., nævnte tilfælde er fortrydelsesretten betinget af, at forbrugeren holder det modtagne til disposition for den erhvervsdrivende i væsentlig samme stand og mængde, hvori det var, da forbrugeren fik det i hænde. § 8, stk. 1, 2. pkt., og stk. 2 og 3, finder tilsvarende anvendelse.

§ 12 b. Vil forbrugeren ved aftale om tjenesteydelser eller løbende levering af tjenesteydelser bruge fortrydelsesretten, skal forbrugeren underrette den erhvervsdrivende herom senest 14 dage efter det seneste af følgende tidspunkter:

1) Den dag, forbrugeren modtog underretning om, at aftalen var indgået, eller

2) den dag, forbrugeren modtog oplysninger i overensstemmelse med § 11 a, stk. 1, 2 og 4, jf. dog stk. 2.

Stk. 2. Den i stk. 1 nævnte frist udløber senest 3 måneder efter den dag, forbrugeren modtog underretning om, at aftalen var indgået.

Stk. 3. § 6, stk. 3 og 4, finder tilsvarende anvendelse.

§ 12 c. Træder forbrugeren tilbage fra aftalen efter §§ 12-12 b, kan den erhvervsdrivende ikke gøre krav vedrørende aftalen gældende mod forbrugeren.

Stk. 2. Har forbrugeren betalt helt eller delvis, skal den erhvervsdrivende tilbagebetale det modtagne, når forbrugeren træder tilbage fra aftalen. I de i § 12 a, stk. 3, nævnte tilfælde skal tilbagebetaling ske, så snart den erhvervsdrivende har modtaget varen og haft lejlighed til at undersøge den. I de i § 12 a, stk. 5, og § 12 b nævnte tilfælde skal tilbagebetaling ske snarest muligt efter, at forbrugerens underretning om tilbagetrædelsen er kommet frem til den erhvervsdrivende, og § 9, stk. 2, finder tilsvarende anvendelse.

Stk. 3. Beløb, som den erhvervsdrivende ikke har tilbagebetalt senest efter 30 dage, skal af den erhvervsdrivende forrentes efter reglerne i lov om renter ved forsinket betaling m.v. Fristen regnes i de i § 12 a, stk. 3, nævnte tilfælde fra den dag, den erhvervsdrivende har modtaget varen, og i de i § 12 a, stk. 5, og § 12 b nævnte tilfælde fra den dag, forbrugerens underretning om tilbagetrædelsen er kommet frem til den erhvervsdrivende.

Den erhvervsdrivendes opfyldelse af aftalen

§ 12 d. Medmindre andet er aftalt, skal den erhvervsdrivende levere sin ydelse senest 30 dage efter den dag, forbrugeren afgav bestilling eller tilbud.

Stk. 2. Misligholder den erhvervsdrivende aftalen på grund af forsinkelse, som skyldes, at den aftalte ydelse som helhed ikke kan leveres, kan forbrugeren hæve aftalen, uanset om forsinkelsen er af væsentlig betydning for ham, og den erhvervsdrivende skal underrette forbrugeren herom. Aftalevilkår, hvorefter forbrugeren bærer risikoen for, at varen eller tjenesteydelsen som helhed ikke kan leveres, er ikke bindende.

Stk. 3. Hæver forbrugeren aftalen i medfør af stk. 2, skal den erhvervsdrivende tilbagebetale eventuelle forudbetalte beløb snarest muligt efter, at den erhvervsdrivende har modtaget forbrugerens meddelelse om ophævelsen. Beløb, som den erhvervsdrivende ikke har tilbagebetalt senest 30 dage efter, at forbrugerens meddelelse er kommet frem, skal af den erhvervsdrivende forrentes efter reglerne i lov om renter ved forsinket betaling m.v.

Visse lovvalgsaftaler

§ 13. Er det i en aftale bestemt, at lovgivningen i et land uden for Det Europæiske Økonomiske Samarbejdsområde skal finde anvendelse på aftalen, gælder en sådan bestemmelse ikke i de spørgsmål om fjernsalg, der er reguleret i Europa-Parlamentets og

Rådets direktiv 97/7/EF om forbrugerbeskyttelse i forbindelse med aftaler vedrørende fjernsalg. Dette gælder dog kun, hvis det uden bestemmelsen ville være lovgivningen herom i et land inden for Det Europæiske Økonomiske Samarbejdsområde, der gjaldt for aftalen, og hvis denne lovgivning giver forbrugeren en bedre beskyttelse ved de pågældende spørgsmål om fjernsalg.«

7. Efter § 13 d indsættes:

»Kapitel 4 b

Bortfald af kreditaftaler

§ 13 e. Hvis forbrugeren påberåber sig, at en aftale efter regler i denne lov ikke er bindende, eller hvis forbrugeren træder tilbage fra en aftale efter regler i denne lov, bortfalder en hertil knyttet kreditaftale, som forbrugeren har indgået med den erhvervsdrivende, eller som på grundlag af en aftale mellem tredjemand og den erhvervsdrivende dækker den aftalte betaling helt eller delvis.

Stk. 2. Bortfalder kreditaftalen i medfør af stk. 1, kan forbrugeren ikke af den grund pålægges at betale gebyr eller erstatning til kreditgiveren.«

8. *§ 18, stk. 2,* affattes således:

»*Stk. 2.* Der kan pålægges selskaber m.v. (juridiske personer) strafansvar efter reglerne i straffelovens 5. kapitel.«

§ 2

I lov om markedsføring, jf. lovbekendtgørelse nr. 545 af 1. juli 1999, som ændret ved lov nr. 164 af 15. marts 2000, foretages følgende ændring:

1. Efter § 6 indsættes:

»*Uanmodet henvendelse til bestemte aftagere*

§ 6 a. En erhvervsdrivende må ikke rette henvendelse til nogen ved brug af elektronisk post, et automatisk opkaldssystem eller telefax med henblik på afsætning af varer, fast ejendom og andre formuegoder samt arbejds- og tjenesteydelser, medmindre den pågældende forudgående har anmodet om det.

Stk. 2. En erhvervsdrivende må ikke rette henvendelse til en bestemt fysisk person ved brug af andre midler til fjernkommunikation med henblik på afsætning som nævnt i stk. 1, hvis den pågældende over for den erhvervsdrivende har frabedt sig dette, hvis det fremgår af en fortegnelse, som udarbejdes af Det Centrale Personregister (CPR) hvert kvartal, at den pågældende har frabedt sig henvendelser, der sker i sådant markedsføringsøjemed, eller hvis den erhvervsdrivende ved undersøgelse i CPR er blevet bekendt med, at den pågældende har frabedt sig sådanne henvendelser. Ved telefonisk henvendelse til forbrugere gælder endvidere reglerne om uanmodet henvendelse i lov om visse forbrugeraftaler.

Stk. 3. Stk. 2 gælder ikke, hvis den pågældende person forudgående har anmodet om henvendelsen fra den erhvervsdrivende.

Stk. 4. Første gang en erhvervsdrivende retter henvendelse som nævnt i stk. 2 til en bestemt fysisk person, der ikke er anført i fortegnelsen fra CPR, skal den erhvervsdrivende tydeligt og på en forståelig måde oplyse om retten til at frabede sig henvendelser som nævnt i stk. 2 fra den erhvervsdrivende. Den pågældende skal samtidig gives adgang til på en nem måde at frabede sig sådanne henvendelser.

Stk. 5. Der må ikke kræves betaling for at modtage eller notere meddelelser om, at en anmodning efter stk. 1 tilbagekaldes, eller at henvendelser som nævnt i stk. 2 frabedes.

Stk. 6. Erhvervsministeren kan fastsætte nærmere regler om den erhvervsdrivendes informationspligt efter stk. 4 og om pligten til at give adgang til at frabede sig henvendelser som nævnt i stk. 2.«

§ 3

I lov nr. 398 af 13. juni 1990 om kreditaftaler, som senest ændret ved lov nr. 1098 af 21. december 1994, foretages følgende ændringer:

1. I bilaget til loven indsættes i *note c* som *2.* og *3. pkt.:*

»Et år antages at have 365 dage, 365,25 dage eller (i skudår) 366 dage, 52 uger eller 12 lige lange måneder. Hver måned antages at have 30,41666 dage (=365/12).«

2. I *bilaget* til loven indsættes efter note c:

»d) Beregningens resultat skal angives med mindst én decimals nøjagtighed. Hvis der afrundes til en bestemt decimal, gælder følgende regel: Hvis decimalen efter denne bestemte decimal er 5 eller derover, forhøjes denne bestemte decimal med én.

e) De benyttede løsningsmetoder skal give et resultat svarende til eksemplerne i bilag III til direktiv 87/102/EØF som ændret ved Europa-Parlamentets og Rådets direktiv 98/7/EF af 16. februar 1998.«

§ 4

I lov nr. 188 af 9. maj 1984 om gennemførelse af konvention om, hvilken lov der skal anvendes på kontraktlige forpligtelser m.v., som ændret ved lov nr. 305 af 16. maj 1990, foretages følgende ændring:

1. I *§ 1, stk. 1,* indsættes som *2. pkt.:*

»Det samme gælder den til konventionen knyttede Første protokol af 19. december 1988 om Domstolens fortolkning af konventionen af 19. juni 1980 og den til konventionen knyttede Anden protokol af 19. december 1988 om tildeling af visse beføjelser til Domstolen vedrørende fortolkning af konventionen af 19. juni 1980.«

§ 5

Stk. 1. Lovens § 1 træder i kraft den 1. juni 2000.

Stk. 2. Lovens § 2 træder i kraft den 1. juli 2000.

Stk. 3. Lovens § 3 træder i kraft den 1. juni 2000. For så vidt angår aftaler om kredit, der sikres ved pant i fast ejendom, træder bestemmelsen dog først i kraft den 8. februar 2001. 2. pkt. gælder ikke ved markedsføring af de pågældende aftaler, i det omfang kreditaftalelovens regler om beregning af årlige omkostninger i procent skal anvendes i forbindelse hermed.

Stk. 4. Justitsministeren fastsætter tidspunktet for ikrafttræden af lovens § 4.

Stk. 5. Lovens § 1, nr. 3 og 4, finder anvendelse, når aftalen er indgået eller forbrugeren har afgivet tilbud efter lovens ikrafttræden. Det samme gælder bestemmelserne i lov om visse forbrugeraftaler som affattet ved lovens § 1, nr. 6.

Stk. 6. Lovens § 3 finder anvendelse på aftaler, der indgås efter lovens ikrafttræden.

§ 6

Loven gælder ikke for Færøerne og Grønland, men kan ved kongelig anordning sættes i kraft for disse landsdele med de afvigelser, som de særlige færøske og grønlandske forhold tilsiger.

Givet på Christiansborg Slot, den 31. maj 2000

Under Vor Kongelige Hånd og Segl

Margrethe R.

/Frank Jensen

LOV nr 188 af 09/05/1984 Gældende
(Kontraktskonventionsloven)
Offentliggørelsesdato: 16-05-1984
Justitsministeriet

Senere ændringer til forskriften

- LBK nr 722 af 24/10/1986 § 3
- LOV nr 305 af 16/05/1990 § 2
- DSK nr 11400 af 18/06/1990
- LOV nr 442 af 31/05/2000 § 4

Den fulde tekst

Lov om gennemførelse af konvention om, hvilken lov der skal anvendes på kontraktlige forpligtelser, m.v.

VI MARGRETHE DEN ANDEN, af Guds Nåde Danmarks Dronning, gør vitterligt: Folketinget har vedtaget og Vi ved Vort samtykke stadfæstet følgende lov:

§ 1. Bestemmelserne i artiklerne 1-16, 18 og 19, stk. 1, i konvention af 19. juni 1980 om, hvilken lov der skal anvendes på kontraktlige forpligtelser, jfr. bilaget til denne lov (* 1), gælder her i landet.

Stk. 2. Uanset konventionens artikel 1, stk. 3, skal konventionens bestemmelser anvendes på forsikringsaftaler, som dækker risici beliggende i Det europæiske økonomiske Fællesskabs medlemsstater.

Stk. 3. Konventionens bestemmelser finder ikke anvendelse i det omfang, særlige lovvalgsregler er fastsat i andre retsforskrifter.

§ 2. I det omfang der gælder forskellige retsregler vedrørende kontraktlige forpligtelser i forskellige dele af det danske rige, skal konventionens bestemmelser i samme omfang som nævnt i § 1 anvendes ved afgørelsen af, hvilken landsdels regler der skal anvendes.

§ 3. I lov nr. 122 af 15. april 1964 om, hvilket lands retsregler der skal anvendes på løsørekøb af international karakter, indsættes i § 1, stk. 2, som nyt litra d:

»d. forbrugerkøb, jfr. købelovens § 4 a.«

§ 4. Loven træder i kraft den 1. juli 1984.

Stk. 2. Konventionens bestemmelser, jfr. §§ 1 og 2, finder med undtagelse af artikel 5 og artikel 6, stk. 1, også anvendelse på aftaler, som er indgået før lovens ikrafttræden. § 3 finder anvendelse på køb, som er indgået efter lovens ikrafttræden.

§ 5. Loven gælder ikke for Færøerne og Grønland, men kan ved kgl. anordning sættes i kraft for disse landsdele med de afvigelser, som de særlige færøske og grønlandske forhold tilsiger.

Givet på Christiansborg slot, den 9. maj 1984

Under Vor Kongelige Hånd og Segl

MARGRETHE R

/Erik Ninn-Hansen

Bilag

Officielle noter

Særligt noter:

(* 1) Bilag udeladt.

LBK nr 722 af 24/10/1986 Gældende
Offentliggørelsesdato: 29-10-1986
Justitsministeriet

Den fulde tekst

Bekendtgørelse af lov om, hvilket lands retsregler der skal anvendes på løsørekøb af international karakter

Herved bekendtgøres lov nr. 122 af 15. april 1964 om, hvilket lands retsregler der skal anvendes på løsørekøb af international karakter med den ændring, der følger af lov nr. 188 af 9. maj 1984, § 3.

§ 1. Denne lov finder anvendelse på løsørekøb af international karakter.

Stk. 2. Loven gælder dog ikke

a. køb af registreret skib eller luftfartøj.

b. køb af værdipapirer.

c. salg som led i en tvangsfuldbyrdelse eller i øvrigt ved rettens foranstaltning.

d. forbrugerkøb, jfr. købelovens § 4 a.

Stk. 3. Med køb ligestilles aftale om levering af løsøregenstande, som først skal tilvirkes, hvis de nødvendige materialer skal ydes af den, der skal levere genstanden.

§ 2. Loven finder ikke anvendelse på spørgsmål om parternes evne til at indgå retshandler, aftalens form eller købets retsvirkninger for andre end parterne.

§ 3. Køber og sælger kan vedtage, at købet skal være undergivet et bestemt lands retsregler. Vedtagelsen skal ske ved udtrykkelig bestemmelse eller utvetydigt fremgå af aftalen. Andre spørgsmål om, hvorvidt parterne gyldigt har vedtaget anvendelse af et bestemt lands retsregler, bedømmes efter dette lands regler.

§ 4. Har parterne ikke i overensstemmelse med bestemmelserne i § 3 vedtaget anvendelse af et bestemt lands regler, gælder reglerne i det land, hvor sælgeren havde bopæl, da han modtog bestillingen. Modtages bestillingen ved et sælgeren tilhørende forretningssted, gælder reglerne i det land, hvor forretningsstedet er beliggende.

Stk. 2. Reglerne i det land, hvor køberen har bopæl, eller hvor det forretningssted, hvorfra bestillingen er afgivet, er beliggende, finder dog anvendelse, såfremt sælgeren eller hans repræsentant har modtaget bestillingen i dette land.

Stk. 3. For køb på børs eller auktion gælder reglerne i det land, hvor børsen eller auktionen afholdes.

§ 5. Om fremgangsmåden ved undersøgelse af salgsgenstanden, frister for undersøgelsen og meddelelser vedrørende denne samt om forholdsregler, der skal træffes, hvis genstanden afvises, gælder reglerne i det land, hvor undersøgelsen skal foretages, medmindre andet udtrykkeligt er aftalt.

§ 6. En udenlandsk retsregel finder ikke anvendelse, såfremt den er uforenelig med grundlæggende danske retsprincipper.

§ 7. Tidspunktet for lovens ikrafttræden bestemmes af justitsministeren. (* 1).

I lov nr. 188 af 9. maj 1984 fastsættes i § 4, at den ændring, som angår § 1, stk. 2, litra d, træder i kraft den 1. juli 1984 og finder

anvendelse på køb, som er indgået efter lovens ikrafttræden.

Lov nr. 188 af 9. maj 1984 indeholder endvidere følgende bestemmelse:

§ 5. Loven gælder ikke for Færøerne og Grønland, men kan ved kgl. anordning sættes i kraft for disse landsdele med de afvigelser, som de særlige færøske og grønlandske forhold tilsiger.

JUSTITSMINISTERIET, DEN 24. OKTOBER 1986

ERIK NINN-HANSEN

/Ingrid Gormsen

Officielle noter

(* 1) Loven trådte i kraft den 1. september 1964, jfr. bekendtgørelse nr. 225 af 3. juli 1964.

LOV nr 305 af 16/05/1990
Historisk
Offentliggørelsesdato: 17-05-1990
Økonomi- og Erhvervsministeriet

Vis mere...

Senere ændringer til forskriften

- LBK nr 726 af 31/10/1990
- LBK nr 266 af 22/04/1992

Yderligere dokumenter:

- Beretninger fra ombudsmanden, der anvender denne retsforskrift

Den fulde tekst

Lov om ændring af lov om forsikringsvirksomhed med flere love

VI MARGRETHE DEN ANDEN, af Guds Nåde Danmarks Dronning, gør vitterligt: Folketinget har vedtaget og Vi ved Vort samtykke stadfæstet følgende lov:

§ 1

I lov om forsikringsvirksomhed, jf. lovbekendtgørelse nr.127 af 23. marts 1984, som ændret senest ved lov nr. 325 af 24. maj 1989, foretages følgende ændringer:

1. I *§ 2* indsættes som nyt nummer:

- »1) forsikringsvirksomhed i det omfang, den omfattes af lov om udveksling af forsikringstjenesteydelser inden for direkte skadesforsikringsvirksomhed;».

Nr. 1-7 bliver herefter nr. 2-8.

2. I *§ 6 a* indsættes efter stk. 2 som nyt stykke:

»Stk. 3. Forsikringsselskaber kan gennem datterselskaber drive virksomhed, som ikke er angivet i selskabets koncession, når datterselskabet alene driver virksomhed, der er underlagt Finanstilsynets tilsyn.«

3. I *§ 10, stk. 1,* udgår »og stadfæstet vedtægterne«.

4. I *§ 10, stk. 3,* udgår »for bygningsbrandforsikring efter kapitel 23 og«.

5. *§ 10, stk. 4,* affattes således:

»Stk. 4. Godkendelse af det tekniske grundlag m.v. og forsikringsbetingelser gælder uden tidsbegrænsning.«

6. *§ 27, 4. pkt.,* ophæves.

7. *§ 29, stk. 1,* affattes således:

»Senest samtidig med anmeldelse til registrering i Erhvervs- og Selskabsstyrelsen skal selskabet indgive ansøgning om koncession til Finanstilsynet. Ansøgningen skal være ledsaget af de bilag, som er nævnt i § 28, stk. 1, nr. 1 og 2.«

8. I *§ 31* indsættes som *stk. 2:*

»Stk. 2. Finanstilsynet kan fastsætte bestemmelser, der under nærmere angivne betingelser undtager fra kravet om godkendelse af et eller flere af de forhold, der er nævnt i § 30, stk. 1, eller af ændringer heri.«

9. *§ 33, stk. 2,* ophæves.

Stk. 3-5 bliver herefter stk. 2-4.

10. *§ 33, stk. 4,* der bliver stk. 3, affattes således:

»Stk. 3. Anmeldelse til Erhvervs- og Selskabsstyrelsen om ændring af selskabets vedtægter skal indsendes inden 1 måned efter ændringens vedtagelse. Med anmeldelsen skal selskabet indsende to daterede eksemplarer af vedtægterne med den fuldstændige nye affattelse til Erhvervs- og Selskabsstyrelsen, der videresender det ene eksemplar til Finanstilsynet.«

11. *I § 33* indsættes efter stk. 4, der bliver stk. 3, som nyt stykke:

»Stk. 4. Inden 1 måned efter selskabets vedtagelse af ændring af forsikringsbetingelser, pensionsregulativ eller teknisk grundlag skal ændringen indsendes til godkendelse i Finanstilsynet.«

Stk. 4 bliver herefter stk. 5.

12. I *§ 33, stk. 5,* udgår »bygningsbrandforsikring og«.

13. *§ 53, 2. pkt.,* affattes således:

»Er anmeldelse om kapitalforhøjelsen ikke indgivet inden et år efter forhøjelsesbeslutningen, eller nægtes registrering, finder reglerne i § 51 tilsvarende anvendelse.«

14. *§ 75, stk. 2, 2. pkt.,* affattes således:

»Finanstilsynet kan bestemme, at der sker tilsvarende henlæggelse til en grundfond eller en anden fond, som ikke uden Finanstilsynets tilladelse må formindskes.«

15. Efter § 78 indsættes:

» § 78 a. Finanstilsynet kan fastsætte regler for de gensidige forsikringsselskaber vedrørende hæftelse for medlemmer og garanter, tilbagebetaling af garantikapital og betingelser for uddeling til medlemmerne af selskabets midler.«

16. *§ 90, stk. 4, 1. pkt.,* affattes således:

»Direktører i forsikringsselskaber må ikke uden tilladelse fra bestyrelsen eje eller drive selvstændig erhvervsvirksomhed eller som bestyrelsesmedlem, funktionær eller på anden måde deltage i ledelsen eller driften af anden erhvervsvirksomhed end det pågældende selskab eller selskaber inden for samme koncern.«

17. *§ 119, stk. 2,* affattes således:

»Stk. 2. Selskaber, der hører til samme koncern, skal have samme regnskabsår, medmindre særlige omstændigheder nødvendiggør andet.«

18. I *overskriften til kapitel 14 a* udgår »og båndlæggelse«.

19. *§ 131* affattes således:

» § 131. I livsforsikringsselskaber skal der føres et register over aktiver til en bogført værdi, der modsvarer de af aktuaren opgjorte livsforsikringshensættelser. De registrerede aktiver tjener udelukkende til fyldestgørelse af forsikringstagerne.

Stk. 2. Livsforsikringshensættelserne opgøres af aktuaren ved regnskabsårets slutning. Livsforsikringsselskabet har derpå 3 måneders frist til at registrere de fornødne aktiver til dækning af forsikringshensættelserne. I løbet af regnskabsåret skal foretages registrering til dækning af det beløb, hvormed livsforsikringshensættelserne skønnes at være vokset i den forløbne del af regnskabsåret.

Stk. 3. Kravet om registrering finder ikke anvendelse på de i § 128, stk. 1, nr. 5, nævnte policelån.

Stk. 4. Den statsautoriserede revisor har pligt til at påse, at stk. 2, 2. og 3. pkt., overholdes.

Stk. 5. Såfremt en del af forsikringshensættelserne dækkes af fast ejendom, der tilhører selskabet, registreres et tinglyst ejerpantebrev.

Stk. 6. Mindst 60 pct. af de registrerede aktiver inklusive policelån, jf. stk. 3, skal være aktiver efter § 128.

Stk. 7. Livsforsikringsselskabet giver indberetning til Finanstilsynet om, hvilke aktiver der er registreret i medfør af stk. 2, 2. og 3. pkt. Finanstilsynet eller den, Finanstilsynet bemyndiger hertil, kontrollerer tilstedeværelsen af disse aktiver efter nærmere regler fastsat af industriministeren.

Stk. 8. Finanstilsynet fastsætter nærmere bestemmelser om livsforsikringsselskabernes indberetnings- og registreringspligt.

Stk. 9. Finanstilsynet kan kræve registeret deponeret, hvis tilsynet beslutter at begrænse eller forbyde selskabets rådighed over dets aktiver. Ved deponering af registeret skal, med hensyn til fondsaktiver, Finanstilsynet registreres som berettiget i Værdipapircentralen, og med hensyn til de øvrige midler, der tjener til dækning af forsikringshensættelserne, skal disse håndpantsættes til fordel for Finanstilsynet.

Stk. 10. Så længe registeret er deponeret, skal enhver ændring godkendes af Finanstilsynet og noteres i registeret.«

20. I *§ 132* ændres »båndlagt« til: »registreret«.

21. *§ 133* ophæves.

22. *§ 136* affattes således:

» § 136. Så længe selskabets basiskapital ikke utvivlsomt opfylder kravene i §§ 34 og 73, kan der ikke udbetales udbytte til aktionærer, rente til garanter eller beløb til medlemmer i gensidige selskaber.«

23. I *§ 151, stk. 2, 1. pkt.,* ændres »båndlagt« til: »registreret«.

24. *§ 157, stk. 5,* ophæves.

25. Efter § 168 indsættes:

» § 168 a. Et forsikringsselskab, der har overdraget hele sin forsikringsbestand til et andet selskab efter reglerne i kapitel 16 eller 17, skal afvikles som forsikringsselskab. Sker afviklingen på anden måde end ved fusion efter §§ 167 b eller 167 c, ved likvidation eller konkurs, skal afviklingens form, indhold og gennemførelse godkendes af Finanstilsynet.«

26. I *§ 175, stk. 1, 3. pkt.,* ændres »§ 151, stk. 1« til: »§ 253«.

27. *§ 180, stk. 2, 2. pkt.,* ophæves.

28. I *§ 193, stk. 1,* ændres »§ 33, stk. 4, 2. pkt.« til: »§ 33, stk. 3, 2. pkt.«

29. *§ 195, stk. 1, 1. pkt.,* affattes således:

»Selskabet skal anmeldes til registrering i Erhvervs- og Selskabsstyrelsen senest 2 måneder efter den konstituerende generalforsamling.«

30. *§ 195, stk. 1, 4. pkt.,* ophæves.

31. *§ 195, stk. 2,* affattes således:

»Stk. 2. Senest samtidig med anmeldelsen til registrering i Erhvervs- og Selskabsstyrelsen skal selskabet indsende ansøgning om koncession til Finanstilsynet. Med ansøgningen skal følge bekræftet udskrift af generalforsamlingsprotokollen.«

32. I *§ 196* ændres »§ 29, stk. 1« til: »§ 29, stk. 2«.

33. I *§ 209* indsættes som nyt *stk. 1:*

»Finanstilsynet fastsætter minimumsbetingelser for forsikringsselskabers tegning af bygningsbrandforsikring.«

Stk. 1 og 2 bliver herefter stk. 2 og 3.

34. § 210 k ophæves.

35. I *§ 211* indsættes som *stk. 4:*

»Stk. 4. Såfremt et udenlandsk forsikringsselskab her i landet har

- 1) et kontor, der ledes af selskabets eget personale, eller
- 2) en uafhængig person, der har en fast bemyndigelse til at handle på selskabets vegne i lighed med en forretningsafdeling,

betragtes det som selskabets herværende forretningsafdeling og skal opfylde de i dette kapitel nævnte betingelser.«

36. I *§ 218, stk. 2,* indsættes efter 1. pkt.:

»Finanstilsynet kan fastsætte bestemmelser, der under nærmere angivne betingelser undtager fra kravet om godkendelse af et eller flere af de forhold, der er nævnt i § 30, stk. 1.«

37. *§ 220, stk. 1,* affattes således:

»Medmindre andet følger af regler, som industriministeren fastsætter til gennemførelse af internationale aftaler, er det ikke tilladt i erhvervsmæssigt øjemed her i landet at medvirke til, at direkte forsikringer med undtagelse af EF-coassurancevirksomhed for her i landet bosiddende personer, danske skibe eller andre risici, der består her i landet, tegnes hos andre end

- 1) danske forsikringsselskaber eller her i landet etablerede udenlandske forsikringsselskaber, der omfattes af denne lov, eller

- 2) udenlandske forsikringsselskaber, der omfattes af lov om udveksling af forsikringstjenesteydelser inden for direkte skadesforsikringsvirksomhed.«

38. I *§ 221, stk. 1,* indsættes som *sidste pkt.:*

»Finanstilsynet kan fastsætte bestemmelser, der under nærmere angivne betingelser undtager fra kravet om godkendelse af ændringer i et eller flere af de forhold, der er nævnt i § 30, stk. 1.«

39. § 223, stk. 2, affattes således:

» Stk. 2. Midler svarende til livsforsikringshensættelserne skal anbringes og registreres i overensstemmelse med reglerne i §§ 128-132. Forretningsafdelingens hovedkontor ligestilles ved anvendelsen af § 128, stk. 1, nr. 6, med et indenlandsk selskabs hovedkontor. Værdien af de registrerede midler opgøres efter de værdiansættelsesregler, der gælder for indenlandske selskaber.«

40. I *§ 224, stk. 3, 2. pkt.,* ændres »båndlægges« til: »registreres« og i *3. pkt.* »båndlæggelse« til: »registrering«.

41. I *§ 226, stk. 4,* ændres »§ 131, stk. 1« til: »§ 131, stk. 9-10«.

42. I *§ 227, stk. 4,* ændres »§ 131, stk. 1« til: »§ 131, stk. 9-10«.

43. *§ 237, stk. 1,* affattes således:

»Finanstilsynet påser overholdelsen af denne lov og af de bestemmelser, der er udstedt i medfør af loven, jf. dog §§ 21 og 243, stk. 2. Erhvervs- og Selskabsstyrelsen påser overholdelsen af § 21.«

44. I *§ 242, stk. 2,* indsættes efter 1. pkt. som nyt punktum:

»Tilsvarende gælder for udenlandske forsikringsselskaber, der her i landet er berettigede til at udøve forsikringstjenesteydelsesvirk somhed, og som har fået Finanstilsynets tilladelse (koncession) til at dække andet end store risici.«

2. pkt. bliver herefter 3. pkt.

45. I *§ 242, stk. 3,* indsættes efter nr. 5 som nyt nummer:

- »6) Udenlandske forsikringsselskaber, der her i landet er berettiget til at udøve forsikringstjenesteydelsesvirksomhed, og som har fået Finanstilsynets tilladelse (koncession) til at dække andet end store risici.«

46. *§ 242, stk. 4, 3. pkt.,* affattes således:

»For udenlandske forsikringsselskaber med herværende forretningsafdeling og for udenlandske forsikringsselskaber, der her i landet er berettigede til at udøve forsikringstjenesteydelsesvirksomhed, og som har fået Finanstilsynets tilladelse (koncession) til at dække andet end store risici, anvendes bruttoindtægt for her i landet tegnede direkte forsikringer som grundlag.«

47. *§ 243, stk. 2,* affattes således:

»Stk. 2. Erhvervs- og Selskabsstyrelsen fastsætter regler om anmeldelse og registrering. Erhvervs- og Selskabsstyrelsen kan fastsætte regler om gebyrer for anmeldelse, udskrifter m.v. og for brugen af styrelsens edb-system. Styrelsen kan fastsætte gebyr for rykkerskrivelser m.v. ved for sen betaling.«

48. I *§ 245, stk. 2,* ændres »Finanstilsynet« til: »Erhvervs- og Selskabsstyrelsen«.

49. *§ 245, stk. 4, 3. pkt.,* affattes således:

»Retten tilsender Finanstilsynet og Erhvervs- og Selskabsstyrelsen udskrift af dommen.«

50. I *§ 247 a, stk. 2,* ændres »§ 33, stk. 4« til: »§ 33, stk. 3«.

51. I *§ 252* ændres »§ 131, stk. 1« til: »§ 131, stk. 9-10«.

52. I *§ 253, stk. 3,* ændres »§ 131, stk. 1« til: »§ 131, stk. 9-10«.

53. *§ 255, stk. 3,* ophæves.

Stk. 4 bliver herefter stk. 3.

54. I *§ 255, stk. 4,* som bliver stk. 3, ændres »stk. 1-3« til: »stk. 1-2«.

55. *§ 256* ophæves.

56. I *§ 260, stk. 1,* indsættes efter »§ 127,»: »§ 131,», og »§ 255, stk. 1-3« ændres til: »§ 255, stk. 1-2«.

§ 2

I lov nr. 188 af 9. maj 1984 om gennemførelse af konvention om, hvilken lov der skal anvendes på kontraktlige forpligtelser m.v., foretages følgende ændring:

I *§ 1* indsættes efter stk. 2 som nyt stykke:

»*Stk. 3.* Justitsministeren kan fastsætte bestemmelser til gennemførelse af lovvalgsregler i EF-direktiver. Det kan i den forbindelse fastsættes, at disse lovvalgsregler finder anvendelse i stedet for bestemmelserne i konventionen og i denne lov.«

Stk. 3 bliver herefter stk. 4.

§ 3

I lov nr. 326 af 24. maj 1989 om tilsyn med firmapensionskasser foretages følgende ændringer:

1. I *overskriften til kapitel 2* udgår », vedtægter«.

2. I *§ 10, stk. 1, nr. 1* , udgår »vedtægter, og«.

3. I *§ 16, stk. 1* , udgår », vedtægter«.

4. I *§ 16, stk. 2,* udgår »samt vedtægter«.

5. I *§ 17* udgår »vedtægter og«.

6. I *§ 17* indsættes efter stk. 1 som nyt stykke:

» *Stk. 2.* Finanstilsynet kan fastsætte bestemmelser, der under nærmere angivne betingelser undtager fra kravet om godkendelse af et eller flere af de forhold, der er nævnt i §§ 12 og 13, eller af ændringer heri.«

7. I *§ 18, stk. 1* , udgår »vedtægter og«.

8. I *§ 20, stk. 1* , udgår »de godkendte vedtægter,».

9. *§ 20, stk. 5* , affattes således:

»*Stk. 5.* Anmeldelse til Erhvervs- og Selskabsstyrelsen om ændring i pensionskassens vedtægter skal indsendes inden 1 måned efter ændringens vedtagelse. Med anmeldelsen skal selskabet indsende to daterede eksemplarer af vedtægterne med den fuldstændige nye affattelse til Erhvervs- og Selskabsstyrelsen, der videresender det ene eksemplar til Finanstilsynet.«

10. I *§ 20* indsættes efter stk. 5 som nyt stykke:

»*Stk. 6.* Inden 1 måned efter pensionskassens vedtagelse af ændring af pensionskassens pensionsregulativ eller tekniske og økonomiske grundlag skal ændringen indsendes til godkendelse i Finanstilsynet.«

11. I *overskriften til kapitel 6* udgår »båndlæggelse«.

12. *§ 49* affattes således:

» § 49. En pensionskasse skal registrere aktiver til en bogført værdi svarende til de af aktuaren opgjorte pensionshensættelser. De registrerede aktiver tjener udelukkende til fyldestgørelse af medlemmerne.

Stk. 2. Pensionshensættelserne opgøres af aktuaren ved regnskabsårets slutning. Pensionskassen har derpå 3 måneders frist til at registrere de fornødne aktiver til dækning af forsikringshensættelserne. I løbet af regnskabsåret skal foretages registrering til dækning af det beløb, pensionshensættelserne skønnes at være vokset i den forløbne del af regnskabsåret.

Stk. 3. Den statsautoriserede revisor har pligt til at påse, at stk.2, 2. og 3. pkt., overholdes.

Stk. 4. Såfremt en del af pensionshensættelserne dækkes af fast ejendom, der tilhører pensionskassen, registreres et tinglyst ejerpantebrev.

Stk. 5. Mindst 60 pct. af de registrerede aktiver skal være aktiver efter § 46.

Stk. 6. Pensionskassen giver indberetning til Finanstilsynet om, hvilke aktiver der er registreret i medfør af stk. 2, 2. og 3. pkt. Finanstilsynet eller den, Finanstilsynet bemyndiger hertil, kontrollerer tilstedeværelsen af disse aktiver efter nærmere regler fastsat af Finanstilsynet.

Stk. 7. Finanstilsynet fastsætter nærmere bestemmelser om pensionskassernes indberetnings- og registreringspligt.

Stk. 8. Finanstilsynet kan kræve registeret deponeret, hvis tilsynet beslutter at begrænse eller forbyde pensionskassens rådighed over dens aktiver. Ved deponering af registeret skal med hensyn til fondsaktiver Finanstilsynet registreres som berettiget i Værdipapircentralen, og med hensyn til de øvrige midler, der tjener til dækning af pensionshensættelserne, skal disse håndpantsættes til fordel for Finanstilsynet.

Stk. 9. Så længe registeret er deponeret, skal enhver ændring godkendes af Finanstilsynet og noteres i registeret.«

13. I *§ 50* ændres »båndlagt« til: »registreret«.

14. *§ 51* ophæves.

15. I *§ 63, 2. pkt.,* ændres »båndlagt« til: »registreret«.

16. I *§ 64, stk. 4, 3. pkt.,* ændres »båndlagt« til: »registreret« og »§§ 49-51« til: »§§ 49 og 50«.

17. I *§ 64, stk. 6, 1. pkt.,* ændres »båndlagte« til: »registrerede«.

18. *§ 65* affattes således:

» § 65. Finanstilsynet påser overholdelsen af denne lov og af de bestemmelser, der er udstedt i medfør af loven, jf. dog § 68. Erhvervs- og Selskabsstyrelsen påser overholdelsen af §§ 11 g og 20, stk. 4 og 5.«

19. I *§ 71, 1. pkt.,* indsættes efter »§ 43«: »§ 49«.

§ 4

Stk. 1. § 1, nr. 2, 3, 5-11, 13-17, 22, 24-32, 34, 36, 38, 43, 47-50 og 53-56, samt § 3, nr. 1-10,14 og 18, træder i kraft dagen efter bekendtgørelsen i Lovtidende.

Stk. 2. § 1, nr. 1, 4, 12, 18-21, 23, 33, 35, 37, 39-42, 44-46, 51 og 52, og § 2 samt § 3, nr. 11-13, 15-17 og 19, træder i kraft den 1. juli 1990.

Givet på Christiansborg Slot, den 16. maj 1990

Under Vor Kongelige Hånd og Segl

I Dronningens Navn:

FREDERIK

Kronprins

/ Anne Birgitte Lundholt

Officielle noter

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EINFÜHRUNGSGESETZ ZUM BÜRGERLICHEN GESETZBUCH

Fassung der Bekanntmachung vom 21.09.1994 (Bundesgesetzblatt I Seite 2494)

Erster Teil. Allgemeine Vorschriften (Art. 1-38)

Erstes Kapitel. Inkrafttreten. Vorbehalt für Landesrecht. Gesetzesbegriff

Zweites Kapitel. Internationales Privatrecht

Erster Abschnitt. Verweisung, Art. 3 - 6

Zweiter Abschnitt. Recht der natürlichen Personen und der Rechtsgeschäfte, Art. 7 - 12

Dritter Abschnitt. Familienrecht, Art. 13 - 24

Vierter Abschnitt. Erbrecht, Art. 25 - 26

Fünfter Abschnitt. Schuldrecht, Art. 27 - 38

Erster Unterabschnitt. Vertragliche Schuldverhältnisse, Art. 27 - 37

Zweiter Unterabschnitt. Außervertragliche Schuldverhältnisse, Art. 38

FÜNFTER ABSCHNITT. SCHULDRECHT

Erster Unterabschnitt. Vertragliche Schuldverhältnisse

Artikel 27. Freie Rechtswahl.

(1) Der Vertrag unterliegt dem von den Parteien gewählten Recht. Die Rechtswahl muß ausdrücklich sein oder sich mit hinreichender Sicherheit aus den Bestimmungen des Vertrages oder aus den Umständen des Falles ergeben. Die Parteien können die Rechtswahl für den ganzen Vertrag oder nur für einen Teil treffen.

(2) Die Parteien können jederzeit vereinbaren, daß der Vertrag einem anderen Recht unterliegen soll als dem, das zuvor auf Grund einer früheren Rechtswahl oder auf Grund anderer Vorschriften dieses Unterabschnitts für ihn maßgebend war. Die Formgültigkeit des Vertrages nach Artikel 11 und Rechte Dritter werden durch eine Änderung der Bestimmung des anzuwendenden Rechts nach Vertragsabschluß nicht berührt.

(3) Ist der sonstige Sachverhalt im Zeitpunkt der Rechtswahl nur mit einem Staat verbunden, so kann die Wahl des Rechts eines anderen Staates - auch wenn sie durch die Vereinbarung der Zuständigkeit eines Gerichts eines anderen Staates ergänzt ist - die Bestimmungen nicht berühren, von denen nach dem Recht jenes Staates durch Vertrag nicht abgewichen werden kann (zwingende Bestimmungen).

(4) Auf das Zustandekommen und die Wirksamkeit der Einigung der Parteien über das anzuwendende Recht sind die Artikel 11, 12, 29 Abs. 3 und Artikel 31 anzuwenden.

Artikel 28. Mangels Rechtswahl anzuwendendes Recht.

(1) Soweit das auf den Vertrag anzuwendende Recht nicht nach Artikel 27 vereinbart worden ist, unterliegt der Vertrag dem Recht des Staates, mit dem er die engsten Verbindungen aufweist. Läßt sich jedoch ein Teil des Vertrages von dem Rest des Vertrages trennen und weist dieser Teil eine engere Verbindung mit einem anderen Staat auf, so kann auf ihn ausnahmsweise das Recht dieses anderen Staates angewandt werden.

(2) Es wird vermutet, daß der Vertrag die engsten Verbindungen mit dem Staat aufweist, in dem die Partei, welche die charakteristische Leistung zu erbringen hat, im Zeitpunkt des Vertragsabschlusses ihren gewöhnlichen Aufenthalt oder, wenn es sich um eine Gesellschaft, einen Verein oder eine juristische Person handelt, ihre Hauptverwaltung hat. Ist der Vertrag jedoch in Ausübung einer beruflichen oder gewerblichen Tätigkeit dieser Partei geschlossen worden, so wird vermutet, daß er die engsten Verbindungen zu dem Staat aufweist, in dem sich deren Hauptniederlassung befindet oder in dem, wenn die Leistung nach dem Vertrag von einer anderen als der Hauptniederlassung zu

erbringen ist, sich die andere Niederlassung befindet. Dieser Absatz ist nicht anzuwenden, wenn sich die charakteristische Leistung nicht bestimmen läßt.

(3) Soweit der Vertrag ein dingliches Recht an einem Grundstück oder ein Recht zur Nutzung eines Grundstücks zum Gegenstand hat, wird vermutet, daß er die engsten Verbindungen zu dem Staat aufweist, in dem das Grundstück belegen ist.

(4) Bei Güterbeförderungsverträgen wird vermutet, daß sie mit dem Staat die engsten Verbindungen aufweisen, in dem der Beförderer im Zeitpunkt des Vertragsabschlusses seine Hauptniederlassung hat, sofern sich in diesem Staat auch der Verladeort oder der Entladeort oder die Hauptniederlassung des Absenders befindet. Als Güterbeförderungsverträge gelten für die Anwendung dieses Absatzes auch Charterverträge für eine einzige Reise und andere Verträge, die in der Hauptsache der Güterbeförderung dienen.

(5) Die Vermutungen nach den Absätzen 2, 3 und 4 gelten nicht, wenn sich aus der Gesamtheit der Umstände ergibt, daß der Vertrag engere Verbindungen mit einem anderen Staat aufweist.

Artikel 29. Verbraucherverträge.

(1) Bei Verträgen über die Lieferung beweglicher Sachen oder die Erbringung von Dienstleistungen zu einem Zweck, der nicht der beruflichen oder gewerblichen Tätigkeit des Berechtigten (Verbrauchers) zugerechnet werden kann, sowie bei Verträgen zur Finanzierung eines solchen Geschäfts darf eine Rechtswahl der Parteien nicht dazu führen, daß dem Verbraucher der durch die zwingenden Bestimmungen des Rechts des Staates, in dem er seinen gewöhnlichen Aufenthalt hat, gewährte Schutz entzogen wird,

1. wenn dem Vertragsabschluß ein ausdrückliches Angebot oder eine Werbung in diesem Staat vorausgegangen ist und wenn der Verbraucher in diesem Staat die zum Abschluß des Vertrages erforderlichen Rechtshandlungen vorgenommen hat,

2. wenn der Vertragspartner des Verbrauchers oder sein Vertreter die Bestellung des Verbrauchers in diesem Staat entgegengenommen hat oder

3. wenn der Vertrag den Verkauf von Waren betrifft und der Verbraucher von diesem Staat in einen anderen Staat gereist ist und dort seine Bestellung aufgegeben hat, sofern diese Reise vom Verkäufer mit dem Ziel herbeigeführt worden ist, den Verbraucher zum Vertragsabschluß zu veranlassen.

(2) Mangels einer Rechtswahl unterliegen Verbraucherverträge, die unter den in Absatz 1 bezeichneten Umständen zustande gekommen sind, dem Recht des Staates, in dem der Verbraucher seinen gewöhnlichen Aufenthalt hat.

(3) Auf Verbraucherverträge, die unter den in Absatz 1 bezeichneten Umständen geschlossen worden sind, ist Artikel 11 Abs. 1 bis 3 nicht anzuwenden. Die Form dieser Verträge unterliegt dem Recht des Staates, in dem der Verbraucher seinen gewöhnlichen Aufenthalt hat.

(4) Die vorstehenden Absätze gelten nicht für

1. Beförderungsverträge,

2. Verträge über die Erbringung von Dienstleistungen, wenn die dem Verbraucher geschuldeten Dienstleistungen ausschließlich in einem anderen als dem Staat erbracht werden müssen, in dem der Verbraucher seinen gewöhnlichen Aufenthalt hat. Sie gelten jedoch für Reiseverträge, die für einen Pauschalpreis kombinierte Beförderungs- und Unterbringungsleistungen vorsehen.

Artikel 30. Arbeitsverträge und Arbeitsverhältnisse von Einzelpersonen.

(1) Bei Arbeitsverträgen und Arbeitsverhältnissen darf die Rechtswahl der Parteien nicht dazu führen, daß dem Arbeitnehmer der Schutz entzogen wird, der ihm durch die zwingenden Bestimmungen des Rechts gewährt wird, das nach Absatz 2 mangels einer Rechtswahl anzuwenden wäre.

(2) Mangels einer Rechtswahl unterliegen Arbeitsverträge und Arbeitsverhältnisse dem Recht des Staates,

1. in dem der Arbeitnehmer in Erfüllung des Vertrages gewöhnlich seine Arbeit verrichtet, selbst wenn er vorübergehend in einen anderen Staat entsandt ist, oder

2. in dem sich die Niederlassung befindet, die den Arbeitnehmer eingestellt hat, sofern dieser seine Arbeit gewöhnlich nicht in ein und demselben Staat verrichtet, es sei denn, daß sich aus der Gesamtheit der Umstände ergibt, daß der Arbeitsvertrag oder das Arbeitsverhältnis engere Verbindungen zu einem anderen Staat aufweist; in diesem Fall ist das Recht dieses anderen Staates anzuwenden.

Artikel 31. Einigung und materielle Wirksamkeit.

(1) Das Zustandekommen und die Wirksamkeit des Vertrages oder einer seiner Bestimmungen beurteilen sich nach dem Recht, das anzuwenden wäre, wenn der Vertrag oder die Bestimmung wirksam wäre.

(2) Ergibt sich jedoch aus den Umständen, daß es nicht gerechtfertigt wäre, die Wirkung des Verhaltens einer Partei nach dem in Absatz 1 bezeichneten Recht zu bestimmen, so kann sich diese Partei für die Behauptung, sie habe dem Vertrag nicht zugestimmt, auf das Recht des Staates ihres gewöhnlichen Aufenthaltsorts berufen.

Artikel 32. Geltungsbereich des auf den Vertrag anzuwendenden Rechts.

(1) Das nach den Artikeln 27 bis 30 und nach Artikel 33 Abs. 1 und 2 auf einen Vertrag anzuwendende Recht ist insbesondere maßgebend für

1. seine Auslegung,

2. die Erfüllung der durch ihn begründeten Verpflichtungen,

3. die Folgen der vollständigen oder teilweisen Nichterfüllung dieser Verpflichtungen einschließlich der Schadensbemessung, soweit sie nach Rechtsvorschriften erfolgt, innerhalb der durch das deutsche Verfahrensrecht gezogenen Grenzen,

4. die verschiedenen Arten des Erlöschens der Verpflichtungen sowie die Verjährung und die Rechtsverluste, die sich aus dem Ablauf einer Frist ergeben.

5. die Folgen der Nichtigkeit des Vertrages.

(2) In bezug auf die Art und Weise der Erfüllung und die vom Gläubiger im Fall mangelhafter Erfüllung zu treffenden Maßnahmen ist das Recht des Staates, in dem die Erfüllung erfolgt, zu berücksichtigen.

(3) Das für den Vertrag maßgebende Recht ist insoweit anzuwenden, als es für vertragliche Schuldverhältnisse gesetzliche Vermutungen aufstellt oder die Beweislast verteilt. Zum Beweis eines Rechtsgeschäfts sind alle Beweismittel des deutschen Verfahrensrechts und, sofern dieses nicht entgegensteht, eines der nach Artikel 11 und 29 Abs. 3 maßgeblichen Rechte, nach denen das Rechtsgeschäft formgültig ist, zulässig.

Artikel 33. Übertragung der Forderung; gesetzlicher Forderungsübergang.

(1) Bei Abtretung einer Forderung ist für die Verpflichtungen zwischen dem bisherigen und dem neuen Gläubiger das Recht maßgebend, dem der Vertrag zwischen ihnen unterliegt.

(2) Das Recht, dem die übertragene Forderung unterliegt, bestimmt ihre Übertragbarkeit, das Verhältnis zwischen neuem Gläubiger und Schuldner, die Voraussetzungen, unter denen die Übertragung dem Schuldner entgegengehalten werden kann, und die befreiende Wirkung einer Leistung durch den Schuldner.

(3) Hat ein Dritter die Verpflichtung, den Gläubiger einer Forderung zu befriedigen, so bestimmt das für die Verpflichtung des Dritten maßgebende Recht, ob er die Forderung des Gläubigers gegen den Schuldner gemäß dem für deren Beziehungen maßgebenden Rechts ganz oder zu einem Teil geltend zu machen berechtigt ist. Dies gilt auch, wenn mehrere Personen dieselbe Forderung zu erfüllen haben und der Gläubiger von einer dieser Personen befriedigt worden ist.

Artikel 34. Zwingende Vorschriften.

Dieser Unterabschnitt berührt nicht die Anwendung der Bestimmungen des deutschen Rechts, die ohne Rücksicht auf das auf den Vertrag anzuwendende Recht den Sachverhalt zwingend regeln.

Artikel 35. Rück- und Weiterverweisung; Rechtsspaltung.

(1) Unter dem nach diesem Unterabschnitt anzuwendenden Recht eines Staates sind die in diesem Staat geltenden Sachvorschriften zu verstehen.

(2) Umfaßt ein Staat mehrere Gebietseinheiten, von denen jede für vertragliche Schuldverhältnisse ihre eigenen Rechtsvorschriften hat, so gilt für die Bestimmung des nach diesem Unterabschnitt anzuwendenden Rechts jede Gebietseinheit als Staat.

Artikel 36. Einheitliche Auslegung.

Bei der Auslegung und Anwendung der für vertragliche Schuldverhältnisse geltenden Vorschriften dieses Kapitels ist zu berücksichtigen, daß die ihnen zugrunde liegenden Regelungen des Übereinkommens vom 19. Juni 1980 über das auf vertragliche Schuldverhältnisse anzuwendende Recht (BGBl. 1986 II S. 809) in den Vertragsstaaten einheitlich ausgelegt und angewandt werden sollen.

Artikel 37. Ausnahmen.

Die Vorschriften dieses Unterabschnitts sind nicht anzuwenden auf

1. Verpflichtungen aus Wechseln, Schecks und anderen Inhaber- oder Orderpapieren, sofern die Verpflichtungen aus diesen anderen Wertpapieren aus deren Handelbarkeit entstehen;

2. Fragen betreffend das Gesellschaftsrecht, das Vereinsrecht und das Recht der juristischen Personen, wie zum Beispiel die Errichtung, die Rechts- und Handlungsfähigkeit, die innere Verfassung und die Auflösung von Gesellschaften, Vereinen und juristischen Personen sowie die persönliche gesetzliche Haftung der Gesellschafter und der Organe für die Schulden der Gesellschaft, des Vereins oder der juristischen Person;

3. die Frage, ob ein Vertreter die Person, für deren Rechnung er zu handeln vorgibt, Dritten gegenüber verpflichten kann, oder ob das Organ einer Gesellschaft, eines Vereins oder einer juristischen Person diese Gesellschaft, diesen Verein oder diese juristische Person gegenüber Dritten verpflichten kann;

4. Versicherungsverträge, die in dem Geltungsbereich des Vertrages zur Gründung der Europäischen Wirtschaftsgemeinschaft oder des Abkommens über den Europäischen Wirtschaftsraum belegende Risiken decken, mit Ausnahme von Rückversicherungsverträgen. Ist zu entscheiden, ob ein Risiko in diesem Gebiet belegen ist, so wendet das Gericht sein Recht an.

ALT="Greek"

Amended proposal for a European Parliament and Council Regulation on the law applicable to non contractual obligations (Rome II) (presented by the Commission pursuant to Article 250 (2) of the EC Treaty)

[pic] ¦ COMMISSION OF THE EUROPEAN COMMUNITIES ¦

Brussels, 21.02.2006

COM(2006) 83 final

2003/0168 (COD)

Amended proposal for a

EUROPEAN PARLIAMENT AND COUNCIL REGULATION

ON THE LAW APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS (ROME II)

(presented by the Commission pursuant to Article 250 (2) of the EC Treaty)

EXPLANATORY MEMORANDUM

1. BACKGROUND

The proposal[1] was adopted by the Commission on 22 July 2003 and transmitted to the European Parliament and the Council on the same date.

The European Economic and Social Committee adopted its Opinion on the Commission proposal on 30 June and I July 2004.[2]

The European Parliament adopted 54 amendments at first reading in plenary session on 6 July 2005.[3]

2. OBJECTI VE OF THE AMENDED PROPOSAL

The amended proposal adapts the original proposal for a Regulation on the law applicable to non-contractual obligations in the light of certain amendments passed by Parliament while reflecting proceedings in the Council.

3. COMMISSION OPINION ON THE AMENDMENTS ADOPTED BY PARLIAMENT

3.1 Amendments accepted in their entirety by the Commission

Amendments 2, 12, 17, 19, 22, 24, 35, 38, 39, 40, 44, 45, 48, 51, 52 and 53 can be accepted as presented by Parliament since they make improvements relating either to the clarity of the instrument or to questions of detail, or add material that will be potentially useful in implementing the initial proposal.

3.2 Amendments accepted by the Commission as to substance, subject to redrafting

Amendments 1, 5, 18, 20, 21, 23, 25, 28, 34, 36, 37, 46 and 49 can be accepted in principle, subject to redrafting.

Amendment 1 refers to the Rome I Regulation. But until the Regulation has been adopted, it would be preferable to refer to the future Community instrument that will replace the Rome Convention of 1980.

Amendment 5 brings non-contractual obligations based on strict liability and the capacity to incur liability in tort/delict within the scope of the Regulation. While the Commission can accept this analysis, it prefers to combine all the points concerning the scope of the Regulation in a single recital - recital 5 - without repeating all the questions already covered expressly by Article 12 (scope of the applicable law).

Amendment 18 specifies that unjust enrichment and administration of others' affairs without a mandate are to be considered as breaches of non-contractual obligations for the purposes of the Regulation. The Commission agrees with this. But to avoid making the text more cumbersome, it prefers to combine all the points concerning the scope of the Regulation in a single recital. Above all the Commission feels it is preferable to restate that there should be an autonomous and coherent interpretation of the legal concepts used in the Brussels I and Rome II instruments and the Rome Convention of 1980 - or the Community instrument that will replace it - by the Court of Justice rather than a long but inevitably incomplete list of details. This amendment also aims to exclude the liability of public administrations in respect of acts or omissions occurring in the performance of their duties from the scope of the Regulation. The Commission accepts the amendment as regards the substance but prefers the forms of words commonly used in international conventions.

Amendment 20 aims to exclude non-contractual obligations governed by specific provisions of company law or specific provisions applicable to other bodies corporate such as associations. The Commission accepts this amendment as regards the substance but proposes drafting it in simpler terms.

Amendment 21 would exclude non-contractual obligations arising from a trust. The Commission accepts the principle of the amendment but prefers to adopt the wording of the Hague Convention of 1 July 1985.

Amendment 23 would exclude liability for acts of public authority, including liability of publicly appointed office-holders. The Commission can accept the proposed solution as regards the substance but considers the amendment to be redundant in view of amendment 18.

Amendment 25 would allow certain parties who are already in a contractual relationship to choose the law applicable to their non-contractual obligation before the loss or damage is sustained. The Commission can accept the principle of an ex ante choice and agrees that the choice should be subject to strict conditions, in particular to protect the weaker party. But the conditions for the choice should be expressed in clear and simple terms. If the legal terms are not precise enough, parties might feel they were being given an incentive to litigate, which would make the procedure more cumbersome in terms of duration and cost and thus run counter to the objective pursued by the Regulation. The wording proposed by the Commission would both protect consumers and employees from ill-thought-out choices and exclude the possibility of such choices being imposed in standard contracts.

The Commission can accept the principle of amendments 28 and 34 , which would change the structure and title of the sections to make a clearer distinction between the general rule and special rules for certain categories of liability. To reflect proceedings in the Council and the differences between the Member States' legal systems, the Commission proposal makes an additional distinction between the special rules applicable to certain categories of liability and the specific rules governing unjust enrichment and administration of others' affairs.

Amendments 36 and 37 replace the single rule of Article 9 of the initial Commission proposal, applicable to all quasi-contracts, by two specific rules, one applying to unjust enrichment and the other to administration of others' affairs. The Commission can accept this additional distinction. In its amended proposal, however, it wishes to reflect certain technical improvements in the text emerging from Council proceedings.

Amendment 46 seeks to clarify the rule on direct actions against the insurer of the person liable without modifying it as to the substance. The Commission can accept the principle of redrafting the rule to make it easier to understand. But it prefers the form of words that emerged from the Council, which pursues the same objective.

Amendment 49 seeks to clarify the place where a natural person working from home has his habitual residence. The Commission can accept the principle of this clarification, but it prefers a form

of words that is closer to what emerged from the Council, whereby the court would prefer the actual place where an occupation is exercised rather than an official address which might turn out to be purely fictitious.

3.3 Amendments accepted by the Commission in part

Amendment 3 would adapt recital 7 of the initial proposal to the changes made by amendment 26 relating to the general rule in Article 3. Since the Commission can only accept part of amendment 26, it will have to reject the corresponding amendment to the recital. As regards the final sentence of the amendment, restating the need to respect the intentions of the parties, the idea is already covered by recital 8 in the Commission's amended proposal.

Amendment 14 relating to rules of safety and conduct in the country where the loss or damage is sustained serves two purposes: first, to add the words in so far as is appropriate so as to emphasise even further that the application of these rules is in the discretion of the court, and second, to exclude this possibility in matters of defamation and unfair competition. The Commission can accept the proposed clarification for the first sentence of the recital. But Parliament's report offers no justification for excluding the rule in matters of defamation and unfair competition. The Commission accordingly sees no reason for depriving the perpetrators of these two categories of liability of the protection which this rule gives them.

Amendment 26 relating to the general rule in Article 3 of the initial Commission proposal can be accepted as regards the drafting improvements to paragraph 1, which confirms the rule proposed by the Commission. On the other hand, the Commission cannot accept the changes to paragraphs 2 and 3. Paragraph 2 brings in a specific rule concerning traffic accidents which would subject to two different laws the non-contractual obligation and the amount of damages. The Commission appreciates Parliament's efforts to find a fair solution for so many people who are the victims of traffic accidents but this solution, which would diverge sharply from the law in force in the Member States, cannot be adopted without prior in-depth analysis. It is accordingly proposed that the question be considered in detail in the report on the application of the Regulation, provided for by amendment 54. As regards paragraph 3, the amendment would substantially alter the spirit of the instrument. While it is specified that the exception clause available to the court really would be applied by way of exception , the current wording runs the risk of sending a message that is contrary to the foreseeability objective pursued by the Regulation. The mere fact that the paragraph lists no less than five factors that can be taken into consideration to justify activating the exception clause means that the parties and the courts will routinely check the justification for the solution that the general rule would have generated even where it is at first sight satisfactory. The Commission therefore cannot accept this part of amendment 26 and maintains its initial approach, which the Council also appears to have endorsed. But the Commission does acknowledge the significance of some of the factors listed in paragraph 3, in particular as regards the parties' shared habitual residence, a pre-existing de facto or de jure relationship or the legitimate expectations of the parties. As the first two of these are already mentioned expressly in paragraphs 2 and 3 of the initial proposal, Article 5(3) of the amended proposal now contains an express reference to the legitimate expectations of the parties.

Amendment 50, which concerns the mechanism for the public policy (ordre public) exception, first inserts a new paragraph 1a) to spell out the concept of public policy of the forum by listing reference instruments. Even though the public policy of the Member States will inevitably contain common elements, there are variations from one to another. Consequently the Commission cannot accept such a list. The proposed new paragraph 1b) addresses the issue of damages in amounts regarded as excessive, such as certain types of exemplary or punitive damages, already covered by a specific rule in Article 24 of the initial Commission proposal. Subject to drafting changes to make clear that punitive

damages are not ipso facto excessive, the Commission can accept this rule being incorporated in the Article concerning the public policy of the forum. Under the proposed new paragraph 1c), only the parties would be able to rely on the exception clause. But it is for the court to ensure compliance with the fundamental values of the forum, and that task cannot be delegated to the parties, especially as they are not always legally represented. The Brussels I Regulation provides for the possibility for the court to withhold the exequatur from a judgment given in another Member State if it would be contrary to the public policy of the forum. The Commission accordingly cannot accept the proposed paragraph 1c).

Amendment 54 provides for an obligation for the Commission to report on the application of the Regulation after it is in force. While the Commission acknowledges the value of such a report, it cannot accept all the conditions provided for by the amendment. For one thing, the period of three years after adoption of the Regulation would not allow an adequate number of judgments to be given as the basis for an effective evaluation. As in the Brussels I Regulation, the Commission proposes a period of five years after the Regulation enters into force. As for the content of the report, the question of the amount of damages awarded by the courts and the elaboration of a code of ethics for the European media are way out of place in a conflict-of-laws regulation. The Commission accordingly cannot accept that these questions should be dealt with in a report on the application of this Regulation. On the other hand the Commission agrees with Parliament on the need to consider how to achieve a more uniform approach to applying foreign law in the courts of the Member States. It does not believe that the time is ripe for a legislative initiative in this respect (see amendment 43), but it can accept the idea of looking into the question in depth in the application report.

3.4 Amendments rejected

Amendments 4, 9, 10, 15 and 16 are not acceptable to the Commission as it rejects amendments 26, 30, 54 (paragraph 3), 31 and 42 to which they correspond.

Amendments 6, 7, 8, 11 and 13 would adapt the recitals to reflect the removal of several special rules for specific forms of liability as proposed in amendments 27, 29 and 33. Since the Commission cannot accept the deletion of these special rules (see above), it must logically reject the corresponding changes to the recitals. In its report, however, Parliament does not exclude the possibility of keeping the special rules, as long as their scope is clearly defined, particular as regards unfair trading practices and damage to the environment. Recitals 12, 13 and 14 of the amended proposal now accordingly refer to the relevant Community secondary legislation. The legal terminology of these Articles has also been changed to align it on that used in the secondary legislation. But while the concepts are thus better defined in Community law, it must still be borne in mind that they may be defined in broader terms than in Community law when they are used for the determination of a tort/delict for the purposes of private international law.

Amendment 27 would abolish the special rule for product liability. As in the case of the other torts/delicts such as unfair competition and environmental damage, the Commission considers that the general rule would not make it possible to foresee the applicable law with reasonable certainty. The place where the damage arises may be the result of pure chance in view of the great mobility of consumer goods (imagine a Dutch-made hairdryer, owned by a German tourist travelling in Thailand). Since in this area there are very often amicable settlements between insurers, it is particularly important to come up with a clear, foreseeable rule to facilitate such agreements. The Commission accordingly cannot accept the proposed deletion.

Amendment 29 would abolish the special rule for anti-competitive practices. The Commission cannot accept this amendment: Article 5 of the initial proposal did not seek to introduce a rule differing from the general rule on the substance but simply to determine more accurately the place where the damage arises, which is not always an easy matter. Article 7 has been slightly reworded in the

amended proposal to make clear that the aim is solely to determine more accurately where the damage arises. To meet the European Parliament's requests regarding definitions, the Commission has also opted to use terminology in Article 7 of the amended proposal that is directly inspired by Directive 2005/29 of 11 May 2005. The result, a contrario , is that non-contractual obligations arising from anti-competitive practices outlawed under Articles 81 and 82 of the Treaty or equivalent rules in the Member States are not covered by Article 7; they are consequently subject to the general rule in Article 5. But in its Green Paper Damages actions for breach of the EC antitrust rules , scheduled for publication in December 2005, the Commission is planning to provoke debate on the question of the law applicable to civil actions for compensation for damage arising from an anti competitive practice. Depending on the replies, the Commission may wish to support a different solution in the course of the codecision procedure.

Amendment 57 would change the substance of the rule applicable to violations of privacy, particularly by the press. The Commission cannot accept this amendment, which is too generous to press editors rather than the victim of alleged defamation in the press and does not reflect the solution taken by a large majority of Member States. Since it is not possible to reconcile the Council's text and the text adopted by Parliament at first reading, the Commission considers that the best solution to this controversial question is to exclude all press offences and the like from the proposal and delete Article 6 of the original proposal. Other privacy violations would be covered by Article 5.

Amendment 31 would bring in a new special rule concerning damage arising from the exercise of the right to strike by employed people. The Commission is sensitive to the underlying political arguments but it cannot accept this amendment as the proposed rule is too rigid.

Amendment 32 restates that, until such time as the Community adopts detailed legislation on the law applicable to traffic accidents, Member States will either apply the 1971 Hague Convention or the general rules of the Rome II Convention. Since it is quite possible that the implementation report provided for by Article 26 of the amended proposal will confirm that the general rules of the Regulation provide a satisfactory solution, the Commission cannot commit itself now to a future legislative proposal and accordingly rejects this amendment. Paragraph 2 of this amendment reiterates the proposal made in amendment 26 as regards the introduction of a new special rule on the evaluation of the damage arising from a traffic accident, which the Commission cannot accept (see above under amendment 26).

Amendment 33 would delete the special rule for damage to the environment. The Commission cannot accept this amendment as the proposed rule reflects the polluter pays principle promoted by the Community and already applied in several Member States. The Greens, incidentally, abstained from voting on this amendment in plenary.

Amendment 41 again raises the question of the evaluation of the damages, which would generally (except as regards traffic accidents) be governed by the lex fori. The Commission cannot accept this amendment. This is a vital question for victims not only of traffic accidents but of any other situations, in particular personal injury, and the rules laid down by the Regulation offer a fair solution reflecting, the legitimate expectations both of the victim and of the person causing the damage.

Amendments 42 and 43 address the question of the application of foreign law by the court. The former would require the parties to indicate the law applicable in their statement of claim. The Commission is in favour of making things easier for courts dealing with international litigation, but this rule would be too difficult to implement as parties are not all capable of stating what law is applicable to their situation, in particular when they are not legally represented. The purpose of the latter is to formalise the rule already in operation in some Member States that the court must itself

determine the content of the foreign law, though it can seek help from the parties. The Commission is of the opinion that, as matters stand, most Member States would not be able to apply the rule as they do not have proper structures in place to enable the courts to apply the foreign law in this way, and it rejects this amendment. But it agrees that this is an avenue well worth exploring and that special attention should be paid to it in the implementation report.

Amendment 47 is redundant with amendment 22, which the Commission prefers on drafting grounds. Amendment 47 is accordingly rejected.

4. CONCLUSION

Acting under Article 250(2) of the EC Treaty, the Commission amends its proposal as follows.

2003/0168 (COD)

Amended proposal for a

EUROPEAN PARLIAMENT AND COUNCIL REGULATION

ON THE LAW APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS (ROME II)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) thereof,

Having regard to the proposal from the Commission,[4]

Having regard to the opinion of the European Economic and Social Committee,[5]

Acting in accordance with the procedure laid down in Article 251 of the Treaty,[6]

Whereas:

(1) The Union has set itself the objective of establishing an area of freedom, security and justice. To that end the Community must adopt measures relating to judicial cooperation in civil matters with a cross-border impact to the extent necessary for the proper functioning of the internal market, including measures promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction.

(2) For the purposes of effectively implementing the relevant provisions of the Amsterdam Treaty, the Council (Justice and Home Affairs) on 3 December 1998 adopted a plan of action specifying that the preparation of a legal instrument on the law applicable to non-contractual obligations is among the measures to be taken within two years following the entry into force of the Amsterdam Treaty.[7]

(3) The Tampere European Council on 15 and 16 October 1999[8] approved the principle of mutual recognition of judgments as a priority matter in the establishment of a European law-enforcement area. The mutual recognition programme[9] states that measures relating to harmonisation of conflict-of-law rules are measures that actually do help facilitate the implementation of the principle.

(4) The proper functioning of the internal market creates a need, in order to improve the foreseeability of the outcome of litigation, certainty as to the law and the free movement of judgments, for the rules of conflict of laws in the Member States to designate the same national law irrespective of the country of the court in which an action is brought.

(5) The scope and provisions of the this Regulation, which are subject to autonomous interpretation by the Court of Justice, must be determined in such a way as to be consistent with Regulation (EC) No 44/2001[10] of 22 December 2000 on jurisdiction and the recognition and enforcement

of judgments in civil and commercial matters (Brussels I), [11] the Rome Convention of 1980[12][13]. and the Community instrument which will replace it. This Regulation will accordingly apply not only to actions for compensation for damage that has already arisen but also to actions to prevent likely future damage. It also covers obligations based on rules imposing strict liability.

(6) Only uniform rules applied irrespective of the law they designate can avert the risk of distortions of competition between Community litigants.

(7) The principle of the lex loci delicti commissi is the basic solution for non-contractual obligations in virtually all the Member States, but the practical application of the principle where the component factors of the case are spread over several countries is handled differently. This situation engenders uncertainty in the law.

(7) The concern for consistency in Community law requires that this Regulation be without prejudice to provisions relating to or having an effect on the applicable law, contained in the treaties or instruments of secondary legislation other than this Regulation, such as conflict rules in specific matters, overriding mandatory rules of Community origin, and the basic legal principles of the internal market. As a result, this Regulation should promote the proper functioning of the internal market, in particular the free movement of goods and services.

(8) To respect the intentions of the parties, they must be able to make an express choice as to the law applicable to a non-contractual obligation. However, their choice should be subject to certain conditions, and consumers and employees should have no possibility of choosing the applicable law before the event from which the damage occurs.

(9) The principle of the lex loci delicti commissi is the basic solution for non-contractual obligations in virtually all the Member States, but the practical application of the principle where the component factors of the case are spread over several countries is handled differently. This situation engenders uncertainty in the law.

(8 10) The uniform rule must serve to improve the foreseeability of court decisions and ensure a reasonable balance between the interests of the person claimed to be liable and the person who has sustained damage. A connection with the country where the direct damage occurred (lex loci delicti commissi) strikes a fair balance between the interests of the person causing the damage and the person sustaining the damage, and also reflects the modern approach to civil liability and the development of systems of strict liability.

(9 11) Specific rules should be laid down for special torts/delicts where the general rule does not allow a reasonable balance to be struck between the interests at stake.

(10 12) Regarding product liability, as penalised under Directive 374/1985/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products,[14] the conflict rule must meet the objectives of fairly spreading the risks inherent in a modern high-technology society, protecting consumers' health, stimulating innovation, securing undistorted competition and facilitating trade. Connection to the law of the place where the person sustaining the damage has his habitual residence, together with a foreseeability clause, is a balanced solution in regard to these objectives.

(11 13) In matters of unfair competition commercial practices, as penalised under Directive 29/2005/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market,[15] the general conflict rule must makes it possible to protect competitors, consumers and the general public and ensure that the market economy functions properly. The connection to the law of the relevant market generally satisfies these objectives, though in specific circumstances other rules might be appropriate The provision in a specific Article that the place where the damage occurs

is the place where the market is affected helps to increase certainty as to the law.

(12) In view of the Charter of Fundamental Rights of the European Union and the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, the conflict must strike a reasonable balance as regards violations of privacy and rights in the personality. Respect for the fundamental principles that apply in the Member States as regards freedom of the press must be secured by a specific safeguard clause.

(1314) Regarding violations of the environment, environmental damage to which Directive 35/2004/EC of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage [16] applies, the solution of allowing the person sustaining the loss to choose the applicable law is fully compliant with Article 174 of the Treaty, which provides that there must a high level of protection based on the precautionary principle and the principle that preventive action must be taken, the principle of priority for corrective action at source and the principle that the polluter pays fully justifies the use of the principle of discriminating in favour of the person sustaining the damage.

(1415) Regarding violations of intellectual property rights, the universally acknowledged principle of the lex loci protectionis should be preserved. For the purposes of this Regulation, the term intellectual property rights means copyright, related rights, sui generis right for the protection of databases and industrial property rights.

(1516) Similar Special rules should be laid down for non-contractual obligations arising from provided for where damage is caused by an act other than a tort or delict, such as unjust enrichment and agency without authority.

(16) To preserve their freedom of will, the parties should be allowed to determine the law applicable to a non-contractual obligation. Protection should be given to weaker parties by imposing certain conditions on the choice.

(17) Considerations of the public interest warrant giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory rules

(18) The concern to strike a reasonable balance between the parties means that account must be taken of the rules of safety and conduct in operation in the country in which the harmful act was committed, even where the non-contractual obligation is governed by another law, in so far as is appropriate.

(19) The concern for consistency in Community law requires that this Regulation be without prejudice to provisions relating to or having an effect on the applicable law, contained in the treaties or instruments of secondary legislation other than this Regulation, such as the conflict rules in specific matters, overriding mandatory rules of Community origin, the Community public policy exception and the specific principles of the internal market. Furthermore, this regulation is not intended to create, nor shall its application lead to obstacles to the proper functioning of the internal market, in particular free movement of goods and services.

(2019) Respect for international commitments entered into by the Member States means that this Regulation should not affect conventions relating to specific matters to which the Member States are parties. To make the rules easier to read, the Commission will publish the list of the relevant conventions in the Official Journal of the European Union on the basis of information supplied by the Member States.

(2120) Since the objective of the proposed action, namely better foreseeability of court judgments requiring genuinely uniform rules determined by a mandatory and directly applicable Community legal

instrument, cannot be adequately attained by the Member States, who cannot lay down uniform Community rules, and can therefore, by reason of its effects throughout the Community, be better achieved at Community level, the Community can take measures, in accordance with the subsidiarity principle set out in Article 5 of the Treaty. In accordance with the proportionality principle set out in that Article, a regulation, which increases certainty in the law without requiring harmonisation of the substantive rules of domestic law, does not go beyond what is necessary to attain that objective.

(2221) [In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and the Treaty establishing the European Community, these Member States have stated their intention of participating in the adoption and application of this Regulation./ In accordance with Articles 1 and 2 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and the Treaty establishing the European Community, these Member States are not participating in the adoption of this Regulation, which will accordingly not be binding on those Member States.]

(2322) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and the Treaty establishing the European Community, that Member State is not participating in the adoption of this Regulation, which will accordingly not be binding on that Member State,

HAVE ADOPTED THIS REGULATION:

Chapter I - Scope

Article 1 - Material scope

1. This Regulation shall apply, in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters.

It shall not apply to revenue, customs or administrative matters.

2. The following are excluded from the scope of this Regulation:

a) non-contractual obligations arising out of family relationships and relationships deemed to be equivalent, including having comparable effects under the law applicable to such relationships, including maintenance obligations;

b) non-contractual obligations arising out of matrimonial property regimes and successions or regimes having comparable effects under the law applicable to such relationships;

c) non-contractual obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other instruments arise out of their negotiable character;

d) the personal legal liability of officers and members as such for the debts of a company or firm or other body corporate or incorporate, and the personal legal liability of persons responsible for carrying out the statutory audits of accounting documents non-contractual obligations, in particular the liability of partners, management bodies and persons responsible for carrying out the statutory audits of accounting documents of an association, a company or firm or other body corporate or incorporate, provided they are subject to specific rules of company law or other specific provisions applicable to such persons or bodies;

e) non-contractual obligations among arising from relationships between the settlers, trustees and beneficiaries of a trust created voluntarily and evidenced in writing;

f) non-contractual obligations arising out of nuclear damage;

g) non-contractual obligations arising in connection with the liability of the State for acts done

in the exercise of public authority (acta iure imperii);

h) violations of privacy and of personal rights by the media;

i) evidence and procedure, without prejudice to Article 19.

3. For the purposes of this Regulation, Member State means any Member State other than [the United Kingdom, Ireland or] Denmark.

Article 2 - Universal application Application of the law of a third country

Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.

Article 3 - Relationship with other provisions of Community law

1. This Regulation shall not prejudice the application or adoption of acts of the institutions of the European Communities which:

a) in relation to particular matters, lay down choice-of-law rules relating to non-contractual obligations; or

b) lay down rules which apply irrespective of the national law governing the relevant non-contractual obligation by virtue of this Regulation; or

c) preclude the application of one or more provisions of the law of the forum or the law designated by this Regulation;

d) lay down rules to promote the smooth operation of the internal market, where such rules cannot apply at the same time as the law designated by the rules of private international law.

Chapter II - Uniform rules

Section 1 RULES APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS ARISING OUT OF A TORT OR DELICT FREEDOM OF CHOICE

Article 3 - General rule Article 4 - Freedom of choice

1. The parties may agree, by an agreement entered into after their dispute arose, to submit non-contractual obligations to the law of their choice. The choice must be expressed or demonstrated with reasonable certainty by the circumstances of the case. It may not affect the rights and obligations of third parties.

2. Where all the parties exercise a commercial activity, such choice may also be made by an agreement freely negotiated before the event from which the damage arises occurs.

3. If all the other elements of the situation at the time when the loss is sustained are located in a country other than the country whose law has been chosen, the choice of the parties shall be without prejudice to the application of rules of the law of that country which cannot be derogated from by contract (mandatory provisions).

4. The parties' choice of the applicable law shall not debar the application of provisions of Community law where the other elements of the situation were located in one of the Member States of the European Community at the time when the loss was sustained.

SECTION 2GENERAL RULE APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS ARISING OUT OF A TORT OR DELICT

Article 5 - General rule

1. Where no choice has been made under Article 4, the law applicable to a non-contractual obligation

shall be the law of the country in which the damage arises or is likely to arise, irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event arise.

2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country when the damage occurs, the non-contractual obligation shall be governed by the law of that country.

3. Notwithstanding paragraphs 1 and 2, where it is clear from all the circumstances of the case that the non-contractual obligation is manifestly more closely connected with another country, the law of that other country shall apply. A manifestly closer connection with another country may be based in particular on a pre-existing relationship between the parties, such as a contract that is closely connected with the non-contractual obligation in question. For the purpose of assessing the existence of a manifestly closer connection with another country, account shall be taken inter alia of the expectations of the parties regarding the applicable law.

SECTION 3RULES APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS ARISING FROM SPECIFIC TORTS/DELICTS

Article 4 6 - Product liability

Without prejudice to Article 35(2) and (3), the law applicable to a non-contractual obligation arising out of damage or a risk of damage caused by a defective product shall be that of the country in which the person sustaining the damage is habitually resident at the time when the damage occurs, unless the person claimed to be liable can show that the product was marketed in that country without his consent, in which case the applicable law shall be that of the country in which the person claimed to be liable is habitually resident.

Article 5 - Unfair competition Article 7 - Unfair commercial practices

1. The law applicable to a non-contractual obligation arising out of an act of unfair competition unfair commercial practice shall be designated by Article 5(1). The country where the damage occurs or threatens to occur shall be the country where competitive relations or the collective interests of consumers are or are likely to be directly and substantially affected.

2. Where an act of unfair competition affects exclusively the interests of a specific competitor, Article 3 5(2) and (3) shall also apply.

Article 6 - Violations of privacy and rights relating to the personality

1. The law applicable to a non-contractual obligation arising out of a violation of privacy or rights relating to the personality shall be the law of the forum where the application of the law designated by Article 3 would be contrary to the fundamental principles of the forum as regards freedom of expression and information.

2. The law applicable to the right of reply or equivalent measures shall be the law of the country in which the broadcaster or publisher has its habitual residence.

Article 7 - Violation of the environment Article 8 - Environmental damage

The law applicable to a non-contractual obligation arising out of a violation of the environment environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined by the application of Article 35(1), unless the person sustaining damage prefers to base his claim on the law of the country in which the event giving rise to the damage occurred.

Article 89 - Infringement of intellectual property rights

1. The law applicable to a non-contractual obligation arising from an infringement of a an intellectual property right shall be the law of the country for which protection is sought.

2. In the case of a non-contractual obligation arising from an infringement of a unitary Community industrial property right, the relevant Community instrument shall apply. For any question that is not governed by that instrument, the applicable law shall be the law of the Member State in which the act of infringement is committed.

3. Notwithstanding Sections 1, 2 and 4, this Article shall apply to all non-contractual obligations arising from an infringement of an intellectual property right.

SECTION 2 RULES APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS ARISING OUT OF AN ACT OTHER THAN A TORT OR DELICT

Article 9 - Determination of the applicable law

SECTION 4SPECIAL RULES APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS ARISING OUT OF UNJUST ENRICHMENT AND NEGOTIORUM GESTIO

Article 10- Unjust enrichment

1. If a non-contractual obligation arising out of an act other than a tort or delict unjust enrichment, including payment of amounts wrongly received, concerns a relationship previously existing between the parties, such as a contract or a tort or delict to which section 2 or 3 applies, which is closely connected with the non-contractual obligation, it shall be governed by the law that governs that relationship.

2. Without prejudice to Where the applicable law cannot be determined on the basis of paragraph 1, and the parties have their habitual residence in the same country when the event giving rise to the damage occurs when the event giving rise to unjust enrichment occurs, the law applicable to the non-contractual obligation shall be the law of that country.

3. Without prejudice to Where the applicable law cannot be determined on the basis of paragraphs 1 and 2, a non-contractual obligation arising out of unjust enrichment shall be governed by the law of the country in which the enrichment takes place the event giving rise to unjust enrichment substantially occurs.

4. Without prejudice to paragraphs 1 and 2, the law applicable to a non-contractual obligation arising out of actions performed without due authority in connection with the affairs of another person shall be the law of the country in which the beneficiary has his habitual residence at the time of the unauthorised action. However, where a non-contractual obligation arising out of actions performed without due authority in connection with the affairs of another person relates to the physical protection of a person or of specific tangible property, the law applicable shall be the law of the country in which the beneficiary or property was situated at the time of the unauthorised action.

5. Notwithstanding paragraphs 1, 2, 3 and 4, where it is clear from all the circumstances of the case that the non-contractual obligation is manifestly more closely connected with another country, the law of that other country shall apply.

6. Nowithstanding the present Article, all non-contractual obligations in the field of intellectual property shall be governed by Article 8.

4. Where it is clear from all the circumstances of the case that the non-contractual obligation arising out of unjust enrichment is manifestly more closely connected with a country other than the one indicated by paragraphs 1, 2 or 3, the law of that other country shall apply.

Article 11- Negotiorum gestio

1. If a non-contractual obligation arising out of an action or actions performed without due authority in connection with the affairs of another person concerns a relationship previously existing between the parties, such as a contract or a tort or delict to which section 2 or 3 applies, which is closely connected with that non-contractual obligation, it shall be governed by the law that governs that relationship.

2. Where the applicable law cannot be determined on the basis of paragraph 1 and the parties have their habitual residence in the same country when the event giving rise to the loss or damage occurs, the applicable law shall be the law of that country.

3. Where the applicable law cannot be determined on the basis of paragraphs 1 and 2, the applicable law shall be the law of the country in which the action took place.

4. Where it is clear from all the circumstances of the case that the non-contractual obligation is manifestly more closely connected with a country other than the one indicated by paragraphs 1, 2 or 3, the law of that other country shall apply.

SECTION 3 COMMON RULES APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS ARISING OUT OF A TORT OR DELICT AND OUT OF AN ACT OTHER THAN A TORT OR DELICT

Article 10 - Freedom of choice

1. The parties may agree, by an agreement entered into after their dispute arose, to submit non-contractual obligations other than the obligations to which Article 8 applies to the law of their choice. The choice must be expressed or demonstrated with reasonable certainty by the circumstances of the case. It may not affect the rights of third parties.

2. If all the other elements of the situation at the time when the loss is sustained are located in a country other than the country whose law has been chosen, the choice of the parties shall be without prejudice to the application of rules of the law of that country which cannot be derogated from by contract.

3. The parties' choice of the applicable law shall not debar the application of provisions of Community law where the other elements of the situation were located in one of the Member States of the European Community at the time when the loss was sustained.

SECTION 5COMMON RULES

Article 1112 - Scope of the law applicable to non-contractual obligations

The law applicable to non-contractual obligations under Articles 34 to 1011 of this Regulation shall govern in particular:

a) the conditions and extent of liability, including the determination of persons who are liable for acts performed by them;

b) the grounds for exemption from liability, any limitation of liability and any division of liability;

c) the existence and kinds of injury or damage for which compensation may be due;

d) within the limits of its powers, the measures which a court has power to take under its procedural law to prevent or terminate injury or damage or to ensure the provision of compensation;

e) the assessment of the damage in so far as prescribed by law;

f) the question whether a right to compensation may be assigned or inherited;

g) persons entitled to compensation for damage sustained personally;

h) liability for the acts of another person;

i) the manners in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement of a period of prescription or limitation and the interruption and suspension of the period.

Article 1213 - Overriding mandatory rules

21. Nothing in this Regulation shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation.

1.2. Where the law of a specific country is applicable by virtue of this Regulation, effect may be given to the mandatory rules of another country with which the situation is closely connected, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the non-contractual obligation. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

Article 1314 - Rules of safety and conduct

Whatever may be the applicable law, in determining liability account shall be taken, as a matter of fact, and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the damage.

Article 1415 - Direct action against the insurer of the person liable

The right of Persons who have suffered damage to may take direct action against the insurer of the person claimed to be liable shall be governed by where such actions are provided for either by the law applicable to the non-contractual obligation unless the person who has suffered damage prefers to base his claims on or by the law applicable to the insurance contract.

Article 1516 - Statutory subrogation and multiple liability

1. Where a person (the creditor) has a non-contractual claim upon another (the debtor), and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, the law which governs the third person's duty to satisfy the creditor shall determine whether the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship in whole or in part.

2. The same rule shall apply where several persons are subject to the same claim and one of them has satisfied the creditor.

Where a third person, for example an insurer, has a duty to satisfy a creditor in respect of a non-contractual obligation, the right of that third person to take action against the person owing the non-contractual obligation shall be governed by the law applicable to the duty to satisfy the third person's claim, for example under an insurance contract.

Article 1617 - Multiple liability

Where a person has a claim upon several debtors who are jointly liable and one of those debtors has already satisfied the creditor, the right of that debtor to take action against the other debtors shall be governed by the law applicable to that debtor's duty to satisfy the creditor.

Article 18 - Formal validity

A unilateral act intended to have legal effect and relating to a non-contractual obligation is formally valid if it satisfies the formal requirements of the law which governs the non-contractual

obligation in question or the law of the country in which this act is done.

Article 1719 - Evidence

1. The law governing a non-contractual obligation under this Regulation applies to the extent that, in matters of non-contractual obligations, it contains rules which raise presumptions of law or determine the burden of proof.

2. Acts intended to have legal effect may be proved by any mode of proof recognised by the law of the forum or by any of the laws referred to in Article 1618 under which that act is formally valid, provided that such mode of proof can be administered by the forum.

Chapter III - Other provisions

Article18 - Assimilation to the territory of a State

For the purposes of this Regulation, the following shall be treated as being the territory of a State:

a) installations and other facilities for the exploration and exploitation of natural resources in, on or below the part of the seabed situated outside the State' s territorial waters if the State, under international law, enjoys sovereign rights to explore and exploit natural resources there;

b) a ship on the high seas which is registered in the State or bears lettres de mer or a comparable document issued by it or on its behalf, or which, not being registered or bearing lettres de mer or a comparable document, is owned by a national of the State;

c) an aircraft in the airspace, which is registered in or on behalf of the State or entered in its register of nationality, or which, not being registered or entered in the register of nationality, is owned by a national of the State.

Article 1920 - Assimilation to habitual residence

1. For companies or firms and other bodies or incorporate or unincorporate, the principal place of business shall be considered to be the habitual residence. However, where the event giving rise to the damage occurs or the damage arises in the course of operation of a subsidiary, a branch or any other establishment, the place of business shall take the place of the habitual residence.

2. Where the event giving rise to the damage occurs or the damage arises in the course of the business activity of a natural person, that natural person's principal place of business shall take the place of the habitual residence.

3. For the purpose of Article 6(2), the place where the broadcaster is established within the meaning of the directive 89/552/EEC, as amended by the directive 97/36/EC, shall take the place of the habitual residence.

Article 2021 - Exclusion of renvoi

The application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law.

Article 2122 - States with more than one legal system

1. Where a State comprises several territorial units, each of which has its own rules of law in respect of non-contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation.

2. A State within which different territorial units have their own rules of law in respect of non-contractual

obligations shall not be bound to apply this Regulation to conflicts solely between the laws of such units.

Article 2223 - Public policy of the forum

The application of a rule of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum. In particular, the application under this Regulation of a law that would have the effect of causing non-compensatory damages to be awarded that would be excessive may be considered incompatible with the public policy of the forum.

Article 2324 - Relationship with other provisions of Community law international conventions

1. This Regulation shall not prejudice the application of provisions contained in the Treaties establishing the European Communities or in acts of the institutions of the European Communities which: This Regulation shall not prejudice the application of multilateral international conventions to which the Member States are parties when this Regulation is adopted and which, in relation to particular matters, lay down conflict-of-law rules relating to non-contractual obligations and of which the Commission has been notified in accordance with Article 26.

- -in relation to particular matters, lay down choice-of-law rules relating to non-contractual obligations; or

- -lay down rules which apply irrespective of the national law governing the non-contractual obligation in question by virtue of this Regulation; or

- -prevent application of a provision or provisions of the law of the forum or of the law designated by this Regulation.

2. This Regulation shall not prejudice the application of Community instruments which, in relation to particular matters and in areas coordinated by such instruments, subject the supply of services or goods to the laws of the Member State where the service-provider is established and, in the area coordinated, allow restrictions on freedom to provide services or goods originating in another Member State only in limited circumstances.

Article 24 - Non-compensatory damages

The application of a provision of the law designated by this Regulation which has the effect of causing non-compensatory damages, such as exemplary or punitive damages, to be awarded shall be contrary to Community public policy.

Article 25 - Relationship with existing international conventions

This Regulation shall not prejudice the application of international conventions to which the Member States are parties when this Regulation is adopted and which, in relation to particular matters, lay down conflict-of-law rules relating to non-contractual obligations.

2. However, where, at the time of conclusion of the contract, all the material aspects of the situation are located in one or more Member States, this Regulation shall take precedence over the following Conventions:

- the Hague Convention of 4 May 1971 on the Law Applicable to Traffic Accidents;

- the Hague Convention of 2 October 1973 on the Law Applicable to Products Liability.

Chapter IV - Final provisions

Article 2625 - List of conventions referred to in Article 2524

1. The Member States shall notify the Commission, no later than 30 June 2004 ..., of the list of conventions referred to in Article 2524. After that date, the Member States shall notify the Commission of all denunciations of such conventions.

2. The Commission shall publish the list of conventions referred to in paragraph 1 in the Official Journal of the European Union within six months of receiving the full that list.

Article 2726 - Implementation report

Not later than five years after this Regulation enters into force, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on its application. If necessary, this report shall be accompanied by proposals to adapt the Regulation.

In making its report, the Commission shall pay particular attention to the effects of the way in which foreign law is treated in the courts of the Member States. If necessary, the report shall include recommendations as to the desirability of a common approach to the application of foreign law.

The report shall consider whether Community legislation specifically dealing with the law applicable to traffic accidents ought to be proposed.

Article 27 - Entry into force and application in time

This Regulation shall enter into force on 1 January 2005....

It shall apply to non-contractual obligations arising out of acts occurring after its entry into force.

This Regulation shall be binding in its entirety and directly applicable in all Member States in accordance with the Treaty establishing the European Community.

Done at Brussels,

For the European Parliament For the Council

The President The President

[1] COM (2003) 427 final - 2003/0168 (COD); not yet published in the OJ.

[2] OJ C 241, 28.9.2004, p. 1.

[3] A6-0211/2005.

[4] OJ C [...], [...] , p. [...]p. Not yet published in the OJ.

[5] OJ C 241, 28.9.2004, p.1.

[6] Opinion of the European Parliament of [...] (JO C [...] du [...], [...] 6 July 2005.

[7] Action plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice: OJ C 19, 23.1.1999, p. 1.

[8] Presidency conclusions of 16 October 1999, points 28 to 39.

[9] OJ C 12, 15.1.2001, p. 1.

[10] OJ L 12, 16.1.2001, p. 1.

[11] OJ L 12, 16.1.2001, p.1

[12] The consolidated text of the Convention as amended by the various Conventions of Accession, and the declarations and protocols annexed to it, is published in OJ C 27, 26.1.1998, p. 34.

[13] The consolidated text of the Convention, as amended by the various Conventions of Accession, and the declarations and protocols annexed to it, is published in OJ C 27, 26.1.1998, p. 34.

[14] OJ L 210, 7.8.1985, p. 29, as amended by Directive 34/1999/EC of 10 May 1999, JO L 141, 4.6.1999, p. 20.

[15] OJ L 149, 11.6.2005, p. 22.

[16] OJ L 143, 30.4.2004, p. 56.

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COMPETENCE ET LOI APPLICABLE EN MATIERE MATRIMONIALE (ROME III)

La Commission a soumis une proposition le 18 juillet 2006 modifiant le règlement Bruxelles II bis. L'objectif de la proposition dite Rome III est de créer la possibilité que les époux, dans le cadre d'une procédure de divorce ou de séparation de corps, puissent choisir de commun accord le for compétent et de définir la loi applicable dans le cadre de ces litiges. Si aucune loi n'est choisie par les époux, le texte introduirait des règles de conflit de lois. Selon la proposition, il y a une série de règles de rattachement : le divorce est régi par la loi du pays de résidence habituelle des deux époux ; à défaut, par celle du pays de la dernière résidence habituelle des époux si l'un d'eux y réside toujours ; à défaut, par celle du pays de la nationalité commune des époux ; ou, à défaut, par la loi du for. Les règles de conflit de lois prévues dans la proposition visent à faire en sorte que, quel que soit le lieu où les époux présentent leur demande de divorce, les tribunaux d'un État membre appliquent normalement le même droit matériel (en évitant le "forum shopping").

Lors de sa session de 5 et 6 juin 2008, le Conseil avait constaté l'absence d'unanimité pour faire aboutir le règlement Rome III et l'existence de difficultés insurmontables qui rendaient impossible toute unanimité dans un avenir proche.

Le Conseil des 24 et 25 juillet 2008 a eu un débat sur l'état de la procédure concernant un instrument relatif à la compétence et la loi applicable en matière matrimoniale (Rome III), notamment en cas de divorce.

Il a pris acte de l'intention d'au moins huit États membres d'inviter la Commission à présenter une proposition de coopération renforcée et que d'autres sont susceptibles d'y participer suite à la proposition de la Commission.

L'invitation éventuelle de ces États à la Commission serait sans préjudice de la suite de le procédure et, en particulier, de l'autorisation que le Conseil sera ultérieurement appelé à accorder.

Certains États membres ont émis des doutes quant au fait que la coopération renforcée soit appropriée dans ce cas.

Quelques États membres ont indiqué ne pas avoir l'intention de participer à l'instrument mais n'ont pas de réserve sur la coopération renforcée.

La Commission s'est montrée disposée à examiner une demande formelle de présentation d'une coopération renforcée par au moins huit Etats membres mais n'a pas voulu préjuger la teneur de la proposition qu'elle présenterait dans ce cas. Elle a souligné qu'elle examinerait cette demande en tenant compte des aspects politiques, juridiques et pratiques d'une telle proposition.

Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters {SEC(2006) 949} {SEC(2006) 950}

[pic] ¦ COMMISSION OF THE EUROPEAN COMMUNITIES ¦

Brussels, 17.7.2006

COM(2006) 399 final

2006/0135 (CNS)

Proposal for a

COUNCIL REGULATION

amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters

(presented by the Commission) {SEC(2006) 949}{SEC(2006) 950}

EXPLANATORY MEMORANDUM

GROUNDS FOR AND OBJECTIVES OF THE PROPOSAL ¦

10 ¦ The Treaty of Amsterdam sets out the objective of progressively establishing a common area of freedom, security and justice, amongst others by adopting measures in the field of judicial cooperation in civil matters. Pursuant to Article 65 of the Treaty, the Community shall adopt measures in the field of judicial cooperation in civil matters having cross-border implications insofar as they are necessary for the proper functioning of the internal market. Article 65 (b) specifically refers to measures "promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction". The harmonisation of conflict-of-law rules facilitates the mutual recognition of judgments. The fact that courts of the Member States apply the same conflict-of-law rules to determine the law applicable to a given situation reinforces the mutual trust in judicial decisions given in other Member States.[1] The European Council has invoked the question of applicable law to divorce on two occasions. The European Council in Vienna requested in 1998 that the possibility of drawing up a legal instrument on the law applicable to divorce be considered within five years of the entry into force of the Treaty of Amsterdam.[2] More recently, the European Council called upon the Commission in November 2004 to present a Green Paper on the conflict-of-law rules in matters relating to divorce in 2005.[3] ¦

120 ¦ General context The growing mobility of citizens within the European Union has led to an increasing number of international couples, i.e. spouses of different nationalities, spouses who live in different Member States or who live in a Member State in which one or both of them are not nationals. In view of the high divorce rate in the European Union, applicable law and jurisdiction in matrimonial matters concern a significant number of citizens each year. Section 3 of the attached Impact Assessment contains statistics on the number of international divorces and marriages within the European Union. Existing provisions in the area of the proposal There are currently no Community rules in the field of applicable law in matrimonial matters. The first Community instrument adopted in the area of family law, Council Regulation (EC) No 1347/2000[4], set out rules on jurisdiction, recognition and enforcement of judgments in matrimonial matters as well as judgments on parental responsibility for children of both spouses given in the context of a matrimonial proceeding. It did not, however, include rules on applicable law. The entry into force of Council Regulation (EC) No 2201/2003[5], which repealed and replaced Council Regulation (EC) No 1347/2001 as of 1 March 2005, did not entail any change in this respect. The question of applicable law was not invoked during the negotiations of this Regulation, which took over virtually unchanged the provisions

on matrimonial matters from Council Regulation (EC) 1347/2000. Council Regulation (EC) No 2201/2003 allows spouses to choose between several alternative grounds of jurisdiction. Once a matrimonial proceeding is brought before the courts of a Member State, the applicable law is determined on the basis of the national conflict-of-law rules of that State, which are based on very different criteria. The majority of Member States determine the applicable law on the basis of a scale of connecting factors that seek to ensure that the proceeding is governed by the legal order with which it has the closest connection. Other Member States apply systematically their domestic laws ("lex fori") to matrimonial proceedings. Objectives of the Proposal The overall objective of this Proposal is to provide a clear and comprehensive legal framework in matrimonial matters in the European Union and ensure adequate solutions to the citizens in terms of legal certainty, predictability, flexibility and access to court. The current situation may give rise to a number of problems in matrimonial proceedings of an international nature. The fact that national laws are very different both with regard to the substantive law and the conflict-of-law rules leads to legal uncertainty. The great differences between and complexity of the national conflict-of-law rules make it very difficult for international couples to predict which law will apply to their matrimonial proceeding. The large majority of Member States do not provide any possibility for the spouses to choose applicable law in matrimonial proceedings. This may lead to the application of a law with which the spouses are only tenuously connected and to a result
that does not correspond to the legitimate expectations of the citizens. In addition, the current rules may induce a spouse to "rush to court", i.e. to seise a court before the other spouse has done so to ensure that the proceeding is governed by a particular law in order to safeguard his or her interests. Finally, the current rules do not guarantee sufficient access to court. The Proposal amends Council Regulation (EC) No 2201/2003 as regards jurisdiction and applicable law in matrimonial matters to attain the following objectives: Strengthening legal certainty and predictability The Proposal introduces harmonised conflict-of-law rules in matters of divorce and legal separation to enable spouses to easily predict which law that will apply to their matrimonial proceeding. The proposed rule is based in the first place on the choice of the spouses. The choice is confined to laws with which the marriage has a close connection to avoid the application of "exotic" laws with which the spouses have little or no connection. In the absence of choice, the applicable law is determined on the basis of a scale of connecting factors which will ensure that the matrimonial proceeding is governed by a legal order with which the marriage has a close connection. This will greatly enhance legal certainty and predictability for the spouses concerned as well as for practitioners. Increasing flexibility by introducing limited party autonomy There is currently very limited place for party autonomy in matrimonial matters. The national conflict-of-law rules foresee in principle only one solution in a given situation, e.g. the application of the law of the common nationality of the spouses or the application of the law of the forum. The proposal renders the legal framework more flexible by introducing a limited possibility for the spouses to choose (a) applicable law and (b) the competent court in proceedings concerning divorce and legal separation. To allow spouses to come to an agreement on these matters could be particularly useful in cases of divorce by mutual consent. Special safeguards are introduced to ensure that the spouses are aware of the consequences of their choice. Ensuring access to court The proposal seeks also to improve access to court in matrimonial proceedings. The possibility to choose the competent court in proceedings relating to divorce and legal separation ("prorogation") will enhance access to court for spouses who are of different nationalities. The rule on prorogation applies regardless of whether the couple lives in a Member State or in a third State. In addition, the proposal specifically addresses the need to ensure access to court for spouses of different nationalities who live in a third State. The proposal introduces a uniform and exhaustive rule on residual jurisdiction in order to enhance legal certainty and ensure access to court in matrimonial matters for spouses who live in a third State but would like to bring proceedings in a Member State with which they have a close connection. Preventing rush to court by one spouse Finally, the Proposal addresses the problem of rush to

court by one spouse, i.e. where one spouse applies for divorce before the other spouse has done so to ensure that the proceeding is governed by a law to safeguard his or her own interests. This may lead to the application of a law with which the defendant
does not feel closely connected or which fails to take into account his or her interests. It further renders reconciliation efforts difficult and leaves little time for mediation. The introduction of harmonised conflict-of-law rules are likely to greatly reduce the risk of "rush to court", since any court seised within the Community would apply the law designated on the basis of common rules. ¦

140 ¦ Consistency with the other policies and objectives of the Union The Proposal respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union as general principles of Community law. In particular, it seeks to ensure full respect for the right to a fair trial as recognised in Article 47 of the Charter. ¦

CONSULTATION OF INTERESTED PARTIES AND IMPACT ASSESSMENT ¦

Consultation of interested parties ¦

211 ¦ The Commission presented a Green Paper on applicable law and jurisdiction matters in divorce matters on 14 March 2005.[6] The Green Paper identified a number of shortcomings under the current situation and identified different possible policy options to address the problems. The options included status quo, harmonisation of the conflict-of-law rules, introducing a limited possibility for the spouses to choose the applicable law, revising the grounds of jurisdiction listed in Article 3 of Council Regulation (EC) No 2201/2003, revising Article 7 on residual jurisdiction of Council Regulation (EC) No 2201/2003, introducing a limited possibility for the spouses to choose the competent court,introducing a limited possibility to transfer a case and finally a combination of the different solutions. The Commission received approximately 65 submissions in response to the Green Paper.[7] In its opinion of 28 September 2005 on the Green Paper, the European Economic and Social Committee welcomed the initiative taken by the Commission. The Commission organised a public hearing on 6 December 2005. An expert meeting was subsequently held on 14 March 2006. The discussions took place on the basis of a discussion paper drawn up by the services of the Commission. ¦

212 ¦ The majority of the responses acknowledged the need to enhance legal certainty and predictability, to introduce a limited party autonomy and to prevent "rush to court". Certain stakeholders expressed concerns that the harmonisation of conflict-of-law rules would oblige courts to apply foreign law and that this may lead to delays and additional costs in matrimonial proceedings. The consultation with interested parties has been taken into account in the preparation of this Proposal. ¦

Collection and use of expertise ¦

229 ¦ There was no need for external expertise. ¦

230 ¦ Impact assessment The Commission has undertaken an impact assessment which is attached to the proposal. The Impact Assessment envisages the following options: (i) status quo, (ii) increased cooperation between Member States; (iii) harmonisation of the conflict-of-law rules including a limited possibility for spouses to choose the applicable law; (iv) revision of the rule on general jurisdiction of Council Regulation (EC) No 2201/2003, (v) introduction of a limited possibility for spouses to choose competent court and (vi) revision of the rule on residual jurisdiction of Council Regulation (EC) No 2201/2003. It results from the impact assessment that a combination of Community actions is necessary to tackle the various problems. The report advocates a revision of Council Regulation (EC) No 2201/2003 including a harmonisation of conflict-of-law rules with a limited possibility for the spouses to choose the applicable law, the introduction of prorogation

and a revision of the rule of residual jurisdiction in Article 7. ¦

231 ¦ The Commission carried out an impact assessment listed in the Work Programme, whose report is accessible on http:europa.eu.int/comm/justice_home/news/consulting_public/news_consulting_pub lic_en.htm. ¦

LEGAL ELEMENTS OF THE PROPOSAL ¦

305 ¦

310 ¦ Legal basis The legal basis for this proposal is Article 61 (c) of the Treaty conferring powers on the Community to adopt measures in the field of judicial cooperation in civil matters as provided for in Article 65. Article 65 confers legislative powers on the Community with regard to judicial cooperation in civil matters having cross-border implications in so far as necessary for the proper functioning of the internal market. Article 65 (b) explicitly mentions measures promoting the compatibility of conflict-of-law rules and jurisdiction rules. The proposal concerns provisions of jurisdiction and applicable law which only come into play in international situations, e.g. where spouses live in different Member States or are of different nationalities. The cross-border requirement in Article 65 is consequently fulfilled. The Community institutions have a certain margin of discretion in determining whether a measure is necessary for the proper functioning of the internal market. The present proposal facilitates the proper functioning of the internal market since it will eliminate any obstacles to the free movement of persons who are currently faced with problems due to the remaining differences between the national laws with regard to applicable law and jurisdiction in matrimonial matters. ¦

329 ¦ Subsidiarity principle The objectives of the Proposal cannot be accomplished by the Member States but require action at Community level in the form of common rules on jurisdiction and applicable law. Jurisdiction rules as well as conflict-of-law rules must be identical to ensure the objective of legal certainty and predictability for the citizens. Unilateral action by Member States would therefore run counter this objective. There is no international convention in force between Member States on the question of applicable law in matrimonial matters. The public consultation and the impact assessment have demonstrated that the scale of the problems addressed in this proposal is significant and that it concerns thousands of citizens each year. In light of the nature and the scale of the problem, the objectives can only be achieved at Community level. ¦

Proportionality principle ¦

331 ¦ The Proposal complies with the principle of proportionality in that it is strictly limited to what is necessary to achieve its objectives. The proposed rules on applicable law and prorogation are limited to divorce and legal separation and do not apply to marriage annulment. ¦

332 ¦ It is expected that the present proposal will not entail any additional financial or administrative burdens on citizens and only a very limited additional burden on national authorities. ¦

Choice of instrument ¦

341 ¦

342 ¦ With regard to the type of legislative instrument, the nature and the objective of the proposal require the form of Regulation. The need for legal certainty and predictability calls for clear and uniform rules. The proposed rules on jurisdiction and applicable law are detailed and precise and require no implementation into national law. To leave Member States any margin of discretion for the implementation of these rules would endanger the objectives of legal certainty and predictability. ¦

BUDGETARY IMPLICATION ¦

409 ¦ The proposal has no implication for the Community budget. ¦

ADDITIONAL INFORMATION ¦

510 ¦ Simplification ¦

511 ¦ The proposal provides a simplification of administrative procedures for citizens as well as for practitioners. ¦

514 ¦ In particular the harmonisation of conflict-of-law rules would considerably simplify the situation for private parties and practitioners, who will be able to determine the applicable law on the basis of one single set of rules which will replace the existing twenty-four national conflict-of-law rules. ¦

516 ¦ The proposal is included in the Commission's rolling programme for up-date and simplification of the acquis communautaire. ¦

570 ¦ Detailed explanation of the proposal Chapter II - Jurisdiction Article 3a This provision introduces a limited possibility for the spouses to designate by common agreement the competent court ("prorogation") in a proceeding relating to divorce and legal separation. It corresponds to Article 12 of Council Regulation No 2201/2003, which allows the parties to agree on the competent court in matters of parental responsibility under certain conditions. This enhanced party autonomy will improve legal certainty and predictability for the spouses. The current jurisdiction rules do not allow spouses to apply for divorce in a Member State of which only one of them is a national in the absence of another connecting factor. The new rule will in particular improve access to court for spouses of different nationalities by enabling them to designate by common agreement a court or the courts of a Member State of which one of them is a national. This possibility applies to spouses living in a Member State as well as spouses living in third States. Spouses who designate a competent court may also avail themselves of the possibility to choose the applicable law pursuant to Article 20a. Certain formal requirements need to be respected to ensure that both spouses are aware of the consequences of their choice. The possibility to choose the competent court does not apply to proceedings relating to marriage annulment where party autonomy is considered inappropriate. Articles 4 and 5 are amended to take account of the new rule on prorogation. Article 6 is deleted. The public consultation revealed that this provision may cause confusion. It is also superfluous since Articles 3, 4 and 5 describe in which circumstances a court has exclusive competence where a spouse is habitually resident in the territory of a Member State or is a national of a Member State, or in the case of the United Kingdom and Ireland, has his or her "domicile" in the territory of one of the latter States. Article 7 Article 7 currently refers to the national rules on international jurisdiction in situations where the spouses are not habitually resident in the territory of a Member State and do not have common nationality. However, the national rules are based on different criteria and do not always effectively ensure access to court for spouses although they may have a close connection with the Member State in question. This may lead to situations where no jurisdiction in the EU or in a third State has jurisdiction to deal with an application for divorce, legal separation or marriage annulment. It may also lead to practical difficulties to have the divorce recognised in a Member State since a decision issued in a third State is not recognised in a Member State pursuant to Council Regulation (EC) No 2201/2003, but only pursuant to national rules or applicable international treaties. The Proposal introduces a uniform and exhaustive rule on residual jurisdiction which replaces the national rules on residual jurisdiction and which ensures access to court for spouses who live in a third States but retain strong links with a certain Member State of which they are nationals or in which
they have resided for a certain period. The scope of this rule corresponds to the general rule of jurisdiction in Article 3 and applies to divorce, legal separation and marriage annulment. Article 12 Article 12 is amended to ensure that a divorce court chosen by the spouses pursuant to Article

3a has jurisdiction also in matters of parental responsibility connected with the divorce application provided the conditions set out in Article 12 are met, in particular that the jurisdiction is in the best interests of the child. Chapter IIa Applicable law in matters of divorce and legal separation The Commission proposes to introduce harmonised conflict-of-law rules in matters of divorce and legal separation, based in the first place on the choice of the spouses. The choice is confined to laws with which the spouses have a close connection by virtue of their last common habitual residence if one of them still resides there, the nationality of one of the spouses, the law of the State of their previous habitual residence or the law of the forum. The majority of the respondents to the Green Paper considered that common conflict-of-law rules should apply to legal separation and divorce, since legal separation is in many cases the necessary precursor to divorce. The Member States that recognise legal separation apply the same conflict-of-law rules to divorce and legal separation. By contrast, most stakeholders were not in favour of extending these rules to marriage annulment, which is closely linked to the validity of the marriage and generally governed by the law of the State where the marriage was celebrated ("lex loci celebrationis") or the law of the nationality of the spouses ("lex patriae"). Article 20a The vast majority of the national conflict-of-law rules only foresee one solution in a given situation. The proposal seeks to enhance the flexibility of the spouses by allowing them to choose the law applicable to divorce and legal separation. The laws available are confined to the laws with which the spouses have a close connection. The rule includes certain procedural requirements to ensure that the spouses are aware of the consequences of their choice. Article 20b In the absence of choice by the parties, the applicable law would be determined on the basis of a scale of connecting factors, based in the first place on the habitual residence of the spouses. This uniform rule will ensure legal certainty and predictability. The introduction of harmonised conflict-of-law rules is likely to greatly reduce the risk of "rush to court" since any court seised within the Community would apply the law designated on the basis of common rules. The fact that the rule is based in the first place on the habitual residence of the spouses and, failing that, on their last habitual residence if one of them still resides there will result in the application of the law of the forum in the vast majority of cases. The problems relating to the application of foreign law will therefore be scarce. Article 20c Although this is not explicitly stated in the text, the proposed Regulation is meant to be of universal application, meaning that the conflict-of-law rule can designate the law of a Member State of the European Union or the law of a third State. Where the law of another Member State is designated, the European Judicial Network in civil and commercial matters can play
a role in assisting the courts on the contents of foreign law. Article 20d To allow renvoi would jeopardise the objective of legal certainty. The designation of a law under the uniform conflict-of-law rules consequently means designating the substantive rules of that law and not its rule of private international law. Article 20e The mechanism of the public policy exception allows the court to disregard the rules of the foreign law designated by the conflict-of-law rule where the application of the foreign law in a given case would be contrary to the public policy of the forum. The word "manifestly" incompatible means that the use of the public policy exception must be exceptional. Position of the United Kingdom, Ireland and Denmark The United Kingdom and Ireland do not participate in co-operation in matters covered by Title IV of the Treaty unless they give notice of their wish to take part in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community. Denmark is not participating in the adoption of this Regulation and is not bound by it nor subject to its application by virtue of Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community. ¦

1. 2006/0135 (CNS)

Proposal for a

COUNCIL REGULATION

amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters

T HE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and Article 67(1) thereof,

Having regard to the proposal from the Commission[8],

Having regard to the opinion of the European Parliament[9],

Having regard to the opinion of the European Economic and Social Committee[10],

Whereas:

(1) The European Union has set itself the objective of maintaining and developing the European Union as an area of freedom, security and justice in which the movement of persons is ensured. For the gradual establishment of such an area, the Community is to adopt, among others, the measures relating to judicial cooperation in civil matters needed for the proper functioning of the internal market.

(2) There are currently no Community rules in the field of applicable law in matrimonial matters. Council Regulation (EC) No 2201/2003 of 27 November 2003 sets out rules on jurisdiction, recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, but does not include rules on applicable law.

(3) The European Council held in Vienna on 11 and 12 December 1998 invited the Commission to consider the possibility of drawing up a legal instrument on the law applicable to divorce. In November 2004, the European Council invited the Commission to present a Green Paper on conflict-of-law rules in divorce matters.

(4) In line with its political mandate, the Commission presented a Green Paper on applicable law and jurisdiction in divorce matters on 14 March 2005. The Green Paper launched a wide public consultation on possible solutions to the problems that may arise under the current situation.

(5) This Regulation should provide a clear and comprehensive legal framework in matrimonial matters in the European Union and ensure adequate solutions to the citizens in terms of legal certainty, predictability, flexibility and access to court.

(6) With the aim of enhancing legal certainty, predictability and flexibility, this Regulation should introduce the possibility for spouses to agree upon the competent court in proceedings for divorce and legal separation. It also should give the parties a certain possibility to choose the law applicable to divorce and legal separation. Such possibility should not extend to marriage annulment, which is closely linked to the conditions for the validity of the marriage, and for which parties' autonomy is inappropriate.

(7) In the absence of choice of applicable law, this Regulation should introduce harmonised conflict-of-law rules based on a scale of connecting factors to ensure legal certainty and predictability and to prevent "rush to court". Such connecting factors should be chosen as to ensure that proceedings relating to divorce or legal separation be governed by a law with which the marriage has a close connection.

(8) Considerations of public interest should justify the possibility in exceptional circumstances to disregard the application of the foreign law in a given case where this would be manifestly contrary to the public policy of the forum.

(9) The residual rule on jurisdiction should be revised to enhance predictability and access to courts for spouses of different nationalities living in a third State. To this end, the Regulation should set out a harmonised rule on residual jurisdiction to enable couples of different nationalities to seise a court of a Member State with which they have a close connection by virtue of their nationality or their last common habitual residence.

(10) Article 12 of Council Regulation (EC) No 2201/2003 should be amended to ensure that a divorce court designated pursuant to Article 3a has jurisdiction also in matters of parental responsibility connected with the divorce application provided the conditions set out in Article 12 of the same Regulation are met, in particular that the jurisdiction is in the best interests of the child.

(11) Regulation (EC) No 2201/2003 should therefore be amended accordingly.

(12) Since the objectives of the action to be taken, namely to enhance legal certainty, flexibility and access to court in international matrimonial proceedings, cannot be sufficiently achieved by the Member States and can therefore, by reason of scale, be better achieved at Community level, the Community may adopt measures, in accordance with the principles of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary to attain these objectives.

(13) This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union as general principles of Community law. In particular, it seeks to ensure full respect for the right to a fair trial as recognised in Article 47 of the Charter.

(14) [The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community, have given notice of their wish to take part in the adoption and application of this Regulation.]

(15) Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, is not participating in the adoption of this Regulation, and is therefore not bound by it nor subject to its application.

HAS ADOPTED THIS REGULATION:

Article 1

Regulation (EC) No 2201/2003 is amended as follows:

(1) the title is replaced by the following:

Council Regulation (EC) N° 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility as well as applicable law in matrimonial matters

(2) the following Article 3a is inserted:

Article 3a

Choice of court by the parties in proceedings relating to divorce and legal separation

1. The spouses may agree that a court or the courts of a Member State are to have jurisdiction in a proceeding between them relating to divorce or legal separation provided they have a substantial connection with that Member State by virtue of the fact that

2. any of the grounds of jurisdiction listed in Article 3 applies, or

3. it is the place of the spouses' last common habitual residence for a minimum period of three years, or

4. one of the spouses is a national of that Member State or, in the case of the United Kingdom and Ireland, has his or her domicile in the territory of one of the latter Member States.

2. An agreement conferring jurisdiction shall be expressed in writing and signed by both spouses at the latest at the time the court is seised."

(3) In Articles 4 and 5, the terms Article 3 are replaced by the terms Articles 3 and 3a..

(4) Article 6 is deleted;

(5) Article 7 is replaced by the following:

"Article 7

Residual jurisdiction

Where none of the spouses is habitually resident in the territory of a Member State and do not have a common nationality of a Member State, or, in the case of the United Kingdom and Ireland do not have their domicile within the territory of one of the latter Member States, the courts of a Member State are competent by virtue of the fact that:

5. the spouses had their common previous habitual residence in the territory of that Member State for at least three years; or

6. one of the spouses has the nationality of that Member State, or, in the case of United Kingdom and Ireland, has his or her domicile in the territory of one of the latter Member States.

(6) In Article 12 (1), the terms Article 3 are replaced by the terms Articles 3 and 3a.

(7) The following Chapter IIa is inserted:

CHAPTER IIa

Applicable law in matters of divorce and legal separation

Article 20a

Choice of law by the parties

1. The spouses may agree to designate the law applicable to divorce and legal separation. The spouses may agree to designate one of the following laws:

7. the law of the State of the last common habitual residence of the spouses insofar as one of them still resides there;

8. the law of the State of the nationality of either spouse, or, in the case of United Kingdom and Ireland, the domicile of either spouse;

9. the law of the State where the spouses have resided for at least five years;

10. the law of the Member State in which the application is lodged.

2. An agreement designating the applicable law shall be expressed in writing and be signed by both spouses at the latest at the time the court is seised.

Article 20b

Applicable law in the absence of choice by the parties

In the absence of choice pursuant to Article 20a, divorce and legal separation shall be subject to the law of the State:

11. where the spouses have their common habitual residence, or failing that,

12. where the spouse had their last common habitual residence insofar as one of them still resides there, or failing that,

13. of which both spouses are nationals, or, in the case of United Kingdom and Ireland, both have their domicile, or failing that,

14. where the application is lodged.

Article 20c

Application of foreign law

Where a law of another Member State is applicable, the court may make use of the European Judicial Network in civil and commercial matters to be informed of its contents.

Article 20d

Exclusion of renvoi

The application of a law designated under this Regulation means the application of the rules of that law other than its rules of private international law

Article 20e

Public policy

The application of a provision of the law designated by this Regulation may be refused only if such application is manifestly incompatible with the public policy of the forum."

Article 2 Entry into force

This Regulation shall enter into force on twentieth day following that of its publication in the Official Journal of the European Union.

It shall apply from 1 March 2008.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

Done at Brussels,

For the Council

The President

[...]

[1] The Programme of measures to implement the principle of mutual recognition of decisions in civil and commercial matters, adopted on 30.11.2000, OJ C 12, 15.1.2000, p. 1.

[2] The Vienna Action Plan, adopted by the European Council 3 December 1998, OJ C19, 23.01.1999, p.1.

[3] The Hague Programme: strengthening freedom, security and justice in the European Union, adopted by the European Council 4-5 November 2004.

[4] Council Regulation (EC) 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility for children of both spouses, OJ L 160, 30.06.2000, p. 19.

[5] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 338, 23.12.2003, p. 1.

[6] COM (2005) 82 final

[7] The responses are published at the following address: http:ec.europa.eu/justice_home/news/consulting_public/news_consulting_public_en .htm

[8] OJ C , , p..

[9] OJ C , , p..

[10] OJ C , , p..

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[pic] | COMMISSION OF THE EUROPEAN COMMUNITIES |

Brussels, 17.7.2006

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Annex to the proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters

IMPACT ASSESSMENT {COM(2006) 399 final}{SEC(2006) 950}

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INTRODUCTION

There are currently no Community provisions on applicable law in matrimonial matters. Council Regulation (EC) No. 1347/2000[1] (the Brussels II Regulation) includes rules on jurisdiction and recognition in matrimonial matters, but does not comprise rules on applicable law. The entry into application of Council Regulation (EC) No. 2201/2003[2] (the new Brussels II Regulation), which replaces the Brussels II Regulation as of 1 March 2005, does not entail any change in this respect, since it takes over the rules on matrimonial matters from the Brussels II Regulation practically unchanged.

There is currently no multilateral convention in force between the Member States on the question of applicable law to divorces.[3]

The European Council in Vienna emphasised in 1998 that the aim of a common judicial area is to make life simpler for the citizens, in particular in cases affecting the everyday life of the citizens, such as divorce.[4] In November 2004, the European Council invited the Commission to present a Green Paper on the conflict-of-law rules in matters relating to divorce in 2005.[5]

The increasing mobility of citizens within the European Union has resulted in an increasing number of international marriages where the spouses are of different nationalities, or live in different Member States or live in a Member State of which they are not nationals. In the event that an international couple decide to divorce, several laws may be invoked. The aim of the rules on applicable law, often referred to as conflict-of-law rules, is to determine which of the different laws that will apply. In view of the high number of divorces within the European Union, applicable law and international jurisdiction in divorce matters affect a considerable number of citizens (see section 3 and Annexes 3-5).

This Impact Assessment has been made on the basis of a study prepared for the Commission by an external contractor. [6]

The term "divorce" is used in this report for the sake of simplicity to encompass all matrimonial proceedings, including legal separation and marriage annulment.

PROBLEMS DUE TO THE CURRENT STATE OF PLAY

The following sub-sections provide more in-depth descriptions of the problems that international couples' may encounter when they want to dissolve their marriage:

Difficulties for the spouses to predict which law that will apply in matrimonial proceedings

All Member States with the exception of Malta allow divorce.[7] Significant differences exist between the Member States' divorce laws, concerning the grounds for divorce as well as the procedures. This divergence can be explained by different factors, such as the different family policies and cultural values. Annex 1 provides an overview of the Member States' rules on the grounds for divorce.

The public consultation[8] revealed that it is currently difficult for spouses and practitioners to predict what law will apply as a result of the differences of the national conflict-of-law rules. Due to the differences between the substantive laws, the conditions for divorce may change drastically depending on which law that applies, in terms of time, requirements of proof of separation periods, grounds for divorce etc. It may also have significant implications for ancillary matters, such as the division of property and maintenance obligations. Citizens are unlikely to be aware of the different legal systems and that the requirements and conditions for divorcing may change substantially as a result of a move. They may thereby find themselves subject to a divorce law with which they do not feel closely connected.

There are significant differences between the Member States' conflict-of-law rules concerning divorce. One category of States determine the applicable law on the basis of a scale of connecting factors that seek to ensure that the divorce is governed by the legal order with which it has the closest connection. The connecting factors vary, but include in most cases criteria based on the nationality or habitual residence of the spouses. The majority of Member States belong to this category. The second category of States applies systematically their domestic laws (lex fori) to divorce proceedings. Annex 2 provides an overview of the national conflict-of-law rules of the Member States.

Insufficient flexibility and party autonomy for citizens to choose competent court and applicable law

In principle, national conflict-of-law rules only foresee one solution in a given situation, e.g. the application of the law of the spouses' common nationality or the law of the forum and do not take account of the wishes of the spouses. Three Member States (Belgium, the Netherlands and Germany) currently offer the spouses a limited possibility to choose the applicable law. This lack of flexibility may lead to a number of problems.

It fails for example to take into account that citizens may feel closely connected with a Member State where they have lived for a long time although they are not nationals of that State. National rules which determine the applicable law on the basis of the common nationality of the spouses do not take into consideration those cases where spouses live in and are fully integrated in a another Member State and would prefer the law of that State to apply. On the other hand, individuals may in some cases live in another country than their country of origin for a number of years and still feel more closely connected with the law of their nationality.

The systematic application of the law of the forum can lead to the application of a law with which the spouses are only tenuously connected, e.g. if they have recently moved there. As a result, citizens are not always able to divorce according to the law of the Member State with which they feel the closest connection. This may lead to results that do not correspond to the legitimate

expectations' of the citizens.

There is currently no possibility under Community law for the spouses to designate a competent court by common agreement ("prorogation"). Whereas the new Brussels II Regulation provides this possibility in matters of parental responsibility, it is not foreseen in matrimonial matters.

Risk of "rush to court" by one spouse

Article 3 of the new Brussels II Regulation includes seven grounds of jurisdiction in divorce matters. The grounds are alternative and do not take precedence over each other. If two spouses bring divorce proceedings before courts of different Member States, the "lis pendens" rule (Article 19) provides that the competent court that is seised first will have jurisdiction. As a result, courts of other Member States must dismiss any subsequent application. This mechanism ensures legal certainty, avoids duplication of litigation, parallel actions and the possibility of irreconcilable judgments.

The combination of the rules in Article 3 and Article 19 may however induce a spouse to apply for divorce before the other spouse has done so to prevent the courts of another Member State from acquiring jurisdiction in order to ensure the application of a certain law which is favourable to him or her (so-called rush to court'). The reason for this may be to obtain the divorce quicker than would otherwise be possible. The financial provisions ancillary to divorce often play an important role, e.g. with regard to maintenance and division of property.

This can in turn lead to the application of a law with which the defendant does not feel closely connected or which does not take his/her interests into account. This may bring along a number of negative consequences, in particular for vulnerable spouses', e.g. those who cannot afford lawyers who investigate where it is most beneficial to get divorced. "Rush to court" also renders reconciliation difficult because there is no time for mediation efforts. The high frequency and seriousness of the rush-to-court problem were emphasised by many practitioners during the consultation process.

Risk of difficulties for couples of different nationalities living outside the EU

The jurisdiction rules (Articles 3-5) of the new Brussels II Regulation do not apply to couples of different nationalities living in a third State. Such couples may encounter problems. In these situations, Article 7 of the new Brussels II Regulation provides that the courts of the Member States may avail themselves of the national rules of jurisdiction (so-called "residual jurisdiction"). However, the national rules of jurisdiction are not harmonised but based on different criteria, such as nationality, residence or domicile. Two Member States (Belgium and the Netherlands) do not have any national rules on residual jurisdiction. The fact that national rules are based on different criteria may leads to legal uncertainty. It may also lead to situations where no court within the European Union or elsewhere is competent. Such a situation deprives the parties of their right of access to a court. In addition, a decision issued by a court in a third State is not recognised in a Member State pursuant to Council Regulation (EC) No 2201/2003, whose rules on recognition apply only to decisions issued by a court in a Member State. The spouses could therefore face problems to have the ensuing decision recognised in their respective home States.

THE SIZE OF THE PROBLEM

This section provides an overview of the numbers of international divorces and marriages in the EU based on data from the Member States' statistical offices. The number of people that may, potentially, be affected by any proposed changes to international divorce legislation is examined by presenting statistical data for "international divorces". Where such statistics are not available, figures on "international marriages" have been incorporated as an indication of the numbers of those likely to be affected by legislation relating to international divorce.

An overview of statistics available on international marriages and divorces is found in Annex 3.

The available data on "international divorces" include divorces between a national of the Member State concerned and:

(a) a citizen of another EU Member State;

(b) a citizen of a non EU State;

(c) a citizen of double nationality

(d) a non-national of unknown origin (including both EU citizens and non-EU citizens)

It includes also divorces between two non-nationals who divorce in the Member State concerned (of the same or of different nationality).

Annex 4 provides the number of international divorce cases by Member State 2000-2004.

International divorces

Data relating to international divorces have been analysed for 13 Member States. Of the 13, only 8 Member States (Germany, Estonia, Finland, Hungary, Luxembourg, the Netherlands, Portugal and Sweden) were able to present complete information for 4 years (2000-2003) with a clear breakdown of the nationality of the spouses. A further 5 Member States (Belgium, Czech Republic, Cyprus, Italy, and Slovenia) have provided data for 1 or 2 years.

The information provided by the national statistical office for Austria shows the number of Austrian nationals respectively the number of non-Austrian nationals divorcing each year in Austria. However, it is not possible to establish the number of international divorces, since the data do not specify the nationality of the spouses. Polish data[9] confirm the number of individuals living in Poland divorcing each year, but do not record the nationality of the spouses. It is therefore impossible to ascertain the nationality of individuals seeking divorce and the data were not included in the analysis.

The statistics offices and government departments in the remaining 8 Member States (Spain, France, Greece, Ireland, Slovak Republic, Latvia, Lithuania and the United Kingdom) have confirmed that they do not hold information regarding the nationality of spouses getting divorced.

There are no data concerning Malta and Denmark. In Malta divorce is not permitted. Efforts were made to obtain data on international' legal separations and marriage annulments issued in Malta, but the Maltese statistical office has confirmed that no such data are collected. Data have not been collected for Denmark, since any proposed Community action would not apply there. [10]

The rate of international divorces of the total number of divorces has increased for all countries except Portugal and Estonia for the period 2000-2004. The rate of international divorces is highest in Estonia (ca 50%) and lowest in Hungary (ca 1,5%). Germany has recorded the highest number of international divorces (36,933 in 2004) compared with Slovenia, which reports the lowest number (256 in 2004).

Table 3.1. gives an overview of the number of international divorces in the Member States.

The proportion of international divorces including foreigners only, has generally increased in all Member States in the period 2000 to 2003. The exceptions to this are Hungary and Portugal. The rate is highest in Estonia (78% in 2002 and 2003) and lowest in the Czech Republic (3.59% in 2003) and Hungary (3.54% in 2001). In Luxembourg, half of the international divorce cases involve foreigners only, but also in the Netherlands and Sweden this type of divorce reaches almost 50% (around 45% of total international cases). The proportions for Belgium, Germany, Finland and Portugal are around 25%.

Table 3.1. - International divorces in the Member States

[pic]

[pic]

International marriages

Data on international marriages has been accessed for 17 countries. Of these, 9 countries (Germany, Estonia, France, Hungary, Italy, Luxembourg, the Netherlands, Portugal and Sweden) presented comprehensive data for 2000-2003. Two countries (Belgium and Finland) provided figures for 3 years, whilst 6 Member States (Austria, Czech Republic, Cyprus, Spain, Latvia, and Portugal) only had figures for 1 year.

Latvian statistical data could not be utilised since only details on spouses' ethnicity and not nationality were provided. Maltese statistics report the number of men and women who get married in Malta each year but do not record the nationality of the partner. Slovenian data do not show figures for marriages by nationality but for husband-wife families by ethnic affiliation in 2002.

The remaining 4 countries (Greece, Ireland, Lithuania and United Kingdom) were not able to provide any information on marriages with a breakdown by nationality.

Annex 4 provides the number of international marriages by Member State for the years 2000-2004.

The figures show an increase in the rate of international marriages in some countries[11] during the years 2000-2003. In France the rate increased from 7.1 to 9.4 per 10,000 population and in Luxembourg it also slightly increased (from 26.3 to 26.8). However, in the Netherlands and Germany, the rate decreased in 2003 compared with 2002 (in the Netherlands from 13.5 to 12.2, and in Germany from 9 to 8.6). The highest rate of international marriages on total numbers of marriages has been recorded in Estonia. Hungary has the lowest rate. In terms of the number of international marriages, Germany has recorded the highest number of international marriages (73,719 in 2002) whilst Luxembourg recorded the lowest in the same period (1,100 in 2002).

Numbers of international marriages and divorce cases by 10,000 persons

Using the data on international divorces and marriages provided by the Member States and the total population living in each county, a weighted average has been calculated for international marriages and divorces for 2003.[12] These rates, which represent the number of international divorce and marriage cases per 10,000 persons, are provided in Table 3.2. below.

Table 3.2. - Weighted average for international marriages and divorce cases in relation to 10,000 persons

[pic]

The data show that in 2003 there were, on average, almost 8 international marriages per 10,000 persons.[13] This can be compared with the numbers of national marriages (39 per 10,000 persons) identifying that on average every fifth marriage relates to an international couple. Based on these calculations it is possible to make an estimation of the total number of international marriages in the EU. This would be 350,299 cases if the remaining Member States have the same rate of international marriages as those indicated by the data used for the analysis.

International data regarding divorces[14] identified that there were almost 4 international divorce cases per 10,000 persons. The numbers of national divorce cases were around 22 per 10,000 persons. Based on this estimate, the total number of international divorce cases in the EU Member States would be 172,230 cases per year.

Given that the rates of international marriages and divorces do not vary enormously amongst the

larger EU countries, it is generally safe to assume that the bulk of the incidences of divorces involving international couples will take place in or involve spouses living in these countries.

Conclusion:

The incidences of international marriages and divorces appear to be generally stable with evidence of minor increases. Very often international marriages involve third country nationals. All EU countries have significant numbers of international marriages, the larger EU countries in populations terms account for a high proportion of international marriages and divorces.

Based on the available data, there are in the order of 2.2 million marriages in the EU per year. It is estimated that in the order of 350,000 of these marriages are international.

There are around 875,000 divorces in the EU per year (excluding Denmark). It is estimated that around 170,000, or 16% of these divorces are of international character.

MAIN OBJECTIVES OF THE PROPOSAL

The overall objective of the Proposal is to provide a clear and comprehensive legal framework in matrimonial matters in the European Union and ensure adequate solutions to the citizens in terms of legal certainty, predictability, flexibility and access to court. The objectives described below correspond to the problems identified under section 2. The proposed rules should meet the following objectives:

(a) enhance legal certainty and predictability;

(b) increase flexibility and party autonomy;

(c) prevent rush to court' by one spouse; and

(d) ensure access to court.

POLICY OPTIONS

Option 1: Status quo

This policy option assumes that no new policy initiatives would take place at EU level. In assessing this policy option consideration will be given to whether existing activities and trends will affect the nature and severity of the problems identified.

The new Brussels II Regulation, which entered into application on 1st March 2005, harmonises the rules the competent court and mutual recognition of divorce judgments. However, it does not harmonise the rules on applicable law.

Option 2: Increased co-operation between Member States

Policy option 2 is a non-legislative action whereby the EU would provide some financial support to encourage relevant co-operation activities between Member States. The following activities could benefit from EU support:

Support to exchanging best practice on family courts. At the moment, some Member States (e.g. Germany and Austria) have special family courts that deal exclusively with family law cases, including international divorces. Feedback from such courts indicates that such specialisation is useful and leads to efficiencies. The EU could financially support Member States learning about specialist family courts from each other and encourage the establishment of such courts across the EU.

Networks of expertise on different national divorce laws. A network of liaison judges and / or lawyers could be set up to provide effective assistance and expert advice on matters relating to their respective national laws. The web-site of the European Judicial Network in civil and commercial

matters, which already provides information on the divorce laws of the different Member States, could be expanded [15] (see below point 8.2). In addition, co-operation and exchange of information could be supported by specialised national institutes such as Max Planck Institute in Germany or the International Legal Institute in the Netherlands.

Information campaign. An information campaign could be organised to inform EU citizens of the differences between the Member States' laws on divorce and of the practical consequences of a move to another Member State in terms of a possible future divorce proceeding.

On the basis of financing of similar EU initiatives, it could be envisaged that the EU could devote around 5 million Euro per year to supporting of such co-operation activities between the Member States.

Option 3: Harmonising conflict-of-law rules and introducing a limited possibility for the spouses to choose applicable law

This policy option would involve legislative action at Community level through harmonisation of conflict-of-law rules. The aim of this rule would be to ensure that the divorce is governed by the law with which the marriage has the closest connection. It could be based on the first place on the limited choice of the parties. In the absence of choice, the applicable law could be determined on the basis of a set of connecting factors, based on the last common habitual residence of the spouses, the common nationality or the law of the forum.

Certain formal requirements would be added to ensure that the spouses are aware of the consequences of their choice and to prevent abuse. This policy option would be supported by a public policy clause, which would allow the courts to refrain from applying a foreign law if it would be manifestly contrary to the public policy and fundamental values of that Member State.

Option 4: Revising the rules on jurisdiction in Article 3 of Council Regulation (EC) 2201/2003

This policy option involves legislative action at the Community level in terms of revision of the jurisdiction rules of the new Brussels II Regulation. The grounds of jurisdiction listed in Article 3 of the new Brussels II Regulation were originally designed to meet objective requirements, to be in line with the interests of the parties, involve flexible rules to deal with mobility and to meet individuals' needs without sacrificing legal certainty.[16]

It could be argued that the jurisdiction rules do not entirely meet these objectives. In the absence of uniform conflict-of-law rules, the existence of several alternative grounds of jurisdiction may lead to the application of laws with which the spouses are not necessarily the most closely connected. On the other hand, the grounds of jurisdiction may in certain cases not be sufficiently flexible to meet individuals' needs.

The consequences of any revision would need to be carefully considered. Hence, a restriction of the grounds of jurisdiction may have adverse consequences in terms of flexibility and access to courts, unless the parties are given the opportunity to choose the competent court. On the other hand, adding new grounds of jurisdiction may further exacerbate the lack of legal certainty. A third possibility would be to replace the list of alternative grounds of jurisdiction by a rule in which the grounds of jurisdiction are listed in hierarchical order.

Policy Option 5: Giving the spouses a limited possibility to choose the competent court ("prorogation")

This policy option would allow the spouses to choose the competent court by common agreement. This would not only promote agreement between spouses and enhance predictability, but it would also improve access to court for couples of different nationalities. The choice should be limited to certain jurisdictions with which the spouses have a close link by virtue of habitual residence or nationality. Alternative connecting factors such as last common habitual residence and nationality of one of

the spouses would be specified in the legislation. As for policy option 3, formal requirements should be included to ensure that the spouses are aware of the consequences of their choice.

Option 6: Revising the rule on residual jurisdiction in Article 7 of Council Regulation (EC) 2201/2003

This policy option involves legislative action at Community level in the form of adopting common rules on residual jurisdiction to ensure that citizens living in a country outside the Union could initiate divorce proceedings before a court in a Member State of which they are nationals or in which they have lived for a certain period of time. In its current wording, Article 7 of the new Brussels II Regulation does not effectively ensure access to court for couples of different nationalities living in a third State. Article 7 refers to the national rules on residual jurisdiction which differ significantly and may lead to situation where a couple of different nationalities living in a third State cannot apply for divorce in a Member State or elsewhere.

ASSESSMENT OF THE POLICY OPTIONS

This section provides an assessment of each of the identified policy options described in Section 5. Each policy option is assessed to determine to which extent it solves the problems identified in Section 2 and meets of the policy objectives described in Section 4 (see also table 6.1). The constraints and problems associated with each problem are mentioned as well as the impact on fundamental rights.

With regard to the financial and organisation resources required for the implementation of each policy option, it is generally very difficult to estimate the exact costs and administrative burden of the proposed policy options, with the exception of policy option 2. Any legislative change would obviously entail certain costs for the training on the new legislation.

Benefits and disadvantages of Policy Option 1 (Status quo)

The benefits of maintaining the Status quo' are that no additional financial commitment or legislative or system changes would be required. However, Policy Option 1 will not address the policy objectives because actions of individual Member States will not improve the situation for international couples who want to divorce. Problems such as difficulties for spouses to predict what law will be applied and rush to court will not be reduced. The latter problem is not likely to diminish without harmonisation of rules (or substantive laws) in relation to divorce and ancillary matters. There are currently no evident trends towards convergence of Member States' substantive divorce laws. The problems related to legal certainty and access to court for citizens outside the EU are likely to remain. Negative consequences for the spouses in terms of distress, time taken, high costs and rights of the weaker spouse are likely to remain unchanged. Fundamental rights would not be furthered by this option. Current trends, which indicate that EU citizens are increasingly taking advantage of the free movement, mean that there is a likelihood of an increased number of international marriages and international divorces in the future. This means that more EU citizens will be subject to the problems described above.

Benefits and disadvantages of Policy Option 2 (Increased co-operation between Member States)

Policy Option 2 would not require any legislative changes at EU or national level, but some financial support from the EU to Member States for cooperation activities. The option would be largely focussed on improving the current situation rather than changing it. As such, it would not solve any of the fundamental sources of the problems and will only address some of the problems to some degree. It would therefore not go far towards addressing the policy objectives. Depending on what actions would be adopted, positive impacts include that it would lead to higher effectiveness in cases where foreign law is applied, which would lead to decreased costs, shorter divorce processes

and decreased numbers of cases where foreign law is applied incorrectly. Informing EU citizens about the problems would result in higher awareness and preparedness for the results of a move to another EU Member States, but it could have negative impacts on the trust in the EU citizenship and common judicial area, and decrease incentives for moving within the EU.

On the basis of similar activities at EU level, the estimated cost of this Policy Option would be approximately 5 million per year.

Benefits and disadvantages of Policy Option 3 (Harmonising conflict-of-law rules and introducing a limited possibility for the spouses to choose applicable law)

This option would lead to a number of improvements compared to the current situation. It would to a high extent increase legal certainty, party autonomy and flexibility. It would also reduce the risk of rush to court, which has been identified by several stakeholders as the most severe current problem. In those cases when spouses cannot agree on applicable law, it will be automatically' determined through the harmonised conflict-of-law rules. The connecting factors are selected to ensure that the divorce is governed by a law with which the spouses have a close connection.

The possibility to choose applicable law would be particularly useful in cases of divorce by mutual consent. Data for four countries (Italy, Luxembourg, Austria and Poland) show that between 70 and 90% of the divorces are made with mutual consent.

The main drawbacks of the policy option are that it would entail the application of foreign courts by the courts in certain cases. Certain practitioners consider this to be a practical problem which could lead to lengthier divorce processes and thereby additional costs for spouses. Who will bear the main costs for finding out the content of foreign law depends on whether the spouses are required to provide the judge with this information or if this is done by the judge ex officio'. Moreover, there is a certain risk that the foreign law is incorrectly applied. Several stakeholders consulted had direct experience of this. The adoption of measures to facilitate application of foreign law should reduce the negative consequences in terms of delays, increased costs, and risks that the foreign law is wrongly applied. In terms of impacts on legal professions, the option would lead to increased efficiency as the harmonised conflict-of-law rules would simplify the legal assessment. It could also lead to new work opportunities because of formal requirements for spouses who agree on law. Training on the new legislation would be needed.

The problems relating to the application of foreign law should be scarce in practice, since the connecting factors would lead to the application of the law of the forum in the large majority of cases. The habitual residence of the spouses is chosen as the first connecting factor followed by the last habitual residence of the spouses if one of them still resides there.

The impact on fundamental rights would be positive. The principle of non-discrimination would be fully respected insofar as the harmonised rules would be of universal application, meaning that they could designate the law of a Member State or the law of a third State. The same rules would apply to all EU citizens, regardless of nationality. The right to a fair trial would be respected would also be respected since this Policy Option would enhance legal certainty and reduce risk of rush to court.

This Policy Option would entail an important change of the national legal systems, in particular in the Member States that currently only apply lex fori. It would imply some costs on Member States' administrative and legal systems for training purposes. The costs are likely to be higher in the Member States that currently only apply lex fori than for the Member States whose legal systems are based on connecting factors which may lead to the application of foreign law. It would also entail some costs at EU and/or at national level to facilitate the application of foreign law. This could include the setting up of national institutes or specialised courts. The costs can be

assessed on the basis of existing institutes and courts, e.g. in Germany, the Netherlands and Germany. There could also be support at EU level (see policy option 2). It would also imply some costs on Member States' administrative and legal systems for training purposes.

Benefits and disadvantages of Policy Option 4 (Revising the rules on jurisdiction in Article 3 of Council Regulation (EC) 2201/2003)

This Policy Option would only address spouses' problems to a minor extent. One could envisage three possible means to revise the current jurisdiction rule as set out in Article 3: (a) to extend the number of grounds of jurisdiction (b) to decrease the number of grounds of jurisdiction or (c) to introduce a hierarchy between the grounds of jurisdiction. Each of the sub-options implies a trade-off between legal certainty and flexibility. Moreover, none of the sub-options would give EU citizens in international marriages living outside the EU access to court or increase party autonomy. Two of the sub-options (decreasing the grounds of jurisdiction and introducing a hierarchy between the jurisdiction grounds) would even decrease flexibility and access to court. On the other hand, both of these sub-options would reduce the risk of rush to court' and also increase efficiency for legal professions as there would be fewer grounds for jurisdiction (which would simplify the legal assessment). To extend the grounds would, on the other hand, decrease legal certainty, but at the same time increase access to court and flexibility. All sub-options would result in increasing training needs for legal professions on the new legislation. However, none of the sub-options would lead to any major changes to the national legal systems or costs. Even though the sub-option does not imply any major changes to Member States' current legal systems, most Member States are firmly against re-opening the discussions on the grounds of jurisdiction.

It would not have any impact on fundamental rights, since the same rules would apply independently of gender and nationality.

Since this Policy Option would not result in any major change of the national legal systems, it would not entail any major costs on Member States' legal and administrative systems.

Benefits and disadvantages of Policy Option 5 (Giving the spouses a limited possibility to choose the competent court ("prorogation"))

The introduction of a limited possibility for the spouses to choose the competent court (prorogation')', would have a positive impact on the spouses with regard to most of the policy objectives, although it would obviously be limited to those spouses who can agree on competent court. It would be possible to introduce this Policy Option separately and not harmonise the conflict-of-law rules. This would allow the spouses a limited choice of jurisdiction whilst allowing Member States to keep their national conflict of law rules.

For legal professions, giving spouses a limited possibility to choose competent court would lead to increased efficiency and could also lead to creation of new work opportunities due to formal requirements for establishing the agreement. Training on the new legislation and the formal requirements would be necessary. The option would obviously only lead to benefits for spouses who can agree on law. Member States are in general supportive to giving the spouses a limited choice of court and / or applicable law.

It would have a positive impact on fundamental rights, since it would enhance access to court and legal certainty for couples who make use of the possibility to choose competent court.

This Policy Option would not result in any major change of the national legal systems and would therefore not entail any major costs on Member States' legal and administrative systems.

Benefits and disadvantages of Policy Option 6 (Revising the rule on residual jurisdiction in Article 7 of Council Regulation (EC) 2201/2003)

Policy Option 6 addresses a separate problem. In some cases, citizens of different nationalities living outside the EU may currently not apply for divorce either in the country they are living in or in the EU (on the basis of their nationality). This option therefore addresses a fundamental right of access to court. Positive impacts are mainly evident in terms of achieving the specific objective of access to court. It would also increase legal certainty for couples of different nationalities living outside the EU who have a strong connection with a Member State, because of nationality or because they have previously resided there for a period of time. This may present practical advantages in particular for spouses who want to move back to their country of origin and/or need to have their divorce recognised in that country. Member States are in general open to the idea of adopting a common rule on residual jurisdiction', including those Member States that currently have rules that give their nationals access to court.

It would have a positive impact on fundamental rights, since it would enhance access to court and legal certainty for couples of different nationality living in third States. It would ensure access to court not only to EU nationals, but also to nationals of third States who have had their common habitual residence in a Member State for at least three years.

Table 6.1.- Comparison of policy options |

Objective to be achieved/ problem addressed | Anticipated impact effectiveness (rated from * to *****) | Explanation of rating and aspects of the policy option necessary to achieve impact |

To increase legal certainty concerning applicable law | ***** | Harmonised conflict of law rules will ensure legal certainty as far as possible in the current situation where substantive laws differ between Member States. Not only will there be clarity in terms of having a common system throughout the EU, but also, having common habitual residence as first connecting factor, will result in that lex fori probably will be applied in a majority of cases. This means that the problems related to application of foreign law will be scarce. Introducing a possibility to choose applicable law or competent court will also increase legal certainty. |

To increase party autonomy for citizens to choose applicable law / competent court | **** | Party autonomy will be greatly increased for those couples who are able to agree on competent court and applicable law. |

To increase flexibility in terms of access to courts in Member States for citizens living in the EU | **** | Flexibility will be greatly increased for those couples who are able to agree on competent court. For other spouses, the harmonised conflict-of-law rule will only provide for one solution in each given case. |

To reduce risk of rush to court' | ****(*) | Rush to court would be effectively prevented by the adoption of this policy option. If the spouses cannot agree on competent court or law, jurisdiction and applicable law will be automatically' determined through the harmonised conflict of law rules. |

To ensure access to court for citizens living in third States | ***** | Access to court could be ensured by a revision to Article 7 of the New Brussels II Regulation to allow spouses to get divorced in a Member State with which they are closely connected. Furthermore, the proposed rule on prorogation would apply also to spouses living in third States and enhance access to court in cases the spouses can come to an agreement on the competent court. |

Impacts on fundamental rights |

Equality before the law (between men and women) | ***** | The rules will apply independently of gender. |

Non-discrimination of EU nationals | ***** | The same rules will apply independently of nationality.

|

Non-discrimination of third State nationals living in the EU | ***** | The rules will apply to EU nationals and non-EU nationals having previously lived in the EU. |

Right to effective remedy (fair trial); reasonable time | ***** | The combination of giving the spouses a limited choice of competent, harmonised conflict of law rules and a hierarchy of competent court would greatly increase efficiency of determining competent court and applicable law. |

Benefits and advantages of options | There are clear benefits of this policy option, since it addresses the problems and achieves the objectives to a higher extent than any of the other options. Only a policy option including changes to substantive laws (which is not within the Community competences) would be able to achieve a higher rating. |

Disadvantages of policy option | The adoption of the policy option is dependent on what rules the Member States can agree on e.g. the content of harmonisation of conflict of law rules and competent court. |

Issues raised in Green Paper, additional stakeholder and Public Hearing consultations | The vast majority of stakeholders are in favour of introducing a limited choice of court and applicable law for spouses. Many stakeholders are also in favour of harmonising conflict of law rules. A high number of stakeholders have commented on problems relating to the application of foreign law and emphasised the importance of adopting supporting measures to facilitate such application e.g. finding out content of the law. Many stakeholders are open to the idea of adopting common rules on residual jurisdiction. |

Political acceptability | The vast majority of Member States are in favour of introducing a limited choice of court and applicable law for spouses. The majority of Member States are also in favour of harmonising conflict of law. In general, there seems to be support for providing the spouses with a choice of court and applicable law as well as adopting common jurisdiction rules. |

Administrative costs | This Policy Option would entail the harmonisation of conflict-of-law rules, which would be an important change of the national legal systems, in particular in the Member States that currently only apply lex fori. It would imply some costs on Member States' administrative and legal systems for training purposes. The costs are likely to be higher in the Member States that currently only apply lex fori than for the Member States whose legal systems are based on connecting factors which may lead to the application of foreign law. It would also entail some costs at EU and/or at national level to facilitate the application of foreign law. This could include the setting up of national institutes or specialised courts. The costs can be assessed on the basis of existing institutes and courts, e.g. in Germany, the Netherlands and Germany. There could also be support at EU level (see policy option 2). It would also imply some costs on Member States' administrative and legal systems for training purposes. |

- SUBSIDIARITY AND PROPORTIONALITY

The subsidiarity principle ensures that within the EU intervention is taken at the most appropriate level to achieve the policy objectives and address the problems in the current situation. The proportionality principle provides that measures taken are proportionate to the size and extent of the problems.

The legal basis for Community action in the divorce area is established in Articles 61(c) and 65 of the Treaty establishing the European Community. These provisions state that in order to establish a common judicial area, the Community is to adopt measures in the field of judicial cooperation in civil matters in so far as necessary for the proper functioning of the internal market'. Furthermore, the principle of proportionality, as set out in Article 5 of the Treaty establishing the European Community, provides that common action shall not go beyond what is necessary to achieve the objectives.

National substantive rules are not affected by the proposed Community action, which is limited to the rules on international jurisdiction and applicable law. The proposal is limited to "international" divorces. There are currently no indications of convergence of either national conflict-of-law rules in this area. There are no international instruments in this field which the Member States could ratify. The problems including rush to court', insufficient legal certainty and party autonomy, would remain.

The fact that the courts of the Member States would apply the same conflict rules to determine the law applicable to a given situation would increase legal certainty and thereby reinforce the principle of mutual recognition and trust in judicial decisions given in other Member States and the free movement of citizens. For individuals to be able to fully exercise their rights wherever they might be in the Union, the EU has acknowledged that the incompatibilities between judicial and administrative systems between Member States have to be removed. It is clear that without Community action in the area of divorce matters, the problems identified would not be resolved and the policy objective of a common judicial area that make life for the EU citizens easier would not be achieved. Common action therefore respects the principle of subsidiarity articulated in the Article 2 of the Treaty on European Union and Article 5 of the Treaty establishing the European Community.

There are a large and growing number of EU citizens that are affected directly and indirectly by international divorces. Divorce amongst those of the same nationality is traumatic and can be costly. The situation is likely to be worse for international divorcees because of the problems described in section 2 of this report. The costs of the proposed reforms are modest and the benefits are, in comparison, very large. It would strengthen legal certainty, increase flexibility, ensure access to court and prevent rush to the court whilst Member States retain full sovereignty with regard to the substantive laws on divorce.

The problems that the preferred policy option would address stem from the cross-border nature of the divorces involved. According to available data, the estimated number of international divorces in the EU is around 170,000 cases per year or 16% of all divorces. Feedback from practitioners suggest that a significant proportion of these divorcing couples experience a number of practical problems arising from the current rules governing international marriage and divorce. No Member State acting alone would be able to address and solve the problems identified in the current situation. By contrast, the preferred policy option, based on legislative intervention by the EU, would address the problems arising in cross-border divorces.

In addition, the lack of EU action in this area would significantly damage the legitimate interests of EU citizens, who have certain expectations of the functioning of the internal market and an effective common judicial area. In the current situation, international couples face considerable legal uncertainty with regard to the applicable law. The lack of harmonised rules may lead to distress and high cost in international divorce proceedings. The preferred policy option of EU legislative action would be able to address such problems.

The preferred policy option would also meet the EU obligation to safeguard and ensure the protection of citizens' fundamental rights. In particular, it would ensure that the international spouses are not discriminated because of their nationality, that an effective remedy to their situation takes reasonable time and everybody is equal before the law. Finally, it would ensure access to court to citizens living in third States.

MONITORING AND EVALUATION

Monitoring and evaluation of the preferred policy option are important elements to ensure its efficiency and effectiveness in addressing the problems and meeting policy objectives. Table 11.1 below suggests

several indicators to evaluate the progress made by the preferred option towards achieving each of the objectives set for such a legislative instrument.

Evaluation would require regular follow-up surveys of divorcing couples and legal practitioners, as well as collection of information from judicial records from the Member States. A proper, regular and systematic assessment of effectiveness and efficiency of the preferred policy option would have cost implications, which might require support, in terms of financial and human resources, from the European Commission.

Table 11.1 - Potential monitoring and evaluation indicators of the preferred Policy Option |

Objectives | Evaluation indicators | Sources of information |

To increase legal certainty concerning applicable law and competent court | Time taken for legal professions to determine applicable law and competent court. Related costs for spouses. Divorcing international spouses' perceptions of legal certainty (i.e. clarity of what law is applicable and court competent to handle their case). | Regular follow up surveys of divorcing spouses and legal practitioners |

To increase party autonomy for citizens to choose applicable law / competent court | Numbers of established agreements between spouses on competent court and applicable law. Numbers of divorce cases handled where applicable law and competent court are based on an established agreement between spouses. Divorcing international spouses' perceptions of party autonomy (e.g. extent, relevance of connecting factors etc.). | Regular follow up surveys of divorcing spouses and legal practitioners Judicial records from Member States |

To increase flexibility in terms of access to courts in Member States for citizens living in the EU | Divorcing international spouses' perceptions of flexibility. Legal professions' perceptions of flexibility. | Regular follow up surveys of divorcing spouses and legal practitioners |

To reduce risk of rush to court' | Legal professions' perceptions of whether jurisdiction rules provide the possibility to rush to court' and estimation of numbers of cases when this occur. | Regular follow up surveys of legal practitioners |

To ensure access to court for EU citizens living in third countries | Numbers of divorcing international spouses living outside the EU experiencing problems accessing court. | Regular follow up surveys of legal practitioners |

Impacts on fundamental rights |

Equality before the law (between men and women) | Women's / financially weaker parties' perceptions of fairness of divorce proceedings | Regular follow up surveys of divorcing spouses and legal practitioners |

Non-discrimination of EU nationals | Divorcing international spouses' (who are national of an EU Member State) and legal professions' perceptions of (non-) discrimination. | Regular follow up surveys of divorcing spouses and legal practitioners |

Non-discrimination of third State nationals living in the EU | Divorcing international spouses' (who are third State nationals) and legal professions' perceptions of (non-)discrimination. | Regular follow up surveys of divorcing spouses and legal practitioners |

Right to effective remedy (fair trial); reasonable time | Length of divorce proceedings | Regular follow up surveys of divorcing spouses and legal practitioners Use of EU-level expert networks to assess the consistency |

Annex 1

Member States' laws on the grounds for divorce

AUTOMONOUS GROUNDS FOR DIVORCE |

No ground required | Mutual consent (ground 1) | Irretrievable breakdown of the marriage (ground 2) | Fault (ground 3) | Factual separation (ground 4) |

AUSTRIA | YES | YES | YES | NO (but a separation of 6 months with consent establishes ground 2. A separation of 5 years is required in the absence of agreement) |

BELGIUM | YES | YES | YES (2 years) |

CZECH REPUBLIC | YES (sole ground) | NO (but e.g. adultery is a presumption of ground 2) | NO (but a separation of 6 months with consent establishes ground 2. A separation of 3 years is required in the absence of agreement) |

CYPRUS | YES | YES (5 years) |

DENMARK | YES | YES | YES (a separation of 6 months is required if the spouses agree. A separation of 2 years is required in the absence of agreement) |

ESTONIA | YES | YES |

FINLAND | No ground is required, but a 6 months consideration period is required in all cases |

FRANCE | YES | YES | YES (2 years) |

GERMANY | NO (but consent and a separation of 1 year establish ground 2) | YES (sole ground) | NO (but a separation of 1 year with consent establishes ground 2. A separation of 3 years is required in the absence of agreement) |

GREECE | YES | YES | NO (but e.g. cruelty establishes ground 2) | NO (but a separation of 4 years establishes ground 2) |

HUNGARY | NO (but consent establishes ground 2) | YES (sole ground) | NO (but a separation of 3 years establishes ground 2) |

IRELAND | YES (sole ground) 4 years separation is required + no reconciliation prospect + adequate arrangements for the children and the other spouse |

No ground required | Mutual consent (ground 1) | Irreparable breakdown of the marriage (ground 2) | Fault (ground 3) | De facto separation (ground 4) |

ITALY | YES (sole ground) | NO (but a separation of 3 years establishes ground 2) |

LATVIA | YES | YES | YES (3 years) |

LITHUANIA | YES | YES | YES (1 year) |

LUXEMBOURG | YES | YES | YES (a separation of 3 years is required if the spouses agree. A separation of 5 years is required in the absence of agreement) |

NETHERLANDS | NO (but consent establishes ground 2) | YES (sole ground) | NO (but relevant under ground 2) |

POLAND | YES (sole ground) | NO (but divorce is not possible under ground 2 if the guilty spouse

applies for divorce and the non-guilty spouse does not consent) |

PORTUGAL | YES | YES | YES (a separation of 1 year is required if the spouses agree. A separation of 3 years is required in the absence of agreement) |

SLOVAKIA | YES (sole ground) |

SLOVENIA | YES (sole ground) |

SPAIN | YES A separation period of 1, 2 or 5 years is required depending on the circumstances. |

SWEDEN | No ground is required, but a 6 months consideration period is required if one spouse opposes the divorce and/or if the spouses have custody of children under 16 years |

UNITED KINGDOM(| YES (sole ground) | NO (but adultery, unreasonable behaviour and desertion establish ground 2) | NO (but a separation of 2 years with consent establishes ground 2. A separation of 5 years is required in the absence of agreement) |

MALTA | DIVORCE NOT ALLOWED |

Annex 2

Member States' choice-of-law rules in divorce and legal separation proceedings

MEMBER STATE | CONNECTING FACTOR 1 | CONNECTING FACTOR 2 | CONNECTING FACTOR 3 | CONNECTING FACTOR 4 |

AUSTRIA | Common nationality or last common nationality if one spouse still retains it | Common habitual residence | Last common habitual residence if one spouse still resides there |

BELGIUM | Possibility to choose the law of the nationality of one of the spouses or Belgian law | Common habitual residence | Last common habitual residence if one spouse still resides there | Nationality of either spouse |

CZECH REPUBLIC | Common nationality | lex fori |

CYPRUS | lex fori |

DENMARK | lex fori |

ESTONIA | Common residence | Common nationality | Last common residence if one spouse still resides there | Closest connection |

FINLAND | lex fori |

FRANCE | French law if (a) both spouses are French nationals or (b) both spouses are domiciled in France or (c) no foreign law claims jurisdiction while French courts have jurisdiction |

GERMANY | Common nationality or last common nationality if one spouse still retains it | Common habitual residence or Last common habitual residence if one spouse still resides there | Closest connection | Possibility to choose applicable law if the spouses do not have common nationality or a last common nationality and neither spouse is a national of the State in which both spouses are habitually resident, or that the spouses are habitually resident in different States |

GREECE | Last common nationality if one spouse still retains it | Last common habitual residence during the marriage | Closest connection |

ITALY | Common nationality | The law of the State where the marriage has been principally based | Italian law applies where divorce and legal separation are not provided for under the applicable foreign law |

HUNGARY | Common nationality | lex fori if one spouse has Hungarian nationality | Common domicile | lex fori |

IRELAND | lex fori |

LATVIA | lex fori |

LITHUANIA | Common domicile | Last common domicile | lex fori |

LUXEMBOURG | Common nationality | Common effective residence | lex fori |

MALTA | DIVORCE NOT ALLOWED |

NETHERLANDS | Possibility to choose Dutch divorce law (irrespective of nationality or habitual residence of the spouses) or the law of the spouses' common foreign nationality | Common nationality | Common habitual residence | lex fori |

POLAND | Common nationality | Common domicile | lex fori |

PORTUGAL | Common nationality | Common habitual residence | Closest connection |

SLOVAKIA | Common nationality | lex fori |

SLOVENIA | Common nationality | Cumulative application of the national laws of both spouses (i.e. conditions for divorce must be met under both laws) | lex fori (if divorce is not possible by cumulative application of both laws and one spouse resides in Slovenia) | lex fori (if divorce is not possible by cumulative application of both laws, the spouses do not reside in Slovenia, and one spouse is of Slovenian nationality) |

SPAIN | Common nationality | Common habitual residence | Last common habitual residence if one of the spouses still resides there | lex fori if one spouse has Spanish nationality or habitual residence in Spain and: (a) no law is applicable under connecting factors 1-3 or, (b) the divorce petition is filed before a Spanish court jointly or by one spouse with the consent of the other spouse, or (c) if the laws designated under connecting factors 1-3 do not recognise divorce or only in a discriminatory manner or contrary to public order |

SWEDEN | lex fori (with a possibility to take account of foreign law in certain cases) |

UNITED KINGDOM[23] | lex fori (in Scotland with a possibility to take account of foreign law in certain cases) |

ANNEX 3

Overview of available statistics in the Member States on international marriages and divorces

[pic]

Annex 4

NUMBER OF INTERNATIONAL DIVORCES IN MEMBER STATES IN WHICH STATISTICS ARE AVAILABLE

By means of summary (listing the countries by rate of international divorces, starting with the highest):

Estonia: This country had the highest rate of international divorces compared with the total number of divorces across the countries for which data were available (52.2% in 2001; 2,251 cases). The divorce rate peaked in 2001 and since then there has been a slight decrease in international divorces (49.64% in 2003; 1,972 cases). A significant proportion of these divorces (around 78%) involve foreigners only (i.e. no Estonian national involved).

Cyprus: Data were only accessed for one year, 2004. In this year the number of international divorce cases was 594 (37%). Of these cases, 14% involved a Cyprian national with another EU citizen whilst 51% included a Cyprian and a non-EU national. 20% of the divorces included foreigners only.

Netherlands: The international divorce rate increased from 2000 to 2004. The number of international divorces, however, decreased from 9,151 cases in 2000 to 9,134 in 2004. The total number of international divorces reached its peak in 2001 with 9,770 divorces (26% of total divorces).

Sweden: The rate and number of international divorces have increased steadily in the period 2000 (4,575 cases, 21.28% of total divorces) to 2003 (4,725 cases, 22.36%). Whilst the number of international divorces increased in this period, the number of national divorces decreased (from 16,927 in 2000 to 16,405 in 2004).

Germany: The proportion of international divorces increased on a yearly basis from 15% in 2000 to 17% in 2004 (of total divorces). The number of international divorces has increased from 28,475 cases in 2000 to 36,933 in 2004.

Belgium: The number of international divorces in 2002 was 4,461, representing 15% of the total number of divorces this year. Most of these international divorces concerned couples of the type Belgian-foreigner (78%) whereas 22% involved two foreigners. Data were accessed for one year only.

Finland: The proportion of international divorces of the total number of divorces increased in the period 2000-2003; from 11% (1,556 cases) in 2000 to 14% (1,880) in 2003. During the same period the number of national divorces decreased, from 12,357 in 2000 to 11,595 in 2003. About 75% of the cases relate to Finnish-foreigner couples while 25% relate to divorces between foreigners only.

Slovak Republic: No numbers have been accessed for the relevant time period. The only information available is the proportion of international divorces 1980-1989, which was 12%.

Slovenia has the lowest number of international divorce cases among the studied countries (256), which represent 11% of the total number of divorce cases. Data have only been accessed for 2004.

Italy: National figures have only been accessed for 2002. In this period 3,854 international divorces were granted in Italy, representing 9% of the total number of divorces.

Czech Republic : Data for 2003 (the only year available) identify that 4% (1,316 cases) of the total number of divorces in this country related to international marriages. Of these cases, 3.6% included foreigners only, whereas 32% (435 cases) were between a Czech national and a citizen of another EU Member State. 643 cases (47%) included a Czech and a third country national.

Portugal: The rate and the number of international divorces decreased in the period 2000 to 2003. In 2000, there were 748 international divorces in Portugal (4%), whilst in 2003 the number was down to 614 (3%). The highest number was noted in 2002, with 884 international divorces (3%).

Hungary : Data show that the percentage of international divorces is very low compared to other countries, only around 1.5% each year in the period 2000 to 2004. The number of cases has risen from 376 in 2000 to 421 in 2004. At the same time national divorces increased from 23,611 cases to 24,217 in 2004. In around 4% of the cases, the couple was composed by two foreigners, and about

15% involved a Hungarian and another EU citizen.

Austria : The data accessed for Austria do not include characteristics of the cases, but only provide the total number of cases and the nationality and sex of the persons involved. It is not possible to make a distinction between cases only involving Austrian nationals and cases with mixed couples. For instance, in 2000 there were 19,552 divorces in Austria, of which 17,943 involved Austrian men and 1,609 involved foreign men. The number of Austrian women was 18,020 and the number of foreign women was 1,532. It is not possible to retrieve information on who was married to whom. There is, however, an indication of an increasing rate of international divorces, in that the number of foreign individuals involved remained practically unchanged for both foreign men and women in 2002 and 2003, whilst the total number of divorces dropped by 850 cases (from 19,597 to 18,727).

Annex 5

Number of international marriages in the Member States

[pic]

[1] Council Regulation (EC) 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility for children of both spouses, OJ L160, 30.06.2000, p. 19.

[2] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 338 of 23.12.2003, p. 1.

[3] The 1902 Convention of the Hague Conference of Private International Law concerning jurisdiction and applicable law concerning divorce and separation is no longer in force between the few States that initially ratified it.

[4] OJ C19, 23.01,1999, p. 1.

[5] The Hague Programme: strengthening freedom, security and justice in the European Union, adopted by the European Council 4-5 November 2004.

[6] See "Study to inform a subsequent Impact Assessment on the Commission proposal on jurisdiction and applicable law in divorce matters", drawn up by the European Policy Evaluation Consortium (EPEC), available at the following web-site: http:europa.eu.int/comm/justice_home/news/consulting_public/news_consulting_pub lic_en.htm.

[7] Maltese law does not allow for divorce, but recognises divorce judgments given by competent foreign courts.

[8] The responses to the Green Paper are published at the following address: http:europa.eu.int/comm/justice_home/news/consulting_public/news_consulting_pub lic_en.htm.

[9] Information provided by the Polish permanent representation in Brussels.

[10] Denmark does not participate in the judicial cooperation under Title IV of the Amsterdam Treaty.

[11] The countries for which data on international marriages were accessible for more than one year.

[12] Due to the limited availability of data, weighted average has only been calculated on EU level for the year (2003) for which most data were accessed.

[13] Based on the numbers of international marriages in the 13 countries for which data were available.

[14] Data accessed for 9 Member States in 2003.

[15] http:europa.eu.int/comm/justice_home/ejn/

[16] Point 27 of the Explanatory report on the Convention of 28 may 1998 on Jurisdiction and the Recognition and Enforcement of Judgment in Matrimonial Matters (on which the Brussels II Regulation is based), OJ C 221, 16.07.1998, p. 27.

[17] The study Questionnaire concerning the law applicable to divorce (Rome III) - compilation of the replies of the delegations (JUSTCIV 67) is available at: http:register.consilium.eu.int/pdf/en/00/st08/08839en0.pdf.

[18] The study Practical problems resulting from the non-harmonization of choice of law rules in divorce matters by the T.M.C Asser Instituut, November 2002 is available at: http:europa.eu.int/comm/justice_home/doc_centre/civil/studies/doc_civil_studies _en.htm

[19] COM (2005) 82 final.

[20] The responses are published at the following address: http:europa.eu.int/comm/justice_home/news/consulting_public/news_consulting_pub lic_en.htm.

[21] http:europa.eu.int/comm/justice_home/ejn/

[22] Note should also be taken of the Council of Europe 1968 Convention on Information of Foreign Law ratified by all Member States but Ireland.

(Including the separate jurisdictions of England/Wales, Scotland and Northern Ireland.

[23] Including the separate jurisdictions of England/Wales, Scotland and Northern Ireland.

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[pic] ¦ COMMISSION OF THE EUROPEAN COMMUNITIES ¦

Brussels, 17.7.2006

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COMMISSION STAFF WORKING DOCUMENT EXECUTIVE SUMMARY

IMPACT ASSESSMENT FOR THE PROPOSAL FOR A COUNCIL REGULATION AMENDING REGULATION (EC) NO 2201/2003 AS REGARDS JURISIDCTION AND INTRODUCING RULES CONCERNING APPLICABLE LAW IN MATRIMONIAL MATTERS (COM (2006) 399 final)(SEC(2006) 949)

EXECUTIVE SUMMARY

IMPACT ASSESSMENT FOR THE PROPOSAL FOR A COUNCIL REGULATION AMENDING REGULATION (EC) NO 2201/2003 AS REGARDS JURISIDCTION AND INTRODUCING RULES CONCERNING APPLICABLE LAW IN MATRIMONIAL MATTERS

This Impact Assessment, which concerns applicable law and jurisdiction in divorce matters, has been drawn up on the basis of a study prepared for the Commission by an external contractor.[1] It describes the problems that international couples may encounter when they want to dissolve their marriage and sets out policy objectives of the proposal: to enhance legal certainty and predictability, increase flexibility and party autonomy, prevent "rush to court" by one spouse and ensure access to court.

The Impact Assessment identifies the following problems under the current situation:

- difficulties for spouses to predict which law will apply in matrimonial proceedings;
- insufficient flexibility for spouses to choose applicable law and competent court;
- risk of "rush to court" by one spouse and
- difficulties for couples of different nationalities living in third States.

The Impact Assessment analyses the above problems and presents six possible policy options: (1) status quo (2) increased cooperation between Member States, (3) harmonising conflict-of-law rules and introducing a limited possibility for spouses to choose applicable law,(4) revising the jurisdiction rules in Article 3 of Council Regulation 2201/2003, (5) giving the spouses a limited possibility to choose the competent court and (6) revising the rule on residual jurisdiction in Article 7 of Council Regulation 2201/2003.

An assessment of the benefits and disadvantages of the six policy options leads to the conclusion that none of the options would fully address all the problems, but that the most efficient response would be a combination of several policy options. The preferred policy option is therefore to harmonise the national conflict-of-law rules and giving the spouses a limited possibility to choose the applicable law (policy option 3), provide the spouses with a limited choice of jurisdiction (policy option 5) and to adopt common rules on residual jurisdiction to ensure access to court for EU citizens living in third States (policy option 6).

The increasing mobility of citizens within the European Union has resulted in an increasing number of international marriages where the spouses are of different nationalities or live in different Member States or live in a Member State of which they are not nationals. Part 3 of the Impact

Assessment provides an extensive overview of the number of international divorces and marriages in the EU based on data from the Member States' statistical offices.

[1] See "Study to inform a subsequent Impact Assessment on the Commission proposal on jurisdiction and applicable law in divorce matters", drawn up by the European Policy Evaluation Consortium (EPEC), available at the following web-site: http:europa.eu.int/comm/justice_home/news/consulting_public/news_consulting_pub lic_en.htm.

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GREEN PAPER

on applicable law and jurisdiction in divorce matters

(presented by the Commission) {SEC(2005) 331}

GREEN PAPER

on applicable law and jurisdiction in divorce matters

The purpose of this Green Paper is to launch a wide-ranging consultation of interested parties on the questions of applicable law and jurisdiction in matrimonial matters. The Green Paper describes problems that may arise under the current situation and proposes a number of possible solutions. The attached Commission working document provides information on the Member States' substantive, procedural and conflict-of-law rules in divorce matters.

The Commission invites interested parties to submit comments before 30 September 2005 to the following address:

European CommissionDirectorate-General for Justice, Freedom and SecurityUnit C1 - Civil JusticeB - 1049 BrusselsFax: +32-2/299 64 57E-mail: jls-coop-jud-civil@cec.eu.int

Interested parties are requested to mention explicitly if they do not wish their comments to be published on the Commission's website.

The Commission plans to organise a public hearing on this subject. All those responding will be invited to attend.

1. BACKGROUND

There are currently no Community provisions on applicable law in divorce. Council Regulation (EC) No. 1347/2000[1] (the Brussels II Regulation) includes rules on jurisdiction and recognition in matrimonial matters, but does not comprise rules on applicable law. The entry into application of Council Regulation (EC) No. 2201/2003[2] (the new Brussels II Regulation), which replaces the Brussels II Regulation as of 1 March 2005, will not entail any change in this respect, since it takes over the rules on matrimonial matters from the Brussels II Regulation practically unchanged.

The European Council in Vienna emphasised in 1998 that the aim of a common judicial area is to make life simpler for the citizens, in particular in cases affecting the everyday life of the citizens, such as divorce.[3] In November 2004, the European Council invited the Commission to present a Green Paper on the conflict-of-law rules in matters relating to divorce (Rome III) in 2005.[4]

The increasing mobility of citizens within the European Union has resulted in an increasing number of international marriages where the spouses are of different nationalities, or live in different Member States or live in a Member State of which they are not nationals. In the event that an international couple decide to divorce, several laws may be invoked. The aim of the rules on applicable law, often referred to as conflict-of-law rules, is to determine which of the different laws that will apply. In view of the high number of divorces within the European Union, applicable law and international jurisdiction in divorce matters affect a considerable number of citizens. As an example, approximately 15 per cent of the divorces pronounced in Germany each year (approximately 30.000 couples) concern couples of different nationalities.[5]

2. SHORTCOMINGS OF THE CURRENT SITUATION

An international couple who want to divorce are subject to the jurisdiction rules of the new Brussels II Regulation, which allow the spouses to choose between several alternative grounds of jurisdiction (see point 3.6 of the attached working document). Once a divorce proceeding is brought before the courts of a Member State, the applicable law is determined pursuant to the national conflict-of-law rules of that State. There are significant differences between the national conflict-of-law rules (see point 3.4 of the attached working document).

The combination of different conflict-of-law rules and the current jurisdiction rules may give rise to a number of problems in the context of international divorces. Apart from the lack of legal certainty and flexibility, the current situation may also lead to results that do not correspond to the legitimate expectations of citizens. Moreover, Community citizens who are resident in a third State may face difficulties in finding a competent divorce court and to have a divorce judgment issued by a court in a third State recognised in their respective Member States of origin. There is finally a risk of rush to court under the current situation.

2.1. Lack of legal certainty and predictability for the spouses

Considering the difference between, and complexity of, the national conflict-of-law rules in divorce matters, it is often difficult to predict which national law will apply in a given case. This is particularly the case in family situations where the spouses have no common habitual residence or nationality, but the problem may also arise when couples of the same nationality split up and move to different Member States.

Example 1: the Portuguese-Italian couple living in different Member States A Portuguese man and an Italian woman get married in Italy. The husband returns immediately to Portugal after the wedding for professional reasons while the wife stays in Italy. After two years, the couple decide to divorce. The couple may apply for divorce in either Italy or Portugal pursuant to the new Brussels II Regulation. The courts in these States apply, in the first place, the law of the common nationality of the spouses. In the present case where the spouses are of different nationalities, the Italian courts would apply the law of the State where the marriage has been principally based. The Portuguese courts would instead apply the law of the spouses' common habitual residence, or, failing that, the law with which the spouses have the closest connection. The spouses find it difficult to predict what the applicable law will be in their situation. |

2.2. Insufficient party autonomy

The national conflict-of-law rules foresee in principle only one solution in a given situation, e.g. the application of the law of the spouses' nationality or the law of the forum (lex fori). This may in certain situations not be sufficiently flexible. It fails for example to take account of the fact that citizens may feel closely connected with a Member State although they are not nationals of that State. Introducing a certain degree of party autonomy allowing the parties to choose the applicable law could render the rules more flexible and enhance legal certainty and predictability for the spouses.

Example 2: the Italian couple living in Germany A couple of Italian nationality live in Munich since twenty years and feel perfectly integrated in German society. When their children leave home, the couple decide to divorce by consent. They would like to divorce under German law, with which they feel the most closely connected, and which requires only one year of separation in cases of divorce by consent, compared to three years of separation required under Italian law. The new Brussels II Regulation allows the spouses to apply for divorce in either Germany or Italy. Nevertheless, since German as well as Italian conflict-of-law rules are based, in the first place, on the common nationality of the spouses, the courts of both countries would apply Italian divorce law. |

2.3. Risk of results that do not correspond to the legitimate expectations of the citizens

Citizens are increasingly taking advantage of the benefits of the internal market by moving to another Member State for professional reasons. They are unlikely to be aware that the conditions for divorce may change drastically as a result of their move. This may happen for instance in the case where spouses of different nationalities move to a Member State of which none of them is a national. Since the new Brussels II Regulation does not allow spouses to apply for divorce in a Member State of which only one of them is a national in the absence of another connecting factor, spouses may find themselves in a situation where the only possibility is to seise the courts of the Member State of their habitual residence. This may in certain circumstances lead to results that do not correspond to their legitimate expectations.

Example 3: the Finnish/Swedish couple moving to Ireland A Finnish/Swedish couple move from Stockholm to Dublin where they are offered interesting jobs. Their marriage deteriorates and they finally decide to divorce. The couple would expect the divorce proceedings to be rather simple and swift, as it would be under Finnish or Swedish law, since they both want to divorce and do not have any children. However, only Irish courts have jurisdiction according to the new Brussels II Regulation and Irish courts apply Irish law (lex fori) to divorce proceedings, irrespective of the nationality of the spouses. The only way to ensure the application of Swedish or Finnish divorce law would be if a spouse returned to his or her Member State of origin for at least six months and then applied for divorce in that country. Neither spouse is willing or able to quit his or her job and leave Ireland for six months for this purpose. On the other hand, they want to avoid the application of Irish divorce law, which requires a four year separation period to establish that the marriage has broken down. They are surprised that the conditions for divorce have changed so dramatically, due to their decision to move to another Member State. |

2.4. Risk of difficulties for Community citizens living in a third State

Whilst the rules of recognition of the new Brussels II Regulation apply to all divorce judgments issued by a court of a Member State, the rules of jurisdiction do not cover all situations. This may give rise to difficulties for Community citizens living in a third State. Situations may arise where none of the grounds of jurisdiction of the Regulation is applicable. The courts of the Member States may in such circumstances avail themselves of the national rules on international jurisdiction. However, the fact that these rules are not harmonised may lead to situations where no court within the European Union or elsewhere is competent to divorce a couple of Community citizens of different nationalities who live in a third State. Moreover, if a divorce is pronounced in a third State, the couple may face serious difficulties to have the divorce recognised in their respective Member States of origin.

Example 4: the German/Dutch couple living in a third State A German/Dutch couple live in a third State since many years. Their relationship deteriorates and the German wife would like to divorce, preferably before a German court. However, she cannot apply for divorce in Germany or in any other Member State. None of the grounds of jurisdiction of the new Brussels II Regulation is applicable since the couple are not habitually resident in a Member State and are not of common nationality. In such circumstances, the courts of the Member States may avail themselves of their national rules of jurisdiction. However, the German wife cannot apply for divorce in Germany under the German rules of jurisdiction, since the Dutch husband can only be sued in Germany according to the jurisdiction rules of the Regulation according to Article 6, which offers a certain protection to respondents. Nor can she apply for divorce in the Netherlands, since Dutch law does not provide for internal jurisdiction rules in these circumstances. Consequently, the German wife is unable to apply for divorce in any Member State. Her only hope is that the courts of the third State will have jurisdiction to deal with the matter. Even if that would be the case, it may be difficult

to have a divorce pronounced in the third State recognised in Germany. |

2.5. Risk of rush to court

The rule on lis pendens (see point 3.6.3 of the attached working document) may induce a spouse to apply for divorce before the other spouse has done so to prevent the courts of another Member State from acquiring jurisdiction (rush to court). This may lead to situations where an applicant applies for divorce in a particular Member State to obtain a certain result, e.g. to circumvent the application of a particular divorce law. Rush to court may have negative consequences for the defendant if it leads to the application of a law with which he or she does not feel closely connected and which does not take account of his or her interests. This risk may be illustrated by the following example:

Example 5: the Polish husband going to Finland to work A Polish couple, married since twenty years, live in Poland with their children. The husband receives an interesting offer to work in Finland for two years. The couple agree that the husband shall accept the offer and that the wife shall stay in Poland. After one year, the husband tells his wife that he wants to divorce. He is aware that divorce proceedings under Polish law are lengthy and that the court must establish that the marriage has broken down completely and irreparably. However, Finnish courts would have jurisdiction under the new Brussels II Regulation, since the husband has lived in Finland for more than one year. Finnish courts apply Finnish law to divorce proceedings according to the principle of lex fori. As a result, the Polish husband can obtain a divorce after six months' consideration period, notwithstanding his wife's objections. Since the husband wants to obtain a divorce as quickly as possible, he seises a Finnish court immediately, which pronounces the divorce after six months, despite the wife's strong objections. |

Question 1: Are you aware of other problems than those identified above that may arise in the context of international divorces? |

3. POSSIBLE WAYS FORWARD

3.1. Status quo

One possibility would be to leave the situation unchanged and not introduce any legislative change. It could be argued that the problems identified are not sufficiently serious or do not occur sufficiently frequently to warrant Community action.

3.2. Harmonising the conflict-of-law rules

A nother way of addressing the problem would be to introduce harmonised conflict-of-law rules based on a set of uniform connecting factors. This solution would have the advantage of ensuring legal certainty (example 1). Depending on the contents of the harmonised rules, it could also increase party autonomy (example 2) and contribute to finding satisfactory solutions for the citizens (example 3). It may at least partly reduce the need for rush to court (example 5), since any court seised would apply the divorce law designated on the basis of common rules.

The connecting factors would need to be carefully considered in order to ensure legal certainty and predictability and at the same time allow for some flexibility. The objective would be to ensure that a divorce is governed according to the legal order with which it has the closest connection. A number of connecting factors, which are commonly used in international instruments and national conflict laws, could be envisaged, such as the spouses' last common habitual residence, the common nationality of the spouses, the last common nationality if one spouse still retains it or lex fori.

Question 2: Are you in favour of harmonising conflict-of-law rules? What are the arguments for and against such solution? Question 3: What would be the most appropriate connecting factors? Question 4: Should the harmonised rules be confined to divorce or apply also to legal separation and marriage

annulment? Question 5: Should the harmonised rules include a public policy clause enabling courts to refuse to apply a foreign law in certain circumstances? |

3.3. Providing to spouses the possibility to choose the applicable law

Another possibility would be to introduce a limited possibility for the spouses to choose the applicable law in divorce proceedings. The possibility to choose the applicable law could enhance legal certainty and predictability for the spouses in particular in divorces by mutual consent. A certain party autonomy would also render the rules more flexible than current rules which in principle only foresee one possible solution. It could finally facilitate access to courts in certain cases. This solution could be particularly useful when the spouses agree to divorce, such as the Portuguese-Italian couple (example 1) and the Italian couple living in Germany (example 2).

The principle of freedom of choice has increasingly been used in international conventions regarding choice-of-law in the field of contract law, but to a lesser extent in family law. There are nevertheless exceptions, such as the recent Belgian law on private international law that allows spouses to choose between the law of the nationality of one of the spouses or Belgian law (i.e. lex fori).[6]

To leave the parties an unlimited choice could result in the application of exotic laws with which the parties have little or no connection. It would therefore seem preferable to restrict the choice to certain laws with which the spouses are closely connected (e.g. by virtue of the nationality of one or both spouses, last common habitual residence or lex fori). One possibility would be to restrict the choice to the law of the forum State (lex fori) in order to ensure that courts would not be obliged to apply foreign law.

The modalities for the choice would obviously need to be further explored. It could be required that the choice should be expressed explicitly and in writing at the time the divorce application is introduced. One would also need to consider whether special safeguards would be needed to protect a spouse against undue pressure from the other spouse to choose a particular law. Special considerations may also be necessary if the spouses have children.

The choice of a law by the parties would obviously imply the choice of the substantive rules of the divorce forum, and not its rules on private international law (exclusion of so-called renvoi). The contrary would jeopardise the objective of creating legal certainty.

Question 6: Should the parties be allowed to choose applicable law? What are the arguments for and against such a solution? Question 7: Should the choice be limited to certain laws? If yes, what would be the appropriate connecting factors? Should it be limited to the laws of the Member States? Should the choice be limited to lex fori? Question 8: Should the possibility to choose applicable law be confined to divorce or should it apply also to legal separation and marriage annulment? Question 9: What should be the appropriate formal requirements for the parties' agreement on the choice of law? |

3.4. Revising the grounds of jurisdiction listed in Article 3 of Regulation No. 2201/2003

The grounds of jurisdiction listed in Article 3 of Council Regulation No. 2201/2003 were originally designed to meet objective requirements, to be in line with the interests of the parties, involve flexible rules to deal with mobility and to meet individuals' needs without sacrificing legal certainty.[7]

It could be argued that the jurisdiction rules do not entirely meet these objectives. In the absence of uniform conflict-of-law rules, the existence of several alternative grounds of jurisdiction may lead to the application of laws with which the spouses are not necessarily the most closely connected (example 5). On the other hand, the grounds of jurisdiction may in certain cases not be sufficiently flexible to meet individuals' needs (example 3).

One possibility could be to revise the jurisdiction rules. However, the consequences of any revision

would need to be carefully considered. Hence, a restriction of the grounds of jurisdiction may have adverse consequences in terms of flexibility and access to courts, unless the parties are given the opportunity to choose the competent court (see below point 3.6). On the other hand, adding new grounds of jurisdiction may further exacerbate the lack of legal certainty.

Question 10: In your experience, does the existence of several grounds of jurisdiction result in rush to court? Question 11: Do you believe that the grounds of jurisdiction should be revised? If so, what would be the best solution? |

3.5. Revising the rule on residual jurisdiction in Article 7 of Regulation No. 2201/2003

Another question is whether the rule on residual jurisdiction of the new Brussels II Regulation should be revised. The current rules may lead to situations where no court in the European Union or indeed anywhere has jurisdiction to deal with a divorce application (example 4). In the event that a court of a third State has jurisdiction, the ensuing divorce decision is not recognised within the European Union pursuant to the new Brussels II Regulation, but only pursuant to national law or applicable international treaties. This is likely to cause difficulties if the couple subsequently seek to have the divorce recognised in their respective countries of origin.

Question 12: Do you consider that the harmonisation of the jurisdiction rules should be reinforced and that Article 7 of Regulation No. 2201/2003 should be deleted, or at least limited to cases where no EU citizens are involved? If yes, what should these rules look like? |

3.6. Providing to spouses the possibility to choose the competent court

Another way forward could be to allow the spouses to agree upon the competent court in divorce cases (prorogation of jurisdiction). To allow the parties to agree that a court or the courts of a certain Member State should have jurisdiction in divorce proceedings between them could enhance legal certainty and flexibility and be particularly useful in cases of divorces by consent.

Prorogation of jurisdiction could prove useful also in situations where the spouses are unable to seise a court of a Member State under the current jurisdiction rules, because they do not have common nationality or domicile. As an example, it would allow the Swedish-Finnish couple living in Ireland to agree that a Finnish or a Swedish court would have jurisdiction in their divorce proceeding (example 3). Similarly, it would allow the German-Dutch couple living in a third State to agree on a competent court (example 4). The court designated by the parties would apply the law designated under its national conflict-of-law rules.

The possibility to choose the competent court exists in several Community instruments. Prorogation is possible pursuant to Article 23 of Council Regulation (EC) No. 44/2001. Similarly, Article 12 of the new Brussels II Regulation foresees a limited possibility to choose competent court in matters of parental responsibility.

Prorogation in divorces could be limited to courts of Member States with which the spouses have a close connection, for example by virtue of the nationality or domicile of either spouse or the spouses' last common habitual residence. If the spouses have children, special attention should be paid to ensure coherence of any such rules with the prorogation rule of Article 12 of the new Brussels II Regulation. The modalities and timing for the choice would obviously need to be examined further.

Question 13: What are the arguments for and against introducing a possibility of prorogation in divorce cases? Question 14: Should prorogation be limited to certain jurisdictions? Question 15: What should be the formal requirements for the parties' prorogation agreement? |

3.7. Introducing the possibility to transfer a case

As explained above (point 2.5.), a spouse may in certain circumstances have an incentive to rush to court before the other spouse has done so. This may at least partly be explained by the lis pendens rule of the new Brussels II Regulation, which has been criticised as being too rigid and to give an incentive to spouses to strike first. A possible remedy could be to introduce a possibility to transfer a divorce case, in exceptional circumstances, to a court of another Member State. Article 15 of the new Brussels II Regulation provides for such possibility in matters of parental responsibility.

A transfer could be envisaged in exceptional circumstances and under strict conditions if a spouse applies for divorce in a Member State, but the defendant requests that the case be transferred to a court of another Member State on the basis that the marriage was principally based in that State. To safeguard legal certainty, the centre of gravity of a marriage could be established on the basis of a closed list of connecting factors, including for example the last common habitual residence of the spouses if one spouse still lives there and the common nationality of the spouses.

The modalities of a possible transfer mechanism would obviously need to be further elaborated to ensure in particular that it would not result in undue delays. Additional safeguards may be necessary if the divorce proceedings are linked to proceedings on parental responsibility to ensure coherence with Article 15 of the new Brussels II Regulation.

The possibility to transfer a case could provide a remedy to the problems that may arise when one spouse has unilaterally applied for divorce against the will of the other spouse. As an example, it would allow the Polish wife mentioned in example 5 to request the Finnish court to transfer the case to a Polish court on the basis that both spouses being Polish nationals and Poland being the last common habitual residence of the spouses, the centre of gravity of the marriage was situated in Poland.

Question 16: Should it be possible to request a transfer of a case to the court of another Member State? What are the arguments for and against such solution? Question 17: What should be the connecting factors to establish whether a case can be transferred to another Member State? Question 18: What safeguards would be necessary to ensure legal certainty and avoid undue delays? |

3.8. Combining different solutions

The ideas described above are examples of different ways forward. However, none of the ideas could by itself successfully solve all the problems described in chapter 2. One could therefore envisage a combination of different solutions.

As an example, spouses could be allowed to choose competent court based on the nationality of either spouse or their last habitual residence. In addition, spouses could be allowed to choose the applicable law, at least the application of lex fori. This combination could solve the problems described in examples 1-4 and be particularly useful in divorces by consent. To solve the problems that may arise where only one spouse wants to divorce (example 5), it could be envisaged to introduce a possibility to transfer a case to another Member State.

Question 19: Which combination of solutions do you believe would provide the most appropriate remedy to the problems described? Question 20: Would you suggest any other solution to solve the problems described in chapter 2? |

[1] Council Regulation (EC) 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility for children of both spouses, OJ L160, 30.06.2000, p. 19.

[2] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 338 of 23.12.2003, p. 1.

[3] OJ C19, 23.01,1999, p. 1.

[4] The Hague Programme: strengthening freedom, security and justice in the European Union, adopted by the European Council 4-5 November 2004.

[5] Source: Statistisches Bundesamt. Deutschland.

[6] Article 55 paragraphe 2 of " Loi portant le Code de droit international privé " of 16 July 2004, published 27.07.2004.

[7] Point 27 of the Explanatory report on the Convention of 28 may 1998 on Jurisdiction and the Recognition and Enforcement of Judgment in Matrimonial Matters (on which the Brussels II Regulation is based), OJ C 221, 16.07.1998, p. 27.

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CONVENTION ON THE LAW APPLICABLE TO CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

(Concluded December 22, 1986)

The States Parties to the present Convention,
Desiring to unify the choice of law rules relating to contracts for the international sale of goods,
Bearing in mind the United Nations Convention on contracts for the international sale of goods, concluded at Vienna on 11 April 1980,
Have agreed upon the following provisions –

CHAPTER I – SCOPE OF THE CONVENTION

Article 1

This Convention determines the law applicable to contracts of sale of goods –
a) between parties having their places of business in different States;
b) in all other cases involving a choice between the laws of different States, unless such a choice arises solely from a stipulation by the parties as to the applicable law, even if accompanied by a choice of court or arbitration.

Article 2

The Convention does not apply to –
a) sales by way of execution or otherwise by authority of law;
b) sales of stocks, shares, investment securities, negotiable instruments or money; it does, however, apply to the sale of goods based on documents;
c) sales of goods bought for personal, family or household use; it does, however, apply if the seller at the time of the conclusion of the contract neither knew nor ought to have known that the goods were bought for any such use.

Article 3

For the purposes of the Convention, "goods" includes –
a) ships, vessels, boats, hovercraft and aircraft;
b) electricity.

Article 4

(1) Contracts for the supply of goods to be manufactured or produced are to be considered contracts of sale unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.
(2) Contracts in which the preponderant part of the obligations of the party who furnishes goods consists of the supply of labour or other services are not to be considered contracts of sale.

Article 5

The Convention does not determine the law applicable to –
a) the capacity of the parties or the consequences of nullity or invalidity of the contract resulting from the incapacity of a party;
b) the question whether an agent is able to bind a principal, or an organ to bind a company or body corporate or unincorporate;
c) the transfer of ownership; nevertheless, the issues specifically mentioned in Article 12 are governed by the law applicable to the contract under the Convention;
d) the effect of the sale in respect of any person other than the parties;

e) agreements on arbitration or on choice of court, even if such an agreement is embodied in the contract of sale.

Article 6
The law determined under the Convention applies whether or not it is the law of a Contracting State.

CHAPTER II – APPLICABLE LAW
Section 1 – Determination of the applicable law
Article 7
(1) A contract of sale is governed by the law chosen by the parties. The parties' agreement on this choice must be express or be clearly demonstrated by the terms of the contract and the conduct of the parties, viewed in their entirety. Such a choice may be limited to a part of the contract.
(2) The parties may at any time agree to subject the contract in whole or in part to a law other than that which previously governed it, whether or not the law previously governing the contract was chosen by the parties. Any change by the parties of the applicable law made after the conclusion of the contract does not prejudice its formal validity or the rights of third parties.

Article 8
(1) To the extent that the law applicable to a contract of sale has not been chosen by the parties in accordance with Article 7, the contract is governed by the law of the State where the seller has his place of business at the time of conclusion of the contract.
(2) However, the contract is governed by the law of the State where the buyer has his place of business at the time of conclusion of the contract, if –
a) negotiations were conducted, and the contract concluded by and in the presence of the parties, in that State; or
b) the contract provides expressly that the seller must perform his obligation to deliver the goods in that State; or
c) the contract was concluded on terms determined mainly by the buyer and in response to an invitation directed by the buyer to persons invited to bid (a call for tenders).
(3) By way of exception, where, in the light of the circumstances as a whole, for instance any business relations between the parties, the contract is manifestly more closely connected with a law which is not the law which would otherwise be applicable to the contract under paragraphs 1 or 2 of this Article, the contract is governed by that other law.
(4) Paragraph 3 does not apply if, at the time of the conclusion of the contract, the seller and the buyer have their places of business in States having made the reservation under Article 21, paragraph 1, sub-paragraph *b)*.
(5) Paragraph 3 does not apply in respect of issues regulated in the United Nations Convention on contracts for the international sale of goods (Vienna, 11 April 1980) where, at the time of the conclusion of the contract, the seller and the buyer have their places of business in different States both of which are Parties to that Convention.

Article 9
A sale by auction or on a commodity or other exchange is governed by the law chosen by the parties in accordance with Article 7 to the extent to which the law of the State where the auction takes place or the exchange is located does not prohibit such choice. Failing a choice by the parties, or to the extent that such choice is prohibited, the law of the State where the auction takes place or the exchange is located shall apply.

Article 10
(1) Issues concerning the existence and material validity of the consent of the parties as to the choice of the applicable law are determined, where the choice satisfies the requirements of Article 7, by the law chosen. If under that law the choice is invalid, the law governing the contract is determined under Article 8.
(2) The existence and material validity of a contract of sale, or of any term thereof, are determined by the law which under the Convention would govern the contract or term if it were valid.
(3) Nevertheless, to establish that he did not consent to the choice of law, to the contract itself, or to any term

thereof, a party may rely on the law of the State where he has his place of business, if in the circumstances it is not reasonable to determine that issue under the law specified in the preceding paragraphs.

Article 11
(1) A contract of sale concluded between persons who are in the same State is formally valid if it satisfies the requirements either of the law which governs it under the Convention or of the law of the State where it is concluded.
(2) A contract of sale concluded between persons who are in different States is formally valid if it satisfies the requirements either of the law which governs it under the Convention or of the law of one of those States.
(3) Where the contract is concluded by an agent, the State in which the agent acts is the relevant State for the purposes of the preceding paragraphs.
(4) An act intended to have legal effect relating to an existing or contemplated contract of sale is formally valid if it satisfies the requirements either of the law which under the Convention governs or would govern the contract, or of the law of the State where the act was done.
(5) The Convention does not apply to the formal validity of a contract of sale where one of the parties to the contract has, at the time of its conclusion, his place of business in a State which has made the reservation provided for in Article 21, paragraph 1, sub-paragraph *c)*.

Section 2 – Scope of the applicable law
Article 12
The law applicable to a contract of sale by virtue of Articles 7, 8 or 9 governs in particular –
a) interpretation of the contract;
b) the rights and obligations of the parties and performance of the contract;
c) the time at which the buyer becomes entitled to the products, fruits and income deriving from the goods;
d) the time from which the buyer bears the risk with respect to the goods;
e) the validity and effect as between the parties of clauses reserving title to the goods;
f) the consequences of non-performance of the contract, including the categories of loss for which compensation may be recovered, but without prejudice to the procedural law of the forum;
g) the various ways of extinguishing obligations, as well as prescription and limitation of actions;
h) the consequences of nullity or invalidity of the contract.

Article 13
In the absence of an express clause to the contrary, the law of the State where inspection of the goods takes place applies to the modalities and procedural requirements for such inspection.

CHAPTER III – GENERAL PROVISIONS
Article 14
(1) If a party has more than one place of business, the relevant place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract.
(2) If a party does not have a place of business, reference is to be made to his habitual residence.

Article 15
In the Convention "law" means the law in force in a State other than its choice of law rules.

Article 16
In the interpretation of the Convention, regard is to be had to its international character and to the need to promote uniformity in its application.

Article 17
The Convention does not prevent the application of those provisions of the law of the forum that must be applied irrespective of the law that otherwise governs the contract.

Article 18
The application of a law determined by the Convention may be refused only where such application would be manifestly incompatible with public policy (*ordre public*).

Article 19
For the purpose of identifying the law applicable under the Convention, where a State comprises several territorial units each of which has its own system of law or its own rules of law in respect of contracts for the sale of goods, any reference to the law of that State is to be construed as referring to the law in force in the territorial unit in question.

Article 20
A State within which different territorial units have their own systems of law or their own rules of law in respect of contracts of sale is not bound to apply the Convention to conflicts between the laws in force in such units.

Article 21
(1) Any State may, at the time of signature, ratification, acceptance, approval or accession make any of the following reservations –
a) that it will not apply the Convention in the cases covered by sub-paragraph *b)* of Article 1;
b) that it will not apply paragraph 3 of Article 8, except where neither party to the contract has his place of business in a State which has made a reservation provided for under this sub-paragraph;
c) that, for cases where its legislation requires contracts of sale to be concluded in or evidenced by writing, it will not apply the Convention to the formal validity of the contract, where any party has his place of business in its territory at the time of conclusion of the contract;
d) that it will not apply sub-paragraph *g)* of Article 12 in so far as that sub-paragraph relates to prescription and limitation of actions.
(2) No other reservation shall be permitted.
(3) Any Contracting State may at any time withdraw a reservation which it has made; the reservation shall cease to have effect on the first day of the month following the expiration of three months after notification of the withdrawal.

Article 22
(1) This Convention does not prevail over any convention or other international agreement which has been or may be entered into and which contains provisions determining the law applicable to contracts of sale, provided that such instrument applies only if the seller and buyer have their places of business in States Parties to that instrument.
(2) This Convention does not prevail over any international convention to which a Contracting State is, or becomes, a Party, regulating the choice of law in regard to any particular category of contracts of sale within the scope of this Convention.

Article 23
This Convention does not prejudice the application –
a) of the United Nations Convention on contracts for the international sale of goods (Vienna, 11 April 1980);
b) of the Convention on the limitation period in the international sale of goods (New York, 14 June 1974), or the *Protocol* amending that Convention (Vienna, 11 April 1980).

Article 24
The Convention applies in a Contracting State to contracts of sale concluded after its entry into force for that State.

CHAPTER IV – FINAL CLAUSES
Article 25
(1) The Convention is open for signature by all States.
(2) The Convention is subject to ratification, acceptance or approval by the signatory States.
(3) The Convention is open for accession by all States which are not signatory States as from the date it is open for signature.
(4) Instruments of ratification, acceptance, approval and accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.

Article 26
(1) If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.
(2) Any such declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.
(3) If a State makes no declaration under this Article, the Convention is to extend to all territorial units of that State.

Article 27
(1) The Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the fifth instrument of ratification, acceptance, approval or accession referred to in Article 25.
(2) Thereafter the Convention shall enter into force –
a) for each State ratifying, accepting, approving or acceding to it subsequently, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance, approval or accession;
b) for a territorial unit to which the Convention has been extended in conformity with Article 26 on the first day of the month following the expiration of three months after the notification referred to in that Article.

Article 28
For each State Party to the Convention on the law applicable to international sales of goods, done at The Hague on 15 June 1955, which has consented to be bound by this Convention and for which this Convention is in force, this Convention shall replace the said Convention of 1955.

Article 29
Any State which becomes a Party to this Convention after the entry into force of an instrument revising it shall be considered to be a Party to the Convention as revised.

Article 30
(1) A State Party to this Convention may denounce it by a notification in writing addressed to the depositary.
(2) The denunciation takes effect on the first day of the month following the expiration of three months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

Article 31

The depositary shall notify the States Members of the Hague Conference on Private International Law and the States which have signed, ratified, accepted, approved or acceded in accordance with Article 25, of the following –

a) the signatures and ratifications, acceptances, approvals and accessions referred to in Article 25;
b) the date on which the Convention enters into force in accordance with Article 27;
c) the declarations referred to in Article 26;
d) the reservations and the withdrawals of reservations referred to in Article 21;
e) the denunciations referred to in Article 30.

In witness whereof the undersigned, being duly authorized thereto, have signed this Convention.

Done at The Hague, on the 22nd day of December, 1986, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law as of the date of its Extraordinary Session of October 1985, and to each State which participated in that Session.

Collection Juris International

Convention on the Law Applicable to International Sale Of Goods

The States signatory to this Convention;

Desiring to establish common provisions concerning the law applicable to sales of goods;

Have resolved to conclude a Convention for this purpose and have agreed on the following provisions:

Article 1

This Convention shall apply to international sales of goods.

It shall not apply to sales of securities, to sales of ships and of registered boats or aircraft, or to sales upon judicial order or by way of execution. It shall apply to sales based on documents.

For the purposes of this Convention, contracts to deliver goods to be manufactured or produced shall be placed on the same footing as sales provided the party who assumes delivery is to furnish the necessary raw materials for their manufacture or production.

The mere declaration of the parties, relative to the application of a law or the competence of a judge or arbitrator, shall not be sufficient to confer upon a sale the international character provided for in the first paragraph of this Article.

Article 2

A sale shall be governed by the domestic law of the country designated by the Contracting Parties.

Such designation must be contained in an express clause, or unambiguously result from the provisions of the contract.

Conditions affecting the consent of the parties to the law declared applicable shall be determined by such law.

Article 3

In default of a law declared applicable by the parties under the conditions provided in the preceding Article, a sale shall be governed by the domestic law of the country in which the vendor has his habitual residence at the time when he receives the order. If the order is received by an establishment of the vendor, the sale shall be governed by the domestic law of the country in which the establishment is situated.

Nevertheless, a sale shall be governed by the domestic law of the country in which the purchaser has his habitual residence, or in which he has the establishment that has given the order, if the order has been received in such country, whether by the vendor or by his representative, agent or commercial traveller.

In case of a sale at an exchange or at a public auction, the sale shall be governed by the domestic law of the country in which the exchange is situated or the auction takes place.

Article 4

In the absence of an express clause to the contrary, the domestic law of the country in which inspection of goods delivered pursuant to a sale is to take place shall apply in respect of the form in which and the periods within which the inspection must take place, the notifications concerning the inspection and the measures to be taken in case of refusal of the goods.

Article 5

This Convention shall not apply to:

1. The capacity of the parties;

2. The form of the contract;

3. The transfer of ownership, provided that the various obligations of the parties, and especially those relating to risks, shall be subject to the law applicable to the sale pursuant to this Convention;

4. The effects of the sale as regards all persons other than the parties.

Article 6

In each of the Contracting States, the application of the law determined by this convention may be excluded on a ground of public policy.

Article 7

The contracting States have agreed to incorporate the provisions of Articles 1-6 of this Convention in the national law of their respective countries.

Article 8

This Convention shall be open for signature by the States represented at the seventh session of the Hague Conference on Private International Law.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

A record shall be made of each deposit of instruments of ratification, a certified copy of which shall be transmitted through the diplomatic channel to each signatory States.

Article 9

This Convention shall enter into force on the sixtieth day following the deposit of the fifth instrument of ratification in accordance with the provisions of article 8, second paragraph.

For each signatory State subsequently ratifying the Convention, it shall enter into force on the sixtieth day following the date of deposit of the instrument of ratification of that State.

Article 10

This Convention shall apply to the metropolitan territories of the Contracting States as matter of course.

If a Contracting State wishes the Convention to be applicable to all its other territories, or to those of its other territories for the international relations of which it is responsible, it shall give notice of its intention in this regard by an instrument which shall be deposited with the Ministry of Foreign Affairs of the Netherlands. The latter shall transmit through the diplomatic channel a certified copy thereof to each of the Contracting States. The Convention shall enter into force as regards such territories on the sixtieth day following the date of deposit of the above-mentioned instrument of notification.

It is understood that the notification provided for in the second paragraph of this article shall not take effect until after the entry into force of the Convention pursuant to article 9, first paragraph.

Article 11

Any State not represented at the seventh session of The Hague Conference on Private International Law may accede to this Convention. A State desiring to accede shall give notice of its intention by an instrument which shall be deposited with the Ministry of Foreign Affairs of the Netherlands. The latter shall transmit through the diplomatic channel a certified copy thereof to each of the Contracting States. The Convention shall enter into force as regards the acceding State on the sixtieth day following the date of deposit of the instrument of accession.

It is understood that the deposit of the instrument of accession may not take place until after the entry into force of the Convention pursuant to article 9, first paragraph.

Article 12

This Convention shall have a duration of five years from the date specified in article 9, first paragraph. This period shall begin to run as from that date even for the States which ratify or accede to the Convention subsequently.

The Convention shall be renewed by tacit agreement for successive periods of five years unless it is denounced.

Notice of denunciation must be given, at least six months before the expiration of the period, to the Ministry of Foreign Affairs of the Netherlands, which shall notify all the other Contracting States thereof.

The denunciation may be limited to the territories, or to certain of the territories, specified in a notification made pursuant to article 10, second paragraph.

The denunciation shall have effect only as regards the States effecting it. The Convention shall remain in force for the other Contracting States.

IN WITNESS WHEREOF, the undersigned, duly authorized by their respective Governments, have signed the present Convention

DONE et The Hague, on 15 June 1955, in a single copy, wich shall be deposited in the rchives of the Government of the Netherlands and of which a certified copy shall be transmitted, through the diplomatic channel, to each of the States represented at the seventh session of The Hague Conference on Private International Law.

[Trade Instruments] [Contracts] [Arbitration Centres] [Business Lawyer Associations]
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UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (1980)

CONTENTS

II. EXPLANATORY NOTE BY THE UNCITRAL SECRETARIAT ON THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

I. United Nations Convention on Contracts for the International Sale of Goods

PREAMBLE

The States Parties to this Convention,

Bearing in mind the broad objectives in the resolutions adopted by the sixth special session of the General Assembly of the United Nations on the establishment of a New International Economic Order,

Considering that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

Being of the opinion that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade,

Have agreed as follows:

Part I. Sphere of application and general provisions

CHAPTER 1. SPHERE OF APPLICATION

Article 1

(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

(a) when the States are Contracting States; or

(b) when the rules of private international law lead to the application of the law of a Contracting State.

(2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.

Article 2

This Convention does not apply to sales:

(a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;
(b) by auction;
(c) on execution or otherwise by authority of law;
(d) of stocks, shares, investment securities, negotiable instruments or money;
(e) of ships, vessels, hovercraft or aircraft;
(f) of electricity.

Article 3

(1) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

(2) This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.

Article 4

This Convention governs only the formation of the contract of sale and the rights and obligations of the

seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:

(a) the validity of the contract or of any of its provisions or of any usage;
(b) the effect which the contract may have on the property in the goods sold.

Article 5

This Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person.

Article 6

The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.

CHAPTER II. GENERAL PROVISIONS

Article 7

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

Article 8

(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

Article 9

(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

Article 10

For the purposes of this Convention:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;
(b) if a party does not have a place of business, reference is to be made to his habitual residence.

Article 11

A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.

Article 12

Any provision of article 11, article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention. The parties may not derogate from or vary the effect of this article.

Article 13

For the purposes of this Convention "writing" includes telegram and telex.

Part II. Formation of the contract

Article 14

(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.

(2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.

Article 15

(1) An offer becomes effective when it reaches the offeree.

(2) An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.

Article 16

(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.

(2) However, an offer cannot be revoked:

(a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or
(b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

Article 17

An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror.

Article 18

(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.

(2) An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph.

Article 19

(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counteroffer.

(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

(3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.

Article 20

(1) A period of time of acceptance fixed by the offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by the offeror by telephone, telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.

(2) Official holidays or non-business days occurring during the period for acceptance are included in calculating the period. However, if a notice of acceptance cannot be delivered at the address of the offeror on the last day of the period because that day falls on an official holiday or a non-business day at the place of business of the offeror, the period is extended until the first business day which follows.

Article 21

(1) A late acceptance is nevertheless effective as an acceptance if without delay the offeror orally so informs the offeree or dispatches a notice to that effect.

(2) If a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror orally informs the offeree that he considers his offer as having lapsed or dispatches a notice to that effect.

Article 22

An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective.

Article 23

A contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention.

Article 24

For the purposes of this Part of the Convention, an offer, declaration of acceptance or any other indication of intention "reaches" the addressee when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence.

Part III. Sale of goods

CHAPTER I. GENERAL PROVISIONS

Article 25

A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

Article 26

A declaration of avoidance of the contract is effective only if made by notice to the other party.

Article 27

Unless otherwise expressly provided in this Part of the Convention, if any notice, request or other communication is given or made by a party in accordance with this Part and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication.

Article 28

If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.

Article 29

(1) A contract may be modified or terminated by the mere agreement of the parties.

(2) A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

CHAPTER II. OBLIGATIONS OF THE SELLER

Article 30

The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention.

Section *I. Delivery of the goods and handing over of documents*

Article 31

If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists:

(a) if the contract of sale involves carriage of the goods--in handing the goods over to the first carrier for transmission to the buyer;
(b) if, in cases not within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place--in placing the goods at the buyer's disposal at that place;
(c) in other cases--in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract.

Article 32

(1) If the seller, in accordance with the contract or this Convention, hands the goods over to a carrier and if the goods are not dearly identified to the contract by markings on the goods, by shipping documents or otherwise, the seller must give the buyer notice of the consignment specifying the goods.

(2) If the seller is bound to arrange for carriage of the goods, he must make such contracts as are necessary for carriage to the place fixed by means of transportation appropriate in the circumstances and according to the usual terms for such transportation.

(3) If the seller is not bound to effect insurance in respect of the carriage of the goods, he must, at the buyer's request, provide him with all available information necessary to enable him to effect such insurance.

Article 33

The seller must deliver the goods:

(a) if a date is fixed by or determinable from the contract, on that date;
(b) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or
(c) in any other case, within a reasonable time after the conclusion of the contract.

Article 34

If the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract. If the seller has handed over documents before that time, he may, up to that time, cure any lack of conformity in the documents, if the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.

Section II. *Conformity of the goods and third party claims*

Article 35

(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.

(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:

(a) are fit for the purposes for which goods of the same description would ordinarily be used;
(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;
(c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;
(d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

(3) The seller is not liable under subparagraphs *(a)* to *(d)* of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have

been unaware of such lack of conformity.

Article 36

(1) The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time.

(2) The seller is also liable for any lack of conformity which occurs after the time indicated in the preceding paragraph and which is due to a breach of any of his obligations, including a breach of any guarantee that for a period of time the goods will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities or characteristics.

Article 37

If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.

Article 38

(1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.

(2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.

(3) If the goods are redirected in transit or redispatched by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispatch, examination may be deferred until after the goods have arrived at the new destination.

Article 39

(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

(2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.

Article 40

The seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.

Article 41

The seller must deliver goods which are free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim. However, if such right or claim is based on industrial property or other intellectual property, the seller's obligation is governed by article 42.

Article 42

(1) The seller must deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that the right or claim is based on industrial property or other intellectual property:

(a) under the law of the State where the goods will be resold or otherwise used, if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that State; or
(b) in any other case, under the law of the State where the buyer has his place of business.

(2) The obligation of the seller under the preceding paragraph does not extend to cases where:

(a) at the time of the conclusion of the contract the buyer knew or could not have been

unaware of the right or claim; or
(b) the right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer.

Article 43

(1) The buyer loses the right to rely on the provisions of article 41 or article 42 if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he has become aware or ought to have become aware of the right or claim.

(2) The seller is not entitled to rely on the provisions of the preceding paragraph if he knew of the right or claim of the third party and the nature of it.

Article 44

Notwithstanding the provisions of paragraph (1) of article 39 and paragraph (1) of article 43, the buyer may reduce the price in accordance with article 50 or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the required notice.

Section III. *Remedies for breach of contract by the seller*

Article 45

(1) If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may:

(a) exercise the rights provided in articles 46 to 52;
(b) claim damages as provided in articles 74 to 77.

(2) The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.

(3) No period of grace may be granted to the seller by a court or arbitral tribunal when the buyer resorts

to a remedy for breach of contract.

Article 46

(1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.

(2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

(3) If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

Article 47

(1) The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.

(2) Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in performance.

Article 48

(1) Subject to article 49, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. However, the buyer retains any right to claim damages as provided for in this Convention.

(2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time

indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.

(3) A notice by the seller that he will perform within a specified period of time is assumed to include a request, under the preceding paragraph, that the buyer make known his decision.

(4) A request or notice by the seller under paragraph (2) or (3) of this article is not effective unless received by the buyer.

Article 49

(1) The buyer may declare the contract avoided:

(a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or
(b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed.

(2) However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so:

(a) in respect of late delivery, within a reasonable time after he has become aware that delivery has been made;
(b) in respect of any breach other than late delivery, within a reasonable time:

(i) after he knew or ought to have known of the breach;
(ii) after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 47, or after the seller has declared that he will not perform his obligations within such an additional period; or
(iii) after the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of article 48, or after the buyer has declared that he will not accept performances.

Article 50

If the goods do not conform with the contract and whether or not the price has already been paid, the

buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 37 or article 48 or if the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price.

Article 51

(1) If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, articles 46 to 50 apply in respect of the part which is missing or which does not conform.

(2) The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract.

Article 52

(1) If the seller delivers the goods before the date fixed, the buyer may take delivery or refuse to take delivery.

(2) If the seller delivers a quantity of goods greater than that provided for in the contract, the buyer may take delivery or refuse to take delivery of the excess quantity. If the buyer takes delivery of all or part of the excess quantity, he must pay for it at the contract rate.

CHAPTER III. OBLIGATIONS OF THE BUYER

Article 53

The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention.

Section I. *Payment of the price*

Article 54

The buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any laws and regulations to enable payment to be made.

Article 55

Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.

Article 56

If the price is fixed according to the weight of the goods, in case of doubt it is to be determined by the net weight.

Article 57

(1) If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller:

(a) at the seller's place of business; or
(b) if the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place.

(2) The seller must bear any increase in the expenses incidental to payment which is caused by a change in his place of business subsequent to the conclusion of the contract.

Article 58

(1) If the buyer is not bound to pay the price at any other specific time, he must pay it when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and this Convention. The seller may make such payment a condition for handing over the goods or documents.

(2) If the contract involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price.

(3) The buyer is not bound to pay the price until he has had an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity.

Article 59

The buyer must pay the price on the date fixed by or determinable from the contract and this Convention without the need for any request or compliance with any formality on the part of the seller.

Section II. *Taking delivery*

Article 60

The buyer's obligation to take delivery consists:

(a) in doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery; and
(b) in taking over the goods.

Section III. *Remedies for breach of contract by the buyer*

Article 61

(1) If the buyer fails to perform any of his obligations under the contract or this Convention, the seller may:

(a) exercise the rights provided in articles 62 to 65;
(b) claim damages as provided in articles 74 to 77.

(2) The seller is not deprived of any right he may have to claim damages by exercising his right to other remedies.

(3) No period of grace may be granted to the buyer by a court or arbitral tribunal when the seller resorts to a remedy for breach of contract.

Article 62

The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement.

Article 63

(1) The seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations.

(2) Unless the seller has received notice from the buyer that he will not perform within the period so fixed, the seller may not, during that period, resort to any remedy for breach of contract. However, the seller is not deprived thereby of any right he may have to claim damages for delay in performance.

Article 64

(1) The seller may declare the contract avoided:

(a) if the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or
(b) if the buyer does not, within the additional period of time fixed by the seller in

accordance with paragraph (1) of article 63, perform his obligation to pay the price or take delivery of the goods, or if he declares that he will not do so within the period so fixed;

(2) However, in cases where the buyer has paid the price, the seller loses the right to declare the contract avoided unless he does so:

(a) in respect of late performance by the buyer, before the seller has become aware that performance has been rendered; or
(b) in respect of any breach other than late performance by the buyer, within a reasonable time:

(i) after the seller knew or ought to have known of the breach; or
(ii) after the expiration of any additional period of time fixed by the seller in accordance with paragraph (1) of article 63, or after the buyer has declared that he will not perform his obligations within such an additional period.

Article 65

(1) If under the contract the buyer is to specify the form, measurement or other features of the goods and he fails to make such specification either on the date agreed upon or within a reasonable time after receipt of a request from the seller, the seller may, without prejudice to any other rights he may have, make the specification himself in accordance with the requirements of the buyer that may be known to him.

(2) If the seller makes the specification himself, he must inform the buyer of the details thereof and must fix a reasonable time within which the buyer may make a different specification. If, after receipt of such a communication, the buyer fails to do so within the time so fixed, the specification made by the seller is binding.

CHAPTER IV. PASSING OF RISK

Article 66

Loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.

Article 67

(1) If the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale. If the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of the risk.

(2) Nevertheless, the risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise.

Article 68

The risk in respect of goods sold in transit passes to the buyer from the time of the conclusion of the contract. However, if the circumstances so indicate, the risk is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage. Nevertheless, if at the time of the conclusion of the contract of sale the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller.

Article 69

(1) In cases not within articles 67 and 68, the risk passes to the buyer when he takes over the goods or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery.

(2) However, if the buyer is bound to take over the goods at a place other than a place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place.

(3) If the contract relates to goods not then identified, the goods are considered not to be placed at the disposal of the buyer until they are clearly identified to the contract.

Article 70

If the seller has committed a fundamental breach of contract, articles 67, 68 and 69 do not impair the remedies available to the buyer on account of the breach.

CHAPTER V. PROVISIONS COMMON TO THE OBLIGATIONS OF THE SELLER AND OF THE BUYER

Section I. *Anticipatory breach and instalment contracts*

Article 71

(1) A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of:

(a) a serious deficiency in his ability of perform or in his creditworthiness; or
(b) his conduct in preparing to perform or in performing the contract.

(2) If the seller has already dispatched the goods before the grounds described in the preceding paragraph become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. The present paragraph relates only to the rights in the goods as between the buyer and the seller.

(3) A party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance.

Article 72

(1) If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided.

(2) If time allows, the party intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance.

(3) The requirements of the preceding paragraph do not apply if the other party has declared that he will not perform his obligations.

Article 73

(1) In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach of contract with respect to that instalment, the other party may declare the contract avoided with respect to that instalment.

(2) If one party's failure to perform any of his obligations in respect of any instalment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future installments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.

(3) A buyer who declares the contract avoided in respect of any delivery may, at the same time, declare it avoided in respect of deliveries already made or of future deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract.

Section II. *Damages*

Article 74

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

Article 75

If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74.

Article 76

(1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recoverable under article 74. If, however, the party claiming damages has avoided the contract after taking over the goods, the current price at the time of such taking over shall be applied instead of the current price at the time of avoidance.

(2) For the purposes of the preceding paragraph, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at such other place as serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

Article 77

A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.

Section III. *Interest*

Article 78

If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on

it, without prejudice to any claim for damages recoverable under article 74.

Section IV. *Exemption*

Article 79

(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:

(a) he is exempt under the preceding paragraph; and
(b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.

(3) The exemption provided by this article has effect for the period during which the impediment exists.

(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such nonreceipt.

(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

Article 80

A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission.

Section V. *Effects of avoidance*

Article 81

(1) Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due. Avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract.

(2) A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently.

Article 82

(1) The buyer loses the right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them.

(2) The preceding paragraph does not apply:

(a) if the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which the buyer received them is not due to his act or omission;
(b) the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 38; or
(c) if the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered or ought to have discovered the lack of conformity.

Article 83

A buyer who has lost the right to declare the contract avoided or to require the seller to deliver substitute goods in accordance with article 82 retains all other remedies under the contract and this Convention.

Article 84

(1) If the seller is bound to refund the price, he must also pay interest on it, from the date on which the price was paid.

(2) The buyer must account to the seller for all benefits which he has derived from the goods or part of them:

(a) if he must make restitution of the goods or part of them; or
(b) if it is impossible for him to make restitution of all or part of the goods or to make restitution of all or part of the goods substantially in the condition in which he received them, but he has nevertheless declared the contract avoided or required the seller to deliver substitute goods.

Section VI. *Preservation of the goods*

Article 85

If the buyer is in delay in taking delivery of the goods or, where payment of the price and delivery of the goods are to be made concurrently, if he fails to pay the price, and the seller is either in possession of the goods or otherwise able to control their disposition, the seller must take such steps as are reasonable in the circumstances to preserve them. He is entitled to retain them until he has been reimbursed his reasonable expenses by the buyer.

Article 86

(1) If the buyer has received the goods and intends to exercise any right under the contract or this Convention to reject them, he must take such steps to preserve them as are reasonable in the circumstances. He is entitled to retain them until he has been reimbursed his reasonable expenses by the seller.

(2) If goods dispatched to the buyer have been placed at his disposal at their destination and he exercises the right to reject them, he must take possession of them on behalf of the seller, provided that this can be done without payment of the price and without unreasonable inconvenience or unreasonable expense. This provision does not apply if the seller or a person authorized to take charge of the goods on his behalf is present at the destination. If the buyer takes possession of the goods under this paragraph, his

rights and obligations are governed by the preceding paragraph.

Article 87

A party who is bound to take steps to preserve the goods may deposit them in a warehouse of a third person at the expense of the other party provided that the expense incurred is not unreasonable.

Article 88

(1) A party who is bound to preserve the goods in accordance with article 85 or 86 may sell them by any appropriate means if there has been an unreasonable delay by the other party in taking possession of the goods or in taking them back or in paying the price or the cost of preservation, provided that reasonable notice of the intention to sell has been given to the other party.

(2) If the goods are subject to rapid deterioration or their preservation would involve unreasonable expense, a party who is bound to preserve the goods in accordance with article 85 or 86 must take reasonable measures to sell them. To the extent possible he must give notice to the other party of his intention to sell.

(3) A party selling the goods has the right to retain out of the proceeds of sale an amount equal to the reasonable expenses of preserving the goods and of selling them. He must account to the other party for the balance.

Part IV. Final provisions

Article 89

The Secretary-General of the United Nations is hereby designated as the depositary for this Convention.

Article 90

This Convention does not prevail over any international agreement which has already been or may be entered into and which contains provisions concerning the matters governed by this Convention, provided that the parties have their places of business in States parties, to such agreement.

Article 91

(1) This Convention is open for signature at the concluding meeting of the United Nations Conference on Contracts for the International Sale of Goods and will remain open for signature by all States at the Headquarters of the United Nations, New York until 30 September 1981.

(2) This Convention is subject to ratification, acceptance or approval by the signatory States.

(3) This Convention is open for accession by all States which are not signatory States as from the date it is open for signature.

(4) Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

Article 92

(1) A Contracting State may declare at the time of signature, ratification, acceptance, approval or accession that it will not be bound by Part II of this Convention or that it will not be bound by Part III of this Convention.

(2) A Contracting State which makes a declaration in accordance with the preceding paragraph in respect of Part II or Part III of this Convention is not to be considered a Contracting State within paragraph (1) of article 1 of this Convention in respect of matters governed by the Part to which the declaration applies.

Article 93

(1) If a Contracting State has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by

submitting another declaration at any time.

(2) These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

(3) If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.

(4) If a Contracting State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State.

Article 94

(1) Two or more Contracting States which have the same or closely related legal rules on matters governed by this Convention may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States. Such declarations may be made jointly or by reciprocal unilateral declarations.

(2) A Contracting State which has the same or closely related legal rules on matters governed by this Convention as one or more non-Contracting States may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States.

(3) If a State which is the object of a declaration under the preceding paragraph subsequently becomes a Contracting State, the declaration made will, as from the date on which the Convention enters into force in respect of the new Contracting State, have the effect of a declaration made under paragraph (1), provided that the new Contracting State joins in such declaration or makes a reciprocal unilateral declaration.

Article 95

Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1) (b) of article 1 of this Convention.

Article 96

A Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with article 12 that any provision of article 11, article 29, or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State.

Article 97

(1) Declarations made under this Convention at the time of signature are subject to confirmation upon ratification, acceptance or approval.

(2) Declarations and confirmations of declarations are to be in writing and be formally notified to the depositary.

(3) A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary. Reciprocal unilateral declarations under article 94 take effect on the first day of the month following the expiration of six months after the receipt of the latest declaration by the depositary.

(4) Any State which makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal is to take effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

(5) A withdrawal of a declaration made under article 94 renders inoperative, as from the date on which the withdrawal takes effect, any reciprocal declaration made by another State under that article.

Article 98

No reservations are permitted except those expressly authorized in this Convention.

Article 99

(1) This Convention enters into force, subject to the provisions of paragraph (6) of this article, on the first day of the month following the expiration of twelve months after the date of deposit of the tenth instrument of ratification, acceptance, approval or accession, including an instrument which contains a declaration made under article 92.

(2) When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the tenth instrument of ratification, acceptance, approval or accession, this Convention, with the exception of the Part excluded, enters into force in respect of that State, subject to the provisions of paragraph (6) of this article, on the first day of the month following the expiration of twelve months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

(3) A State which ratifies, accepts, approves or accedes to this Convention and is a party to either or both the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods done at The Hague on 1 July 1964 (1964 Hague Formation Convention) and the Convention relating to a Uniform Law on the International Sale of Goods done at The Hague on 1 July 1964 (1964 Hague Sales Convention) shall at the same time denounce, as the case may be, either or both the 1964 Hague Sales Convention and the 1964 Hague Formation Convention by notifying the Government of the Netherlands to that effect.

(4) A State party to the 1964 Hague Sales Convention which ratifies, accepts, approves or accedes to the present Convention and declares or has declared under article 92 that it will not be bound by Part II of this Convention shall at the time of ratification, acceptance, approval or accession denounce the 1964 Hague Sales Convention by notifying the Government of the Netherlands to that effect.

(5) A State party to the 1964 Hague Formation Convention which ratifies, accepts, approves or accedes to the present Convention and declares or has declared under article 92 that it will not be bound by Part III of this Convention shall at the time of ratification, acceptance, approval or accession denounce the 1964 Hague Formation Convention by notifying the Government of the Netherlands to that effect.

(6) For the purpose of this article, ratifications, acceptances, approvals and accessions in respect of this Convention by States parties to the 1964 Hague Formation Convention or to the 1964 Hague Sales Convention shall not be effective until such denunciations as may be required on the part of those States in respect of the latter two Conventions have themselves become effective. The depositary of this Convention shall consult with the Government of the Netherlands, as the depositary of the 1964 Conventions, so as to ensure necessary co-ordination in this respect.

Article 100

(1) This Convention applies to the formation of a contract only when the proposal for concluding the contract is made on or after the date when the Convention enters into force in respect of the Contracting States referred to in subparagraph (1) (a) or the Contracting State referred to in subparagraph (1) *(b)* of article 1.

(2) This Convention applies only to contracts concluded on or after the date when the Convention enters into force in respect of the Contracting States referred to in subparagraph (1)(a) or the Contracting State referred to in subparagraph *(1)(b)* of article 1.

Article 101

(1) A Contracting State may denounce this Convention, or Part II or Part III of the Convention, by a formal notification in writing addressed to the depositary.

(2) The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

DONE at Vienna, this day of eleventh day of April, one thousand nine hundred and eighty, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed this Convention.

II. EXPLANATORY NOTE BY THE UNCITRAL SECRETARIAT ON THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS*

INTRODUCTION

1. The United Nations Convention on Contracts for the International Sale of Goods provides a uniform text of law for international sales of goods. The Convention was prepared by the United Nations

Commission on International Trade Law (UNCITRAL) and adopted by a diplomatic conference on 11 April 1980.

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* This note has been prepared by the Secretariat of the United Nations Commission on International Trade Law for informational purposes; it is not an official commentary on the Convention.

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2. Preparation of a uniform law for the international sale of goods began in 1930 at the International Institute for the Unification of Private Law (UNIDROIT) in Rome. After a long interruption in the work as a result of the Second World War, the draft was submitted to a diplomatic conference in The Hague in 1964, which adopted two conventions, one on the international sale of goods and the other on the formation of contracts for the international sale of goods.

3. Almost immediately upon the adoption of the two conventions there was wide-spread criticism of their provisions as reflecting primarily the legal traditions and economic realities of continental Western Europe, which was the region that had most actively contributed to their preparation. As a result, one of the first tasks undertaken by UNCITRAL on its organization in 1968 was to enquire of States whether or not they intended to adhere to those conventions and the reasons for their positions. In the light of the responses received, UNCITRAL decided to study the two conventions to ascertain which modifications might render them capable of wider acceptance by countries of different legal, social and economic systems. The result of this study was the adoption by diplomatic conference on 11 April 1980 of the United Nations Convention on Contracts for the International Sale of Goods, which combines the subject matter of the two prior conventions.

4. UNCITRAL's success in preparing a Convention with wider acceptability is evidenced by the fact that the original eleven States for which the Convention came into force on 1 January 1988 included States from every geographical region, every stage of economic development and every major legal, social and economic system. The original eleven States were: Argentina, China, Egypt, France, Hungary, Italy, Lesotho, Syria, United States, Yugoslavia and Zambia.

5. As of 31 January 1988, an additional four States, Austria, Finland, Mexico and Sweden, had become a party to the Convention.

6. The Convention is divided into four parts. Part One deals with the scope of application of the Convention and the general provisions. Part Two contains the rules governing the formation of contracts for the international sale of goods. Part Three deals with the substantive rights and obligations of buyer and seller arising from the contract. Part Four contains the final clauses of the Convention concerning such matters as how and when it comes into force, the reservations and declarations that are permitted and the application of the Convention to international sales where both States concerned have the same

or similar law on the subject.

Part One. Scope of application and general provisions

A. Scope of application

7. The articles on scope of application state both what is included in the coverage of the Convention and what is excluded from it. The provisions on inclusion are the most important. The Convention applies to contracts of sale of goods between parties whose places of business are in different States and either both of those States are Contracting States or the rules of private international law lead to the law of a Contracting State. A few States have availed themselves of the authorization in article 95 to declare that they would apply the Convention only in the former and not in the latter of these two situations. As the Convention becomes more widely adopted, the practical significance of such a declaration will diminish.

8. The final clauses make two additional restrictions on the territorial scope of application that will be relevant to a few States. One applies only if a State is a party to another international agreement that contains provisions concerning matters governed by this Convention; the other permits States that have the same or similar domestic law of sales to declare that the Convention does not apply between them.

9. Contracts of sale are distinguished from contracts for services in two respects by article 3. A contract for the supply of goods to be manufactured or produced is considered to be a sale unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for their manufacture or production. When the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services, the Convention does not apply.

10. The Convention contains a list of types of sales that are excluded from the Convention, either because of the purpose of the sale (goods bought for personal, family or household use), the nature of the sale (sales by auction, on execution or otherwise by law) or the nature of the goods (stocks, shares, investment securities, negotiable instruments, money, ships, vessels, hovercraft, aircraft or electricity). In many States some or all of such sales are governed by special rules reflecting their special nature.

11. Several articles make clear that the subject matter of the Convention is restricted to the formation of the contract and the rights and duties of the buyer and seller arising from such a contract. In particular, the Convention is not concerned with the validity of the contract, the effect which the contract may have on the property in the goods sold or the liability of the seller for death or personal injury caused by the goods to any person.

B. Party autonomy

12. The basic principle of contractual freedom in the international sale of goods is recognized by the provision that permits the parties to exclude the application of this Convention or derogate from or vary the effect of any of its provisions. The exclusion of the Convention would most often result from the choice by the parties of the law of a non-contracting State or of the domestic law of a contracting State to be the law applicable to the contract. Derogation from the Convention would occur whenever a provision in the contract provided a different rule from that found in the Convention.

C. Interpretation of the Convention

13. This Convention for the unification of the law governing the international sale of goods will better fulfill its purpose if it is interpreted in a consistent manner in all legal systems. Great care was taken in its preparation to make it as clear and easy to understand as possible. Nevertheless, disputes will arise as to its meaning and application. When this occurs, all parties, including domestic courts and arbitral tribunals, are admonished to observe its international character and to promote uniformity in its application and the observance of good faith in international trade. In particular, when a question concerning a matter governed by this Convention is not expressly settled in it, the question is to be settled in conformity with the general principles on which the Convention is based. Only in the absence of such principles should the matter be settled in conformity with the law applicable by virtue of the rules of private international law.

D. Interpretation of the contract; usages

14. The Convention contains provisions on the manner in which statements and conduct of a party are to be interpreted in the context of the formation of the contract or its implementation. Usages agreed to by the parties, practices they have established between themselves and usages of which the parties knew or ought to have known and which are widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned may all be binding on the parties to the contract of sale.

E. Form of the contract

15. The Convention does not subject the contract of sale to any requirement as to form. In particular, article 11 provides that no written agreement is necessary for the conclusion of the contract. However, if

the contract is in writing and it contains a provision requiring any modification or termination by agreement to be in writing, article 29 provides that the contract may not be otherwise modified or terminated by agreement. The only exception is that a party may be precluded by his conduct from asserting such a provision to the extent that the other person has relied on that conduct.

16. In order to accommodate those States whose legislation requires contracts of sale to be concluded in or evidenced by writing, article 96 entitles those States to declare that neither article 11 nor the exception to article 29 applies where any party to the contract has his place of business in that State.

Part Two. Formation of the contract

17. Part Two of the Convention deals with a number of questions that arise in the formation of the contract by the exchange of an offer and an acceptance. When the formation of the contract takes place in this manner, the contract is concluded when the acceptance of the offer becomes effective.

18. In order for a proposal for concluding a contract to constitute an offer, it must be addressed to one or more specific persons and it must be sufficiently definite. For the proposal to be sufficiently definite, it must indicate the goods and expressly or implicitly fix or make provision for determining the quantity and the price.

19. The Convention takes a middle position between the doctrine of the revocability of the offer until acceptance and its general irrevocability for some period of time. The general rule is that an offer may be revoked. However, the revocation must reach the offeree before he has dispatched an acceptance. Moreover, an offer cannot be revoked if it indicates that it is irrevocable, which it may do by stating a fixed time for acceptance or otherwise. Furthermore, an offer may not be revoked if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

20. Acceptance of an offer may be made by means of a statement or other conduct of the offeree indicating assent to the offer that is communicated to the offerer. However, in some cases the acceptance may consist of performing an act, such as dispatch of the goods or payment of the price. Such an act would normally be effective as an acceptance the moment the act was performed.

21. A frequent problem in contract formation, perhaps especially in regard to contracts of sale of goods, arises out of a reply to an offer that purports to be an acceptance but contains additional or different terms. Under the Convention, if the additional or different terms do not materially alter the terms of the offer, the reply constitutes an acceptance, unless the offeror without undue delay objects to those terms. If he does not object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

22. If the additional or different terms do materially alter the terms of the contract, the reply constitutes a

counter-offer that must in turn be accepted for a contract to be concluded. Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or settlement of disputes are considered to alter the terms of the offer materially.

Part Three. Sale of goods

A. Obligations of the seller

23. The general obligations of the seller are to deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention. The Convention provides supplementary rules for use in the absence of contractual agreement as to when, where and how the seller must perform these obligations.

24. The Convention provides a number of rules that implement the seller's obligations in respect of the quality of the goods. In general, the seller must deliver goods that are of the quantity, quality and description required by the contract and that are contained or packaged in the manner required by the contract. One set of rules of particular importance in international sales of goods involves the seller's obligation to deliver goods that are free from any right or claim of a third party, including rights based on industrial property or other intellectual property.

25. In connection with the seller's obligations in regard to the quality of the goods, the Convention contains provisions on the buyer's obligation to inspect the goods. He must give notice of any lack of their conformity with the contract within a reasonable time after he has discovered it or ought to have discovered it, and at the latest two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.

B. Obligations of the buyer

26. Compared to the obligations of the seller, the general obligations of the buyer are less extensive and relatively simple; they are to pay the price for the goods and take delivery of them as required by the contract and the Convention. The Convention provides supplementary rules for use in the absence of contractual agreement as to how the price is to be determined and where and when the buyer should perform his obligation to pay the price.

C. Remedies for breach of contract

27. The remedies of the buyer for breach of contract by the seller are set forth in connection with the obligations of the seller and the remedies of the seller are set forth in connection with the obligations of the buyer. This makes it easier to use and understand the Convention.

28. The general pattern of remedies is the same in both cases. If all the required conditions are fulfilled, the aggrieved party may require performance of the other party's obligations, claim damages or avoid the contract. The buyer also has the right to reduce the price where the goods delivered do not conform with the contract.

29. Among the more important limitations on the right of an aggrieved party to claim a remedy is the concept of fundamental breach. For a breach of contract to be fundamental, it must result in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the result was neither foreseen by the party in breach nor foreseeable by a reaonsable person of the same kind in the same circumstances. A buyer can require the delivery of substitute goods only if the goods delivered were not in conformity with the contract and the lack of conformity constituted a fundamental breach of contract. The existence of a fundamental breach is one of the two circumstances that justifies a declaration of avoidance of a contract by the aggrieved party; the other circumstance being that, in the case of non-delivery of the goods by the seller or non-payment of the price or failure to take delivery by the buyer, the party in breach fails to perform within a reasonable period of time fixed by the aggrieved party.

30. Other remedies may be restricted by special circumstances. For example, if the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A party cannot recover damages that he could have mitigated by taking the proper measures. A party may be exempted from paying damages by virtue of an impediment beyond his control.

D. Passing of risk

31. Determining the exact moment when the risk of loss or damage to the goods passes from the seller to the buyer is of great importance in contracts for the international sale of goods. Parties may regulate that issue in their contract either by an express provision or by the use of a trade term. However, for the frequent case where the contract does not contain such a provision, the Convention sets forth a complete set of rules.

32. The two special situations contemplated by the Convention are when the contract of sale involves carriage of the goods and when the goods are sold while in transit. In all other cases the risk passes to the buyer when he takes over the goods or from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery, whichever comes first. In the frequent case

when the contract relates to goods that are not then identified, they must be identified to the contract before they can be considered to be placed at the disposal of the buyer and the risk of their loss can be considered to have passed to him.

E. Suspension of performance and anticipatory breach

33. The Convention contains special rules for the situation in which, prior to the date on which performance is due, it becomes apparent that one of the parties will not perform a substantial part of his obligations or will commit a fundamental breach of contract. A distinction is drawn between those cases in which the other party may suspend his own performance of the contract but the contract remains in existence awaiting future events and those cases in which he may declare the contract avoided.

F. Exemption from liability to pay damages

34. When a party fails to perform any of his obligations due to an impediment beyond his control that he could not reasonably have been expected to take into account at the time of the conclusion of the contract and that he could not have avoided or overcome, he is exempted from paying damages. This exemption may also apply if the failure is due to the failure of a third person whom he has engaged to perform the whole or a part of the contract. However, he is subject to any other remedy, including reduction of the price, if the goods were defective in some way.

G. Preservation of the goods

35. The Convention imposes on both parties the duty to preserve any goods in their possession belonging to the other party. Such a duty is of even greater importance in an international sale of goods where the other party is from a foreign country and may not have agents in the country where the goods are located. Under certain circumstances the party in possession of the goods may sell them, or may even be required to sell them. A party selling the goods has the right to retain out of the proceeds of sale an amount equal to the reasonable expenses of preserving the goods and of selling them and must account to the other party for the balance.

Part Four. Final clauses

36. The final clauses contain the usual provisions relating to the Secretary-General as depositary and

providing that the Convention is subject to ratification, acceptance or approval by those States that signed it by 30 September 1981, that it is open to accession by all States that are not signatory States and that the text is equally authentic in Arabic, Chinese, English, French, Russian and Spanish.

37. The Convention permits a certain number of declarations. Those relative to scope of application and the requirement as to a written contract have been mentioned above. There is a special declaration for States that have different systems of law governing contracts of sale in different parts of their territory. Finally, a State may declare that it will not be bound by Part II on formation of contracts or Part III on the rights and obligations of the buyer and seller. This latter declaration was included as part of the decision to combine into one convention the subject matter of the two 1964 Hague Conventions.

Further information may be obtained from

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1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (consolidated version)

1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (consolidated version)

PRELIMINARY NOTE

The signing on 29 November 1996 of the Convention on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice has made it desirable, as with previous accessions, for legal practitioners to be provided with an up-to-date consolidated version of the texts of the Brussels Convention and of that Protocol published in Official Journal of the European Communities C 189 of 28 July 1990.

These texts are accompanied by three Declarations by the representatives of the Governments of the Member States, one made in 1978 in connection with the International Convention relating to the arrest of sea-going ships, another in 1989 concerning the ratification of the Convention on the accession of the Kingdom of Spain and the Portuguese Republic and the last in 1996 on jurisdiction for cases where, in the framework of the provision of services, workers are posted in a Member State other than that in which their work is normally performed.

The text printed in this edition was drawn up by the General Secretariat of the Council, in whose archives the originals of the instruments concerned are deposited. It should be noted, however, that this text has no binding force. The official texts of the instruments consolidated are to be found in the following Official Journals.

Language version of the Official Journal	1968 Brussels Convention	1971 Protocol	1978 Accession Convention	1982 Accession Convention	1989 Accession Convention	1997 Accession Convention
German	L 299, 31. 12. 1972, p. 32	L 204, 2. 8. 1975, p. 28	L 304, 30. 10. 1978, p. 1	L 388, 31. 12. 1982, p. 1	L 285, 3. 10. 1989, p. 1	C 15, 15. 1. 1997, p. 1
English	L 304, 30. 10. 1978, p. 36	L 304, 30. 10. 1978, p. 50	L 304, 30. 10. 1978, p. 1	L 388, 31. 12. 1982, p. 1	L 285, 3. 10. 1989, p. 1	C 15, 15. 1. 1997, p. 1
Danish	L 304, 30. 10. 1978, p. 17	L 304, 30. 10. 1978, p. 31	L 304, 30. 10. 1978, p. 1	L 388, 31. 12. 1982, p. 1	L 285, 3. 10. 1989, p. 1	C 15, 15. 1. 1997, p. 1
French	L 299, 31. 12. 1972, p. 32	L 204, 2. 8. 1975, p. 28	L 304, 30. 10. 1978, p. 1	L 388, 31. 12. 1982, p. 1	L 285, 3. 10. 1989, p. 1	C 15, 15. 1. 1997, p. 1

Language version of the Official Journal	1968 Brussels Convention	1971 Protocol	1978 Accession Convention	1982 Accession Convention	1989 Accession Convention	1997 Accession Convention
Greek	L 388, 31. 12. 1982, p. 7	L 388, 31. 12. 1982, p. 20	L 388, 31. 12. 1982, p. 24	L 388, 31. 12. 1982, p. 1	L 285, 3. 10. 1989, p. 1	C 15, 15. 1. 1997, p. 1
Irish	Special Edition (L 388)	Special Edition (L 388)	Special Edition (L 388)	Special Edition (L 388)	Special Edition (L 285)	Special Edition (C 15)
Italian	L 299, 31. 12. 1972, p. 32	L 204, 2. 8. 1975, p. 28	L 304, 30. 10. 1978, p. 1	L 388, 31. 12. 1982, p. 1	L 285, 3. 10. 1989, p. 1	C 15, 15. 1. 1997, p. 1
Dutch	L 299, 31. 12. 1972, p. 32	L 204, 2. 8. 1975, p. 28	L 304, 30. 10. 1978, p. 1	L 388, 31. 12. 1982, p. 1	L 285, 3. 10. 1989, p. 1	C 15, 15. 1. 1997, p. 1
Spanish	L 285, 3. 10. 1989, p. 24	L 285, 3. 10. 1989, p. 37	L 285, 3. 10. 1989, p. 41	L 285, 3. 10. 1989, p. 54	L 285, 3. 10. 1989, p. 1	C 15, 15. 1. 1997, p. 1
Portuguese	L 285, 3. 10. 1989, p. 24	L 285, 3. 10. 1989, p. 37	L 285, 3. 10. 1989, p. 41	L 285, 3. 10. 1989, p. 54	L 285, 3. 10. 1989, p. 1	C 15, 15. 1. 1997, p. 1
Swedish	C 15, 15. 1. 1997, p. 30	C 15, 15. 1. 1997, p. 10	C 15, 15. 1. 1997, p. 14	C 15, 15. 1. 1997, p. 26	C 15, 15. 1. 1997, p. 43	C 15, 15. 1. 1997, p. 1
Finnish	C 15, 15. 1. 1997, p. 30	C 15, 15. 1. 1997, p. 10	C 15, 15. 1. 1997, p. 14	C 15, 15. 1. 1997, p. 26	C 15, 15. 1. 1997, p. 43	C 15, 15. 1. 1997, p. 1

ANNEX

CONVENTION on jurisdiction and the enforcement of judgments in civil and commercial matters (1)

PREAMBLE (2)

THE HIGH CONTRACTING PARTIES TO THE TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY,

DESIRING to implement the provisions of Article 220 of that Treaty by virtue of which they undertook to secure the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals;

ANXIOUS to strengthen in the Community the legal protection of persons therein established;

CONSIDERING that it is necessary for this purpose to determine the international jurisdiction of their courts, to facilitate recognition and to introduce an expeditious procedure for securing the enforcement of judgments, authentic instruments and court settlements (2);

HAVE DECIDED to conclude this Convention and to this end have designated as their Plenipotentiaries:

[Plenipotentiaries designated by the Member States]

WHO, meeting within the Council, having exchanged their full powers, found in good and due form,

HAVE AGREED AS FOLLOWS:

TITLE I

SCOPE

Article 1

This Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters (3).

The Convention shall not apply to:

1. the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession;

2. bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;

3. social security;

4. arbitration.

TITLE II

JURISDICTION

Section 1

General provisions

Article 2

Subject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State.

Persons who are not nationals of the State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State.

Article 3

Persons domiciled in a Contracting State may be sued in the courts of another Contracting State only by virtue of the rules set out in Sections 2 to 6 of this Title.

In particular the following provisions shall not be applicable as against them:

- in Belgium: Article 15 of the civil code (Code civil - Burgerlijk Wetboek) and Article 638 of the judicial code (Code judiciaire - Gerechtelijk Wetboek),
- in Denmark: Article 246 (2) and (3) of the law on civil procedure (Lov om rettens pleje) (4),
- in the Federal Republic of Germany: Article 23 of the code of civil procedure (Zivilprozeßordnung),
- in Greece, Article 40 of the code of civil procedure (E¦äéêao áïeéôéê«o Æéêïíïißao),
- in France: Articles 14 and 15 of the civil code (Code civil),
- in Ireland: the rules which enable jurisdiction to be founded on the document instituting the proceedings having been served on the defendant during his temporary presence in Ireland,
- in Italy: Articles 2 and 4, Nos 1 and 2 of the code of civil procedure (Codice di procedura civile),
- in Luxembourg: Articles 14 and 15 of the civil code (Code civil),
- in Austria: Article 99 of the Law on Court Jurisdiction (Jurisdiktionsnorm),
- in the Netherlands: Articles 126 (3) and 127 of the code of civil procedure (Wetboek van Burgerlijke Rechtsvordering),
- in Portugal: Article 65 (1) (c), Article 65 (2) and Article 65A (c) of the code of civil procedure (Codigo de Processo Civil) and Article 11 of the code of labour procedure (Codigo de Processo de Trabalho),
- in Finland: the second, third and fourth sentences of the first paragraph of Section 1 of Chapter 10 of the Code of Judicial Procedure (oikeudenkäymiskaari/rättegångsbalken),
- in Sweden: the first sentence of the first paragraph of Section 3 of Chapter 10 of the Code of Judicial Procedure (rättegångsbalken),
- in the United Kingdom: the rules which enable jurisdiction to be founded on:

(a) the document instituting the proceedings having been served on the defendant during his temporary presence in the United Kingdom; or

(b) the presence within the United Kingdom of property belonging to the defendant; or

(c) the seizure by the plaintiff of property situated in the United Kingdom (5).

Article 4

If the defendant is not domiciled in a Contracting State, the jurisdiction of the courts of each Contracting State shall, subject to the provisions of Article 16, be determined by the law of that State.

As against such a defendant, any person domiciled in a Contracting State may, whatever his nationality, avail himself in that State of the rules of jurisdiction there in force, and in particular those specified in the second paragraph of Article 3, in the same way as the nationals of that State.

Section 2

Special jurisdiction

Article 5

A person domiciled in a Contracting State may, in another Contracting State, be sued:

1. in matters relating to a contract, in the courts for the place of performance of the obligation in question; in matters relating to individual contracts of employment, this place is that where the employee habitually carries out his work, or if the employee does not habitually carry out his work in any one country, the employer may also be sued in the courts for the place where the business which engaged the employee was or is now situated (6);

2. in matters relating to maintenance, in the courts for the place where the maintenance creditor is domiciled or habitually resident or, if the matter is ancillary to proceedings concerning the status of a person, in the court which, according to its own law, has jurisdiction to entertain those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties (7);

3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred;

4. as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the court seised of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings;

5. as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated;

6. as settlor, trustee or beneficiary of a trust created by the operation of a statute, or by a written instrument, or created orally and evidenced in writing, in the courts of the Contracting State in which the trust is domiciled (8);

7. as regards a dispute concerning the payment of remuneration claimed in respect of the salvage of a cargo or freight, in the court under the authority of which the cargo or freight in question:

(a) has been arrested to secure such payment, or

(b) could have been so arrested, but bail or other security has been given;

provided that this provision shall apply only if it is claimed that the defendant has an interest in the cargo or freight or had such an interest at the time of salvage (9).

Article 6

A person domiciled in a Contracting State may also be sued:

1. where he is one of a number of defendants, in the courts for the place where any one of them is domiciled;

2. as a third party in an action on a warranty or guarantee or in any other third party proceedings, in the court seised of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case;

3. on a counter-claim arising from the same contract or facts on which the original claim was based, in the court in which the original claim is pending;

4. in matters relating to a contract, if the action may be combined with an action against the same defendant in matters relating to rights in rem in immovable property, in the court of the Contracting State in which the property is situated (10).

Article 6a (11)

Where by virtue of this Convention a court of a Contracting State has jurisdiction in actions relating to liability from the use or operation of a ship, that court, or any other court substituted for this purpose by the internal law of that State, shall also have jurisdiction over claims for limitation of such liability.

Section 3

Jurisdiction in matters relating to insurance

Article 7

In matters relating to insurance, jurisdiction shall be determined by this Section, without prejudice to the provisions of Articles 4 and 5 point 5.

Article 8 (12)

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 Contracting 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 State.

Article 9

In respect of liability insurance or insurance of immovable property, the insurer may in addition be sued in the courts for the place where the harmful event occurred. The same applies if movable and immovable property are covered by the same insurance policy and both are adversely affected by the same contingency.

Article 10

In respect of liability insurance, the insurer may also, if the law of the court permits it, be joined in proceedings which the injured party had brought against the insured.

The provisions of Articles 7, 8 and 9 shall apply to actions brought by the injured party directly against the insurer, where such direct actions are permitted.

If the law governing such direct actions provides that the policy-holder or the insured may be joined as a party to the action, the same court shall have jurisdiction over them.

Article 11

Without prejudice to the provisions of the third paragraph of Article 10, an insurer may bring proceedings only in the courts of the Contracting State in which the defendant is domiciled, irrespective of whether he is the policy-holder, the insured or a beneficiary.

The provisions of this Section shall not affect the right to bring a counterclaim in the court in which, in accordance with this Section, the original claim is pending.

Article 12 (13)

The provisions of this Section may be departed from only by an agreement on jurisdiction:

1. which is entered into after the dispute has arisen, or

2. which allows the policy-holder, the insured or a beneficiary to bring proceedings in courts other than those indicated in this Section, or

3. which is concluded between a policy-holder and an insurer, both of whom are domiciled in the same Contracting State, and which has the effect of conferring jurisdiction on the courts of that State even if the harmful event were to occur abroad, provided that such an agreement is not contrary to the law of that State, or

4. which is concluded with a policy-holder who is not domiciled in a Contracting State, except in so far as the insurance is compulsory or relates to immovable property in a Contracting State, or

5. which relates to a contract of insurance in so far as it covers one or more of the risks set out in Article 12a.

Article 12a (14)

The following are the risks referred to in point 5 of Article 12:

1. any loss of or damage to:

(a) sea-going ships, installations situated offshore or on the high seas, or aircraft, arising from perils which relate to their use for commercial purposes;

(b) goods in transit other than passengers' baggage where the transit consists of or includes carriage by such ships or aircraft;

2. any liability, other than for bodily injury to passengers or loss of or damage to their baggage:

(a) arising out of the use or operation of ships, installations or aircraft as referred to in point 1 (a) above in so far as the law of the Contracting State in which such aircraft are registered does not prohibit agreements on jurisdiction regarding insurance of such risks;

(b) for loss or damage caused by goods in transit as described in point 1 (b) above;

3. any financial loss connected with the use or operation of ships, installations or aircraft as referred to in point 1 (a) above, in particular loss of freight or charter-hire;

4. any risk or interest connected with any of those referred to in points 1 to 3 above.

Section 4 (15)

Jurisdiction over consumer contracts

Article 13

In proceedings concerning a contract concluded by a person for a purpose which can be regarded as being outside his trade or profession, hereinafter called 'the consumer`, jurisdiction shall be determined by this Section, without prejudice to the provisions of point 5 of Articles 4 and 5, if it is:

1. a contract for the sale of goods on instalment credit terms; or

2. a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or

3. any other contract for the supply of goods or a contract for the supply of services, and

(a) in the State of the consumer's domicile the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising; and

(b) the consumer took in that State the steps necessary for the conclusion of the contract.

Where a consumer enters into a contract with a party who is not domiciled in a Contracting State but has a branch, agency or other establishment in one of the Contracting States, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State.

This Section shall not apply to contracts of transport.

Article 14

A consumer may bring proceedings against the other party to a contract either in the courts of the Contracting State in which that party is domiciled or in the courts of the Contracting State in which he is himself domiciled.

Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Contracting State in which the consumer is domiciled.

These provisions shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.

Article 15

The provisions of this Section may be departed from only by an agreement:

1. which is entered into after the dispute has arisen; or

2. which allows the consumer to bring proceedings in courts other than those indicated in this Section; or

3. which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Contracting State, and which confers jurisdiction on the courts of that State, provided that such an agreement is not contrary to the law of that State.

Section 5

Exclusive jurisdiction

Article 16

The following courts shall have exclusive jurisdiction, regardless of domicile:

1. (a) in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, the courts of the Contracting State in which the property is situated;

(b) however, in proceedings which have as their object tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months, the courts of the Contracting State in which the defendant is domiciled shall also have jurisdiction, provided that the landlord and the tenant are natural persons and are domiciled in the same Contracting State (16);

2. in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or the decisions of their organs, the courts of the Contracting State in which the company, legal person or association has its seat;

3. in proceedings which have as their object the validity of entries in public registers, the courts of the Contracting State in which the register is kept;

4. in proceedings concerned with the registration or validity of patents, trade marks, designs, or other similar rights required to be deposited or registered, the courts of the Contracting State in which the deposit or registration has been applied for, has taken place or is under the terms of an international convention deemed to have taken place;

5. in proceedings concerned with the enforcement of judgments, the courts of the Contracting State in which the judgment has been or is to be enforced.

Section 6

Prorogation of jurisdiction

Article 17 (17)

If the parties, one or more of whom is domiciled in a Contracting State, have agreed that a court or the courts of a Contracting State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction. Such an agreement conferring jurisdiction shall be either:

(a) in writing or evidenced in writing; or

(b) in a form which accords with practices which the parties have established between themselves; or

(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

Where such an agreement is concluded by parties, none of whom is domiciled in a Contracting State, the courts of other Contracting States shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction.

The court or courts of a Contracting State on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settler, trustee or beneficiary, if relations between these persons or their rights or obligations under the trust are involved.

Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to the provisions of Articles 12 or 15, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 16.

If an agreement conferring jurisdiction was concluded for the benefit of only one of the parties, that party shall retain the right to bring proceedings in any other court which has jurisdiction by virtue of this Convention.

In matters relating to individual contracts of employment an agreement conferring jurisdiction shall have legal force only if it is entered into after the dispute has arisen or if the employee invokes it to seise courts other than those for the defendant's domicile or those specified in Article 5 (1).

Article 18

Apart from jurisdiction derived from other provisions of this Convention, a court of a Contracting State before whom a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered solely to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 16.

Section 7

Examination as to jurisdiction and admissibility

Article 19

Where a court of a Contracting State is seised of a claim which is principally concerned with a matter over which the courts of another Contracting State have exclusive jurisdiction by virtue of Article 16, it shall declare of its own motion that it has no jurisdiction.

Article 20

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 the 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 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 (18).

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.

Section 8

Lis pendens - related actions

Article 21 (19)

Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

Article 22

Where related actions are brought in the courts of different Contracting States, any court other than the court first seised may, while the actions are pending at first instance, stay its proceedings.

A court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the law of that court permits the consolidation of related actions and the court first seised has jurisdiction over both actions.

For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

Article 23

Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court.

Section 9

Provisional, including protective, measures

Article 24

Application may be made to the courts of a Contracting State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Convention, the courts of another Contracting State have jurisdiction as to the substance of the matter.

TITLE III

RECOGNITION AND ENFORCEMENT

Article 25

For the purposes of this Convention, 'judgment` means any judgment given by a court or tribunal of a Contracting State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court.

Section 1

Recognition

Article 26

A judgment given in a Contracting State shall be recognized in the other Contracting States without any special procedure being required.

Any interested party who raises the recognition of a judgment as the principal issue in a dispute may, in accordance with the procedures provided for in Sections 2 and 3 of this Title, apply for a decision that the judgment be recognized.

If the outcome of proceedings in a court of a Contracting State depends on the determination of an incidental question of recognition that court shall have jurisdiction over that question.

Article 27

A judgment shall not be recognized:

1. if such recognition is contrary to public policy in the State in which recognition is sought;

2. where it was given in default of appearance, if the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defence (20);

3. if the judgment is irreconcilable with a judgment given in a dispute between the same parties in the State in which recognition is sought;

4. if the court of the State of origin, in order to arrive at its judgment, has decided a preliminary question concerning the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills or succession in a way that conflicts with a rule of the private international law of the State in which the recognition is sought, unless the same result

would have been reached by the application of the rules of private international law of that State (21);

5. if the judgment is irreconcilable with an earlier judgment given in a non-contracting State involving the same cause of action and between the same parties, provided that this latter judgment fulfils the conditions necessary for its recognition in the State addressed (22).

Article 28

Moreover, a judgment shall not be recognized if it conflicts with the provisions of Sections 3, 4 or 5 of Title II, or in a case provided for in Article 59.

In its examination of the grounds of jurisdiction referred to in the foregoing paragraph, the court or authority applied to shall be bound by the findings of fact on which the court of the State of origin based its jurisdiction (23).

Subject to the provisions of the first paragraph, the jurisdiction of the court of the State of origin may not be reviewed; the test of public policy referred to in point 1 of Article 27 may not be applied to the rules relating to jurisdiction (24).

Article 29

Under no circumstances may a foreign judgment be reviewed as to its substance.

Article 30

A court of a Contracting State in which recognition is sought of a judgment given in another Contracting State may stay the proceedings if an ordinary appeal against the judgment has been lodged.

A court of a Contracting State in which recognition is sought of a judgment given in Ireland or the United Kingdom may stay the proceedings if enforcement is suspended in the State of origin, by reason of an appeal (25).

Section 2

Enforcement

Article 31

A judgment given in a Contracting State and enforceable in that State shall be enforced in another Contracting State when, on the application of any interested party, it has been declared enforceable there (26).

However, in the United Kingdom, such a judgment shall be enforced in England and Wales, in Scotland, or in Northern Ireland when, on the application of any interested party, it has been registered for enforcement in that part of the United Kingdom (27).

Article 32

1. The application shall be submitted:

- in Belgium, to the 'tribunal de première instance` or 'rechtbank van eerste aanleg`,
- in Denmark, to the 'byret` (28),
- in the Federal Republic of Germany, to the presiding judge of a chamber of the 'Landgericht`,
- in Greece, to the 'öïíïìáe¡o áñùôïäéêåßï`,
- in Spain, to the 'Juzgado de Primera Instancia`,
- in France, to the presiding judge of the 'tribunal de grande instance`,
- in Ireland, to the High Court,
- in Italy, to the 'Corte d'appello`,
- in Luxembourg, to the presiding judge of the 'tribunal d'arrondissement`,
- in Austria, to the 'Bezirksgericht`,
- in the Netherlands, to the presiding judge of the 'arrondissementsrechtbank`,
- in Portugal, to the 'Tribunal Judicial de Circulo`,
- in Finland, to the 'käräjäoikeus/tingsrätt`,
- in Sweden, to the 'Svea hovrätt`,
- in the United Kingdom:

(a) in England and Wales, to the High Court of Justice, or in the case of maintenance judgment to the Magistrates' Court on transmission by the Secretary of State;

(b) in Scotland, to the Court of Session, or in the case of a maintenance judgment to the Sheriff Court on transmission by the Secretary of State;

(c) in Northern Ireland, to the High Court of Justice, or in the case of a maintenance judgment to the Magistrates' Court on transmission by the Secretary of State (29).

2. The jurisdiction of local courts shall be determined by reference to the place of domicile of the party against whom enforcement is sought. If he is not domiciled in the State in which enforcement is sought, it shall be determined by reference to the place of enforcement.

Article 33

The procedure for making the application shall be governed by the law of the State in which enforcement is sought.

The applicant must give an address for service of process within the area of jurisdiction of the court applied to. However, if the law of the State in which enforcement is sought does not provide for the furnishing of such an address, the applicant shall appoint a representative ad litem.

The documents referred to in Articles 46 and 47 shall be attached to the application.

Article 34

The court applied to shall give its decision without delay; the party against whom enforcement is sought shall not at this stage of the proceedings be entitled to make any submissions on the application.

The application may be refused only for one of the reasons specified in Articles 27 and 28.

Under no circumstances may the foreign judgment be reviewed as to its substance.

Article 35

The appropriate officer of the court shall without delay bring the decision given on the application to the notice of the applicant in accordance with the procedure laid down by the law of the State in which enforcement is sought.

Article 36

If enforcement is authorized, the party against whom enforcement is sought may appeal against the decision within one month of service thereof.

If that party is domiciled in a Contracting State other than that in which the decision authorizing enforcement was given, the time for appealing shall be two months and shall run from the date of service, either on him in person or at his residence. No extension of time may be granted on account of distance.

Article 37 (30)

1. An appeal against the decision authorizing enforcement shall be lodged in accordance with the rules governing procedure in contentious matters:

- in Belgium, with the 'tribunal de première instance` or 'rechtbank van eerste aanleg`,
- in Denmark, with the 'landsret`,
- in the Federal Republic of Germany, with the 'Oberlandesgericht`,
- in Greece, with the 'êöåôåßï`,
- in Spain, with the 'Audiencia Provincial`,
- in France, with the 'cour d'appel`,
- in Ireland, with the High Court,
- in Italy, with the 'corte d'appello`,
- in Luxembourg, with the 'Cour supérieure de justice` sitting as a court of civil appeal,
- in Austria with the 'Bezirksgericht`,
- in the Netherlands, with the 'arrondissementsrechtbank`,
- in Portugal, with the 'Tribunal de Relaçao`,

- in Finland, with the 'hovioikeus/hovrätt`,
- in Sweden, with the 'Svea hovrätt`,
- in the United Kingdom:

(a) in England and Wales, with the High Court of Justice, or in the case of a maintenance judgment with the Magistrates' Court;

(b) in Scotland, with the Court of Session, or in the case of a maintenance judgment with the Sheriff Court;

(c) in Northern Ireland, with the High Court of Justice, or in the case of a maintenance judgment with the Magistrates' Court.

2. The judgment given on the appeal may be contested only:

- in Belgium, Greece, Spain, France, Italy, Luxembourg and in the Netherlands, by an appeal in cassation,
- in Denmark, by an appeal to the 'højesteret`, with the leave of the Minister of Justice,
- in the Federal Republic of Germany, by a 'Rechtsbeschwerde`,
- in Austria, in the case of an appeal, by a 'Revisionsrekurs` and, in the case of opposition proceedings, by a 'Berufung` with the possibility of a revision,
- in Ireland, by an appeal on a point of law to the Supreme Court,
- in Portugal, by an appeal on a point of law,
- in Finland, by an appeal to 'korkein oikeus/högsta domstolen`,
- in Sweden by an appeal to 'Högsta domstolen`,
- in the United Kingdom, by a single further appeal on a point of law.

Article 38

The court with which the appeal under Article 37 (1) is lodged may, on the application of the appellant, stay the proceedings if an ordinary appeal has been lodged against the judgment in the State of origin or if the time for such an appeal has not yet expired; in the latter case, the court may specify the time within which such an appeal is to be lodged (31).

Where the judgment was given in Ireland or the United Kingdom, any form of appeal available in the State of origin shall be treated as an ordinary appeal for the purposes of the first paragraph (32).

The court may also make enforcement conditional on the provision of such security as it shall determine.

Article 39

During the time specified for an appeal pursuant to Article 36 and until any such appeal has been determined, no measures of enforcement may be taken other than protective measures taken against the property of the party against whom enforcement is sought.

The decision authorizing enforcement shall carry with it the power to proceed to any such protective measures.

Article 40

If the application for enforcement is refused, the applicant may appeal:

- in Belgium, to the 'cour d'appel` or 'hof van beroep`,
- in Denmark, to the 'landsret`,
- in the Federal Republic of Germany, to the 'Oberlandesgericht`,
- in Greece, to the 'êöåôåßï`,
- in Spain, to the 'Audiencia Provincial`,
- in France, to the 'cour d'appel`,
- in Ireland, to the High Court,
- in Italy, to the 'corte d'appello`,
- in Luxembourg, to the 'Cour supérieure de justice` sitting as a court of civil appeal,
- in Austria, to the 'Bezirksgericht`,
- in the Netherlands, to the 'gerechtshof`,
- in Portugal, to the 'Tribunal de Relaçao`,
- in Finland, to 'hovioikeus/hovrätten`,
- in Sweden, to the 'Svea hovrätt`,
- in the United Kingdom:

(a) in England and Wales, to the High Court of Justice, or in the case of a maintenance judgment to the Magistrates' Court;

(b) in Scotland, to the Court of Session, or in the case of a maintenance judgment to the Sheriff Court;

(c) in Northern Ireland, to the High Court of Justice, or in the case of a maintenance judgment to the Magistrates' Court (33).

2. The party against whom enforcement is sought shall be summoned to appear before the appellate court. If he fails to appear, the provisions of the second and third paragraphs of Article 20 shall apply even where he is not domiciled in any of the Contracting States.

Article 41 (34)

A judgment given on an appeal provided for in Article 40 may be contested only:

- in Belgium, Greece, Spain, France, Italy, Luxembourg and in the Netherlands, by an appeal in cassation,
- in Denmark, by an appeal to the 'højesteret`, with the leave of the Minister of Justice,
- in the Federal Republic of Germany, by a 'Rechtsbeschwerde`,
- in Ireland, by an appeal on a point of law to the Supreme Court,

- in Austria, by a 'Revisionsrekurs`,
- in Portugal, by an appeal on a point of law,
- in Finland, by an appeal to 'korkein oikeus/högsta domstolen`,
- in Sweden, by an appeal to 'Högsta domstolen`,
- in the United Kingdom, by a single further appeal on a point of law.

Article 42

Where a foreign judgment has been given in respect of several matters and enforcement cannot be authorized for all of them, the court shall authorize enforcement for one or more of them.

An applicant may request partial enforcement of a judgment.

Article 43

A foreign judgment which orders a periodic payment by way of a penalty shall be enforceable in the State in which enforcement is sought only if the amount of the payment has been finally determined by the courts of the State of origin (35).

Article 44 (36)

An applicant who, in the State of origin has benefited from complete or partial legal aid or exemption from costs or expenses, shall be entitled, in the procedures provided for in Articles 32 to 35, to benefit from the most favourable legal aid or the most extensive exemption from costs or expenses provided for by the law of the State addressed.

However, an applicant who requests the enforcement of a decision given by an administrative authority in Denmark in respect of a maintenance order may, in the State addressed, claim the benefits referred to in the first paragraph if he presents a statement from the Danish Ministry of Justice to the effect that he fulfils the economic requirements to qualify for the grant of complete or partial legal aid or exemption from costs or expenses.

Article 45

No security, bond or deposit, however described, shall be required of a party who in one Contracting State applies for enforcement of a judgment given in another Contracting State on the ground that he is a foreign national or that he is not domiciled or resident in the State in which enforcement is sought.

Section 3

Common provisions

Article 46

A party seeking recognition or applying for enforcement of a judgment shall produce:

1. a copy of the judgment which satisfies the conditions necessary to establish its authenticity;

2. in the case of a judgment given in default, the original or a certified true copy of the document which establishes that the party in default was served with the document instituting the proceedings or with an equivalent document (37).

Article 47 (38)

A party applying for enforcement shall also produce:

1. documents which establish that, according to the law of the State of origin the judgment is enforceable and has been served;

2. where appropriate, a document showing that the applicant is in receipt of legal aid in the State of origin.

Article 48

If the documents specified in point 2 of Articles 46 and 47 are not produced, the court may specify a time for their production, accept equivalent documents or, if it considers that it has sufficient information before it, dispense with their production.

If the court so requires, a translation of the documents shall be produced; the translation shall be certified by a person qualified to do so in one of the Contracting States.

Article 49

No legalization or other similar formality shall be required in respect of the documents referred to in Articles 46 or 47 or the second paragraph of Article 48, or in respect of a document appointing a representative ad litem.

TITLE IV

AUTHENTIC INSTRUMENTS AND COURT SETTLEMENTS

Article 50

A document which has been formally drawn up or registered as an authentic instrument and is enforceable in one Contracting State shall, in another Contracting State, be declared enforceable there, on application made in accordance with the procedures provided for in Article 31 et seq. The application may be refused only if enforcement of the instrument is contrary to public policy in the State addressed (39).

The instrument produced must satisfy the conditions necessary to establish its authenticity in the State of origin.

The provisions of Section 3 of Title III shall apply as appropriate.

Article 51

A settlement which has been approved by a court in the course of proceedings and is enforceable in the State in which it was concluded shall be enforceable in the State addressed under the same conditions as authentic instruments (40).

TITLE V

GENERAL PROVISIONS

Article 52

In order to determine whether a party is domiciled in the Contracting State whose courts are seised of a matter, the Court shall apply its internal law.

If a party is not domiciled in the State whose courts are seised of the matter, then, in order to determine whether the party is domiciled in another Contracting State, the court shall apply the law of that State.

. . . (41).

Article 53

For the purposes of this Convention, the seat of a company or other legal person or association of natural or legal persons shall be treated as its domicile. However, in order to determine that seat, the court shall apply its rules of private international law.

In order to determine whether a trust is domiciled in the Contracting State whose courts are seised of the matter, the court shall apply its rules of private international law (42).

TITLE VI

TRANSITIONAL PROVISIONS

Article 54 (43)

The provisions of the Convention shall apply only to legal proceedings instituted and to documents formally drawn up or registered as authentic instruments after its entry into force in the State of origin and, where recognition or enforcement of a judgment or authentic instruments is sought, in the State addressed.

However, judgments given after the date of entry into force of this Convention between the State of origin and the State addressed in proceedings instituted before that date shall be recognized and enforced in accordance with the provisions of Title III if jurisdiction was founded upon rules which accorded with those provided for either in Title II of this Convention or in a convention concluded between the State of origin and the State addressed which was in force when the proceedings were instituted (44).

If the parties to a dispute concerning a contract had agreed in writing before 1 June 1988 for Ireland or before 1 January 1987 for the United Kingdom that the contract was to be governed by the law of Ireland or of a part of the United Kingdom, the courts of Ireland or of that part of

the United Kingdom shall retain the right to exercise jurisdiction in the dispute (45).

Article 54a (46)

For a period of three years from 1 November 1986 for Denmark and from 1 June 1988 for Ireland, jurisdiction in maritime matters shall be determined in these States not only in accordance with the provisions of Title II, but also in accordance with the provisions of paragraphs 1 to 6 following. However, upon the entry into force of the International Convention relating to the arrest of sea-going ships, signed at Brussels on 10 May 1952, for one of these States, those provisions shall cease to have effect for that State.

1. A person who is domiciled in a Contracting State may be sued in the courts of one of the States mentioned above in respect of a maritime claim if the ship to which the claim relates or any other ship owned by him has been arrested by judicial process within the territory of the latter State to secure the claim, or could have been so arrested there but bail or other security has been given, and either:

(a) the claimant is domiciled in the latter State; or

(b) the claim arose in the latter State; or

(c) the claim concerns the voyage during which the arrest was made or could have been made; or

(d) the claim arises out of a collision or out of damage caused by a ship to another ship or to goods or persons on board either ship, either by the execution or non-execution of a manoeuvre or by the non-observance of regulations; or

(e) the claim is for salvage; or

(f) the claim is in respect of a mortgage or hypothecation of the ship arrested.

2. A claimant may arrest either the particular ship to which the maritime claim relates, or any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship. However, only the particular ship to which the maritime claim relates may be arrested in respect of the maritime claims set out in 5 (o), (p) or (q) of this Article.

3. Ships shall be deemed to be in the same ownership when all the shares therein are owned by the same person or persons.

4. When in the case of a charter by demise of a ship the charterer alone is liable in respect of a maritime claim relating to that ship, the claimant may arrest that ship or any other ship owned by the charterer, but no other ship owned by the owner may be arrested in respect of such claim. The same shall apply to any case in which a person other than the owner of a ship is liable in respect of a maritime claim relating to that ship.

5. The expression 'maritime claim` means a claim arising out of one or more of the following:

(a) damage caused by any ship either in collision or otherwise;

(b) loss of life or personal injury caused by any ship or occurring in connection with the operation on any ship;

(c) salvage;

(d) agreement relating to the use or hire of any ship whether by charterparty or otherwise;

(e) agreement relating to the carriage of goods in any ship whether by charterparty or otherwise;

(f) loss of or damage to goods including baggage carried in any ship;

(g) general average;

(h) bottomry;

(i) towage;

(j) pilotage;

(k) goods or materials wherever supplied to a ship for her operation or maintenance;

(l) construction, repair or equipment of any ship or dock charges and dues;

(m) wages of masters, officers or crew;

(n) mater's disbursements, including disbursements made by shippers, charterers or agents on behalf of a ship or her owner;

(o) dispute as to the title to or ownership of any ship;

(p) disputes between co-owners of any ship as to the ownership, possession, employment or earnings of that ship;

(q) the mortgage or hypothecation of any ship.

6. In Denmark, the expression 'arrest` shall be deemed as regards the maritime claims referred to in 5 (o) and (p) of this Article, to include a 'forbud`, where that is the only procedure allowed in respect of such a claim under Articles 646 to 653 of the law on civil procedure (lov om rettens pleje).

TITLE VII

RELATIONSHIP TO OTHER CONVENTIONS

Article 55

Subject to the provisions of the second subparagraph of Article 54, and of Article 56, this Convention shall, for the States which are parties to it, supersede the following conventions concluded between two or more of them:

- the Convention between Belgium and France on jurisdiction and the validity and enforcement of judgments, arbitration awards and authentic instruments, signed at Paris on 8 July 1899,
- the Convention between Belgium and the Netherlands on jurisdiction, bankruptcy, and the validity and enforcement of judgments, arbitration awards and authentic instruments, signed at Brussels on 28 March 1925,
- the Convention between France and Italy on the enforcement of judgments in civil and commercial matters, signed at Rome on 3 June 1930,
- the Convention between the United Kingdom and the French Republic providing for the reciprocal enforcement of judgments in civil and commercial matters, with Protocol, signed at Paris on 18 January 1934 (47),
- the Convention between the United Kingdom and the Kingdom of Belgium providing for the reciprocal enforcement of judgments in civil and commercial matters, with Protocol, signed at Brussels on 2 May 1934 (47),
- the Convention between Germany and Italy on the recognition and enforcement of judgments in

civil and commercial matters, signed at Rome on 9 March 1936,

- the Convention between the Kingdom of Belgium and Austria on the reciprocal recognition and enforcement of judgments and authentic instruments relating to maintenance obligations, signed at Vienna on 25 October 1957 (48),
- the Convention between the Federal Republic of Germany and the Kingdom of Belgium on the mutual recognition and enforcement of judgments, arbitration awards and authentic instruments in civil and commercial matters, signed at Bonn on 30 June 1958,
- the Convention between the Kingdom of the Netherlands and the Italian Republic on the recognition and enforcement of judgments in civil and commercial matters, signed at Rome on 17 April 1959,
- the Convention between the Federal Republic of Germany and Austria on the reciprocal recognition and enforcement of judgments, settlements and authentic instruments in civil and commercial matters, signed at Vienna on 6 June 1959 (49),
- the Convention between the Kingdom of Belgium and Austria on the reciprocal recognition and enforcement of judgments, arbitral awards and authentic instruments in civil and commercial matters, signed at Vienna on 16 June 1959 (49),
- the Convention between the United Kingdom and the Federal Republic of Germany for the reciprocal recognition and enforcement of judgments in civil and commercial matters, signed at Bonn on 14 July 1960 (50),
- the Convention between the United Kingdom and Austria providing for the reciprocal recognition and enforcement of judgments in civil and commercial matters, signed at Vienna on 14 July 1961, with amending Protocol signed at London on 6 March 1970 (49),
- the Convention between the Kingdom of Greece and the Federal Republic of Germany for the reciprocal recognition and enforcement of judgments, settlements and authentic instruments in civil and commercial matters, signed in Athens on 4 November 1961 (51),
- the Convention between the Kingdom of Belgium and the Italian Republic on the recognition and enforcement of judgments and other enforceable instruments in civil and commercial matters, signed at Rome on 6 April 1962,
- the Convention between the Kingdom of the Netherlands and the Federal Republic of Germany on the mutual recognition and enforcement of judgments and other enforceable instruments in civil and commercial matters, signed at The Hague on 30 August 1962,
- the Convention between the Kingdom of the Netherlands and Austria on the reciprocal recognition and enforcement of judgments and authentic instruments in civil and commercial matters, signed at The Hague on 6 February 1963 (49),
- the Convention between France and Austria on the recognition and enforcement of judgments and authentic instruments in civil and commercial matters, signed at Vienna on 15 July 1966 (52),
- the Convention between the United Kingdom and the Republic of Italy for the reciprocal recognition and enforcement of judgments in civil and commercial matters, signed at Rome on 7 February 1964, with amending Protocol signed at Rome on 14 July 1970 (53),
- the Convention between the United Kingdom and the Kingdom of the Netherlands providing for the reciprocal recognition and enforcement of judgments in civil matters, signed at The Hague on 17 November 1967 (53),
- the Convention between Spain and France on the recognition and enforcement of judgment arbitration awards in civil and commercial matters, signed at Paris on 28 May 1969 (54),

- the Convention between Luxembourg and Austria on the recognition and enforcement of judgments aud authentic instruments in civil and commercial matters, signed at Luxembourg on 29 July 1971 (52),
- the Convention between Italy and Austria on the recognition and enforcement of judgments in civil and commercial matters, of judicial settlements and of authentic instruments, signed at Rome on 16 November 1971 (52),
- the Convention between Spain and Italy regarding legal aid and the recognition and enforcement of judgments in civil and commercial matters, signed at Madrid on 22 May 1973 (54),
- the Convention between Finland, Iceland, Norway, Sweden and Denmark on the recognition and enforcement of judgments in civil matters, signed at Copenhagen on 11 October 1977 (52),
- the Convention between Austria and Sweden on the recognition and enforcement of judgments in civil matters, signed at Stockholm on 16 September 1982 (52),
- the Convention between Spain and the Federal Republic of Germany on the recognition and enforcement of judgments, settlements and enforceable authentic instruments in civil and commercial matters, signed at Bonn on 14 November 1983 (54),
- the Convention between Austria and Spain on the recognition and enforcement of judgments, settlements and enforceable authentic instruments in civil and commercial matters, signed at Vienna on 17 February 1984 (52),
- the Convention between Finland and Austria on the recognition and enforcement of judgments in civil matters, signed at Vienna on 17 November 1986 (52),

and, in so far as it is in force:

- the Treaty between Belgium, the Netherlands and Luxembourg in jurisdiction, bankruptcy, and the validity and enforcement of judgments, arbitration awards and authentic instruments, signed at Brussels on 24 November 1961.

Article 56

The Treaty and the conventions referred to in Article 55 shall continue to have effect in relation to matters to which this Convention does not apply.

They shall continue to have effect in respect of judgments given and documents formally drawn up or registered as authentic instruments before the entry into force of this Convention.

Article 57

1. This Convention shall not affect any conventions to which the Contracting States are or will be parties and which in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments (55).

2. With a view to its uniform interpretation, paragraph 1 shall be applied in the following manner:

(a) this Convention shall not prevent a court of a Contracting State which is a party to a convention on a particular matter from assuming jurisdiction in accordance with that Convention, even where the defendant is domiciled in another Contracting State which is not a party to that Convention.

The court hearing the action shall, in any event, apply Article 20 of this Convention;

(b) judgments given in a Contracting State by a court in the exercise of jurisdiction provided for in a convention on a particular matter shall be recognized and enforced in the other Contracting State in accordance with this Convention.

Where a convention on a particular matter to which both the State of origin and the State addressed are parties lays down conditions for the recognition or enforcement of judgments, those conditions shall apply. In any event, the provisions of this Convention which concern the procedure for recognition and enforcement of judgments may be applied (56).

3. This Convention shall not affect the application of provisions which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments and which are or will be contained in acts of the institutions of the European Communities or in national laws harmonized in implementation of such acts (57).

Article 58 (58)

Until such time as the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, signed at Lugano on 16 September 1988, takes effect with regard to France and the Swiss Confederation, this Convention shall not affect the rights granted to Swiss nationals by the Convention between France and the Swiss Confederation on jurisdiction and enforcement of judgments in civil matters, signed at Paris on 15 June 1869.

Article 59

This Convention shall not prevent a Contracting State from assuming, in a convention on the recognition and enforcement of judgments, an obligation towards a third State not to recognize judgments given in other Contracting States against defendants domiciled or habitually resident in the third State where, in cases provided for in Article 4, the judgment could only be founded on a ground of jurisdiction specified in the second paragraph of Article 3.

However, a Contracting State may not assume an obligation towards a third State not to recognize a judgment given in another Contracting State by a court basing its jurisdiction on the presence within that State of property belonging to the defendant, or the seizure by the plaintiff of property situated there:

1. if the action is brought to assert or declare proprietary or possessory rights in that property, seeks to obtain authority to dispose of it, or arises from another issue relating to such property; or

2. if the property constitutes the security for a debt which is the subject-matter of the action (59).

TITLE VIII

FINAL PROVISIONS

Article 60

. . . (60).

Article 61 (61)

This Convention shall be ratified by the signatory States. The instruments of ratification shall be deposited with the Secretary-General of the Council of the European Communities.

Article 62 (62)

This Convention shall enter into force on the first day of the third month following the deposit of the instrument of ratification by the last signatory State to take this step.

Article 63

The Contracting States recognize that any State which becomes a member of the European Economic Community shall be required to accept this Convention as a basis for the negotiations between the Contracting States and that State necessary to ensure the implementation of the last paragraph of Article 220 of the Treaty establishing the European Economic Community.

The necessary adjustments may be the subject of a special convention between the Contracting States of the one part and the new Member States of the other part.

Article 64 (63)

The Secretary-General of the Council of the European Communities shall notify the signatory States of:

(a) the deposit of each instrument of ratification;

(b) the date of entry into force of this Convention;

(c) . . . (64);

(d) any declaration received pursuant to Article IV of the Protocol;

(e) any communication made pursuant to Article VI of the Protocol.

Article 65

The Protocol annexed to this Convention by common accord of the Contracting States shall form an integral part thereof.

Article 66

This Convention is concluded for an unlimited period.

Article 67

Any Contracting State may request the revision of this Convention. In this event, a revision conference shall be convened by the President of the Council of the European Communities.

Article 68 (65)

This Convention, drawn up in a single original in the Dutch, French, German and Italian languages, all four texts being equally authentic, shall be deposited in the archives of the Secretariat of the Council of the European Communities. The Secretary-General shall transmit a certified copy to the Government of each signatory State (66).

In witness whereof, the undersigned Plenipotentiaries have affixed their signatures below this Convention.

[Signatures of the designated plenipotentiaries (67)]

PROTOCOL (68)

The High Contracting Parties have agreed upon the following provisions, which shall be annexed to the Convention:

Article I

Any person domiciled in Luxembourg who is sued in a court of another Contracting State pursuant to Article 5 (1) may refuse to submit to the jurisdiction of that court. If the defendant does not enter an appearance the court shall declare of its own motion that it has no jurisdiction.

An agreement conferring jurisdiction, within the meaning of Article 17, shall be valid with respect to a person domiciled in Luxembourg only if that person has expressly and specifically so agreed.

Article II

Without prejudice to any more favourable provisions of national laws, persons domiciled in a Contracting State who are being prosecuted in the criminal courts of another Contracting State of which they are not nationals for an offence which was not intentionally committed may be defended by persons qualified to do so, even if they do not appear in person.

However, the court seised of the matter may order appearance in person; in the case of failure to appear, a judgment given in the civil action without the person concerned having had the opportunity to arrange for his defence need not be recognized or enforced in the other Contracting States.

Article III

In proceedings for the issue of an order for enforcement, no charge, duty or fee calculated by reference to the value of the matter in issue may be levied in the State in which enforcement is sought.

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.

Unless the State in which service is to take place objects by declaration to the Secretary-General of the Council of the European Communities, such documents may also be sent by the appropriate public officers of the State in which the document has been drawn up directly to the appropriate public officers of the State in which the addressee is to be found. In this case the officer of the State of origin shall send a copy of the document to the officer of the State applied to who is competent to forward it to the addressee. The document shall be forwarded in the manner specified by the law of the State applied to. The forwarding shall be recorded by a certificate sent directly to the officer of the State of origin.

Article V (69)

The jurisdiction specified in Articles 6 (2) and 10 in actions on a warranty or guarantee or in any other third-party proceedings may not be resorted to in the Federal Republic of Germany or in Austria. Any person domiciled in another Contracting State may be sued in the courts:

- of the Federal Republic of Germany, pursuant to Articles 68, 72, 73 and 74 of the code of civil procedure (Zivilprozessordnung) concerning third-party notices,
- of Austria, pursuant to Article 21 of the code of civil procedure (Zivilprozessordnung) concerning third-party notices.

Judgments given in the other Contracting States by virtue of Article 6 (2) or 10 shall be recognized and enforced in the Federal Republic of Germany and in Austria in accordance with Title III. Any effects which judgments given in those States may have on third parties by application of the provisions in the preceeding paragraph shall also be recognized in the other Contracting States.

Article Va (70)

In matters relating to maintenance, the expression 'court` includes the Danish administrative authorities.

In Sweden, in summary proceedings concerning orders to pay (betalningsföreläggande) and assistance (bandräckning), the expression 'court` includes the 'Swedish enforcement service` (kronofogdemyndighet).

Article Vb (71)

In proceedings involving a dispute between the master and a member of the crew of a sea-going ship registered in Denmark, in Greece, in Ireland or in Portugal, concerning remuneration or other conditions of service, a court in a Contracting State shall establish whether the diplomatic or consular officer responsible for the ship has been notified of the dispute. It shall stay the proceedings so long as he has not been notified. It shall of its own motion decline jurisdiction if the officer, having been duly notified, has exercised the powers accorded to him in the matter by a consular convention, or in the absence of such a convention has, within the time allowed, raised any objection to the exercise of such jurisdiction.

Article Vc (72)

Article 52 and 53 of this Convention shall, when applied by Article 69 (5) of the Convention for the European patent for the common market, signed at Luxembourg on 15 December 1975, to the provisions relating to 'residence` in the English text of that Convention, operate as if 'residence` in that text were the same as 'domicile` in Articles 52 and 53.

Article Vd (73)

Without prejudice to the jurisdiction of the European Patent Office under the Convention on the grant of European patents, signed at Munich on 5 October 1973, the courts of each Contracting State shall have exclusive jurisdiction, regardless of domicile, in proceedings concerned with the registration or validity of any European patent granted for that State which is not a Community

patent by virtue of the provisions of Article 86 of the Convention for the European patent for the common market, signed at Luxembourg on 15 December 1975.

Article Ve (74)

Arrangements relating to maintenance obligations concluded with administrative authorities or authenticated by them shall also be regarded as authentic instruments within the meaning of the first paragraph of Article 50 of the Convention.

Article VI

The Contracting States shall communicate to the Secretary-General of the Council of the European Communities the text of any provisions of their laws which amend either those articles of their laws mentioned in the Convention or the lists of courts specified in Section 2 of Title III of the Convention.

In witness whereof, the undersigned Plenipotentiaries have affixed their signatures below this Protocol.

Done at Brussels on the twenty-seventh day of September in the year one thousand nine hundred and sixty-eight.

[Signatures of the designated plenipotentiaries]

JOINT DECLARATION

The Government of the Kingdom of Belgium, the Federael Republic of Germany, the French Republic, the Italian Republic, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands,

On signing the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters,

Desiring to ensure that the Convention is applied as effectively as possible,

Anxious to prevent differences of interpretation of the Convention from impairing its unifying effect,

Recognizing that claims and disclaimers of jurisdiction may arise in the application of the Convention,

Declare themselves ready:

1. to study these questions and in particular to examine the possibility of conferring jurisdiction in certain matters on the Court of Justice of the European Communities and, if necessary, to negotiate an agreement to this effect;

2. to arrange meetings at regular intervals between their representatives.

In witness whereof, the undersigned Plenipotentiaries have affixed their signatures below this Joint Declaration.

Done at Brussels on the twenty-seventh day of September in the year one thousand nine hundred and sixty-eight.

[Signatures of the plenipotentiaries]

THE REPRESENTATIVES OF THE GOVERNMENTS OF THE MEMBER STATES OF THE EUROPEAN UNION,

AWARE of the importance of having available provisions on jurisdiction for cases where, in the framework of the provision of services, workers are posted in a Member State other than that in which their work is normally performed;

NOTE that on 3 June 1996 the Council adopted a common position on the amended proposal for a directive concerning the posting of workers in the framework of the provision of services, which is being examined by the European Parliament under the procedure set out in Article 189b of the Treaty;

UNDERTAKE to examine whether the Brussels and Lugano Conventions need to be amended with a view to ensuring the protection of workers in the provision of services context following the Council's adoption of the Directive concerning the posting of workers in the framework of the provision of services.

(1) Text as amended by the Convention of 9 October 1978 on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland - hereafter referred to as the '1978 Accession Convention` - by the Convention of 25 October 1982 on the accession of the Hellenic Republic - hereafter referred to as the '1982 Accession Convention` - and by the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic - hereafter referred to as the '1989 Accession Convention`, and by the Convention of 29 November 1996 on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden, hereinafter referred to as the '1996 Accession Convention`.

(2) The Preamble of the 1989 Accession Convention contained the following text:

'MINDFUL that on 16 September 1988 the Member States of the Community and the Member States of the European Free Trade Association concluded in Lugano the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, which extends the principles of the Brussels Convention to the States becoming parties to that Convention`.

(3) Second sentence added by Article 3 of the 1978 Accession Convention.

(4) As amended by a communication of 8 February 1988 made in accordance with Article VI of the annexed Protocol, and confirmed by Annex 1 (d) (1) to the 1989 Accession Convention.

(5) Second subparagraph as amended by Article 4 of the 1978 Accession Convention, by Article 3 of the 1982 Accession Convention, by Article 3 of the 1989 Accession Convention and by Article 2 of the 1996 Accession Convention.

(6) Point 1 as amended by Article 4 of the 1989 Accession Convention.

(7) Point 2 as amended by Article 5 (3) of the 1978 Accession Convention.

(8) Point 6 added by Article 5 (4) of the 1978 Accession Convention.

(9) Point 7 added by Article 5 (4) of the 1978 Accession Convention.

(10) Point 4 added by Article 5 of the 1989 Accession Convention.

(11) Article added by Article 6 of the 1978 Accession Convention.

(12) Text as amended by Article 7 of the 1978 Accession Convention.

(13) Text as amended by Article 8 of the 1978 Accession Convention.

(14) Article added by Article 9 of the 1978 Accession Convention.

(15) Text as amended by Article 10 of the 1978 Accession Convention.

(16) Point 1 as amended by Article 6 of the 1989 Accession Convention.

(17) Text as amended by Article 11 of the 1978 Accession Convention and by Article 7 of the 1989 Accession Convention.

(18) Second subparagraph as amended by Article 12 of the 1978 Accession Convention.

(19) Text as amended by Article 8 of the 1989 Accession Convention.

(20) Point 2 as amended by Article 13 (1) of the 1978 Accession Convention.

(21) Point 4 as amended by Annex I (a) (2) first subparagraph to the 1989 Accession Convention.

(22) Point 5 added by Article 13 (2) of the 1978 Accession Convention and amended by Annex I (d) (2) second subparagraph to the 1989 Accession Convention.

(23) As amended by Annex I (d) (3) first subparagraph to the 1989 Accession Convention.

(24) As amended by Annex I (d) (3) second subparagraph to the 1989 Accession Convention.

(25) Second subparagraph added by Article 14 of the 1978 Accession Convention and amended by Annex I (d) (4) to the 1989 Accession Convention.

(26) Text as amended by Article 9 of the 1989 Accession Convention.

(27) Second subparagraph added by Article 15 of the 1978 Accession Convention.

(28) As amended by a communication of 8 February 1988 made in accordance with Article VI of the annexed Protocol, and confirmed by Annex I (d) (5) to the 1989 Accession Convention.

(29) First subparagraph as amended by Article 16 of the 1978 Accession Convention, by Article 4 of the 1982 Accession Convention, by Article 10 of the 1989 Accession Convention and by Article 3 of the 1996 Accession Convention.

(30) Text as amended by Article 17 of the 1978 Accession Convention, by Article 5 of the 1982 Accession Convention, by Article 11 of the 1989 Accession Convention and by Article 4 of the 1996 Accession Convention.

(31) As amended by Annex I (d) (5) first subparagraph to the 1989 Accession Convention.

(32) Second subparagraph added by Article 18 of the 1978 Accession Convention and amended by Annex I (d) (6) second subparagraph to the 1978 Accession Convention.

(33) First subparagraph as amended by Article 19 of the 1978 Accession Convention, by Article 6 of the 1982 Accession Convention, by Article 12 of the 1989 Accession Convention and by Article 5 of the 1996 Accession Convention.

(34) Text as amended by Article 20 of the 1978 Accession Convention, by Article 7 of the 1982 Accession Convention, by Article 13 of the 1989 Accession Convention and by Article 6 of the 1996 Accession Convention.

(35) As amended by Annex I (d) (7) to the 1989 Accession Convention.

(36) Text as amended by Article 21 of the 1978 Accession Convention and by Annex I (d) (8) to the 1989 Accession Convention.

(37) Point 2 as amended by Article 22 of the 1978 Accession Convention.

(38) As amended by Annex I (d) (9) to the 1989 Accession Convention.

(39) First paragraph as amended by Article 14 of the 1989 Accession Convention.

(40) As amended by Annex I (d) (10) to the 1989 Accession Convention.

(41) Third paragraph deleted by Article 15 of the 1989 Accession Convention.

(42) Second subparagraph added by Article 23 of the 1978 Accession Convention.

(43) Text as replaced by Article 16 of the 1989 Accession Convention.

(44) Title V of the 1978 Accession Convention contains the following transitional provisions:

'Article 34

1. The 1968 Convention and the 1971 Protocol, with the amendments made by this Convention, shall apply only to legal proceedings instituted and to authentic instruments formally drawn up or registered after the entry into force of this Convention in the State of origin and, where recognition or enforcement of a judgment or authentic instrument is sought, in the State addressed.

2. However, as between the six Contracting States to the 1968 Convention, judgments given after the date of entry into force of this Convention in proceedings instituted before that date shall be recognized and enforced in accordance with the provisions of Title III of the 1968 Convention as amended.

3. Moreover, as between the six Contracting States to the 1968 Convention and the three States mentioned in Article 1 of this Convention, and as between those three States, judgments given after the date of entry into force of this Convention between the State of origin and the State addressed in proceedings instituted before that date shall also be recognized and enforced in accordance with the provisions of Title III of the 1968 Convention as amended if jurisdiction was founded upon rules which accorded with the provisions of Title II, as amended, or with provisions of a convention concluded between the State of origin and the State addressed which was in force when the proceedings were instituted.`

Title V of the 1982 Accession Convention contains the following transitional provisions:

'Article 12

1. The 1968 Convention and the 1971 Protocol, as amended by the 1978 Convention, shall apply only to legal proceedings instituted and to authentic instruments formally drawn up or registered after the entry into force of this Convention in the State of origin and, where recognition or enforcement of a judgment or authentic instrument is sought, in the State addressed.

2. However, as between the State of origin and the State addressed, judgments given after the date of entry into force of this Convention in proceedings instituted before that date shall be recognized and enforced in accordance with the provisions of Title III of the 1968 Convention, as amended by the 1978 Convention, and by this Convention if jurisdiction was founded upon rules which accorded with the provisions of Title II, as amended by the 1968 Convention or with provisions of a convention concluded between the State of origin and the State addressed which was in force when the proceedings were instituted.`

Title VI of the 1989 Accession Convention contains the following transitional provisions:

'Article 29

1. The 1968 Convention and the 1971 Protocol, as amended by the 1978 Convention, the 1982 Convention

and this Convention, shall apply only to legal proceedings instituted and to authentic instruments formally drawn up or registered after the entry into force of this Convention in the State of origin and, where recognition or enforcement of a judgment or authentic instrument is sought, in the State addressed.

2. However, judgments given after the date of entry into force of this Convention between the State of origin and the State addressed in proceedings instituted before that date shall be recognized and enforced in accordance with the provisions of Title III of the 1968 Convention, as amended by the 1978 Convention, the 1982 Convention and this Convention, if jurisdiction was founded upon rules which accorded with the provisions of Title II of the 1968 Convention, as amended, or with the provisions of a convention which was in force between the State of origin and the State addressed when the proceedings were instituted.`

Title V of the 1996 Accession Convention contains the following transitional provisions:

'Article 13

1. The 1968 Convention and the 1971 Protocol, as amended by the 1978 Convention, the 1982 Convention, the 1989 Convention and by this Convention, shall apply only to legal proceedings instituted and to authentic instruments formally drawn up or registered after the entry into force of this Convention in the State of origin and, where recognition or enforcement of a judgment or authentic instrument is sought, in the State addressed.

2. However, judgments given after the date of entry into force of this Convention between the State of origin and the State addressed in proceedings instituted before that date shall be recognized and enforced in accordance with the provisions of Title III of the 1968 Convention, as amended by the 1978 Convention, the 1982 Convention, the 1989 Convention and this Convention, if jurisdiction was founded upon rules which accorded with the provisions of Title II, as amended, of the 1968 Convention, or with the provisions of a convention which was in force between the State of origin and the State addressed when the proceedings were instituted.`

(45) This paragraph replaces Article 35 of Title V of the 1978 Accession Convention which was extended to the Hellenic Republic by Article 1 (2) of the 1982 Accession Convention. Article 28 of the 1989 Accession Convention provided for the deletion of both these provisions.

(46) Article added by Article 17 of the 1989 Accession Convention. It corresponds to Article 36 of Title V of the 1978 Accession Convention which was extended to the Hellenic Republic by Article 1 (2) of the 1982 Accession Convention. Article 28 of the 1989 Accession Convention provided for the deletion of both these provisions.

(47) Indent added by Article 24 of the 1978 Accession Convention.

(48) Indent added by Article 7 of the 1996 Accession Convention.

(49) Indent added by Article 7 of the 1996 Accession Convention.

(50) Indent added by Article 24 of the 1978 Accession Convention.

(51) Indent added by Article 8 of the 1982 Accession Convention.

(52) Indent added by Article 7 of the 1996 Accession Convention.

(53) Indent added by Article 24 of the 1978 Accession Convention.

(54) Indent added by Article 18 of the 1989 Accession Convention.

(55) First paragraph as amended by Article 25 (1) of the 1978 Accession Convention and by Article 19 of the 1989 Accession Convention.

(56) Paragraph 2 added by Article 19 of the 1989 Accession Convention. This paragraph corresponds to Article 25 (2) of the 1978 Accession Convention which was extended to the Hellenic Republic by Article 1 (2) of the 1982 Accession Convention. Article 28 of the 1989 Accession Convention provided for the deletion of both these provisions.

(57) Paragraph added by Article 25 (1) of the 1978 Accession Convention.

(58) Text as amended by Article 20 of the 1989 Accession Convention.

(59) Second subparagraph added by Article 26 of the 1978 Accession Convention.

(60) Article 21 of the 1989 Accession Convention provides for the deletion of Article 60 as amended by Article 27 of the 1978 Convention.

(61) Ratification of the 1978 and 1982 Accession Conventions was governed by Articles 38 and 14 of those Conventions. The ratification of the 1989 Accession Convention is governed by Article 31 of that Convention, which reads as follows:

'Article 31

This Convention shall be ratified by the signatory States. The instruments of ratification shall be deposited with the Secretary-General of the Council of the European Communities.`

The ratification of the 1996 Accession Convention is governed by Article 15 of that Convention, which reads as follows:

'Article 15

This Convention shall be ratified by the signatory States. The instruments of ratification shall be deposited with the Secretary-General of the Council of the European Union.`

(62) The entry into force of the 1978 and 1982 Accession Convention was governed by Articles 39 and 15 of those Conventions.

The entry into force of the 1989 Accession Convention is governed by Article 32 of that Convention, which reads as follows:

'Article 32

1. This Convention shall enter into force on the first day of the third month following the date on which two signatory States, of which one is the Kingdom of Spain or the Portuguese Republic, deposit their instruments of ratification.

2. This Convention shall take effect in relation to any other signatory State on the first day of the third month following the deposit of its instrument of ratification.`

The entry into force of the 1996 Accession Convention is governed by Article 16 of that Convention, which reads as follows:

'Article 16

1. This Convention shall enter into force on the first day of the third month following the date on which two signatory States, one of which is the Republic of Austria, the Republic of Finland or the Kingdom of Sweden, deposit their instruments of ratification.

2. This Convention shall produce its effects for any other signatory State on the first day of the third month following the deposit of its instrument of ratification.`.

(63) Notification concerning the 1978 and 1982 Accession Conventions is governed by Articles 40 and 16 of those Conventions.

Notification concerning the 1989 Accession Convention is governed by Article 33 of that Convention, which reads as follows:

'Article 33

The Secretary-General of the Council of the European Communities shall notify the signatory States of:

(a) the deposit of each instrument of ratification;

(b) the dates of entry into force of this Convention for the Contracting States.`

Notification concerning the 1996 Accession Convention is governed by Article 17 of that Convention, which reads as follows:

'Article 17

The Secretary-General of the Council of the European Union shall notify the signatory States of:

(a) the deposit of each instrument of ratification;

(b) the dates of entry into force of this Convention for the Contracting States.`

(64) Article 22 of the 1989 Accession Convention provides for the deletion of letter (c) as amended by Article 28 of the 1978 Accession Convention.

(65) An indication of the authentic texts of the Accession Conventions is to be found in the following provisions:

- with regard to the 1978 Accession Convention, in Article 41 of that Convention, which reads as follows:

'Article 41

This Convention, drawn up in a single original in the Danish, Dutch, English, French, German, Irish and Italian languages, all seven texts being equally authentic, shall be deposited in the

archives of the Secretariat of the Council of the European Communities. The Secretary-General shall transmit a certified copy to the Government of each signatory State.`,

- with regard to the 1982 Accession Convention, in Article 17 of that Convention, which reads as follows:

'Article 17

This Convention, drawn up in a single original in the Danish, Dutch, English, French, German, Greek, Irish and Italian languages, all eight texts being equally authentic, shall be deposited in the archives of the General Secretariat of the Council of the European Communities. The Secretary-General shall transmit a certified copy to the Government of each signatory State.`,

- with regard to the 1989 Accession Convention, in Article 34 of that Convention, which reads as follows:

'Article 34

This Convention, drawn up in a single original in the Danish, Dutch, English, French, German, Greek, Irish, Italian, Portuguese and Spanish languages, all 10 texts being equally authentic, shall be deposited in the archives of the General Secretariat of the Council of the European Communities. The Secretary-General shall transmit a certified copy to the Government of each signatory State.`,

- with regard to the 1996 Accession Convention, in Article 18 of that Convention, which reads as follows:

'Article 18

This Convention, drawn up in a single original in the Danish, Dutch, English, Finnish, French, German, Greek, Irish, Italian, Portuguese, Spanish and Swedish languages, all 12 texts being equally authentic, shall be deposited in the archives of the General Secretariat of the Council of the European Union. The Secretary-General shall transmit a certified copy to the Government of each signatory State.`

(66) Legal backing for the drawing-up of the authentic texts of the 1968 Convention in the official languages of the acceding Member States is to be found:

- with regard to the 1978 Accession Convention, in Article 37 of that Convention, which reads as follows:

'Article 37

The Secretary-General of the Council of the European Communities shall transmit a certified copy of the 1968 Convention and of the 1971 Protocol in the Dutch, French, German and Italian languages to the Governments of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland.

The texts of the 1968 Convention and the 1971 Protocol, drawn up in the Danish, English and Irish languages, shall be annexed to this Convention. The texts drawn up in the Danish, English and Irish languages shall be authentic under the same conditions as the original texts of the 1968 Convention and the 1971 Protocol.`

- with regard to the 1982 Accession Convention, in Article 13 of that Convention, which reads as follows:

'Article 13

The Secretary-General of the Council of the European Communities shall transmit a certified copy of the 1968 Convention, of the 1971 Protocol and of the 1978 Convention in the Danish, Dutch, English, French, German, Irish and Italian languages to the Government of the Hellenic Republic.

The texts of the 1968 Convention, of the 1971 Protocol and of the 1978 Convention, drawn up in the Greek language, shall be annexed to this Convention. The texts drawn up in the Greek language shall be authentic under the same conditions as the other texts of the 1968 Convention, the 1971 Protocol and the 1978 Convention.`

- with regard to the 1989 Accession Convention, in Article 30 of that Convention, which reads as follows:

'Article 30

1. The Secretary-General of the Council of the European Communities shall transmit a certified copy of the 1968 Convention, of the 1971 Protocol, of the 1978 Convention and of the 1982 Convention in the Danish, Dutch, English, French, German, Greek, Irish and Italian languages to the Governments of the Kingdom of Spain and of the Portuguese Republic.

2. The texts of the 1968 Convention, of the 1971 Protocol, of the 1978 Convention and of the 1982 Convention, drawn up in the Portuguese and Spanish languages, are set out in Annexes II, III, IV and V to this Convention. The texts drawn up in the Portuguese and Spanish languages shall be authentic under the same conditions as the other texts of the 1968 Convention, the 1971 Protocol, the 1978 Convention and the 1982 Convention.`

- with regard to the 1996 Accession Convention, in Article 14 of that Convention, which reads as follows:

'Article 14

1. The Secretary-General of the Council of the European Union shall transmit a certified copy of the 1968 Convention, of the 1971 Protocol, of the 1978 Convention, of the 1982 Convention and of the 1989 Convention in the Danish, Dutch, English, French, German, Greek, Irish, Italian, Spanish and Portuguese languages to the Governments of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden.

2. The texts of the 1968 Convention, of the 1971 Protocol, of the 1978 Convention, of the 1982 Convention and of the 1989 Convention, drawn up in the Finnish and Swedish languages, shall be

authentic under the same conditions as the other texts of the 1968 Convention, the 1971 Protocol, the 1978 Convention, the 1982 Convention and the 1989 Convention.`

(67) The 1978, 1982 and 1989 Accession Conventions were signed by the respective Plenipotentiaries of the Member States. The signature of the Plenipotentiary of the Kingdom of Denmark to the 1989 Accession Convention is accompanied by the following text:

'Subject to the right to table a territorial reservation concerning the Faroes and Greenland in connection with ratification, but with the possibility of subsequently extending the Convention to cover the Faroes and Greenland.`

(68) Text as amended by the 1978 Accession Convention, the 1982 Accession Convention and the 1989 Accession Convention

(69) Article amended by Article 8 of the 1996 Accession Convention.

(70) Article added by Article 29 of the 1978 Accession Convention and amended by Article 9 of the 1996 Accession Convention.

(71) Article added by Article 29 of the 1978 Accession Convention, amended by Article 9 of the 1982 Accession Convention and by Article 23 of the 1989 Accession Convention.

(72) Article added by Article 29 of the 1978 Accession Convention.

(73) Article added by Article 29 of the 1978 Accession Convention.

(74) Article added by Article 10 of the 1996 Accession Convention.

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(Information)

COUNCIL

Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters

(Signed at Brussels, 27 September 1968)

by Mr P. Jenard

Director in the Belgian Ministry of Foreign Affairs and External Trade.

A committee of experts set up in 1960 by decision of the Committee of Permanent Representatives of the Member States, following a proposal by the Commission, prepared a draft Convention, in pursuance of Article 220 of the EEC Treaty, on jurisdiction and the enforcement of judgments in civil and commercial matters. The committee was composed of governmental experts from the six Member States, representatives of the Commission, and observers. Its rapporteur, Mr P. Jenard, Directeur d'Administration in the Belgian Ministry for Foreign Affairs and External Trade, wrote the explanatory report, which was submitted to the governments at the same time as the draft prepared by the committee of experts. The following is the text of that report. It takes the form of a commentary on the Convention, which was signed in Brussels on 27 September 1968.

CONTENTS

CHAPTER I

PRELIMINARY REMARKS

By Article 220 of the Treaty establishing the European Economic Community, the Member States agreed to enter into negotiations with each other, so far as necessary, with a view to securing for the benefit of their nationals the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards.

The fact that the Treaty of Rome requires the Member States to resolve this problem shows that it is important. In a note sent to the Member States on 22 October 1959 inviting them to commence negotiations, the Commission of the European Economic Community pointed out that

> 'a true internal market between the six States will be achieved only if adequate legal protection can be secured. The economic life of the Community may be subject to disturbances and difficulties unless it is possible, where necessary by judicial means, to ensure the recognition and enforcement of the various rights arising from the existence of a multiplicity of legal relationships. As jurisdiction in both civil and commercial matters is derived from the sovereignty of Member States, and since the effect of judicial acts is confined to each national territory, legal protection and, hence, legal certainty in the common market are essentially dependent on the adoption by the Member States of a satisfactory solution to the problem of recognition and enforcement of judgments.'

On receiving this note the Committee of Permanent Representatives decided on 18 February 1960 to set up a committee of experts. The committee, consisting of delegates from the six Member countries, observers from the Benelux Committee on the unification of law and from the Hague Conference on private international law, and representatives from the EEC Commission departments concerned, met for the first time from 11 to 13 July 1960 and appointed as its chairman Professor Bülow then Ministerialdirigent and later Staatssekretär in the Federal Ministry of Justice in Bonn, and as its rapporteur Mr Jenard, directeur in the Belgian Ministry for Foreign Affairs.

At its 15th meeting, held in Brussels from 7 to 11 December 1964, the committee adopted a 'Preliminary Draft Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, and the enforcement of authentic instruments (document 14371/IV/64). This preliminary draft, with an explanatory report (document 2449/IV/65), was submitted to the Governments for comment.

The comments of the Governments, and those submitted by the Union of the Industries of the European Community, the Permanent Conference of Chambers of Commerce and Industry of the EEC, the Banking Federation of the EEC, the Consultative Committee of the Barristers' and Lawyers' Associations of the six EEC countries (a committee of the International Association of Lawyers), were studied by the Committee at its meeting of 5 to 15 July 1966. The draft Convention was finally adopted by the experts at that meeting.

The names of the governmental experts who took part in the work of the committee are set out in the annex to this report.

CHAPTER II

BACKGROUND TO THE CONVENTION

It is helpful to consider, first, the rules in each of the six countries governing the recognition and enforcement of foreign judgments.

A. THE LAW IN FORCE IN THE SIX STATES

In Belgium, until the entry into force of the Judicial Code (Code Judiciaire), the relevant provisions as

regards enforcement are to be found in Article 10 of the Law of 25 March 1876, which contains Title I of the Introductory Book of the Code of Civil Procedure (1).

Where there is no reciprocal convention, a court seised of an application for an order for enforcement 'has jurisdiction over a foreign judgment as to both form and substance, and can re-examine both the facts and the law. In other words, it has power to review the matter fully'. (2) (3)

(1) Article 10 of the Law of 1876 provides that: They (courts of first instance) shall also have jurisdiction in relation to judgments given by foreign courts in civil and commercial matters. Where there exists a treaty concluded on a basis of reciprocity between Belgium and the country in which the judgment was given, they shall review only the following five points:

1. whether the judgment contains anything contrary to public policy or to the principles of Belgian public law;
2. whether, under the law of the country in which the judgment was given, it has become *res judicata;*
3. whether, under that law, the certified copy of the judgment satisfies the conditions necessary to establish its authenticity;
4. whether the rights of the defendant have been observed;
5. whether the jurisdiction of the foreign court is based solely on the nationality of the plaintiff.

Article 570 of the Judicial Code contained in the Law of 10 October 1967 (supplement to the Moniteur belge of 31 October 1967) reads as follows:

'Courts of first instance shall adjudicate on applications for orders for the enforcement of judgments given by foreign courts in civil matters, regardless of the amount involved. Except where the provisions of a treaty between Belgium and the country in which judgment was given are to be applied, the court shall examine, in addition to the substance of the matter:

1. whether the judgment contains anything contrary to public policy or to the principles of Belgian public law;
2. whether the rights of the defendant have been observed;
3. whether the jurisdiction of the foreign court is based solely on the nationality of the plaintiff;
4. whether, under the law of the country in which the judgment was given, it has become *res judicata;*
5. whether, under that law, the certified copy of the judgment satisfies the conditions necessary to establish its authenticity.' These provisions will enter into force on 31 October 1970 at the latest. Before that date an *arrêté royal* (Royal Decree) will determine the date on which the provisions of the Judicial Code enter into force.

(2) GRAULICH, Principes de droit international privé, No 248 *et seq.*

(3) RIGAUX, L'efficacité des jugements étrangers en Belgique, Journal des tribunaux, 10. 4. 1960, p 287.

As regards recognition, text-book authorities and case-law draw a distinction between foreign judgments relating to status and legal capacity and those relating to other matters. The position at present is that foreign judgments not relating to the status and legal capacity of persons are not regarded by the courts as having the force of *res judicata.*

However, foreign judgments relating to a person's status or legal capacity may be taken as evidence of the status acquired by that person (4). Such a foreign judgment thus acts as a bar to any new proceedings for divorce or separation filed before a Belgian court if the five conditions listed in Article 10 of the Law of 1876 are fulfilled, as they 'constitute no more than the application to foreign judgments of rules which the legislature considers essential for any judgment to be valid'.

In the *Federal Republic of Germany,* foreign judgments are recognized and enforced on the basis of reciprocity (5). The conditions for recognition of foreign judgments are laid down in paragraph 328 of the Code of Civil Procedure (Zivilprozeßordnung):

'I. A judgment given by a foreign court may not be recognized:

1. where the courts of the State to which the foreign court belongs have no jurisdiction under German law;

2. where the unsuccessful defendant is German and has not entered an appearance, if the document instituting the proceedings was not served on him in person either in the State to which the court belongs, or by a German authority under the system of mutual assistance in judicial matters;

3. where, to the detriment of the German party, the judgment has not complied with the provisions of Article 13 (1) and (3) or of Articles 17, 18, and 22 of the Introductory Law to the Civil Code (Einführungsgesetz zum Bürgerlichen Gesetzbuch), or with the provisions of Article 27 of that Law which refer to Article 13 (1), nor where, in matters falling within the scope of Article 12 (3) of the Law of 4 July 1939 on disappearances, certifications of death, and establishment of the date of decease (RGBl. I, p. 1186), there has been a failure to comply with the provisions of Article 13 (2) of the Introductory Law to the Civil Code, to the

(4) Cass. 16. 1. 1953 — Pas. I. 335.

(5) Riezler, Internationales Zivilprozeßrecht, 1949, p. 509 *et seq.*

detriment of the wife of a foreigner who has been declared dead by judgment of the court (1);

4. where recognition of the judgment would be contrary to 'good morals' (gegen die guten Sitten) or the objectives of a German law;

5. where there is no guarantee of reciprocity.

II. The provision in (5) above shall not prevent recognition of a judgment given in a matter not relating to property rights where no court in Germany has jurisdiction under German law.'

The procedure for recognizing judgments delivered in actions relating to matrimonial matters is governed by a special Law (Familienrechtsänderungsgesetz) of 11 August 1961 (BGBl. I, p. 1221, Article 7).

Enforcement is governed by Articles 722 and 723 of the Code of Civil Procedure, which read as follows:

Article 722

'I. A foreign judgment may be enforced only where this is authorized by virtue of an order for enforcement.

II. An application for an order for enforcement shall be heard either by the Amtsgericht or the Landgericht having general jurisdiction in relation to the defendant, or otherwise by the Amtsgericht or the Landgericht before which the defendant may be summoned under Article 23.'

Article 723

'I. An order for enforcement shall be granted without re-examination of the substance of the judgment.

II. An order for enforcement shall be granted only if the foreign judgment has become *res judicata* under the law of the court in which it was given. No order for enforcement shall be granted where recognition of the judgment is excluded by Article 328.'

In France, Article 546 of the Code of Civil Procedure (Code de procédure civile) provides that judgments given by foreign courts and instruments recorded by foreign officials can be enforced only after being declared enforceable by a French court (Articles 2123 and 2128 of the Civil Code).

The courts have held that four conditions must be satisfied for an order for enforcement to be granted: the foreign court must have had jurisdiction; the procedure followed must have been in order; the law applied must have been that which is applicable under the French system of conflict of laws; and due regard must have been paid to public policy (2).

The Cour de cassation recently held (Cass. civ. 1er Section, 7 January 1964 — Munzer case) that the substance of the original action could not be reviewed by the court hearing the application for an order for enforcement. This judgment has since been followed.

In Italy, on the other hand, the Code of Civil Procedure (Codice di procedura civile) in principle allows foreign judgments to be recognized and enforced.

Under Article 796 of the Code of Civil Procedure, any foreign judgment may be declared enforceable in Italy by the Court of Appeal (Corte d'appello) for the place in which enforcement is to take place (Dichiarazione di efficacia).

Under Article 797 of the Code of Civil Procedure, the Court of Appeal examines whether the foreign judgment was given by a judicial authority having jurisdiction under the rules in force in Italy; whether in the proceedings abroad the document instituting the proceedings was properly served and whether sufficient notice was given; whether the parties properly entered an appearance in the proceedings or whether their default was duly recognized; whether the judgment has become *res judicata;* whether the judgment conflicts with a judgment given by an Italian judicial authority; whether proceedings between the same parties and concerning the same claim are pending before an Italian judicial authority; and whether the judgment contains anything contrary to Italian public policy.

However, if the defendant failed to appear in the foreign proceedings, he may request the Italian court to review the substance of the case (Article 798). In such a case, the Court may either order enforcement, or hear the substance of the case and give judgment.

(1) These Articles of the Introductory Law to the Civil Code provide for the application of German law in many cases: condition of validity of marriage, form of marriage, divorce, legitimate and illegitimate paternity, adoption, certification of death.

(2) Batiffol, Traité élémentaire de droit international privé, No 741 *et seq.*

There is also in Italian law the 'delibazione incidentale' (Article 799 of the Code of Civil Procedure) which, however, applies only to proceedings in which it is sought to invoke a foreign judgment.

Luxembourg. Under Article 546 of the Luxembourg Code of Civil Procedure (Code de procédure civile), judgments given by foreign courts and instruments recorded by foreign officials can be enforced in the Grand Duchy only after being declared enforceable by a Luxembourg court (see Articles 2123 and 2128 of the Civil Code).

Luxembourg law requires seven conditions to be satisfied before an order for enforcement can be granted: the judgment must be enforceable in the country in which it was given; the foreign court must have had jurisdiction; the law applied must have been that applicable under the Luxembourg rules of conflict of laws; the rules of procedure of the foreign law must have been observed; the rights of the defendant must have been observed; due regard must have been paid to public policy; the law must not have been contravened (Luxembourg, 5. 2. 64, Pasicrisie luxembourgeoise XIX, 285).

Luxembourg law no longer permits any review of a foreign judgment as to the merits.

In the *Netherlands,* the Code of Civil Procedure (Wetboek van Burgerlijke Rechtsvordering) lays down the principle that judgments of foreign courts are not enforceable in the Kingdom. Matters settled by foreign courts may be reconsidered by Netherlands courts (see Article 431 of the Code of Civil Procedure).

The national laws of the Member States thus vary considerably.

B. EXISTING CONVENTIONS

Apart from conventions dealing with particular matters (see p. 10), various conventions on enforcement exist between the Six; they are listed in Article 55 of the Convention. However, relations between France and the Federal Republic of Germany, France and the Netherlands, France and Luxembourg, Germany and Luxembourg, and Luxembourg and Italy are hampered by the absence of such conventions (1).

There are also striking differences between the various conventions. Some, like those between France and Belgium, and between Belgium and the Netherlands, and the Benelux Treaty, are based on 'direct' jurisdiction; but all the others are based on 'indirect' jurisdiction. The Convention between France and Italy is based on indirect jurisdiction, but nevertheless contains some rules of direct jurisdiction. Some conventions allow only those judgments which have becom *res judicata* to be recognized and enforced, whilst others such as the Benelux Treaty and the Conventions between Belgium and the Netherlands, Germany and Belgium, Italy and Belgium and Germany and the Netherlands apply to judgments which are capable of enforcement (2). Some cover judgments given in civil matters by criminal courts, whilst others are silent on this point or expressly exclude such judgments from their scope (Conventions between Italy and the Netherlands, Article 10, and between Germany and Italy, Article 12).

There are various other differences between these treaties and conventions which need not be discussed in detail; they relate in particular to the determination of competent courts and to the conditions governing recognition and enforcement. It should moreover be stressed that these conventions either do not lay down the enforcement procedure or give only a summary outline of it.

The present unsatisfactory state of affairs as regards the recognition and enforcement of judgments could have been improved by the conclusion of new bilateral conventions between Member States not yet bound by such conventions.

(1) It should be noted that at the time of writing this report, the Benelux Treaty has not yet entered into force and there is no agreement existing between Luxembourg on the one hand and Belgium and the Netherlands on the other.

(2) The Franco-Belgian convention, in spite of the provisions of Article 11 (2) which impose the condition of *res judicata,* nevertheless applies to enforceable judgments even if there is still a right of appeal (see Niboyet, Droit international privé français, T. VII 2022).

However, the Committee has decided in favour of the conclusion of a multilateral convention between the countries of the European Economic Community, in accordance with the views expressed in the Commission's letter of 22 October 1959. The Committee felt that the differences between the bilateral conventions would hinder the 'free movement' of judgments and lead to unequal treatment of the various nationals of the Member States, such inequality being contrary to the fundamental EEC principle of non-discrimination, set out, in particular, in Article 7 of the Treaty of Rome.

In addition, the European Economic Community provided the conditions necessary for a modern, liberal law on the recognition and enforcement of judgments, which would satisfy both legal and commercial interests.

C. THE NATURE OF THE CONVENTION

Some of the bilateral conventions concluded between the Member States, such as the Convention between France and Belgium of 8 July 1899, the Convention between Belgium and the Netherlands of 28 March 1925, and the Benelux Treaty of 24 November 1961, are based on rules of direct jurisdiction, whilst in the others the rules of jurisdiction are indirect. Under conventions of the first type, known also as 'double treaties', the rules of jurisdiction laid down are applicable in the State of origin, i.e. the State in which the proceedings originally took place; they therefore apply independently of any proceedings for recognition and enforcement, and permit a defendant who is summoned before a court which under the convention in question would not have jurisdiction to refuse to accept its jurisdiction.

Rules of jurisdiction in a convention are said to be 'indirect' when they do not affect the courts of the State in which the judgment was originally given, and are to be considered only in relation to recognition and enforcement. They apply only in determining cases in which the court of the State in which recognition or enforcement of a judgment is sought (the State addressed) is obliged to recognize the jurisdiction of the court of the State of origin. They can therefore be taken as conditions governing the recognition and enforcement of foreign judgments and, more specifically, governing supervision of the jurisdiction of foreign courts.

The Committee spent a long time considering which of these types of convention the EEC should have. It eventually decided in favour of a new system based on direct jurisdiction but differing in several respects from existing bilateral conventions of that type.

Although the Committee of experts did not underestimate the value and importance of 'single' conventions, (i. e. conventions based on rules of indirect jurisdiction) it felt that within the EEC a convention based on rules of direct jurisdiction as a result of the adoption of common rules of jurisdiction would allow increased harmonization of laws, provide greater legal certainty, avoid discrimination and facilitate the 'free movement' of judgments, which is after all the ultimate objective.

Conventions based on direct jurisdiction lay down common rules of jursidiction, thus bringing about the harmonization of laws, whereas under those based on indirect jurisdiction, national provisions apply, without restriction, in determining international jurisdiction in each State.

Legal certainty is most effectively secured by conventions based on direct jurisdiction since, under them, judgments are given by courts deriving their jurisdiction from the conventions themselves; however, in the case of conventions based on indirect jurisdiction, certain judgments cannot be recognized and enforced abroad unless national rules of jurisdiction coincide with the rules of the convention (1).

Moreover, since it establishes, on the basis of mutual agreement, an autonomous system of international jurisdiction in relations between the Member States, the Convention makes it easier to abandon certain rules of jurisdiction which are generally regarded as exorbitant.

Finally, by setting out rules of jurisdiction which may be relied upon as soon as proceedings are begun in the State of origin, the Convention regulates the problem of *lis pendens* and also helps to minimize the conditions governing recognition and enforcement.

(1) WESER, Les conflits de juridictions dans le cadre du Marché Commun, Revue Critique de droit international privé 1960, pp. 161-172.

As already stated, the Convention is based on direct jurisdiction, but differs fundamentally from treaties and conventions of the same type previously concluded. This is not the place to undertake a detailed study of the differences, or to justify them; it will suffice merely to list them:

1. the criterion of domicile replaces that of nationality;
2. the principle of equality of treatment is extended to any person domiciled in the Community, whatever his nationality;
3. rules of exclusive jurisdiction are precisely defined;
4. the right of the defendant to defend himself in the original proceedings is safeguarded;
5. the number of grounds for refusal of recognition and enforcement is reduced.

In addition, the Convention is original in that:

1. the procedure for obtaining enforcement is standardized;
2. rules of procedure are laid down for cases in which recognition is at issue;
3. provision is made for cases of conflict with other conventions.

CHAPTER III

SCOPE OF THE CONVENTION

The scope of the Convention is determined by the preamble and Article 1.

It governs international legal relationships, applies automatically, and covers all civil and commercial matters, apart from certain exceptions which are exhaustively listed.

I. INTERNATIONAL LEGAL RELATIONSHIPS

As is stressed in the fourth paragraph of the preamble, the Convention determines the international jurisdiction of the courts of the Contracting States.

It alters the rules of jurisdiction in force in each Contracting State only where an international element is involved. It does not define this concept, since the international element in a legal relationship may depend on the particular facts of the proceedings of which the court is seised. Proceedings instituted in the courts of a Contracting State which involves only persons domiciled in that State will not normally be affected by the Convention; Article 2 simply refers matters back to the rules of jurisdiction in force in that State. It is possible, however, that an international element may be involved in proceedings of this type. This would be the case, for example, where the defendant was a foreign national, a situation in which the principle of equality of treatment laid down in the second paragraph of Article 2 would apply, or where the proceedings related to a matter over which the courts of another State had exclusive jurisdiction (Article 16), or where identical or related proceedings had been brought in the courts of another State (Article 21 to 23).

It is clear that at the recognition and enforcement stage, the Convention governs only international legal relationships, since *ex hypothesi* it concerns the recognition and enforcement in one Contracting State of judgments given in another Contracting State [1].

II. THE BINDING NATURE OF THE CONVENTION

It was decided by the committee of experts that the Convention should apply automatically. This principle is formally laid down in Articles 19 and 20 which deal with the matter of examination by the courts of the Contracting States of their international jurisdiction. The courts must apply the rules of the Convention whether or not they are pleaded by the parties. It follows from this, for example, that if a person domiciled in Belgium is sued in a French court on the basis of Article 14 of the French Civil Code, and contests the jurisdiction of that court but without pleading the provisions of the Convention, the court

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[1] A. BÜLOW, Vereinheitlichtes internationales Zivilprozeßrecht in der Europäischen Wirtschaftsgemeinschaft — Rabels Zeitschrift für ausländisches und internationales Privatrecht, 1965, p. 473 *et seq.*

must nevertheless apply Article 3 and declare that it has no jurisdiction (1).

III. CIVIL AND COMMERCIAL MATTERS

The Committee did not specify what is meant by 'civil and commercial matters', nor did it point to a solution of the problem of classification by determining the law according to which that expression should be interpreted.

In this respect it followed the practice of existing conventions (2).

However, it follows from the text of the Convention that civil and commercial matters are to be classified as such according to their nature, and irrespective of the character of the court or tribunal which is seised of the proceedings or which has given judgment. This emerges from Article 1, which provides that the Convention shall apply in civil and commercial matters 'whatever the nature of the court or tribunal'. The Convention also applies irrespective of whether the proceedings are contentious or non-contentious. It likewise applies to labour law in so far as this is regarded as a civil or commercial matter (see also under contracts of employment, page 24).

The Convention covers civil proceedings brought before criminal courts, both as regards decisions relating to jurisdiction, and also as regards the recognition and enforcement of judgments given by criminal courts in such proceedings. It thereby takes into account certain laws in force in the majority of the Contracting States (3), tends to rule out any differences of interpretation such as have arisen in applying the Convention between Belgium and the Netherlands (4) and, finally, meets current requirements arising from the increased number of road accidents.

The relevant provisions of the treaty and conventions already concluded between the Member States vary widely, as has already been pointed out in Chapter I (A).

The formula adopted by the Committee reflects the current trend in favour of inserting in conventions clauses specifying that they apply to judgments given in civil or commercial matters by criminal courts. This can in particular be seen in the Benelux Treaty of 24 November 1961 and in the work of the Hague Conference on private international law.

It should be noted that the provisions of Article 5 (4) of the Convention in no way alter the penal jurisdiction of criminal courts and tribunals as laid down in the various codes of criminal procedure.

As regards both jurisdiction and recognition and enforcement, the Convention affects only civil proceedings of which those courts are seised, and judgments given in such proceedings.

However, in order to counter the objection that a party against whom civil proceedings have been brought might be obstructed in conducting his defence if criminal sanctions could be imposed on him in the same proceedings, the Committee decided on a solution identical to that adopted in the Benelux Treaty. Article II of the Protocol provides that such persons may be defended or represented in criminal courts. Thus they will not be obliged to appear in person to defend their civil interests.

The Convention also applies to civil or commercial matters brought before administrative tribunals.

The formula adopted by the Committee is identical to that envisaged by the Commission which was given the task at the fourth session of the Hague Conference on private international law of examining the Convention of 14 November 1896 in order to draw up common rules on a number of aspects of private international law relating to civil procedure. It reported as follows:

> 'The expression "civil or commercial matters" is very wide and does not include only those matters which fall within the jurisdiction of civil tribunals and commercial tribunals in countries where administrative tribunals also exist. Otherwise there would be a wholly unjustifiable inequality between the Contracting States: service abroad of judicial

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(1) Tribunal civil de Lille, 9. 11. 1953, Revue critique de droit international privé, 1954, p. 832.

(2) This problem is not dealt with in any treaty on enforcement. See also the report by Professor Fragistas on the Preliminary Draft Convention adopted by the Special Commission of the Hague Conference on private international law, preliminary document No 4 for the tenth session, p. 11.

(3) In *Belgium*, see Article 4 of the Law of 17 April 1878 containing the Introductory Title of the Code of Criminal Procedure.
In the *Federal Republic of Germany*, see Article 403 *et seq.* of the Code of Criminal Procedure.
In *France*, see Article 4 of the Code of Criminal Procedure.
In *Luxembourg*, any person who claims to have suffered loss or injury as a result of a crime or other wrongful act may, under Article 63 of the Code of Criminal Procedure, be joined as a civil party.
In the *Netherlands*, see Articles 332 to 337 of the Code of Criminal Procedure, and Articles 44 and 56 of the Law of Judicial Procedure, which gives jurisdiction to the justices of the peace or to the courts up to Fl 200 and 500 respectively.

(4) In interpreting the 1925 Convention between Belgium and the Netherlands, the Netherlands Court of Cassation held in its judgment of 16. 3. 1931 (N.J. 1931, p. 689) that Articles 11 and 12 did not affect orders by criminal courts to pay compensation for injury or loss suffered by a party.

instruments could take place on a wider scale for countries which do not have administrative tribunals than for countries which have them. In brief, the Convention is applicable from the moment when private interests become involved ...' (1).

Thus, for example, decisions of the French Conseil d'État given on such matters may be recognized and enforced (2).

IV. MATTERS EXCLUDED FROM THE SCOPE OF THE CONVENTION

The ideal solution would certainly have been to apply the Convention to all civil and commercial matters. However, the Committee did not feel able to adopt this approach, and limited the scope of the Convention to matters relating to property rights for reasons similar to those which prevailed when the Hague Convention on the recognition and enforcement of foreign judgments in civil and commercial matters was drafted, the main reason being the difficulties resulting from the absence of any overall solution to the problem of conflict of laws.

The disparity between rules of conflict of laws is particularly apparent in respect of matters not relating to property rights, since in general the intention of the parties cannot regulate matters independently of considerations of public policy.

The Committee, like the Hague Conference on private international law, preferred a formula which excluded certain matters to one which would have involved giving a positive definition of the scope of the Convention. The solution adopted implies that all litigation and all judgments relating to contractual or non-contractual obligations which do not involve the status or legal capacity of natural persons, wills or succession, rights in property arising out of a matrimonial relationship, bankruptcy or social security must fall within the scope of the Convention, and that in this respect the Convention should be interpreted as widely as possible.

However, matters falling outside the scope of the Convention do so only if they constitute the principal subject-matter of the proceedings. They are thus not excluded when they come before the court as a subsidiary matter either in the main proceedings or in preliminary proceedings (3).

A. Status, legal capacity, rights in property arising out of a matrimonial relationship, wills, succession

Apart from the desirability of bringing the Convention into force as soon as possible, the Committee was influenced by the following considerations. Even assuming that the Committee managed to unify the rules of jurisdiction in this field, and whatever the nature of the rules selected, there was such disparity on these matters between the various systems of law, in particular regarding the rules of conflict of laws, that it would have been difficult not to re-examine the rules of jurisdiction at the enforcement stage. This in turn would have meant changing the nature of the Convention and making it much less effective. In addition, if the Committee had agreed to withdraw from the court of enforcement all powers of examination, even in matters not relating to property rights, that court would surely have been encouraged to abuse the notion of public policy, using it to refuse recognition to foreign judgments referred to it. The members of the Committee chose the lesser of the two evils, retaining the unity and effectiveness of their draft while restricting its scope. The most serious difficulty with regard to status and legal capacity is obviously that of divorce, a problem which is complicated by the extreme divergences between the various systems of law: Italian law prohibits divorce, while Belgian law not only provides for divorce by consent (Articles 223, 275 *et seq.* of the Civil Code), which is unknown under the other legal systems apart from that of Luxembourg, but also, by the Law of 27 June 1960 on the admissibility of divorce when at least one of the spouses is a foreign national, incorporates provisions governing divorces by foreign nationals who ordinarily reside in Belgium.

The wording used, 'status or legal capacity of natural persons', differs slightly from that adopted in the Hague Convention, which excludes from its scope judgments concerning 'the status or capacity of persons or questions of family law, including personal or financial rights and obligations between parents and children or between spouses' (Article 1 (1)). The reason for this is twofold. Firstly, family law in the six Member States of the Community is not a concept distinct from questions of status or capacity; secondly, the EEC Convention, unlike the Hague Convention, applies to maintenance (Article 5 (2)) even where the obligation stems from the status of the persons and irrespective of whether rights

(1) See The Hague Conference on private international law — documents of the fourth session (May to June 1904), p. 84.

(2) WESER, Traité franco-belge du 8. 7. 1899, No 235.

(3) BELLET, 'L'élaboration d'une convention sur la reconnaissance des jugements dans le cadre du Marché commun', Clunet, 1965.

and duties between spouses or between parents and children are involved.

Moreover, in order to avoid differences of interpretation, Article 1 specificies that the Convention does not apply to the status or legal capacity of natural persons, thereby constituting a further distinction between this Convention and the Hague Convention, which specifies that it does not apply to judgments dealing principally with 'the existence or constitution of legal persons or the powers of their organs' (Article 1 (2) third indent).

With regard to matters relating to succession, the Committee concurred in the opinion of the International Union of Latin Notaries.

This body, when consulted by the Committee, considered that it was necessary, and would become increasingly so as the EEC developed in the future, to facilitate the recognition and enforcement of judgments given in matters relating to succession, and that it was therefore desirable for the six Member States to conclude a convention on the subject. However, the Union considered that it was essential first to unify the rules of conflict of laws.

As is pointed out in the Memorandum of the Permanent Bureau of the Hague Conference on private international law [1], from which this commentary has been taken, there are fairly marked differences between the various States on matters of succession and of rights in property arising out of a matrimonial relationship.

1. As regards succession, some systems of law make provision for a portion of the estate to devolve compulsorily upon the heirs, whereas others do not. The share allocated to the surviving spouse (a question which gives rise to the greatest number of proceedings in matters of succession because of the clash of interests involved) differs enormously from country to country. Some countries place the spouse on the same footing as a surviving child, or grant him or her a certain reserved portion (Italy), while others grant the spouse only a limited life interest (for example, Belgium).

   The disparities as regards rules of conflict of laws are equally marked. Some States (Germany, Italy and the Netherlands) apply to succession the national law of the *de cujus;* others (Belgium and France) refer succession to the law of the domicile as regards movable property and, as regards immovable property, to the law of the place where the property is situated; or (as in Luxembourg) refer to the law of the place where the property is situated in the case of immovable property, but subject movable property to national law.

2. As regards rights in property arising out of a matrimonial relationship, the divergences between the legal systems are even greater, ranging from joint ownership of all property (Netherlands) through joint ownership of movable property and all property acquired during wedlock (France, Belgium and Luxembourg) or joint ownership of the increase in capital value of assets (Federal Republic of Germany) to the complete separation of property (Italy).

There are also very marked divergences between the rules of conflict of laws, and this provokes positive conflicts between the systems. In some States the rules governing matrimonial property, whether laid down by law or agreed between the parties, are subject to the national law of the husband (Germany, Italy and the Netherlands); in the other States (Belgium, France, and Luxembourg) matrimonial property is subject to the rules impliedly chosen by the spouses at the time of their marriage.

Unlike the preliminary draft the Convention does not expressly exclude gifts from its scope. In this respect it follows the Hague Convention, though gifts will of course be excluded in so far as they relate to succession.

However, the Committee was of the opinion that there might possibly be grounds for resuming discussion of these problems after the Judgments Convention had entered into force, depending on the results of the work currently being done by the Hague Conference and by the International Commission on Civil Status.

It should be stressed that these matters will still be governed, temporarily at least, by existing bilateral conventions, in so far as these conventions apply (see Article 56).

B. Bankruptcy

Bankruptcy is also excluded from the scope of this Convention.

A separate Convention is currently being drafted, since the peculiarities of this branch of law require special rules.

Article 1 (2) excludes bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings, i.e. those proceedings which,

[1] The Hague Conference on private international law, recognition and enforcement of foreign judgments in matters relating to property rights. Memorandum, with Annexes, by the Permanent Bureau. Preliminary document No 1 of January 1962 for the Special Committee, p. 10.

depending on the system of law involved, are based on the suspension of payments, the insolvency of the debtor or his inability to raise credit, and which involve the judicial authorities for the purpose either of compulsory and collective liquidation of the assets or simply of supervision.

Thus the Convention will cover proceedings arising from schemes of arrangement out of court, since the latter depend on the intention of the parties and are of a purely contractual nature. The insolvency of a non-trader (déconfiture civile) under French law, which does not involve organized and collective proceedings, cannot be regarded as falling within the category of 'analogous proceedings' within the meaning of Article 1 (2).

Proceedings relating to a bankruptcy are not necessarily excluded from the Convention. Only proceedings arising directly from the bankruptcy (1) and hence falling within the scope of the Bankruptcy Convention of the European Economic Community are excluded from the scope of the Convention (2).

Pending the conclusion of the separate Convention covering bankruptcy, proceedings arising directly from bankruptcy will be governed by the legal rules currently in force, or by the conventions which already exist between certain Contracting States, as provided in Article 56 (3).

C. Social Security

The Committee decided, like the Hague Conference (4), to exclude social security from the scope of the Convention. The reasons were as follows.

In some countries, such as the Federal Republic of Germany, social security is a matter of public law, and in others it falls in the borderline area between private law and public law.

In some States, litigation on social security matters falls within the jurisdiction of the ordinary courts, but in others it falls within the jurisdiction of administrative tribunals; sometimes it lies within the jurisdiction of both (5).

The Committee was moreover anxious to allow current work within the EEC pursuant to Articles 51, 117 and 118 of the Treaty of Rome to develop independently, and to prevent any overlapping on matters of social security between the Convention and agreements already concluded, whether bilaterally or under the auspices of other international organizations such as the International Labour Organization or the Council of Europe.

Social security has not in fact hitherto given rise to conflicts of jurisdiction, since judicial jurisdiction has been taken as coinciding with legislative jurisdiction, which is determined by Community regulations adopted pursuant to Article 51 of the Treaty of Rome; however, the recovery of contributions due to social security bodies still raises problems of enforcement. This matter should therefore be the subject of a special agreement between the Six.

What is meant by social security?

Since this is a field which is in a state of constant development, it did not seem desirable to define it expressly in the Convention, nor even to indicate in an annex what this concept covers, especially as Article 117 of the Treaty of Rome states that one of the Community's objectives is the harmonization of social security systems.

Nevertheless, it should be pointed out that in the six countries benefits are paid in the circumstances listed in Convention No 102 of the International Labour Organization on minimum standards of social security, namely: medical care, sickness benefits, maternity allowances, invalidity benefits, old age and survivors' pensions, benefits for accidents at work and occupational diseases, family allowances and unemployment benefits (6). It may also be useful to refer

(1) Benelux Treaty, Article 22 (4), and the report annexed thereto. The Convention between France and Belgium is interpreted in the same way. See WESER, Convention franco-belge 1899, in the Jurisclasseur de droit international, Vol. 591, Nos 146 to 148.

(2) A complete list of the proceedings involved will be given in the Bankruptcy Convention of the European Economic Community.

(3) These are the Conventions between Belgium and France, between France and Italy, and between Belgium and the Netherlands, unless the latter convention has been abrogated by the Benelux Treaty on its entry into force.

(4) The Hague Conference on private international law, extraordinary session. Final Act, see Article 1 of the Convention.

(5) Étude de la physionomie actuelle de la sécurité sociale dans les pays de la CEE. Série politique sociale 3 — 1962, Services des publications des Communautés européennes. 8058/1/IX/1962/5.

(6) Tableaux comparatifs des régimes de sécurité sociale applicables dans les États membres des Communautés européennes. Third edition, Services des publications des Communautés européennes 8122/1/VII/1964/5.

to the definition given in Articles 1 (c) and 2 of Council Regulation No 3 on social security for migrant workers which, moreover, corresponds to that laid down in Convention No 102 of the ILO.

However, the litigation on social security which is excluded from the scope of the Convention is confined to disputes arising from relationships between the administrative authorities concerned and employers or employees. On the other hand, the Convention is applicable when the authority concerned relies on a right of direct recourse against a third party responsible for injury or damage, or is subrogated as against a third party to the rights of an injured party insured by it, since, in doing so, it is acting in accordance with the ordinary legal rules [1].

D. Arbitration

There are already many international agreements on arbitration. Arbitration is, of course, referred to in Article 220 of the Treaty of Rome. Moreover, the Council of Europe has prepared a European Convention providing a uniform law on arbitration, and this will probably be accompanied by a Protocol which will facilitate the recognition and enforcement of arbitral awards to an even greater extent than the New York Convention. This is why it seemed preferable to exclude arbitration. The Brussels Convention does not apply to the recognition and enforcement of arbitral awards (see the definition in Article 25); it does not apply for the purpose of determining the jurisdiction of courts and tribunals in respect of litigation relating to arbitration — for example, proceedings to set aside an arbitral award; and, finally, it does not apply to the recognition of judgments given in such proceedings.

CHAPTER IV

JURISDICTION

A. GENERAL CONSIDERATIONS

1. Preliminary remarks

Underlying the Convention is the idea that the Member States of the European Economic Community wanted to set up a common market with characteristics similar to those of a vast internal market. Everything possible must therefore be done not only to eliminate any obstacles to the functioning of this market, but also to promote its development. From this point of view, the territory of the Contracting States may be regarded as forming a single entity: it follows, for the purpose of laying down rules on jurisdiction, that a very clear distinction can be drawn between litigants who are domiciled within the Community and those who are not.

Starting from this basic concept, Title II of the Convention makes a fundamental distinction, in particular in Section 1, between defendants who are domiciled in a Contracting State and those who are domiciled elsewhere.

1. If a person is domiciled in a Contracting State, he must in general be sued in the courts of that State in accordance with the rules of jurisdiction in force in that State (Article 2).

2. If a person is domiciled in a Contracting State, he may be sued in the courts of another Contracting State only if the courts of that State are competent by virtue of the Convention (Article 3).

3. If a person is not domiciled in a Contracting State, that is, if he is domiciled outside the Community, the rules of jurisdiction in force in each Contracting State, including those regarded as exorbitant, are applicable (Article 4).

The instances in which a person domiciled in a Contracting State may be sued in the courts of another Contracting State — or must be so sued, in cases of exclusive jurisdiction or prorogation of jurisdiction — are set out in Sections 2 to 6. Section 7, entitled 'Examination as to jurisdiction . . . and admissibility', is mainly concerned with safeguarding the rights of the defendant.

Section 8 concerns *lis pendens* and related actions. The very precise rules of this Section are intended to prevent as far as possible conflicting judgments being given in relation to the same dispute in different States.

[1] See Michel Voirin, note under Cass. 16. 2. 1965, Recueil Dalloz 1965, p. 723.

Section 9 relates to provisional and protective measures and provides that application for these may be made to any competent court of a Contracting State, even if, under the Convention, that court does not have jurisdiction over the substance of the matter.

2. Rationale of the basic principles of Title II

The far-reaching nature of the Convention may at first seem surprising. The rules of jurisdiction which it lays down differ fundamentally from those of bilateral conventions which are based on direct jurisdiction (the Conventions between France and Belgium, and between Belgium and the Netherlands, the Benelux Treaty, the Convention between France and Switzerland) and apply not only to nationals of the Contracting States but also to any person, whatever his nationality, who is domiciled in one of those States.

The radical nature of the Convention may not only evoke surprise but also give rise to the objection that the Committee has gone beyond its terms of reference, since Article 220 of the Treaty of Rome provides that States should enter into negotiations with a view to securing 'for the benefit of their nationals' the simplification of formalities governing the recognition and enforcement of judgments. The obvious answer to this is that the extension of the scope of the Convention certainly does not represent a departure from the Treaty of Rome provided the Convention ensures, for the benefit of nationals, the simplification of formalities governing the recognition and enforcement of judgments. Too strict an interpretation of the Treaty of Rome would, moreover, have led to the Convention providing for the recognition and enforcement only of those judgments given in favour of nationals of the Contracting States. Such a limitation would have considerably reduced the scope of the Convention, which would in this regard have been less effective than existing bilateral conventions.

There are several reasons for widening the scope of the Convention by extending in particular the rules of jurisdiction under Title II to all persons, whatever their nationality, who are domiciled in a Contracting State.

First, it would be a retrograde step if common rules of jurisdiction were to be dependent on the nationality of the parties; the connecting factor in international procedure is usually the domicile or residence of the parties (see, for example, Article 3 (1) and (2) of the Hague Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children; the Hague Convention of 15 April 1958 on the jurisdiction of the contractual forum in matters relating to the international sale of goods; Article 11 of the Benelux Treaty; and Article 10 (1) of the Hague Convention on the recognition and enforcement of foreign judgments in civil and commercial matters).

Next, the adoption of common rules based on nationality would have caused numerous difficulties in applying the Convention. This method would have necessitated the introduction of different rules of jurisdiction depending on whether the litigation involved nationals of Contracting States, a national of a Contracting State and a foreign national, or two foreign nationals.

In some situations the rules of jurisdiction of the Convention would have had to be applied; in others, national rules of jurisdiction. Under this system the court would, at the commencement of proceedings, automatically have had to carry out an examination of the nationality of the parties, and it is not difficult to imagine the practical problems involved in, for example, establishing the nationality of a defendant who has failed to enter an appearance.

If the Convention had adopted the nationality of the parties as a connecting factor, it might well have been necessary to introduce a special provision to deal with the relatively frequent cases of dual nationality.

The Convention would thus have had to solve many problems which do not strictly speaking fall within its scope. Using nationality as a criterion would inevitably have led to a considerable increase in the effect of those rules of jurisdiction which may be termed exorbitant. Thus, for example, a judgment given in France or Luxembourg on the basis of Article 14 of the Civil Code in an action between a national of France or Luxembourg and a national of a non-Member State of the Community would have had to be recognized and enforced in Germany even if the foreign national was domiciled in Germany and a generally recognized jurisdiction, that of the defendant's domicile, thus existed.

By ruling out the criterion of nationality, the Committee is anxious not only to simplify the application of the Convention by giving it a unity which allows a uniform interpretation, but also, in fairness, to allow foreign nationals domiciled in the Community, who are established there and who thereby contribute to its

economic activity and prosperity, to benefit from the provisions of the Convention.

Moreover, the purpose of the Convention is also, by establishing common rules of jurisdiction, to achieve, in relations between the Six and in the field which it was required to cover, a genuine legal systematization which will ensure the greatest possible degree of legal certainty. To this end, the rules of jurisdiction codified in Title II determine which State's courts are most appropriate to assume jurisdiction, taking into account all relevant matters; the approach here adopted means that the nationality of the parties is no longer of importance.

3. Determination of domicile

As already shown, the rules of jurisdiction are based on the defendant's domicile. Determining that domicile is therefore a matter of the greatest importance.

The Committee was faced with numerous questions which proved difficult to resolve. Should the Convention include a common definition of domicile? Should domicile possibly be replaced by the concept of habitual residence? Should both domicile and habitual residence be used? Should the term domicile be qualified?

1. Should the Convention include a common definition of domicile?

   The first point to note is that the concept of domicile is not defined in the Conventions between France and Belgium, Belgium and the Netherlands, Germany and Belgium, and Italy and Belgium, nor in the Benelux Treaty.

   It is, however, defined in the Conventions between France and Italy (Article 28), between Italy and the Netherlands (Article 11), and between Germany and Italy (Article 13); but these Conventions are all based on indirect jurisdiction.

   At first, the Committee thought of defining domicile in the Convention itself, but it finally rejected this course of action. Such a definition would have fallen outside the scope of the Convention, and properly belongs in a uniform law [1]. To define the concept of domicile in international conventions might even be dangerous, as this could lead to a multiplicity of definitions and so to inconsistency.

   Moreover, such definitions run the risk of being superseded by developments in national law.

2. Should domicile be replaced by habitual residence?

   This course was similarly rejected. It was pointed out that the term 'habitual' was open to conflicting interpretations, since the laws of some of the Member States provide that an entry in the population registers is conclusive proof of habitual residence.

   The adoption of this course would, moreover, represent a divergence from that followed under the laws of the Contracting States, the majority of which use domicile as a basis of jurisdiction [2].

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[1] The concept of domicile has been specified by the European Committee for Legal Cooperation, set up by the Council of Europe, as one of the basic legal concepts which should be defined.

[2] *Belgium*
Law of 25 March 1876 containing Title I of the Introductory Book of the Code of Civil Procedure.

Article 39: Except in the case of amendments and exceptions provided for under the law, the court of the defendant's domicile shall be the only court having jurisdiction.

Judicial Code:
Article 624: Except in cases where the law expressly determines the court having jurisdiction a plaintiff may institute proceedings:

1. in the court of the domicile of the defendant or of one of the defendants.

Federal Republic of Germany
Code of Civil Procedure, Article 13: A person shall in general be subject to the jurisdiction of the courts of his domicile.

France
Code of Civil Procedure, Article 59 (1): In actions *in personam,* the defendant shall be sued in the court of his domicile or, where he has no domicile or, in the court of his place of residence.

Italy
Code of Civil Procedure, Article 18: Except where the law otherwise provides, the competent court shall be the court for the place where the defendant has his habitual residence or his domicile or, where these are not known, the court for the place where the defendant is resident.

Luxembourg
Article 59 of the Code of Civil Procedure corresponds to Article 59 of the French Code of Civil Procedure.

Netherlands
Code of Civil Procedure, Article 126:
1. In actions *in personam* or actions relating to movable property, the defendant shall be sued in the court of his domicile.

Adopting habitual residence as the sole criterion would have raised new problems as regards jurisdiction over persons whose domicile depends or may depend on that of another person or on the location of an authority (e.g. minors or married women).

Finally, in a treaty based on direct jurisdiction, it is particularly important that jurisdiction should have a secure legal basis for the court seised of the matter. The concept of domicile, while not without drawbacks, does however introduce the idea of a more fixed and stable place of establishment on the part of the defendant than does the concept of habitual residence.

3. Should both domicile and habitual residence be adopted?

In a treaty based on direct jurisdiction, the inclusion of both criteria would result in the major disadvantage that the number of competent courts would be increased. If the domicile and the place of habitual residence happened to be in different States, national rules of jurisdiction of both the States concerned would be applicable by virtue of Article 2 of the Convention, thus defeating the object of the Convention. Moreover, the inclusion of both criteria could increase the number of cases of *lis pendens* and related actions. For these reasons, the Committee preferred finally to adopt only the concept of domicile.

4. Should the concept of domicile be qualified?

In view of the varied interpretations of the concept of domicile, the Committee considered that the implementation of the Convention would be facilitated by the inclusion of a provision specifying the law to be applied in determining domicile. The absence of such a provision might give rise to claims and disclaimers of jurisdiction; the purpose of Article 52 is to avoid this.

Article 52 deals with three different situations:

(i) where the court of a Contracting State must determine whether a person is domiciled in that State;

(ii) where the court must determine whether a person is domiciled in another Contracting State; and finally,

(iii) where the court must determine whether a person's domicile depends on that of another person or on the seat of an authority.

Article 52 does not deal with the case of a person domiciled outside the Community. In this case the court seised of the matter must apply its rules of private international law.

Nor does Article 52 attempt to resolve the conflicts which might arise if a court seised of a matter ruled that a defendant were to be considered as having his domicile in two other Contracting States, or in one Contracting State and a third country. According to the basic principles of Title II the court, having found that a person is domiciled in some other Contracting State, must, in order to determine its own jurisdiction, apply the rules set out in Article 3 and in Sections 2 to 6 of the Convention.

In most disputed cases it will be necessary to determine where the defendant is domiciled.

However, when applying certain provisions of the Convention, in particular Article 5 (2) and the first paragraph of Article 8, the rules set out will be used to determine the plaintiff's domicile. For this reason Article 52 does not specify either the defendant or the plaintiff since, in the opinion of the Committee, the same provisions for determining domicile must apply to both parties.

Under the first paragraph of Article 52, only the internal law of the court seised of the matter can determine whether a domicile exists in that State. It follows that, if there is a conflict between the *lex fori* and the law of another Contracting State when determining the domicile of a party, the *lex fori* prevails. For example, if a defendant sued in a French court is domiciled both in France, because he has his principal place of business there, and in Belgium, because his name is entered there in the official population registers, where the laws conflict the French court must apply only French law. If it is established under that law that the defendant is in fact domiciled in France, the court need take no other law into consideration. This is justified on various grounds. First, to take the example given, a defendant, by establishing his domicile in a given country, subjects himself to the law of that country. Next, only if the *lex fori* prevails can the court examine whether it has jurisdiction; as the Convention requires it to do, in cases where the defendant fails to enter an appearance (Article 20).

Where the courts of different Contracting States are properly seised of a matter — for example, the Belgian court because it is the court for the place where the defendant's name is entered in the population registers, and the French court because it

is the court for the place where he has his principal place of business — the conflict may be resolved by applying the rules governing *lis pendens* or related actions.

The second paragraph covers the case of a defendant who is not domiciled in the State whose courts are seised of the matter. The court must then determine whether he is domiciled in another Contracting State, and to do this the internal law of that other State must be applied.

This rule will be applied in particular where a defendant is sued in the courts of a Contracting State in which he is not domiciled. If the jurisdiction of the court is contested, then, following the basic principles of Title II, whether or not the court has jurisdiction will vary according to whether the defendant is domiciled in another Contracting State or outside the Community. Thus, for example, a person domiciled outside the Community may properly be sued in Belgium in the court for the place where the contract was concluded (1) while a person domiciled in another Contracting State and sued in the same court may refuse to accept its jurisdiction, since Article 5 (1) of the Convention provides that only the courts for the place of performance of the obligation in question have jurisdiction. Thus if a defendant wishes to contest the jurisdiction of the Belgian court, he must establish that he is domiciled in a Contracting State.

Under the second paragraph of Article 52 the Belgian court must, in order to determine whether the defendant is domiciled in another Contracting State, apply the internal law of that State.

The Committee considered it both more equitable and more logical to apply the law of the State of the purported domicile rather than the *lex fori.*

If a court, seised of a matter in which the defendant was domiciled in another Contracting State, applied its own law to determine the defendant's domicile, the defendant might under that law not be regarded as being domiciled in the other Contracting State even though under the law of that other State he was in fact domiciled there. This solution becomes all the more untenable when one realises that a person establishing his domicile in a Contracting State can obviously not be expected to consider whether this domicile is regarded as such under a foreign law (2).

On the other hand, where the law of the State of the purported domicile has two definitions of domicile (3), that of the Civil Code and that of the Code of Civil Procedure, the latter should obviously be used since the problem is one of jurisdiction.

The third principle laid down by Article 52 concerns persons such as minors or married women whose domicile depends on that of another person or on the seat of an authority.

Under this provision national law is applied twice. For example, the national law of a minor first determines whether his domicile is dependent on that of another person. If it is, the national law of the minor similarly determines where that domicile is situated (e.g. where his guardian is domiciled). If, however, the domicile of the dependent person is under his national law not dependent on that of another person or on the seat of an authority, the first or second paragraph of Article 52 may be applied to determine the domicile of the dependent person. These two paragraphs also apply for the purpose of determining the domicile from which that of the dependent person derives.

The members of the Committee were alive to the difficulties which may arise in the event of dual nationality, and more especially in determining the domicile of a married woman. For example, where a German woman marries a Frenchman an acquires French nationality while retaining her German

(1) See Article 634 of the Judicial Code and Article 4 of the Convention.

(2) NIBOYET, Traité de droit international privé français, Vol. VI, No 1723: 'It is submitted that domicile is not systematically determined according to the *lex fori,* but according to the law of the country where the domicile is alleged to be. French law alone can therefore determine whether a person is domiciled in France; but whether a person is domiciled in any particular foreign country is a matter, not for French law, but for the law of the country concerned.'

(3) Such might for example be the case in Belgium, where Article 102 of the Civil Code provides that the domicile of a Belgian in so far as the exercise of his civil rights is concerned is where he has his principal establishment, while Article 36 of the Judicial Code provides that, for the purpose of that Code, a person is deemed to be domiciled in the place where his name is entered in the official population registers.

nationality, her domicile under French law (1) is that of her husband, whereas under German law she can have a separate domicile, since German law no longer provides that a married woman has the domicile of her husband (2). In cases of this kind, the Committee considered that the usual rules relating to dual nationality should be applied. Thus, even if she has a separate domicile in Germany, that person may be sued in France in the court for the husband's domicile, since the French court must apply French law. If, however, she is sued in Germany in the court for the place of her own domicile, the German court will apply German law and declare that it has jurisdiction.

Finally, it should be made clear that the concept of domicile within the meaning of the Convention does not extend to the legal fiction of an address for service of process.

B. COMMENTARY ON THE SECTIONS OF TITLE II

Section 1

General provisions

Section 1 sets out the main principles on which the rules of jurisdicition laid down by the Convention are founded:

1. the rule that a defendant domiciled in a Contracting State is in general to be sued in the courts of that State (Article 2);

2. the rule that a person domiciled in a Contracting State may in certain circumstances be sued in the courts of another Contracting State (Article 3);

3. the rule that a person domiciled outside the Community is subject to all applicable national rules of jurisdiction (Article 4).

This Section also embodies the widely applied principle of equality of treatment (3), which is already enshrined in Article 1 of the Convention between France and Belgium of 8 July 1899, Article 1 of the Convention between Belgium and the Netherlands of 28 March 1925 and Article 1 of the Benelux Treaty of 24 November 1961. Whilst this principle thus forms an integral part of treaties based on direct jurisdiction, in this Convention it also ensures implementation of the mandatory rules of the Treaty of Rome. Article 7 of that Treaty lays down the principle of non-discrimination between nationals of Member States of the Community.

Specific provisions applying the general principle set out in Article 7 of the Treaty of Rome to the right of establishment are laid down in Article 52 *et seq.* of that Treaty.

During the preparation of the General Programme on establishment, the Economic and Social Committee of the European Communities drew particular attention to this aspect of the problem by requesting that equality of treatment as regards legal protection be achieved in full as quickly as possible.

Article 2

The maxim *'actor sequitur forum rei'*, which expresses the fact that law leans in favour of the defendant, is even more relevant in the international sphere than it is in national law (4). It is more difficult, generally speaking, to defend oneself in the courts of a foreign country than in those of another town in the country where one is domiciled.

A defendant domiciled in a Contracting State need not necessarily be sued in the court for the place where he is domiciled or has his seat. He may be sued in any court of the State where he is domiciled which has jurisdiction under the law of that State.

As a result, if a defendant is sued in one of the courts of the State in which he is domiciled, the internal rules of jurisdiction of that State are fully applicable. Here the Convention requires the application of the national law of the court seised of the matter; the Convention determines whether the courts of the State in question have jurisdiction, and the law of that State in turn determines whether a particular court in that State has jurisdiction. This solution seems equitable since it is usual for a defendant domiciled in a State to be subject to the internal law of that State without it being

(1) French Civil Code, Article 108: 'A married woman has no domicile other than that of her husband.'

(2) BGB, Article 10, repealed by the Gleichberechtigungsgesetz (Law on equal rights of men and women in the field of civil law) of 18 June 1957.

(3) WESER, Revue critique de droit international privé, 1960, pp. 29-35.

(4) See report by Professor FRAGISTAS — Hague Conference on private international law — preliminary doc. No 4, May 1964, for the tenth session.

necessary for the Convention to provide special rules for his protection. It is, moreover, an extremely practical solution because it means that in most cases the court will not have to take the Convention any further into consideration.

Defendants are usually sued in the courts of the State in which they are domiciled. This is true of proceedings in which there is no international element. It is also true of proceedings with an international element in which, by application of the traditionally accepted maxim *'actor sequitur forum rei'*, the defendant is sued in the courts of the State of his domicile. The Convention does not therefore involve a general reversal of national rules of jurisdiction nor of the practice of judges and lawyers. In fact, judges and lawyers will need to take account of the changes effected by the Convention only in cases where a defendant is sued in a court of a State where he is not domiciled, or in one of the few cases in which the Convention has laid down common rules of exclusive jurisdiction.

The second paragraph of Article 2 embodies the principle of equality of treatment where a foreigner is domiciled in the State of the forum. Such foreigner, whether he is defendant or plaintiff, is governed in that State by the same rules of jurisdiction as its nationals, or more precisely, as its nationals who are domiciled in that State, where, as in Italy, the law of that State determines the jurisdiction of its courts according to whether the national concerned is domiciled in its territory.

As a result, Article 52 of the Belgian Law of 25 March 1876 will no longer be applicable as such to foreigners domiciled in Belgium (1).

The positive aspect of equality of treatment is set out in the second paragraph of Article 4.

Article 3

Article 3 deals with those cases in which a defendant domiciled in a Contracting State may be sued in another Contracting State. This Article lays down the principle that a defendant may be sued otherwise than in the courts of the State where he is domiciled only in the cases expressly provided for in the Convention. The rule sets aside the rules of exorbitant jurisdiction in force in each of the Contracting States. However, these rules of jurisdiction are not totally excluded; they are excluded only in respect of persons who are domiciled in another Contracting State. Thus they remain in force with respect to persons who are not domiciled within the Community.

The second paragraph of Article 3 prohibits the application of the most important and best known of the rules of exorbitant jurisdiction. While this paragraph is not absolutely essential it will nevertheless facilitate the application of certain provisions of the Convention (see, in particular, Article 59).

The following are the rules of exorbitant jurisdiction in question in each of the States concerned.

In Belgium

Articles 52, 52bis and 53 of the Law of 25 March 1876, which govern territorial jurisdiction in actions brought by Belgians (2) or by foreigners against foreigners before Belgian courts, and Article 15 of the Civil Code which corresponds to Article 15 of the French Civil Code.

In Germany

The nationality of the parties does not in general affect the rules of jurisdiction. Article 23 of the Code of Civil Procedure lays down that, where no other German court has jurisdiction, actions relating to property instituted against a person who is not domiciled in the national territory come under the jurisdiction of the court for the place where the property or subject of the dispute is situated.

German courts have in a number of cases given a very liberal interpretation to this provision, thereby leading some authors to state that Article 23 'can be likened to Article 14 of the French Civil Code' (3).

In France

1. Article 14 of the Civil Code provides that any French plaintiff may sue a foreigner or another Frenchman in the French courts, even if there is no

(1) This Article provides, in particular, that foreigners who are domiciled or resident in Belgium may be sued before a court of the Kingdom either by a Belgian or by a foreigner.

(2) Répertoire pratique du droit belge, under 'compétence' — No 17518 *et seq.* — (see Judicial Code, Articles 635, 637 and 638).

(3) WESER, Revue critique de droit international privé, 1959, p. 636; ROSENBERG, Lehrbuch des deutschen Zivilprozeßrechts, ninth edition, paragraph 35 I 3.

connection between the cause of action and those courts.

2. Article 15 of the Civil Code provides that a Frenchman may always be sued in the French courts by a Frenchman or by a foreigner, and can even insist on this.

Despite the fact that Articles 14 and 15 in terms refer only to contractual obligations, case law has extended their scope beyond contractual obligations to all actions whether or not relating to property rights. There are thus only two limitations to the general application of Articles 14 and 15: French courts are never competent to hear either actions *in rem* concerning immovable property situated abroad, or actions concerning proceedings for enforcement which is to take place abroad (1).

In Italy

1. Article 2 of the Code of Civil Procedure provides that an agreement to substitute for the jurisdiction of Italian courts the jurisdiction of a foreign court or arbitral tribunal will be valid only in the case of litigation between foreigners, or between a foreigner and an Italian citizen who is neither resident nor domiciled in Italy, and only if the agreement is evidenced in writing.

2. (a) Under Article 4 (1) of the Code of Civil Procedure, a foreigner may be sued in an Italian court if he is resident or domiciled in Italy, or if he has an address for service there or has a representative who is authorized to bring legal proceedings in his name, or if he has accepted Italian jurisdiction, unless the proceedings concern immovable property situated abroad.

   (b) Under Article 4 (2) of the Code of Civil Procedure, a foreigner may be sued in the courts of the Italian Republic if the proceedings concern property situated in Italy, or succession to the estate of an Italian national, or an application for probate made in Italy, or obligations which arose in Italy or which must be performed there.

3. The interpretation given to Article 4 by Italian case law means that an Italian defendant may always be sued in the Italian courts (2).

In Luxembourg

Articles 14 and 15 of the Civil Code correspond to Articles 14 and 15 of the French Civil Code.

Luxembourg case law applies the same principles of interpretation as French case law.

In the Netherlands

Article 126 (3) of the Code of Civil Procedure provides that, in personal matters or matters concerning movable property, a defendant who has no known domicile or residence in the Kingdom shall be sued in the court for the domicile of the plaintiff. This provision applies whether or not the plaintiff is a Netherlands national (3).

Article 127 provides that a foreigner, even if he does not reside in the Netherlands, may be sued in a Netherlands court for the performance of obligations contracted towards a Netherlander either in the Netherlands or abroad.

Article 4

Article 4 applies to all proceedings in which the defendant is not domiciled in a Contracting State, and provides that the rules of internal law remain in force.

This is justified on two grounds:

First, in order to ensure the free movement of judgments, this Article prevents refusal of recognition or enforcement of a judgment given on the basis of rules of internal law relating to jurisdiction. In the absence of such a provision, a judgment debtor would be able to prevent execution being levied on his property simply by transferring it to a Community country other than that in which judgment was given.

Secondly, this Article may perform a function in the case of *lis pendens*. Thus, for example, if a French court is seised of an action between a Frenchman and a defendant domiciled in America, and a German court is

(1) BATIFFOL, *op. cit.*, No 684 *et seq.*

(2) MORELLI, Diritto processuale civile internazionale, pp. 108-112.

(3) WESER, Revue critique de droit international privé, 1959, p. 632.

seised of the same matter on the basis of Article 23 of the Code of Civil Procedure, one of the two courts must in the interests of the proper administration of justice decline jurisdiction in favour of the other. This issue cannot be settled unless the jurisdiction of these courts derives from the Convention.

In the absence of an article such as Article 4, there would be no rule in the Convention expressly recognizing the jurisdiction of the French and German courts in a case of this kind.

The only exception to the application of the rules of jurisdiction of internal law is the field of exclusive jurisdiction (Article 16) (1). The rules which grant exclusive jurisdiction to the courts of a State are applicable whatever the domicile of the defendant.

However, the question arises why the Committee did not extend the scope of the provision limiting the application of rules of exorbitant jurisdiction to include in particular nationals of Member States regardless of their place of domicile.

In other words, and to take another example based on Article 14 of the French Civil Code, why will it still be possible for a French plaintiff to sue in the French courts a foreigner, or even a national of a Member State of the Community, who is domiciled outside the Community?

The Committee thought that it would have been unreasonable to prevent the rules of exorbitant jurisdiction from applying to persons, including Community nationals, domiciled outside the Community. Thus, for example, a Belgian national domiciled outside the Community might own assets in the Netherlands. The Netherlands courts have no jurisdiction in the matter since the Convention does not recognize jurisdiction based on the presence of assets within a State. If Article 14 of the French Civil Code could not be applied, a French plaintiff would have to sue the Belgian defendant in a court outside the Community, and the judgment could not be enforced in the Netherlands if there were no enforcement treaty between the Netherlands and the non-member State in which judgment was given.

This, moreover, was the solution adopted in the Conventions between France and Belgium, and between Belgium and the Netherlands, and in the Benelux Treaty, which, however, take nationality as their criterion (2).

The second paragraph of Article 4 of the Convention constitutes a positive statement of the principle of equality of treatment already laid down in the second paragraph of Article 2. An express provision was considered necessary in order to avoid any uncertainty (3). Under this provision, any person domiciled in a Contracting State has the right, as plaintiff, to avail himself in that State of the same rules of jurisdiction as a national of that State.

This principle had already been expressly laid down in the Convention between France and Belgium of 8 July 1899 (Article 1 (2)).

This positive aspect of the principle of equality of treatment was regarded as complementing the right of establishment (Article 52 *et seq.* of the Treaty of Rome), the existence of which implies, as was stated in the General Programme for the abolition of restrictions on freedom of establishment of 18 December 1961 (4), that any natural or legal person established in a Member State should enjoy the same legal protection as a national of that State.

The provision is also justified on economic grounds. Since rules of exorbitant jurisdiction can still be invoked against foreigners domiciled outside the European Economic Community, persons who are domiciled in the Member State concerned and who thus contribute to the economic life of the Community should be able to invoke such rules in the same way as the nationals of that State.

It may be thought surprising that the Convention extends the 'privileges of jurisdiction' in this way, since equality of treatment is granted in each of the States to all persons, whatever their nationality, who are domiciled in that State.

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(1) The third paragraph of Article 8, which concerns jurisdiction in respect of insurers who are not domiciled in the Community but have a branch or agency there, may also be regarded as an exception.

(2) The Convention between France and Belgium is interpreted to mean that a Frenchman may not rely on Article 14 of the Civil Code to sue in France a Belgian domiciled in Belgium, but may do so to sue a Belgian domiciled abroad. BATIFFOL, Traité élémentaire de droit international privé, No 714.

(3) According to French case law on the Treaty of 9 February 1842 between France and Denmark, a Danish national may not rely on Article 14 of the French Civil Code.

(4) *Official Journal of the European Communities*, 15. 1. 1962, p. 36 *et seq.*

It should first be noted that such treatment is already granted to foreigners in Belgium, the Federal Republic of Germany, Italy and the Netherlands, where the rules of exorbitant jurisdiction may be invoked by foreigners as well as by nationals. The second paragraph of Article 4 therefore merely brings into line with these laws the French and Luxembourg concepts, according to which Article 14 of the Civil Code constitutes a privilege of nationality.

Secondly, the solution adopted in the Convention follows quite naturally from the fact that, for the reasons already given, the Convention uses domicile as the criterion for determining jurisdiction. In this context it must not be forgotten that it will no longer be possible to invoke the privileges of jurisdiction against persons domiciled in the Community, although it will be possible to invoke them against nationals of the Community countries who have established their domicile outside the territory of the Six.

Section 2

Special jurisdiction

Articles 5 and 6

Articles 5 and 6 list the situations in which a defendant may be sued in a Contracting State other than that of his domicile. The forums provided for in these Articles supplement those which apply under Article 2. In the case of proceedings for which a court is specifically recognized as having jurisdiction under these Articles, the plaintiff may, at his option, bring the proceedings either in that court or in the competent courts of the State in which the defendant is domiciled.

One problem which arose here was whether it should always be possible to sue the defendant in one of the courts provided for in these Articles, or whether this should be allowed only if the jurisdiction of that court was also recognized by the internal law of the State concerned.

In other words, in the first case, jurisdiction would derive directly from the Convention and in the second there would need to be dual jurisdiction: that of the Convention and that of the internal law on local jurisdiction. Thus, for example, where Netherlands law on jurisdiction does not recognize the court for the place of performance of the obligation, can the plaintiff nevertheless sue the defendant before that court in the Netherlands? In addition, would there be any obligation on the Netherlands to adapt its national laws in order to give that court jurisdiction?

By adopting 'special' rules of jurisdiction, that is by directly designating the competent court without referring to the rules of jurisdiction in force in the State where such a court might be situated, the Committee decided that a plaintiff should always be able to sue a defendant in one of the forums provided for without having to take the internal law of the State concerned into consideration. Further, in laying down these rules, the Committee intended to facilitate implementation of the Convention. By ratifying the Convention, the Contracting States will avoid having to take any other measures to adapt their internal legislation to the criteria laid down in Articles 5 and 6. The Convention itself determines which court has jurisdiction.

Adoption of the 'special' rules of jurisdiction is also justified by the fact that there must be a close connecting factor between the dispute and the court with jurisdiction to resolve it. Thus, to take the example of the *forum delicti commissi,* a person domiciled in a Contracting State other than the Netherlands who has caused an accident in The Hague may, under the Convention, be sued in a court in The Hague. This accident cannot give other Netherlands courts jurisdiction over the defendant. On this point there is thus a distinct difference between Article 2 and Articles 5 and 6, due to the fact that in Article 2 domicile is the connecting factor.

Forum contractus (Article 5 (1)) including contracts of employment

There are great differences between the laws of the Six in their attitude to the jurisdiction of the *forum contractus*; in some countries this jurisdiction is not recognized (the Netherlands, Luxembourg), while in others it exists in varying degrees. Belgian law recognizes the jurisdiction of the courts for the place where the obligation arose, and also that of the courts for the place where the obligation has been or is to be performed (1); Italian law recognizes only the jurisdiction of the courts for the place where the obligation arose and where it has been performed (2); German law in general recognizes only the jurisdiction of the courts for the place where the obligation has been

(1) Articles 41 and 52 of the Law of 25 March 1876, Article 624 of the Judicial Code.
(2) Articles 4 and 20 of the Code of Civil Procedure.

performed [1]; and, finally. French law recognizes the jurisdiction of the *forum contractus* only to a limited extent and subject to certain conditions [2].

Some of the conventions concluded between the Six reject this forum, while others accept it in varying degrees. Article 2 (1) of the Convention between *France and Belgium* provides that, where a defendant is neither domiciled nor resident in France or Belgium, a Belgian or French plaintiff may institute proceedings in the courts for the place where the obligation arose or where it has been or is to be performed [3].

Article 4 of the Convention between *Belgium and the Netherlands* provides that in civil or commercial matters a plaintiff may bring a personal action concerning movable property in the courts for the place where the obligation arose or where it has been or is to be performed.

In Article 3 (5) of the Convention between *Belgium and Germany,* jurisdiction is recognized where, in matters relating to a contract, proceedings are instituted in a court of the State where the obligation has been or is to be performed.

Article 14 of the Convention between *France and Italy* provides that if the action concerns a contract which is considered as a commercial matter by the law of the country in which the action is brought, a French or Italian plaintiff may seise the courts of either of the two countries in which the contract was concluded or is to be performed.

The Convention between *Belgium and Italy* (Article 2 (5)) recognizes jurisdiction where, in matters relating to a contract, an action is brought before the courts of the State where the obligation arose, or where it has been or should have been performed.

There are no provisions on this subject in the Conventions between *Italy and the Netherlands, Germany and Italy,* and *Germany and the Netherlands.*

Finally, the Benelux Treaty adopts Article 4 of the Convention between Belgium and the Netherlands, but includes a Protocol which in Article 1 lays down that Article 4 shall not apply where Luxembourg is concerned if the defendant is domiciled or resident in the country of which he is a national [4].

Article 5 (1) provides a compromise between the various national laws.

The jurisdiction of the forum is, as in German law, limited to matters relating to contract. It could have been restricted to commercial matters, but account must be taken of the fact that European integration will mean an increase in the number of contractual relationships entered into. To have confined it to commercial matters would moreover have raised the problem of classification.

Only the jurisdiction of the *forum solutionis* has been retained, that is to say the jurisdiction of the courts for the place of performance of the obligation on which the claim is based. The reasons for this are as follows.

The Committee considered that it would be unwise to give jurisdiction to a number of courts, and thus possibly create conflicts of jurisdiction. A plaintiff already has a choice, in matters relating to a contract, between the competent courts of the State where the defendant is domiciled, or, where there is more than one defendant, the courts for the place where any one of them is domiciled, or finally, the courts for the place of performance of the obligation in question.

If the Committee had adopted as wide-ranging a provision as that of the Benelux Treaty, which recognizes also the jurisdiction of the courts for the place where the obligation arose, this would have involved very considerable changes for those States whose laws do not recognize that forum, or do so only with certain restrictions.

There was also concern that acceptance of the jurisdiction of the courts for the place where the obligation arose might sanction, by indirect means, the jurisdiction of the forum of the plaintiff. To have accepted this forum would have created tremendous problems of classification, in particular in the case of contracts concluded by parties who are absent.

The court for the place of performance of the obligation will be useful in proceedings for the recovery of fees: the creditor will have a choice between the courts of the State where the defendant is domiciled and the courts of another State within whose jurisdiction the services

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(1) Article 29 of the Code of Civil Procedure.

(2) Articles 59 (3) and 420 of the Code of Civil Procedure.

(3) On the serious controversy to which this Article has given rise, see WESER, Traité franco-belge du 8 juillet 1899. Étude critique, p. 63 *et seq.;* also Jurisclasseur de droit international, vol. 591, Nos 42 and 45.

(4) For the reasons for this limitation, see the report on the negotiations.

were provided, particularly where, according to the appropriate law, the obligation to pay must be performed where the services were provided. This forum can also be used where expert evidence or inquiries are required. The special position of Luxembourg justified, as in the Benelux Treaty, the inclusion of a special provision in the Protocol (Article I).

Contracts of employment

In matters relating to contracts of employment in the broadest sense of the term, the preliminary draft of the Convention contained a provision attributing exclusive jurisdiction to the courts of the Contracting State either in which the undertaking concerned was situated, or in which the work was to have been or had been performed. After prolonged consideration, the Committee decided not to insert in the Convention any special provisions on jurisdiction in this field. Its reasoning was as follows.

First, work is at present in progress within the Commission of the EEC to harmonize the provisions of labour law in the Member States. It is desirable that disputes over contracts of employment should as far as possible be brought before the courts of the State whose law governs the contract. The Committee therefore did not think that rules of jurisdiction should be laid down which might not coincide with those which may later be adopted for determining the applicable law.

In order to lay down such rules of jurisdiction, the Committee would have had to take into account not only the different ways in which work can be carried out abroad, but also the various categories of worker: wage-earning or salaried workers recruited abroad to work permanently for an undertaking, or those temporarily transferred abroad by an undertaking to work for it there; commercial agents, management, etc. Any attempt by the Committee to draw such distinctions might have provided a further hindrance to the Commission's work.

Next, in most Member States of the Community the principle of freedom of contract still plays an important part; a rule of exclusive jurisdiction such as that previously provided for in Article 16 would have nullified any agreements conferring jurisdiction.

The general rules of the Convention will therefore apply to contracts of employment. Thus, in litigation between employers and employees, the following courts have jurisdiction: the courts of the State where the defendant is domiciled (Article 2); the courts for the place of performance of the obligation, if that place is in a State other than that of the domicile of the defendant (Article 5 (1)); and any court on which the parties have expressly or impliedly agreed (Articles 17 and 18). In the case of proceedings based on a tort committed at work (Article 2, Nos 2 and 3 of the Arbeitsgerichtsgesetz), Article 5 (3), which provides for the jurisdiction of the courts for the place where the harmful event occurred, could also apply. It seems that these rules will, for the time being, prove of greater value to the persons concerned than a provision similar to that of the former Article 16 (2), which could not be derogated from because it prohibited any agreement conferring jurisdiction.

The rules on the recognition and enforcement of judgments will probably ensure additional protection for employees. If the law of the State addressed had to be applied to a contract of employment, the courts of that State, upon being seised of an application for recognition or enforcement of a foreign judgment, would, on the basis of Article 27 (1), which permits refusal of recognition (or enforcement) on grounds of public policy in the State addressed, be able to refuse the application if the court of the State of origin had failed to apply, or had misapplied, an essential provision of the law of the State addressed.

Once the work of the Commission in this field has been completed, it will always be possible to amend the provisions of the Convention, either by means of an additional Protocol, or by the drafting of a convention governing the whole range of problems relating to contracts of employment, which would, under Article 57, prevail over the Convention.

Maintenance obligations (Article 5 (2))

Matters relating to maintenance are governed by the Convention.

The Convention is in a sense an extension of the Hague Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations in respect of children [1], since

[1] In force on 1. 9. 1966 between Belgium, France, Germany, Italy and the Netherlands.

it ensures the recognition and enforcement of judgments granting maintenance to creditors other than children, and also of the New York Convention of 20 June 1956 on the recovery abroad of maintenance (1).

The Committee decided that jurisdiction should be conferred on the forum of the creditior, for the same reasons as the draftsmen of the Hague Convention (2). For one thing, a convention which did not recognize the forum of the maintenance creditor would be of only limited value, since the creditor would be obliged to bring the claim before the court having jurisdiction over the defendant.

If the Convention did not confer jurisdiction on the forum of the maintenance creditor, it would apply only in those situations where the defendant against whom an order had been made subsequently changed residence, or where the defendant possessed property in a country other than that in which the order was made.

Moreover the court for the place of domicile of the maintenance creditor is in the best position to know whether the creditor is in need and to determine the extent of such need.

However, in order to align the Convention with the Hague Convention, Article 5 (2) also confers jurisdiction on the courts for the place of habitual residence of the maintenance creditor. This alternative is justified in relation to maintenance obligations since it enables in particular a wife deserted by her husband to sue him for payment of maintenance in the courts for the place where she herself is habitually resident, rather than the place of her legal domicile.

The Convention also supplements the New York Convention of 20 June 1956 on the recovery abroad of maintenance. The latter is limited to providing that a forwarding authority will transmit to an intermediate body any judgment already given in favour of a maintenance creditor, and that body will then have to begin proceedings for enforcement or registration of the judgment, or institute new proceedings altogether.

This Convention, by simplifying the formalities governing enforcement, will thus facilitate implementation of the New York Convention.

As regards maintenance payments, the Committee did not overlook the problems which might be raised by preliminary issues (for example, the question of affiliation). However, it considered that these were not properly problems of jurisdiction, and that any difficulties should be considered in the chapter on recognition and enforcement of judgments.

It was suggested that, in order to avoid conflicting judgments, it might be desirable to provide that the court which had fixed the amount of a maintenance payment should be the only court to have jurisdiction to vary it. The Committee did not think it necessary to adopt such a solution. This would have obliged parties, neither of whom had any further connection with the original court, to bring proceedings before courts which could be very far away. Moreover, any judgment by a second court, in order to vary that of the first court, would have to be based on changed facts, and in those circumstances it could not be maintained that the judgments were in conflict (3).

Forum delicti commissi (Article 5 (3) and (4))

This jurisdiction is recognized by the national laws of the Member States with the exception of Luxembourg and the Netherlands, where it exists only in respect of collisions of ships and of road accidents.

The following are applicable in Belgium, Articles 41, and 52 (3) of the Law of 1876 (4); in Germany, Article 32 of the Code of Civil Procedure; in France, Article 59 (12) of the Code of Civil Procedure and Article 21 of the Decree of 22 December 1958; and in Italy, Article 20 of the Code of Civil Procedure.

This jurisdiction is incorporated in the bilateral conventions by the following provisions: Article 4 of the Convention between Belgium and the Netherlands and Article 4 of the Benelux Treaty, which cover all obligations concerning movable property, whether statutory, contractual or non-contractual (5); Article 2 (b) of the Convention between Belgium and Italy; Article 3 (1) (6) of the Convention between Germany

(1) In force on 1. 9. 1966 between Belgium, France, Germany, Italy and the Netherlands.

(2) Hague Conference on private international law, documents for the eighth session, p. 315.

(3) For a similar view, see the Hague Conference on private international law, documents for the ninth session. Report on the draft Convention concerning the recognition and enforcement of decisions relating to maintenance obligations in respect of children, p. 321.

(4) Article 626 of the Judicial Code.

(5) Report on the negotiations, p. 17.

and Belgium; Article 15 of the Convention between France and Italy; Article 2 (4) of the Convention between Germany and Italy; and Article 4 (1) (e) of the Convention between Germany and the Netherlands.

The fact that this jurisdiction is recognized under most of the legal systems, and incorporated in the majority of the bilateral conventions, was a ground for including it in the Convention, especially in view of the high number of road accidents.

Article 5 (3) uses the expression 'the place where the harmful event occurred'. The Committee did not think it should specify whether that place is the place where the event which resulted in damage or injury occurred, or whether it is the place where the damage or injury was sustained. The Committee preferred to keep to a formula which has already been adopted by number of legal systems (Germany, France).

Article 5 (4) provides that a civil claim may be brought before a court seised of criminal proceedings; this is in order to take into account the rules of jurisdiction laid down by the various codes of criminal procedure. A civil claim can thus always be brought, whatever the domicile of the defendant, in the criminal court having jurisdiction to entertain the criminal proceedings even if the place where the court sits (place of arrest, for example) is not the same as that where the harmful event occurred.

Jurisdiction based on a dispute arising out of the operations of a branch, agency or other establishment (Article 5 (5))

This jurisdiction exists in the bilateral conventions already concluded between the Contracting States: the Conventions between Italy and Belgium (Article 2 (3)), between Belgium and Germany (Article 2 (1) (4)), between France and Belgium (Article 3 (2)), between France and Italy (Article 13), between Italy and the Netherlands (Article 2 (3)), and between Belgium and the Netherlands (Article 5 (3)); the Benelux Treaty (Article 5 (4)); and the Conventions between Germany and the Netherlands (Article 4 (1) (d)), and between Germany and Italy (Article 2 (3)).

This provision concerns only defendants domiciled in a Contracting State (Article 5), that is, companies or firms having their seat in one Contracting State and having a branch, agency or other establishment in another Contracting State. Companies or firms which have their seat outside the Community but have a branch, etc. in a Contracting State are governed by Article 4, even as regards disputes relating to the activities of their branches, but without prejudice to the provisions of Article 8 relating to insurance.

More than one defendant (Article 6 (1))

Where there is more than one defendant, the courts for the place where any one of the defendants is domiciled are recognized as having jurisdiction. This jurisdiction is provided for in the internal law of Belgium (1), France (2), Italy (3), Luxembourg (4) and the Netherlands (5).

It is not in general provided for in German law. Where an action must be brought in Germany against a number of defendants and there is no jurisdiction to which they are all subject, the court having jurisdiction may, subject to certain conditions, be designated by the superior court which is next above it (Article 36 (3) of the German Code of Civil Procedure).

This jurisdiction is also provided for in the Conventions between Italy and the Netherlands (Article 2 (1)), between Italy and Belgium (Article 2 (1)), between France and Italy (Article 11 (2)), and between Germany and Italy (Article 2 (1)). However, under the latter Convention, jurisdiction depends on the existence of a procedural requirement that the various defendants be joined.

It follows from the text of the Convention that, where there are several defendants domiciled in different Contracting States, the plaintiff can at his option sue them all in the courts for the place where any one of them is domiciled.

In order for this rule to be applicable there must be a connection between the claims made against each of the defendants, as for example in the case of joint debtors (6). It follows that action cannot be brought solely with the object of ousting the jurisdiction of the courts of the State in which the defendant is domiciled (7).

(1) Articles 39 and 52 (10) of the Law of 25 March 1876, and Article 624 of the Judicial Code.
(2) Article 59 (4) of the Code of Civil Procedure.
(3) Article 33 of the Code of Civil Procedure.
(4) Article 59 (2) of the Code of Civil Procedure.
(5) Article 126 (7) of the Code of Civil Procedure.
(6) MOREL, Traité élémentaire de procédure civile, No 264.
(7) Cass. française 1924, D.P. 1925, Vol. 13.

Jurisdiction derived from the domicile of one of the defendants was adopted by the Committee because it makes it possible to obviate the handing down in the Contracting States of judgments which are irreconcilable with one another.

Actions on a warranty or guarantee, third party proceedings, counterclaims.

(a) Actions on a warranty or guarantee (Article 6 (2))

An action on a warranty or guarantee brought against a third party by the defendant in an action for the purpose of being indemnified against the consequences of that action, is available in Belgian (1), French (2), Italian (3), Luxembourg (4) and Netherlands (5) law.

The proceeding which corresponds to an action on a warranty or guarantee in Germany is governed by Articles 72, 73 and 74 and Article 68 of the Code of Civil Procedure.

A party who in any proceedings considers that, if he is unsuccessful, he has a right of recourse on a warranty or guarantee against a third party, may join that third party in the proceedings (Article 72) (Streitverkündung — *litis denunciatio*).

The notice joining the third party must be served on that party and a copy must be sent to the other party (Article 73). No judgment can be given as regards the third party, but the judgment given in the original proceedings is binding in the sense that the substance of the judgment cannot be contested in the subsequent action which the defendant may bring against the third party (Article 68). Under the German Code of Civil Procedure the defendant can exercise his right of recourse against the third party only in separate proceedings.

Actions on a warranty or guarantee are governed by the bilateral Conventions between Belgium and Germany (Article 3 (10)), between France and Belgium (Article 4 (2)), between Belgium and the Netherlands (Article 6 (2)), between Italy and the Netherlands (Article 2 (4)), between Belgium and Italy (Article 2 (10)), and between Germany and the Netherlands (Article 4 (1) (c)), and also by the Benelux Treaty (Article 6 (3)).

This jurisdiction is, in the opinion of the Committee, of considerable importance in commercial dealings, as can be seen from the following example: A German exporter delivers goods to Belgium and the Belgian importer resells them. The purchaser sues the importer for damages in the court for the place of his domicile, for example in Brussels. The Belgian importer has a right of recourse against the German exporter and consequently brings an action for breach of warranty against that exporter in the court in Brussels, since it has jurisdiction over the original action. The jurisdiction over the action on the warranty is allowed by the Convention although the warrantor is domiciled in Germany, since this is in the interests of the proper administration of justice.

However, under Article 17, the court seised of the original action will not have jurisdiction over the action on the warranty where the warrantor and the beneficiary of the warranty have agreed to confer jurisdiction on another court, provided that the agreement covers actions on the warranty.

Moreover, the court seised of the original action will not have jurisdiction over an action on the warranty if the original proceedings were instituted solely with the object of ousting the jurisdiction of the courts of the State in which the warrantor is domiciled (6).

The special position of German law is covered by Article V of the Protocol.

Under this provision, the jurisdiction specified in Article 6 (2) in actions on a warranty or guarantee may not be resorted to in the Federal Republic of Germany, but any person domiciled in another Contracting State may be summoned before the German courts on the basis of Articles 72 to 74 of the Code of Civil Procedure.

Judgments given against a guarantor or warrantor in the other Contracting States will be recognized and enforced in Germany.

Judgments given in Germany pursuant to Articles 72 to 74 will have the same effect in the other Contracting States as in Germany.

Thus, for example, a guarantor or warrantor domiciled in France can be sued in the German court having jurisdiction over the original action. The German law

(1) Articles 50 and 52 of the Law of 25 March 1876, Article 181 of the Code of Civil Procedure.
(2) Articles 59 (10) and 181 to 185 of the Code of Civil Procedure.
(3) Articles 32 and 36 of the Code of Civil Procedure.
(4) Articles 59 (8) and 181 to 185 of the Code of Civil Procedure.
(5) Article 126 (14) of the Code of Civil Procedure.

(6) See Article 181 of the Belgian, French and Luxembourg Code of Civil Procedure, and Article 74 of the Netherlands Code of Civil Procedure.

judgment given in Germany affects only the parties to the action, but it can be invoked against the guarantor or warrantor. Where the beneficiary of the guarantee or warranty proceeds agaist the guarantor or warrantor in the competent French courts, he will be able to apply for recognition of the German judgment, and it will no longer be possible to re-examine that judgment as to the merits.

It is clear that, following the principles which apply to enforcement, a judgment given in an action on a guarantee or warranty will have no effects in the State in which enforcement is sought other than those which it had in the country of origin.

This principle, which already applied under the Conventions between Germany and Belgium (Article 3 (10)) and between Germany and the Netherlands (Article 4 (1) (i)), is thus incorporated in the provision governing relations between the Federal Republic of Germany and the other Member States of the Community.

(b) Third party proceedings

While a third party warranty or guarantee necessarily involves the intervention of an outsider, it seemed preferable to make separate provision for guarantors or warrantors and for other third parties. The simplest definition of third party proceedings is to be found in Articles 15 and 16 of the Belgian Judicial Code, which provides that:

> 'Third party proceedings are those in which a third party is joined as a party to the action.
>
> They are intended either to safeguard the interests of the third party or of one of the parties to the action, or to enable judgment to be entered against a party, or to allow an order to be made for the purpose of giving effect to a guarantee or warranty (Article 15).
>
> The third party's intervention is voluntary where he appears in order to defend his interests.
>
> It is not voluntary where the third party is sued in the course of the proceedings by one or more of the parties (Article 16).'

(c) Counterclaims (Article 6 (3))

The bilateral conventions on enforcement all recognize jurisdiction over counterclaims: see the Convention between Belgium and Germany (Article 3 (1) (10)) (counterclaims); the Convention between Italy and Belgium (Article 2 (1) (10)) (dependent counterclaims); the Convention between France and Belgium (Article 4 (2)) (counterclaims); the Convention between Belgium and the Netherlands (Article 6) (counterclaims, third party proceedings and interlocutory proceedings); the Convention between France and Italy (Article 18) (claims for compensation, interlocutory or dependent proceedings, counterclaims); the Convention between Italy and the Netherlands (Article 2 (4)) dependent proceedings, counterclaims); the Convention between Germany and Italy (Article 2 (5)) (counterclaims); the Benelux Treaty (Article 6) (counterclaims, third party proceedings and interlocutory proceedings); and the Convention between Germany and the Netherlands (Article 4 (1) (i)) (counterclaims and actions on a warranty or guarantee).

It has been made clear that in order to establish this jurisdiction the counterclaim must be related to the original claim. Since the concept of related actions is not recognized in all the legal systems, the provision in question, following the draft Belgian Judicial Code, states that the counterclaim must arise from the contract or from the facts on which the original claim was based.

Sections 3 to 5

Insurance, instalment sales, exclusive jurisdiction

General remarks

In each of the six Contracting States, the rules of territorial jurisdiction are not as a rule part of public policy and it is therefore permissible for the parties to agree on a different jurisdiction.

There are, however, exceptions to this principle: certain rules of jurisdiction are mandatory or form part of public policy, either in order to further the efficient administration of justice by reducing the number of jurisdictions and concentrating certain forms of litigation in a single forum, or else out of social considerations for the protection of certain categories of persons, such as insured persons or buyers of goods on instalment credit terms.

In view of the Convention's structure and objectives, it was necessary to deal with this matter under the Convention. Failure to take account of the problem raised by these rules of jurisdiction might not only have caused recognition and enforcement to be refused in certain cases on grounds of public policy, which would be contrary to the principle of free movement of judgments, but also result, indirectly, in a general re-examination of the jurisdiction of the court of the State of origin.

Serveral solutions were open to the Committee.

The first is found in many bilateral Conventions, and enables the court of the State in which recognition or enforcement is sought to refuse to recognize the jurisdiction of the court of the State of origin where, in the former State, there are 'rules attributing exclusive jurisdiction to the courts of that State in the proceedings which led to the judgment' (1).

This system would have been unsatisfactory not only because it gives rise to the objections already set out above, but because it would have introduced into the Convention an element of insecurity incompatible with its basic principles. It is no solution to the problem, and only postpones the difficulties, deferring them until the recognition and enforcement stage.

Another possible solution would have been a general clause like that contained in the Convention between Belgium and the Netherlands or the Benelux Treaty (Article 5 (1)), which takes into consideration the internal law of the Contracting States (2). Such a clause could however, lead to difficulties of interpretation, since the court of the State of origin must, where its jurisdiction is contested, apply the internal law of the State which claims to have exclusive jurisdiction.

Moreover, while such a solution might be acceptable in a Treaty between three States, it would be much more difficult to incorporate it in a Convention between six States where it is not always possible to determine in advance the State or States in which recognition or enforcement may be sought.

A third solution would have been to draw up a list of the individual jurisdictions which would be exclusive and which would thus be binding on all the Contracting States. Such a list would answer the need of the parties for information regarding the legal position, allow the court to give judgment on the basis of a definite common rule, remove any element of uncertainty and ensure a balance between the parties to contractual arrangements.

The considerations underlying the various provisions of the Convention are complex. Sections 3 and 4, for example, concerning insurance and instalment sales and loans, are dictated by social considerations and are aimed in particular at preventing abuses which could result from the terms of contracts in standard form.

Section 5 (Article 16) contains a list of situations in which the courts of a Contracting State are acknowledged as having exclusive jurisdiction, since the proper administration of justice requires that actions should be brought before the courts of a single State.

The Convention deals with the two categories differently. The first category has been placed in an intermediate position between the general rules of jurisdiction and the rules which are wholly exclusive.

The following system adopted:

1. For matters falling within Section 3 and 4 there is no single jurisdiction. A choice, albeit a limited one, exists between the courts of different Contracting States where the plantiff is a protected person, that is, a policy-holder, a buyer or a borrower. In matters falling under exclusive jurisdictions pursuant to Section 5, the parties have no choice between the courts of serveral Contracting States.

2. The parties may, in certain circumstances, derogate from the provisions of Sections 3 and 4 (Articles 12, 15, and 18). The provisions of Section 5 may not, however, be derogated from, either by an agreement conferring jurisdiction (second paragraph of Article 17) or by an implied submission to the jurisdiction (Article 18).

3. The rules in Section 3 and 4 are applicable only where the defendant is domiciled in a Contracting State, whereas those in Section 5 apply regardless of domicile.

However, contravention of the provisions of Sections 3 and 4, as well as of those of Section 5, constitutes a ground for refusing recognition and enforcement (Articles 28 and 34).

(1) Convention between Germany and Belgium, Article 3 (2); Convention between Italy and the Netherlands (end of Article 2); Convention between Italy and Belgium (end of Article 2).

(2) Article 5 (1) of the Convention between Belgium and the Netherlands reads as follows: 'Where a domicile conferring jurisdiction has been chosen in one of the two countries for the enforcement of an instrument, the courts for the place of domicile chosen shall have exclusive jurisdiction over litigation relating to that instrument, save for exceptions and modifications enacted or to be enacted under the national law of one of the two States or by international agreement.'

Section 3

Jurisdiction in matters relating to insurance

Rules of exclusive or special jurisdiction relating to insurance exist in France (Article 3 of the Law of 13 July 1930 concerning contracts of insurance), in Belgium (Law of 20 May 1920, added as Article 43 bis to the Law of 25 March 1876 on jurisdiction), in Germany (§ 48 of the Gesetz über den Versicherungsvertrag (Law on contracts of insurance)), and in Italy (Article 1903 (2) of the Civil Code, Article 124 of the Consolidated Law on private insurance). In Luxembourg, the Law of 16 May 1891 on contracts of insurance does not include any provision on jurisdiction. This is due to the small size of the Grand Duchy, which comprises only two judicial arrondissements. However, the Law of 16 May 1891 concerning the supervision of insurance matters governs jurisdiction in regard to foreign insurance companies. This Law requires an insurer resident abroad who is transacting insurance business in the Grand Duchy to appoint a general representative domiciled in Luxembourg who will represent him there judicially and extrajudicially. This representative must give an address for service of process in the judicial arrondissement in which he is not domiciled. Either the domicile of the general representative or his address for service founds jurisdiction in respect of actions arising from contracts of insurance. In the Netherlands, there are no special provisions concerning the jurisdiction of the courts in insurance matters. As regards foreign life-assurance companies, the Netherlands Law of 22 December 1922 recognizes rules analogous to those of the Luxembourg Law of 16 May 1891. The rules are approximately the same in Germany.

Section 3 was drawn up in cooperation with the European Insurance Committee.

The provisions of this Section may be summarized as follows: in matters relating to insurance, actions against an insurer domiciled in a Contracting State may be brought in the following courts, i.e. either:

(i) In the courts of the State where he is domiciled (Article 8), or, subject to certain conditions, in the courts for the place where he has a branch (Articles 7 and 8); or

(ii) (a) in the courts for the place where the policy-holder is domiciled (Article 8);

(b) in the courts of the State where one of the insurers is domiciled, if two or more insurers are the defendants (Article 8);

(c) in the courts for the place where the agent who acted as intermediary in the making of the contract of insurance has his domicile, if there is provision for such jurisdiction under the law of the court seised of the matter (Article 8);

(d) 1. in respect of liability insurance, the insurer may in addition be sued:

(1) in the courts for the place where the harmful event occurred (Articles 9 and 10),

(2) as a third party, in the court seised of the action brought by the injured party against the insured if, under its own law, that court has jurisdiction in the third party proceedings (Article 10);

2. in respect of insurance of immovable property, the insurer may in addition be sued in the courts for the place where the harmful event occurred. The same applies if movable and immovable property are covered by the same insurance policy and both are adversely affected by the same contingency (Article 9).

Where an insurer is the plaintiff, he may in general bring an action only in the courts of the State in which the defendant is domiciled, irrespective of whether the latter is the policy-holder, the insured or a beneficiary.

Agreements conferring jurisdiction which depart from these rules have no legal force if they were entered into before the dispute arose (Article 12).

Article 7

Article 7 specifies that jurisdiction in matters relating to insurance is governed solely by Section 3 of Title II.

Specific exceptions are made by the references to Articles 4 and 5 (5), which concern respectively defendants domiciled outside the Community and disputes arising out of the operations of a branch, agency or other establishment.

It follows from the first of these exceptions that jurisdiction is determined by the law of the court seised of the matter, including the rules of exorbitant jurisdiction, where the defendant, whether he is the insurer or the policy-holder, is domiciled outside the Community. However, as an exception to the general rules of the Convention, an insurer domiciled outside the Community who has a branch or an agency in a

Contracting State is, in disputes relating to the operations of the branch or agency, deemed to be domiciled in that State. This exception, which is contained in the last paragraph of Article 8, was adopted because foreign insurance companies can establish branches or agencies in other States only by putting up guarantees which in practice place them in the same position as national companies. However, the exception applies only to branches or agencies, i.e. when the foreign company is represented by a person able to conclude contracts with third parties on behalf of the company.

The second exception again relates to branches or agencies, and also to other establishments, which, as appears from the reference back to Article 5 (5), depend from a company whose seat is in a Contracting State. The result is that such a company may be sued in the courts for the place in which the branch, agency or establishment is situated, in all disputes arising out of their operations.

Article 8

Article 8 lays down general rules of jurisdiction in proceedings instituted against an insurer in matters relating to insurance.

First, the courts of the State where the insurer is domiciled have jurisdiction. This provision determines only general jurisdiction, namely the jurisdiction of the courts of the State where the insurer is domiciled. Each State must then apply its internal law to determine which court has jurisdiction. However, if the insurer is sued outside the State in which he is domiciled, the proceedings must be instituted in a specifically determined court, in accordance with the principles already adopted in Article 5.

Secondly, an action may be brought in a State other than that in which the insurer is domiciled, in the courts for the place where the policy-holder is domiciled. 'Policy-holder' is to be taken to mean the other party to the contract of insurance. Where the insured or the beneficiary is not the same person as the policy-holder, their place of domicile is not taken into consideration. As was noted in particular by the European Insurance Committee, the insurer, as a supplier of services, enters into a business relationship with the other contracting party (the policy-holder). Because of their direct contact it is right and proper that the insurer can be sued in the courts for the place where the policy-holder is domiciled. But it would be unreasonable to expect the insurer to appear in the court of the insured or of a beneficiary, since he will not necessarily know their exact domicile at the time when the cause of action arises.

The domicile of the policy-holder which is relevant here is the domicile existing at the time when the proceedings are instituted.

Thirdly, if two or more insurers are defendants in the same action, they may be sued in the courts of the State where any one of them is domiciled. This provision is identical to that in Article 6 (1), which does not apply here since the Section relating to insurance applies independently of the rest of the Convention.

Furthermore, an insurer may be sued in a State other than that in which he is domiciled, in the courts for the place where the agent who acted as intermediary in the making of the contract of insurance is domiciled, but subject to two conditions: first, that the domicile of the agent who acted as intermediary is mentioned in the insurance policy or proposal, and, secondly, that the law of the court seised of the matter recognizes this jurisdiction. It is not recognized in Belgium or in France, although it is in Germany [1] and in Italy (Article 1903 of the Civil Code). The reference to the insurance proposal takes account of the usual practice in Germany. Insurance companies there in general use data-processing systems, so that the place of the agency often appears in the policy only in the form of a number referring back to the insurance proposal. The insurance proposal, within the meaning of the Convention, means, of course, the final proposal which forms the basis of the contract.

The expression 'the agent, who acted as intermediary in the making of the contract of insurance' includes both an agent through whom the contract was directly concluded between the company and the policy-holder, and also an agent who negotiated the contract to conclusion on behalf of the company. The significance

[1] § 48 of the Gesetz über den Versicherungsvertrag:
1. If an insurance agent has acted as intermediary in the making of the contract, or has concluded the contract, then in actions against the insurer arising out of the insurance contract the court for the place where, at the time when the contract was negotiated through the agent or concluded, the agent had his agency or, in the absence of an agency, has domicile, shall have jurisdiction.
2. The jurisdiction defined in paragraph 1 may not be excluded by agreement.'

of the last paragraph of Article 8 is made clear in the commentary on Article 7.

Article 9

Article 9 allows an insurer to be sued in a State other than that in which he is domiciled in the courts for the place where the harmful event occurred, but without prejudice to the application of Article 12 (3). This jurisdiction applies only in respect of liability insurance and insurance of immovable property. It extends to movable property in cases where a building and the movable property it contains are covered by the same insurance policy. This also applies if the movables are covered by an endorsement to the policy covering the immovable property.

Article 10

Article 10 contains rules of special jurisdiction for liability insurance cases. This provision is of particular importance in relation to road accidents.

Under the first paragraph of Article 10, in an action brought by the injured party against the insured, the latter may join the insurer as a third party if the court seised of the matter has jurisdiction in such a case under its own law. This is not possible in the Federal Republic of Germany (1).

The problem arose whether consolidation of the two actions should be allowed even where the insurer and the insured are both domiciled in the same State, which, it must be assumed for the purposes of this argument, is different from the State of the court seised of the matter. For example, where an accident is caused in France by a German domiciled in Germany who is insured with a German company, should third party proceedings, which are recognized under French law, be possible even though the litigation concerns a contract of insurance between a German insured person and a German insurer? As it is subject to German law, should this contract not be litigated in a German court? The contractual relationship between the insurer and the policy-holder would then fall outside the scope of the proceedings relating to personal liability.

While acknowledging the relevance of this question, the Committee was of the opinion that it would be unwise to introduce rules of jurisdiction which would depart from national laws and which could also jeopardize the system in force following the introduction of the green card (2).

The compromise solution adopted by the Committee is to reduce the scope of the first paragraph of Article 10 by inserting, under Article 12 (3), a provision that, if the policy-holder and the insurer are both domiciled in the same Contracting State, when the contract is concluded, they may agree to confer jurisdiction on the courts of that State. Such an agreement must not, however, be contrary to the law of that State.

Under the second paragraph of Article 10 the insurer may also, in respect of liability insurance, be sued directly by the injured party (3) outside the State in which he is domiciled in any court which, under Articles 7 to 9, has jurisdiction over actions brought by the policy-holder against the insurer.

Where, however, under the first paragraph of Article 8, the court for the place where the policy-holder is domiciled has jurisdiction, there is no provision giving jurisdiction to the court for the place where the injured party is domiciled. The phrase 'where such direct actions are permitted' has been used specifically to include the conflict of laws rules of the court seised of the matter (4).

Under the last paragraph of Article 10, the insurer may join the policy-holder or the insured as parties to the action brought against him by the injured party. In the interests of the proper administration of justice, it must be possible for the actions to be brought in the same court in order to prevent different courts from giving judgments which are irreconcilable. This procedure will in addition protect the insurer against fraud (5).

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(1) See Article V of the Protocol.

(2) Insurance against civil liability in respect of motor vehicles is compulsory in all Community countries except Italy.
Belgium: Law of 1 July 1956.
France: Law of 27 February 1958, Decree of 7 January 1959.
Germany: Law of 7 November 1939.
Luxembourg: Law of 10 June 1932, Implementing Regulations of 28 October 1932 and 24 December 1932.
Netherlands: Law of 30 May 1963, Decree of 23 June 1964.

(3) Direct actions are recognized under Belgian, French and Luxembourg law. Under German and Netherlands law they are recognized only with regard to compulsory insurance against civil liability in respect of motor vehicles.

(4) The rules of conflict must be used to decide whether the law to be applied is the law of the place where the harmful event occurred, the law governing the contract of insurance or the *lex fori*.

(5) J. WAUTIER, L'assurance automobile obligatoire, Brussels 1947.

Article 11

Article 11 relates to actions brought by the insurer against the policy-holder, the insured or a beneficiary.

The courts of the State in which the defendant is domiciled when the proceedings are instituted have exclusive jurisdiction.

Again, this is a provision dealing with international jurisdiction; local jurisdiction within each State will be determined by the internal law of that State.

Article 11 does not apply where the defendant is domiciled outside a Contracting State, that is to say, outside the Community. In such cases Article 4 applies.

The second paragraph corresponds to the provisions of Article 6 (3).

Article 12

Article 12 relates to agreements conferring jurisdiction. Agreements concluded before a dispute arises will have no legal force if they are contrary to the rules of jurisdiction laid down in the Convention.

The purpose of this Article is to prevent the parties from limiting the choice offered by this Convention to the policy-holder, and to prevent the insurer from avoiding the restrictions imposed under Article 11.

A number of exceptions are, however, permitted. After a dispute has arisen, that is to say 'as soon as the parties disagree on a specific point and legal proceedings are imminent or contemplated' [1], the parties completely regain their freedom.

Certain agreements conferring jurisdiction which were concluded before the dispute arose are also permissible. First, there are those made to the advantage of the policy-holder, the insured or a beneficiary, which allow them to bring proceedings in courts other than those specified in the preceding Articles.

Certain other agreements conferring jurisdiction are allowed under Article 12 (3), but only in the strictly defined circumstances therein specified which have been explained in the commentary on Article 10.

[1] BRAAS, Précis de procédure civile, Vol. I, No 795.

Section 4

Jurisdiction in matters relating to instalment sales and loans

This Section relates to the sale of goods where the price is payable in a series of instalments, and to the sale of goods where the sale is contractually linked to a loan (Abzahlungsgeschäfte). The rules here adopted are similar to those applicable in the national law of several of the Member States and, like them, stem from a desire to protect certain categories of persons. Article 13 provides that this Section applies independently of the rest of the Convention and, like Article 7, without prejudice to the provisions of Articles 4 and 5 (5).

Article 14 determines the rules of jurisdiction.

In actions against a seller or a lender, proceedings may be instituted by the buyer or borrower either in the courts of the State in which the defendant is domiciled, or in the courts of the State in which the buyer or borrower is domiciled.

Actions by a seller or a lender may in general be brought only in the courts for the place where the buyer or borrower is domiciled when the proceedings are instituted.

The third paragraph, relating to counterclaims, corresponds to Article 6 (3).

Article 15, which relates to agreements conferring jurisdiction, contains under (3) a provision analogous to that of Article 12 (3), but for different reasons. In actions brought by a seller or a lender, it is rather difficult to determine jurisdiction where the buyer or borrower establishes himself abroad after the contract has been concluded. To protect these persons, they should ideally be sued only in the courts of the State where they have established their new domicile. For reasons of equity the Committee has however provided that where a seller and a buyer, or a lender and a borrower, are both domiciled or at least habitually resident in the same State when the contract is concluded, they may confer on the courts of that State jurisdiction over all disputes arising out of the contract, on condition that such agreements are not contrary to the law of that State.

The criterion of habitual residence allows agreements conferring jurisdiction to be concluded even where a buyer or borrower remains domiciled in a Contracting

State other than that in which he is resident. It follows, for example, that a seller or lender need not sue the defendant abroad in the courts of the State in which the defendant is domiciled, if, when the proceedings are instituted, the defendant is still resident in the State in which the contract was concluded.

Section 5

Exclusive jurisdiction

Article 16

Article 16 lists the circumstances in which the six States recognize that the courts of one of them have exclusive jurisdiction. The matters referred to in this Article will normally be the subject of exclusive jurisdiction only if they constitute the principal subject-matter of the proceedings of which the court is to be seised.

The provisions of Article 16 on jurisdiction may not be departed from either by an agreement purporting to confer jurisdiction on the courts of another Contracting State, or by an implied submission to the jurisdiction (Articles 17 and 18). Any court of a State other than the State whose courts have exclusive jurisdiction must declare of its own motion that it has no jurisdiction (Article 19). Failure to observe these rules constitutes a ground for refusal of recognition or enforcement (Articles 28 and 34).

These rules, which take as their criterion the subject-matter of the action, are applicable regardless of the domicile or nationality of the parties. In view of the reasons for laying down rules of exclusive jurisdiction, it was necessary to provide for their general application, even in respect of defendants domiciled outside the Community. Thus, for example, a Belgian court will not, on the basis of Article 53 of the Law of 1876 or of Article 637 of the draft Judicial Code, which in actions against foreigners recognize the jurisdiction of the courts of the plaintiff, have jurisdiction in proceedings between a Belgian and a person domiciled, for example, in Argentina, if the proceedings concern immovable property situated in Germany. Only the German courts will have jurisdiction.

Immovable property

Under Article 16 (1), only the courts of the Contracting State in which the immovable property is situated have jurisdiction in proceedings concerning rights *in rem* in, or tenancies of, immovable property.

The importance of matters relating to immovable property had already been taken into consideration by the authors of the Treaty of Rome since, under Article 54 (3) (c) of that Treaty, the Commission and the Council must enable 'a national of one Member State to acquire and use land and buildings situated in the territory of another Member State', in so far as this does not conflict with the principles laid down in Article 39 (2) relating to agricultural policy.

The problems which the Committee faced in this connection did not in fact relate to the recognition and enforcement of judgments, since these questions are governed by the provisions of the conventions already concluded between Member States, all of which apply in civil and commercial matters, including immovable property, but rather to the choice of rules of jurisdiction.

The laws of all the Member States include in this respect special rules of jurisdiction [1] which, generally speaking, have been incorporated in the bilateral conventions, whether they are based on direct [2] or indirect [3] jurisdiction.

However, the rules laid down in the Convention differ from those in the bilateral agreements in that the Convention lays down rules of exclusive jurisdiction. The Convention follows in this respect the Treaty between France and Germany settling the question of the Saar, Article 49 of which provides that the courts 'of the country in which the immovable property is situated shall have exclusive jurisdiction in all disputes regarding the possession or ownership of such property and in all disputes regarding rights *in rem* in such property'.

As in that Treaty, the exclusive jurisdiction established by Article 16 (1) applies only in international relations; the internal rules of jurisdiction in force in each of the States are thus not affected.

In other words, the Convention prohibits the courts of one Contracting State from assuming jurisdiction in

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[1] Belgium: Article 8 of the Law of 25 March 1876, amended by the Arrêté royal of 3 January 1935; Article 52 of the Law of 1876; Federal Republic of Germany, Article 24 of the Code of Civil Procedure; France, Article 59 (5) of the Code of Civil Procedure; Italy, Articles 4 and 21 of the Code of Civil Procedure; Luxembourg, Article 59 (3) and (4) of the Code of Civil Procedure; Netherlands, Article 126 (8) of the Code of Civil Procedure.

[2] Convention between Belgium and the Netherlands (Article 10).

[3] Conventions between Germany and Belgium (Article 10); between France and Italy (Article 16); between Italy and the Netherlands (Article 2 (6)); between Germany and Italy (Article 2 (7)); between Belgium and Italy (Article 2 (8)); and between Germany and the Netherlands (Article 4 (1) (f)).

disputes relating to immovable property situated in another Contracting State; it does not, in the State in which the immovable property is situated, prevent courts other than that for the place where the property is situated from having jurisdiction in such disputes if the jurisdiction of those other courts is recognized by the law of that State.

A number of considerations led the Committee to provide a rule of exclusive jurisdiction in this matter. In the Federal Republic of Germany and in Italy, the court for the place where the immovable property is situated has exclusive jurisdiction, this being considered a matter of public policy. It follows that, in the absence of a rule of exclusive jurisdiction, judgments given in other States by courts whose jurisdiction might have been derived from other provisions of the Convention (the court of the defendant's domicile, or an agreed forum) could have been neither recognized nor enforced in Germany or Italy.

Such a system would have been contrary to the principle of 'free movement of judgments'.

The Committee was all the more inclined to extend to international relations the rules of jurisdiction in force in the Federal Republic of Germany and in Italy, since it considered that to do so was in the interests of the proper administration of justice. This type of dispute often entails checks, enquiries and expert examinations which have to be made on the spot. Moreover, the matter is often governed in part by customary practices which are not generally known except in the courts of the place, or possibly of the country, where the immovable property is situated. Finally, the system adopted also takes into account the need to make entries in land registers located where the property is situated.

The wording adopted covers not only all disputes concerning rights *in rem* in immovable property, but also those relating to tenancies of such property. This will include tenancies of dwellings and of premises for professional or commercial use, and agricultural holdings. In providing for the courts of the State in which the property is situated to have jurisdiction as regards tenancies in immovable property, the Committee intended to cover disputes between landlord and tenant over the existence or interpretation of tenancy agreements, compensation for damage caused by the tenant, eviction, etc. The rule was not intended by the Committee to apply to proceedings concerned only with the recovery of rent, since such proceedings can be considered to relate to a subject-matter which is quite distinct from the rented property itself.

The adoption of this provision was dictated by the fact that tenancies of immovable property are usually governed by special legislation which, in view of its complexity, should preferably be applied only by the courts of the country in which it is in force. Moreover, several States provide for exclusive jurisdiction in such proceedings, which is usually conferred on special tribunals.

Companies and associations of natural or legal persons

Article 16 (2) provides that the courts of the State in which a company or other legal person, or an association of natural or legal persons, has its seat, have exclusive jurisdiction in proceedings which are in substance concerned either with the validity of the constitution, the nullity or the dissolution of the company, legal person or association, or with the decisions of its organs.

It is important, in the interests of legal certainty, to avoid conflicting judgments being given as regards the existence of a company or association or as regards the validity of the decisions of its organs. For this reason, it is obviously preferable that all proceedings should take place in the courts of the State in which the company or association has its seat. It is in that State that information about the company or association will have been notified and made public. Moreover, the rule adopted will more often than not result in the application of the traditional maxim *'actor sequitur forum rei'*. Such jurisdiction is recognized in particular in German law and, as regards non-profit making organizations, in Luxembourg law.

Public registers

Article 16 (3) lays down that the courts of the State in which a public register is kept have exclusive jurisdiction in proceedings relating to the validity or effects of entries in that register.

This provision does not require a lengthy commentary. It correspond to the provisions which appear in the internal laws of most of the Contracting States; it covers in particular entries in land registers, land charges registers and commercial registers.

Patents

Article 16 (4) applies to proceedings concerned with the registration or validity of patents, trade marks, designs or other similar rights, such as those which protect fruit and vegetable varieties, and which are required to be deposited or registered.

A draft convention has been drawn up by the EEC countries relating to patent law. The draft includes rules of jurisdiction for the Community patent, but it will not apply to national patents, which thus fall within the scope of the Judgments Convention.

Since the grant of a national patent is an exercise of national sovereignty, Article 16 (4) of the Judgments Convention provides for exclusive jurisdiction in proceedings concerned with the validity of patents.

Other actions, including those for infringement of patents, are governed by the general rules of the Convention.

The expression 'the deposit or registration has been applied for' takes into account internal laws which, like German law, make the grant of a patent subject to the results of an examination. Thus, for example, German courts will have exclusive jurisdiction in the case of an application to the competent authorities for a patent to be granted where, during the examination of the application, a dispute arises over the rights relating to the grant of that patent.

The phrase 'is under the terms of an international convention deemed to have taken place' refers to the system introduced by the Madrid Agreement of 14 April 1891 concerning international registration of trade marks, revised at Brussels on 14 December 1900, at Washington on 2 June 1911, at The Hague on 6 November 1925 and at London on 2 June 1934, and also to the Hague Arrangement of 6 November 1925 for the international registration of industrial designs, revised at London on 2 June 1934. Under this system, the deposit of a trade mark, design or model at the International Office in Berne through the registry of the country of origin has the same effect in the other Contracting States as if that trade mark, design or model had been directly registered there. Thus where a trade mark is deposited at the International Office at the request of the German authorities, the French courts will have exclusive jurisdiction in disputes relating, for example, to whether the mark should be deemed to have been registered in France.

Enforcement of judgments

Article 16 (5) provides that the courts of the State in which a judgment has been or is to be enforced have exclusive jurisdiction in proceedings concerned with the enforcement of that judgment.

What meaning is to be given to the expression 'proceedings concerned with the enforcement of judgments'?

It means those proceedings which can arise from 'recourse to force, constraint or distraint on movable or immovable property in order to ensure the effective implementation of judgments and authentic instruments' (1).

Problems arising out of such proceedings come within the exclusive jurisdiction of the courts for the place of enforcement.

Provisions of this kind appear in the internal law of many Member States (2).

Section 6

Prorogation of jurisdiction

This section includes Article 17, on jurisdiction by consent, and Article 18, which concerns jurisdiction implied from submission.

Article 17

Jurisdiction deriving from agreements conferring jurisdiction is already a feature of all the Conventions concluded between Member States of the Community, whether the rules of jurisdiction are direct or indirect: see the Convention between France and Belgium (Article 3), and between Belgium and the Netherlands (Article 5); the Benelux Treaty (Article 5); the

(1) BRAAS, Précis de procédure civile, Vol. I, No 808.

(2) See LEREBOURS-PIGEONNIÈRE, Droit international privé, seventh edition, p. 9; LOUSSOUARN, No 411: French courts have exclusive jurisdiction over measures for enforcement which is to take place in France (preventive measures, distress levied on a tenant's chattels, writs of attachment and applications for enforcement of a foreign judgment); over distraint levied on immovable or movable property, and over proceedings concerned with the validity of measures for enforcement.'

Convention between France and Italy (Article 12), between Germany and Italy (Article 2 (2)), between Italy and the Netherlands (Article 2 (2)), between Italy and Belgium (Article 2 (1) (2)), between Germany and Belgium (Article 3 (2)), and between Germany and the Netherlands (Article 4 (1) (b)).

This jurisdiction is also the subject of international conventions, namely the Hague Convention of 15 April 1958 on the jurisdiction of the contractual forum in matters relating to the international sale of goods, and the Hague Convention of 25 November 1965 on the choice of court (1).

It is unnecessary to stress the importance of this jurisdiction, particularly in commercial relations.

However, although agreement was readily reached on the basic principle of including such a jurisdiction in the Convention, the Committee spent much time in drafting Article 17.

Like the draftsmen of the Convention between Germany and Belgium, the report of which may usefully be quoted, the Committee's first concern was 'not to impede commercial practice, yet at the same time to cancel out the effects of clauses in contracts which might go unread. Such clauses will therefore be taken into consideration only if they are the subject of an agreement, and this implies the consent of all the parties. Thus, clauses in printed forms for business correspondence or in invoices will have no legal force if they are not agreed to by the party against whom they operate.'

The Committee was further of the opinion that, in order to ensure legal certainty, the formal requirements applicable to agreements conferring jurisdiction should be expressly prescribed, but that 'excessive formality which is incompatible with commercial practice' (2) should be avoided.

In this respect, the version adopted is similar to that of the Convention between Germany and Belgium, which was itself based on the rules of the Hague Convention of 15 April 1958, in that a clause conferring jurisdiction is valid only if it is in writing, or if at least one of the parties has confirmed in writing an oral agreement (3).

Since there must be true agreement between the parties to confer jurisdiction, the court cannot necessarily deduce from a document in writing adduced by the party seeking to rely on it that there was an oral agreement. The special position of the Grandy Duchy of Luxembourg in this matter necessitated an additional restriction which is contained in the second paragraph of Article I of the Protocol.

The question of how much weight is to be attached to the written document was left open by the Committee. In certain countries, a document in writing will be required only as evidence of the existence of the agreement; in others, however, it will go to the validity of the agreement.

Like the Conventions between Belgium and the Netherlands and between France and Belgium, and also the Benelux Treaty and the Hague Convention, the first paragraph of Article 17 provides that the court agreed on by the parties shall have exclusive jurisdiction. This solution is essential to avoid different courts from being properly seised of the matter and giving conflicting or at least differing judgments. In order to meet practical realities, the first paragraph of Article 17 also covers specifically cases of agreement that a particular court in a Contracting State or the courts of a Contracting State are to have jurisdiction, and is similar in this to the 1958 Hague Convention. As Professor Batiffol pointed out in his report on that Convention, an agreement conferring jurisdiction generally on the courts of a Contracting State 'may have no legal effect if, in the absence of any connecting factor between the contractual situation and the State whose courts have been agreed on as having jurisdiction, the law of that State provides no way of determining which court can or should be seised of the matter' (4). But as Batiffol remarks, this is a matter which the parties should consider at the appropriate time.

The first paragraph of Article 17 applies only if at least one of the parties is domiciled in a Contracting State. It does not apply where two parties who are domiciled in the same Contracting State have agreed that a court of that State shall have jurisdiction, since the Convention,

(1) By 1 September 1966 neither of these Conventions had entered into force.

(2) Hague Conference on private international law, documents of the eighth session. FRÉDERICQ, Report on the work of the Second Committee, p. 303.

(3) Hague Conference on private international law, Final Act of the tenth session. Convention on the choice of court, Article 4.

(4) Hague Conference on private international law, documents of the eighth session, p. 305.

under the general principle laid down in the preamble, determines only the international jurisdiction of courts (see Commentary, Chapter III, Section 1, International legal relationships).

Article 17 applies where the agreement conferring jurisdiction was made either between a person domiciled in one Contracting State and a person domiciled in another Contracting State, or between a person domiciled in a Contracting State and a person domiciled outside the Community, if the agreement confers jurisdiction on the courts of a Contracting State; it also applies where two persons domiciled in one Contracting State agree that a particular court of another Contracting State shall have jurisdiction.

The second paragraph of Article 17 provides that agreements conferring jurisdiction shall have no legal force if they are contrary to the provisions of Article 12 (insurance) or Article 15 (instalment sales), or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 16.

The intention behind the Convention is to obviate cases of refusal of recognition and enforcement on the basis of Articles 28 and 34, and so, as already stated, to promote the free movement of judgments.

The third paragraph of Article 17 provides that if the agreement conferring jurisdiction was concluded for the benefit of only one of the contracting parties, that party shall retain the right to bring proceedings in any other court which has jurisdiction [1]. Agreements conferring jurisdiction cannot of course affect the substantive jurisdiction of the courts.

Article 18

Article 18 governs jurisdiction implied from submission. If a defendant domiciled in a Contracting State is sued in a court of another Contracting State which does not have jurisdiction under the Convention, two situations may arise: the defendant may either, as he is entitled to do, plead that the court has no jurisdiction under the Convention, in which case the court must declare that it does not have jurisdiction; or he may elect not to raise this plea, and enter an appearance. In the latter case, the court will have jurisdiction.

Unlike the case of conventions based on indirect jurisdiction, the defendant may, by virtue of the Convention, rely on its provisions in the court seised of the proceedings and plead lack of jurisdiction. It will be necessary to refer to the rules of procedure in force in the State of the court seised of the proceedings in order to determine the point in time up to which the defendant will be allowed to raise this plea, and to determine the legal meaning of the term 'appearance'.

Moreover, by conferring jurisdiction on a court in circumstances where the defendant does not contest that court's jurisdiction, the Convention extends the scope of Title II and avoids any uncertainty. The main consequence of this rule is that if a defendant domiciled in a Contracting State is, notwithstanding the provisions of the second paragraph of Article 3, sued in another Contracting State on the basis of a rule of exorbitant jurisdiction, for example in France on the basis of Article 14 of the Civil Code, the court will have jurisdiction if this is not contested. The only cases in which a court must declare that it has no jurisdiction and where jurisdiction by submission will not be allowed are those in which the courts of another State have exclusive jurisdiction by virtue of Article 16.

Section 7

Examination as to jurisdiction and admissibility

Article 19

As has already been stated (page 8), a court must of its own motion examine whether it has jurisdiction. Article 19 emphasizes that the court must of its own motion declare that it has no jurisdiction if it is seised of a matter in which the courts of another Contracting State have exclusive jurisdiction by virtue of Article 16.

This rule is essential since the exclusive jurisdictions are conceived to be matters of public policy which cannot be departed from by the free choice of the parties. Moreover, it corresponds to Article 171 of the French Code of Civil Procedure, by virtue of which territorial jurisdiction is automatically examined where the parties are not permitted to reach a settlement [2].

If this Article deserves particular attention, it is mainly because, in order that the general rules of jurisdiction

[1] See also the Conventions between France and Belgium, Article 3, between France and Italy, Article 2, and between Belgium and the Netherlands, Article 5 and the Benelux Treaty, Article 5.

[2] The same is true in the Federal Republic of Germany: see ROSENBERG, *op. cit.* paragraph 38 (I) (3).

are observed, it grants wide powers to the court seised of the proceedings, since that court will of its own motion have to examine whether it has jurisdiction.

The words 'principally concerned' have the effect that the court is not obliged to declare of its own motion that it has no jurisdiction if an issue which comes within the exclusive jurisdiction of another court is raised only as a preliminary or incidental matter.

Article 20

Article 20 is one of the most important Articles in the Convention: it applies where the defendant does not enter an appearance; here the court must of its own motion examine whether it has jurisdiction under the Convention. If it finds no basis for jurisdiction, the court must declare that it has no jurisdiction. It is obvious that the court is under the same obligation even where there is no basis for exclusive jurisdiction. Failure on the part of the defendant to enter an appearance is not equivalent to a submission to the jurisdiction. It is not sufficient for the court to accept the submissions of the plaintiff as regards jurisdiction; the court must itself ensure that the plaintiff proves that it has international jurisdiction (1).

The object of this provision is to ensure that in cases of failure to enter an appearance the court giving judgment does so only if it has jurisdiction, and so to safeguard the defendant as fully as possible in the original proceedings. The rule adopted is derived from Article 37 (2) of the Italian Code of Civil Procedure, by virtue of which the court must of its own motion examine whether it has jurisdiction where the defendant is a foreigner and does not enter an appearance.

The second paragraph of Article 20 is also designed to safeguard the rights of the defendant, by recognizing the international importance of the service of judicial documents. The service of judicial documents abroad, although governed differently in each of the Member States, can broadly be separated into two main systems. The German system is based on the cooperation of the public authorities of the place of residence of the addressee which have jurisdiction to deliver to him a copy of the instrument. A German court cannot in general give judgment in default of appearance unless it receives conclusive evidence that the instrument has been delivered to the addressee (2) (3). The system contrasts with those in force in Belgium, France, Italy, Luxembourg and the Netherlands (4), all of which are characterized by the 'desire to localize in the territory of the State of the forum all the formalities connected with the judicial document whose addressee resides abroad' (5).

Under the laws of these countries, service is properly effected, and causes time to begin to run, without there being any need to establish that the document instituting the proceedings has actually been served on its addressee. It is not impossible in these circumstances that, in some cases, a defendant may have judgment entered against him in default of appearance without having any knowledge of the action.

The Hague Convention of 1 March 1954 on civil procedure, to which the six Member States are party, does not solve the difficulties which arise under such legislation.

The Committee also tried to solve the problems arising when service is effected late, bearing in mind that the aim of the Convention is to promote, so far as possible, the free movement of judgments.

The search for a solution was obviously helped by the drafting at the tenth session of the Hague Conference on private international law of the Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters, which was opened for signature on 15 November 1965. This is the reason why the solution adopted in the second paragraph of Article 20 is only transitional.

This provision summarizes Article 15 of the Hague Convention, which is in fact derived from Article 20 of this present Convention, since the work of the Committee served as a basis for discussion at the meetings of the Special Commission which was established by the Hague Conference and which drew up the preliminary draft which was submitted for discussion at the tenth session.

(1) BÜLOW, *op. cit.*

(2) RIGAUX, La signification des actes judiciaires à l'étranger. Revue critique de droit international privé, p. 448 *et seq.*

(3) See German Code of Civil Procedure, Article 335 (1) (2) and Article 202.

(4) Belgium: Code of Civil Procedure, Article 69bis, and Judgment of the Cour de cassation of 4 March 1954. Revue des huissiers de Belgique, May-June 1954, p. 15.
France: Code of Civil Procedure, Article 69 (10), as interpreted by the French Cour de cassation. See Revue critique de droit international privé, No 1, January-March 1961, p. 174 *et seq.*
Italy: Code of Civil Procedure, Articles 142 and 143.
Luxembourg: Arrêté-loi of 1 April 1814.
Netherlands: Code of Civil Procedure, Article 4 (8).

(5) RIGAUX, id., p. 454.

Under the second paragraph of Article 20, where a defendant domiciled in one Contracting State is sued in the courts of another 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 in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end.

This provision is based on the old Article 8 of the Netherlands Law of 12 June 1909, Stb No 141 (1).

The second paragraph of Article 20 requires first that notification of the proceedings has been given to the party who has not entered an appearance, that is either to him in person or at his domicile, and secondly that it has been delivered in sufficient time to enable the defendant to arrange for his defence. It does not require that the defendant should actually have been notified in sufficient time. The defendant must be responsible for any delay caused by his own negligence or by that of his relations or servants. The critical time is thus the time at which service was properly effected, and not the time at which the defendant received actual knowledge of the institution of proceedings.

The question of 'sufficient time' is obviously a question of fact for the discretion of the court seised of the matter.

The court may give judgment in default against a defendant if it is shown that 'all necessary steps have been taken' for him actually to have received in sufficient time the document instituting the proceedings.

This means that a court will be able to give judgment in default against a defendant even if no affidavit can be produced to confirm service on the defendant of the document instituting the proceedings, provided it is shown that all the necessary approaches have been made to the competent authorities of the State in which the defendant is domiciled in order to reach him in sufficient time. Where necessary, it must also be shown that 'all the investigations required by good conscience and good faith have been undertaken to discover the defendant' (2).

As already stated, the second paragraph of Article 20 is only a transitional provision. Under the third paragraph of that Article, where the State of the forum and the State in which the document had to be transmitted have both ratified the new Hague Convention, the court seised of the matter will no longer apply the second paragraph of Article 20 but will be exclusively bound by Article 15 of the Hague Convention. Thus any possibility of conflict between Article 15 of the Hague Convention and the second paragraph of Article 20 of the EEC Judgments Convention is resolved in favour of the Hague Convention.

The Committee also considered it important to ensure certainty and speed in the transmission of judicial documents. In order to achieve this, it considered as a possible solution the transmission of such documents by registered post. However, it did not adopt this system for, although it meets the requirement of speed, it does not offer all the necessary safeguards from the point of view of certainty. In the end the Committee adopted the system which is set out in Article IV of the Protocol.

This Article simply adds a new method of transmission to those already provided for by the Hague Convention of 1 March 1954 on civil procedure, or by the agreements concluded between the Contracting States in application of that Convention. It corresponds, moreover, to the facility provided for by Article 10 (b) of the new Hague Convention.

Under the system adopted in the Protocol, documents can be transmitted by public officers in one Contracting State directly to their colleagues in another Contracting State, who will deliver them to the addressee in person or to his domicile.

According to the assurances which were given to the Committee by a representative of the 'Union internationale des huissiers de justice et d'officiers judiciaires', it will be easy for a public officer in one country to correspond with the appropriate public officer in another country. In case of difficulty it would moreover be possible for the officer in the State in which judgment was given to invoke the assistance of the national associations of public officers, or on the central office of the 'Union' which has its headquarters in Paris.

(1) This Article reads as follows: 'Where the defendant does not enter an appearance, the court may not give judgment in default if the plaintiff does not show that the defendant received the writ of summons. The plaintiff may ask for a new date to be fixed for the hearing.'

(2) Cour d'appel de POITIERS, 9. 7. 1959 (Gazette du Palais, 1959.II.183); cf. GAVALDA, Revue critique de droit international privé, 1960, No 1, p. 174.

In the opinion of the Committee these arrangements meet the requirements of speed and certainty. Direct communication between public officers allows a considerable gain in time by avoiding any recourse to intermediary bodies such as Ministries for Foreign Affairs, Ministries of Justice or prosecutors' offices.

Certainty is further guaranteed since if, for example, the address is incomplete or inaccurate, the officer in the State in which service is to be effected may well be able to undertake investigations in order to find the addressee.

As for the linguistic difficulties which could arise in the context of a grouping of the six countries, these could be overcome by attaching to the instrument a summary in the language of the addressee.

Like Article 10 (b) of the Hague Convention, Article IV of the Protocol allows a Contracting State to object to this method of transmission.

Section 8

Lis pendens — related actions

Article 21

As there may be several concurrent international jurisdictions, and the courts of different States may properly be seised of a matter (see in particular Articles 2 and 5), it appeared to be necessary to regulate the question of *lis pendens*. By virtue of Article 21, the courts of a Contracting State must decline jurisdiction, if necessary of their own motion, where proceedings involving the same cause of action and between the same parties are already pending in a court of another State. In cases of *lis pendens* the court is therefore obliged to decline jurisdiction, either on the application of one of the parties, or of its own motion, since this will facilitate the proper administration of justice within the Community. A court will not always have to examine of its own motion whether the same proceedings are pending in the courts of another country, but only when the circumstances are such as to lead the court to belive that this may be the case.

Instead of declining jurisdiction, the court which is subsequently seised of a matter may, however, stay its proceedings if the jurisdiction of the court first seised is contested. This rule was introduced so that the parties would not have to institute new proceedings if, for example, the court first seised of the matter were to decline jurisdiction. The risk of unnecessary disclaimers of jurisdiction is thereby avoided.

Jurisdiction is declined in favour of the court first seised of the matter. The Committee decided that there was no need to specify in the text the point in time from which the proceedings should be considered to be pending, and left this question to be settled by the internal law of each Contracting State.

Article 22

The solution offered by this Article to the problem of related actions differs in several respects from that adopted to regulate the question of *lis pendens*, although it also serves to avoid the risk of conflicting judgments and thus to facilitate the proper administration of justice in the Community.

Where actions are related, the first duty of the court is to stay its proceedings. The proceedings must, however, be pending at the same level of adjudication, for otherwise the object of the proceedings would be different and one of the parties might be deprived of a step in the heirarchy of the courts.

Furthermore, to avoid disclaimers of jurisdiction, the court may decline jurisdiction only if it appears that the court first seised has jurisdiction over both actions, that is to say, in addition, only if that court has not jurisdiction over the second action. The court may decline jurisdiction only on the application of one of the parties, and only if the law of the court first seised permits the consolidation of related actions which are pending in different courts. This last condition takes into account the specific problems of German and Italian law. In German law, consolidation is in general permitted only if both actions are pending in the same court. In Italian law, the constitution does not permit a court to decide whether it will hear an action itself or refer it to another court. It will, however, always be possible for a German or Italian court which is subsequently seised of a matter to stay its proceedings.

Finally, since the expression 'related actions' does not have the same meaning in all the Member States, the third paragraph of Article 22 provides a definition. This is based on the new Belgian Judicial Code (Article 30).

The Convention does not regulate the procedure for the consolidation of related actions. This is a question which is left to the internal laws of the individual States.

Article 23

This Article deals with a situation which will occur only very rarely, namely where an action comes within the exclusive jurisdiction of several courts. To avoid conflicts of jurisdiction, any court other than the court first seised of the action is required under Article 21 or Article 22 to decline jurisdiction in favour of that court.

Section 9

Provisional and protective measures

Article 24

Article 24 provides that application may be made to the courts of a Contracting State for such provisional measures, including protective measures, as may be available under the internal law of that State, irrespective of which court has jurisdiction as to the substance of the case. A corresponding provision will be found in nearly all the enforcement conventions (1).

In each State, application may therefore be made to the competent courts for provisional or protective measures to be imposed or suspended, or for rulings on the validity of such measures, without regard to the rules of jurisdiction laid down in the Convention.

As regards the measures which may be taken, reference should be made to the internal law of the country concerned.

CHAPTER V

RECOGNITION AND ENFORCEMENT

A. GENERAL CONSIDERATIONS

As a result of the safeguards granted to the defendant in the original proceedings, Title III of the Convention is very liberal on the question of recognition and enforcement. As already stated, it seeks to facilitate as far as possible the free movement of judgments, and should be interpreted in this spirit. This liberal approach is evidenced in Title III first by a reduction in the number of grounds which can operate to prevent the recognition and enforcement of judgments and, secondly, by the simplification of the enforcement procedure which will be common to the six countries.

It will be recalled that Article 1, which governs the whole of the Convention, provides that the Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal. It follows that judgments given in a Contracting State in civil or commercial matters by criminal courts or by administrative tribunals must be recognized and enforced in the other Contracting States. Under Article 25, the Convention applies to any judgment, whatever the judgment may be called. It also applies to writs of execution (Vollstreckungsbefehl, Article 699 of the German Code of Civil Procedure) (2) and to the determination of costs (Kostenfestsetzungsbeschluß des Urkundsbeamten, Article 104 of the German Code of Civil Procedure) which, in the Federal Republic, are decisions of the registrar acting as an officer of the court. In decisions based on Article 104 of the German Code of Civil Procedure, the costs are determined in accordance with a schedule laid down by law and on the basis of the judgment of the court deciding on the substance of the matter (3). In the event of a dispute as to the registrar's decision, a fully constituted court decides the issue.

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(1) Benelux Treaty and Convention between Belgium and the Netherlands (Article 8); Convention between Germany and Belgium (Article 15 (2)); between France and Belgium (Article 9); between Italy and Belgium (Article 14); between Italy and the Netherlands (Article 10); between France and Italy (Article 32); and between Germany and the Netherlands (Article 18 (2)).

(2) The Vollstreckungsbefehl is issued by the court registrar.

(3) See also Article 18 (2) of the Hague Convention of 1 March 1954 on Civil Procedure.

It follows from Article 1 that Title III cannot be invoked for the recognition and enforcement of judgments given on matters excluded from the scope of the Convention (status and legal capacity of persons, rules governing rights in property arising out of a matrimonial relationship, wills and succession, bankruptcy and other similar proceedings, social security, and arbitration, including arbitral awards).

On the other hand, Title III applies to any judgment given by a court or tribunal of a Contracting State in those civil and commercial matters which fall within the scope of the Convention, whether or not the parties are domiciled within the Community and whatever their nationality.

B. COMMENTARY ON THE SECTIONS

Section 1

Recognition

Article 26

Recognition must have the result of conferring on judgments the authority and effectiveness accorded to them in the State in which they were given.

The words *'res judicata'* which appear in a number of conventions have expressly been omitted, since judgments given in interlocutory proceedings and *ex parte* may be recognized, and these do not always have the force of *res judicata*. Under the rules laid down in Article 26:

1. judgments are to be recognized automatically;

2. in the event of a dispute, if recognition is itself the principal issue, the procedure for enforcement provided for in the Convention may be applied;

3. if the outcome of proceedings depends on the determination of an incidental question of recognition, the court entertaining those proceedings has jurisdiction on the question of recognition.

The first of these rules lays down the principle that judgments are to be recognized; recognition is to be accorded without the need for recourse to any prior special procedure. It is thus automatic, and does not require a judicial decision in the State in which recognition is sought to enable the party in whose favour judgment has been given to invoke that judgment against any party concerned, for example an administrative authority, in the same way as a judgment given in that State. This provision means that certain legal provisions which in some countries, such as Italy, make the recognition of a foreign judgment subject to a special procedure (dichiarazione di efficacia) will be abolished. The Italian delegation stated that it was able to concur in this solution since the scope of the Convention was limited to matters relating to property rights.

Furthermore, this system is the opposite of that adopted in numerous conventions, according to which foreign judgments are recognized only if they fulfil a certain number of conditions. Under Article 26 there is a presumption in favour of recognition, which can be rebutted only if one of the grounds for refusal listed in Article 27 is present.

The second rule concerns the case where the recognition of a judgment is itself the point at issue, there being no other proceedings involved and no question of enforcement. For example, a negotiable instrument is declared invalid in Italy by reason of fraud. The negotiable instrument is presented to a bank in Belgium. Reliance is placed on the Italian judgment. The bank is faced with two contradictory instruments. The Italian judgment would normally have to be recognized, but it may be that one of the grounds for refusal set out in Article 27 applies. In the event of a dispute it is hardly the task of the bank to decide on the grounds for refusal, and in particular on the scope of Belgian 'international public policy'. The second rule of Article 26 offers a solution in cases of this kind. It allows the party seeking recognition to make use of the simplified procedure provided by the Convention for enforcement of the judgment. There is thus unification at the stage of recognition not only of the legal or administrative procedures which govern this matter in a number of States, but also in those countries which, like Belgium, do not allow actions for a declaration that a judgment is not to be recognized. Only the party seeking recognition may make use of this simplified procedure, which was evolved solely to promote the enforcement of judgments, and hence their recognition. It would moreover be difficult to apply the procedure laid down if the party opposing recognition could also avail himself of it; the latter will have to submit his claims in accordance with the ordinary rules of the internal law of the State in which recognition is sought.

The third rule concerns the case where recognition of a judgment is raised as an incidental question in the course of other proceedings. To simplify matters, the Committee provided that the court entertaining the principal proceedings shall also have jurisdiction on the question of recognition.

It will immediately be noticed that two conditions which are frequently inserted in enforcement treaties are not referred to in the Convention: it is not necessary that the foreign judgment should have become *res judicata* (1), and the jurisdiction of the court which gave the original judgment does not have to be verified by the court of the State in which the recognition is sought unless the matter in question falls within the scope of Sections 3, 4 or 5 of Title II.

Article 27

Public policy

Recognition may be refused if it is contrary to public policy in the State in which the recognition is sought. In the opinion of the Committee this clause ought to operate only in exceptional cases. As has already been shown in the commentary on Article 4, public policy is not to be invoked as a ground for refusing to recognize a judgment given by a court of a Contracting State which has based its jurisdiction over a defendant domiciled outside the Community on a provision of its internal law, such as the provisions listed in the second paragraph of Article 3 (Article 14 of the French Civil Code, etc.).

Furthermore, it follows from the last paragraph of Article 27 that public policy is not to be used as a means of justifying refusal of recognition on the grounds that the foreign court applied a law other than that laid down by the rules of private international law of the court in which the recognition is sought.

The wording of the public policy provision is similar to that adopted in the most recent conventions (2), in that it is made clear that there are grounds for refusal, not of the foreign judgment itself, but if recognition of it is contrary to public policy in the State in which the recognition is sought. It is no part of the duty of the court seised of the matter to give an opinion as to whether the foreign judgment is, or is not, compatible with the public policy of its country. Indeed, this might be taken as criticism of the judgment. Its duty is rather to verify whether recognition of the judgment would be contrary to public policy.

Safeguarding the rights of the defendant

Where judgment is given in default of appearance, recognition must be refused if the defendant was not duly served with the document which instituted the proceedings in sufficient time to enable him to arrange for his defence. Where judgment is given abroad in default of appearance, the Convention affords the defendant double protection.

First, the document must have been duly served. In this connection reference must be made to the internal law of the State in which the judgment was given, and to the international conventions on the service abroad of judicial instruments. Thus, for example, a German court in which recognition of a Belgian judgment given in default of appearance against a person who is in Germany is sought could, on the basis of the Agreement between Belgium and Germany of 25 April 1959, which was entered into to simplify application of the Hague Convention of 1 March 1954 on civil procedure, refuse recognition if the document instituting the proceedings was sent from Belgium to Germany by registered post, since the Federal Republic of Germany does not permit this method of transmitting documents.

Secondly, even where service has been duly effected, recognition can be refused if the court in which recognition is sought considers that the document was not served in sufficient time to enable the defendant to arrange for his defence.

Looking at the second paragraph of Article 20, which lays down that the court of the State in which judgment is given must stay the proceedings if the document instituting the proceedings was not served on the defendant in sufficient time, it might be assumed that Article 27 (2) would apply only in exceptional cases. It must not be forgotten, however, that the second

(1) The condition of *res judicata* is required by the Conventions between Germany and Italy, France and Italy, and Italy and the Netherlands. It is not required in the Conventions between Belgium and the Netherlands, Belgium and Italy, Germany and Belgium and Germany and the Netherlands, in the Benelux Treaty, or in the application of the Convention between France and Belgium, in spite of the wording of this last Convention (Article 11 (2)).

(2) Conventions between Germany and Belgium, Italy and Belgium; Hague Convention on the recognition and enforcement of foreign judgments in civil and commercial matters.

paragraph of Article 20 requires the court of the State in which judgment is given to stay proceedings only where the defendant is domiciled in another Contracting State.

Incompatibility with a judgment already given in the State in which recognition is sought

There can be no doubt that the rule of law in a State would be disturbed if it were possible to take advantage of two conflicting judgments (1).

The case where a foreign judgment is irreconcilable with a judgment given by a national court is, in the existing conventions, either treated as a matter of public policy (2), as in the Convention between France and Belgium, the Benelux Treaty and the Convention between Belgium and Germany, or is regulated by a special provision.

In the opinion of the Committee, to treat this as a matter of public policy would involve the danger that the concept of public policy would be interpreted too widely. Furthermore, the Italian courts have consistently held that foreign judgments whose recognition is sought in Italy and which conflict with an Italian judgment do not fall within the scope of public policy. This is why the enforcement conventions concluded by Italy always contain two provisions, one referring to public policy, which serves the purpose of providing a safeguard in exceptional cases, and the other whereby the judgment must not conflict with an Italian judgment already given, or be prejudicial to proceedings pending in an Italian court (3).

There are also several other conventions which contain a clause providing for refusal of recognition of a judgment which conflicts with another judgment already given by the courts of the State in which recognition is sought.

In certain conventions, the judgment given in the State in which recognition is sought has to have become *res judicata* (4), in others it is sufficient for the judgment to be final and conclusive at that stage of procedure (5), and finally there are some which do not regulate the point (6).

The Committee preferred a form of wording which does not decide whether the judgment should have become *res judicata* or should merely be final and conclusive, and left this question to the discretion of the court in which recognition is sought.

The Committee also considered that, for refusal of recognition, it would be sufficient if the judgment whose recognition was sought were irreconcilable with a judgment given between the same parties in the State in which recognition was sought. It is therefore not necessary for the same cause of action to be involved. Thus, for example, a French court in which recognition of a Belgian judgment awarding damages for failure to perform a contract is sought will be able to refuse recognition if a French court has already given judgment in a dispute between the same parties declaring that the contract was invalid.

The form of words used also covers the situation referred to in Article 5 (3) (c) of the Hague Convention on the recognition and enforcement of foreign judgments, under which recognition may be refused if the proceedings which gave rise to the judgment whose recognition is sought have already resulted in a judgment which was given in a third State and which would be entitled to recognition and enforcement under the law of the State in which recognition is sought.

It is to be anticipated that the application of the provisions of Title II regarding *lis pendens* and related actions will greatly reduce the number of irreconcilable judgments.

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(1) NIBOYET, Traité de droit international privé français, Paris 1949, Vol. VI, No 2028.

(2) BATIFFOL, Traité élémentaire de droit international privé, Paris 1959, No 761: '... any judgment which is irreconcilable with a French judgment previously given is contrary to public policy. This rule holds good even if the judgment is not final' (Civ. 23 March 1936, Sirey 1936.1.175, R.1937–198); Riezler, *op. cit.* pp. 521 and 547.

(3) Conventions between Germany and Italy, Article 4; between France and Italy, Article 1 (5); between Belgium and Italy, Article 1 (4); and between the Netherlands and Italy, Article 1 (3).

(4) Hague Convention on the jurisdiction of the contractual forum in matters relating to the international sales of goods, Article 5 (3).

(5) Conventions between France and the United Kingdom, Article 3 (1) (a); between the United Kingdom and Belgium, Article 3 (1) (a); between France and Germany on the Saar, Article 30 (I) (d); between Austria and Belgium on maintenance, Article 2 (2) (b); between Austria and Belgium (general), Article 2 (2) (b).

(6) Hague Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children, Article 2 (4), and the Conventions concluded by Italy. Hague Convention on the recognition and enforcement of foreign judgments in civil and commercial matters (Article 5).

PRELIMINARY QUESTIONS

Recognition is not to be refused on the sole ground that the court which gave the original judgment applied a law other than that which would have been applicable under the rules of private international law of the State in which recognition is sought. However, the Convention makes an exception for preliminary questions regarding the status or legal capacity of natural persons, rules governing rights in property arising out of a matrimonial relationship, wills and succession, unless the same result would have been reached by the application of the rules of private international law of the State in which recognition is sought.

The Convention between Belgium and Germany contains a rule which is similar, but confined to cases where the judgment concerns a national of the State in which it is sought to give effect to that judgment. It is pointed out in the report of the negotiators of that Convention that this exception is justified by the fact that States reserve to themselves the right to regulate the status of their nationals. The wording used is similar to that of Article 7 of the Hague Convention on the recognition and enforcement of foreign judgments in civil and commercial matters.

Article 28

The very strict rules of jurisdiction laid down in Title II, and the safeguards granted in Article 20 to defendants who do not enter an appearance, make it possible to dispense with any review, by the court in which recognition or enforcement is sought, of the jurisdiction of the court in which the original judgment was given.

The absence of any review of the substance of the case implies complete confidence in the court of the State in which judgment was given; it is similarly to be assumed that that court correctly applied the rules of jurisdiction of the Convention. The absence of any review as to whether the court in which the judgment was given had jurisdiction avoids the possibility that an alleged failure to comply with those rules might again be raised as an issue at the enforcement stage. The only exceptions concern, first, the matters for which Title II lays down special rules of jurisdiction (insurance, instalment sales and loans) or exclusive rules, and which, as has been shown, are in the six countries either of a binding character or matters of public policy, and, secondly, the case provided for in Article 59; reference should be made to the commentary on that Article.

The second paragraph contains a provision which is already included in a number of conventions (Convention between Germany and Belgium; Hague Convention, Article 9) and avoids recourse to time-wasting duplication in the exceptional cases where re-examination of the jurisdiction of the court of origin is permitted.

The last paragraph of Article 28 specifies that the rules of jurisdiction are not matters of public policy within the meaning of Article 27; in other words, public policy is not to be used as a means of justifying a review of the jurisdiction of the court of origin (1). This again reflects the Committee's desire to limit so far as possible the concept of public policy.

REVIEW AS TO SUBSTANCE

Article 29

It is obviously an essential provision of enforcement conventions that foreign judgments must not be reviewed.

The court of a State in which recognition of a foreign judgment is sought is not to examine the correctness of that judgment; 'it may not substitute its own discretion for that of the foreign court (2) nor refuse recognition' if it considers that a point of fact or of law has been wrongly decided (3).

STAY OF PROCEEDINGS

Article 30

Article 30 postulates the following situation: a party may, in the course of litigation, wish to plead a judgment which has been given in another Contracting State but has not yet become *res judicata*. In order to remedy the inconvenience which would result if such judgment were reversed, Article 30 allows the court to stay the proceedings upon the principal issue of which it

(1) For a similar provision, see Article 13 (2) of the Benelux Treaty.

(2) P. GRAULICH, Principes de droit international privé. Conflits de lois. Conflits de juridictions. No 254.

(3) BATIFFOL, Traité élémentaire de droit international privé, No 763.

is seised, until the foreign judgment whose recognition is sought has become *res judicata* in the State in which it was given.

This power does not prevent the court from examining, before staying the proceedings, whether the foreign judgment fulfils the conditions for recognition laid down in Article 27.

Section 2

Enforcement

(a) **Preliminary remarks**

As has already been shown, the Committee endeavoured to give the Convention a progressive and pragmatic character by means of rules of jurisdiction which break new ground as compared with the enforcement conventions concluded hitherto.

This means, of course, that at the enforcement stage solutions must be found which follow from the rules of jurisdiction.

The progress achieved by Title II of the Convention would be rendered nugatory if a party seeking enforcement in a Contracting State of a judgment given in his favour were impeded by procedural obstacles.

The aim of Title II of the Convention is to strengthen the role of the court of the State in which the judgment was given. It must not be forgotten that that court must declare that it does not have jurisdiction if there are rules of exclusive jurisdiction which give jurisdiction to the courts of another State (Article 19); the court must also declare that it does not have jurisdiction, in cases where the defendant does not enter an appearance, if its jurisdiction is not derived from the Convention (first paragraph of Article 20).

Moreover, the court must stay the proceedings in the absence of proof that the defendant has been able to arrange for his defence (second paragraph of Article 20).

This role, as set out in Title II, is thus of prime importance.

If follows that the intervention of the court in which enforcement is sought is more limited than is usual under enforcement conventions. That court has in practice only two points to examine: public policy and whether the defendant has had the opportunity of defending himself. The other reasons for refusal — conflicting judgments, preliminary questions, review of jurisdiction in relation to certain specific topics — can, in fact, be regarded as akin to public policy. Since, moreover, the Convention is confined to matters relating to property rights, public policy will only very seldom have any part to perfom.

This limitation on the powers of the court in which enforcement is sought led to a simplification of the enforcement procedure. Furthermore, as the position of the defendant in the original proceedings is well protected, it is proper that the applicant for enforcement be enabled to proceed rapidly with all the necessary formalities in the State in which enforcement is sought, that he be free to act without prior warning and that enforcement be obtained without unnecessary complications.

The Committee discussed the enforcement procedure at length before adopting it. There were several possibilities open to it: reference back to national laws but subject to certain rules of the Convention, ordinary contentious procedure, summary contentious procedure or *ex parte* application.

Each of these solutions had its advantages and disadvantages. The Committee finally adopted a system for the whole Community based on *ex parte* application. This rapid and simple procedure will apply in all six States.

This uniform solution has the advantage of creating a proper balance as between the various provisions of the Convention: uniform rules of jurisdiction in the six countries and identical procedures for enforcement.

(b) **Conditions for enforcement**

As has been shown, the Convention is based on the principle that a foreign judgment is presumed to be in order. It must, in principle, be possible to enforce it in the State in which enforcement is sought. Enforcement can be refused only if there is a ground for refusing recognition (1). The foreign judgment must, however, be enforceable in the State in which it was given in order to be enforceable in the State in which enforcement is sought.

(1) On the disadvantages resulting from a difference between the conditions for recognition and for enforcement, see RIGAUX, *op. cit.*, p. 207, No 39.

If a judgment from which an appeal still lies or against which an appeal has been lodged in the State in which it was given cannot be provisionally enforced in that State, it cannot be enforced in the State in which enforcement is sought. It is an essential requirement of the instrument whose enforcement is sought that it should be enforceable in the State in which it originates. As Niboyet points out, there is no reason for granting to a foreign judgment rights which it does not have in the country in which it was given (1).

Under no circumstances may a foreign judgment be reviewed as to its substance (Article 34).

(c) **Enforcement procedure**

Before examining the Articles of the section on enforcement it seems appropriate to give on outline of the procedure which will be applicable in the six States.

1. The application, accompanied by the documents required under Articles 46 and 47, must be submitted to the authority specified in Article 32. The procedure for making the application is governed by the law of the State in which enforcement is sought.

   The applicant must give an address for service of process or appoint a representative *ad litem* in the jurisdiction of the court applied to.

2. The court applied to must give its decision without delay, and is not able to summon the other party. At this stage no contentious proceedings are allowed.

The application may be refused only for one of the reasons specified in Articles 27 and 28.

3. If enforcement is authorized:

   (a) the party against whom enforcement is sought may appeal against the decision within one month of service of the decision (Article 36);

   (b) the appeal must be lodged, in accordance with the rules governing procedure in contentious matters, with the court specified in Article 37;

   (c) if an appeal has been lodged against the foreign judgment in the State in which it was given, or if the time for such an appeal has not yet expired, the court seised of the appeal against the decision authorizing enforcement may stay the proceedings or make enforcement conditional on the provision of security (Article 38);

   (d) the judgment given on the appeal against the decision authorizing enforcement may not be contested by an ordinary appeal. It may be contested only by an appeal in cassation (2) (Article 37);

   (e) during the time specified for an appeal against the decision authorizing enforcement, the applicant may take only protective measures; the decision authorizing enforcement carries with it the power to proceed to such measures (Article 39).

4. If enforcement is refused:

   (a) the applicant may appeal to the court specified in Article 40;

   (b) the procedure before that court is contentious, the other party being summoned to appear (Article 40);

   (c) the judgment given on this appeal may be contested only by an appeal in cassation (2) (Article 41).

Article 31

Under this Article 'a judgment given in a Contracting State and enforceable in that State shall be enforced in another Contracting State when, on the application of any interested party, the order for its enforcement has been issued there'.

As can be seen, this provision is almost identical with that contained in the European Convention providing a uniform law on arbitration (3). The Committee did, in fact, take the view that judgments given in one

(1) NIBOYET, Droit international privé français. Vol VI, No 1974.

(2) In the Federal Republic of Germany by a 'Rechtsbeschwerde'.

(3) European Convention providing a uniform law on arbitration, Strasbourg, 20 January 1966. Article 29 of Annex I: 'An arbitral award may be enforced only when it can no longer be contested before arbitrators and when an enforcement formula has been apposed to it by the competent authority on the application of the interested party.'

Contracting State should be enforceable in any other Contracting State as easily as arbitral awards.

The legal systems of the Member States are already familiar with authorization of enforcement by means of an enforcement order. This is so, for example, in the case of judgments and decisions given by the European Community institutions (Article 92 of the ECSC Treaty, Article 192 of the EEC Treaty, Article 164 of the Euratom Treaty). It is also true of judgments and decisions falling within the scope of the Mannheim Convention (1).

The Convention of 30 August 1962 between Germany and the Netherlands also provides that judgments given in one of the two States are to be enforced in the other if enforcement is authorized by means of an enforcement order.

A rule similar to that in Article 31, that is to say an *ex parte* procedure, was contained in the Franco-German Treaty on the Saar of 27 October 1956. Business circles in the Saar have said that the rule has proved entirely satisfactory.

About 80% of enforcement proceedings have been successfully completed by means of the first *ex parte* written phase of the procedure. In the majority of cases, judgment debtors have refrained from contesting the proceedings by means of an appeal. This is easily explained by the fact that cases of refusal of enforcement are exceptional, and the risk of having to bear the costs of the proceedings restrains the judgment debtor, unless he feels certain of winning his case.

Article 31 does not purport to determine whether it is the judgment given in the State of origin, or the decision authorizing the issue of the enforcement order, which is enforceable in the State in which enforcement is sought.

The expression 'on the application of any interested party' implies that any person who is entitled to the benefit of the judgment in the State in which it was given has the right to apply for an order for its enforcement.

Article 32

Article 32 specifies the authority in each of the Contracting States to which the application must be submitted and which will have jurisdiction. It was considered to be in the interests of the parties that each relevant authority be indicated in the Convention itself.

The court to which local jurisdiction is given is that for the place of domicile of the party against whom enforcement is sought, or, if that party is not domiciled in the State in which enforcement is sought, the court for the place of enforcement, that is, where the judgment debtor has assets. The jurisdiction of the court for the place of enforcement is thus of minor importance.

The provision requiring applications to be submitted to the court for the place where the judgment debtor is domiciled was included for the following reason. It is quite possible that in the State in which enforcement is sought the judgment debtor may possess property situated in the jurisdiction of different courts. If jurisdiction had been given only to the court for the place of enforcement, a choice between several courts would have been open to the applicant. Thus an applicant who was unsuccessful in one court could, instead of availing himself of the methods of appeal provided for in the Convention, have applied to another court which would not necessarily have come to the same decision as the first court, and this without the knowledge of the other party, since the procedure is *ex parte*.

Article 33

Under Article 33, the procedure and formalities for making the application are to be governed by the law of the State in which enforcement is sought.

Reference must therefore be made to the national laws for the particulars which the application must contain, the number of copies which must be submitted to the court, the authority to which the application must be submitted, also, where necessary, the language in which it must be drawn up, and whether a lawyer should be instructed to appear.

The provisions to which reference must be made are the following:

Belgium:
The matter will be governed by the Judicial Code (see Articles 1025 and 1027);

Federal Republic of Germany, Netherlands and Italy:
The question will be governed by the law implementing the Convention;

France:
Code of Civil Procedure, Article 1040;

(1) Revised Convention for the Navigation of the Rhine signed at Mannheim on 17 October 1868.

Luxembourg:
A lawyer must be instructed in accordance with the general law under which no one can officially address the court except through an *avoué*. Article 856 or Article 512 of the Code of Civil Procedure is generally invoked in support of this proposition.

The application must be accompanied by the documents required to be produced under Articles 46 and 47.

In the view of the Committee, if the applicant does not produce the required documents, enforcement should not be refused, but the court may stay the proceedings and allow the applicant time to produce the documents. If the documents produced are not sufficient and the court cannot obtain sufficient information, it may refuse to entertain the application.

Finally, the applicant must, in accordance with the law of the State in which enforcement is sought, either give an address for service of process or appoint a representative *ad litem* within the area of jurisdiction of the court applied to. This provision is important in two respects: first for communicating to the applicant the decision given on the application (Article 35), and secondly in case the party against whom enforcement is sought wishes to appeal, since such an appeal must be lodged 'in accordance with the rules governing procedure in contentious matters' (Article 37).

The respondent must therefore summon the applicant to appear; the furnishing of an address for service or the appointment of a representative enables the summons to be served rapidly, in accordance with the law of the country in which enforcement is sought, without risk of error and without all the hazards connected with the service of legal documents abroad. It will in fact usually happen that the applicant is domiciled outside the State in which enforcement is sought.

The appointment of a representative *ad litem* has been provided for because the furnishing of an address for service is unknown in German law.

The two methods will, of course, produce the same result.

Article 34

Article 34 provides that the court applied to shall give its decision without delay; 'the party against whom enforcement is sought shall not at this stage of the proceedings be entitled to make any submissions on the application.'

The Committee considered but rejected the idea of imposing on the court to which application is made a fixed period for giving its decision. Such a time limit is unknown in judicial practice, and there would in any case be no way of enforcing it.

The Convention does not allow the court to which application is made to ask the respondent to make submissions, even in exceptional cases. Such a possibility would have meant that the proceedings were not fully *ex parte*. Certain courts might be inclined to hear the respondent, which would in fact result in the *ex parte* procedure systematically becoming *inter partes*. Moreover, there would be a reduction in the element of surprise which is necessary in an enforcement procedure if the respondent is not to have the opportunity of withdrawing his assets from any measure of enforcement.

The rights of the respondent are safeguarded, since he can institute contentious proceedings by appealing against the decision authorizing enforcement.

As has been shown above, the application may be refused only for one of the reasons specified in Articles 27 and 28, and the foreign judgment may not be reviewed as to its substance. Consequently, fresh claims which have not been submitted to the foreign court are inadmissible; the court seised of the application may authorize or refuse enforcement, but it cannot alter the foreign judgment.

The court may, however, refuse the application if it does not satisfy the requirements of Articles 32 and 33.

Article 35

Article 35 provides that the appropriate officer of the court shall without delay bring the decision given on the application to the notice of the applicant in accordance with the procedure laid down by the law of the State in which enforcement is sought. It is important that the applicant be informed of the decision taken. This demonstrates the value of an address for service or of the appointment of a representative *ad litem*, particularly where the applicant is domiciled abroad.

The manner in which the decision is communicated to the applicant will be a matter for the national law of the State in which enforcement is sought, irrespective of whether enforcement is authorized or refused.

Article 36

If enforcement is authorized, the decision must be notified to the party against whom enforcement has been granted. That party may appeal against the decision from the time it is served on him. As regards the period within which an appeal may be lodged and the moment from which it begins to run, Article 36 makes a distinction between the following situations:

(a) if the party is domiciled in the State in which the decision was given, the period is one month; the moment from which time begins to run is determined by the law of that State, from which there is no reason to derogate;

(b) if the party is domiciled in another Contracting State, the period is two months, and runs from the date when the decision was served, either on him in person or at his residence (1).

In France and the Netherlands, the day of delivery to the prosecutor's office is not counted for purposes of computation of time. In Belgium, the day of delivery to the postal authorities is not counted (Article 40 of the Judicial Code), nor is the day on which an instrument is dispatched by a Belgian Consul to a foreign authority (2).

The purpose of this rule, which derogates from some national laws, is to protect the respondent and to prevent his being deprived of a remedy because he had not been informed of the decision in sufficient time to contest it.

No extension of time may be granted on account of distance, as the time allowed is sufficient to enable the party concerned to contest the decision, if he is so minded;

(c) if the party is domiciled outside the Community, the period within which an appeal may be lodged runs from the date when the decision is served or is deemed to have been served according to the law of the State in which the decision was given. In this case the period of one month may be extended on account of distance in accordance with the law of that State.

Computation of time is governed by the internal law of the State in which the decision was given.

(1) Service on a party at his residence means delivering the instrument to a person who is present and empowered by law to receive a copy of the instrument or, if there is no such person, to a competent authority.

(2) Belgian Court of Cassation, 4 March 1954; Revue des huissiers de Belgique, May to June 1954, p. 15.

Article 37

Article 37 specifies for each country the court with which an appeal can be lodged.

In that court the proceedings are contentious. Accordingly it is incumbent upon the person against whom enforcement has been authorized to summon the other party to appear.

The court seised of the appeal will have to examine whether it was properly lodged and will have to decide upon the merits of the appeal, taking account of the additional information supplied by the appellant. It will therefore be open to the appellant to establish, in the case of a judgment originally given in default of appearance, that the rights of the defendant were disregarded, or that a judgment has already been given in a dispute between the same parties in the State in which enforcement is sought which is irreconcilable with the foreign judgment. The appellant may also plead Article 38 if he has lodged an appeal against the judgment whose enforcement is sought in the State in which it was given.

It is no part of the duty of the court with which the appeal against the decision authorizing enforcement is lodged to review the foreign judgment as to its substance. This would be contrary to the spirit of the Convention. The appellant could, however, effectively adduce grounds which arose after the foreign judgment was given. For example, he may establish that he has since discharged the debt. As Batiffol points out, such grounds are admissible in enforcement proceedings (3) (4).

The second paragraph of Article 37 provides that the judgment given on the appeal may be contested only by an appeal in cassation and not by any other form of appeal or review.

This rule was requisite for the following reasons. First, the grounds for refusing enforcement are very limited and involve public policy in the State in which enforcement is sought. No useful purpose is served by further argument on this concept. Next, the situation is different from that in which purely national proceedings are involved. The proceedings on the merits of the case itself have already taken place in the State in which the judgment was given, and the Convention in no way

(3) BATIFFOL, *op. cit.*, p. 863, note 57.

(4) For the Federal Republic of Germany, see Article 767 of the Code of Civil Procedure; see also BAUMBACH-LAUTERBACH, Zivilprozeßordnung, paragraph 723, note 1.

interferes with the rights of appeal. It is true that the Convention applies to judgments which are enforceable only provisionally, but in this case the court with which the appeal is lodged may, as provided in Article 38, stay the proceedings. An excessive number of avenues of appeal might be used by the losing party purely as delaying tactics, and this would constitute an obstacle to the free movement of judgments which is the object of the Convention.

Since appeals in cassation are unknown in the Federal Republic of Germany, it has been provided, in order to establish a certain parity amongst the Contracting States, that an appeal on a point of law (Rechtsbeschwerde) shall lie against a judgment of the Court of Appeal (Oberlandesgericht).

Article 38

Article 38 covers cases where an ordinary appeal has been lodged against the judgment in the State in which that judgment was given, and also cases where the period within which such an appeal may be lodged has not yet expired. The court with which the appeal against enforcement under the first paragraph of Article 37 is lodged may either stay the proceedings, authorize enforcement, make enforcement conditional on the provision of such security as it thinks fit, or specify the time within which the defendant must lodge his appeal.

This provision originates in the Convention between Germany and Belgium (Article 10), and its 'object is to protect the judgment debtor against any loss which could result from the enforcement of a judgment which has not yet become *res judicata* and may be amended' (1).

Article 38 deals only with judgments which, notwithstanding that they may be appealed against, are enforceable in the State in which they were given.

Only the court seised of the appeal has the power to stay the proceedings, and such a stay can be granted only on the application of the party against whom enforcement is sought. This is because that party does not appear at the first stage of the proceedings and cannot be required to do so.

(1) Convention between Germany and Belgium. See Report of the negotiators.

Article 39

Article 39 contains two very important rules. First it provides that during the time specified for the lodging of an appeal the applicant for enforcement may take no enforcement measures other than protective measures — namely those available under the law of the State in which enforcement is sought. Similarly, if an appeal has actually been lodged, this rule applies until the appeal has been determined. Secondly it provides that the decision authorizing enforcement carries with it the power to proceed to any such protective measures. Article 39 also allows the judgment creditor in certain States, for example in the Federal Republic of Germany, to initiate the first phase of the enforcement of the foreign instrument. The object of this provision is to ensure at the enforcement stage a balance between the rights and interests of the parties concerned, in order to avoid either of them suffering any loss as a result of the operation of the rules of procedure.

On the one hand, an applicant who, in consequence of a foreign judgment, is in possession of an enforceable instrument, must be able to take quickly all measures necessary to prevent the judgment debtor from removing the assets on which execution is to be levied. This is made possible by the *ex parte* procedure and by the provision in Article 39 that the decision authorizing enforcement carries with it the power to proceed to such protective measures. The power arises automatically. Even in those States whose law requires proof that the case calls for prompt action or that there is any risk in delay the applicant will not have to establish that either of those elements is present; power to proceed to protective measures is not a matter for the discretion of the court.

On the other hand, the fact that the enforcement procedure is *ex parte* makes it essential that no irreversible measures of execution can be taken against the defendant. The latter may be in a position to establish that there are grounds for refusal of enforcement; he may, for example, be able to show that the question of public policy was not examined in sufficient detail. To safeguard his rights it accordingly appeared to be necessary to delay enforcement, which is usually carried out by sequestration of the movable and immovable property of the defendant, until the end of the time specified for appeal (see Article 36) or, if an appeal is actually lodged, until it has been determined. In other words, this is a counterbalance to the *ex parte* procedure; the effect of the decision authorizing enforcement given pursuant to Article 31 is limited in that during the time specified for an appeal, or if an appeal has been lodged, no enforcement measures can be taken on the basis of that decision against the assets of the judgment debtor.

Articles 40 and 41

These Articles relate to the case where an application for enforcement is refused.

Article 40 provides that the applicant may appeal to the appeal court which has jurisdiction in the State in which enforcement is sought.

The Committee did not think it necessary that the Convention should fix the period within which appeals would have to be lodged. If the applicant has had his application refused, it is for him to give notice of appeal within such time as he considers suitable. He will have regard, no doubt, to the length of time it will take him to assemble all the relevant documents.

Upon appeal the proceedings are contentious, since the party against whom enforcement is sought is summoned to appear. The *inter partes* procedure is necessary in order to avoid numerous appeals. If the procedure on appeal had remained *ex parte*, it would have been essential to provide for additional proceedings to enable the defendant to make his submissions if the appellate court were to reverse the decision at first instance and authorize enforcement. The Committee wished to avoid a plethora of appeals. Moreover, the dismissal of the application reverses the presumption of validity of the foreign judgment.

The summoning of the party against whom enforcement is sought is to be effected in manner prescribed by the national laws.

The appellate court can give judgment only if the judgment debtor has in fact been given an opportunity to make his submissions. The object of this provision is to protect the rights of the defendant and to mitigate the disadvantages which result from certain systems of serving instruments abroad. These disadvantages are all the more serious in that a party against whom enforcement is sought and who is not notified in time to arrange for his defence no longer has any judicial remedy against the judgment given on the appeal other than by way of an appeal in cassation, and then only to the extent that this is allowed by the law of the State in which enforcement is sought (Article 41).

Because of the safeguards contained in Article 40, Article 41 provides that the judgment given on the appeal may not be contested by an ordinary appeal, but only by an appeal in cassation. The reason why a special form of appeal (Rechtsbeschwerde) is provided for in the Federal Republic of Germany has already been explained (Article 37).

The procedure for the forms of appeal provided for in Articles 40 and 41 is to be determined by the national laws which may, where necessary, prescribe time limits.

Article 42

Article 42 covers two different situations.

The first paragraph of Article 42 empowers the court of the State in which enforcement is sought to authorize enforcement in respect of certain matters dealt with in a judgment and to refuse it in respect of others (1). As explained in the report annexed to the Benelux Treaty, which contains a similar provision, 'this discretion exists in all cases where a judgment deals with separate and independent heads of claim, and the decision on some of these is contrary to the public policy of the country in which enforcement is sought, while the decision on others is not.'

The second paragraph of Article 42 allows an applicant to request the partial enforcement of a judgment, and *ex hypothesi* allows the court addressed to grant such a request. As mentioned in the report on the Benelux Treaty, 'it is possible that the applicant for enforcement himself wants only partial enforcement, e. g. where the judgment whose enforcement is sought orders the payment of a sum of money, part of which has been paid since the judgment was given.' (2).

As is made clear in the Conventions between Germany and Belgium, and between Belgium and Italy, which contain similar provisions, the applicant may exercise this option whether the judgment covers one or several heads of claim.

Article 43

Article 43 relates to judgments which order a periodic payment by way of a penalty. Some enforcement conventions contain a clause on this subject (see Benelux Treaty, Article 14; Convention between Germany and the Netherlands, Article 7).

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(1) See Benelux Treaty (Articles 14 (4)); the Conventions between France and Italy (Article 3); between Italy and the Netherlands (Article 3); between Germany and Belgium (Article 11); between Belgium and Italy (Article 10) and between Germany and the Netherlands (Article 12).

(2) See also the Conventions between Germany and Belgium (Article 11) and between Belgium and Italy (Article 10).

It follows from the wording adopted that judgments given in a Contracting State which order the payment of a sum of money for each day of delay, with the intention of getting the judgment debtor to fulfil his obligations, will be enforced in another Contracting State only if the amount of the payment has been finally determined by the courts of the State in which judgment was given.

Article 44

Article 44 deals with legal aid.

A number of enforcement conventions deal with this matter (1).

The provisions adopted by the Committee supplements the Hague Convention of 1 March 1954 on civil procedure, which has been ratified by the six States, so that a party who has been granted legal aid in the State in which judgment was given also qualifies automatically for legal aid in the State in which enforcement is sought, but only as regards the issuing of the order for enforcement. Thus the automatic extension of legal aid achieved by the Convention does not apply in relation to enforcement measures or to proceedings arising from the exercise of rights of appeal.

The reasoning underlying Article 44 is as follows.

First, as maintenance obligations fall within the scope of the Convention, consideration was given to the humanitarian issues which were the basis for a similar provision in the 1958 Hague Convention.

Above all it must not be forgotten that if a needy applicant were obliged, before making his application for enforcement, to institute in the State in which enforcement is sought proceedings for recognition of the decision granting him legal aid in the State in which the judgment was given, he would be in a less favourable position than other applicants. He would in particular not have the advantage of the rapidity of the procedure and the element of surprise which Title III is designed to afford to any party seeking the enforcement of a foreign judgment.

It is moreover because of this consideration that the automatic extension of legal aid has been limited to the procedure for issuing the order for enforcement, and has not been extended to the proceedings on appeal. Once these proceedings have been set in motion, the applicant for enforcement, or, in case of appeal, the respondent, may, in accordance with the 1954 Hague Convention, take the necessary steps, in the State in which enforcement is sought, to obtain legal aid, in the same way as nationals of that State.

Under Article 47 (2) an applicant must, on making his application, produce documents showing that he is in receipt of legal aid in the State in which judgment was given.

Article 45

This Article deals with security for costs. A similar rule is included in the Hague Convention of 1 March 1954 but as regards the obligation to provide security it exempts only nationals of the Contracting States who are also domiciled in one of those States (Article 17). Under Article 45, any party, irrespective of nationality or domicile, who seeks enforcement in one Contracting State of a judgment given in another Contracting State, may do so without providing security. The two conditions — nationality and domicile — prescribed by the 1954 Convention do not apply.

The Committee considered that the provision of security in relation to proceedings for the issuing of an order for enforcement was unnecessary.

As regards the proceedings which take place in the State in which judgment was given, the Committee did not consider it necessary to depart from the rules of the 1954 Convention.

Section 3

Common provisions

This Section deals with the documents which must be produced when application is made for the recognition or enforcement of a judgment.

Article 46 applies to both recognition and enforcement. Article 47 applies only to applications for enforcement. It should be noted that at the recognition stage there is no reason to require production of the documents referred to in Article 47.

(1) Hague Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children (Article 9); Conventions between Italy and the Netherlands (Article 6) and between Germany and the Netherlands (Article 15).

Article 47 (1) provides for the production of documents which establish that the judgment is enforceable in the State in which it was given. The requirement that the judgment be, in law, enforceable in that State applies only in relation to its enforcement (not to its recognition) abroad. (Article 31).

Article 47 (2), which relates to documents showing that the applicant is receiving legal aid in the State in which judgment was given, is also relevant only in enforcement proceedings. The documents are in fact intended to enable a party receiving legal aid in the State in which judgment was given to qualify for it automatically in the proceedings relating to the issue of the order for enforcement (Article 44). However, recognition requires no special procedure (Article 26). If recognition were itself the principal issue in an action, Article 44 and, consequently, Article 47 (2) would apply, since Article 26 refers to Sections 2 and 3 of Title III.

Under Article 46 (1), a copy of the judgment which satisfies the conditions necessary to establish its authenticity must be produced, whether it is recognition or enforcement which is sought.

This provision is found in all enforcement treaties and does not require any special comment. The authenticity of a judgment will be established in accordance with the maxim *locus regit actum;* it is therefore the law of the place where the judgment was given which prescribes the conditions which the copy of the judgment must satisfy in order to be valid [1].

Under Article 46 (2), if the judgment was given in default, a document which establishes that the party in default was served with the document instituting the proceedings must also be produced.

The court in which recognition or enforcement is sought must, if the foreign judgment was given in default, be in a position to verify that the defendant's right to defend himself was safeguarded.

Article 47 provides that the following documents must be produced:

(a) documents which establish that the judgment is enforceable according to the law of the State in which it was given. This does not mean that a separate document certifying that the judgment has become enforceable in that State is necessarily required. Thus, in France, 'provisional enforceability' would be deduced from an express reference to it in judgments given pursuant to Article 135a of the Code of Civil Procedure. Decisions given in summary proceedings will be provisionally enforceable (Article 809 of the Code of Civil Procedure); and so will decisions in *ex parte* proceedings (Article 54 of the Decree of 30 March 1808). But whether other judgments are enforceable can be determined only when the date on which they were given has been considered in relation to the date on which they were served and the time allowed for lodging an appeal [2].

Documents which establish that the judgment has been served will also have to be produced, since some judgments may be enforceable and consequently fall within the scope of the Convention even if they have not been served on the other party. However, before enforcement can be applied for, that party must at least have been informed of the judgment given against him and also have had the opportunity to satisfy the judgment voluntarily;

(b) where appropriate, a document showing, in accordance with the law of the State in which the judgment was given, that the applicant is in receipt of legal aid in that State.

Article 48

In order to avoid unnecessary formalities, this Article authorizes the court to allow time for the applicant to produce the documentary evidence proving service of the document instituting the proceedings, required under Article 46 (2), and the documentary evidence showing that the applicant was in receipt of legal aid in the State in which judgment was given (Article 47 (2)).

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[1] WESER: Traité franco-belge du 8 juillet 1899. Étude critique No 247.

[2] *Belgium:* Judicial Code: see Article 1029 for decisions in *ex parte* proceedings, Article 1039 for decisions in summary proceedings, and Articles 1398 and 1496 for judgments.

Federal Republic of Germany: 'Vollstreckungsklausel' — Under Article 725 of the Code of Civil Procedure, the order for enforcement is worded as follows:
'This copy of the judgment shall be given to ... (name of the party) for the purpose of enforcement.' This order must be added at the end of the copy of the judgment and must be signed by the appropriate officer of the court and sealed with the seal of the court.

Luxembourg: see Articles 135, 136 and 137 of the Code of Civil Procedure, Article 164 for judgments in default, Article 439 for Commercial Courts (tribunaux de commerce) and Article 5 of the Law of 23 March 1893 on summary jurisdiction.

Netherlands: see Articles 339, 350, 430 and 433 of the Code of Civil Procedure, also Articles 82 and 85 of that Code.

The court may dispense with the production of these documents by the applicant (the Committee had in mind the case where the documents had been destroyed) if it considers that it has sufficient information before it from other evidence.

The second paragraph relates to the translation of the documents to be produced. Again with the object of simplifying the procedure, it is here provided that the translation may be certified by a person qualified to do so in any one of the Contracting States.

Article 49

This Article provides that legalization or other like formality is not necessary as regards the documents to be produced and, in particular, that the certificate provided for in the Hague Convention of 5 October 1961 abolishing the requirement of legalization for foreign public documents is not required. The same applies to the document whereby an applicant appoints a representative, perhaps a lawyer, to act for him in proceedings for the issue of an order for enforcement.

CHAPTER VI

AUTHENTIC INSTRUMENTS AND COURT SETTLEMENTS

Article 50

In drawing up rules for the enforcement of authentic instruments, the Committee has broken no new ground. Similar provisions are, in fact, contained in the Conventions already concluded by the six States [1], with the sole exception of the Convention between Germany and Italy.

Since Article 1 governs the whole Convention, Article 50 applies only to authentic instruments which have been drawn up or registered in matters falling within the scope of the Convention.

In order that an authentic instrument which has been drawn up or registered in one Contracting State may be the subject of an order for enforcement issued in another Contracting State, three conditions must be satisfied:

(a) the instrument must be enforceable in the State in which it was drawn up or registered;

(b) it must satisfy the conditions necessary to establish its authenticity in that State;

(c) its enforcement must not be contrary to public policy in the State in which enforcement is sought.

The provisions of Section 3 of Title III are applicable as appropriate. It follows in particular that no legalization or similar formality is required.

Article 51

A provision covering court settlements was considered necessary on account of the German and Netherlands legal systems [2], under German and Netherlands law, settlements approved by a court in the course of proceedings are enforceable without further formality (Article 794 (1) of the German Code of Civil Procedure, and Article 19 of the Netherlands Code of Civil Procedure).

The Convention, like the Convention between Germany and Belgium, makes court settlements subject to the same rules as authentic instruments, since both are contractual in nature. Enforcement can therefore be refused only if it is contrary to public policy in the State in which it is sought.

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[1] Conventions between France and Belgium (Article 16); between Belgium and the Netherlands (Article 16); Benelux Treaty (Article 18); Conventions between Germany and Belgium (Article 14); between Italy and Belgium (Article 13); between Germany and the Netherlands (Article 16); between Italy and the Netherlands (Article 8); and between France and Italy (Article 6).

[2] See the Conventions between Germany and Belgium (Article 14 (1)); between Germany and the Netherlands (Article 16); between Germany and Italy (Article 9); and the Hague Convention on the choice of court (Article 10).

CHAPTER VII

GENERAL PROVISIONS

Article 52

As regards the determination of domicile (Article 52), reference should be made to Chapter IV (A) (3) which deals with the matter.

Article 53

Article 53 provides that, for the purposes of this Convention, the seat of a company or other legal person or association of natural or legal persons shall be treated as its domicile.

The Convention does not define what is meant by the seat of a legal person or of a company or association of natural or legal persons any more than it defines domicile.

In determining the location of the seat, the court will apply its rules of private international law. The Committee did not think it possible to particularize the concept of seat in any other way, and considered that it could not be achieved by making a reference to Article 52, in view of the different approaches which the various Member States of the Community adopt in this matter. Moreover, the Committee did not wish to encroach upon the work on company law which is now being carried out within the Community.

It did not excape the attention of the Committee that the application of Article 16 (2) of the Convention could raise certain difficulties. This would be the case, for example, where a court in one State ordered the dissolution of a company whose seat was in that State and application was then made for recognition of that order in another State under whose law the location of the company's seat was determined by its statutes, if, when so determined, it was in that other State. In the opinion of the Committee, the court of the State in which recognition were sought would be entitled, under the first paragraph of Article 28, to refuse recognition on the ground that the courts of that State had exclusive jurisdiction.

Article 53 does not deal with the preliminary question of the recognition of companies or other legal persons or associations of natural or legal persons; this must be resolved either by national law or by the Hague Convention of 1 June 1956 on the recognition of the legal personality of companies, firms, associations and foundations (1), pending the entry into force of the Convention which is at present being prepared within the EEC on the basis of Article 220 of the Treaty of Rome.

Article 53 refers to companies or other legal persons and to associations of natural or legal persons; to speak only of legal persons would have been insufficient, since this expression would not have covered certain types of company, such as the 'offene Handelsgesellschaft' under German law, which are not legal persons. Similarly, it would not have been sufficient to speak only of companies, since certain bodies, such as associations and foundations, would then not have been covered by this Convention.

(1) Ratified on 20 April 1966 by Belgium, France and the Netherlands.

CHAPTER VIII

TRANSITIONAL PROVISIONS

Article 54

As a general rule, enforcement treaties have no retroactive effect (1), in order 'not to alter a state of affairs which has been reached on the basis of legal relations other than those created between the two States as a result of the introduction of the Convention' (2).

So far as the author is aware only the Benelux Treaty applies to judgments given before its entry into force.

(1) Conventions between France and Belgium (Article 19); between Belgium and the Netherlands (Article 27); between Germany and Belgium (Article 17); between Germany and Italy (Article 18); between Germany and the Netherlands (Article 20); between Italy and Belgium (Article 17); and between Italy and the Netherlands (Article 16).

(2) See Report of the negotiators of the Convention between Germany and Belgium.

A solution as radical as that of the Benelux Treaty did not seem acceptable. In the first place, the conditions which a judgment must fulfil in order to be recognized and enforced are much stricter under the Benelux Treaty (Article 13) than under the EEC Convention. Secondly, the ease with which recognition and enforcement can be granted under the EEC Convention is balanced by the provisions of Title II which safeguard the interests of the defendant. In particular, those provisions have made it possible, at the stage of recognition or enforcement, to dispense with any review of the jurisdiction of the court of origin (Article 28). But, of course, a defendant in the State in which judgment was originally given will be able to rely on these protective provisions only when the Convention has entered into force. Only then will he be able to invoke the Convention to plead lack of jurisdiction.

Although Article 54 was not modelled on the Benelux Treaty, its effect is not very different.

The rules adopted are as follows:

1. The Convention applies to proceedings which are instituted — and in which, therefore, judgment is given — after the entry into force of the Convention.

2. The Convention does not apply if the proceedings were instituted and judgment given before the entry into force of the Convention.

3. The Convention does apply, but subject to certain reservations, to judgments given after its entry into force in proceedings instituted before its entry into force.

In this case, the court of the State addressed may review the jurisdiction of the court of origin, since the defendant originally had no opportunity to contest that jurisdiction in that court on the basis of the Convention.

Enforcement will be authorized if the jurisdiction of the court of origin:

(i) either was based on a rule which accords with one of the rules of jurisdiction in the Convention; for example, if the defendant was domiciled in the State in which the judgment was given;

(ii) or was based on a multilateral or bilateral convention in force between the State of origin and the State addressed. Thus if, for example, an action relating to a contract were brought in a German court, the judgment given could be recognized and enforced in Belgium if the obligation had been or was to be performed in the Federal Republic since the jurisdiction of the German court would be founded on Article 3 (1) (5) of the Convention between Germany and Belgium.

If the jurisdiction of the court of origin is founded on one of those bases, the judgment must be recognized and enforced, provided of course that there is no ground for refusal under Article 27 or 28. Recognition will be accorded without any special procedure being required (Article 26); enforcement will be authorized in accordance with the rules of Section 2 of Title III, that is to say, on *ex parte* application.

It follows from Article 54, which provides that the Convention applies only to legal proceedings instituted after its entry into force, that the Convention will have no effect on proceedings in progress at the time of its entry into force. If, for example, before the entry into force of the Convention, proceedings were instituted in France in accordance with Article 14 of the Civil Code against a person domiciled in another Contracting State, that person could not plead the Convention for the purpose of contesting the jurisdiction of the French court.

CHAPTER IX

RELATIONSHIP TO OTHER INTERNATIONAL CONVENTIONS

Title VII deals with the relationship between the Convention and other international instruments governing jurisdiction, recognition and the enforcement of judgments. It covers the following matters:

1. the relationship between the Convention and the bilateral agreements already in force between certain Member States of the Community (Article 55 and 56) (1):

2. the relationship between the Convention and those international agreements which, in relation to particlar matters, govern — or will govern — jurisdiction and the recognition or enforcement of judgments (Article 57);

3. the relationship between the Convention and the Convention of 15 June 1869 between France and Switzerland, which is the only enforcement convention concluded between a Member State of the EEC and a non-member State to contain rules of direct jurisdiction (Article 58);

4. the relationship between the Convention and any other instruments, whether bilateral or multilateral, which may in the future govern the recognition and enforcement of judgments (Article 59).

It was not thought necessary to regulate the relationship between the Convention and the bilateral conventions already concluded between Member States of the EEC and non-member States since, with the exception of the Convention between France and Switzerland, such conventions all contain rules of indirect jurisdiction. There is, therefore, no conflict between those conventions and the rules of jurisdiction laid down in Title II of the Convention. Recognition and enforcement would seem to raise no problem, since judgments given in those non-member States must be recognized in accordance with the provisions of the bilateral conventions.

Articles 55 and 56

Article 55 contains a list of the Conventions which will be superseded on the entry into force of the EEC Convention. This will, however, be subject to:

1. the provisions of the second paragraph of Article 54, as explained in the commentary on that Article;

2. the provisions of the first paragraph of Article 56, the consequence of which is that these conventions will continue to have effect in relation to matters to which the EEC Convention does not apply (status, legal capacity etc.);

3. the provisions of the second paragraph of Article 56 concerning the recognition and enforcement of judgments given before the EEC Convention enters into force. Thus a judgment given in France before the EEC Convention enters into force and to which by virtue of Article 54 this Convention would therefore not apply, could be recognized and enforced in Italy after the entry into force of the EEC Convention under the terms of the Convention of 3 June 1930 between France and Italy. Without such a rule, judgments given before the Convention enters into force could be recognized and enforced only in accordance with the general law, and this would in several Contracting States involve the possibility of a review of the substance of the judgment, which would unquestionably be a retrograde step.

Article 57

The Member States of the Community, or some of them, are already parties to numerous international agreements which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments. Those agreements include the following:

1. The revised Convention for the navigation of the Rhine signed at Mannheim on 17 October 1868 (2);

2. The International Convention for the unification of certain rules relating to international carriage by air, and Additional Protocol, signed at Warsaw on 12 October 1929 (3);

3. The International Convention on certain rules concerning civil jurisdiction in matters of collision, signed at Brussels on 10 May 1952 (4);

4. The International Convention relating to the arrest of sea-going ships, signed at Brussels on 10 May 1952 (5);

5. The Convention on damage caused by foreign aircraft to third parties on the surface, signed at Rome on 7 October 1952 (6);

(1) Mention has been made of the Benelux Treaty although, as it has not been ratified by Luxembourg, it has not yet entered into force; this is to avoid any conflict between the Convention and that Treaty should it enter into force.

(2) These Conventions have been ratified by the following Member States of the European Economic Community (list drawn up on 15 September 1966): Belgium, the Federal Republic of Germany, France and the Netherlands.

(3) Belgium, the Federal Republic of Germany, France, Italy, Luxembourg and the Netherlands.

(4) Belgium and France.

(5) Belgium and France.

(6) Belgium and Luxembourg.

6. The International Convention concerning the carriage of goods by rail (CIM), and Annexes, signed at Berne on 25 October 1952 (1);

7. The International Convention concerning the carriage of passengers and luggage by rail (CIV) and Annexes, signed at Berne on 25 October 1952 (2);

8. The Agreement on German external debts, signed at London on 27 February 1953 (2);

9. The Convention on civil procedure concluded at The Hague on 1 March 1954 (3);

10. The Convention on the contract for the International carriage of goods by road (CMR) and Protocol of Signature, signed at Geneva on 19 May 1956 (3);

11. The Convention concerning the recognition and enforcement of decisions relating to maintenance obligations in respect of children, concluded at The Hague on 15 April 1958 (4);

12. The Convention on the jurisdiction of the contractual forum in matters relating to the international sale of goods, concluded at The Hague on 15 April 1958 (5);

13. The Convention on third party liability in the field of nuclear energy, signed at Paris on 29 July 1960 (6a), and the Additional Protocol, signed at Paris on 28 January 1964 (6b), the Supplementary Convention to the Paris Convention of 29 July 1960, and Annex, signed at Brussels on 31 January 1963 (6c), and Additional Protocol to the Supplementary Convention signed at Paris on 28 January 1964 (6d).

14. The Convention on the liability of operators of nuclear ships, and Additional Protocol, signed at Brussels on 25 May 1962 (7);

15. The Convention of 27 October 1956 between the Grand Duchy of Luxembourg, the Federal Republic of Germany and the French Republic on the canalization of the Moselle (8).

(1) Belgium, the Federal Republic of Germany, France, Luxembourg and the Netherlands.
(2) Belgium, the Federal Republic of Germany, France, Luxembourg and the Netherlands.
(3) The six States.
(4) Belgium, the Federal Republic of Germany, France, Italy and the Netherlands.
(5) Italy.
(6) (a) and (b) France and Belgium; (c) and (d) France.
(7) Not ratified.
(8) Ratified by the three States concerned.

The structure of these agreements varies considerably. Some of them govern only jurisdiction, like the Warsaw Convention of 12 October 1929 for the unification of certain rules relating to international carriage by air, or are based on indirect jurisdiction, like the Hague Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations in respect of children, or contain rules of direct or even exclusive jurisdiction, such as the International Convention of 25 October 1952 concerning the carriage of goods by rail (CIM), which lays down in Article 43 (5) that actions arising from the contract of carriage may be brought only in the courts of the State to which the defendant railway belongs.

The approach adopted by the Committee means that agreements relating to particular matters prevail over the Convention. It follows that, where those agreements lay down rules of direct or exclusive jurisdiction, the court of the State of origin will have to apply those rules to the exclusion of any others; where they contain provisions concerning the conditions governing the recognition and enforcement of judgments given in matters to which the agreements apply, only those conditions need be satisfied, so that the enforcement procedure set up by the EEC Convention will not apply to those judgments.

The Committee adopted this approach in view of the fact that the Member States of the Community, when they entered into these agreements, had for the most part contracted obligations towards non-Member States which should not be modified without the consent of those States.

Moreover, the following points must be borne in mind:

1. The rules of jurisdiction laid down in these agreements have been dictated by particular considerations relating to the matters of which they treat, e. g. the flag or port of registration of a vessel in the maritime conventions; the criterion of domicile is not often used to establish jurisdiction in such agreements.

2. The EEC Convention lays down that judgments are in principle to be recognized, whereas agreements relating to particular matters usually subject the recognition and enforcement of judgments to a certain number of conditions. These conditions may well differ from the grounds for refusal set out in Articles 27 and 28; moreover they usually include a

requirement, which the Convention has dropped, that the court of origin had jurisdiction.

3. The simplified enforcement procedure laid down by the Convention is the counterpart of Title II, the provisions of which will not necessarily have to be observed where the court of the State of origin has to apply another convention. Consequently, where agreements relating to particular matters refer for the enforcement procedure back to the ordinary law of the State in which enforcement is sought, it is that law which must be applied. There is, however, nothing to prevent a national legislature from substituting the Convention procedure for its ordinary civil procedure for the enforcement of judgments given in application of agreements governing particular matters.

Article 58

This Article deals only with certain problems of jurisdiction raised by the Convention of 15 June 1869 between France and Switzerland.

Under Article 1 of that Convention, a Swiss national domiciled in France may sue in the French courts a French national domiciled in a third State.

This option, granted by that Convention to Swiss nationals domiciled in France, might, in the absence of Article 58, conflict with the EEC Convention, according to which a defendant domiciled in a Contracting State may be sued in the courts of another Contracting State only in certain defined situations, and in any case not on the basis of rules of exorbitant jurisdiction such as those of Article 14 of the French Civil Code.

Under Article 58, a Swiss national domiciled in France can exercise the option which the Convention between France and Switzerland grants him to sue in France a Frenchman domiciled in another Contracting State, without there being any conflict with the EEC Convention, since the jurisdiction of the French Court will be recognized under the terms of Article 58. As a result of this provision, the rights secured by Swiss nationals domiciled in France are safeguarded, and France can continue to honour the obligations which it has entered into with respect to Switzerland. This is, of course, only an option which is granted to Swiss nationals, and there is nothing to prevent them from making use of the other provisions of the EEC Convention.

Article 59

It will be recalled that under Article 3 of the Convention, what are known as the rules of 'exorbitant' jurisdiction are no longer to be applied in cases where the defendant is domiciled in the Community, but that under Article 4 they are still fully applicable where the defendant is domiciled outside the Community, and that, in such cases, judgments given by a court whose jurisdiction derives from those rules are to be recognized and enforced in the other Contracting States.

It must first be stressed that Article 59 does not reduce the effect of Article 4 of the Convention, for the latter Article does not prevent a State, in an agreement with a third State, from renouncing its rules of exorbitant jurisdiction either in whole or only in certain cases, for example, if the defendant is a national of that third State or if he is domiciled in that State. Each State party to the EEC Convention remains quite free to conclude agreements of this type with third States, just as it is free to amend the provisions of its legislation which contain rules of exorbitant jurisdiction; Article 4 of the Convention imposes no common rule, but merely refers back to the internal law of each State.

The only objective of Article 59 is to lessen the effects, within the Community, of judgments given on the basis of rules of exorbitant jurisdiction. Under the combined effect of Articles 59 and 28, recognition or enforcement of a judgment given in a State party to the Convention can be refused in any other Contracting State:

1. where the jurisdiction of the court of origin could only be based on one of the rules of exorbitant jurisdiction specified in the second paragraph of Article 3. It would therefore be no ground for refusal that the court of origin founded its jurisdiction on one of those rules, if it could equally well have founded its jurisdiction on other provisions of its law. For example, a judgment given in France on the basis of Article 14 of the Civil Code could be recognized and enforced if the litigation related to a contract which was to be performed in France;

2. where a convention on the recognition and enforcement of judgments exists between the State addressed and a third State, under the terms of which judgments given in any other State on the basis of a rule of exorbitant jurisdiction will be neither recognized nor enforced where the defendant was domiciled or habitually resident in the third State. Belgium would thus not be obliged to recognize or enforce a judgment given in France against a person domiciled or habitually resident in Norway where the jurisdiction of the French courts over that person could be based only on Article 14 of the Civil Code since a convention between Belgium and Norway exists under which those two countries undertook not to recognize or enforce such judgments. Article 59 includes a reference not only to the defendant's domicile but also to his habitual residence, since in many non-member States this criterion is in practice equivalent to the concept of domicile as this is understood in the Member States of the Community (see also Article 10 (1)) of the Hague Convention on the recognition and enforcement of foreign judgments in civil and commercial matters).

As regards the recognition and enforcement of judgments. Article 59 thus opens the way towards regulating the relations between the Member States of the EEC and other States, in particular the increasing number which are members of the Hague Conference. This seemed to justify a slight encroachment on the principle of free movement of judgments.

CHAPTER X

FINAL PROVISIONS

Articles 60 to 62 and 64 to 68

These Articles give rise to no particular comment.

Article 63

Article 63 deals with the accession of new Member States to the European Economic Community.

It is desirable, in the opinion of the Committee, that, in order to be able to fulfil the obligations laid down in Article 220 of the Treaty establishing the European Economic Community, such States should accede to the Convention. The legal systems of such States might, however, prevent the acceptance of the Convention as it stands, and negotiations might be necessary. If such were the case, any agreement concluded between the Six and a new Member State should not depart from the basic principles of the Convention. That is why Article 63 provides that the Convention must be taken as a basis for the negotiations, which should be concerned only with such adjustments as are essential for the new Member State to be able to accede to the Convention.

The negotiations with that State would not necessarily have to precede its admission to the Community.

Since the adjustments would be the subject of a special agreement between the Six and the new Member State, it follows from the second paragraph of Article 63 that these negotiations could not be used as an opportunity for the Six to reopen debate on the Convention.

CHAPTER XI

PROTOCOL

Article I

Article I of the Protocol takes account of the special position of the Grand Duchy of Luxembourg. It provides that any person domiciled in Luxembourg who is sued in a court of another Contracting State pursuant to Article 5 (1) (which provides, in matters relating to a contract, that the courts for the place of performance of

the obligation shall have jurisdiction), may refuse the jurisdiction of those courts. A similar reservation is included in the Benelux Treaty (Protocol, Article I), and it is justified by the particular nature of the economic relations between Belgium and Luxembourg, in consequence of which the greater part of the contractual obligations between persons resident in the two countries are performed or are to be performed in Belgium. It follows from Article 5 (1) that a plaintiff domiciled in Belgium could in most cases bring an action in the Belgian courts.

Another characteristic of Luxembourg economic relations is that a large number of the contracts concluded by persons resident in Luxembourg are international contracts. In view of this, it was clearly necessary that agreements conferring jurisdiction which could be invoked against persons domiciled in Luxembourg should be subject to stricter conditions than those of Article 17. The text adopted is based on that of the Benelux Treaty (Article 5 (3)).

Article II

Article II of the Protocol also has its origin in the Benelux Treaty. The latter applies *inter alia* to judgments given in civil matters by criminal courts, and thus puts an end to a controversy between Belgium and the Netherlands on the interpretation of the 1925 Convention between Belgium and the Netherlands. As the report annexed to the Treaty explains [1], the reluctance of the Netherlands authorities to enforce judgments given by foreign criminal courts in civil claims is due to the fact that a Netherlander charged with a punishable offence committed in a foreign country may be obliged to appear in person before the foreign criminal court in order to defend himself even in relation to the civil claim, although the Netherlands does not extradite its nationals. This objection is less pertinent than would appear at first sight under certain systems of law, and in particular in France, Belgium and Luxembourg, the judgment in a criminal case has the force of *res judicata* in any subsequent civil action.

In view of this, the subsequent civil action brought against a Netherlander convicted of a criminal offence will inevitably go against him. It is therefore essential that he should be able to conduct his defence during the criminal stage of the proceedings.

For this reason the Convention, like the Benelux Treaty, provides (see the Protocol) that a person domiciled in a Contracting State may arrange for his defence in the criminal courts of any other Contracting State.

Under Article II of the Protocol, that person will enjoy this right even if he does not appear in person and even if the code of criminal procedure of the State in question does not allow him to be represented. However, if the court seised of the matter should specifically order appearance in person, the judgment given without the person concerned having had the opportunity to arrange for his defence, because he did not appear in person, need not be recognized or enforced in the other Contracting States.

This right is, however, accorded by Article II of the Protocol only to persons who are prosecuted for an offence which was not intentionally committed; this includes road accidents.

Article III

This Article is also based on the Benelux Treaty (Article III of the Protocol).

It abolishes the levying, in the State in which enforcement is sought, of any charge, duty or fee which is calculated by reference to the value of the matter in issue, and seeks to remedy the distortion resulting from the fact that enforcement gives rise to the levying of fixed fees in certain countries and proportional fees in others.

This Article is not concerned with lawyers' fees.

In the opinion of the Committee, while it was desirable to abolish proportional fees on enforcement, there was no reason to suppress the fixed charges, duties and fees which are payable, even under the internal laws of the Contracting States, whenever certain procedural acts are performed, and which in some respects can be regarded as fees charged for services rendered to the parties.

Article IV

(See the commentary on Article 20 (2) page 66 *et seq.*)

[1] Benelux Treaty: see the commentary on Article 13 and Article II of the Protocol.

Article V

(See the commentary on Article 6 (2), page 27 *et seq.)*

Article VI

This Article relates to the case where legislative amendments to national laws affect either the provisions of the laws mentioned in the Convention — as might happen in the case of the provisions specified in the second paragraph of Article 3 — or affect the courts listed in Section 2 of Title III. Information on these matters must be passed to the Secretary General of the Council of the European Communities to enable him, in accordance with Article 64 (e), to notify the other Contracting States.

ANNEX

Committee of experts who drafted the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters

CHAIRMAN	
Professor A. Bülow	Staatssekretär a. D. im Bundesministerium der Justiz der Bundesrepublik Deutschland
Belgium	
Mr P. Jenard, *Chairman of the Working Party*	Directeur au ministère des affaires étrangères et du commerce extérieur
Mr H. Meuleman	Directeur général au ministère de la justice
Mr M. Rouserez	Magistrat délégué au ministère de la justice
Mr Ch. van Reepinghen (†)	Commissaire royal à la réforme judiciaire
Mr E. Krings	Commissaire royal à la réforme judiciaire
Professor R. van der Elst	Avocat, professeur à l'université libre de Bruxelles
Germany	
Mr H. Arnold	Ministerialrat im Bundesministerium der Justiz
France	
Mr J. Baudoin	Sous-directeur des affaires civiles et du sceau — Ministère de la justice
Mr P. Bellet	Premier vice-président du tribunal de grande instance de la Seine
Mr Y. Cotte	Chef de bureau 'Droit européen et international' — Ministère de la justice
Italy	
Professor L. Marmo (†)	Consigliere di Corte di cassazione — Ministero di grazia e giustizia
Mr Caldarera	Consigliere di Corte di cassazione addetto al servizio del contenzioso diplomatico del ministero degli affari esteri
Mr G. di Blasi	Magistrato, ministero degli affari esteri
Professor R. Miccio	Consigliere di Corte d'appello, ministero di grazia e giustizia

Luxembourg

Mr A. Huss	Procureur général d'État
Mr F. Goerens	Avocat général

Netherlands

Mr Th. van Sasse van Ysselt	Directeur, Afdelingschef bij het ministerie van justitie
Mr C. W. Dubbink	Raadsheer in de Hoge raad der Nederlanden

Observers

Benelux Committee on the unification of law

Mrs M. Weser	Member of the Committee

Hague Conference on private international law

Mr M. H. van Hoogstraten	Secretary-General to the Conference
Mr G. Droz	First Secretary to the Permanent Bureau of the Conference

Commission of the European Economic Community

— Directorate-General for Competition

Mr W. Hauschild	*Head of Division*
Miss M. Van Es	*Member of Division*

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Protocol on the interpretation of the 1968 Convention by the Court of Justice (consolidated version)

Protocol on the interpretation of the 1968 Convention by the Court of Justice (consolidated version)

PRELIMINARY NOTE

The signing on 29 November 1996 of the Convention on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice has made it desirable, as with previous accessions, for legal practitioners to be provided with an up-to-date consolidated version of the texts of the Brussels Convention and of that Protocol published in Official Journal of the European Communities C 189 of 28 July 1990.

These texts are accompanied by three Declarations by the representatives of the Governments of the Member States, one made in 1978 in connection with the International Convention relating to the arrest of sea-going ships, another in 1989 concerning the ratification of the Convention on the accession of the Kingdom of Spain and the Portuguese Republic and the last in 1996 on jurisdiction for cases where, in the framework of the provision of services, workers are posted in a Member State other than that in which their work is normally performed.

The text printed in this edition was drawn up by the General Secretariat of the Council, in whose archives the originals of the instruments concerned are deposited. It should be noted, however, that this text has no binding force. The official texts of the instruments consolidated are to be found in the following Official Journals.

Language version of the Official Journal	1968 Brussels Convention	1971 Protocol	1978 Accession Convention	1982 Accession Convention	1989 Accession Convention	1997 Accession Convention
German	L 299, 31. 12. 1972, p. 32	L 204, 2. 8. 1975, p. 28	L 304, 30. 10. 1978, p. 1	L 388, 31. 12. 1982, p. 1	L 285, 3. 10. 1989, p. 1	C 15, 15. 1. 1997, p. 1
English	L 304, 30. 10. 1978, p. 36	L 304, 30. 10. 1978, p. 50	L 304, 30. 10. 1978, p. 1	L 388, 31. 12. 1982, p. 1	L 285, 3. 10. 1989, p. 1	C 15, 15. 1. 1997, p. 1
Danish	L 304, 30. 10. 1978, p. 17	L 304, 30. 10. 1978, p. 31	L 304, 30. 10. 1978, p. 1	L 388, 31. 12. 1982, p. 1	L 285, 3. 10. 1989, p. 1	C 15, 15. 1. 1997, p. 1
French	L 299, 31. 12. 1972, p. 32	L 204, 2. 8. 1975, p. 28	L 304, 30. 10. 1978, p. 1	L 388, 31. 12. 1982, p. 1	L 285, 3. 10. 1989, p. 1	C 15, 15. 1. 1997, p. 1

Language version of the Official Journal	1968 Brussels Convention	1971 Protocol	1978 Accession Convention	1982 Accession Convention	1989 Accession Convention	1997 Accession Convention
Greek	L 388, 31. 12. 1982, p. 7	L 388, 31. 12. 1982, p. 20	L 388, 31. 12. 1982, p. 24	L 388, 31. 12. 1982, p. 1	L 285, 3. 10. 1989, p. 1	C 15, 15. 1. 1997, p. 1
Irish	Special Edition (L 388)	Special Edition (L 388)	Special Edition (L 388)	Special Edition (L 388)	Special Edition (L 285)	Special Edition (C 15)
Italian	L 299, 31. 12. 1972, p. 32	L 204, 2. 8. 1975, p. 28	L 304, 30. 10. 1978, p. 1	L 388, 31. 12. 1982, p. 1	L 285, 3. 10. 1989, p. 1	C 15, 15. 1. 1997, p. 1
Dutch	L 299, 31. 12. 1972, p. 32	L 204, 2. 8. 1975, p. 28	L 304, 30. 10. 1978, p. 1	L 388, 31. 12. 1982, p. 1	L 285, 3. 10. 1989, p. 1	C 15, 15. 1. 1997, p. 1
Spanish	L 285, 3. 10. 1989, p. 24	L 285, 3. 10. 1989, p. 37	L 285, 3. 10. 1989, p. 41	L 285, 3. 10. 1989, p. 54	L 285, 3. 10. 1989, p. 1	C 15, 15. 1. 1997, p. 1
Portuguese	L 285, 3. 10. 1989, p. 24	L 285, 3. 10. 1989, p. 37	L 285, 3. 10. 1989, p. 41	L 285, 3. 10. 1989, p. 54	L 285, 3. 10. 1989, p. 1	C 15, 15. 1. 1997, p. 1
Swedish	C 15, 15. 1. 1997, p. 30	C 15, 15. 1. 1997, p. 10	C 15, 15. 1. 1997, p. 14	C 15, 15. 1. 1997, p. 26	C 15, 15. 1. 1997, p. 43	C 15, 15. 1. 1997, p. 1
Finnish	C 15, 15. 1. 1997, p. 30	C 15, 15. 1. 1997, p. 10	C 15, 15. 1. 1997, p. 14	C 15, 15. 1. 1997, p. 26	C 15, 15. 1. 1997, p. 43	C 15, 15. 1. 1997, p. 1

ANNEX

PROTOCOL on the interpretation by the Court of Justice of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (1)

THE HIGH CONTRACTING PARTIES TO THE TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY,

Having regard to the Declaration annexed to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, signed at Brussels on 27 September 1968,

Have decided to conclude a Protocol conferring jurisdiction on the Court of Justice of the European Communities to interpret that Convention, and to this end have designated as their Plenipotentiaries:

[List of the plenipotentiaries designated by the Member States]

WHO, meeting within the Council, having exchanged their full powers, found in good and due form,

HAVE AGREED AS FOLLOWS:

Article 1

The Court of Justice of the European Communities shall have jurisdiction to give rulings on the interpretation of the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and of the Protocol annexed to that Convention, signed at Brussels on 27 September 1968, and also on the interpretation of the present Protocol.

The Court of Justice of the European Communities shall also have jurisdiction to give rulings on the interpretation of the Convention on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention of 27 September 1968 and to this Protocol (2).

The Court of Justice of the European Communities shall also have jurisdiction to give rulings on the interpretation of the Convention on the accession of the Hellenic Republic to the Convention of 27 September 1968 and to this Protocol, as adjusted by the 1978 Convention (3).

The Court of Justice of the European Communities shall also have jurisdiction to give rulings on the interpretation of the Convention on the accession of the Kingdom of Spain and the Portuguese Republic to the Convention of 27 September 1968 and to this Protocol, as adjusted by the 1978 Convention and the 1982 Convention (4).

The Court of Justice of the European Communities shall also have jurisdiction to give rulings on the interpretation of the Convention on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the Convention of 27 September 1968 and to this Protocol, as adjusted by the 1978 Convention, the 1982 Convention and the 1989 Convention (5).

Article 2

The following courts may request the Court of Justice to give preliminary rulings on questions of interpretation:

1. - in Belgium: 'la Cour de Cassation` - 'het Hof van Cassatie` and 'le Conseil d'Etat` - 'de Raad van State`,

- in Denmark: 'højesteret`,
- in the Federal Republic of Germany: 'die obersten Gerichtshöfe des Bundes`,
- in Greece: the 'aí¦ôaôa äéêaoô«ñéa`,
- in Spain: 'el Tribunal Supremo`,
- in France: 'la Cour de Cassation` and 'le Conseil d'Etat`,
- in Ireland: the Supreme Court,
- in Italy: 'la Corte Suprema di Cassazione`,
- in Luxembourg: 'la Cour supérieure de Justice` when sitting as 'Cour de Cassation`,
- in Austria, the 'Oberste Gerichtshof`, the 'Verwaltungsgerichtshof` and the 'Verfassungsgerichtshof`,
- in the Netherlands: 'de Hoge Raad`,
- in Portugal: 'o Supremo Tribunal de Justiça` and 'o Supremo Tribunal Administrativo`,
- in Finland, 'korkein oikeus/högsta domstolen` and 'korkein hallintooikeus/högsta förvaltningsdomstolen`,
- in Sweden, 'Högsta domstolen`, 'Regeringsrätten`, 'Arbetsdomstolen` and 'Marknadsdomstolen`,
- in the United Kingdom: the House of Lords and courts to which application has been made under the second paragraph of Article 37 or under Article 41 of the Convention (6);

2. the courts of the Contracting States when they are sitting in an appellate capacity;

3. in the cases provided for in Article 37 of the Convention, the courts referred to in that Article.

Article 3

1. Where a question of interpretation of the Convention or of one of the other instruments referred to in Article 1 is raised in a case pending before one of the courts listed in point 1 of Article 2, that court shall, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

2. Where such a question is raised before any court referred to in point 2 or 3 of Article 2, that court may under the conditions laid down in paragraph 1, request the Court of Justice to give a ruling thereon.

Article 4

1. The competent authority of a Contracting State may request the Court of Justice to give a ruling on a question of interpretation of the Convention or of one of the other instruments referred to in Article 1 if judgments given by courts of that State conflict with the interpretation given either by the Court of Justice or in a judgment of one of the courts of another Contracting State referred to in point 1 or 2 of Article 2. The provisions of this paragraph shall apply only to judgments which have become res judicata.

2. The interpretation given by the Court of Justice in response to such a request shall not affect the judgments which gave rise to the request for interpretation.

3. The Procurators-General of the Courts of Cassation of the Contracting States, or any other authority designated by a Contracting State, shall be entitled to request the Court of Justice for a ruling on interpretation in accordance with paragraph 1.

4. The Registrar of the Court of Justice shall give notice of the request to the Contracting States, to the Commission and to the Council of the European Communities; they shall then be entitled within two months of the notification to submit statements of case or written observations to the Court.

5. No fees shall be levied or any costs or expenses awarded in respect of the proceedings provided for in this Article.

Article 5

1. Except where this Protocol otherwise provides, the provisions of the Treaty establishing the European Economic Community and those of the Protocol on the Statute of the Court of Justice annexed thereto, which are applicable when the Court is requested to give a preliminary ruling, shall also apply to any proceedings for the interpretation of the Convention and the other instruments referred to in Article 1.

2. The Rules of Procedure of the Court of Justice shall, if necessary, be adjusted and supplemented in accordance with Article 188 of the Treaty establishing the European Economic Community.

Article 6

. . . (7)

Article 7 (8)

This Protocol shall be ratified by the signatory States. The instruments of ratification shall be deposited with the Secretary-General of the Council of the European Communities.

Article 8 (9)

This Protocol shall enter into force on the first day of the third month following the deposit of the instrument of ratification by the last signatory State to take this step; provided that it shall at the earliest enter into force at the same time as the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters.

Article 9

The Contracting States recognize that any State which becomes a member of the European Economic Community, and to which Article 63 of the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters applies, must accept the provisions of this Protocol, subject to such adjustments as may be required.

Article 10 (10)

The Secretary-General of the Council of the European Communities shall notify the signatory States of:

(a) the deposit of each instrument of ratification;

(b) the date of entry into force of this Protocol;

(c) any designation received pursuant to Article 4 (3);

(d) . . . (11).

Article 11

The Contracting States shall communicate to the Secretary-General of the Council of the European Communities the texts of any provisions of their laws which necessitate an amendment to the list of courts in point 1 of Article 2.

Article 12

This Protocol is concluded for an unlimited period.

Article 13

Any Contracting State may request the revision of this Protocol. In this event, a revision conference shall be convened by the President of the Council of the European Communities.

Article 14 (12)

This Protocol, drawn up in a single original in the Dutch, French, German and Italian languages, all four texts being equally authentic, shall be deposited in the archives of the Secretariat of the Council of the European Communities. The Secretary-General shall transmit a certified copy to the Government of each signatory State (13).

In witness whereof, the undersigned Plenipotentiaries have affixed their signatures below this Protocol.

Done at Luxembourg on the third day of June in the year one thousand nine hundred and seventy-one.

[Signatures of the plenipotentiaries]

JOINT DECLARATION

The Government of the Kingdom of Belgium, the Federal Republic of Germany, the French Republic, the Italian Republic, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands,

On signing the Protocol on the interpretation by the Court of Justice of the Convention of 27

September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters,

Desiring to ensure that the provisions of that Protocol are applied as effectively and as uniformly as possible,

Declare themselves ready to organize, in cooperation with the Court of Justice, an exchange of information on the judgments given by the courts referred to in Article 2 (1) of that Protocol in application of the Convention and the Protocol of 27 September 1968.

In witness whereof, the undersigned Plenipotentiaries have affixed their signatures below this Joint Declaration.

Done at Luxembourg on the third day of June in the year one thousand nine hundred and seventy-one.

[Signatures of the plenipotentiaries]

JOINT DECLARATION of 9 October 1978

THE REPRESENTATIVES OF THE GOVERNMENTS OF THE MEMBER STATES OF THE EUROPEAN ECONOMIC COMMUNITY, MEETING WITHIN THE COUNCIL,

Desiring to ensure that in the spirit of the Convention of 27 September 1968 uniformity of jurisdiction should also be achieved as widely as possible in maritime matters,

Considering that the International Convention relating to the arrest of sea-going ships, signed at Brussels on 10 May 1952, contains provisions relating to such jurisdiction,

Considering that all of the Member States are not parties to the said Convention,

Express the wish that Member States which are coastal States and have not already become parties to the Convention of 10 May 1952 should do so as soon as possible.

In witness whereof, the undersigned Plenipotentiaries have affixed their signature below this Joint Declaration.

Done at Luxembourg on the ninth day of October in the year one thousand nine hundred and seventy-eight.

[Signatures of the plenipotentiaries]

JOINT DECLARATION of 26 May 1989 concerning the ratification of the Convention on the accession of the Kingdom of Spain and the Portuguese Republic to the 1968 Brussels Convention

Upon signature of the Convention on the accession of the Kingdom of Spain and the Portuguese Republic to the 1968 Brussels Convention, done at Donostia - San Sebastian on 26 May 1989,

THE REPRESENTATIVES OF THE GOVERNMENTS OF THE MEMBER STATES OF THE EUROPEAN COMMUNITIES, MEETING WITHIN THE COUNCIL,

DESIROUS that, in particular with a view to the completion of the internal market, application of the Brussels Convention and of the 1971 Protocol should be rapidly extended to the entire Community,

WELCOMING the conclusion on 16 September 1988 of the Lugano Convention which extends the principles of the Brussels Convention to those States becoming parties to the Lugano Convention, designed principally to govern relations between the Member States of the European Economic Community (EEC) and those of the European Free Trade Association (EFTA) with regard to the legal protection of persons established in any of those States and to the simplification of formalities for the reciprocal recognition and enforcement of judgments,

CONSIDERING that the Brussels Convention has as its legal basis Article 220 of the Treaty of Rome and is interpreted by the Court of Justice of the European Communities,

MINDFUL that the Lugano Convention does not affect the application of the Brussels Convention as regards relations between Member States of the European Economic Community, since such relations must be governed by the Brussels Convention,

NOTING that the Lugano Convention is to enter into force after two States, of which one is a member of the European Communities and the other a member of the European Free Trade Association, have deposited their instruments of ratification,

DECLARE THEMSELVES READY to take every appropriate measure with a view to ensuring that national procedures for the ratification of the Convention on the accession of the Kingdom of Spain and the Portuguese Republic to the Brussels Convention, signed today, are completed as soon as possible and, if possible, by 31 December 1992 at the latest.

In witness whereof the undersigned have signed this declaration.

Done at Donostia - San Sebastian on the twenty-sixth day of May in the year one thousand nine hundred and eighty-nine.

[Signatures of the plenipotentiaries]

(1) Text as amended by the Convention of 9 October 1978 on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland - hereafter referred to as the '1978 Accession Convention` - by the Convention of 25 October 1982 on the accession of the Hellenic Republic - hereafter referred to as the '1982 Accession Convention`, and by the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic - hereafter referred to as the '1989 Accession Convention` - and by the Convention of 29 November 1996 on the Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden - hereafter referred to as the '1996 Accession Convention`.

(2) Second paragraph added by Article 30 of the 1978 Accession Convention.

(3) Third paragraph added by Article 10 of the 1982 Accession Convention.

(4) Fourth paragraph added by Article 24 of the 1989 Accession Convention.

(5) Fifth paragraph added by Article 11 of the 1996 Accession Convention.

(6) Point 1 as amended by Article 31 of the 1978 Accession Convention, by Article 11 of the 1982 Accession Convention, by Article 25 of the 1989 Accession Convention, and by Article 12 of the 1996 Accession Convention.

(7) Article 26 of the 1989 Accession Convention provides for the deletion of Article 6 as amended by Article 32 of the 1978 Accession Convention.

(8) Ratification of the 1978 and 1982 Accession Conventions was governed by Articles 38 and 14 of those Conventions. The ratification of the 1989 Accession Convention is governed by Article 31 of that Convention, which reads as follows:

'Article 31

This Convention shall be ratified by the signatory States. The instruments of ratification shall be deposited with the Secretary-General of the Council of the European Communities.`

The ratification of the 1996 Accession Convention is governed by Article 15 of that Convention, which reads as follows:

'Article 15

This Convention shall be ratified by the signatory States. The instruments of ratification shall be deposited with the Secretary-General of the Council of the European Union.`

(9) The entry into force of the 1978 and 1982 Accession Convention was governed by Articles 39 and 15 of those Conventions.

The entry into force of the 1989 Accession Convention is governed by Article 32 of that Convention, which reads as follows:

'Article 32

1. This Convention shall enter into force on the first day of the third month following the date on which two signatory States, of which one is the Kingdom of Spain or the Portuguese Republic, deposit their instruments of ratification.

2. This Convention shall take effect in relation to any other signatory State on the first day of the third month following the deposit of its instrument of ratification.`

The entry into force of the 1996 Accession Convention is governed by Article 16 of that Convention, which reads as follows:

'Article 16

1. This Convention shall enter into force on the first day of the third month following the date on which two signatory States, one of which is the Republic of Austria, the Republic of Finland or the Kingdom of Sweden, deposit their instruments of ratification.

2. This Convention shall produce its effects for any other signatory State on the first day of the third month following the deposit of its instrument of ratification.`.

(10) Notification concerning the 1978 and 1982 Accession Conventions is governed by Articles 40 and 16 of those Conventions.

Notification concerning the 1989 Accession Convention is governed by Article 33 of that Convention, which reads as follows:

'Article 33

The Secretary-General of the Council of the European Communities shall notify the signatory States of:

(a) the deposit of each instrument of ratification;

(b) the dates of entry into force of this Convention for the Contracting States.`

Notification concerning the 1996 Accession Convention is governed by Article 17 of that Convention, which reads as follows:

'Article 17

The Secretary-General of the Council of the European Union shall notify the signatory States of:

(a) the deposit of each instrument of ratification;

(b) the dates of entry into force of this Convention for the Contracting States.`

(11) Article 27 of the 1989 Accession Convention provides for the deletion of (d) as amended by Article 33 of the 1978 Accession Convention.

(12) An indication of the authentic texts of the Accession Conventions is to be found in the following provisions:

- with regard to the 1978 Accession Convention, in Article 41 of that Convention, which reads as follows:

'Article 41

This Convention, drawn up in a single original in the Danish, Dutch, English, French, German, Irish and Italian languages, all seven texts being equally authentic, shall be deposited in the archives of the Secretariat of the Council of the European Communities. The Secretary-General shall transmit a certified copy to the Government of each signatory State.`,

- with regard to the 1982 Accession Convention, in Article 17 of that Convention, which reads as follows:

'Article 17

This Convention, drawn up in a single original in the Danish, Dutch, English, French, German, Greek, Irish and Italian languages, all eight texts being equally authentic, shall be deposited in the archives of the General Secretariat of the Council of the European Communities. The Secretary-General shall transmit a certified copy to the Government of each signatory State.`,

- with regard to the 1989 Accession Convention, in Article 34 of that Convention, which reads as follows:

'Article 34

This Convention, drawn up in a single original in the Danish, Dutch, English, French, German, Greek, Irish, Italian, Portuguese and Spanish languages, all 10 texts being equally authentic, shall be deposited in the archives of the General Secretariat of the Council of the European Communities. The Secretary-General shall transmit a certified copy to the Government of each signatory State.`,

- with regard to the 1996 Accession Convention, in Article 18 of that Convention, which reads as follows:

'Article 18

This Convention, drawn up in a single original in the Danish, Dutch, English, Finnish, French, German, Greek, Irish, Italian, Portuguese, Spanish and Swedish languages, all 12 texts being equally authentic, shall be deposited in the archives of the General Secretariat of the Council of the European Union. The Secretary-General shall transmit a certified copy to the Government of each signatory State.`

(13) Legal backing for the drawing-up of the authentic texts of the 1968 Convention in the official languages of the acceding Member States is to be found:

- with regard to the 1978 Accession Convention, in Article 37 of that Convention, which reads as follows:

'Article 37

The Secretary-General of the Council of the European Communities shall transmit a certified copy of the 1968 Convention and of the 1971 Protocol in the Dutch, French, German and Italian languages to the Governments of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland.

The texts of the 1968 Convention and the 1971 Protocol, drawn up in the Danish, English and Irish languages, shall be annexed to this Convention. The texts drawn up in the Danish, English and Irish languages shall be authentic under the same conditions as the original texts of the 1968 Convention and the 1971 Protocol.`

- with regard to the 1982 Accession Convention, in Article 13 of that Convention, which reads as follows:

'Article 13

The Secretary-General of the Council of the European Communities shall transmit a certified copy of the 1968 Convention, of the 1971 Protocol and of the 1978 Convention in the Danish, Dutch, English, French, German, Irish and Italian languages to the Government of the Hellenic Republic.

The texts of the 1968 Convention, of the 1971 Protocol and of the 1978 Convention, drawn up in the Greek language, shall be annexed to this Convention. The texts drawn up in the Greek language shall be authentic under the same conditions as the other texts of the 1968 Convention, the 1971 Protocol and the 1978 Convention.`

- with regard to the 1989 Accession Convention, in Article 30 of that Convention, which reads as follows:

'Article 30

1. The Secretary-General of the Council of the European Communities shall transmit a certified copy of the 1968 Convention, of the 1971 Protocol, of the 1978 Convention and of the 1982 Convention

in the Danish, Dutch, English, French, German, Greek, Irish and Italian languages to the Governments of the Kingdom of Spain and of the Portuguese Republic.

2. The texts of the 1968 Convention, of the 1971 Protocol, of the 1978 Convention and of the 1982 Convention, drawn up in the Portuguese and Spanish languages, are set out in Annexes II, III, IV and V to this Convention. The texts drawn up in the Portuguese and Spanish languages shall be authentic under the same conditions as the other texts of the 1968 Convention, the 1971 Protocol, the 1978 Convention and the 1982 Convention.`

- with regard to the 1996 Accession Convention, in Article 14 of that Convention, which reads as follows:

'Article 14

1. The Secretary-General of the Council of the European Union shall transmit a certified copy of the 1968 Convention, of the 1971 Protocol, of the 1978 Convention, of the 1982 Convention and of the 1989 Convention in the Danish, Dutch, English, French, German, Greek, Irish, Italian, Spanish and Portuguese languages to the Governments of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden.

2. The texts of the 1968 Convention, of the 1971 Protocol, of the 1978 Convention, of the 1982 Convention and of the 1989 Convention, drawn up in the Finnish and Swedish languages, shall be authentic under the same conditions as the other texts of the 1968 Convention, the 1971 Protocol, the 1978 Convention, the 1982 Convention and the 1989 Convention.`

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REPORT ON THE PROTOCOLS

on the interpretation by the Court of Justice of the Convention of 29 February 1968 on the mutual recognition of companies and legal persons and of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters

(Signed at Luxembourg, 3 June 1971)

By Mr P. JENARD

Directeur in the Belgian Ministry of Foreign Affairs and External Trade

I. General remarks

1. In Joint Declaration No 3, annexed to the Convention on the mutual recognition of companies and legal persons, signed at Brussels on 29 February 1968, the Governments of the Member States of the European Communities expressed their willingness to study means of avoiding differences in the interpretation of the Convention. To this end, they agreed to examine the possibility of conferring jurisdiction in certain matters on the Court of Justice of the European Communities and, if necessary, to negotiate an agreement to that effect.

A similar Joint Declaration was annexed to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, signed at Brussels on 27 September 1968. This Declaration envisages the possibility of assigning to the Court of Justice jurisdiction both to interpret the Convention and to settle any conflicting claims and disclaimers of jurisdiction which may arise in applying it.

2. In the course of negotiations to give effect to these Declarations, it was soon agreed to give the Court additional jurisdiction, and to use for the purpose a system based on Article 177 of the Treaty. The further question nevertheless arose as to whether it would be appropriate to draft a general convention applicable to all the conventions which had been or were to be concluded on the basis of Article 220, or whether it would not be preferable to seek solutions which took into account the individual characteristics of each of these conventions.

This question was approached in an entirely pragmatic manner. A detailed study was made of the two Conventions already signed, the Convention on the mutual recognition of companies and legal persons, and the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters.

3. This study led to the conclusion that these two Conventions have distinct features which justify different arrangements for their interpretation by the Court of Justice. Although it had been suggested that a single convention might determine the jurisdiction of the Court to interpret all the conventions concluded on the basis of Article 220 of the Treaty, in the end it was thought preferable to conclude separate Protocols which would be better adapted to the requirements of each of the Conventions.

4. There was no need to apply the procedure of Article 236 of the Treaty for the purposes of concluding these Protocols since they deal with the interpretation of Conventions drawn up pursuant to Article 220 of the Treaty and in no way aim at revising the Treaty itself.

They merely confer on the Court of Justice further jurisdiction which is additional to, but does not affect, its existing jurisdiction [1].

II. Protocol on the interpretation of the Convention on the mutual recognition of companies and legal persons

5. As regards the interpretation of the Convention on the mutual recognition of companies and legal persons,

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[1] On various occasions, jurisdiction has been conferred on the Court of Justice without reference to the revision procedure set out in Article 236 (internal agreements under Conventions of Association — see OJ No 93, 11. 6. 1964, p. 1490/64; provisions of Council Regulation No 17 on appeal to the Court — see OJ No 13, 21. 2. 1962, p. 204/62).

there was thought to be no reason for departing from the preliminary ruling system laid down in Article 177 of the Treaty; and this system was therefore adopted in the draft Protocol in question.

Article 1 of the Protocol confers on the Court jurisdiction to interpret the Convention of 29 February 1968, Joint Declaration No 1 contained in the Protocol annexed to that Convention, and the Protocol which is the subject of this report. Article 2 repeats, in identical terms, the second and third paragraphs of Article 177, defining the circumstances in which references may be made to the Court by courts which have to decide questions of interpretation.

6. Since the Convention sometimes refers back to national law, the problem arose as to whether it might be necessary expressly to exclude the jurisdiction of the Court to interpret such law. It was thought unnecessary expressly to exclude jurisdiction in this respect, for the cases decided by the Court of Justice have already firmly established that it has no jurisdiction to interpret national law.

7. Article 3 concerns the procedure to be followed before the Court of Justice when, in accordance with the Protocol, the Court is asked to give a ruling.

It was thought appropriate to provide that the Rules of Procedure of the Court should be supplemented to take account of the new jurisdiction. Article 3 (2) indicated that Article 188 of the Treaty is to be used for this purpose.

It was considered that, in order to ensure that the Convention would be applied as effectively and as uniformly as possible, an exchange of information should be organized on judgments of national courts against whose decision there is no remedy under national law.

A Joint Declaration to this effect is annexed to the Protocol.

III. Protocol on the interpretation of the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters

8. The study of the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters showed that it has features sufficiently distinctive to justify a separate system for its interpretation by the Court of Justice.

There was unanimous agreement on the need to ensure uniform interpretation of the Convention, and hence to confer new jurisdiction on the Court of Justice, using a system based on Article 177. But it was feared that, in view of the number and diversity of the disputes to which the Convention applies, an application for a preliminary ruling on the lines of Article 177 might be made by one of the parties either as a delaying tactic or as a means of putting pressure on an opponent of modest financial means. In short, the application might be made for improper purposes.

(1) This Convention will be applicable in a large number of cases. It governs not only recognition and enforcement of judgments, but also the international jurisdiction of the courts, and in particular all cases where a person is sued in the courts of a Contracting State in which he is not domiciled. Moreover, it is not confined to a limited field such as the recognition of companies, but extends to all civil and commercial matters relating to rights in property (litigation over all kinds of contract, non-contractual liability, maintenance, etc.).

(2) At the stage of recognition and enforcement, Article 34 of the Convention provides that the court to which application is made for the issue of an order for enforcement shall give its decision without delay, and without the party against whom enforcement is sought being entitled at that stage of the proceedings to make any submissions.

Plainly, an application to the Court of Justice for a preliminary ruling would, if made at this stage, undermine the object of the Convention which, by introducing a new, standardized, *ex parte* procedure for enforcement, aims at eliminating delaying tactics and preventing the respondent from withdrawing his assets from any measure of enforcement.

(3) Finally it must be stressed that decisions of the Court of Justice on the interpretation of the Convention differ from decisions on the interpretation of other conventions, as regards the consequences for the parties.

Thus, if the court were to interpret a provision of the Convention so as to rule that the courts seised of a matter had no jurisdiction, the proceedings might well have to be instituted again from the outset, either in a State other than that whose courts were

originally seised or, perhaps, in other courts in the same State (see, for example, Article 5 of the Convention which lays down special rules of jurisdiction).

9. The Protocol therefore follows the system of Article 177, but subject to such adjustments as were thought necessary to deal with the matters set out above. The system may be summarized as follows:

(a) the courts which are allowed to refer questions to the court are expressly specified;

(b) the right to apply to the court for a preliminary ruling is not given to courts of first instance;

(c) the Protocol provides that the Courts of Cassation and other courts of last instance are required to refer a question of interpretation to the court if they consider that a decision of the Court on that question is necessary to enable them to give judgment;

(d) in addition to requests for a preliminary ruling, there is a novel provision for interpretation by the Court of Justice, similar to the 'pourvoi dans l'intérêt de la loi'.

10. Article 1, which is similar to Article 1 of the Protocol on the interpretation of the Convention on the mutual recognition of companies and legal persons, confers on the Court jurisdiction to interpret the Convention of 27 September 1968 and its Protocol, as well as the Protocol which is the subject of this report.

11. Article 2 lists the national courts which may ask the Court to give a preliminary ruling.

(1) Courts of first instance are not included in this list. Their exclusion is designed mainly to prevent the interpretation of the Court being requested in too many cases, and particularly in trivial matters. Moreover, it was thought that where two courts of first instance, for example a 'justice de paix' and an Amtsgericht, gave judgments which became *res judicata* and showed differences of interpretation in the application of the Convention, this should not necessitate further action, any more than would similar differences of interpretation between two inferior courts of the same country. Similarly, it was argued that the Court of Justice should not be required to give rulings unless it was fully informed. In order to achieve this, questions of interpretation should, in the first place, be dealt with by the national courts, especially in view of the fact that in the interests of legal certainty the Court of Justice can only seldom depart from the principles established by its previous judgments.

(2) Article 2 (1) specifies by name the courts which are allowed to refer questions to the Court of Justice, including those which, pursuant to Article 3 (1), are required to do so. Such a list seemed to be essential, since the present wording of the third paragraph of Article 177 has given rise to conflicting interpretations as to which are the courts and tribunals against whose decisions there is no judicial remedy under national law (for example, the theoretical and pragmatic schools of thought in Germany).

It seemed all the more necessary to make this point clear because, under the Protocol, inferior courts have no jurisdiction to refer a question to the Court of Justice.

This list also takes into account the fact that the Convention of 27 September 1968 governs only civil and commercial matters concerning property rights; the list therefore includes only those Courts which have jurisdiction in such cases.

(3) Article 2 (2) states that the power to refer a question to the Court is also given to the courts of the Contracting States when they are sitting in an appellate capacity. The Courts in question thus include courts of appeal, save for the exceptional cases when they are sitting at first instance when sitting in an appellate capacity.

In the Federal Republic of Germany the expression 'appeal' includes 'Beschwerde'.

(4) Article 2 (3) lays down that in the cases provided for in Article 37 of the Convention of 27 September 1968, the courts referred to in that Article may also refer a question to the Court of Justice. It will be remembered that Article 37 governs appeals against judgments authorizing the enforcement of a foreign judgment.

12. Article 3 lays down that a court of last instance is bound to refer a question to the Court of Justice only 'if it considers that a decision on the question is necessary to enable it to enable it to give judgment'. In Article 177 of the Treaty of Rome this provision appears only in the second paragraph, governing cases in which other courts are entitled to refer a question to the Court of Justice.

The provision contained in Article 3 (1) of the Protocol accords with the interpretation now generally given to Article 177: it is generally agreed to be beyond dispute that a court of last instance has discretion to assess the relevance of questions put to it for interpretation.

Nevertheless, this provision seemed necessary to avoid conflicting interpretations; for it will be remembered that, as has already been pointed out in paragraph 8 (3) of this report, decisions of the Court of Justice on the interpretation of the Judgments Convention differ, in their consequences, from decisions of the interpretation of other conventions.

Thus if the jurisdiction of a court were challenged on appeal, and the Court of Justice ruled that the Convention had been misinterpreted by the first court, the proceedings might have to be instituted again from the very beginning, either in another State or, perhaps, in another court in the same State.

A party to an action might accordingly be greatly tempted to raise a question of interpretation of the Convention before an appellate court merely in order to gain time, and the temptation would be all the greater if that court were automatically required to refer the question to the Court of Justice.

A number of other solutions were considered, including giving the highest courts only a power, rather than a duty, to refer a question to the Court, or requiring them to refer a question only if they would otherwise give to a provision an interpretation different from the interpretation already given either by the Court of Justice or by other courts. Finally, however, a provision very close to Article 177 was adopted in order to achieve the greatest possible uniformity in Community law.

For the reasons set out above, it was thought necessary to confirm the discretion of courts of last instance by means of a clear and unambiguous text, and above all to make it proof against any possible subsequent tendency automatically to refer questions to the Court.

As regards its form, Article 3 differs from Article 177, in that it sets out first of all the rule for the courts of last instance, and thereafter for the other courts. The object of this modified form was to emphasize that the Protocol was designed solely to provide a specific solution to problems of interpretation of the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters.

13. Since the Convention also refers back to national law, reference should be made to what was said in this connection in the commentary on the protocol on the interpretation of the Convention on the mutual recognition of companies (see paragraph 6).

14. Article 4 lays down a new procedure based in part on the 'pourvoi dans l'intérêt de la loi' and in part on the procedure for giving advisory opinions. All the countries of the Community, with the exception of the Federal Republic of Germany, have a form of appeal for the clarification of a point of law which enables the competent judicial authority, in this instance the Procurators-General of the Courts of Cassation, to appeal against a final decision which misunderstands or misapplies either the letter or the spirit of the law. The purpose of this appeal is to avoid perpetuating an erroneous interpretation of the law where the parties have omitted to appeal against the decision which includes that interpretation (see Dalloz, Encyclopédie juridique under Cassation No 2509).

Article 4 is designed to make for a uniform interpretation of the Convention by introducing a procedure complementary to the request for a preliminary ruling provided for in Article 3. The purpose is to ensure a uniform interpretation for the future wherever existing judgments are in conflict.

In the last analysis, this procedure occupies an intermediate position between the 'pourvoi dans l'intérêt de la loi', from which it differs in that it does not entail the setting aside of a judgment which is ultimately shown to have misinterpreted the Convention, and that of an advisory appeal. The procedure is, however, limited to cases in which a court has already given judgment.

Paragraph 1 defines the cases in which the competent authority of a State may apply to the Court of Justice. It will be for that authority to decide whether it is advisable to refer a matter to the Court, and it will presumably not do so unless the national judgment includes reasons which might lead to an interpretation different from that previously given by the Court of Justice or by a foreign court. If there are no factors involved which make it likely that the principles

established in the decided cases would be changed, the national authority could always seek to clarify the point of law by appealing in its own country in accordance with the procedure there in force.

Paragraph 2 lays down that rulings given by the Court shall not affect the decisions submitted to it, in the same way that the setting aside of a judgment following an appeal to clarify a point of law in no way influences the position of the parties.

It follows that the judgments of the Court cannot give rise to any fresh proceedings, even where otherwise an extraordinary avenue of appeal might be appropriate.

Paragraph 3 lays down that the Procurators-General of the Courts of Cassation (who, in the countries which know the 'pourvoi dans l'intérêt de la loi', are competent) or any other authority designated by a State, are entitled to request the Court of Justice for a ruling. The designation of the Procurators-General is further evidence that the appeal procedure laid down in Article 4 is intended solely to clarify points of law.

The wording of paragraph 3 takes account of the situation obtaining in Germany, where the 'pourvoi dans l'intérêt de la loi' is unknown. It furthermore empowers any of the Contracting States to designate any other authority or even to designate two authorities, as for example the Procurator-General for appeals against judgments of civil, commercial or criminal courts in civil matters, and the Minister of Justice for appeals against decisions of administrative tribunals.

Paragraph 4 amends Article 20 of the Statute of the Court of Justice to deal with the procedure provided for in Article 4. The amendment takes account of the fact that the parties to the original proceedings will have no interest in intervening at this stage.

It may be wondered what are the implications of a ruling on interpretation given on the basis of Article 4. The ruling certainly is not binding on the parties. It must be acknowledged that such a ruling has no force in law, and that accordingly nobody is bound by it. But clearly it will have the greatest persuasive authority and will for the future constitute the guideline for all Community courts. In this respect it may be compared with the decision on a 'pourvoi dans l'intérêt de la loi'. Such a decision is binding on nobody, but constitutes a decision of principle of the greatest importance for the future, and one which judges will generally follow.

15. Article 5 of the Protocol, like Article 3 of the Protocol on the interpretation of the Convention on the mutual recognition of companies, extends the provisions governing the jurisdiction of the Court of Justice to cover the exercise of the new jurisdiction conferred on it.

However, these provisions are extended only in so far as the Protocol does not otherwise provide; this reservation chiefly concerns Article 177 of the Treaty, whose provisions, even if they should be modified, are not applicable to the Protocol, which has its own separate provisions on this point.

16. Article 11 provides for any relevant amendment to the jurisdiction of the courts of the Contracting States.

17. The other Articles of the Protocol, which contain the final provisions, give rise to no particular comment. Again, an exchange of information is to be organized on the decisions of the courts referred to in Article 2 (1) in order to ensure that the Convention is applied as effectively and as uniformly as possible. A Joint Declaration to this effect is annexed to the Protocol.

18. The provisions of the Convention on *lis pendens* and related actions should go a long way, if not all the way, towards resolving any problems which may arise from conflicting claims and disclaimers of jurisdiction. Where, however, such problems arise from conflicting interpretations, they will be solved by applying the Protocol.

Joint Declaration to the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters /* Consolidated version CF 498Y0126(01) */

JOINT DECLARATION on Convention on jurisdiction and the enforcement of judgments in civil and commercial matters - 1968 Brussels Convention /* Consolidated version CF 498Y0126(01) */

The Governments of the Kingdom of Belgium, the Federal Republic of Germany, the French Republic, the Italian Republic, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands,

On signing the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters,

Desiring to ensure that the Convention is applied as effectively as possible,

Anxious to prevent differences of interpretation of the Convention from impairing its unifying effect,

Recognizing that claims and disclaimers of jurisdiction may arise in the application of the Convention,

Declare themselves ready:

1. to study these questions and in particular to examine the possibility of conferring jurisdiction in certain matters on the Court of Justice of the European Communities and, if necessary, to negotiate an agreement to this effect;

2. To arrange meetings at regular intervals between their representatives.

In witness whereof, the undersigned Plenipotentiaries have signed this Joint Declaration.

Done at Brussels this twenty-seventh day of September in the year one thousand nine hundred and sixty-eight.

Pierre HARMEL

Willy BRANDT

Michel DEBRE

Giuseppe MEDICI

Pierre GREGOIRE

J.M.A.H. LUNS

DOCNUM	41968X0927(03)
AUTHOR	Representatives of the Governments of the Member States
FORM	Declaration
TREATY	European Economic Community
TYPDOC	4 ; supplementary legal acts ; 1968 ; X
PUBREF	Official Journal L 299 , 31/12/1972 P. 0045 - 0045 Official Journal L 304 , 30/10/1968 P. 0049 - 0049

Official Journal L 304 , 30/10/1968 P. 0030 - 0030
Spanish special edition...: Chapter 01 Volume 1 P. 0198
Portuguese special edition Chapter 01 Volume 1 P. 0198

DESCRIPT jurisdiction of the courts ; civil law ; commercial law ; EC Intergovernmental Convention ; joint position

PUB 1972/12/31 ; 1968/10/30

DOC 1968/09/27

INFORCE 1973/02/01=EV

ENDVAL 9999/99/99

SIGNED 1968/09/27=Brussels

LEGCIT 41968A0927(01).....

SUB General provisions ; Brussels Convention of 27 September 1968

REGISTER 19200000

DATES of document: 27/09/1968
of effect: 01/02/1973; Entry into force See 41968A0927(01) Art 62 And Title
of signature: 27/09/1968; Brussels
end of validity: 99/99/9999

ɔint declaration on the Protocol concerning the interpretation by the Court of Justice of the convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters /* Consolidated version CF 498Y0126(02) */

JOINT DECLARATION

The Governments of the Kingdom of Belgium , the Federal Republic of Germany , the French Republic , the Italian Republic , the Grand Duchy of Luxembourg and the Kingdom of the Netherlands ,

at the time of signing the Protocol concerning the interpretation by the Court of Justice of the convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters ,

wishing to ensure that these provisions are applied as effectively and as uniformly as possible ,

declare that they are willing , in cooperation with the Court of Justice , to organize an exchange of information on the decisions made by the courts and tribunals mentioned in Article 2 (1) of the said Protocol in application of the convention and the Protocol of 27 September 1968.

In witness whereof , the undersigned plenipotentiaries have affixed their signatures below this Protocol

Done at Luxembourg on the third day of June in the year one thousand nine hundred and seventy-one

DOCNUM	41971X0603(03)
AUTHOR	REPRESENTATIVES OF THE GOVERNMENTS OF THE MEMBER STATES
FORM	DECLARATION
TREATY	European Economic Community
TYPDOC	4 ; SUPPLEMENTARY LEGAL ACTS ; 1971 ; X
PUBREF	Official Journal L 204 , 02/08/1975 p. 0032 - 0032
DESCRIPT	jurisdiction of the courts ; civil law ; commercial law ; EC Intergovernmental Convention ; information transfer ; EC Court of Justice
PUB	1975/08/02
DOC	1971/06/03
INFORCE	1975/09/01=EV
ENDVAL	9999/99/99

SIGNED 1971/06/03=LUXEMBOURG

LEGCIT 41968A0927(01).....
41968A0927(02).....
41971A0603(02).....

MODIFIED COORDINATED-BY 41983Y0411(02).....
COORDINATED-BY 41990Y0728(02).....
COORDINATED-BY 41998Y0126(02).....

SUB GENERAL PROVISIONS ; BRUSSELS CONVENTION OF 27 SEPTEMBER 1968

REGISTER 01405000 ; 19200000

DATES OF DOCUMENT.....: 03/06/1971
OF EFFECT.....: 01/09/1975; ENTRY INTO FORCE SEE 41971A0603(02) ART 8 AND TITLE
OF SIGNATURE.....: 03/06/1971; LUXEMBOURG
OF END OF VALIDITY: 99/99/9999

JOINT DECLARATION

of 9 October 1978

THE REPRESENTATIVES OF THE GOVERNMENTS OF THE MEMBER STATES OF THE EUROPEAN ECONOMIC COMMUNITY, MEETING WITHIN THE COUNCIL,

Desiring to ensure that in the spirit of the Convention of 17 September 1968 uniformity of jurisdiciton should also be achieved as widely as possible in maritime matters,

Considering that the International Convention relating to the arrest of sea-going ships, signed at Brussels on 10 May 1952, contains provisions relating to such jurisdiction,

Considering that all of the Member States are not parties to the said Convention,

Express the wish that Member States which are coastal States and have not already become parties to the Convention of 10 May 1952 should do so as soon as possible.

Done at Luxembourg on the ninth day of October in the year one thousand nine hundred and seventy-eight.

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JOINT DECLARATION

of 26 May 1989

concerning the ratification of the Convention on the accession of the Kingdom of Spain and the Portuguese Republic to the 1968 Brussels Convention

Upon signature of the Convention on the accession of the Kingdom of Spain and the Portuguese Republic to the 1968 Brussels Convention, done at Donostia - San Sebastián on 26 May 1989,

THE REPRESENTATIVES OF THE GOVERNMENTS OF THE MEMBER STATES OF THE EUROPEAN COMMUNITIES, MEETING WITHIN THE COUNCIL,

DESIROUS that, in particular with a view to the completion of the internal market, application of the Brussels Convention and of the 1971 Protocol should be rapidly extended to the entire Community,

WELCOMING the conclusion on 16 September 1988 of the Lugano Convention which extends the principles of the Brussels Convention to those States becoming parties to the Lugano Convention, designed principally to govern relations between the Member States of the European Economic Community (EEC) and those of the European Free Trade Association (EFTA) with regard to the legal protection of persons established in any of those States and to the simplification of formalities for the reciprocal recognition and enforcement of judgments,

CONSIDERING that the Brussels Convention has as its legal basis Article 220 of the Treaty of Rome and is interpreted by the Court of Justice of the European Communities,

MINDFUL that the Lugano Convention does not affect the application of the Brussels Convention as regards relations between Member States of the European Economic Community, since such relations must be governed by the Brussels Convention,

NOTING that the Lugano Convention is to enter into force after two States, of which one is a member of the European Communities and the other a member of the European Free Trade Association, have deposited their instruments of ratification,

DECLARE THEMSELVES READY to take every appropriate measure with a view to ensuring that national procedures for the ratification of the Convention on the accession of the Kingdom of Spain and the Portuguese Republic to the Brussels Convention, signed today, are completed as soon as possible and, if possible, by 31 December 1992 at the latest.

In witness whereof the undersigned have signed this declaration.

Done at Donostia - San Sebastián on the twenty-sixth day of May in the year one thousand nine hundred and eighty-nine.

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Communication from the Portuguese Republic in accordance with Article VI of the Protocol of 27 September 1968 annexed to the Brussels Convention

Communication from the Portuguese Republic in accordance with Article VI of the Protocol of 27 September 1968 annexed to the Brussels Convention

(2000/C 160/01)

In view of the amendments made to the legal order of the Portuguese Republic by:

- Articles 65 and 65A of the code of civil procedure (Codigo de Processo Civil) regarding the international jurisdiction of the law courts,

- Law No 3/99 of 13 January 1999 on the organisation, operation and jurisdiction of the law courts, particularly as regards the abolition of the "Tribunais Judiciais de Circulo",

IN ACCORDANCE with Article VI of the Protocol of 27 September 1968 annexed to the Brussels Convention of the same date and for the purposes of Article 64(e) of the Convention,

THE FOLLOWING AMENDMENTS SHOULD BE MADE TO THE CONVENTION:

(a) the eleventh indent of Article 3 should read as follows: "in Portugal: Articles 65 and 65A of the code of civil procedure (Codigo de Processo Civil) and Article 11 of the code of labour procedure (Codigo de Processo de Trabalho),"

(b) the twelfth indent of Article 32 should read as follows: "in Portugal, to the 'Tribunal de Comarca'."

DOCNUM	32000Y0608(02)
AUTHOR	PORTUGAL
FORM	COMMUNICATION
TREATY	European Community
TYPDOC	3 ; SECONDARY LEGISLATION ; 2000 ; Y
PUBREF	Official Journal C 160 , 08/06/2000 p. 0001 - 0001
DESCRIPT	civil procedure ; ordinary court of law ; European convention ; Portugal
PUB	2000/06/08
INFORCE	2000/06/08=EV
ENDVAL	9999/99/99
LEGBASE	41968A0927(02)-A06..... 41968A0927(02)-A64PTE.....
MODIFIES	41968A0927(01)..... AMENDMENT..... COMPLETION ART 3 FR 08/06/2000

41968A0927(01)..... AMENDMENT..... COMPLETION ART 32 FR 08/06/2000

SUB GENERAL PROVISIONS ; BRUSSELS CONVENTION OF 27 SEPTEMBER 1968

REGISTER 19200000

DATES OF EFFECT.....: 08/06/2000; ENTRY INTO FORCE DATE OF DOCUMENT
OF END OF VALIDITY: 99/99/9999

41978A1009(01) Official Journal L 304 , 30/10/1978 P. 0001 - 0073

78/884/EEC: Convention of Accession of 9 October 1978 of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and enforcement of judgements in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice

COUNCIL CONVENTION on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice (Signed on 9 October 1978 (*)) (78/884/EEC)

PREAMBLE

THE HIGH CONTRACTING PARTIES TO THE TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY,

CONSIDERING that the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland, in becoming members of the Community, undertook to accede to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on the interpretation of that Convention by the Court of Justice, and to this end undertook to enter into negotiations with the original Member States of the Community in order to make the necessary adjustments thereto,

HAVE DECIDED to conclude this Convention and to this end have designated as their Plenipotentiaries:

HIS MAJESTY THE KING OF THE BELGIANS:

Renaat VAN ELSLANDE,

Minister for Justice;

HER MAJESTY THE QUEEN OF DENMARK:

Nathalie LIND,

Minister for Justice; (*) The date of entry into force of the Convention will be published in the Official Journal of the European Communities by the General Secretariat of the Council.

THE PRESIDENT OF THE FEDERAL REPUBLIC OF GERMANY:

Dr Hans-Jochen VOGEL,

Federal Minister for Justice;

THE PRESIDENT OF THE FRENCH REPUBLIC:

Alain PEYREFITTE,

Keeper of the Seals,

Minister for Justice;

THE PRESIDENT OF IRELAND:

Gerard COLLINS,

Minister for Justice;

THE PRESIDENT OF THE ITALIAN REPUBLIC:

Paolo BONIFACIO,

Minister for Justice;

HIS ROYAL HIGHNESS THE GRAND DUKE OF LUXEMBOURG:

Robert KRIEPS,

Minister of Education and Justice;

HER MAJESTY THE QUEEN OF THE NETHERLANDS:

Prof. Mr J. DE RUITER,

Minister for Justice;

HER MAJESTY THE QUEEN OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND:

The Right Honourable the Lord ELWYN-JONES, CH,

Lord High Chancellor of Great Britain;

WHO, meeting within the Council, having exchanged their Full Powers, found in good and due form,

HAVE AGREED AS FOLLOWS:

TITLE I GENERAL PROVISIONS

Article 1

The Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland hereby accede to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, signed at Brussels on 27 September 1968 (hereinafter called "the 1968 Convention"), and to the Protocol on its interpretation by the Court of Justice, signed at Luxembourg on 3 June 1971 (hereinafter called "the 1971 Protocol").

Article 2

The adjustments to the 1968 Convention and to the 1971 Protocol are set out in Titles II to IV of this Convention.

TITLE II ADJUSTMENTS TO THE 1968 CONVENTION

Article 3

The following shall be added to the first paragraph of Article 1 of the 1968 Convention:

"It shall not extend, in particular, to revenue, customs or administrative matters."

Article 4

The following shall be substituted for the second paragraph of Article 3 of the 1968 Convention:

"In particular the following provisions shall not be applicable as against them: - in Belgium

: Article 15 of the civil code (Code civil - Burgerlijk Wetboek) and Article 638 of the judicial code (Code judiciaire - Gerechtelijk Wetboek);

- in Denmark : Article 248 (2) of the law on civil procedure (Lov om rettens pleje) and Chapter 3, Article 3 of the Greenland law on civil procedure (Lov for Grønland om rettens pleje);

- in the Federal Republic of Germany : Article 23 of the code of civil procedure (Zivilprozeßordnung);

- in France : Articles 14 and 15 of the civil code (Code civil);

- in Ireland : the rules which enable jurisdiction to be founded on the document instituting the proceedings having been served on the defendant during his temporary presence in Ireland;

- in Italy : Articles 2 and 4, Nos 1 and 2 of the code of civil procedure (Codice di procedura civile);

- in Luxembourg : Articles 14 and 15 of the civil code (Code civil);

- in the Netherlands : Articles 126 (3) and 127 of the code of civil procedure (Wetboek van Burgerlijke Rechtsvordering);

- in the United Kingdom : the rules which enable jurisdiction to be founded on: (a) the document instituting the proceedings having been served on the defendant during his temporary presence in the United Kingdom ; or

(b) the presence within the United Kingdom of property belonging to the defendant ; or

(c) the seizure by the plaintiff of property situated in the United Kingdom."

Article 5

1. The following shall be substituted for the French text of Article 5 (1) of the 1968 Convention:

"1. en matière contractuelle, devant le tribunal du lieu où l'obligation qui sert de base à la demande a été ou doit être exécutée;".

2. The following shall be substituted for the Dutch text of Article 5 (1) of the 1968 Convention:

"1. ten aanzien van verbintenissen uit overeenkomst : voor het gerecht van de plaats, waar de verbintenis, die aan de eis ten grondslag ligt, is uitgevoerd of moet worden uitgevoerd;".

3. The following shall be substituted for Article 5 (2) of the 1968 Convention:

"2. in matters relating to maintenance, in the courts for the place where the maintenance creditor is domiciled or habitually resident or, if the matter is ancillary to proceedings concerning the status of a person, in the court which, according to its own law, has jurisdiction to entertain those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties;".

4. The following shall be added to Article 5 of the 1968 Convention:

"6. in his capacity as settlor, trustee or beneficiary of a trust created by the operation of a statute, or by a written instrument, or created orally and evidenced in writing, in the courts of the Contracting State in which the trust is domiciled;

7. as regards a dispute concerning the payment of remuneration claimed in respect of the salvage of a cargo or freight, in the court under the authority of which the cargo or freight in question (a) has been arrested to secure such payment,

or

(b) could have been so arrested, but bail or other security has been given;

provided that this provision shall apply only if it is claimed that the defendant has an interest in the cargo or freight or had such an interest at the time of salvage."

Article 6

The following Article shall be added to Title II, Section 2, of the 1968 Convention:

"Article 6a

Where by virtue of this Convention a court of a Contracting State has jurisdiction in actions relating to liability arising from the use or operation of a ship, that court, or any other court substituted for this purpose by the internal law of that State, shall also have jurisdiction over claims for limitation of such liability."

Article 7

The following shall be substituted for Article 8 of the 1968 Convention:

"Article 8

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 Contracting 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 State."

Article 8

The following shall be substituted for Article 12 of the 1968 Convention:

"Article 12

The provisions of this Section may be departed from only by an agreement on jurisdiction: 1. which is entered into after the dispute has arisen, or

2. which allows the policy-holder, the insured or a beneficiary to bring proceedings in courts other than those indicated in this Section, or

3. which is concluded between a policy-holder and an insurer, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Contracting State, and which has the effect of conferring jurisdiction on the courts of that State even if the harmful event were to

occur abroad, provided that such an agreement is not contrary to the law of that State, or

4. which is concluded with a policy-holder who is not domiciled in a Contracting State, except in so far as the insurance is compulsory or relates to immovable property in a Contracting State, or

5. which relates to a contract of insurance in so far as it covers one or more of the risks set out in Article 12a."

Article 9

The following Article shall be added to Section 3 of Title II of the 1968 Convention:

"Article 12a

The following are the risks referred to in Article 12 (5): 1. Any loss of or damage to (a) sea-going ships, installations situated offshore or on the high seas, or aircraft, arising from perils which relate to their use for commercial purposes,

(b) goods in transit other than passengers' baggage where the transit consists of or includes carriage by such ships or aircraft;

2. Any liability, other than for bodily injury to passengers or loss of or damage to their baggage, (a) arising out of the use or operation of ships, installations or aircraft as referred to in 1 (a) above in so far as the law of the Contracting State in which such aircraft are registered does not prohibit agreements on jurisdiction regarding insurance of such risks,

(b) for loss or damage caused by goods in transit as described in 1 (b) above;

3. Any financial loss connected with the use or operation of ships, installations or aircraft as referred to in 1 (a) above, in particular loss of freight or charter-hire;

4. Any risk or interest connected with any of those referred to in 1 to 3 above."

Article 10

The following shall be substituted for Section 4 of Title II of the 1968 Convention:

"Section 4

Jurisdiction over consumer contracts

Article 13

In proceedings concerning a contract concluded by a person for a purpose which can be regarded as being outside his trade or profession, hereinafter called "the consumer", jurisdiction shall be determined by this section, without prejudice to the provisions of Articles 4 and 5 (5), if it is: 1. a contract for the sale of goods on instalment credit terms, or

2. a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods, or

3. any other contract for the supply of goods or a contract for the supply of services, and (a) in the State of the consumer's domicile the conclusion of the contract was preceded by a specific invitation adressed to him or by advertising, and

(b) the consumer took in that State the steps necessary for the conclusion of the contract.

Where a consumer enters into a contract with a party who is not domiciled in a Contracting State but has a branch, agency or other establishment in one of the Contracting States, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State.

This section shall not apply to contracts of transport.

Article 14

A consumer may bring proceedings against the other party to a contract either in the courts of the Contracting State in which that party is domiciled or in the courts of the Contracting State in which he is himself domiciled.

Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Contracting State in which the consumer is domiciled.

These provisions shall not affect the right to bring a counterclaim in the court in which, in accordance with this Section, the original claim is pending.

Article 15

The provisions of this Section may be departed from only by an agreement: 1. which is entered into after the dispute has arisen, or

2. which allows the consumer to bring proceedings in courts other than those indicated in this Section, or

3. which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Contracting State, and which confers jurisdiction on the courts of that State, provided that such an agreement is not contrary to the law of that State."

Article 11

The following shall be substituted for Article 17 of the 1968 Convention.

"Article 17

If the parties, one or more of whom is domiciled in a Contracting State, have agreed that a court or the courts of a Contracting State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction. Such an agreement conferring jurisdiction shall be either in writing or evidenced in writing or, in international trade or commerce, in a form which accords with practices in that trade or commerce of which the parties are or ought to have been aware.

Where such an agreement is concluded by parties, none of whom is domiciled in a Contracting State, the courts of other Contracting States shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction.

The court or courts of a Contracting State on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between these persons or their rights or obligations under the trust are involved.

Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to the provisions of Article 12 or 15, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 16.

If an agreement conferring jurisdiction was concluded for the benefit of only one of the parties, that party shall retain the right to bring proceedings in any other court which has jurisdiction by virtue of this Convention."

Article 12

The second paragraph of Article 20 of the 1968 Convention shall be replaced by the following:

"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 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."

Article 13

1. Article 27 (2) of the 1968 Convention shall be replaced by the following:

"2. where it was given in default of appearance, if the defendant was not duly served with the document which instituted the proceedings or with a equivalent document in sufficient time to enable him to arrange for his defence;".

2. The following shall be added to Article 27 of the 1968 Convention:

"5. if the judgment is irreconcilable with an earlier judgment give in a non-Contracting State involving the same cause of action and between the same parties, provided that this latter judgment fulfils the conditions necessary for its recognition in the State addressed."

Article 14

The following paragraph shall be added to Article 30 of the 1968 Convention:

"A court of a Contracting State in which recognition is sought of a judgment given in Ireland or the United Kingdom may stay the proceedings if enforcement is suspended in the State in which the judgment was given by reason of an appeal."

Article 15

The following paragraph shall be added to Article 31 of the 1968 Convention:

"However, in the United Kingdom, such a judgment shall be enforced in England and Wales, in Scotland, or in Northern Ireland when, on the application of any interested party, it has been registered for enforcement in that part of the United Kingdom."

Article 16

The following shall be substituted for the first paragraph of Article 32 of the 1968 Convention:

"The application shall be submitted: - in Belgium, to the tribunal de première instance or rechtbank van eerste aanleg,

- in Denmark, to the underret,

- in the Federal Republic of Germany, to the presiding judge of a chamber of the Landgericht,

- in France, to the presiding judge of the tribunal de grande instance,

- in Ireland, to the High Court,

- in Italy, to the corte d'appelo,

- in Luxembourg, to the presiding judge of the tribunal d'arrondissement,

- in the Netherlands, to the presiding judge of the arrondissementsrechtbank,

- in the United Kingdom: 1. in England and Wales, to the High Court of Justice, or in the case of a maintenance judgment to the Magistrates' Court on transmission by the Secretary of State;

2. in Scotland, to the Court of Session, or in the case of a maintenance judgment to the Sheriff Court on transmission by the Secretary of State;

3. in Northern Ireland, to the High Court of Justice, or in the case of a maintenance judgment to the Magistrates' Court on transmission by the Secretary of State."

Article 17

The following shall be substituted for Article 37 of the 1968 Convention:

"Article 37

An appeal against the decision authorizing enforcement shall be lodged in accordance with the rules governing procedure in contentious matters: - in Belgium, with the tribunal de première instance or rechtbank van eerste aanleg,

- in Denmark, with the landsret,

- in the Federal Republic of Germany, with the Oberlandesgericht,

- in France, with the cour d'appel,

- in Ireland, with the High Court,

- in Italy, with the corte d'appello,

- in Luxembourg, with the Cour supérieure de Justice sitting as a court of civil appeal,

- in the Netherlands, with the arrondissementsrechtbank,

- in the United Kingdom: 1. in England and Wales, with the High Court of Justice, or in the case of a maintenance judgment with the Magistrates' Court;

2. in Scotland, with the Court of Session, or in the case of a maintenance judgment with the Sheriff Court;

3. in Northern Ireland, with the High Court of Justice, or in the case of a maintenance judgment with the Magistrates' Court.

The judgment given on the appeal may be contested only: - in Belgium, France, Italy, Luxembourg and the Netherlands, by an appeal in cassation,

- in Denmark, by an appeal to the højesteret, with the leave of the Minister of Justice,

- in the Federal Republic of Germany, by a Rechtsbeschwerde,

- in Ireland, by an appeal on a point of law to the Supreme Court,

- in the United Kingdom, by a single further appeal on a point of law."

Article 18

The following paragraph shall be added after the first paragraph of Article 38 of the 1968 Convention:

"Where the judgment was given in Ireland or the United Kingdom, any form of appeal available in the State in which it was given shall be treated as an ordinary appeal for the purposes of the first paragraph."

Article 19

The following shall be substituted for the first paragraph of Article 40 of the 1968 Convention:

"If the application for enforcement is refused, the applicant may appeal: - in Belgium, to the cour d'appel or hof van beroep,

- in Denmark, to the landsret,

- in the Federal Republic of Germany, to the Oberlandesgericht,

- in France, to the cour d'appel,

- in Ireland, to the High Court,

- in Italy, to the corte d'appello,

- in Luxembourg, to the Cour supérieure de Justice sitting as a court of civil appeal,

- in the Netherlands, to the gerechtshof,

- in the United Kingdom: 1. in England and Wales, to the High Court of Justice, or in the case of a maintenance judgment to the Magistrates' Court;

2. in Scotland, to the Court of Session, or in the case of a maintenance judgment to the Sheriff Court;

3. in Northern Ireland, to the High Court of Justice, or in the case of a maintenance judgment to the Magistrates' Court."

Article 20

The following shall be substituted for Article 41 of the 1968 Convention:

"Article 41

A judgment given on an appeal provided for in Article 40 may be contested only: - in Belgium, France, Italy, Luxembourg and the Netherlands, by an appeal in cassation,

- in Denmark, by an appeal to the højesteret, with the leave of the Minister of Justice,

- in the Federal Republic of Germany, by a Rechtsbeschwerde,

- in Ireland, by an appeal on a point of law to the Supreme Court,

- in the United Kingdom, by a single further appeal on a point of law."

Article 21

The following shall be substituted for Article 44 of the 1968 Convention:

"Article 44

An applicant who, in the State in which the judgment was given, has benefited from complete or partial legal aid or exemption from costs or expenses, shall be entitled, in the procedures provided for in Articles 32 to 35, to benefit from the most favourable legal aid or the most extensive exemption from costs or expenses provided for by the law of the State addressed.

An applicant who requests the enforcement of a decision given by an administrative authority in Denmark in respect of a maintenance order may, in the State addressed, claim the benefits referred to in the first paragraph if he presents a statement from the Danish Ministry of Justice to the effect that he fulfils the economic requirements to qualify for the grant of complete or partial legal aid or exemption from costs or expenses."

Article 22

Article 46 (2) of the 1968 Convention is replaced by the following:

"2. in the case of a judgment given in default, the original or a certified true copy of the document which establishes that the party in default was served with the document instituting the proceedings or with an equivalent document."

Article 23

The following paragraph shall be added to Article 53 of the 1968 Convention:

"In order to determine whether a trust is domiciled in the Contracting State whose courts are seised of the matter, the court shall apply its rules of private international law."

Article 24

The following shall be inserted at the appropriate places in chronological order in the list of Conventions set out in Article 55 of the 1968 Convention: - the Convention between the United Kingdom and the French Republic providing for the reciprocal enforcement of judgments in civil and commercial matters, with Protocol, signed at Paris on 18 January 1934,

- the Convention between the United Kingdom and the Kingdom of Belgium providing for the reciprocal enforcement of judgments in civil and commercial matters, with Protocol, signed at Brussels on 2 May 1934,

- the convention between the United Kingdom and the Republic of Italy for the reciprocal reciprocal recognition and enforcement of judgments in civil and commercial matters, signed at Bonn on 14 July 1960,

- the convention between the United Kingdom and the Republic of Italy for the reciprocal recognition and enforcement of judgments in civil and commercial matters, signed at Rome on 7 February 1964, with amending Protocol signed at Rome on 14 July 1970,

- the Convention between the United Kingdom and the Kingdom of the Netherlands providing for the reciprocal recognition and enforcement of judgments in civil matters, signed at The Hague on 17 November 1967.

Article 25

1. The following shall be substituted for Article 57 of the 1968 Convention:

"Article 57

This Convention shall not affect any conventions to which the Contracting States are or will be parties and which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments.

This Convention shall not affect the application of provisions which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments and which are or will be contained in acts of the institutions of the European Communities or in national laws harmonized in implementation of such acts."

2. With a view to its uniform interpretation, paragraph 1 of Article 57 shall be applied in the following manner: (a) the 1968 Convention as amended shall not prevent a court of a Contracting State which is a party to a convention on a particular matter from assuming jurisdiction in accordance with that Convention, even where the defendant is domiciled in another Contracting State which is not a party to that Convention. The court shall, in any event, apply Article 20 of the 1968 Convention as amended;

(b) a judgment given in a Contracting State in the exercise of jurisdiction provided for in a convention on a particular matter shall be recognized and enforced in the other Contracting States in accordance

with the 1968 Convention as amended.

Where a convention on a particular matter to which both the State of origin and the State addressed are parties lays down conditions for the recognition or enforcement of judgments, those conditions shall apply. In any event, the provisions of the 1968 Convention as amended which concern the procedures for recognition and enforcement of judgments may be applied.

Article 26

The following paragraph shall be added to Article 59 of the 1968 Convention:

"However, a Contracting State may not assume an obligation towards a third State not to recognize a judgment given in another Contracting State by a court basing its jurisdiction on the presence within that State of property belonging to the defendant, or the seizure by the plaintiff of property situated there: 1. if the action is brought to assert or declare proprietary or possessory rights in that property, seeks to obtain authority to dispose of it, or arises from another issue relating to such property, or,

2. if the property constitutes the security for a debt which is the subject-matter of the action."

Article 27

The following shall be substituted for Article 60 of the 1968 Convention:

"Article 60

This Convention shall apply to the European territories of the Contracting States, including Greenland, to the French overseas departments and territories, and to Mayotte.

The Kingdom of the Netherlands may declare at the time of signing or ratifying this Convention or at any later time, by notifying the Secretary-General of the Council of the European Communities, that this Convention shall be applicable to the Netherlands Antilles. In the absence of such declaration, proceedings taking place in the European territory of the Kingdom as a result of an appeal in cassation from the judgment of a court in the Netherlands Antilles shall be deemed to be proceedings taking place in the latter court.

Notwithstanding the first paragraph, this Convention shall not apply to: 1. the Faroe Islands, unless the Kingdom of Denmark makes a declaration to the contrary,

2. any European territory situated outside the United Kingdom for the international relations of which the United Kingdom is responsible, unless the United Kingdom makes a declaration to the contrary in respect of any such territory.

Such declarations may be made at any time by notifying the Secretary-General of the Council of the European Communities.

Proceedings brought in the United Kingdom on appeal from courts in one of the territories referred to in subparagraph 2 of the third paragraph shall be deemed to be proceedings taking place in those courts.

Proceedings which in the Kingdom of Denmark are dealt with under the law on civil procedure for the Faroe Islands (lov for Færøerne om rettens pleje) shall be deemed to be proceedings taking

place in the courts of the Faroe Islands."

Article 28

The following shall be substituted for Article 64 (c) of the 1968 Convention:

"(c). any declaration received pursuant to Article 60;".

TITLE III ADJUSTMENTS TO THE PROTOCOL ANNEXED TO THE 1968 CONVENTION

Article 29

The following Articles shall be added to the Protocol annexed to the 1968 Convention:

"Article Va

In matters relating to maintenance, the expression "court" includes the Danish administrative authorities.

Article Vb

In proceedings involving a dispute between the master and a member of the crew of a sea-going ship registered in Denmark or in Ireland, concerning remuneration or other conditions of service, a court in a Contracting State shall establish whether the diplomatic or consular officer responsible for the ship has been notified of the dispute. It shall stay the proceedings so long as he has not been notified. It shall of its own motion decline juridiction if the officer, having been duly notified, has exercised the powers accorded to him in the matter by a consular convention, or in the absence of such a convention, has, within the time allowed, raised any objection to the exercise of such jurisdiction.

Article Vc

Articles 52 and 53 of this Convention shall, when applied by Article 69 (5) of the Convention for the European Patent for the common market, signed at Luxembourg on 15 December 1975, to the provisions relating to "residence" in the English text of that Convention, operate as if "residence" in that text were the same as "domicile" in Articles 52 and 53.

Article Vd

Without prejudice to the jurisdiction of the European Patent Office under the Convention on the Grant of European Patents, signed at Munich on 5 October 1973, the courts of each Contracting State shall have exclusive jurisdiction, regardless of domicile, in proceedings concerned with the registration or validity of any European patent granted for that State which is not a Community patent by virtue of the provisions of Article 86 of the Convention for the European Patent for the common market, signed at Luxembourg on 15 December 1975."

TITLE IV ADJUSTMENTS TO THE 1971 PROTOCOL

Article 30

The following paragraph shall be added to Article 1 of the 1971 Protocol:

"The Court of Justice of the European Communities shall also have jurisdiction to give rulings on the interpretation of the Convention on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention of 27 September 1968 and to this Protocol."

Article 31

The following shall be substituted for Article 2 (1) of the 1971 Protocol:

"1. - in Belgium : la Cour de Cassation - het Hof van Cassatie and le Conseil d'Etat - de Raad van State,

- in Denmark : højesteret,

- in the Federal Republic of Germany : die obersten Gerichtshöfe des Bundes,

- in France : la Cour de Cassation and le Conseil d'Etat,

- in Ireland : the Supreme Court,

- in Italy : la Corte Suprema di Cassazione,

- in Luxembourg : la Cour supérieure de Justice when sitting as Cour de Cassation,

- in the Netherlands : de Hoge Raad,

- in the United Kingdom : the House of Lords and courts to which application has been made under the second paragraph of Article 37 or under Article 41 of the Convention;".

Article 32

The following shall be substituted for Article 6 of the 1971 Protocol:

"Article 6

This Protocol shall apply to the European territories of the Contracting States, including Greenland, to the French overseas departments and territories, and to Mayotte.

The Kingdom of the Netherlands may declare at the time of signing or ratifying this Protocol or at any later time, by notifying the Secretary-General of the Council of the European Communities, that this Protocol shall be applicable to the Netherlands Antilles.

Notwithstanding the first paragraph, this Protocol shall not apply to: 1. the Faroe Islands, unless the Kingdom of Denmark makes a declaration to the contrary,

2. any European territory situated outside the United Kingdom for the international relations of which the United Kingdom is responsible, unless the United Kingdom makes a declaration to the

contrary in respect of any such territory.

Such declarations may be made at any time by notifying the Secretary-General of the Council of the European Communities."

Article 33

The following shall be substituted for Article 10 (d) of the 1971 Protocol:

"(d) any declaration received pursuant to Article 6."

TITLE V TRANSITIONAL PROVISIONS

Article 34

1. The 1968 Convention and the 1971 Protocol, with the amendments made by this Convention, shall apply only to legal proceedings instituted and to authentic instruments formally drawn up or registered after the entry into force of this Convention in the State of origin and, where recognition or enforcement of a judgment or authentic instrument is sought, in the State addressed.

2. However, as between the six Contracting States to the 1968 Convention, judgments given after the date of entry into force of this Convention in proceedings instituted before that date shall be recognized and enforced in accordance with the provisions of Title III of the 1968 Convention as amended.

3. Moreover, as between the six Contracting States to the 1968 Convention and the three States mentioned in Article 1 of this Convention, and as between those three States, judgments given after the date of entry into force of this Convention between the State of origin and the State addressed in proceedings instituted before that date shall also be recognized and enforced in accordance with the provisions of Title III of the 1968 Convention as amended if jurisdiction was founded upon rules which accorded with the provisions of Title II, as amended, or with provisions of a convention concluded between the State of origin and the State addressed which was in force when the proceedings were instituted.

Article 35

If the parties to a dispute concerning a contract had agreed in writing before the entry into force of this Convention that the contract was to be governed by the law of Ireland or of a part of the United Kingdom, the courts of Ireland or of that part of the United Kingdom shall retain the right to exercise jurisdiction in the dispute.

Article 36

For a period of three years from the entry into force of the 1968 Convention for the Kingdom of Denmark and Ireland respectively, jurisdiction in maritime matters shall be determined in these States not only in accordance with the provisions of that Convention but also in accordance with

the provisions of paragraphs 1 to 6 following. However, upon the entry into force of the International Convention relating to the arrest of sea-going ships, signed at Brussels on 10 May 1952, for one of these States, these provisions shall cease to have effect for that State. 1. A person who is domiciled in a Contracting State may be sued in the courts of one of the States mentioned above in respect of a maritime claim if the ship to which the claim relates or any other ship owned by him has been arrested by judicial process within the territory of the latter State to secure the claim, or could have been so arrested there but bail or other security has been given, and either: (a) the claimant is domiciled in the latter State ; or

(b) the claim arose in the latter State ; or

(c) the claim concerns the voyage during which the arrest was made or could have been made;

or

(d) the claim arises out of a collision or out of damage caused by a ship to another ship or to goods or persons on board either ship, either by the execution or non-execution of a manoeuvre or by the non-observance of regulations ; or

(e) the claim is for salvage ; or

(f) the claim is in respect of a mortgage or hypothecation of the ship arrested.

2. A claimant may arrest either the particular ship to which the maritime claim relates, or any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship. However, only the particular ship to which the maritime claim relates may be arrested in respect of the maritime claims set out in subparagraphs (o), (p) or (q) of paragraph 5 of this Article.

3. Ships shall be deemed to be in the same ownership when all the shares therein are owned by the same person or persons.

4. When in the case of a charter by demise of a ship the charterer alone is liable in respect of a maritime claim relating to that ship, the claimant may arrest that ship or any other ship owned by the charterer, but no other ship owned by the owner may be arrested in respect of such claim. The same shall apply to any case in which a person other than the owner of a ship is liable in respect of a maritime claim relating to that ship.

5. The expression "maritime claim" means a claim arising out of one or more of the following: (a) damage caused by any ship either in collision or otherwise;

(b) loss of life or personal injury caused by any ship or occurring in connection with the operation of any ship;

(c) salvage;

(d) agreement relating to the use or hire of any ship whether by charter-party or otherwise;

(e) agreement relating to the carriage of goods in any ship whether by charter-party or otherwise;

(f) loss of or damage to goods including baggage carried in any ship;

(g) general average;

(h) bottomry;

(i) towage;

(j) pilotage;

(k) goods or materials wherever supplied to a ship for her operation or maintenance;

(l) construction, repair or equipment of any ship or dock charges and dues;

(m) wages of masters, officers or crew;

(n) master's disbursements, including disbursements made by shippers, charterers or agents on behalf of a ship or her owner;

(o) dispute as to the title to or ownership of any ship;

(p) disputes between co-owners of any ship as to the ownership, possession, employment or earnings of that ship;

(q) the mortgage or hypothecation of any ship.

6. In Denmark, the expression "arrest" shall be deemed as regards the maritime claims referred to in subparagraphs (o) and (p) of paragraph 5 of this Article, to include a "forbud", where that is the only procedure allowed in respect of such a claim under Articles 646 to 653 of the law on civil procedure (lov om rettens pleje).

TITLE VI FINAL PROVISIONS

Article 37

The Secretary-General of the Council of the European Communities shall transmit a certified copy of the 1968 Convention and of the 1971 Protocol in the Dutch, French, German and Italian languages to the Governments of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland.

The texts of the 1968 Convention and the 1971 Protocol, drawn up in the Danish, English and Irish languages, shall be annexed to this Convention (1). The texts drawn up in the Danish, English and Irish languages shall be authentic under the same conditions as the original texts of the 1968 Convention and the 1971 Protocol.

Article 38

This Convention shall be ratified by the signatory States. The instruments of ratification shall be deposited with the Secretary-General of the Council of the European Communities.

Article 39

This Convention shall enter into force, as between the States which shall have ratified it, on the first day of the third month following the deposit of the last instrument of ratification by the original Member States of the Community and one new Member State.

It shall enter into force for each new Member State which subsequently ratifies it on the first day of the third month following the deposit of its instrument of ratification.

Article 40

The Secretary-General of the Council of the European Communities shall notify the signatory States of:
(a) the deposit of each instrument of ratification,

(b) the dates of entry into force of this Convention for the Contracting States.

Article 41

This Convention, drawn up in a single original in the Danish, Dutch, English, French, German, Irish and Italian languages, all seven texts being equally authentic, shall be deposited in the archives of the Secretariat of the Council of the European Communities. The Secretary-General shall transmit a certified copy to the Government of each signatory State. (1)See pages 17, 36 and 55 of this Official Journal.

Til bekræftelse heraf har undertegnede befuldmægtigede underskrevet denne konvention.

Zu Urkund dessen haben die unterzeichneten Bevollmächtigten ihre Unterschriften unter dieses Übereinkommen gesetzt.

In witness whereof, the undersigned Plenipotentiaries have affixed their signatures below this Convention.

En foi de quoi, les plénipotentiaires soussignés ont apposé leurs signatures au bas de la présente convention.

Da fhianu sin, chuir na Lanchumhachtaigh thíos-sínithe a lamh leis an gCoinbhinsiun seo.

In fede di che, i plenipotenziari sottoscritti hanno apposto le loro firme in calce alla presente convenzione.

Ten blijke waarvan de ondergetekende gevolmachtigden hun handtekening onder dit Verdrag hebben gesteld.

Udfærdiget i Luxembourg, den niende oktober nitten hundrede og otteoghalvfjerds.

Geschehen zu Luxemburg am neunten Oktober neunzehnhundertachtundsiebzig.

Done at Luxembourg on the ninth day of October in the year one thousand nine hundred and seventy-eight.

Fait à Luxembourg, le neuf octobre mil neuf cent soixante-dix-huit.

Arna dhéanamh i Lucsamburg, an naou la de Dheireadh Fomhair sa bhliain míle naoi gcéad seachto a hocht.

Fatto a Lussemburgo, addi nove ottobre millenovecentosettantotto.

Gedaan te Luxemburg, de negende oktober negentienhonderd achtenzeventig.

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41968A0927(01)..... Amendment..... ADDITION.. ART.6BIS
41968A0927(01)..... Amendment..... REPLACEMNT ART.12
41968A0927(01)..... Amendment..... REPLACEMNT ART.13
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41968A0927(01)..... Amendment..... REPLACEMNT ART.15
41968A0927(01)..... Amendment..... REPLACEMNT ART.17
41968A0927(01)..... Amendment..... REPLACEMNT ART.20.2
41968A0927(01)..... Amendment..... COMPLETION ART.31
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41968A0927(01)..... Amendment..... REPLACEMNT ART.3.2
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41968A0927(01)..... Amendment..... REPLACEMNT ART.46.2

41968A0927(01)..... Amendment..... REPLACEMNT ART.5.1 VERS.F
41968A0927(01)..... Amendment..... REPLACEMNT ART.5.1 VERS.NL
41968A0927(01)..... Amendment..... COMPLETION ART.38
41968A0927(01)..... Amendment..... REPLACEMNT ART.5.2
41968A0927(01)..... Amendment..... REPLACEMNT ART.57
41968A0927(01)..... Amendment..... REPLACEMNT ART.60
41968A0927(01)..... Amendment..... REPLACEMNT ART.64.C
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CORRIGENDUM TO:
78/884/EEC: Convention of Accession
of 9 October 1978
of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and enforcement of judgements in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice

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REPORT ON THE CONVENTION

on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice

(Signed at Luxembourg, 9 October 1978)

by Professor Dr Peter SCHLOSSER,

of the Chair of German, international and foreign civil procedure, of the general theory of procedure and of civil law at the University of Munich

Pursuant to Article 3 (2) of the Act of Accession of 22 January 1972 a Council working party, convened as a result of a decision taken by the Committee of Permanent Representatives of the Member States, prepared a draft Convention on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol of 3 June 1971 on its interpretation by the Court of Justice. This working party was composed of government experts from the nine Member States and representatives from the Commission. The rapporteur, Mr P. Schlosser, Professor of Law at the University of Munich, drafted the explanatory report which was submitted to the governments at the same time as the draft prepared by the experts. The text of this report, which is a commentary on the Convention of Accession signed at Luxembourg on 9 October 1978, is now being published in this issue of the Official Journal.

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CHAPTER 1

PRELIMINARY REMARKS

. Under Article 3 (2) of the Act of Accession, the new Member States undertook 'to accede to the Conventions provided for in Article 220 of the EEC Treaty, and to the Protocols on the interpretation of those Conventions by the Court of Justice, signed by the original Member States and to this end to enter into negotiations with the original Member States in order to make the necessary adjustments thereto'. As a first step the Commission of the European Communities made preparations for the impending discussions on the contemplated adjustments. On 29 November 1971, it submitted to the Council an interim report on the additions considered necessary to the two Conventions signed in 1968, namely the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (hereinafter referred to as 'the 1968 Convention') and the Convention on the mutual recognition of companies and legal persons. Following consultations with the new Member States, the Commission on 15 September 1972 drew up a comprehensive report to the Council on the main problems arising from adjusting both Conventions to the legal institutions and systems of the new Member States. On the basis of this report, the Committee of Permanent Representatives decided on 11 October 1972 to set up a Working Party which was to be composed of delegates of the original and the new Member States of the Community and of a representative of the Commission. The Working Party held its inaugural meeting on 16 November 1972 under the chairmanship of the Netherlands delegate in accordance with the rota. On this occasion, it decided to focus its attention initially on negotiations concerning adjustments to the 1968 Convention which had already been ratified by the original Member States of the EEC and to the Protocol of 3 June 1971 on its interpretation ('the Interpretation Protocol of 1971'), and to postpone the work entrusted to it regarding the Convention on the mutual recognition of companies and legal persons. At its second meeting, the Working Party elected the author of this report as its rapporteur. On the basis of a request made by the Working Party at its third meeting in June 1973, the Committee of Permanent Representatives appointed Mr Jenard, the 'Directeur d'administration auprès du ministère belge des Affaires Étrangères', as its permanent chairman.

2. The Working Party initially considered proposing the legal form of a Protocol for the accession of the new Member States to the 1968 Convention, and that the adjustments contemplated should be annexed thereto. However, this method would have introduced some confusion into the subject. A distinction would then have had to be made between three different Protocols, i.e. the Protocol referred to in Article 65 of the 1968 Convention, the Interpretation Protocol of 1971 and the new Protocol on accession. Furthermore, there were no grounds for dividing the new provisions required in consequence of the accession of the new Member States to the 1968 Convention by putting some into a protocol and others into an act of accession annexed to it. The Working Party therefore presented the outcome of its discussions in the form of a draft Convention between the original Member States and the new Member States of the EEC. This draft Convention makes provision for accession both to the 1968 Convention and to the Interpretation Protocol of 1971 (Title I) as well as for the necessary changes to them (Titles II and IV). The accession of Denmark, Ireland and the United Kingdom to the 1968 Convention extends also to the Protocol referred to in Article 65 which is an integral part of the 1968 Convention. The Working Party also proposed adjustments to this Protocol (Title III).

The decision of the Working Party to adopt the legal form of a Convention incorporating adjustments instead of replacing the 1968 Convention by a new Convention has the advantage that the unchanged provisions of the 1968 Convention do not require renewed ratification.

Accordingly three different 'Conventions' will in future have to be distinguished:

The Convention on jurisdiction and the enforcement of judgments in civil and commercial matters in its original form will be referred to as 'the 1968 Convention' (1).

The expression 'Accession Convention' refers to the draft Convention proposed by the Working Party.

After ratification of the Accession Convention certain provisions of the 1968 Convention will exist in an amended form. References in this

report to the amended form will be indicated by the addition of that word, e.g. 'Article 5 (2) as amended'.

3. The structure of this report does not closely follow the structure of the proposed new Accession Convention. In many places, this report can only be understood, or at any rate is easier to understand, if it is read in conjunction with the corresponding parts of the reports on the 1968 Convention and on the Interpretation Protocol of 1971 which were drawn up by the present permanent chairman and erstwhile rapporteur of the Working Party (hereinafter referred to as 'the Jenard report'). The structure of this report is based on that of these earlier reports.

CHAPTER 2

REASONS FOR THE CONVENTION

4. The second chapter of the Jenard report sets out the reasons for concluding a Convention. They apply with at least as much force to the new Member States as they did to the relationships between the original Member States of the EEC, but they do not call for further close examination here. The obligation on the new Member States to accede to the 1968 Convention is laid down in Article 3 (2) of the Act of Accession to the EEC Treaty. However, in order to give a clear view of the legal position, it may be helpful to supplement the references in the Jenard report to the laws in force in the original Member States of the EEC and to the existing Conventions between these States with details concerning the new Member States.

A.

THE LAW IN FORCE IN THE NEW MEMBER STATES

1. *UNITED KINGDOM*

5. The legal position in the United Kingdom is characterized by six significant features.

6. (a) In the first place, there is a distinction between recognition and enforcement at common law on the one hand and under the Foreign judgments (reciprocal enforcement) Act 1933 on the other.

At common law, a judgment given in a foreign State may serve as a basis for proceedings before courts in the United Kingdom, if the adjudicating court was competent to assume jurisdiction. This legal consequence follows irrespective of whether or not there is reciprocity. In this connection, recognition and enforceability are not limited to the use of the foreign judgment as evidence. The United Kingdom court dealing with the case may not in general review the substance of the foreign judgment. There are, of course, a limited number of grounds for refusing recognition.

For recognition and enforcement under the Foreign judgments (reciprocal enforcement) Act 1933 on the other hand the successful party does not have to institute fresh proceedings before courts in the United Kingdom on the basis of the foreign judgment. The successful party merely has to have the judgment registered with the appropriate court. However, this simplified recognition and enforcement procedure is available only where the judgment to be recognized was given by a Superior Court, and, more important, where a convention on the reciprocal recognition and enforcement of judgments is in force between the State of origin and the United Kingdom. Once the foreign judgment is registered, it has the same legal force and effect as a judgment given by the court of registration.

7. (b) Both these methods are available in the United Kingdom only for the enforcement of judgments which order payment of a specific sum of money. Consequently maintenance orders made by foreign courts which stipulate periodic payments are not generally enforceable in the United Kingdom. However, the Maintenance orders (reciprocal enforcement) Act which came into force in 1972 makes it possible for international treaty obligations to be concluded in this field.

8. (c) Both at common law and under the 1933 Act, it is a requirement for recognition and enforcement that the judgment should be 'final and conclusive between the parties'. This requirement is clearly satisfied where the adjudicating court can no longer alter its judgment or can only do so in very exceptional circumstances. Similarly, neither the fact that the period during which an appeal may be made is still running nor even a pending appeal prevent this requirement from being satisfied. However, maintenance orders which stipulate periodic payments are excluded from recognition since they may be varied to take account of changed circumstances unless they are covered by the abovementioned Maintenance orders (reciprocal enforcement) Act 1972.

9. (d) It is possible to institute proceedings on the basis of a foreign judgment or to make an application for its registration under the 1933 Act during a period of six years from the date on which the judgment was given.

10. (e) United Kingdom law distinguishes between the recognition and enforcement of foreign judgments in the same way as the other States of the Community. If a foreign judgment fulfils the common law requirements for its recognition or if it is registered with a United Kingdom court, it becomes effective also in fields other than enforcement. A clear distinction is made between recognition and enforcement of foreign judgments in, for example, the bilateral Conventions with France and Germany.

The requirements mentioned in paragraphs 7 and 9 are not set out in those Conventions as requirements for recognition.

11. (f) Finally, it should be noted that the United Kingdom although not a federal State, is not a single legal and judicial area. It consists of three areas with different legal systems: England and Wales, Scotland and Northern Ireland. Whilst the common law rules described in paragraph 6 apply uniformly to the whole of the United Kingdom, the different judicial systems in each of the three legal areas of this State have to be taken into consideration when the 1933 Act is applied. Applications for registration have to be made in England and Wales to the High Court of Justice, in Scotland to the Court of Session, and in Northern Ireland to the High Court of Justice of Northern Ireland. If registration is granted, the judgment can be enforced only in the area in which the relevant courts have jurisdiction, which extends to the whole of England and Wales, of Scotland or of Northern Ireland respectively (see paragraph 209; for maintenance orders, see paragraphs 210 and 218). Recognition of a judgment is, nevertheless, independent of its registration.

2. *IRELAND*

12. The common law provisions of Irish law are similar to those which apply in the United Kingdom. The only statutory provisions of Irish law on the recognition and enforcement of foreign judgments are contained in the Maintenance orders (reciprocal enforcement) Act 1974. This Act gives effect to an international agreement between Ireland and the United Kingdom for the reciprocal recognition of maintenance orders made by courts in those States. The agreement is expressed to terminate on the coming into force of the 1968 Convention for both States.

3. *DENMARK*

13. Under paragraph 223a of the Law of 11 April 1916, foreign judgments can be recognized only if a treaty providing reciprocity has been concluded with the State of origin, or if binding effect has been given to judgments of a foreign State by Royal Decree. Denmark has concluded no bilateral conventions on recognition and enforcement. There is only one Royal Decree of the type referred to and it concerns judgments given by German courts (2).

B.

EXISTING CONVENTIONS

14. Apart from Conventions relating to particular matters (see paragraph 238 *et seq.*), the United Kingdom is the only new Member State to be bound to other Member States of the EEC by bilateral Conventions on the recognition and enforcement of judgments. These are the Conventions with France, Belgium, the Federal Republic of Germany, Italy and the Netherlands listed in the new version of Article 55 (see

paragraph 237). These bilateral Conventions serve to implement the Foreign judgments (reciprocal enforcement) Act for the United Kingdom (see paragraph 6) and therefore contain provisions which more or less follow the same pattern. The requirements for recognition and enforcement correspond to the criteria mentioned in paragraphs 6 to 11 above. Rules providing for 'direct' jurisdiction [3] are not included.

C.

GENERAL ARRANGEMENT OF THE PROPOSED ADJUSTMENTS

15. Neither Article 3 (2) of the Act of Accession nor the terms of reference given to the Working Party provide any clear guide of what is meant by 'necessary adjustments'.

The term could be given a very narrow interpretation. The emphasis would then have to be laid above all on the requirement of necessity, in the sense of indispensability. At the beginning of the Working Party's discussions it became clear, however, that such a narrow view of the contemplated adjustments was bound to make it more difficult for the 1968 Convention to take root in the legal systems of the new Member States. There are a variety of reasons for this.

1. *SPECIAL STRUCTURAL FEATURES OF THE LEGAL SYSTEMS OF THE NEW MEMBER STATES*

16. The 1968 Convention implicitly proceeded from a legal background common to the original Member States of the EEC. By contrast the legal systems of the new Member States unmistakably contain certain special structural features. It would hardly have been reasonable to expect these States to adjust their national law to the legal position on which the 1968 Convention is based.

On the contrary, adjustment of the Convention seemed the more obvious course on occasion. This applies, for example, to the distinction made in Articles 30 and 38 between ordinary and extraordinary appeals (see paragraph 195 *et seq.)*, which does not exist in United Kingdom and Irish law, to the system of registering judgments in the United Kingdom instead of the system of granting enforcement orders (see paragraph 208) and to the concept of the trust which is a characteristic feature of the common law [4] (see paragraph 109 *et seq.)*. The same also applies to the inter-relation existing in Denmark between judicial and administrative competence in maintenance cases (see paragraph 66 *et seq.)*.

2. *AMBIGUITIES IN THE EXISTING TEXT*

17. In certain cases, enquiries about the precise meaning of some provisions of the 1968 Convention by the States obliged to accede to it clearly showed that their interpretation was often uncertain and controversial. The Working Party decided therefore to propose that certain provisions of the 1968 Convention should be given a more precise wording or an authoritative interpretation. This applies, for example, to the provisions about granting legal aid in enforcement proceedings (see paragraph 223). The Working Party also dealt in this way with the provisions of Article 57 on the relation between the 1968 Convention and other Conventions, (see paragraph 238 *et seq.*). In most cases, however, the information requested could be given in a sufficiently clear and uniform way, so that this report need do no more than refer to it.

3. *FURTHER DEVELOPMENTS IN THE LAW OF THE ORIGINAL MEMBER STATES OF THE EEC*

18. In yet other cases, enquiries by the new Member States about the content of some provisions of the 1968 Convention revealed that in the original Member States of the EEC too the law had in the meantime evolved in such a way that general adjustments ratner than adjustments restricted to relations with the new Member States seemed advisable. This applies particularly to proceedings in matters of family law in which ancillary relief, and especially maintenance claims, are now often combined with the main proceedings concerning status. In family and matrimonial matters, such combined proceedings have replaced the traditional system of separating status proceedings from subsequent proceedings in many countries during the years following the signing of the 1968 Convention. This is the reason for the revised Article 5 (2) proposed by the Working Party (see paragraphs 32 and 90). The development of consumer protection law in the Member States led to a completely new version of Section 4 of Title II, and in one case the 1968 Convention was amended as a result of judgments of the Court of Justice of the European Communities (see paragraph 179).

4. *SPECIFIC ECONOMIC EFFECTS*

19. Finally, it became apparent that certain provisions of the 1968 Convention in their application to the new Member States would have economic repercussions unequalled in the original Member States. Thus, the worldwide significance of the British insurance market prompted the Working Party to recommend amendments concerning jurisdiction in insurance matters (see paragraph 136). The new paragraph (7) of Article 5 (see paragraph 122) is justified by the special position occupied by British maritime jurisdiction.

CHAPTER 3

SCOPE OF THE CONVENTION

20. As already discussed in the Jenard report, the provisions governing the scope of the 1968 Convention contain four significant elements. These required some further explanation in the context of the relationship of the original Member States to each other. They are:

1. Limitation to proceedings and judgments on matters involving international legal relationships (I).

2. Duty of the national courts to observe the provisions governing the scope of the 1968 Convention of their own motion (II).

3. Limitation of the Convention to civil and commercial matters (III).

4. A list (Article 1, second paragraph) of matters excluded from the scope of the Convention (IV).

In the relationship of the original Member States to each other there was no problem about a fifth criterion which is much more clearly brought out in the title of the 1968 Convention than in Article 1 which defines its scope. The 1968 Convention only applies where court proceedings and court decisions are involved. Proceedings and decisions of administrative authorities do not come within the scope of the 1968 Convention. This gave rise to a particular problem of adjustment in relation to Denmark (V).

I. MATTERS INVOLVING INTERNATIONAL LEGAL RELATIONSHIPS

21. The accession of the new Member States to the 1968 Convention in no way affects the application of the principle that only proceedings and judgments about matters involving international legal relationships are affected, so that reference need only be made to Section I of Chapter III of the Jenard report.

II. BINDING NATURE OF THE CONVENTION

22. Under Articles 19 and 20 of the 1968 Convention the provisions concerning 'direct jurisdiction' are to be observed by the court of its own motion: in some cases, i.e. where exclusive jurisdiction exists, irrespective of whether the defendant takes any steps; in other cases only where the defendant challenges the jurisdiction. Similarly, a court must also of its own motion consider whether there exists an agreement on jurisdiction which excludes the court's jurisdiction and which is valid in accordance with Article 17.

An obligation to observe the rules of jurisdiction of its own motion is by no means an unusual duty for a court in the original Member States. However, the United Kingdom delegation pointed out that such a provision would mean a fundamental change for its courts. Hitherto United Kingdom courts had been able to reach a decision only on the basis of submissions of fact or law made by the parties. Without infringing this principle, no possibility existed of examining their jurisdiction of their own motion.

However, Article 3 (2) of the Act of Accession cannot be interpreted as requiring the amendment of any provisions of the Conventions referred to on the ground that introduction of those provisions into the legal system of a new Member State would necessitate certain changes in its long-established legal practices and procedures.

It does not necessarily follow from Articles 19 and 20 of the 1968 Convention that the courts must, of their own motion, investigate the facts relevant to deciding the question of jurisdiction, that they must for example inquire where the defendant is domiciled. The only essential factor is that uncontested assertions by the parties should not bind the court. For this reason the following rule is reconcilable with the 1968 Convention: a court may assume jurisdiction only if it is completely satisfied of all the facts on which such jurisdiction is based; if it is not so satisfied it can and must request the parties to provide the necessary evidence, in default of which the action will be dismissed as inadmissible. In such circumstances the lack of jurisdiction would be declared by the court of its own motion, and not as a result of a challenge by one of the parties. Whether a court is itself obliged to investigate the facts relevant to jurisdiction, or whether it can, or must, place the burden of proof in this respect on the party interested in the jurisdiction of the court concerned, is determined solely by national law. Indeed some of the legal systems of the original Member States, for example Germany, do not require the court itself to undertake factual investigations in a case of exclusive jurisdiction, even though lack of such jurisdiction has to be considered by the court of its own motion.

III. CIVIL AND COMMERCIAL MATTERS

23. The scope of the 1968 Convention is limited to legal proceedings and judgments which relate to civil and commercial matters. All such proceedings not expressly excluded fall within its scope.

In particular, it is irrelevant whether an action is brought 'against' a named defendant (see paragraphs 124 *et seq.*). It is true that in such a case Article 2 *et seq.* cannot operate; but otherwise the 1968 Convention remains applicable.

The distinction between civil and commercial matters on the one hand and matters of public law on the other is well recognized in the legal systems of the original Member States and is, in spite of some important differences, on the whole arrived at on the basis of similar criteria. Thus the term 'civil law' also includes certain important special subjects which are not public law, especially, for example, parts of labour law.

For this reason the draftsmen of the original text of the 1968 Convention, and the Jenard report, did not include a definition of civil and commercial matters and merely stated that the 1968 Convention also applies to decisions of criminal and administrative courts, provided they are given in a civil or commercial matter, which occasionally happens. In this last respect, the accession of the three new Member States presents no additional problems. But as regards the main distinction referred to earlier considerable difficulties arise.

In the United Kingdom and Ireland the distinction commonly made in the original EEC States between private law and public law is hardly known. This meant that the problems of adjustment could not be solved simply by a reference to these classifications. In view of the Judgment of the Court of Justice of the European Communities of 14 October 1976 ([5]), which was delivered during the final stages of the discussions and which decided in favour of an interpretation which made no reference to the 'applicable' national law, the Working Party restricted itself to declaring, in Article 1, paragraph 1, that revenue, customs or administrative matters are not civil or commercial matters within the meaning of the Convention. Moreover, the legal practice in the Member States of the Community, including the new Member States, must take account of the above judgment which states that, in interpreting the concept of civil and commercial matters, reference must be made 'first, to the objectives and scheme of the Convention and, secondly, to the general principles which stem from the corpus of the national legal systems'.

As a result of this all that this report can do is to throw light on the Court's instructions by setting out some details of comparative law.

A.

ADMINISTRATIVE LAW IN IRELAND AND THE UNITED KINGDOM

24. In the United Kingdom and in Ireland the expression 'civil law' is not a technical term and has more than one meaning. It is used mainly as

the opposite of criminal law. Except in this limited sense, no distinction is made between 'private' and 'public' law which is in any way comparable to that made in the legal systems of the original Member States, where it is of fundamental importance. Constitutional law, administrative law and tax law are all included in 'civil law'. Admittedly the United Kingdom is already a party to several Conventions which expressly apply only to 'civil and commercial matters'. These include all the bilateral Conventions on the enforcement of foreign judgments concluded by the United Kingdom. None of these, however, contains any rules which decide the circumstances under which an original court before which an issue is brought may assume jurisdiction. They govern only the recognition and enforcement of judgments and deal with questions of jurisdiction only indirectly as a condition of recognition. Moreover, these Conventions generally only apply to judgments ordering the payment of a specific sum of money (see paragraph 7). In drafting them, a pragmatic approach dispensing with a definition of 'civil and commercial matters' proved, therefore, quite adequate.

B.

ADMINISTRATIVE LAW IN THE CONTINENTAL MEMBER STATES

25. In the legal systems of the original Member States, the State itself and corporations exercising public functions such as local authorities may become involved in legal transactions in two ways. Having regard to their special functions and the fact that they are formally part of public law they may act outside private law in a 'sovereign' capacity. If they do this, their administrative ac ('Verwaltungsakt', 'décision exécutoire') is of a special nature. The State and some other public corporations may, however, also engage in legal transactions in the same way as private individuals. They can conclude contracts subject to private law, for example with transport undertakings for the carriage of goods or persons in accordance with tariffs generally in force or with a property owner for the lease of premises. The State and public corporations can also incur tortious liability in the same way as private individuals, for example as a result of a traffic accident in which an official car is involved. The real difficulty arises from distinguishing between instances in which the State and its independent organs act in a private law capacity and those in which they act in a public law capacity. A few guidelines on how this difficulty may be overcome are set out below.

The difficulties of finding a dividing line are of three kinds. The field of activities governed by public law differs in the various continental Member States (1). Public authorities frequently have a choice of the form in which they wish to act (2). The position is relatively clear only regarding the legal relations between the State and its independent organs (3).

1. *THE VARYING EXTENT OF PUBLIC LAW*

26. The most important difference between national administrative laws on the continent consists in the legal rules governing the duties of public authorities to provide supplies for themselves and for public tasks. For this purpose the French legal system has established the separate concept of administrative contracts which are governed independently of the 'Code civil' by a special law, the 'Code des marchés publics'. The administrative contract is used both when public authorities wish to cover their own requirements and when public works, such as surface or underground construction, land development, etc., have to be undertaken. In such situations the French State and public corporations do not act in the capacity of private persons. The characteristic result of this is that, if the other parties to the contract do not perform their obligations, the State and public corporations do not have to bring an action before the courts, but may impose unilaterally enforceable sanctions by an administrative act ('décision exécutoire'). The legal situation in Germany is quite different. There the administrative contract plays a completely subordinate role. Supplies to the administrative agencies, and in particular the placing of contracts for public works, are carried out solely on the basis of private law. Even where the State undertakes large projects like the construction of a dam or the channelling of a river, it concludes its contracts with the firms concerned like a private individual.

2. *CHOICE OF TYPE OF LAW*

27. However, the borderline between the public law and the private law activities of public agencies is not rigidly prescribed in some of the legal systems. Public authorities have, within certain limits, a right to choose whether in carrying out their functions they wish to use the method of a 'sovereign act', i.e. an administrative contract, or merely to conclude a private transaction.

In respect of those areas where public authorities may act either under private or public law, it is not always easy to decide whether or not they have acted as private individuals. In practice a clear indication is often lacking.

3. *RELATIONSHIP OF PUBLIC AUTHORITIES TO ONE ANOTHER*

28. Relations between public authorities may also be governed either by private or by public law. If governed by public law, such relations are not subject to the 1968 Convention, even if, as in Italy, they are not considered part of administrative law. However, relations of States and public corporations with each other would fall almost without exception within the sphere of private law, if they contain international aspects (and are not subject to public international law). It is hard to imagine how, for example, it would be possible for relations under public law to exist between two local authorities in different States. However, such relations could, of course, be established in future by treaties.

C.

CIVIL AND CRIMINAL LAW

29. The Working Party considered it obvious that criminal proceedings and criminal judgments of all kinds are excluded from the scope of the 1968 Convention, and that this matter needed, therefore, no clarification in the revised text (see paragraph 17). This applies not only to criminal proceedings *stricto sensu*. Other proceedings imposing sanctions for breaches of orders or prohibitions intended to safeguard the public interest also fall outside the scope of civil law. Certain difficulties may arise in some cases in classifying private penalties known to some legal systems like contractual penalty clauses, penalties imposed by associations, etc. Since in many legal systems criminal proceedings may be brought by a private plaintiff, a distinction cannot be made by reference to the party which instituted the proceedings. The decisive factor is whether the penalty is for the benefit of the private plaintiff or some other private individual. Thus the decisions of the Danish industrial courts imposing fines, which are for the benefit of the plaintiff or some other aggrieved party, certainly fall within the scope of the 1968 Convention.

IV. MATTERS EXPRESSLY EXCLUDED

30. The second paragraph of Article 1 sets out under four points the civil matters excluded from the scope of the 1968 Convention. The accession of the new Member States raises problems in respect of all four points.

A.

STATUS OR LEGAL CAPACITY OF NATURAL PERSONS, RIGHTS IN PROPERTY ARISING OUT OF A MATRIMONIAL RELATIONSHIP, WILLS AND SUCCESSION

31. The Working Party encountered considerable difficulties when dealing with two problems relating to point (1) of the second paragraph of Article 1. The first problem was that of maintenance proceedings ancillary to status proceedings (1) and the second problem was the meaning of the term 'régimes matrimoniaux' (rights in property arising out of a matrimonial relationship) (2). Apart from these two problems, the enquiries directed to the Working Party by the new Member States in respect of point (1) of the second paragraph of Article 1 were relatively easy to answer (3).

1. *MAINTENANCE JUDGMENTS ANCILLARY TO STATUS PROCEEDINGS (ANCILLARY MAINTENANCE JUDGMENTS)*

32. When the 1968 Convention was drawn up, the principle still applied in the original Member States that disputes relating to property could not be combined with status proceedings, nor could

maintenance proceedings be combined with proceedings for the dissolution of a marriage or paternity proceedings. It was therefore possible, without running the risk of creating disadvantages caused by artificially separating proceedings which in reality belonged together, to exclude status matters, but not maintenance proceedings, from the scope of the 1968 Convention. Once this rule comes up against national legislation which allows combined proceedings comprising maintenance claims and status matters, it will perforce give rise to great difficulties. These difficulties had already become serious in the original Member States, as soon as the widespread reform of family law had led to an increasing number of combined proceedings in those countries. Accordingly a mere adjustment of the 1968 Convention as between the original and new Member States would have provided only a piecemeal solution. Time and opportunity were ripe for an adjustment of the 1968 Convention, even as regards the relationships between the original Member States, to take account of the developments in the law which had taken place (see paragraph 18).

33. (a) The solution proposed by the Working Party is the outcome of a lengthy and intensive study of the possible alternatives. A distinctive feature of the 1968 Convention is the inter-relation of the application of its rules of jurisdiction at the adjudicating stage and the prohibition against reopening the question of jurisdiction at the recognition stage. Consequently, on the basis of the original text of the Convention only two completely clear-cut solutions present themselves as regards the treatment of ancillary maintenance judgments. The first is that the adjudicating court dealing with a status matter may give an ancillary maintenance judgment only when it has jurisdiction under the 1968 Convention; the maintenance judgment must then be recognized by the foreign court which may not re-examine whether the original adjudicating court had jurisdiction. The second possible solution is that ancillary maintenance judgments should also be excluded from the scope of the 1968 Convention under point (1) of the second paragraph of Article 1 as being ancillary to status judgments. However, both solutions have practical drawbacks. The second would result in ancillary maintenance judgments being generally excluded from recognition and enforcement under the 1968 Convention, even though the great majority of cases are decided by courts which would have had jurisdiction under its provisions. In an unacceptably high number of cases established maintenance claims would then no longer be able to move freely. The first solution would constitute a retrograde step from the progressive and widely acclaimed achievement of combined proceedings and judgments in status and maintenance matters.

34. In view of the above, the simplest solution would have been to include rules of jurisdiction covering status proceedings in the 1968 Convention. However, the reasons given earlier against taking that course are still valid. Therefore, the only way out is to opt for one of the two alternatives outlined above, whilst mitigating its drawbacks as far as possible. In the view of the Working Party, to deprive maintenance judgments ancillary to status proceedings of the guarantee of their enforceability abroad, or to recognize them only to a severely limited extent, would be the greater evil.

35. The Working Party therefore tried first of all to find a solution along the following lines. National courts dealing with status matters should have unrestricted power to decide also on maintenance claims, even when they cannot use their jurisdiction in respect of the maintenance claim on any provision of the 1968 Convention; ancillary maintenance judgments should in principle be recognized and enforced, but the court addressed may, contrary to the principles of the 1968 Convention which would otherwise apply, re-examine whether the court which gave judgment on the maintenance claims had jurisdiction under the provisions of Title II. However, the principle that the jurisdiction of the court of origin should not be re-examined during the recognition and enforcement stages was one of the really decisive achievements of the 1968 Convention. Any further restriction of this principle, even if limited to one area, would be justifiable only if all other conceivable alternatives were even more unacceptable.

36. The proposed addition to Article 5 would on the whole have most advantages. It prevents maintenance judgments which are ancillary to status judgments being given on the basis of the rule of exorbitant jurisdiction which generally applies in family law matters, namely the rule which declares the nationality of only one of the two parties as sufficient. One can accept that maintenance proceedings may not be combined with status proceedings where the competence of the court concerned is based solely on such

exorbitant jurisdiction. For status proceedings, jurisdiction will continue to depend on the nationality of one of the two parties. The maintenance proceedings will have to be brought before another court with jurisdiction under the 1968 Convention.

(b) The significance of the new approach is as follows:

37. It applies uniformly to the original and to the new Member States alike.

38. The jurisdiction of the court of origin may not be re-examined during the recognition and enforcement stages. This still follows from the third paragraph of Article 28 even after the addition made to Article 5. The court of origin has a duty to examine very carefully whether it has jurisdiction under the 1968 Convention, because a wrong decision on the question of jurisdiction cannot be corrected later on.

39. Similar rules apply in respect of *lis pendens*. It was not necessary to amend Articles 21 and 23. As long as the maintenance claim is pending before the court seised of the status proceedings it may not validly be brought before the courts of another State.

40. The question whether the court seised of the status proceedings has indeed jurisdiction also in respect of the maintenance proceedings, without having to rely solely on the nationality of one of the parties to the proceedings, is to be determined solely by the *lex fori,* including of course its private international law and procedural law. Even where the courts of a State may not as a rule combine a status matter with a maintenance claim, but can do so if a foreign legal system applicable under the provisions of their private international law so provides, they have jurisdiction in respect of the maintenance claim under the provisions of Article 5 (2) of the 1968 Convention as amended. This is subject to the proviso that the court concerned in fact had jurisdiction in respect of both the status proceedings and the maintenance claim under the current provisions of its own national law.

41. The 1968 Convention prohibits the assumption of a combined jurisdiction which may be provided for under the national law to cover both status and maintenance proceedings only where the court's jurisdiction would be based solely on the nationality of one of the two parties. This concerns principally the exorbitant jurisdictions which are referred to in the second paragraph of Article 3, and provided for in Article 15 of the Belgian Civil Code (Code civil), and Articles 14 and 15 of the French and Luxembourg Civil Code (Code civil), governing proceedings which do not relate only to status and are therefore not excluded pursuant to point (1) of the second paragraph of Article 1. Maintenance actions combined with status proceedings continue to be permitted, even if the jurisdiction of the court is based on grounds other than those which are normally excluded by the 1968 Convention as being exorbitant. Jurisdiction on the basis of both parties having the same nationality is excluded by the 1968 Convention in respect of ordinary civil and commercial matters, (Article 3, second paragraph), but in respect of combined status and maintenance proceedings, it cannot be considered as exorbitant, and consequently should not be inadmissible. The plaintiff's domicile is recognized in any case as a basis for jurisdiction in maintenance actions.

Finally, the proposed addition to Article 5 (2) deprives courts of jurisdiction to entertain maintenance claims in combined family law proceedings only where their jurisdiction in respect of the status proceedings is based solely on the nationality of one of the two parties. Where the jurisdiction of a court depends on the fulfilment of several conditions, only one of which is that one of the parties should possess the nationality of the country concerned, jurisdiction does not depend solely on the nationality of the two parties.

Article 606 (3) of the German Code of Civil Procedure is intended to ensure, in conjunction with Article 606a, that in matrimonial matters a German court always has jurisdiction, even when only one of the spouses is German. The fact that this provision is only supplementary to other provisions governing jurisdiction does not change the fact that jurisdiction may be based solely on the nationality of one of the parties. Once Article 5 (2) of the 1968 Convention comes into force in its amended form maintenance claims can no longer be brought and decided under that particular jurisdiction.

42. Article 5 (2) does not apply where the defendant is not domiciled in a Contracting State, or where maintenance questions can be decided without the

procedural requirement of a claim or petition by one spouse against the other (see paragraph 66).

2. *RIGHTS IN PROPERTY ARISING OUT OF A MATRIMONIAL RELATIONSHIP*

43. The exclusion of 'rights in property arising out of a matrimonial relationship' from the scope of the Convention (Article 1 second paragraph, point (1)) raises a problem for the United Kingdom and Ireland.

Neither of these countries has an equivalent legal concept, although the expression 'matrimonial property' is used in legal literature. In principle, property rights as between spouses are governed by general law. Agreements between spouses regulating their property rights are no different in law from agreements with third parties. Occasionally, however, there are special statutory provisions affecting the rights of spouses. Under English law (Matrimonial homes Act 1967) and Irish law (Family home protection Act 1976), a spouse is entitled to certain rights of occupation of the matrimonial home. Moreover, divorce courts in the United Kingdom have, under the Matrimonial causes Act 1973, considerable powers, though varying in extent in the different parts of the country, to order the payment of capital sums by one former spouse to the other. In England even a general redistribution of property as between former spouses and their children is possible.

The concept of 'rights in property arising out of a matrimonial relationship' can also give rise to problems in the legal systems of the original Member States. It does not cover the same legal relations in all the systems concerned.

For a better understanding of the problems involved, they are set out more fully below (a), before the solution proposed by the Working Party is discussed (b).

44. (a) Three observations may give an indication of what is meant by 'matrimonial regimes' (rights in property arising out of a matrimonial relationship) in the legal systems of the seven continental Member States. They will deal with the character of the concept which is confined exclusively to relationships between spouses (paragraph 45), with the relationship with the provisions which apply to all marriages irrespective of the particular 'matrimonial regime' between the spouses (paragraph 46), and finally with the possibility of third parties becoming involved (paragraph 47).

45. For the purpose of governing the relations between spouses in respect of property, these legal systems do not, or at least not predominantly, employ the legal concepts and institutions otherwise used in their civil law. Instead, they have developed exclusive legal institutions the application of which is limited to relations between spouses, and whose most important feature is a comprehensive set of rules governing property. However, there is not merely one such set of rules in each legal system. Instead, spouses have a choice between several, ranging from general 'community of property' to strict 'separation of property'. Even the latter, when chosen by the spouses, is a special form of 'property regime', although special features arising from marriage can then hardly be said to exist any longer. The choice of a 'property regime' must take the form of a 'marriage contract' which is a special legal concept and should not be confused with the conclusion of the marriage itself. If the spouses do not make a choice, one of the sets of rules governing property rights applies to them by law (known as the 'statutory matrimonial regime').

In some legal systems (France and Belgium) the 'matrimonial regime' existing at the beginning of a marriage can subsequently be changed only in exceptional circumstances. In others (Germany) the spouses are free to alter their 'matrimonial regime' at any time.

Disputes concerning 'matrimonial regimes' can arise in various forms. There may be a dispute about the existence and interpretation of a marriage contract. In certain circumstances, a spouse may apply to the court for conversion of one 'matrimonial regime' into a different one. Some 'matrimonial regimes' provide for different rules in respect of different types of property. A dispute may then arise as to the type of property to which a particular object belongs. Where the 'matrimonial regime' in question differentiates between the management of different types of property, there may be disagreement as to which spouse may manage which items of property. The most frequent type of dispute relating to 'matrimonial regimes' concerns the winding up of the 'matrimonial regime' after termination of the marriage, particularly after divorce. The 'statutory matrimonial regime' under German

law ('Zugewinngemeinschaft' or community of acquisitions) then results in an equalization claim by the spouse whose property has not increased in value to the same extent as that of his partner.

46. Some provisions apply to all marriages, irrespective of the particular 'matrimonial régime' under which spouses live, especially in Germany and France. Significantly the German and French texts of the 1968 Convention use the term in the plural ('die Güterstände', 'les régimes matrimoniaux').

This can be explained as follows: the Code civil, for instance, deals with property aspects of marriage in two different parts of the code. Title V of the third book (on the acquisition of property) refers in detail to the 'contrat de mariage' and then 'régimes matrimoniaux', while property aspects of the relations between spouses are also covered by Articles 212 to 226 in Title V of the first book. The new French divorce law of 11 July 1975 (6) introduced into the new version of Article 270 *et seq.* of the Code civil equalization payments normally in the form of lump sum compensation (Article 274) which are independent of the particular 'regime' applicable between the spouses. German law in the fourth book of the Bürgerliches Gesetzbuch makes a similar distinction between the legal consequences in respect of property rights which generally follow from marriage (Title V, Article 1353 *et seq.)* and those which follow from 'matrimonial property law', which varies according to the various 'matrimonial regimes'. Under both systems (Article 1357 (2) of the Bürgerliches Gesetzbuch, Article 220 (2) of the French Code civil) it is possible, for example, to prevent a spouse from engaging in certain legal transactions which he is normally entitled to engage in his capacity as spouse. According to Article 285 of the Code civil (7) the court can, after divorce, make orders concerning the matrimonial home irrespective of the 'matrimonial regime' previously applicable. Similar possibilities exist in other States.

French legal literature refers to provisions concerning property rights which apply to all marriages as 'régime matrimonial primaire'. Other legal systems have no such special expression. It is within the spirit of Article 1, second paragraph, point (1) of the 1968 Convention to exclude those provisions concerning property rights affecting all marriages from its scope of application, in so far as they are not covered by the term 'maintenance claims' (see paragraph 91 *et seq.*)

In all legal systems of the Community it is possible to conceive of relations affecting rights between spouses which are governed by the general law of contract, law of tort or property law. Some laws contain provisions specifically intended to govern cases where such relations exist between spouses. For example, Article 1595 of the French Code civil contains restrictions on the admissibility of contracts of sale between spouses. Case law has sometimes developed special rules in this field which are designed to take account of the fact that such transactions commonly occur in relations between spouses. All this does not alter the position that legal relations governed by the general law of contract or tort remain subject to the provisions of the 1968 Convention, even if they are between spouses.

47. Finally, legal provisions comprised in the term 'matrimonial regimes' are not limited to relations between the spouses themselves. For example, in Italian law, in connection with the liquidation of a 'fondo patrimoniale' disputes may arise between parents and children (Article 171 (3) of the Codice civile), which under Italian law unequivocally concern relations arising out of 'matrimonial property law' ('il regime patrimoniale della famiglia'). German law contains the regime of 'continued community of property' ('fortgesetzte Gütergemeinschaft'), which forms a link between a surviving spouse and the issue of the marriage.

48. (b) These findings raise problems similar to those with which the Working Pary was faced in connection with the concept 'civil and commercial matters'. It was, however, possible to define the concept of 'matrimonial regimes' not only in a negative manner (paragraph 49), but also positively, albeit rather broadly. This should enable implementing legislation in the United Kingdom and Ireland, in reliance on these statements, to indicate to the courts which legal relations form part of 'matrimonial regimes' within the meaning of the 1968 Convention (paragraph 50). Consequently no formal adjustment of the 1968 Convention became necessary.

49. As a negative definition, it can be said with certainty that in no legal system do maintenance claims between spouses derive from rules governing 'matrimonial regimes'; nor are

maintenance claims confined to claims for periodic payments (see paragraph 93).

50. The mutual rights of spouses arising from 'matrimonial régimes' correspond largely with what are best described in English as 'rights in property arising out of a matrimonial relationship'. Apart from maintenance matters property relations between spouses which are governed by the differing legal systems of the original Member States otherwise than as 'matrimonial regimes' only seldom give rise to court proceedings with international aspects.

Thus the following can be said in respect of the scope of point (1) of the second paragraph of Article 1 as far as 'matrimonial regimes' are concerned:

The Convention does not apply to the assumption of jurisdiction by United Kingdom and Irish courts, nor to the recognition and enforcement of foreign judgments by those courts, if the subject matter of the proceedings concerns issues which have arisen between spouses, or exceptionally between a spouse and a third party, during or after dissolution of their marriage, and which affect rights in property arising out of the matrimonial relationship. The expression 'rights in property' includes all rights of administration and disposal — whether by marriage contract or by statute — of property belonging to the spouses.

3. *THE REMAINING CONTENTS OF ARTICLE 1, SECOND PARAGRAPH, POINT (1) OF THE 1968 CONVENTION*

51. (a) The non-applicability of the 1968 Convention in respect of the status or legal capacity of natural persons concerns in particular proceedings and judgments relating to:

— the voidability and nullity of marriages, and judicial separation,

— the dissolution of marriages,

— the death of a person,

— the status and legal capacity of a minor and the legal representation of a person who is mentally ill; the status and legal capacity of a minor also includes judgments on the right to custody after the divorce or legal separation of the parents; this was the Working Party's unanimous reply to the express question put by the Irish delegation,

— the nationality or domicile (see paragraph 71 *et seq.*) of a person,

— the care, custody and control of children, irrespective of whether these are in issue in divorce, guardianship, or other proceedings,

— the adoption of children.

However, the 1968 Convention is only inapplicable when the proceedings are concerned directly with legal consequences arising from these matters. It is not sufficient if the issues raised are merely of a preliminary nature, even if their preliminary nature is, or has been, of some importance in the main proceedings.

52. (b) The expression 'wills and succession' covers all claims to testate or intestate succession to an estate. It includes disputes as to the validity or interpretation of the terms of a will setting up a trust, even where the trust takes effect on a date subsequent to the death of the testator. The same applies to proceedings in respect of the application and interpretation of statutory provisions establishing trusts in favour of persons or institutions as a result of a person dying intestate. The 1968 Convention does not, therefore, apply to any disputes concerning the creation, interpretation and administration of trusts arising under the law of succession including wills. On the other hand, disputes concerning the relations of the trustee with persons other than beneficiaries, in other words the 'external relations' of the trust, come within the scope of the 1968 Convention (see paragraph 109 *et seq.*)

B.

BANKRUPTCY AND SIMILAR PROCEEDINGS

53. Article 1, second paragraph, point (2), occupies a special position among the provisions concerning the legal matters excluded from the 1968 Convention. It was drafted with reference to a special Convention on bankruptcy which was being discussed at the same time as the 1968 Convention.

Leaving aside special bankruptcy rules for very special types of business undertakings, the two Conventions were intended to dovetail almost completely with each other. Consequently, the preliminary draft Convention on bankruptcy, which was first drawn up in 1970, submitted in an amended form in 1975 ([8]), deliberately adopted the principal terms 'bankruptcy', 'compositions' and 'analogous proceedings' ([9]) in the provisons concerning its scope in the same way ([10]) as they were used in the 1968 Convention. To avoid, as far as possible, leaving lacunae between the scope of the two Conventions, efforts are being made in the discussions on the proposed Convention on bankruptcy to enumerate in detail all the principal and secondary proceedings involved ([11]) and so to eliminate any problems of interpretation. As long as the proposed Convention on bankruptcy has not yet come into force, the application of Article 1, second paragraph, point (2) of the 1968 Convention remains difficult. The problems, including the matters arising from the accession of the new Member States, are of two kinds. First, it is necessary to define what proceedings are meant by bankruptcy, compositions or analogous proceedings as well as their constituent parts (1). Secondly, the legal position in the United Kingdom poses a special problem as the bankruptcy of 'incorporated companies' is not a recognized concept in that country (2).

1. *GENERAL AND INDIVIDUAL TYPES OF PROCEEDINGS EXCLUDED FROM THE SCOPE OF THE 1968 CONVENTION*

54. It is relatively easy to define the basic types of proceedings that are subject to bankruptcy law and therefore fall outside the scope of the 1968 Convention. Such proceedings are defined in almost identical terms in both the Jenard and the Noël-Lemontey reports ([12]) as those

> 'which, depending on the system of law involved, are based on the suspension of payments, the insolvency of the debtor or his inability to raise credit, and which involve the judicial authorities for the purpose either of compulsory and collective liquidation of the assets or simply of supervision by those authorities.'

In the legal systems of the original States of the EEC there are only a very few examples of proceedings of this kind, ranging from two (in Germany) to four (Italy and Luxembourg). In its 1975 version ([8]) the Protocol to the preliminary draft Convention on bankruptcy enumerates the proceedings according to types of proceedings and States concerned. A list is reproduced in Annex I to this report. Naturally, the 1968 Convention does not, *a fortiori,* cover global insolvency proceedings which do not take place before a court as, for example, can be the case in France when authorization can be withdrawn from an insurance undertaking for reasons of insolvency.

The enumeration in Article 17 of the preliminary draft Convention on bankruptcy cannot, before that Convention has come into force, be used for the interpretation of Article 1, second paragraph, point (2) of the 1968 Convention. Article 17 mentions the kind of proceedings especially closely connected with bankruptcy where the courts of the State where the bankruptcy proceedings are opened are to have exclusive jurisdiction.

It is not desirable at this stage to prescribe this list, or even an amended list, as binding. Further amendments may well have to be made during the discussions on the Convention on bankruptcy. To prescribe a binding list would cause confusion, even though the list to be included in the Protocol to the Convention on bankruptcy will, after the latter's entry into force, prevail over the 1968 Convention pursuant to Article 57, since it is part of a special Convention. Moreover, the list, as already mentioned, does not include all bankruptcies, compositions and analogous proceedings. For instance, it has become clear during the discussions on the Convention on bankruptcy that the list will not cover insurance undertakings which only undertake direct insurance ([13]), without thereby bringing the bankruptcy of such undertakings within the scope of the 1968 Convention. Finally the Working Party was not sure whether all the proceedings included in the list as it stood at the beginning of 1976 could properly be regarded as bankruptcies, compositions or analogous proceedings, before the list formally comes into force. This applied particularly to the proceedings mentioned in connection with the liquidation of companies (see paragraph 57).

2. *BANKRUPTCY LAW AND THE DISSOLUTION OF COMPANIES*

55. As far as dissolution, whether or not by decision of a court, and the capacity to be made bankrupt are concerned, the legal treatment of a

partnership (14) established under United Kingdom or Irish law is comparable in every respect to the treatment of companies established under continental legal systems. Companies (15) within the meaning of United Kingdom or Irish law, however, are dealt with in a fundamentally different way. The Bankruptcy Acts do not apply to them (16), but instead they are subject to the winding-up procedure of the Companies Acts (17); even if they are not registered companies. Winding-up is not a special bankruptcy procedure, but a legal concept which can take different forms and serves different purposes. A common feature of all winding-up proceedings is a disposal of assets and the distribution of their proceeds amongst the persons entitled thereto with a view of bringing the company to an end. The start of winding-up proceedings corresponds, therefore, to what is understood by 'dissolution' on the continent. The dissolution of a company on the other hand is identical with the final result of a liquidation under continental legal systems.

A distinction is made between winding-up by the court, voluntary winding-up and winding-up subject to the supervision of the court. The second kind of winding-up takes place basically without the intervention of the court, either at the instance of the members alone or of the members together with the creditors. Only as a subsidiary measure and exceptionally can the court appoint a liquidator. The third kind of winding-up is only a variation on the second. The court has certain supervisory powers. A winding-up of a company by the court requires an application either by the company or by a creditor which is possible in a number of circumstances of which insolvency is only one. Other grounds for a winding-up include: the number of members falling below the required minimum, failure to commence, or a lengthy suspension of, business and the general ground 'that the court is of the opinion that it is just and equitable that the company should be wound up'.

56. The legal position outlined has the following consequences for the application of Article 1, second paragraph, point (2), and Article 16 (2) of the 1968 Convention in the Continental (b) and other (a) Member States:

57. (a) A voluntary winding-up under United Kingdom or Irish law cannot be equated with court proceedings. The same applies to the non-judicial proceedings under Danish law for the dissolution of a company. Legal disputes incidental to or consequent upon such proceedings are therefore normal civil or commercial disputes and as such are not excluded from the scope of the 1968 Convention. This also applies in the case of a winding-up subject to the supervision of the court. The powers of the court in such a case are not sufficiently clearly defined for the proceedings to be classed as judicial.

A winding-up by the court cannot, of course, be automatically excluded from the scope of the 1968 Convention. For although most proceedings of this kind serve the purpose of the liquidation of an insolvent company, this is not always the case. The Working Party decided to exclude from the scope of the 1968 Convention only those proceedings which are or were based on Section 222 (e) of the British Companies Act (18) or the equivalent provisions in the legislation of Ireland and Northern Ireland. This would, however, involve too narrow a definition of the proceedings to be excluded, as the liquidation of an insolvent company is frequently based on one of the other grounds referred to in Section 222 of the British Companies Act, notably in (a), which states that a special resolution of the members is sufficient to set proceedings in motion. There is no alternative therefore to ascertaining the determining factor in the dissolution in each particular case. The English version of Article 1, second paragraph, point (2), of the 1968 Convention has been worded accordingly. It was not, however, necessary to alter the text of the Convention in the other languages. If a winding-up in the United Kingdom or Ireland is based on a ground other than the insolvency of the company, the court concerned with recognition and enforcement in another Contracting State will have to examine whether the company was not in fact insolvent. Only if it is of the opinion that the company was solvent will the 1968 Convention apply.

58. Only in that event does the problem arise of whether exclusive jurisdiction exists for the courts at the seat of the company pursuant to Article 16 (2) of the 1968 Convention. In the United Kingdom and Ireland this is the case for proceedings which involve or have involved a solvent company.

The term 'dissolution' in Article 16 (2) of the 1968 Convention is not to be understood in the narrow technical sense in which it is used in legal systems on the Continent. It also covers

proceedings concerning the liquidation of a company after 'dissolution'. These include disputes about the amount to be paid out to a member; such proceedings are nothing more than stages on the way towards terminating the legal existence of a company.

59. (b) If a company established under a Continental legal system is dissolved, i.e. enters the stage of liquidation, because it has become insolvent, court proceedings relating to the 'dissolution of the company' are only conceivable as disputes concerning the admissibility of, or the mode and manner of conducting, winding-up proceedings. All this is outside the scope of the 1968 Convention. On the other hand, all other proceedings intended to declare or to bring about the dissolution of a company are not the concern of the law of winding-up. It is unnecessary to examine whether the company concerned is solvent or insolvent. It also makes no difference, if bankruptcy law questions arise as a preliminary issue. For instance, when litigation ensues as to whether a company should be dissolved, because a person who allegedly belongs to it has gone bankrupt, the dispute is not about a matter of bankruptcy law, but of a type which falls within the scope of the 1968 Convention. The Convention also applies if, in connection with the dissolution of a company not involving the courts, third parties contend in legal proceedings that they are creditors of the company and consequently entitled to satisfaction out of assets of the company.

C.

SOCIAL SECURITY

60. Matters relating to social security were expressly excluded from the scope of the 1968 Convention. This was intended to avoid the difficulties which would arise from the fact that in some Member States this area of law comes under public law, whereas in others it is on the border-line between public and private law. Legal proceedings by social security authorities against third parties, for example against wrongdoers, in exercise of rights of action which they have acquired by subrogation or by operation of law, do come within the scope of the 1968 Convention.

D.

ARBITRATION

61. The United Kingdom requested information on matters regarding the effect of the exclusion of 'arbitration' from the scope of the 1968 Convention, which were not dealt with in the Jenard report. Two divergent basic positions which it was not possible to reconcile emerged from the discussion on the interpretation of the relevant provisions of Article 1, second paragraph, point (4). The point of view expressed principally on behalf of the United Kingdom was that this provision covers all disputes which the parties had effectively agreed should be settled by arbitration, including any secondary disputes connected with the agreed arbitration. The other point of view, defended by the original Member States of the EEC, only regards proceedings before national courts as part of 'arbitration' if they refer to arbitration proceedings, whether concluded, in progress or to be started. It was nevertheless agreed that no amendment should be made to the text. The new Member States can deal with this problem of interpretation in their implementing legislation. The Working Party was prepared to accept this conclusion, because all the Member States of the Community, with the exception of Luxembourg and Ireland, had in the meantime become parties to the United Nations Convention of 10 June 1958 on the recognition and enforcement of foreign arbitral awards, and Ireland is willing to give sympathetic consideration to the question of her acceding to it. In any event, the differing basic positions lead to a different result in practice only in one particular instance (see paragraph 62).

1. *DECISIONS OF NATIONAL COURTS ON THE SUBJECT MATTER OF A DISPUTE DESPITE THE EXISTENCE OF AN ARBITRATION AGREEMENT.*

62. If a national court adjudicates on the subject matter of a dispute, because it overlooked an arbitration agreement or considered it inapplicable, can recognition and enforcement of that judgment be refused in another State of the Community on the ground that the arbitration agreement was after all valid and that therefore, pursuant to Article 1, second paragraph, point (4), the judgment falls outside the scope of the 1968 Convention? Only if the first interpretation (see paragraph 61) is accepted can an affirmative answer be given to this question.

In support of the view that this would be the correct course, it is argued that since a court in the State addressed is free, contrary to the view of the court in the State of origin, to regard a dispute as affecting the status of an individual, or the law of succession, or as falling outside the scope of civil law, and therefore as being outside the scope of the 1968 Convention, it must in the same way be free to take the opposite view to that taken by the court of origin and to reject the applicability of the 1968 Convention because arbitration is involved.

Against this, it is contended that the literal meaning of the word 'arbitration' itself implies that it cannot extend to every dispute affected by an arbitration agreement; that 'arbitration' refers only to arbitration proceedings. Proceedings before national courts would therefore be affected by Article 1, second paragraph, point (4) of the 1968 Convention only if they dealt with arbitration as a main issue and did not have to consider the validity of an arbitration agreement merely as a matter incidental to an examination of the competence of the court of origin to assume jurisdiction. It has been contended that the court in the State addressed can no longer re-open the issue of classification; if the court of the State of origin, in assuming jurisdiction, has taken a certain view as to the applicability of the 1968 Convention, this becomes binding on the court in the State addressed.

2. *OTHER PROCEEDINGS CONNECTED WITH ARBITRATION BEFORE NATIONAL COURTS*

63. (a) The 1968 Convention as such in no way restricts the freedom of the parties to submit disputes to arbitration. This applies even to proceedings for which the 1968 Convention has established exclusive jurisdiction. Nor, of course, does the Convention prevent national legislation from invalidating arbitration agreements affecting disputes for which exclusive jurisdiction exists under national law or pursuant to the 1968 Convention.

64. (b) The 1968 Convention does not cover court proceedings which are ancillary to arbitration proceedings, for example the appointment or dismissal of arbitrators, the fixing of the place of arbitration, the extension of the time limit for making awards or the obtaining of a preliminary ruling on questions of substance as provided for under English law in the procedure known as 'statement of a special case' (Section 21 of the Arbitration Act 1950). In the same way a judgment determining whether an arbitration agreement is valid or not, or because it is invalid, ordering the parties not to continue the arbitration proceedings, is not covered by the 1968 Convention.

65. (c) Nor does the 1968 Convention cover proceedings and decisions concerning applications for the revocation, amendment, recognition and enforcement of arbitration awards. This also applies to court decisions incorporating arbitration awards — a common method of recognition under United Kingdom law. If an arbitration award is revoked and the revoking court or another national court itself decides the subject matter in dispute, the 1968 Convention is applicable.

V. JUDICIAL NATURE OF PROCEEDINGS AND JUDGMENTS

66. As between the original Member States, and also as between those States and the United Kingdom and Ireland, the 1968 Convention could and can in one particular respect be based on a surprisingly uniform legal tradition. Almost everywhere the same tasks pertaining to the field of private law are assigned to the courts. The authorities which constitute 'courts' can everywhere be recognized easily and with certainty. This is also true in cases where proceedings are being conducted in 'court' which are not the result of an action by one party 'against' another party (see paragraphs 23 and 124 *et seq.*). The accession of Denmark raised new problems.

Although the Working Party had no difficulty in confirming that the Industrial Court under the Danish Industrial Court Act of 21 April 1964 (Bulletin No 124) was, in spite of its unusual structure, clearly to be considered a court within the meaning of the 1968 Convention, it was more difficult to decide how to classify proceedings in maintenance matters, which, in Denmark, failing an amicable settlement, are almost always held before administrative authorities and terminate with a decision by the latter.

1. *THE LEGAL POSITION IN DENMARK*

67. The legal position may be summed up as follows. Maintenance matters are determined as regards the obligation to pay either by agreement or by a court judgment. The amount of the payment and the scale of any necessary modifications are, however, determined by an authority known as the 'Amtmand', which under Danish law is clearly not a court but an administrative authority which in this case plays a judicial role. It is true that decisions given in such proceedings come under The Hague Convention on the recognition and enforcement of decisions relating to maintenance obligations, but this is only because under that Convention the matter does not specifically require a court judgment.

2. *ARTICLE Va OF THE PROTOCOL AND ITS EFFECT*

68. There would, however, be an imbalance in the scope of the 1968 Convention, if it excluded maintenance proceedings of the type found in Denmark on the sole ground that they do not take place before courts.

The amendment to the 1968 Convention thus made necessary is contained in the proposal for the adoption of a new Article Va in the Protocol. This method appeared simpler than attempting to amend a large number of separate provisions of the 1968 Convention.

Wherever the 1968 Convention refers to 'court' or 'judge' it must in the future be taken to include Danish administrative authorities when dealing with maintenance matters (as in Article 2, first paragraph, Article 3, first paragraph, Article 4, first paragraph, Article 5 (2), Article 17, Article 18, Articles 20 to 22, Article 27 (4), Article 28, third paragraph and Article 52). This applies in particular to Article 4, first paragraph, even though in the French, Italian and Dutch texts, unlike the German version, the word 'court' does not appear.

Similarly, wherever the 1968 Convention refers to 'judgments', the decisions arrived at by the Danish administrative authorities in maintenance matters will in future be included in the legal definition of the term 'judgment' contained in Article 25. Its content is extended in this respect by the addition of Article Va to the Protocol, so that it is now to be understood as reading:

> 'For the purposes of this Convention, "judgment" means any judgment given by a court or tribunal of a Contracting State — including in matters relating to maintenance, the Danish administrative authorities — whatever the judgment may be called . . .'.

CHAPTER 4

JURISDICTION

A.

GENERAL REMARKS

69. In section A of Chapter 4 of his report, Mr. Jenard sets out the main ideas underlying the rules of jurisdiction of the 1968 Convention. None of this is affected by the accession of the new Member States. The extent to which three features of the law in the United Kingdom and in Ireland are consistent with the application of the 1968 Convention must, however, be clarified. These features are: the far-reaching jurisdiction of the Superior Courts (1), the concept of domicile (2) and, lastly, the discretionary powers enjoyed by the courts to determine territorial jurisdiction (3).

1. *FIRST INSTANCE JURISDICTION OF THE SUPERIOR COURTS*

70. The Continental Member States of the Community have geographically defined jurisdictions where courts of first instance are competent to give judgments even in the most important civil disputes. There are many courts of equal status: approximately 50 'Landgerichte' in Germany, and an equal number of 'tribunaux de grande instance' in France and 'Tribunali' in Italy. Where the 1968 Convention itself lays down both the international and local jurisdiction of the courts, as for example in Articles 5 and 6, jurisdiction is given to only one of the many courts with equal status in a State. There is little room for such a distinction in the judicial systems

of Ireland and the United Kingdom in so far as a Superior Court has jurisdiction as a court of first instance.

In Ireland, the High Court is the only court of first instance with unlimited jurisdiction. It can, exceptionally, sit outside Dublin. Nothing in the 1968 Convention precludes this. In addition to the High Court, there is a Circuit Court and a District Court. In respect of these courts too, the expression 'the Court' is used in the singular and there is only one Court for the whole country, but each of its judges is permanently assigned to a specific circuit or district. The local jurisdiction laid down in the 1968 Convention means, in the case of Ireland, the judge assigned to a certain 'circuit' or 'district'.

In the United Kingdom three Superior Courts have jurisdiction at first instance: the High Court of Justice for England and Wales, the Outer House of the Court of Session for Scotland and the High Court for Northern Ireland. Each of these courts has, however, exclusive jurisdiction for the entire territory of the relevant part of the United Kingdom (see paragraph 11). Thus the same comments as those made in connection with the territorial jurisdiction of the Irish High Court apply also to each judicial area. The possibility of transferring a case from London to a district registry of the High Court does not mean transfer to another court. Bearing in mind that foreign judgments have to be registered separately in respect of each of the judicial areas of the United Kingdom in order to become enforceable therein (see paragraph 208), the distinction between international and local jurisdiction becomes largely irrelevant in the United Kingdom. The rules in the 1968 Convention governing local jurisdiction are relevant to the Superior Courts of first instance in the United Kingdom only in so far as a distinction has to be made between the courts of England and Wales, Scotland and Northern Ireland. The competence of the other courts (County Courts, Magistrates' Courts, and, in Scotland, the Sheriff Courts) presents no particular problems.

2. THE CONCEPT OF 'DOMICILE' AND THE APPLICATION OF THE CONVENTION

71. (a) The concept of domicile is of fundamental importance for the 1968 Convention in determining jurisdiction (e.g. Articles 2 to 6, 8, 11, 12 (3), 14, 17 and 32). In the legal systems of the original Member States of the EEC, its meaning differs to some extent. In the Federal Republic of Germany, it expresses a person's connection with a local community within the national territory. In France and Luxembourg, it denotes a person's exact address. In Belgium, for purposes of jurisdiction the term denotes the place where a person is entered in the register of population as having his principal residence (Article 36 of the Code judiciaire). These differences explain why, in determining a person's domicile, e.g. German law places greater emphasis on the stability of the connection with a specific place than do some of the other legal systems.

Notwithstanding these differences the basic concept of 'domicile' is the same in all the legal systems of the original Member States of the EEC, namely the connection of a person with a smaller local unit within the State. This made it possible in Article 52 of the 1968 Convention to leave a more precise definition of the term to the law of the State in which the 'domicile' of a person had to be ascertained. It did not lead to an uneven application of the provisions of the 1968 Convention. Clearly, for the purposes of applying them in the original Member States of the Community it is irrelevant whether the concept of domicile refers to a specific address or to a local community.

72. (b) The concept of domicile under the law in Ireland and the United Kingdom differs considerably in several respects from the Continental concept.

First, this concept does not refer to a person's connection with a particular place and even less with a particular residence within a place, but to his having his roots within a territory covered by a particular legal system (see paragraph 11). A person's domicile only indicates whether he comes under the legal system of England and Wales, Scotland, Northern Ireland, or possibly under a foreign legal system. A person's legal connection with a particular place is denoted by the word 'residence', not 'domicile'.

According to United Kingdom law, a person always has one 'domicile' and can never have more than one. At birth a legitimate child acquires the domicile of its father, an illegitimate child that of its mother. A child retains its domicile of its parents throughout its minority.

After it reaches its majority, it may acquire another domicile but for this there are very strict requirements: the usual place of residence must have been transferred to another country — with the intention of keeping it there permanently or at least for an unlimited period.

73. (c) Article 52 of the 1968 Convention does not expressly provide for the linking of the concept of domicile with a particular place or a particular residence, nor does it expressly prohibit it from being connected with a particular national territory. The United Kingdom and Ireland would, consequently, be free to retain their traditional concept of domicile when the jurisdiction of their courts is invoked. The Working Party came to the conclusion that this would lead to a certain imbalance in the application of the 1968 Convention. In certain cases, the courts of the United Kingdom or Ireland could assume jurisdiction on the basis of their rules on the retention of domicile, although by the law of all the other Member States of the Community, such a person would be domiciled at his actual place of residence within their territory.

The Working Party therefore requested the United Kingdom and Ireland to provide in their legislation implementing the 1968 Convention (see paragraph 256), at any rate for the purposes of that Convention, for a concept of domicile which would depart from their traditional rules and would tend to reflect more the concept of 'domicile' as understood in the original States of the EEC.

In Article 69 (5) of the Convention for the European patent for the common market which was drawn up concurrently with the Working Party's discussions, the concept of 'Wohnsitz' is translated as 'residence' and for the meaning of the expression reference is made to Articles 52 and 53 of the 1968 Convention. To prevent confusion, the proposed new Article Vc of the Protocol makes it clear that the concept of 'residence' within the meaning of the Community Patent Convention should be ascertained in the same way as the concept of 'domicile' in the 1968 Convention.

74. (d) It should be noted that the application of the third paragraph of Article 52 raises the problem of different concepts of domicile, when considering which system of law determines whether a person's domicile depends on that of another person. The relevant factor, in such a case, may be where the dependent person is domiciled. Under United Kingdom private international law, the question whether a person has a dependent domicile is not determined by that person's nationality, but by his domicile in the traditional sense of that concept. The re-definition of 'domicile' in connection with the first paragraph of Article 52 in no way affects this.

If a foreigner under age who has settled in England is sued in an English court, that court must take account of the different concepts of domicile. As a first step it must establish where the defendant had his 'domicile' before settling in England. This is decided in accordance with the traditional meaning of that concept. The law thus found to be applicable will then determine whether the minor was in a position to acquire a 'domicile' in England within the meaning of the 1968 Convention. The English court must then ascertain whether the requirements for a 'domicile' in the area covered by the English court concerned are satisfied.

75. (e) There is no equivalent in the law of the United Kingdom to the concept of the 'seat' of a company in Continental law. In order to achieve the results which under private international law are linked on the continent with the 'seat' of a company, the United Kingdom looks to the legal system where the company was incorporated ('law of incorporation', Section 406 of the Companies Act, 1948). The 'domicile' of a company in the traditional sense of the term (see paragraph 72) is taken to be the judicial area in which it was incorporated. The new Member States of the Community are not obliged to introduce a legal concept which corresponds to that of a company's 'seat' within the meaning of the continental legal systems, just as in general they are not obliged to adapt their concept of domicile. However, should the United Kingdom and Ireland not change their law on this point, the result would again be an imbalance in the application of the 1968 Convention. It would, therefore, be desirable for the United Kingdom to introduce for the purposes of the Convention an appropriate concept in its national legislation such as 'domicile of a company', which would correspond more closely to the Continental concept of the 'seat' of a company than the present United Kingdom concept of 'law of incorporation'.

Such a provision would not preclude a company from having a 'domicile' in the United Kingdom

in accordance with legislation in the United Kingdom and a 'seat' in a Continental State in accordance with the legislation of that State. As a result of the second sentence of Article 53, a company is enabled under the laws of several of the original States of the EEC to have a 'seat' in more than one State. The problems which might arise from such a situation can be overcome by the provisions in the 1968 Convention on *lis pendens* and related actions (see paragraph 162).

3. *DISCRETIONARY POWERS REGARDING JURISDICTION AND TRANSFER OF PROCEEDINGS*

76. The idea that a national court has discretion in the exercise of its jurisdiction either territorially or as regards the subject matter of a dispute does not generally exist in Continental legal systems. Even where, in the rules relating to jurisdiction, tests of an exceptionally flexible nature are laid down, no room is left for the exercise of any discretionary latitude. It is true that Continental legal systems recognize the power of a court to transfer proceedings from one court to another. Even then the court has no discretion in determining whether or not this power should be exercised. In contrast, the law in the United Kingdom and in Ireland has evolved judicial discretionary powers in certain fields. In some cases, these correspond in practice to legal provisions regarding jurisdiction which are more detailed in the Continental States, while in others they have no counterpart on the Continent. It is therefore difficult to evaluate such powers within the context of the 1968 Convention. A distinction has to be made between the international and national application of this legal concept.

77. (a) In relationships with the courts of other States and also, within the United Kingdom, as between the courts of different judicial areas (see paragraph 11) the doctrine of *forum conveniens* — in Scotland, *forum non conveniens* — is of relevance.

The courts are allowed, although only in very rare and exceptional cases, to disregard the fact that proceedings may already be pending before foreign courts, or courts of another judicial area.

Exceptionally, the courts may refuse to hear or decide a case, if they believe it would be better for the case to be heard before a court having equivalent jurisdiction in another State (or another judicial area) because this would increase the likelihood of an efficient and impartial hearing of the particular case.

There are several special reasons why in practice such discretionary powers are exercised: the strict requirements traditionally imposed by the laws of the United Kingdom and Ireland regarding changes of domicile (see paragraph 72); the rules allowing establishment of jurisdiction by merely serving a writ or originating summons in the territory of the State concerned (see paragraphs 85 and 86); the principles developed particularly strongly in the procedural law of these States requiring directness in the taking of evidence with the consequent restrictions on making use of evidence taken abroad or merely in another judicial area; and finally, the considerable difficulties arising in the application of foreign law by United Kingdom or Irish courts.

78. According to the views of the delegations from the Continental Member States of the Community such possibilities are not open to the courts of those States when, under the 1968 Convention, they have jurisdiction and are asked to adjudicate.

Article 21 expressly prohibits a court from disregarding the fact that proceedings are already pending abroad. For the rest the view was expressed that under the 1968 Convention the Contracting States are not only entitled to exercise jurisdiction in accordance with the provisions laid down in Title 2; they are also obliged to do so. A plaintiff must be sure which court has jurisdiction. He should not have to waste his time and money risking that the court concerned may consider itself less competent than another. In particular, in accordance with the general spirit of the 1968 Convention, the fact that foreign law has to be applied, either generally or in a particular case, should not constitute a sufficient reason for a court to decline jurisdiction. Where the courts of several States have jurisdiction, the plaintiff has deliberately been given a right of choice, which should not be weakened by application of the doctrine of *forum conveniens*. The plaintiff may have chosen another apparently 'inappropriate' court from among the competent courts in order to obtain a judgment in the State in which he also wishes to enforce it. Furthermore, the risk of a negative conflict of jurisdiction should not be disregarded: despite the United Kingdom court's decision, the judge on the Continent could likewise decline jurisdiction. The practical

reasons in favour of the doctrine of *forum conveniens* will lose considerably in significance, as soon as the 1968 Convention becomes applicable in the United Kingdom and Ireland. The implementing legislation will necessitate not inconsiderable changes in the laws of those States, both in respect of the definition of the concept of domicile (see paragraph 73) and on account of the abolition of jurisdictional competence based merely on service of a writ within the area of the court (see paragraph 86). To correct rules of jurisdiction in a particular case by means of the concept of *forum conveniens* will then be largely unnecessary. After considering these arguments the United Kingdom and Irish delegations did not press for a formal adjustment of the 1968 Convention on this point.

79. (b) A concept similar to the doctrine of *forum conveniens* is also applied within the territory of the State, though the term itself is not used in that context. This may be due to the fact that the same result can be achieved by the device of transferring the case to another court having alternative jurisdiction within the same State or the same legal area (see paragraph 11). The Working Party had to examine to what extent the 1968 Convention restricted such powers of transfer. In this connection certain comments made earlier may be repeated: the powers of the Superior Courts in Ireland or in a judicial area of the United Kingdom (see paragraph 70) to decide as a court of first instance remain unchanged. For the rest, the following applies:

80. (aa) The previous legal position in Ireland and the United Kingdom remains essentially the same. Each court can transfer proceedings to another court, if that court has equivalent jurisdiction and can better deal with the matter. For example, if an action is brought before the High Court, the value of which is unlikely to exceed the amount which limits the jurisdiction of the lower court, the High Court has power to transfer the proceedings to such a court, but it is not obliged to do so. A Circuit Court in Ireland, a County Court or Magistrates' Court in England and a Sheriff Court in Scotland — but not an Irish District Court (see paragraph 70) — may transfer proceedings to another court of the same category or exceptionally to a court of another category, if the location of the evidence or the circumstances for a fair hearing should make such a course desirable in the interest of the parties.

Some Continental legal systems also provide for the possibility, albeit on a much smaller scale, of a judge having discretion to confer jurisdiction on a court which would not otherwise have it. This is the case under, for instance, Article 36 of the German Code of Civil Procedure, if proper proceedings are not possible before the court which originally had jurisdiction. Under Section 356 of the new French Code of Civil Procedure ([19]) proceedings may be transferred to another court of the same type, if a risk of lack of impartiality exists.

81. (bb) The 1968 Convention in no way affects the competence as regards subject matter of the courts of a State. The national legal systems are thus free to provide for the possibility of transfer of cases between courts of different categories.

For the most part, the 1968 Convention does not affect the territorial jurisdiction of the courts within a State, but only their international jurisdiction. This is clearly reflected by the basic rule on jurisdiction contained in Article 2. Unless the jurisdiction of a court where proceedings are instituted against a person domiciled in the United Kingdom or Ireland is derived from a provision of the 1968 Convention which at the same time determines local jurisdiction, as for example Article 5, the 1968 Convention does not prevent a transfer of the proceedings to another court in the same State. Even in respect of exclusive jurisdiction, Article 16 only lays down the international jurisdiction of the courts of a State, and does not prevent a transfer within that State.

Finally, the 1968 Convention does not of course prevent a transfer to the court which actually has local jurisdiction under the Convention. This would occur where both parties agree to the transfer and the requirements for jurisdiction by consent pursuant to Article 17 are satisfied.

The only type of case which remains problematic is where an action is brought before a court in circumstances where the 1968 Convention gives the plaintiff a choice of jurisdiction. An action in tort or a liability insurance claim is brought at the place where the harmful event occurred or a

maintenance claim at the domicile of the maintenance creditor. It appears obvious that in special exceptional cases a transfer to another court of the same State must be permitted, when proper proceedings are not possible before the court which would otherwise have jurisdiction. However, the Working Party did not feel justified in incorporating these matters expressly in the 1968 Conventation. They could be covered by a rule of interpretation to the effect that the court having local jurisdiction may, in exceptional cases, include the court which is designated as having local jurisdiction by the decision of another court. The courts for the place 'where the harmful event occurred' could thus be a neighbouring court designated by another court, if the courts for the place of the harmful event should be unable to hear the proceedings.

In so far as a court's discretionary powers to confer jurisdiction on other courts and in particular to transfer proceedings to another court are not defined in detail such discretionary powers should, of course, only be used in the spirit of the 1968 Convention, if the latter has determined, not only international but also local jurisdiction. A transfer merely on account of the cost of the proceedings or in order to facilitate the taking of evidence would be possible only with the consent of the plaintiff, who had the choice of jurisdiction.

B.

COMMENTS ON THE SECTIONS OF TITLE II

Section 1

General provisions

82. The proposed adjustments to Articles 2 ([20]) to 4 are confined to inserting certain exorbitant jurisdictions in the legal systems of the new Member States into the second paragraph of Article 3. The occasion has been taken to adjust the text of that Article to take account also of an amendment to the law which has been introduced in Belgium. Detailed comments on the proposed alterations (I) precede two more general remarks on the relevance of this provision to the whole structure of the 1968 Convention (II).

I. *Detailed comments*

83. 1. Belgium

In Belgium, Articles 52, 52 bis and 53 of the law of 25 March 1876 had already been superseded before the coming into force of the 1968 Convention by Articles 635, 637 and 638 of the Judicial Code. Nevertheless only Article 638 of the Judicial Code is mentioned in the second paragraph of Article 3 in its revised version. It corresponds to Article 53 of the law of 25 March 1876 and provides that where Belgian courts do not possess jurisdiction based on other provisions, a plaintiff resident in Belgium may sue any person before the court of his place of residence. The version of Article 3, valid hitherto, erroneously classed the jurisdiction based on Articles 52 and 52 bis of the abovementioned law as exorbitant.

84. 2. Denmark

The provisions of Danish law included in the second paragraph of Article 3 state that a foreigner may be sued before any Danish court in whose district he is resident or has property when the document instituting the proceedings is served. On this last point the provision corresponds to similar German provisions included in the list of exorbitant jurisdictions. On the first point reference may be made to what follows concerning Ireland (see paragraph 85). There is a separate Code of Civil Procedure for Greenland (see paragraph 253); special reference had therefore to be made to the corresponding provisions affecting that country.

85. 3. Ireland

According to the principles of common law which are unwritten and apply equally in the United Kingdom and Ireland, a court has jurisdiction in principle if the plaintiff has been properly served with the court process. The jurisdiction of Irish (and United Kingdom) courts is indirectly restricted to the extent of the limits imposed on the service of a writ of summons. Service is available without special leave only within the territory of Ireland (or the United Kingdom). However, every service validly effected there is sufficient to establish jurisdiction; even a short stay by the defendant in

the territory concerned will suffice. Service abroad will be authorized only where certain specified conditions are satisfied. As regards legal relations within the EEC — especially because of the possibility of free movement of judgments resulting from the 1968 Convention — there is no longer any justification for founding the jurisdiction of a court on the mere temporary presence of a person in the State of the court concerned. This common law jurisdiction, for which of course no statutory enactment can be cited, had therefore to be classed as exorbitant.

86. 4. United Kingdom

As regards the United Kingdom it will suffice for point (a) of Article 3, second paragraph, of the 1968 Convention as amended, to refer to what has been said above in the case of Ireland. Points (b) and (c) deal with some characteristic features of Scottish law. To establish jurisdiction merely by service of a writ of summons during the temporary presence of the defendant is a rare, though not totally unknown, practice in Scotland. Scottish courts usually base their jurisdiction in respect of a defendant not permanently resident there on other factors, namely that he has been in Scotland for at least 40 days, or that he owns immovable property in Scotland or that he owns movable property which has been impounded in Scotland. In such cases service on the defendant is also required, but this may be effected by post or, exceptionally, by posting it on the court notice board. In the case of Germany, the 1968 Convention has already classed jurisdiction based solely on the existence of property in Germany as exorbitant. Any jurisdiction based solely on the seizure of property within a country must be treated in the same way.

II. *The relevance of the second paragraph of Article 3 to the whole structure of the 1968 Convention*

87. 1. The special significance of the second paragraph of Article 3

The rejection as exorbitant of jurisdictional bases hitherto considered to be important in the new Member States should not, any more than the original version of the second paragraph of Article 3, mislead anyone into thinking that the scope of the first paragraph of Article 3 would thereby be more closely circumscribed. Only particularly extravagant claims to international jurisdiction by the courts of a Member State are expressly underlined. Other rules founding jurisdiction in the national laws of the new Member States are compatible with the 1968 Convention also only to the extent that they do not offend against Article 2 and Articles 4 to 18. Thus, for example, the jurisdiction of English courts in respect of persons domiciled in the Community can no longer be based on the ground that the claim concerns a contract which was concluded in England or is governed by English law. On the other hand, the rules on the jurisdiction of English courts in connection with breaches of contract in England or claims connected with the commission or omission of an act in England largely correspond to the provisions in Article 5 (1) to (3).

2. Impossibility of founding jurisdiction on the location of property

88. With regard to Germany, Denmark and the United Kingdom the list in the second paragraph of Article 3 contains provisions rejecting jurisdiction derived solely from the existence of property in the territory of the State in which the court is situated. Such jurisdiction cannot be asserted even if the proceedings concern a dispute over rights of ownership, or possession, or the capacity to dispose of the specific property in question. Persons domiciled on the Continent of Europe may not be sued in Scotland, even if the aim of the action is to recover movable property situated or seized there or to determine its ownership. Interpleader actions (England and Wales) and multiple poinding (Scotland) are no longer permissible in the United Kingdom in respect of persons domiciled in another Member State of the Community, in so far as the international jurisdiction of the English or Scottish courts does not result from other provisions of the 1968 Convention. This applies, for example, to actions brought by an auctioneer to establish whether ownership of an article sent to him for disposal belongs to his customer or a third party claiming the article.

There is, however, no reason why United Kingdom legislation should not introduce appropriate measures pursuant to Article 24, to provide protection to persons (such as auctioneers) faced with conflicting legal claims. This might, for instance, take the form of a court order authorizing an article to be temporarily withdrawn from auction.

As regards persons who are domiciled outside the Community, the provisions which hitherto governed the jurisdiction of courts in the new Member States remains unaffected. Even the rules of jurisdiction mentioned in the second paragraph of Article 3 may continue to apply to such persons. Judgments delivered by courts which thus have jurisdiction must also be recognized and enforced in other States of the Community unless one of the exceptions in the new paragraph 5 of Article 27 or in Article 59 as amended applies.

This latter provision is the only one concerning which the list in Article 3, second paragraph is not only of illustrative significance but has direct and restrictive importance. (see paragraph 249).

Section 2

Special jurisdictions [21]

89. In the sphere of special, non-exclusive jurisdictions the problems of adjustment were confined to judicial competence as regards maintenance claims (I), questions raised by trusts in United Kingdom and Irish law (II) and problems in connection with jurisdiction in maritime cases (III). In addition, the Working Party dealt with a few less important individual questions (IV).

Reference should be made here to the Judgments of the Court of Justice of the European Communities of 6 October 1976 (12/76; 14/76) and of 30 November 1976 (21/76) which were delivered shortly before or after the end of the negotiations [22].

I. *Maintenance claims*

90. The need for an adjustment of Article 5 (2) arose because the laws of the new Member States — as was also by then the case with the laws of many of the original States of the EEC — allow status proceedings to be combined with proceedings concerning maintenance claims (see paragraphs 32 to 42). As far as other problems were concerned no formal adjustment was required. However, certain special features of United Kingdom and Irish law give rise to questions of interpretation; the views of the Working Party as to their solutions should be recorded. They concern a more precise definition of the term 'maintenance' (1) and how maintenance entitlements are to be adjusted to changed circumstances in accordance with the system of jurisdiction and recognition established by the 1968 Convention (2).

1. The term 'maintenance'

91. (a) The 1968 Convention refers simply to 'maintenance' in Article 5 (2), the only Article which uses the expression. Several legal concepts used within one and the same national legal system can be covered by this term. For example, Italian law speaks of 'alimenti' (Article 433 *et seq.* of the codice civile) to indicate payments amongst relations and spouses, but payments after divorce are 'assegni' [23]. The new French divorce law [24], too, does not speak of 'aliments', but of 'devoir de secours'. In addition French legal terminology uses the expressions 'devoir d'entretien' and 'contribution aux charges du ménage'. All those are 'maintenance' within the meaning of Article 5 (2) of the 1968 Convention.

92. (b) The Article says nothing, however, about the legal basis from which maintenance claims can emanate. The wording differs markedly from that of the Hague Convention of 2 October 1973 on the recognition and enforcement of decisions relating to maintenance obligations. Article 1 of that Convention excludes from its scope maintenance claims arising from tort, contract and the law of succession. However, there is no significant difference regarding the concept of maintenance as used in the two Conventions. The 1968 Convention is in any case not applicable to maintenance claims under the law of succession (second paragraph, point (1) of Article 1). 'Maintenance' claims as the legal consequence of a tortious act are, in legal theory, claims for damages, even if the amount of compensation depends on the needs of the injured party. Contracts creating a 'maintenance' obligation

which previously did not exist are, according to the form employed, gifts, contracts of sale or other contracts for a consideration. Obligations arising therefrom, even where they consist in the payment of 'maintenance', are to be treated like other contractual obligations. In such cases Article 5 (1) rather than 5 (2) of the 1968 Convention applies as far as jurisdiction is concerned; the outcome hardly differs from an application of Article 5 (2). 'Maintenance' obligations created by contract are generally to be fulfilled at the domicile or habitual residence of the maintenance creditor. Thus actions may also be brought there. Article 5 (2) is applicable, however, where a maintenance contract merely crystallizes an existing maintenance obligation which originated from a family relationship.

Judicial proceedings concerning 'maintenance' claims are still civil and commercial matters even where Article 5 (2) is not applicable because the claim arises from a tortious act or a contract.

93. (c) The concept of maintenance does not stipulate that the claim must be for periodic payments. Under Article 1613 (2) of the German Civil Code, for example, the maintenance creditor may in addition to regular payments, claim payment of a lump sum on the ground of exceptional need. Under Article 1615 (e) of the Code a father may agree with his illegitimate child on the payment of a lump sum settlement. Article 5 (4), third sentence, of the Italian divorce law of 1 December 1970 allows divorced spouses to agree on the payment of maintenance in the form of a lump sum settlement. Finally, under Article 285 of the French Civil Code, as amended by the divorce law of 11 July 1975, the French courts can order maintenance in the form of a single capital payment even without the agreement of the spouses. The mere fact that the courts in the United Kingdom have power to order not only periodic payments by one spouse to the other after a divorce, but also the payment of a single lump sum of money, does not therefore prevent the proceedings or a judgment from being treated as a maintenance matter. Even the creation of charges on property and the transfer of property as provided on the Continent, for example in Article 8 of the Italian divorce law, can be in the nature of maintenance.

94. (d) It is difficult to distinguish between claims for maintenance on the one hand and claims for damages and the division of property on the other.

95. (aa) In Continental Europe a motivating factor in assessing the amount of maintenance due to a divorced spouse by his former partner is to compensate an innocent spouse for his loss of matrimonial status. A typical example is contained in Article 301 of the Civil Code in its original form, which still applies in Luxembourg. In its two paragraphs a sharp distinction is drawn in respect of post-matrimonial relations between a claim for maintenance and compensation for material and non-material damages. Yet material damages generally consist in the loss of the provision of maintenance which the divorced party would have enjoyed as a spouse. Thus the claims deriving from the two paragraphs of Article 301 of the Civil Code overlap in practice, especially since they can both take the form of a pension or a single capital payment. It remains to be seen whether the new French divorce law of 11 July 1975, which makes a clearer distinction between 'prestations compensatoires' and 'devoir de secours', will change this situation.

Under Section 23 (1) (c) and (f) and Section 27 (6) (c) of the English Matrimonial causes Act 1973, an English divorce court, too, may order a lump sum to be paid by one divorced spouse to the other or to a child. However, English law, which is characterized by judicial discretionary powers and which does not favour inflexible systematic rules, does not make a distinction as to whether the payments ordered by the Court are intended as damages or as maintenance.

96. (bb) The 1968 Convention is not applicable at all where the payments claimed or ordered are governed by matrimonial property law (see paragraph 45 *et seq)*. Where claims for damages are involved, Article 5 (2) is not relevant. Whether or not that provision applies depends, in the case of a lump sum payment, solely on whether a payment under family law is in the nature of maintenance.

The maintenance nature of the payment is likely to predominate in relation to children. As

between spouses, a division of property or damages may well be the underlying factor. Where both spouses are earning well, payment of a lump sum can only serve the purpose of a division of property or compensation for non-material damage. In that case the obligation to pay is not in the nature of maintenance. If payment is in pursuance of a division of property, the 1968 Convention does not apply at all. If it is to compensate for non-material damage, there is no scope for the application of Article 5 (2). A divorce court may not adjudicate in the matter in either case, unless it has jurisdiction under Article 2 or Article 5 (1).

97. (e) All legal systems have to deal with the problems of how the needs of a person requiring financial support are to be met when the maintenance debtor defaults. Others also liable to provide maintenance, if necessary a public authority, may have to step in temporarily. They, in turn, should be able to obtain a refund of their outlay from the (principal) maintenance debtor. Legal systems have therefore evolved various methods to overcome this problem. Some of them provide for the maintenance claim to be transferred to the payer, thereby giving it a new creditor, but not otherwise changing its nature. Others confer on the payer an independent right to compensation. United Kingdom law makes particular use of the latter method in cases where the Supplementary Benefits Commission has paid maintenance. As already mentioned in the Jenard report ([25]) claims of this type are covered by the 1968 Convention, even where claims for compensation are based on a payment made by a public authority in accordance with administrative law or under provisions of social security legislation. It is not, however, the purpose of the special rules of jurisdiction in Article 5 (2) to confer jurisdiction in respect of compensation claims on the courts of the domicile of the maintenance creditor or even those of the seat of the public authority — whichever of the two abovementioned methods a legal system may have opted for.

2. Adjustment of maintenance orders

98. Economic circumstances in general and the particular economic position of those obliged to pay and those entitled to receive maintenance are constantly changing. The need for periodical adjustments of maintenance orders arises particularly in times of creeping inflation. Jurisdiction to order adjustments depends on the general provisions of the 1968 Convention. Since this is a problem of great practical importance it may be appropriate to preface its discussion in detail with a brief comparative legal survey.

99. (a) Continental legal systems differ according to whether the emphasis of the relevant legal provisions is placed on the concept of an infringement of the principle of finality of a maintenance judgment or more on the concept of an adjustment of the question of the claim (aa). In this respect, as in many others, the provisions of United Kingdom (bb) and Irish (cc) law do not fit into this scheme.

100. (aa) The provisions of German law relating to adjustments of maintenance orders are based on the concept of a special procedural remedy in the nature of a review of the proceedings (Wiederaufnahmeklage).

Since there are no special provisions governing jurisdiction, the general provisions governing jurisdiction in maintenance claims are considered applicable. This means that the original court making the maintenance order may have lost its competence to adjust it. Enforcement authorities, even when they are courts, have no power, either in general or in maintenance cases, to adjust a judgment to changed circumstances. Provisions giving protection against enforcement of a judgment for social reasons apply irrespective of whether or not the amount ordered to be paid in the judgment is subject to variation. This is also true regarding the subsidiary provision of Article 765 (a) of the Zivilprozessordnung (Code of Civil Procedure) ([26]), which is of general application and states that enforcement measures may be rescinded or disallowed in very special circumstances, if they constitute an undue hardship for the debtor.

Accordingly legal theory and case law accept that a foreign maintenance order may be adjusted by a German court, if the latter has jurisdiction ([27]).

In the legal systems in the other original Member States of the EEC the problem has always been regarded as one of substantive law and not as a

remedy providing protection against enforcement of judicial decisions. Accordingly jurisdiction depends on the general principles applying to maintenance cases ([28]). Indirect adjustments cannot be obtained by invoking, as a defence against measures of enforcement, a change in the circumstances which were taken into account in determining the amount of the maintenance.

In general, the 1968 Convention is based on a similar legal position obtaining in all the original Member States: in the case of proceedings for adjustment of a maintenance order the jurisdiction of the court concerned has to be examined afresh.

101. (bb) In the United Kingdom, the most important legal basis for amendment of maintenance orders is Section 53 of the Magistrates' Courts Act of 1952 in conjunction with Sections 8 to 10 of the Matrimonial proceedings (Magistrates' Courts) Act 1960 which will be suspended in 1979 by the Domestic proceedings and Magistrates' Courts Act 1978. According to these Acts, the Court may revoke or vary maintenance orders, or revive them after they have been revoked or varied. In addition, the court in whose district the applicant is now resident also has jurisdiction in such matters ([29]). In principle, the court's discretion is unfettered in such cases, but an application for variation may not be based on facts or evidence which could have been relied on when the original order was made ([30]). The same applies under Section 31 of the Matrimonial causes Act 1973. A divorce court can vary or discharge an order it has made with regard to maintenance, irrespective of whether the original basis for its jurisdiction still exists or not.

102. To these possibilities must be added another characteristic aspect of the British judicial system. Enforcement of judgments is linked much more closely than on the Continent to the jurisdiction of the particular court which gave the judgment (see paragraph 208). Before a judgment can be enforced by the executive organs of another court, it must be registered with that other court. After registration, it is regarded as a judgment of that court. A further consequence is that, after such registration, the court with which it is registered is empowered to amend it. Hitherto, the United Kingdom has also applied this system in cases where foreign maintenance judgments have been registered with a British court to be enforced in the United Kingdom ([31]).

103. (cc) In Ireland the District Court has jurisdiction to make maintenance orders in respect of spouses and children of a marriage and also in respect of illegitimate children. The Court also has power to vary or revoke its maintenance orders. The jurisdiction of the Court is exercised by the judge for the district where either of the parties to the proceedings is ordinarily resident or carries on any profession or occupation or, in the case of illegitimate children, the judge for the district in which the mother of the child resides. A judge who makes a maintenance order loses jurisdiction to vary it if these requirements as to residence, etc., are no longer fulfilled. Apart from the possibility of having a maintenance order varied there is a right of appeal to the Circuit Court from such orders made by the District Court. The Circuit Court also has jurisdiction to make maintenance orders in proceedings relating to the guardianship of infants. It may also vary or revoke its maintenance orders. Its jurisdiction is exercised by the judge for the circuit in which the defendant is ordinarily resident at the date of application for maintenance or at the date of application for a variation of a maintenance order, as the case may be. An appeal lies to the High Court.

The High Court may order maintenance to be paid, including alimony pending suit and permanent alimony following the granting of divorce *a mensa et thoro*. It has jurisdiction to vary its own maintenance orders and appeals against its orders lie to the Supreme Court.

104. (b) Although it nowhere states this expressly, the 1968 Convention is based on the principle that all judgments given in a Member State can be contested in that State by all the legal remedies available under the law of that State, even when the basis on which the competence of the courts of that State was founded no longer exists. In France, a French judgment may be contested by an appeal, appeal in cassation and an application to set aside a conviction, even if the defendant has long since ceased to be domiciled in France. It follows from the obligation of recognition that no Contracting State can claim jurisdiction with regard to appeals against judgments given in another Contracting State. This also covers proceedings similar to an appeal, such as an

action of reduction in Scotland or a 'Wiederaufnahmeklage' in Germany. Conversely, every claim to jurisdiction which is not based on proceedings to pursue a remedy by way of appeal must satisfy the provisions of the 1968 Convention. This has three important consequences (see paragraphs 105 to 107) for decisions concerning jurisdiction for the adjustment of maintenance orders. A fourth concerns recognition and enforcement and is mentioned now as a connected matter. (See paragraph 108).

105. On no account may the court of the State addressed examine whether the amount awarded is still appropriate, without having regard to the jurisdiction provisions of the 1968 Convention. If the proceedings are an appeal, the courts of the State of origin will remain competent. Alternatively the new action may be quite distinct from the original proceedings, in which case the jurisdiction provisions of the 1978 Convention must be observed.

106. (bb) Under the legal systems of all six original EEC States, the adjustment of maintenance orders, at any rate as far as jurisdiction is concerned, is not regarded as a remedy by way of appeal (see paragraph 100). Accordingly the courts of the State of origin lose their competence to adjust maintenance orders within the original scope of the 1968 Convention, if the conditions on which their jurisdiction was based no longer exist. The 1968 Convention could not, however, be applied consistently, if the courts in the United Kingdom were to claim jurisdiction to adjust decisions irrespective of the continued existence of the facts on which jurisdiction was originally based.

107. Applications for the adjustment of maintenance claims can only be made in courts with jurisdiction under Article 2 or Article 5 (2), as amended, of the 1968 Convention. For example, if the maintenance creditor claims adjustment due to increases in the cost of living, he may choose between the international jurisdiction of the domicile of the maintenance debtor and the local jurisdiction of the place where he himself is domiciled or habitually resident. However, if the maintenance debtor seeks adjustment because of a deterioration in his financial circumstances, he can only apply under the international jurisdiction referred to in Article 2, i.e. the jurisdiction of the domicile of the maintenance creditor, even where the original judgment (pursuant to Article 2 where it is applicable) was given in the State of his own domicile and the parties have retained their places of residence.

108. If a maintenance debtor wishes effect to be given in another State to an adjusted order, account must be taken of the reversed roles of the parties. Adjustment at the instance of the maintenance debtor can only be aimed at a remission or reduction of the amount of maintenance. Reliance on such a decision in another Contracting State does not therefore involve 'enforcement' within the meaning of Sections 2 and 3 of Title III, but rather recognition as referred to in Section 1 of that Title. It is true that the second paragraph of Article 26 makes provision for a special application to obtain recognition of a judgment, and the provisions of Sections 2 and 3 of Title III concerning enforcement are applicable to such an application. If, in these circumstances, recognition is to be granted to a judgment which has been amended on the application of the maintenance debtor, the position is as follows: the applicant within the meaning of Articles 34 and 36 is not the creditor but the debtor, and therefore, according to Article 34, the creditor is the party who is not entitled to make any submissions. The right of appeal of the party against whom enforcement is sought, provided for in Article 36, lies with the creditor in this case. As applicant, the maintenance debtor has the right laid down in the second paragraph of Article 42, read together with the second paragraph of Article 26, to request recognition of part only of an adjusting order. For the application of Article 44 it has to be determined whether, as plaintiff, he was granted legal aid in the original proceedings.

II. *Trusts*

1. Problems which the Convention in its present form would create with regard to trusts

109. A distinguishing feature of United Kingdom and Irish law is the trust. In these two States it provides the solution to many problems which Continental legal systems overcome in an

altogether different way. The basic structure of a trust may be described as the relationship which arises when a person or persons (the trustees) hold rights of any kind for the benefit of one or more persons (the beneficiaries) or for some object permitted by law, in such a way that the real benefit of the property accrues, not to the trustees, but to the beneficiaries (who may, however, include one or more of the trustees) or other object of the trust. Basically two kinds of legal relationships can be distinguished in a trust; they may be defined as the internal relationships and the external relationships.

110. (a) In his external relationships, i.e. in legal dealings with persons who are not beneficiaries of the trust, the trustee acts like any other owner of property. He can dispose of and acquire rights, enter into commitments binding on the trust and acquire rights for its benefit. As far as these acts are concerned no adjustments to the 1968 Convention are necessary. Its provisions on jurisdiction are applicable, as in legal dealings between persons who are not acting as trustees. If a Belgian lessee of property situated in Belgium, but belonging to an English trust, sues to be allowed into occupation, Article 16 (1) is applicable, irrespective of the fact that the property belongs to a trust.

111. (b) Problems arise in connection with the internal relationships of a trust, i.e. as between the trustees themselves, between persons claiming the status of trustees and, above all, between trustees on the one hand and the beneficiaries of a trust on the other. Disputes may occur among a number of persons as to who has been properly appointed as a trustee; among a number of trustees doubts may arise as to the extent of their respective rights to one another; there may be disputes between the trustees and the beneficiaries as to the rights of the latter to or in connection with the trust property, as to whether, for example, the trustee is obliged to hand over assets to a child beneficiary of the trust after the child has attained a certain age. Disputes may also arise between the settlor and other parties involved in the trust.

112. The internal relationships of a trust are not necessarily covered by the 1968 Convention. They are excluded from its scope when the trust deals with one of the matters referred to in the second paragraph of Article 1. Thus as a legal institution the trust plays a significant role in connection with the law of succession. If a trust has been established by a will, disputes arising from the internal relationships are outside the scope of the 1968 Convention (see paragraph 52). The same applies when a trustee is appointed in bankruptcy proceedings; he would correspond to a liquidator ('Konkursverwalter') in Continental legal systems.

113. Where the 1968 Convention is applicable to the internal relationships of a trust, its provisions on jurisdiction were in their original form not always well adapted to this legal institution. To base jurisdiction on the domicile of the defendant trustee would not be appropriate in trust matters. A trust has no legal personality as such. If, however, an action is brought against a defendant in his capacity as trustee, his domicile would not necessarily be a suitable basis for determining jurisdiction. If a person leaves the United Kingdom to go to Corsica, it is right and proper that, in the absence of any special jurisdiction, claims directed against him personally should be brought only before Corsican courts. If, however, he is a sole or joint trustee or co-trustee of trust property situated in the United Kingdom and hitherto administered there, the beneficiaries and the other trustees cannot be expected to seek redress in a Corsican court.

Moreover, the legal relationships between trustees *inter se,* and between the trustees and the beneficiaries, are not of a contractual nature; in most cases, the trustees are not even authorized to conclude agreements conferring jurisdiction by consent. Jurisdiction for actions arising from the internal relationships of a trust can be based, therefore, neither on Article 5 (1) nor — as a rule — on agreements conferring jurisdiction by consent pursuant to Article 17. To overcome this difficulty simply by amending the 1968 Convention so as to allow a settlor to stipulate which courts are to have jurisdiction would only partly solve the problem. Such an amendment would not include already existing trusts, and the most suitable jurisdiction for possible disputes cannot always be foreseen when creating a trust.

2. The solution proposed

114. (a)The solution proposed in the new paragraph(6) of Article 5 is based on the argument that trusts,

even though they have no legal personality, may be said to have a geographical centre of operation. This would fulfil functions similar to those fulfilled by the 'seat' of business associations without legal personality. It is true that United Kingdom and Irish law have so far provided only a tentative definition of such a central point of a trust. However, the concept of the domicile of a trust is not, at present, unknown in legal practice and theory ([32]). In his manual on Private International Law the Scottish Professor Anton gives the following definition ([33]):

> 'The domicile of a trust is thought to be basically a matter depending upon the wishes of a truster and his expressed intentions will usually be conclusive. In their absence the truster's intentions will be inferred from such circumstances as the administrative centre of the trust, the place of residence of the trustees, the situs of the assets of the trust, the nature of the trust purposes and the place where these are to be fulfilled.'

No doubt these notions about the domicile of a trust were developed mainly for the purpose of determining the legal system to be applied, usually either English or Scottish law. The principal characteristics of 'domicile' so defined and some of the factors on which it is based would also justify making it the basis for founding jurisdiction. The proposed new provision does not, strictly speaking, create a special jurisdiction. It covers only a very limited number of cases and is, therefore, added to Article 5 rather than to Article 2. For the non-exclusive character of the new provision see paragraph 118.

115. (b) The following are some detailed comments on the Working Party's proposal (see paragraph 181).

116. The concepts 'trust', 'trustee' and 'domicile' have not been translated into the other Community languages, since they relate to a distinctive feature of United Kingdom and Irish law. However, the Member States can give a more detailed definition of the concept of a trust in their national language in their legislation implementing the Accession Convention.

117. The phrase 'created by the operation of a statute, or by a written instrument, or created orally and evidenced in writing' is intended to indicate clearly that the new rules on jurisdiction apply only to cases in which under United Kingdom or Irish law a trust has been expressly constituted, or for which provision is made by Statute. This is important, because these legal systems solve many problems with which Continental systems have to deal in a completely different way, by means of so-called 'constructive' or 'implied' trusts. Where the latter are involved, the new Article 5 (6) is not applicable, as for instance where, after conclusion of a contract of sale, but prior to the transfer of title, the vendor is treated as holding the property on trust for the purchaser (see paragraph 172). Trusts resulting from the operation of a statutory provision are unlikely to fall within the scope of the 1968 Convention. Since in the United Kingdom, for example, children cannot own real property, a trust in their favour arises by operation of statute, if the circumstances are such that adult persons would have acquired ownership.

118. It should be noted that the new provision is not exclusive. It merely establishes an additional jurisdiction.The trustee who has gone to Corsica (see paragraph 113) can also be sued in the courts there. However, a settlor would be free to stipulate an exclusive jurisdiction (see paragraph 174).

119. If proceedings are brought in a Contracting State, relating to a trust which is subject to a foreign legal system, the question arises as to which law determines the domicile of that trust. The new version of Article 53 proposes the same criterion as that adopted in the 1968 Convention for ascertaining the 'seat' of a company. As far as the legal systems of England and Wales, Scotland, Northern Ireland and Ireland are concerned, application of this provision should present no serious difficulty. There are at present no rules of private international law in the legal systems of the Continental Member States of the Community for determining the domicile of a trust. The courts of those States will have to evolve such rules to enable them to apply the trust provisions of the 1968 Convention. Two possibilities exist. It could be contended that the domicile of a trust should be determined by the

legal system to which the trust is subject. One could, however, also contend that the court concerned should decide the issue in accordance with its own *lex fori* which would have to evolve its own appropriate criteria.

120. In principle, the exclusive jurisdictions provided for by Article 16 take priority over the new Article 5 (6). However, it is not easy to establish the precise extent of that priority.

In legal disputes arising from internal trust relationships, the legal relations referred to in the provisions in question usually play only an incidental role, if any. The trustee requires court approval for certain acts of management. Even where the management of immovable property is concerned, any such applications to the court do not affect the proprietary rights of the trustee, but only his fiduciary obligations under the trust. Article 16 (1) does not apply. One could, however, envisage a dispute arising between two people as to which of them was trustee of certain property. If one of them instituted proceedings against the other in a German court claiming the cancellation of the entry in the land register showing the defendant as the owner of the property and the substitution of an entry showing the plaintiff as the true owner, there can be no doubt that, under Article 16 (1) or (3), the German court would have exclusive jurisdiction. However, if a declaration is sought that a particular person is a trustee of a particular trust which includes certain property, Article 16 (1) does not become applicable merely because that property includes immovable property.

III. *Admiralty jurisdiction*

121. The exercise of jurisdiction in maritime matters has traditionally played a far greater role in the United Kingdom than in the Continental States of the Community. The scope of the international competence of the courts, as it has been developed in the United Kingdom, has become of worldwide significance for admiralty jurisdiction. This factor is reflected not least in the Brussels Conventions of 1952 and 1957 (see paragraph 238 *et seq.*). It would have been inappropriate to limit the exercise of admiralty jurisdiction to the basis of jurisdiction included in the 1968 Convention in its original form. If a ship is arrested in a State because of an internationally recognized maritime claim, it would be unreasonable to expect the creditor to seek a decision on his claim before the courts of the shipowner's domicile. For this reason, the Working Party gave lengthy consideration to the possible inclusion of a special section on admiralty jurisdiction in Title II. Article 36 of the Accession Convention is derived from an earlier draft prepared for that purpose (see paragraph 131). Parallel negotiations on Article 57 of the 1968 Convention did, however, lead to a generally acceptable interpretation which will enable States party to a Convention on maritime law to assume jurisdiction on any particular matter dealt with in that Convention, even in respect of persons domiciled in a Community State which is not a party to that Convention (see paragraph 236 *et seq.*). Furthermore, all delegations are in support of a Joint Declaration urging the Community States to accede to the most important of all the Conventions on maritime law, namely the Brussels Convention of 10 May 1952 (see paragraph 238). The Working Party, confident that this Joint Declaration will be adopted and implemented, finally dropped its plans for a section dealing with admiralty jurisdiction. This would also avoid interfering with the general principles of the 1968 Convention, and maintain a clear dividing line between its scope and that of other Conventions.

Two issues remain outstanding, however, since they are not fully covered by the Brussels Conventions of 1952 and 1957: jurisdiction in the event of the arrest of salvaged cargo or freight (the new Article 5 (7)) (1) and actions for limitation of liability in maritime matters (the new Article 6a) (2). Moreover, until Denmark and Ireland accede to the Brussels Arrest Convention of 10 May 1952, transitional provisions had also to be introduced (3). Finally, a particularity affecting only Denmark and Ireland (4) still remained to be settled.

1. Jurisdiction in connection with the arrest of salvaged cargo or freight

122. (a) The Brussels Convention of 1952 allows a claimant, *inter alia*, to invoke the jurisdiction of a State in which a ship has been arrested on account of a salvage claim (Article 7 (1) (b)). Implicit in this provision is a rule of substantive law. A claim to remuneration for salvage entitles

the salvage firm to a maritime lien on the ship. A similar lien in favour of a salvage firm can also exist on the cargo; this can be of some economic importance, if it is the cargo rather than the ship which was salvaged, or if the salvaged ship is so badly damaged that its value is less than the cost of the salvage operation. The value of the cargo of a modern supertanker can amount to a considerable sum. Finally, prior rights can also arise in regard to freight. If freight is payable solely in the event of the safe arrival of the cargo at the place of destination, it is appropriate that the salvage firm should have a prior right to be satisfied out of the claim to freight which was preserved due to the salvage of the cargo.

Accordingly United Kingdom law provides that a salvage firm may apply for the arrest of the salvaged cargo or the freight claim preserved due to its intervention and may also apply to the court concerned for a final decision on its claims to remuneration for salvage. Jurisdiction of this kind is similar in scope to the provisions of Article 7 of the Brussels Convention of 1952. As there is no other Convention on the arrest of salvaged cargo and freight which would remain applicable under Article 57, the United Kingdom would, on acceding to the 1968 Convention, have suffered an unacceptable loss of jurisdiction if a special provision had not been introduced.

123. (b) The proposed solution applies the underlying principle of Article 7 of the Brussels Convention of 1952 to jurisdiction after the arrest of salvaged cargo or freight claims.

Under Article 24 of the 1968 Convention, there is no limitation on national laws with regard to the granting of provisional legal safeguards including arrest. However, they could not provide that arrest, whether authorized or effected, should suffice to found jurisdiction as to the substance of the matter. The exception introduced in Article 5 (7) (a) is confined to arrest to safeguard a salvage claim.

Article 5 (7) (b) introduces an extension of jurisdiction not expressly modelled on the Brussels Convention of 1952. It is a result of practical experience. After salvage operations — whether involving a ship, cargo or freight — arrest is sometimes ordered, but not actually carried into effect, because bail or other security has been provided. This must be sufficient to confer jurisdiction on the arresting court to decide also on the substance of the matter.

The object of the provision is to confer jurisdiction only with regard to those claims which are secured by a maritime lien. If the owner of a ship in difficulties has concluded a contract for its salvage, as his contract with the cargo owner frequently obliges him to do, any disputes arising from the former contract will not be governed by this provision.

2. Jurisdiction to order a limitation of liability

124. It is not easy to say precisely how the application of Article 57 of the 1968 Convention links up with that of the International Convention of 10 October 1957 relating to the limitation of the liability of owners of seagoing ships ([34]) (see end of paragraph 128) and with relevant national laws. The latter Convention contains no express provisions directly affecting international jurisdiction or the enforcement of judgments. The Working Party did not consider that it was its task to deal systematically with the issues raised by that Convention and to devise proposals for solving them. It would, however, be particularly unfortunate in certain respects if the jurisdictional lacunae of the 1957 Convention on the limitation of liability were carried over into the 1968 Convention and were supplemented in accordance with the general provisions on jurisdiction of that Convention.

A distinction needs to be drawn between three differing aspects arising in connection with the limitation of liability in matters of maritime law. First, a procedure exists for setting up and allocating the liability fund. Secondly, the entitlement to damages against the shipowner must be judicially determined. Finally, and distinct from both, there is the assessment of limitation of liability regarding a given claim.

The procedural details giving effect to these three aspects vary in the different legal systems of the Community.

125. Under one system, which is followed in particular in the United Kingdom, limitation of liability necessitates an action against one of the claimants — either by way of originating proceedings or, if an action has already been brought against the shipowner, as a counterclaim. The liability fund is set up at the court dealing with the limitation of liability issue, and other claimants must also lodge their claims with the same court.

126. Under the system obtaining in Germany, for example, proceedings for the limitation of liability are started not by means of an action brought against a claimant, but by a simple application which is not directed 'against' any person, and which leads to the setting up of the fund.

If the application is successful, all claimants must lodge their claims with that court. If any disputes arise about the validity of any of the claims lodged, they have to be dealt with by special proceedings taking the form of an action by the claimant against the fund administrator, creditor or shipowner contesting the claim. Under this system an independent action by the shipowner against the claimant in connection with limitation of liability is also possible. Such an action leads not to the setting up of a liability fund or to an immediately effective limitation of liability, but merely establishes whether liability is subject to potential limitation, in case of future proceedings to assess the extent of such liability.

127. The new Article 6a does not apply to an action by a claimant against the shipowner, fund administrator or other competing claimants, nor to the collective proceedings for creating and allocating the liability fund, but only to the independent action brought by a shipowner against a claimant (a). Otherwise the present provisions of the 1968 Convention which are relevant to limitation of maritime liability apply (b).

128. (a) The actual or potential limitation of the liability of a shipowner can, however, in all legal systems of the Community be used otherwise than as a defence. If a shipowner anticipates a liability claim, it may be in his interest to take the initiative by asking for a declaration that he has only limited or potentially limited liability for the claim. In that case he can choose from one of the jurisdictions which are competent by virtue of Articles 2 to 6. According to these provisions, he cannot bring an action in the courts of his domicile. Since, however, he could be sued in those courts, it would be desirable also to allow him to have recourse to this jurisdiction. It is the purpose of Article 6a to provide for this. Moreover, apart from the Brussels Convention of 1952, this is the only jurisdiction where the shipowner could reasonably concentrate all actions affecting limitation of his liability. The result for English law (see paragraph 125) is that the fund can be set up and allocated by that same court. In addition, Article 6a makes it clear that proceedings for limitation of liability can also be brought by the shipowner in any other court which has jurisdiction over the claim. It also enables national legislations to give jurisdiction to a court within their territory other than the court which would normally have jurisdiction.

129. (b) For proceedings concerning the validity as such of a claim against a shipowner, Articles 2 to 6 are exclusively applicable.

In addition, Article 22 is always applicable. If proceedings to limit liability have been brought in one State, a court in another State which has before it an application to establish or to limit liability may stay the proceedings or even decline jurisdiction.

130. (c) A clear distinction must be drawn between the question of jurisdiction and the question which substantive law on limitation of liability is to be applied. This need not be the law of the State whose courts have jurisdiction for assessing the limitation of liability. The law applicable for the limitation of liability also defines more precisely the type of case in which limitation of liability can be claimed at all.

131. 3. Transitional provisions

All the delegations hope that Denmark and Ireland will accede to the Brussels Convention of 10 May 1952 (see paragraph 121). This will, however, naturally take some time, and it is reasonable to allow a transitional period of three years after the entry into force of the Accession Convention. It would be harsh if, within that period, in the two States concerned jurisdiction in maritime matters were to be limited to what is authorized under the terms of Articles 2 to 6a. Article 36 of the Accession Convention therefore contains transitional provisions in favour of those States. These provisions correspond, apart from variations in the drafting, to the provisions which the Working Party originally proposed to recommend for the special section on maritime law as general rules of jurisdiction regarding the arrest of seagoing ships. In preparing these provisions the Working Party drew heavily, in fact almost exclusively, on the rules of the 1952 Brussels Convention relating to the arrest of seagoing ships (see paragraph 121).

Since they are temporary, the transitional provisions do not merit detailed comments on how they differ from the text of that Convention.

132. 4. Disputes between a shipmaster and crew members

The new Article Vb of the Protocol annexed to the 1968 Convention is based on a request by Denmark founded on Danish tradition. This has become part of the Danish Seamen's Law No 420 of 18 June 1973 which states that disputes between a crew member and a shipmaster of a Danish vessel may not be brought before foreign courts. The same principle is also embodied in some consular conventions between Denmark and other States. Following a specific request from the Irish delegation, the scope of this provision has also been extended to Irish ships.

IV. *Other special matters*

133. 1. Jurisdiction based on the place of performance

In the course of the negotiations it emerged that the French and Dutch texts of Article 5 (1) were less specific than the German and Italian texts on the question of the designation of the obligation. The former could be misinterpreted as including other contractual obligations than those which were the subject of the legal proceedings in question. The revised versions of the French and Dutch texts should clear up this misunderstanding ([35]).

134. 2. Jurisdiction in matters relating to tort

Article 5 (3) deals with the special tort jurisdiction. It presupposes that the wrongful act has already been committed and refers to the place where the harmful event has occurred. The legal systems of some States provide for preventive injunctions in matters relating to tort. This applies, for example, in cases where it is desired to prevent the publication of a libel or the sale of goods which have been manufactured or put on the market in breach of the law on patents or industrial property rights. In particular the laws of the United Kingdom and Germany provide for measures of this nature. No doubt Article 24 is applicable when courts have an application for provisional protective measures before them, even if their decision has, in practice, final effect. There is much to be said for the proposition that the courts specified in Article 5 (3) should also have jurisdiction in proceedings whose main object is to prevent the imminent commission of a tort.

135. 3. Third party proceedings and claims for redress

In Article 6 (2), the term 'third party proceedings' relates to a legal institution which is common to the legal systems of all the original Member States, with the exception of Germany. However, a jurisdictional basis which rests solely on the capacity of a third party to be joined as such in the proceedings cannot exist by itself. It must necessarily be supplemented by legal criteria which determine which parties may in which capacity and for what purpose be joined in legal proceedings. Thus the provisions already existing in, or which may in future be introduced into, the legal systems of the new Member States with reference to the joining of third parties in legal proceedings, remain unaffected by the 1968 Convention.

Section 3

Jurisdiction in insurance matters

136. The accession of the United Kingdom introduced a totally new dimension to the insurance business as it had been practised hitherto within the European Community. Lloyds of London has a substantial share of the market in the international insurance of large risks ([36]).

In view of this situation the United Kingdom requested a number of adjustments. Its main argument was that the protection afforded by Articles 7 to 12 was unnecessary for policy-holders domiciled outside the Community (I) or of great economic importance (II). The United Kingdom expressed concern that, without an adjustment of the 1968 Convention, insurers within the Community might be forced to demand higher premiums than their competitors in other States.

There were additional reasons for each particular request for an adjustment. As regards contracts of insurance with policy-holders domiciled outside the Community the United Kingdom sought the unrestricted admissibility of agreements conferring jurisdiction to be vouchsafed so that appropriate steps could be taken with regard to the binding provisions contained in the national laws of many policy-holders insuring with English insurers (I). Requests for adjustments also referred, in conjunction with the other requests for adjustments, to the scope of Articles 9 and 10 which seemed to require clarification (III). Finally there were requests for a few minor adjustments (IV).

The original request of the United Kingdom in respect of the first two problems, namely that the insurance matters in question should be excluded from the scope of Articles 7 to 12 was too far-reaching in view of the general objectives of the 1968 Convention. In particular a number of features of the mandatory rules of jurisdiction, which differ for the various types of insurance, had to be retained (see paragraphs 138, 139 and 143). However, the special structure of the British insurance market had to be taken into account — not least so that it would not be driven to resort systematically to arbitration. Although the 1968 Convention does not restrict the possibility of settling disputes by arbitration (see paragraph 63), national law should be careful not to encourage arbitration simply by making proceedings before national courts too complicated and uncertain for the parties. The Working Party therefore endeavoured to extend the possibilities of conferring jurisdiction by consent. For the form of such agreements see paragraph 176.

I. *Insurance contracts taken out by policy-holders domiciled outside the Community*

137. As already indicated earlier (see note 36), insurance contracts with policy-holders domiciled outside the Community account for a very large part of the British insurance business. The 1968 Convention does not expressly stipulate to what extent such contracts may provide for jurisdiction by consent. Article 4 applies only to the comparatively rare case where the policy-holder is the defendant in subsequent proceedings. In so far as the jurisdiction of courts outside the Community can be determined by agreement, the general question arises as to what restrictions should be imposed on such agreements having regard to the exclusive jurisdictions provided for by the 1968 Convention (see paragraphs 148, 162 *et seq.*). The main problem in this connection was the jurisdiction under Articles 9 and 10 which, it was thought, could not be excluded. However, this difficulty did not affect insurance contracts only with policy-holders domiciled outside the Community. It also affects, more generally, agreements on jurisdiction which are authorized by Article 12.

In view of the great importance for the United Kingdom of the question of agreements on jurisdiction with policy-holders domiciled outside the Community, it was necessary to incorporate the admissibility in principle of such agreements on jurisdiction expressly in the 1968 Convention. If, therefore, a policy-holder domiciled outside the Community insures a risk in England, exclusive jurisdiction may be conferred by agreement on English courts as well as on the courts of the policy-holder's domicile or others.

This basic rule had however to be limited again in two ways in the new paragraph (4) of Article 12.

138. 1. Compulsory insurance

Where a statutory obligation exists to take out insurance no departure from the provisions of Articles 8 to 11 on compulsory insurance can be permitted, even if the policy-holder is domiciled outside the Community. If a person domiciled in Switzerland owns a motor car which is normally based in Germany, then the car must, under German law, be insured against liability. Such an insurance contract may not contain provisions for jurisdiction by consent concerning accidents occurring in Germany.

The possibility of invoking the jurisdiction of German courts (Article 8) cannot be contractually excluded. This is so even although the relevant German law of 5 April 1965 on compulsory insurance (Bundesgesetzblatt I, page 213) does not expressly prohibit agreements on jurisdiction. However, in practice German law prevents the conclusion of agreements on jurisdiction in the area of compulsory insurance because approval of conditions of insurance containing such a provision would be withheld.

Compulsory insurance exists in the following Member States of the Community for the following articles, installations, activities and occupations, although this list does not claim to be complete:

FEDERAL REPUBLIC OF GERMANY (37)

1. Federal

Liability insurance compulsory for owners of motor vehicles, airline companies, hunters, owners of nuclear installations and handling of nuclear combustible materials and other radioactive materials, road haulage, accountants and tax advisers, security firms, those responsible for schools for nursing, infant and child care and midwifery, automobile experts, notaries' professional organizations, those responsible for development aid, exhibitors, pharamaceutical firms;

Life insurance for master chimney sweeps;

Accident insurance for airline companies and usufructuaries;

Fire insurance for owners of buildings which are subject to a charge, usufructuaries, warehouse occupiers, pawnbrokers;

Goods insurance for pawnbrokers;

Pension funds for theatres, cultural orchestras, district master chimney sweeps, supplementary pension funds for the public service.

2. Länder

There is no uniformity as between the Länder of the Federal Republic of Germany, but there is in particular compulsory fire insurance for buildings, compulsory pension funds for agricultural workers, the liberal professions (doctors, chemists, architects, notaries) and (in Bavaria, for example) members of the Honourable Company of Chimney Sweeps and, for example, a supplementary pension fund for workers in the Free and Hanseatic City of Bremen. In Bavaria there is compulsory insurance for livestock intended for slaughter.

BELGIUM:

Motor vehicles, hunting, nuclear installations, accidents at work, transport accidents (for paying transport by motor vehicles).

DENMARK:

Motor vehicles, dogs, nuclear installations, accountants.

FRANCE:

Operators of ships and nuclear installations, sand motor vehicles, operators of cable-cars, chair-lifts and other such mechanical units, hunting, estate agents, managers of property, syndics of co-owners, business managers, operators of sports centres, accountants, agricultural mutual assistance schemes, legal advisers, physical education establishments and pupils, operators of dance halls, managers of pharmacists' shops in the form of a private limited liability company (S.à.r.l.), blood transfusion centres, architects, motor vehicle experts, farmers.

LUXEMBOURG:

Motor vehicles, hunting and hunting organizations, hotel establishments, nuclear installations, fire and theft insurance for hotel establishments;

Insurance against the seizure of livestock in slaughterhouses.

NETHERLANDS:

Motor vehicles, nuclear installations, tankers.

UNITED KINGDOM:

Third party liability in respect of motor vehicles;

Employers' liability in respect of accidents at work;

Insurance of nuclear installations;

Insurance of British registered ships against oil pollution;

Compulsory insurance scheme for a number of professions, e. g. solicitors and insurance brokers.

139. 2. Insurance of immovable property

The second exception referred to at the end of paragraph 137 is particularly designed to ensure that Article 9 continues to apply even when the policy-holder is domiciled outside the Community. However, this exception has further implications. It prohibits jurisdiction agreements conferring exclusive jurisdiction on the courts mentioned in Article 9. This applies even where the national law of the State in which the immovable property is situated allows agreements conferring jurisdiction in such circumstances.

II. *Insurance of large risks, in particular marine and aviation insurance*

140. The United Kingdom's request for special rules for the insurance of large risks was probably the most difficult problem for the Working Party. The request was based on the realization that the concept of social protection underlying a restriction on the admissibility of provisions conferring jurisdiction in insurance matters is no longer justified where the policy-holders are powerful undertakings. The problem was one of finding a suitable demarcation line. Discussions on the second Directive on insurance had already revealed the impossibility of taking as criteria abstract, general factors like company capital or turnover. The only solution was to examine which types of insurance contracts were in general concluded only by policy-holders who did not require social protection. On this basis, special treatment could not be conceded to industrial insurance as a whole.

Accordingly, the Working Party directed its attention to the various classes of insurance connected with the transport industry. In this area there is an additional justification for special treatment for agreements on jurisdiction: the risks insured are highly mobile and insurance policies tend to change hands several times in quick succession. This leads to uncertainty as to which courts will have jurisdiction and the difficulties in calculating risks are thereby greatly increased. On the other hand, there are here, too, certain areas requiring social protection. Particular complications were caused by the fact that there is a well integrated insurance market for the transport industry. The various types of risk for different means of transport are usually covered under one single policy. The British insurance industry in particular has developed standard policies which only require for their completion a notification by the insured that the means of transport (which can be of many different types) have set off.

The result of a consideration of all these matters is the solution which figures in the new paragraph (5) of Article 12, as supplemented by Article 12a: agreements on jurisdiction are in principle to be given special treatment in marine insurance and in some sectors of aviation insurance. In the case of insurance of transport by land alone no exceptional rules of any kind appeared justified.

In order to avoid difficulties and differences of interpretation, a list had to be drawn up of the types of policy for which the admissibility of agreements on jurisdiction was to be extended. The idea of referring for this purpose to the list of classes of insurance appearing in the Annex to the First Council Directive of 24 July 1973 (73/239/EEC) proved inadequate. The classification used there took account of the requirements of State administration of insurance, and was not directed towards a fair balancing of private insurance interests. There was thus no alternative but to draw up a separate list for the purposes of the 1968 Convention. The following comments apply to the list and the classes of insurance not included in it.

141. 1. Article 12 a (1) (a)

This provision applies only to hull insurance and not to liability insurance. The term 'seagoing ships' means all vessels intended to travel on the sea. This includes not only ships in the traditional sense of the word but also hovercraft, hydrofoils, barges and lighters used at sea. It also covers floating apparatus which cannot move under its own power, e.g. oil exploration and extraction installations which are moved about on water. Installations firmly moored or to be moored on the seabed are in any event expressly included in the text of the provision. The provision also covers ships in the course of construction, but only in so far as the damage is the result of a maritime risk. This is damage caused by the fact that the ship is on the water and not therefore, damage which occurs in dry-dock or in the workshops of shipyards.

142. 2. Article 12a (1) (b)

In the same way as (1) (a) covers the value of the hull of a ship or of an aeroplane, (1) (b) covers the value of goods destroyed or lost in transit, but not liability insurance for any loss or damage caused by those goods. The most important single decision taken on the provision was the addition of the words 'consists of or includes'. The reason for this is that goods in transit are frequently not conveyed by the same means of transport right to their final destination. There may be a sequence of journeys by land, sea and air. There would be unwarranted complications for the insurance industry in drafting policies and settling claims, if a fine distinction had always to be drawn as to the section of transit in which loss or damage had occurred. Moreover it is often impossible to ascertain this. One has only to think of container transport to realize how easily a loss may be discovered only at the destination. Practical considerations therefore required that agreements on jurisdiction be permitted, even where goods are carried by sea or by air for only part of their journey. Even if it can be proved that the loss occurred in the course of transport on land, agreements on jurisdiction permitted by the new paragraph (5) of Article 12 remain effective. The provision applies even if the shipment does not cross any national border.

143. The exception in respect of injury to passengers and loss of or damage to their baggage, which is repeated in Article 12a (2) (a) and (b), is justified by the fact that such persons as a group tend to have a weaker economic position and less bargaining power.

144. 3. Article 12a (2) (a)

Whether these provisions also cover all liability arising in connection with the construction, modification and repair of a ship; whether therefore the provision includes all liability which the shipyard incurs towards third parties and which was caused by the ship; or whether the expression 'use or operation' has to be construed more narrowly as applying only to liability arising in the course of a trial voyage — all these are questions of interpretation which still await an answer. The exception for compulsory aircraft insurance is intended to leave the Member States free to provide for such protection as they consider necessary for the policy-holder and for the victim.

145. 4. Article 12a (2) (b)

As there is no reason to treat combined transport any differently for liability insurance than for hull insurance, it is equally irrelevant during which section of the transport the circumstances causing the liability occurred (see paragraphs 142 and 143).

146. 5. Article 12a (3)

The most important application of this provision is stated in the text itself. In the absence of a provision to the contrary in the charter party, an air crash would cause the carrier to lose his entitlement to freight and the owner his charter-fee from the charterer. Another example might be loss caused by the late arrival of a ship. For the rest the notion is the same as that used in Directive 73/239/EEC.

147. 6. Article 12a (4)

Insurance against ancillary risks is a familiar practice, especially in United Kingdom insurance

contracts. An example would be 'shipowner's disbursements' consisting of exceptional operational costs, e.g. harbour dues accruing whilst a ship remains disabled. Another example is insurance against 'increased value', providing protection against loss arising from the fact that a destroyed or damaged cargo had increased in value during transit.

The provision does not require an ancillary risk to be insured under the same policy as the main risk to which it relates. The Working Party therefore deliberately opted for a somewhat different wording from that in Directive 73/239/EEC for the 'ancillary risks' referred to in that Directive. The definition in that Directive could not be used since it is concerned with a different subject, the authorization of insurance undertakings.

148. III. *The remaining scope of Articles 9 and 10*

The revised text of Article 12, like the original text, does not expressly deal with the effect of agreements on jurisdiction or the special jurisdictions for insurance matters set out in Section 3. Nevertheless, the legal position is clear from the systematic construction of Section 3 of the 1968 Convention, as amended. Agreements on jurisdiction cover all legal proceedings between insurer and policy-holder, even where the latter wishes, pursuant to the first paragraph of Article 10, to join the insurer in the court in which he himself is sued by the injured party. However, jurisdiction clauses in insurance contracts cannot be binding upon third parties. The provisions of the second paragraph of Article 10 concerning a direct action by the injured party are thus not affected by such jurisdiction clauses. The same is true of the third paragraph of Article 10.

IV. *Other problems of adjustment and clarification in insurance law*

149. 1. Co-insurance

The substantive amendment in the first paragraph of Article 8 covers jurisdiction where several co-insurers are parties to a contract of insurance. What usually happens is that one insurer acts as leader for the other co-insurers and each of them underwrites a part of the risk, possibly a very small part. In such cases, however, there is no justification for permitting all the insurers, including the leader, to be sued in the courts of each State in which any one of the many co-insurers is domiciled. The only additional international jurisdiction which can be justified would be one which relates to the circumstances of the leading insurer. The Working Party considered at length whether to refer to the leading insurer's domicile, but the effect of this would have been that the remaining co-insurers could be sued there even if the leader was sued elsewhere. An additional jurisdiction based on the leading insurer's circumstances is justifiable only if it leads to a concentration of actions arising out of an insured event. The new version of the first paragraph of Article 8 therefore refers to the court where proceedings are brought against the leading insurer. Co-insurers can thus be sued for their share of the insurance in that court, at the same time as the leading insurer or subsequently. However, the provision does not impose an obligation for proceedings to be concentrated in one court; there is nothing to prevent a policy-holder from suing the various co-insurers in different courts. If the leading insurer has settled the claim out of court, the policy-holder must bring any action against the other co-insurers in one of the courts having jurisdiction under points (1) or (2) of the new version of the first paragraph of Article 8.

The remaining amendments to the first paragraph of Article 8 merely rephrase it for the sake of greater clarity.

150. 2. Insurance agents, the setting up of branches

There was discussion on the present text of the second paragraph of Article 8 of the 1968 Convention because its wording might give rise to the misunderstanding that jurisdiction could be founded not only on the intervention of an agent of the insurer, but also on that of an independent insurance broker of the type common in the United Kingdom. The discussion revealed that this provision was unnecessary in view of Article 5 (5). The Working Party therefore changed the present paragraph three into paragraph two. The addition of the words 'or other establishment' is intended merely to ensure consistency between Article 5 (5) and the third paragraph of the new Article 13. The latter provision is necessary in addition to the former in order to prevent Article 4 being applicable.

151. 3. Reinsurance

Reinsurance contracts cannot be equated with insurance contracts. Accordingly, Articles 7 to 12 do not apply to reinsurance contracts.

152. 4. The term 'policy-holder'

The previous authentic texts of the 1968 Convention use the term 'preneur d'assurance' and the equivalent in German, Italian and Dutch; the nearest English equivalent of the term proved to be 'the policy-holder'. However, this should not give rise to the misunderstanding that the problems arising from a transfer of legal rights are now any different from those existing before the accession of the new Member States to the Convention. The rightful possessor of the policy document is not always the 'preneur d'assurance'. It is of course conceivable that the whole legal status of the other party to the contract with the insurer might pass to another person by inheritance or some other means, in which case the new party to the contract would become the 'preneur d'assurance'. However, this case must be clearly distinguished from the transfer of individual rights arising out of the contract of insurance, especially in the form of assignment of the sum assured to a beneficiary. Such an assignment may be made in advance and may be contingent, for instance, upon the occurrence of a claim. In this event it is conceivable that the insurance policy might be passed on to the beneficiary at the same time as the assignment of the right to the sum assured so that he can claim his entitlement from the insurer, if the case arises. The beneficiary would not thereby become the 'preneur d'assurance'. Hence, where a court's jurisdiction is dependent on individual characteristics of the 'preneur d'assurance', the situation remains unchanged as a result of prior assignment of any claim to the sum assured which might arise, even if the policy document is transferred at the same time.

152. (a) 5. Agreements on jurisdiction between parties to a contract from the same State

For the amendment to Article 12 (3) ('at the time of conclusion of the contract'), see paragraph 161 (a).

Section 4

Jurisdiction over consumer contracts

153. I. *Principles*

Leaving aside insurance matters, the 1968 Convention pays heed to consumer protection considerations only in one small section, that dealing with instalment sales and loans. This was consistent with the law as it then stood in the original Member States of the Community since it was in fact at first only in the field of instalment sales and loans that awareness of the need to protect the consumer against unfairly worded contracts became widespread. Since that time legislation in the Member States of the Community has become concerned with much broader-based consumer protection. In particular there has been a general move in consumer protection legislation to ensure appropriate jurisdictions for the consumer. Intolerable tensions would be bound to develop between national legislation and the 1968 Convention in the long run if the Convention did not afford the consumer much the same protection in the case of transfrontier contracts as he received under national legislation. The Working Party therefore decided to propose that the previous Section 4 of Title II be extended into a section on jurisdiction over consumer contracts, establishing at the same time for future purposes that only final consumers acting in a private capacity should be given special protection and not those contracting in the course of their business to pay by instalments for goods and services used. The Working Party was influenced on this last point by the proceedings in the Court of Justice of the European Communities in response to a reference from the French Cour de cassation concerning the interpretation of 'instalment sales and loans', proceedings which centred on the question of whether the existing Section 4 of Title II covered instalment sales contracts concluded by businessmen (Case 150/77: Société Bertrand v. Paul Ott KG).

The basic principle underlying the provisions of the new section is to draw upon ideas emerging from European Community law as it has evolved and is currently evolving. Consequently, most of the existing provisions on instalment sales and loans have been incorporated in the new section, which also draws on Article 5 of the preliminary draft Convention on the law applicable to contractual and non-contractual obligations. On points of drafting detail, however, improvements

were made on the wording of the preliminary draft Convention. One substantive change was necessary, since to accord with the general structure of the 1968 Convention reference had to be made to the place where the parties are domiciled, rather than habitually resident. Details are as follows:

154. II. *The scope of the new Section*

Using the device of an introductory provision defining the scope of the Section, the proposal follows the practice previously adopted at the beginning of Sections 3 and 4 of Title II.

1. Persons covered

155. The only new point of principle is a provision governing the persons covered by the section, including in particular the legal definition of the section's central term, the 'consumer'. The substances of the definition is taken from Article 5 of the preliminary draft Convention on the law applicable to contractual and non-contractual obligations the most recent version of which was used by the Working Party. The amendments made were only drafting improvements.

2. Subject matter covered

156. As regards the subject matter covered by the new section, a clear distinction is drawn between instalment sales, including the financing of such sales, and other consumer contracts. The consequent effect on the precedence of the provisions of Sections 3 and 4 is as follows: Section 3 is a more specific provision than Section 4 and hence takes precedence over it. A contract of insurance is not a contract for the supply of services within the meaning of the 1968 Convention. Within Section 4, the provisions on instalment sales are more specific than the general reference to consumer sales in the first paragraph of Article 13.

157. (a) As in the past, instalment sales are subject to the special provisions without any further preconditions. The sole change lies in the stipulation that the special provisions apply only where the purchaser is a private consumer. The rules governing instalment sales also apply automatically to the legal institution of hire purchase, which has developed into the commonest legal form for transacting instalment sales in the United Kingdom and Ireland. For reasons which are not material for jurisdiction purposes, instalment sales in those countries usually take the form in law of a contract of hire with an option to purchase for the hirer. In form the instalments represent the hire fee, whereas in substance they form the purchase price. At the end of the prescribed 'hire' period, once all the prescribed instalments of the 'hire fee' have been paid, the 'hirer' is entitled to purchase the article for a nominal price. As the term 'instalment sale' under the continental legal systems by no means implies that ownership of the article must necessarily pass to the purchaser at the same time as physical possession, hire purchase is in practice tantamount to an instalment sale.

Contracts to finance instalment sales to private consumers are also subject to the special provisions without any further preconditions. Contrary to the legal position obtaining hitherto, the Working Party has made actions arising out of a loan contract to finance the purchase of movable property subject to the special provision, even if the loan itself is not repayable by instalments or if the article is purchased with a single payment (normally with the funds lent). Credit contracts are not, moreover, contracts for the supply of services, so that, apart from point (2) of the first paragraph of Article 13, the whole of Section 4 does not apply to such contracts. Contracts of sale not falling under point (1) of the first paragraph of Article 13 do not, for instance, come under point (2) of that paragraph, although Section 4 may be applicable to them subject to the further conditions contained in point (3) (see paragraph 158).

158. (b) On the other hand, consumer contracts other than those referred to in paragraph 157 are subject to the special provisions only if there is a sufficiently strong connection with the place where the consumer is domiciled. In this, the new provisions once again follow the preliminary draft Convention on the law applicable to contractual and non-contractual obligations. Both the conditions referred to in point (3) of the first paragraph of Article 13—an offer or advertising in the State of the consumer's domicile, and steps necessary for the conclusion of the contract taken by the consumer in that State—must be satisfied. The introductory phrase should, moreover, ensure that Articles 4 and 5 (5)

will apply to all consumer contracts, as has until now been the case only for instalment sales and for loans repayable by instalments. One particular consequence of this is that, subject to the second paragraph of Article 13, Section 4 does not apply where the defendant is not domiciled in the EEC.

For further details of what is meant by 'a specific invitation' or 'advertising' in the State of the consumer's domicile and by 'the steps necessary for the conclusion of the contract', see the report currently being drawn up by Professor Giuliano on the Convention on the law applicable to contractual and non-contractual obligations.

3. Only a branch, agency or other establishment within the Community

159. The exclusion from the scope of Section 4 of contracts between consumers and firms domiciled outside the EEC would not be reasonable where such firms have a branch, agency or other establishment within the EEC. Under the national laws upon which jurisdiction is to be founded in such cases pursuant to Article 4, it would often be impossible for the consumer to sue in the courts which would be guaranteed to have jurisdiction for his purposes in the case of contracts with parties domiciled within the EEC. Insurers with branches, agencies or other establishments in the EEC are treated as regards jurisdiction in like manner to those domiciled within the Community (Article 8) and for the same reasons the other parties to contracts with consumers must also be deemed to be domiciled within the EEC if they have a branch, agency of other establishment in the Community. It is, however, only logical that it should not be possible to invoke exorbitant jurisdictions against such parties simply because their head office lies outside the EEC.

4. Contracts of transport

160. The last paragraph of Article 13 is again taken from Article 5 of the preliminary draft Convention on the law applicable to contractual and non-contractual obligations. The reason for leaving contracts of transport out of the scope of the special consumer protection provisions in the 1968 Convention is that such contracts are subject under international agreements to special sets of rules with very considerable ramifications, and the inclusion of those contracts in the 1968 Convention purely for jurisdictional purposes would merely complicate the legal position. Moreover, the total exclusion of contracts of transport from the scope of Section 4 means that Sections 1 and 2 and hence in particular Article 5 (1) remain applicable.

161. III. *The substance of the provisions of Section 4*

There are only a few points requiring a brief explanation of the substance of the new provisions.

1. Subsequent change of domicile by the consumer

In substance, the new Article 14 closely follows the existing Article 14, while extending it to actions arising from all consumer contracts. The rearrangement of the text is merely a rewording due to the availability of a convenient description for one party to the contract, the 'consumer', which was better placed at the beginning of the text so as to make it more easily comprehensible. The Working Party's decision means in substance that, as in the case with the existing Article 14, the consumer may sue in the courts of his new State of domicile if he moves to another Community State after concluding the contract out of which an action subsequently arises. This only becomes practical, however, in the case of the instalment sales and credit contracts referred to in points (1) and (2) of the first paragraph of Article 13. For actions arising out of other consumer contracts the new Section 4 will in virtually all cases cease to be applicable if the consumer transfers his domicile to another State after conclusion of the contract. This is because the steps necessary for the conclusion of the contract will almost always not have been taken in the new State of domicile. The cross-frontier advertising requirement also ensures that the special provisions will in practice not be applicable to contracts between two persons neither of whom is acting in a professional or trading capacity.

2. Agreements on jurisdiction

161a. The new version of Article 15, too, is in substance based on the existing version relating to instalment sales and loans. The only addition is intended to make it clear that it is at the time of conclusion of the contract, and not when proceedings are subsequently instituted, that the parties must be domiciled in the same State. It

was then necessary to align and clarify Article 12 (3) in the same way.

Although Article 13 is not expressed to be subject to Article 17, the Working Party was unanimously of the opinion that agreements on jurisdiction must, in so far as they are permitted at all, comply with the formal requirements of Article 17. Since the form of such agreements is not governed by Section 4, it must be governed by Article 17.

Section 5

Exclusive jurisdiction

162. The only amendment proposed by the Working Party to the cases of exclusive jurisdiction provided for in Article 16 is a technical amendment in Article Vd of the Protocol annexed to the 1968 Convention, to clarify Article 16 (4). The Working Party did, however, spend some time discussing paragraphs (1) and (2) of that Article. Details of the information supplied to the new Member States regarding exclusive jurisdiction in actions relating to the validity of the constitution of companies or to their dissolution have already been given elsewhere (see paragraph 56 *et seq.*). It is only necessary to add that a company may have more than one seat. Where under a legal system it is possible for a company to have two seats, and it is that system which, pursuant to Article 53 of the 1968 Convention, is to determine the seat of the company, the existence of two seats has to be accepted. It is then open to the plaintiff to choose which of the two seats he will use to base the jurisdiction of the court for his action. Finally, it should be pointed out that Article 16 (2) also applies to partnerships established under United Kingdom and Irish law (see paragraph 55).

Thus essentially the only exclusive jurisdiction left to be dealt with more fully here is that in respect of actions relating to rights *in rem* in, or tenancies of, immovable property. There were five problems with regard to which the new Member States had requested explanations.

163. There was no difficulty in clarifying that actions for damages based on infringement of rights *in rem* or in damage to property in which rights *in rem* exist do not fall within the scope of Article 16 (1). In that context the existence and content of such rights *in rem*, usually rights of ownership, are only of marginal significance.

164. The Working Party was unable to agree whether actions concerned only with rent, i.e. dealing simply with the recovery of a debt, are excluded from the scope of Article 16 (1) as, according to the Jenard report, was the opinion of the Committee which drafted the 1968 Convention ([38]). However, the underlying principle of the provision quite clearly does not require its application to short-term agreements for use and occupation such as, for example, holiday accommodation.

165. Two of the three remaining problems which the Working Party examined relate to the differences between the law of immovable property on the continent and the corresponding law in the United Kingdom and Ireland; they require therefore somewhat more detailed comments. There is, first, the question what are rights *in rem* (1) within the meaning of Article 16 (1), and, secondly, the problem of disputes arising in connection with the transfer of immovable property (2). Certain other problems emerged as a result of developments which have taken place in the meantime in international patent law (3).

1. Rights 'in rem' in immovable property in the Member States of the Community

166. (a) The concept of a right *in rem* — as distinct from a right *in personam* — is common to the legal systems of the original Member States of the EEC, even though the distinction does not appear everywhere with the same clarity.

A right *in personam* can only be claimed against a particular person; thus only the purchaser is obliged to pay the purchase price and only the lessor of an article is obliged to permit its use.

A right *in rem*, on the other hand, is available against the whole world. The most important legal consequence flowing from the nature of a right *in rem* is that its owner is entitled to

demand that the thing in which it exists be given up by anyone not enjoying a prior right.

In the legal systems of all the original Member States of the EEC without exception, there are only a restricted number of rights *in rem*, even though they do not rigidly apply the principle. Some rights *in rem* are defined only in outline, with freedom for the parties to agree the details. The typical rights *in rem* are listed under easily identifiable heads of the civil law, which in all six countries is codified ([39]). In addition, a few rights *in rem* are included in some special laws, the most important of which are those on the co-ownership of real property. Apart from ownership as the most comprehensive right *in rem*, a distinction can be made between certain rights of enjoyment and certain priority rights to secure liabilities. All the legal systems know the concept of usufruct, which confers extensive rights to enjoyment of a property. More restricted rights of enjoyment can also exist in these legal systems in various ways.

167. (b) At first glance there appears to be in United Kingdom and Irish law too a small, strictly circumscribed group of statutory rights corresponding to the Continental rights *in rem*. However, the position is more complicated, because these legal systems distinguish between law and equity.

In this connection it has always to be borne in mind that equity also constitutes law and not something merely akin to fairness lying outside the concept of law. As a consequence of these special concepts of law and equity in the United Kingdom and in Ireland, equitable interests can exist in immovable property in addition to the legal rights.

In the United Kingdom the system of legal rights has its origin in the idea that all land belongs to the Crown and that the citizen can only have limited rights in immovable property. This is the reason why the term 'ownership' does not appear in the law of immovable property. However, the estate in fee simple absolute in possession is equivalent to full ownership under the Continental legal systems. In addition the Law of property Act 1925 provides for full ownership for a limited period of time ('term of years absolute'). The same Act limits restricted rights in immovable property ('interests or charges in or over land') to five. All the others are equitable interests, whose number and content are not limited by the Act. Equitable interests are not, however, merely the equivalent of personal rights on the Continent. Some can be registered and then, like legal rights, have universal effect, even against purchasers in good faith. Even if not registered they operate in principle against all the world; only purchasers in good faith who had no knowledge of them are protected in such a case ([40]). If the owner of an estate in fee simple absolute in possession grants another person a right of way over his property for the period of that person's life, this cannot amount to a legal right. It can only be an equitable interest, though capable of registration ([41]). Equitable interests can thus fulfil the same functions as rights *in rem* under the Continental legal systems, in which case they must be treated as such under Article 16 (1). There is no limit to the number of such interests. The granting of equitable interests is on the contrary the method used for achieving any number of subdivisions of proprietary rights ([42]).

168. (c) If an action relating to immovable property is brought in a particular State and the question whether the action is concerned with a right *in rem* within the meaning of Article 16 (1) arises, the answer can hardly be derived from any law other than that of the *situs*.

2. Actions in connection with obligations to transfer immovable property

169. The legal systems of the original and the new Member States of the Community also differ as regards the manner in which ownership of immovable property is transferred on sale. Admittedly the legal position even within the original Member States differs in this respect.

170. (a) German law distinguishes most clearly between the transfer itself and the contract of sale (or other contract designed to bring about a transfer). The legal position in the case of immovable property is no different from that obtaining in the case of movable property. The transfer is a special type of legal transaction which in the case of immovable property is called 'Auflassung' (conveyance) and which even between the parties becomes effective only on entry in the land register. Where a purchaser of German immovable property brings proceedings on the basis of a contract for sale of immovable property which is governed by German law, the

subject matter of such proceedings is never a right *in rem* in the property. The only matter in issue is the defendant's personal obligation to carry out all acts necessary to transfer and hand over the property. If one of the parties fails to fulfil its obligations under a contract for sale of immovable property, the remedy in German law is not a court order for rescission, but a claim for damages and the right to rescind the contract.

Admittedly it is possible with the vendor's consent to protect the contractual claim for a transfer of ownership by means of a caution in the land register. In that case the claim has, as against third parties, effects which normally only attach to a right *in rem*. The consequence for German domestic law is that nowadays rights secured by such a caution may be claimed against third parties in the jurisdiction competent to deal with the property concerned ([43]). However, any proceedings for a transfer of ownership against the vendor himself would remain an action based on a personal obligation.

171. (b) Under French, Belgian and Luxembourg law, which is largely followed by Italian law, the ownership, at any rate as between the parties, passes to the purchaser as soon as the contract of sale is concluded, just as it does in the case of movable property, unless the parties have agreed a later date (see e.g. Article 711 and 1583 of the French Civil Code and Article 1376 of the Italian Civil Code). The purchaser need only enter the transfer of ownership in the land register ('transcription') to acquire a legal title which is also effective against third parties. For the purchaser to bring proceedings for performance of the contract is therefore normally equivalent to a claim that the property be handed over him. Admittedly this claim is based not only on the obligation which the vendor undertook by the contract of sale, but also on ownership which at that point has already passed to the purchaser. This means that the claim for handing over the property has as its basis both a personal obligation and a right *in rem*. The system of remedies which is available in the event of one party to a contract not complying with its obligations is fully in accordance with this. Accordingly, French domestic law has treated such actions as a 'matière mixte' and given the plaintiff the right to choose between the jurisdiction applicable to the right *in rem* and the jurisdiction applicable to the personal obligation arising from the contract, i.e. the law of the defendant's domicile or of the place of performance of the contract ([44]).

The 1968 Convention does not deal with this problem. It would seem that the personal aspect of such claims predominates and Article 16 (1) is inapplicable.

172. (c) In the United Kingdom ownership passes on the conclusion of a contract of sale only in the case of movable property. In the case of a sale of immovable property the transfer of ownership follows the conclusion of the contract of sale and is effected by means of a separate document, the conveyance. If necessary, the purchaser has to bring an action for all necessary acts to be performed by the vendor. However, except in Scotland, in contrast with German law, the purchaser's rights prior to the transfer of ownership are not limited to a personal claim against the vendor. In fact the purchaser has an equitable interest (see paragraph 167) in the property which, provided the contract is protected by a notice on the Land Register, is also effective against third parties. Admittedly the new paragraph (6) of Article 5 does not apply (see paragraph 114 *et seq.)*, because a contract of sale does not create a trust within the meaning of Article 5 (6), even if it is in writing. It is only in one respect that a purchaser's equitable interest does not place him in as strong a position as the French owner of immovable property prior to 'transcription' (see paragraph 171): the vendor's cooperation is still required to make the new owner's legal title fully effective.

This legal position would justify application of the exclusive jurisdiction referred to in Article 16 (1) even less than the corresponding position under French law. The common law has developed the concept of equitable interests so as to confer on parties to an agreement which originally gave them nothing more than merely personal rights a certain protection as against third parties not acting in good faith. As against the other party to the contract the claim remains purely a personal one, as does a claim, under German law, to transfer of ownership (see paragraph 170) secured by a caution in the Land Register. In Scotland contracts in favour of a third party are enforceable by that party *(jus quaesitum tertii)*.

Actions based on contracts for the transfer of ownership or other rights *in rem* affecting immovable property do not therefore have as their object rights *in rem*. Accordingly they may also be brought before courts outside the United Kingdom. Admittedly, care will have to be exercised in that case to ensure that the plaintiff clearly specifies the acts to be done by the defendant so that the transfer of ownership (governed by United Kingdom law) does indeed become effective.

173. 3. Jurisdiction in connection with patent disputes

Since the 1968 Convention entered into force, two Conventions on patents have been signed which are of the greatest international importance. The Munich Convention on the grant of European patents was signed on 5 October 1973 and the Luxembourg Convention for the European patent for the common market was signed on 15 December 1975. The purpose of the Munich Convention is to introduce a common patent application procedure for the Contracting States, though the patent subsequently granted is national in scale. It is valid for one or more States, its substance in each case being basically that of a corresponding patent granted nationally. The aim of the Luxembourg Convention is to institute in addition a patent granted *ab initio* for all States of the Community in a standard manner and with the same substance, based on Community law; such a patent necessarily remains valid or expires uniformly throughout the EEC.

Both instruments contain specific provisions on jurisdiction which take precedence over the 1968 Convention. However, the special jurisdiction provisions relate only to specific matters, such as applications for the revocation of patents pursuant to the Luxembourg Convention. Article 16 (4) of the 1968 Convention remains relevant for actions for which no specific provision is made. In the case of European patents under the Munich Convention it is conceivable that this provision might be construed as meaning that actions must be brought in the State in which the patent was applied for and not in the State for which it is valid and in which it is challenged. The new Article Vd of the Protocol annexed to the 1968 Convention is designed to prevent this interpretation and ensure that only the courts of the State in which the patent is valid have jurisdiction, unless the Munich Convention itself lays down special provisions.

Clearly, such a provision cannot cover a Community patent under the Luxembourg Convention, since the governing principle is that the patent is granted, not for a given State, but for all the Member States of the EEC. Hence the exception at the end of the new provision. However, even in the area covered by the Luxembourg Convention patents valid for one or more, but not all, States of the Community are possible. Article 86 of that Convention allows this for a transitional period to which no term has yet been set. Where the applicant for a patent takes up the option available to him under this provision and applies for a patent for one or more, but not all, States of the EEC, the patent is not a Community patent even though it comes under some of the provisions of the Luxembourg Convention but merely a patent granted for one or more States. Accordingly, the courts of that State have exclusive jurisdiction under Article Vd of the Protocol annexed to the 1968 Convention. The same is true for any case in which a national patent is granted in response to an international application, e.g. under the Patent cooperation Treaty opened for signature at Washington on 19 June 1970.

It only remains to be made clear that Article 16 (4) of the 1968 Convention and the new Article Vd of the Protocol annexed to the Convention also cover actions which national legislation allows to be brought at the patent application stage, so as to reduce the risk of a patent being granted, and the correctness of the grant being subsequently challenged.

Section 6

Jurisdiction by consent [45]

174. Article 17, applying as it does only if the transaction in question is international in character (see paragraph 21), which the mere fact of choosing a court in a particular State is by no means sufficient to establish, presented the Working Party with four problems. First, account had to be taken of the practice of courts in the United Kingdom (excluding Scotland) and Ireland of deducing from the choice of law to govern the main issue an agreement as to the courts having jurisdiction. Secondly, there was the problem, previously ignored by the 1968 Convention, of agreements conferring jurisdiction upon a court outside the Community or agreements conferring jurisdiction upon courts within the Community by two parties both domiciled outside the Community. Thirdly, special rules had to be made for provisions in trusts. And finally, the Working Party had to consider whether it was reasonable to let Article 17 stand in view of the interpretation which had been placed upon it by the Court of Justice of the European Communites. It should be repeated (see paragraph 22) that the existence of an agreement conferring jurisdiction on a court other than the court seised of the proceedings is one of the points to be taken into account by the court of its own motion.

1. Choice-of-law clause and international jurisdiction

175. Nowhere in the 1968 Convention is there recognition of a connection between the law applicable to a particular issue and the international jurisdiction of the courts over that issue. However, persons who, relying on the practice of United Kingdom or Irish courts, have agreed on choice-of-law clauses before the entry into force of the Accession Convention, are entitled to expect protection. This explains the transitional provision contained in Article 35 of the proposed Accession Convention. The term 'entry into force' within the meaning of this provision refers to the date on which the Accession Convention comes into effect in the State in question. For the various systems of law applying in the United Kingdom, see paragraph 11.

2. Agreements conferring jurisdiction on courts outside the Community

176. (a) In cases where parties agree to bring their disputes before the courts of a State which is not a party to the 1968 Convention there is obviously nothing in the 1968 Convention to prevent such courts from declaring themselves competent, if their law recognizes the validity of such an agreement. The only question is whether and, if so, in what form such agreements are capable of depriving Community courts of jurisdiction which is stated by the 1968 Convention to be exclusive or concurrent. There is nothing in the 1968 Convention to support the conclusion that such agreements must be inadmissible in principle ([46]). However, the 1968 Convention does not contain any rules as to their validity either. If a court within the Community is applied to despite such an agreement, its decision on the validity of the agreement depriving it of jurisdiction must be taken in accordance with its own *lex fori*. In so far as the local rules of conflict of laws support the authority of provisions of foreign law, the latter will apply. If, when these tests are applied, the agreement is found to be invalid, then the jurisdictional provisions of the 1968 Convention become applicable.

177. (b) On the other hand, proceedings can be brought before a court within the Community by parties who, although both domiciled outside the Community, have agreed that that court should have jurisdiction. There is no reason for the Convention to include rules on the conditions under which the court stipulated by such parties must accept jurisdiction. It is however important for the Community to ensure, by means of more detailed conditons, that the effect of such an agreement on jurisdiction is recognized throughout the EEC. The new third sentence of the first paragraph of Article 17 is designed to cater for this. It covers the situation where, despite the fact that both parties are domiciled outside the Community, a court in a Community State ('X') would, were it not for a jurisdiction agreement, have jurisdiction, e.g. on the ground that the place of performance lies within that State. If in such a case the parties agree that the courts of another Community State are to have exclusive jurisdiction, that agreement must be observed by the courts of State X, provided the agreement meets the formal requirements of Article 17. Strictly speaking, it is true, this is not a necessary adjustment. Such situations were possible before, in relations between the original Member States of the Community. However, owing to the frequency with which jurisdiction is conferred upon United Kingdom courts in international trade, the problem takes on considerably greater importance with the United Kingdom's accession to the Convention than hitherto.

3. Jurisdiction clauses in trusts

178. A trust (see paragraph 111) need not be established by contract. A unilateral legal instrument is sufficient. As the previous version of Article 17 dealt only with 'agreements' on jurisdiction, it needed to be expanded.

4. The form of agreements on jurisdiction in international trade

179. Some of the first judgments given by the Court of Justice of the European Communities since it was empowered to interpret the 1968 Convention were concerned with the form of jurisdiction clauses incorporated in standardized general conditions of trade ([47]). The Court of Justice's interpretation of Article 17 of the 1968 Convention does protect the other party to a contract with anyone using such general conditions of trade from the danger of inadvertently finding himself bound by standard forms of agreement containing jurisdiction clauses without realizing it. However, the Court's

interpretation of that Article, which many national courts have also shown a tendency to follow ([45]), does not cater adequately for the customs and requirements of international trade. In particular, the requirement that the other party to a contract with anyone employing general conditions of trade has to give written confirmation of their inclusion in the contract before any jurisdiction clause in those conditions can be effective is unacceptable in international trade. International trade is heavily dependent on standard conditions which incorporate jurisdiction clauses. Nor are those conditions in many cases unilaterally dictated by one set of interests in the market; they have frequently been negotiated by representatives of the various interests. Owing to the need for calculations based on constantly fluctuating market prices, it has to be possible to conclude contracts swiftly by means of a confirmation of order incorporating sets of conditions. These are the factors behind the relaxation of the formal provisions for international trade in the amended version of Article 17. This is however, as should be clearly emphasized, only a relaxation of the formal requirements. It must be proved that a consensus existed on the inclusion in the contract of the general conditions of trade and the particular provisions, though this is not the place to pass comment on whether questions of consensus other than the matter of form should be decided according to the national laws applicable or to unified EEC principles. Dealing with the form of jurisdiction agreements in a separate second sentence in the first paragraph of Article 17, rather than in passing in the first sentence as hitherto, is designed merely to obviate rather cumbersome wording.

Section 7

Examination of own motion

Adjustments and further clarification were not necessary.

Section 8

'Lis pendens' and related actions ([48])

180. As regards *lis pendens,* there are two structural differences between the laws of the United Kingdom and Ireland, on the one hand, and the Continental legal systems on the other. However, neither of them necessitated a technical amendment of the 1968 Convention.

1. Discretion of the court

181. The rules governing *lis pendens* in England and Wales, and to some extent in Scotland, are more flexible than those on the Continent. Basically, it is a question for the court's discretion whether a stay should be granted. The doctrine of *lis pendens* is therefore less fully developed there than in the Continental States. The practice is in a sense an application of the doctrine of *forum conveniens* (see paragraph 77 *et seq.).* Generally a court will in fact grant an application for a stay of proceedings, where the matter in dispute is already pending before another court. Where proceedings are pending abroad, the courts in England and Wales exercise great caution, and if they grant a stay of proceedings at all, they will do so only if the plaintiff in England or Wales is also the plaintiff in the proceedings abroad. Scottish courts take into account to a considerable extent any conflicting proceedings which a Scottish defendant may have instituted abroad, or which are pending against him abroad.

After the United Kingdom has acceded to the 1968 Convention, it will no longer be possible for this practice to be maintained in relation to the other Member States of the Community. United Kingdom courts will have to acknowledge the existence of proceedings instituted in the other Member States, and even to take notice of them of their own motion (see paragraph 22).

2. Moment at which proceedings become pending

182. The fact that the moment at which proceedings become pending is determined differently in the United Kingdom and Ireland from the way it is determined on the Continent is due to peculiarities of procedural law in those States. In the original Member States of the Community a claim becomes pending when the document instituting the proceedings is served ([49]). Filing with the court is sometimes sufficient. In the United Kingdom, except Scotland, and in Ireland, proceedings become pending as soon as the originating document has been issued. In Scotland, however, proceedings become pending only when service of the summons has been effected on the defender. The moment at which proceedings become pending under the national

procedural law concerned is the deciding factor for the application of Article 21 of the 1968 Convention. The addition to the text of Article 20 does not concern this point. It is justified by the fact that in the United Kingdom and in Ireland foreigners who are abroad do not receive the original writ but only notification of the order of the court authorizing service.

Section 9

Provisional measures

183. No particular adjustments had to be made to the provisions of the 1968 Convention concerning provisional measures. The change in emphasis which the accession of further Member States introduced into the 1968 Convention consists in this field entirely in the wide variety of provisional measures available in the law of Ireland and of the United Kingdom. This will involve certain difficulties where provisional judgments given in these States have to be given effect by the enforcement procedures of the original Member States of the Community. However, this problem does not affect only provisional measures. The integration of judgments on the main issue into the respective national enforcement procedures also involves difficulties in the relationship between Ireland and the United Kingdom on the one hand and the original Member States of the Community on the other (see paragraph 221 *et seq.*).

CHAPTER 5

RECOGNITION AND ENFORCEMENT

A.

GENERAL REMARKS — INTERLOCUTORY COURT DECISIONS

184. Article 25 emphasizes in terms which could hardly be clearer that every type of judgment given by a court in a Contracting State must be recognized and enforced throughout the rest of the Community. The provision is not limited to a judgment terminating the proceedings before the court, but also applies to provisional court orders. Nor does the wording of the provision indicate that interlocutory court decisions should be excluded from its scope where they do not provisionally regulate the legal relationships between the parties, but are for instance concerned only with the taking of evidence. What is more, the legal systems of the original Member States of the Community describe such interlocutory decisions in a way which corresponds to the terms given, by way of example, in Article 25. Thus, in France court decisions which order the taking of evidence are also called 'jugements (d'avant dire droit)'. In Germany they are termed '(Beweis) beschlüsse' of the court. Nevertheless, the provisions of the 1968 Convention governing recognition and enforcement are in general designed to cover only court judgments which either determine or regulate the legal relationships of the parties. An answer to the question whether, and if so which, interlocutory decisions intended to be of procedural assistance fall within the scope of the 1968 Convention cannot be given without further consideration.

1. RELATIONSHIP OF THE CONTINENTAL STATES WITH EACH OTHER

185. This matter is of no great significance as between the original Member States of the EEC, or as between the latter and Denmark. All seven States are parties to the 1954 Hague Convention relating to civil procedure. The latter governs the question of judicial assistance, particularly in the case of evidence to be taken abroad, and its provisions take precedence over the 1968 Convention by virtue of Article 57. In any case, it is always advisable in practice to make use of the machinery of the Hague Convention, which is particularly suited to the processes required for obtaining judicial assistance. See paragraph 238, and note 59 (7) on the Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial matters and on the Hague Convention of 18 March 1970 on the taking of evidence abroad in civil or commercial matters.

2. RELATIONSHIP OF THE UNITED KINGDOM AND IRELAND WITH THE OTHER MEMBER STATES

186. It is only with the accession of the United Kingdom and Ireland to the 1968 Convention that the problem assumes any degree of

importance. Ireland has concluded no convention judicial assistance of any kind with the other States of the European Community. Agreements on judicial assistance do, however, exist between the United Kingdom and the following States: the Federal Republic of Germany (Agreement of 20 March 1928), the Netherlands (Agreement of 17 November 1967). The United Kingdom is also party to the Hague Conventions of 1965 and 1970 referred to in paragraph 185. It has concluded no other agreements with Member States of the Community.

3. PRECISE SCOPE OF TITLE III OF THE 1968 CONVENTION

187. If it were desired that interlocutory decisions by courts on the further conduct of the proceedings, and particularly on the taking of evidence, should be covered by Article 25 of the 1968 Convention, this would also affect decisions with which the parties would be totally unable to comply without the court's cooperation, and the enforcement of which would concern third parties, particularly witnesses. It would therefore be impossible to 'enforce' such decisions under the 1968 Convention. It can only be concluded from the foregoing that interlocutory decisions which are not intended to govern the legal relationships of the parties, but to arrange the further conduct of the proceedings, should be excluded from the scope of Title III of the 1968 Convention.

B.

COMMENTS ON THE INDIVIDUAL SECTIONS

Section 1

Recognition

188. With two exceptions (4), no formal amendments were required to Articles 26 to 30. The Working Party did, however, answer some questions raised by the new Member States regarding the interpretation of these provisions. Basically, these concerned problems arising in connection with the application of the public policy reservation in Article 27 (1) — (2), the right to a hearing — Article 27 (2) — (3), and the nature of the obligation to confer recognition, as distict from enforceability (1). The fact that Article 28 makes no reference to the provisions of Section 6 of Title II on jurisdiction agreements is intentional and deserves mention. When considering such agreements it must be borne in mind that the court seised of the proceedings in the State of origin must of its own motion take note of any agreement to the contrary (see paragraphs 22 and 174).

1. Article 26

189. Article 26, second paragraph, introduces a special simplified procedure for seeking recognition, modelled on the provisions governing the issue of orders for enforcement. However, this is not the only way in which recognition may be sought. Every court and public authority must take account of judgments which qualify for recognition, and must decide whether the conditions for recognition exist in a particular case, unless this question has already been determined under Article 26, second paragraph. In particular, every court must itself decide whether there is an obligation to grant recognition, if the principal issue in a foreign judgment concerns a question which in the fresh proceedings emerges as a preliminary issue. Each of these two recognition procedures involves a problem which the Working Party discussed.

190. (a) If proceedings are conducted in accordance with Article 26, second paragraph, the court may of its own motion take into account grounds for refusing recognition if they appear from the judgment or are known to the court. It may not, however, make enquiries to establish whether such grounds exist, as this would not be compatible with the summary nature of the proceedings. Only if further proceedings are instituted by way of an appeal lodged pursuant to Article 36 can the court examine whether the requirements for recognition have been satisfied.

191. (b) The effects of a court decision are not altogether uniform under the legal systems obtaining in the Member States of the Community. A judgment delivered in one State as a decision on a procedural issue may, in another State, be treated as a decision on an issue of substance. The same type of judgment may be of varying scope and effect in different countries. In France, a judgment against the principal debtor is also effective against the surety, whereas in the Netherlands and Germany it is not (50).

The Working Party did not consider it to be its task to find a general solution to the problems arising from these differences in the national legal systems. However, one fact seemed obvious.

Judgments dismissing an action as unfounded must be recognized. If a German court declares that it has no jurisdiction, an English court cannot disclaim its own jurisdiction on the ground that the German court was in fact competent. Clearly, however, German decisions on procedural matters are not binding, as to the substance, in England. An English court may at any time allow (or, for substantive reasons, disallow) an action, if proceedings are started in England after such a decision has been given by a German court.

2. Article 27 (1) — public policy

192. (a) The 1968 Convention does not state in terms whether recognition may be refused pursuant to Article 27 (1) on the ground that the judgment has been obtained by fraud. Not even in the legal systems of the original Contracting States to the 1968 Convention is it expressly stated that fraud in obtaining a judgment constitutes a ground for refusing recognition. Such conduct is, however, generally considered as an instance for applying the doctrine of public policy ([51]). The legal situation in the United Kingdom and Ireland is different inasmuch as fraud constitutes a special ground for refusing recognition in addition to the principle of public policy. In the conventions on enforcement which the United Kingdom concluded with Community States, a middle course was adopted by expressly referring to fraudulent conduct, but treating it as a special case of public policy ([52]).

As a result there is no doubt that to obtain a judgment by fraud can in principle constitute an offence against the public policy of the State addressed. However, the legal systems of all Member States provide special means of redress by which it can be contended, even after the expiry of the normal period for an appeal, that the judgment was the result of a fraud (see paragraph 197 *et seq.*). A court in the State addressed must always, therefore, ask itself, whether a breach of its public policy still exists in view of the fact that proceedings for redress can be, or could have been, lodged in the courts of the State of origin against the judgment allegedly obtained by fraud.

193. (b) Article 41 (3) of the Irish Constitution prohibits divorce and also provides, as regards marriages dissolved abroad:

> 'No person whose marriage has been dissolved under the civil law of any other State but is a subsisting valid marriage under the law for the time being in force within the jurisdiction of the Government and Parliament established by this Constitution shall be capable of contracting a valid marriage within that jurisdiction during the lifetime of the other party to the marriage so dissolved.'

In so far as the jurisdiction of the 1968 Convention is concerned, this Article of the Constitution is of importance for maintenance orders made upon a divorce. The Irish courts have not yet settled whether the recognition of such maintenance orders would, in view of the constitutional provisions cited, be contrary to Irish public policy.

3. The right to a hearing (Article 27 (2))

194. Article 27 (2) is amended for the same reason as Article 20 (see paragraph 182). The object of the addition to Article 20 was to specify the moment when proceedings became pending before the Irish or British courts; in Article 27 (2) it is intended to indicate which documents must have been served for the right to a hearing to be respected.

4. Ordinary and extraordinary appeals

195. The 1968 Convention makes a distinction in Articles 30 and 38 between ordinary and extraordinary appeals. No equivalent for this could be found in the Irish and United Kingdom legal systems. Before discussing the reason for this and explaining the implications of the solutions proposed by the Working Party (b), something should be said about the distinction between ordinary and extraordinary appeals in the Continental Member States of the EEC, since judges in the United Kingdom and Ireland will have to come to terms with these concepts which to them are unfamiliar (a).

196. (a) A clearly defined distinction between ordinary and extraordinary appeals is nowhere to be found.

Legal literature and case law ([53]) have pointed out two criteria. In the first place neither an appeal ('Berufung') nor an objection to a default judgment ('Einspruch') has to be based on specific grounds; a party may challenge a judgment by alleging any kind of defect. Secondly execution is postponed during the period allowed for an appeal or objection, or after an appeal or objection has been lodged, unless the court otherwise directs or unless, exceptionally, different legal provisions apply.

Some legal systems contain a list of ordinary appeal procedures.

197. Part 1, Book 4 of the French Code de procédure civile of 1806, which still applies in Luxembourg, referred to extraordinary forms of appeal by which a judgment could be contested. It did not say, however, what was meant by ordinary appeals. Book 3 referred merely to 'courts of appeal'. However, in legal literature and case law appeals ('appel') and objections to default judgments ('opposition') have consistently been classified as ordinary appeals. The new French Code de procédure civile of 1975 now expressly clarifies the position. In future only objections (Article 76) and appeals (Article 85) are to be classified as ordinary appeals.

198. The Belgian Code judiciaire of 1967 has retained the French system which previously applied in Belgium. Only appeals and objections are considered as ordinary appeals (Article 21).

199. There is no distinction in Netherlands law between ordinary and extraordinary appeals. Academic writers classify the forms of appeal as follows: objections ('Verzet' — where a judgment is given in default), appeals ('Hoger beroep'), appeals in cassation ('Beroep in cassatie') and appeals on a point of law ('Revisie') are classed as ordinary appeals. 'Revisie' is a special form of appeal which lies only against certain judgments of the Hoge Raad sitting as a court of first instance.

200. The Italian text of Articles 30 and 38 refers to 'impugnazione' without distinguishing between ordinary and extraordinary appeals. However, Italian legal literature distinguishes very clearly between ordinary and extraordinary appeals. Article 324 of the Codice di procedura civile states that a judgment does not become binding as between the parties until the periods within which the following forms of appeal may be lodged have expired: appeals on grounds of jurisdiction ('regolamento di competenza'), appeals ('appello'), appeals in cassation ('ricorso per cassazione'), or petitions for review ('revocazione'), where these are based on one of the grounds provided for in Article 395 (4) and (5). These forms of appeal are classified as ordinary.

201. In Denmark, too, the distinction between ordinary and extraordinary appeals is recognized only in legal literature. The deciding factor mentioned there is whether a form of appeal may be lodged within a given period without having to be based on particular grounds, or whether its admissibility depends on special consent by a court or ministry. Accordingly, appeals ('Anke') and objections to default judgments ('Genoptagelse af sager, i hvilke der er afsagt udeblivelsesdom') are classified as ordinary appeals.

202. Book 3 of the German Code of Civil Procedure ('Zivilprozeßordnung') is headed 'Rechtsmittel' ('means of redress') and it governs 'Berufung' (appeals) 'Beschwerde' (complaints) and 'Revision' (appeals on a point of law). These are frequently said to have in common the fact that the decision appealed against does not become binding ('rechtskräftig') until the period within which these means of redress may be lodged has expired. However Article 705 of the Code defines 'Rechtskraft' as the stage when these means of redress are no longer available. The material difference between the means of redress and other forms of appeal is that the former need not be based on particular grounds of appeal, that they are addressed to a higher court and that, as long as the decision has not become binding, enforcement is also postponed pursuant to Article 704 unless the court, as is almost invariably the case, allows provisional enforcement. If the expression 'ordinary appeal' is used at all, a reference to 'Rechtsmittel' (means of redress) is intended.

German legal writers, in accordance with the phraseology used by the law, do not classify objections to default judgments as a means of redress ('Rechtsmittel') ([54]). It does not involve the competence of a higher court. However, it has the effect of suspending execution and is not tied to specific grounds of appeal, just like an

objection in the other original Member States of the Community. It must, therefore, be included under 'ordinary appeals' within the meaning of Articles 30 and 38 of the 1968 Convention.

203. In its judgment of 22 November 1977 ([55]) the European Court held that the concept of an 'ordinary appeal' was to be uniformly determined in the original Member States according to whether there was a specific period of time for appealing, which started to run 'by virtue of' the judgment.

204. (b) In Ireland and the United Kingdom nothing which would enable a distinction to be drawn between ordinary and extraordinary appeals can be found in either statutes, cases or systematic treaties on procedural law. The basic method of redress is the appeal. Not only is this term used where review of a judgment can be sought within a certain period, without being subject to special grounds for appeal; it is also the name given to other means of redress. Some have special names such as; for default judgments, 'reponing' (in Scotland) or 'application to set the judgment aside' (in England, Wales and Ireland); or again 'motion' (in Scotland) or 'application' (in England, Wales and Ireland) 'for a new trial', which correspond roughly to a petition for review in Continental legal systems. They are the only forms of redress against a verdict by a jury. A further distinctive feature of the appeal system in these States is the fact that the enforceability of a judgment is not automatically affected by the appeal period or even by the lodging of an appeal. However, the appellate court will usually grant a temporary stay of execution, if security is given. Finally there do exist in the United Kingdom legal procedures whose function corresponds to the ordinary legal procedures of Continental legal systems, but which are not subject to time limits. The judge exercises his discretion in deciding on the admissibility of each particular case. This is the case, for example, with default judgments. The case law of the European Court could therefore not be applied to the new Member States.

The Working Party therefore made prolonged efforts to work out an equivalent for the United Kingdom and Ireland of the Continental distinction between ordinary and extraordinary appeals, but reached no satisfactory result. This failure was due in particular to the fact that the term 'appeal' is so many-sided and cannot be regarded, like similar terms in Continental law, as a basis for 'ordinary appeals'. The Working Party therefore noted that the legal consequences resulting from the distinction drawn in Articles 30 and 38 between ordinary and extraordinary appeals do not have to be applied rigidly, but merely confer a discretion on the court. Accordingly, in the interests of practicality and clarity, a broad definition of appeal seemed justified in connection with judgments of Irish and United Kingdom courts. Continental courts will have to use their discretion in such a way that an equal balance in the application of Articles 30 and 38 in all Contracting States will be preserved. To this effect they will have to make only cautious use of their discretionary power to stay proceedings, if the appeal is one which is available in Ireland or the United Kingdom only against special defects in a judgment or which may still be lodged after a long period. A further argument in favour of this pragmatic solution was that, in accordance with Article 38, a judgment is in any event no longer enforceable if it was subject to appeal in the State of origin and the appellate court suspended execution or granted a temporary stay of execution.

5. Conflicts with judgments given in non-contracting States which qualify for recognition

205. In one respect the provisions of the 1968 Convention governing recognition required formal amendment. A certain lack of clarity in some of these provisions can be accepted since the European Court of Justice has jurisdiction to interpret them. However, Member States cannot be expected to accept lack of clarity where this might give rise to diplomatic complications with non-contracting States. The new Article 27 (5) is designed to avoid such complications.

This may be explained by way of an example. A decision dismissing an action against a person domiciled in the Community is given in non-contracting State A. A Community State, B, is obliged to recognize the judgment under a bilateral convention. The plaintiff brings fresh proceedings in another Community State, C, which is not obliged to recognize the judgment

given in the non-contracting State. If he is successful, the existing text of the 1968 Convention leaves it open to doubt whether the judgment has to be recognized in State B.

In future, it is certain that this is not the case. In order to avoid unnecessary discrepancies, the text of the new provision is based on Article 5 of the Hague Convention of 1 February 1971 on the recognition and enforcement of foreign judgments in civil and commercial matters. Its wording is slightly wider in scope than would have been required to avoid diplomatic complications. A judgment given in a non-contracting State takes priority even where it has to be recognized, not by virtue of an international convention but merely under national law. For obligations under conventions not to recognize certain judgments, see paragraph 249 *et seq.*

Section 2

Enforcement

1. Preliminary remarks

206. The Working Party's efforts were almost entirely confined to deciding which courts in the new Member States should have jurisdiction in enforcement proceedings, and what appeal procedures should be provided in this context. In this connection four peculiarities of United Kingdom and, to a certain extent, Irish law had to be considered.

The Working Party took no decision on amendments to deal with the costs of the enforcement procedure. On this point, however, reference should be made to the judgment of the Court of Justice of the European Communites of 30 November 1976 (Case 42/76). According to that decision, Article 31 prohibits a successful plaintiff from bringing fresh proceedings in the State in which enforcement is sought. But the Contracting States are obliged to adopt rules on costs which take into account the desire to simplify the enforcement procedure.

207. The Working Party also abandoned attempts to draft provisions in the Convention on seizure for international claims, although it was clear that problems would occur to a certain extent if debtors and third party debtors were domiciled in different States. If, in one State, the court of the debtor's domicile has jurisdiction over seizure for such claims, then the State of domicile of the third party debtor may regard the making of the order for seizure applicable to the latter as a violation of its sovereignty, and refuse to enforce it. In such a situation the creditor can seek assistance by obtaining a declaration that the judgment is enforceable in the State of domicile of the third party debtor, and enforcing the debtor's claim against the third party in that State, provided that this State assumes international jurisdiction over such a measure.

208. (a) United Kingdom and Irish law does not have the *exequatur* system for foreign judgments. In these countries an action on the basis of the foreign judgment is necessary unless, as in the United Kingdom, a system of registration applies to the judgments of certain States (including the six original Member States with the exception of Luxembourg) (see paragraph 6). In that case the foreign judgments, if they are to be enforced, must be registered with a court in the United Kingdom. They then have the same force as judgments of the registering court itself. The application has to be lodged by the creditor in person or by a solicitor on his behalf. Personal appearance is essential; lodging by post will not suffice. If the application is granted, an order to that effect will be entered in the register kept at the court.

Except in Scotland, however, the United Kingdom has no independent enforcement officer like the French 'huissier' or the German 'Gerichtsvollzieher' (see paragraph 221). Only the court which gave the judgment or where the judgment was registered can direct enforcement measures. Since this system of registration affords the same protection to a foreign judgment creditor as does the *exequatur* system on the Continent, the United Kingdom registration system could also be accepted for applying the provisions of the 1968 Convention.

209. (b) A special feature of the constitution of the United Kingdom has already been mentioned in the introductory remarks (see paragraph 11): England and Wales, Scotland and Northern Ireland are independent judicial areas. A new paragraph had to be added to Article 31 to cover this. Similarly the appeal possibilities provided for in Articles 37 and 40 apply separately to each registration. If a judgment has been validly registered with the High Court in London, another appeal is again possible against a subsequent registration with the Court of Session in Edinburgh.

210. (c) As far as the enforcement of foreign judgments is concerned the United Kingdom traditionally concedes special treatment to maintenance orders (see paragraph 7). Until now they have been enforced only in respect of a few Commonwealth countries and Ireland, and their enforcement is entrusted to courts different from those responsible for enforcing other judgments. Since the 1968 Convention contains no provisions precluding different recognition procedures for different types of judgment, there is no reason why maintenance orders cannot be covered by a special arrangement within the scope of the 1968 Convention. This will permit the creation of a uniform system for the recognition of maintenance orders from the Community and the Commonwealth and, in view of the type of court having jurisdiction, the setting up of a central agency to receive applications for enforcement (see paragraph 218). For agreements concerning maintenance see paragraph 226.

211. (d) Finally there were still problems in connection with judgments ordering performance other than the payment of money. Judgments directing a person to do a particular act are not generally enforceable under United Kingdom and Irish law, but only in pursuance of special legal provisions. These provisions cover judgments ordering the delivery of movable property or the transfer of ownership or possession of immovable property, and injunctions by which the court may in its discretion order an individual to do or refrain from doing a certain act. Enforcement is possible either by the sheriff's officer using direct compulsion or indirectly by means of fines or imprisonment for contempt of court. In Scotland, in addition to judgments for the transfer of possession or ownership of immovable property and preventative injunctions, there are also 'decrees *ad factum prestandum* by means of which the defendant can be ordered to perform certain acts, particularly to hand back movable property.

212. (aa) If an application is made in the Federal Republic of Germany for the enforcement of such a judgment given in Ireland or the United Kingdom, the court must apply the same means of compulsion as would be applicable in the case of a corresponding German judgment, i. e. a fine or imprisonment. In the reverse situation, the United Kingdom and Irish courts may have to impose penalties for contempt of court in the same way as when their own orders are disregarded.

213. (bb) The system for enforcing orders requiring the performance of a specific act is fundamentally different in other States of the Community, e.g. Belgium, France and Luxembourg. The defendant is ordered to perform the act and at the same time to pay a sum of money to the plaintiff to cover a possible non-compliance with the order. In France he is initially only threatened with a fine ('astreinte'). In case of non-compliance, a separate judgment is required and is hardly ever as high as the fine originally threatened. In Belgium the amount of the fine is already fixed in the judgment ordering the act to be performed ([56]). With a view to overcoming the difficulties which this could cause for the inter-State enforcement of judgments ordering specific acts. Article 43 provides that, if the sanction takes the form of a fine ('astreinte'), the original court should itself fix the amount. Enforcement abroad is then limited to the 'astreinte'. French, Belgian, Dutch and Luxembourg judgments can be enforced without difficulty in Germany, the United Kingdom and Italy if the original court has proceeded on that basis.

However, the 1968 Convention leaves open the question whether such a fine for disregarding a court order can also be enforced when it accrues not to the judgment creditor but to the State. Since this is not a new problem arising out of the accession of the new Member States, the Working Party did not express a view on the matter.

2. Formal adjustments as regards courts having jurisdiction and authorized appeals

214. Apart from the inclusion of a term equivalent in the Irish and United Kingdom legal systems to ordinary appeal (see paragraph 195), and apart from Article 44 which deals with legal aid (see paragraph 223), the formal adjustments to Articles 32 to 45 relate exclusively to the courts having jurisdiction and the possible types of appeal against their decisions. (See paragraph 108 for adjustments relating to maintenance.)

215. (a) For applications for a declaration of enforceability (see paragraph 208) of judgments other than maintenance orders only one court has been given jurisdiction in each of Ireland, England and Wales, Scotland and Northern Ireland. This is due to the peculiarities of the court systems in these countries (see paragraphs 11, 208 and 209).

216. If the judgment debtor wishes to argue against the authorization of enforcement, he must lodge his application to set the registration aside not with a higher court, as in Germany, France and Italy, but, as in Belgium and the Netherlands, with the court which registered the judgment. The proceedings will take the form of an ordinary contentious civil action.

A corresponding position applies regarding the appeal which the applicant may lodge if his application is refused, although in such a case it is a higher court which has jurisdiction in all seven Continental Member States of the Community.

217. The adjustment of the second paragraph of Article 37 and of Article 41 gave rise to difficulties with regard to the solution adopted for Articles 32 and 40.

In the original Member States of the Community an appeal against judgments of courts on which jurisdiction is conferred by Articles 37 and 40 could only be lodged on a point of law and with the highest court in the State. It was therefore sufficient to make the same provision apply to the appeals provided for in the 1968 Convention and, in the case of Belgium, simply to bypass the Cour d'appel. The purpose of this arrangement is to limit the number of appeals, in the interests of rapid enforcement, to a single appeal which may involve a full review of the facts and a second one limited to points of law. It would therefore not have been enough to stipulate for the new Member States that only one further appeal would be permitted against the judgment of the court which had ruled on an appeal made by either the debtor or the creditor. Instead, the second appeal had to be limited to points of law.

Ireland and the United Kingdom will have to adapt their appeal system to the requirements of the 1968 Convention. In the case of Ireland, which has only a two-tier superior court system, the Supreme Court is the only possibility. Implementing legislation in the United Kingdom will have to determine whether the further appeals should go direct to the House of Lords or, depending on the judicial area concerned (see paragraph 11), to the Court of Appeal in England and Wales, to the court of the same name in Northern Ireland or to the Inner House of the Court of Session in Scotland. The concept of 'appeal on a point of law' is the nearest equivalent as far as United Kingdom law is concerned to the 'Rechtsbeschwerde' of German law and the appeal in cassation in the legal systems of the other original Member States of the Community, the common feature of which is a restriction of the grounds of appeal to an incorrect application of the law (as opposed to an incorrect assessment of the facts). Even in relation to appeals in cassation and 'Rechtsbeschwerde' the distinction between points of law and matters of fact is not identical; for the United Kingdom and Ireland, too, this will remain a matter for its own legislation and case law to clarify.

Traditionally the leave of the Minister for Justice is required for an appeal to the highest Danish court at third instance. The Working Party was initially doubtful whether it should accept this in the context of the 1968 Convention. It emerged, however, that the Convention does not guarantee a third instance in all circumstances. In order to relieve the burden on their highest courts, Member States may limit the admissibility of the appeals provided for in Article 41. The Danish solution is only one manifestation of this idea. There was also no need in the case of Denmark to stipulate that the appeal to the highest court should be limited to a point of law. When granting leave the Ministry of Justice can ensure that the appeal concerns only questions of law requiring further elucidation. Denmark has given

an assurance that leave will always be granted, if the court of second instance has not made use of its discretion to refer a matter to the European Court of Justice or if enforcement of a foreign judgment has been refused on legal grounds.

218. (b) In Ireland the proposed arrangement also applies to maintenance orders. In the United Kingdom, however, maintenance orders are subject to a special arrangement (see paragraph 210). In England and Wales and in Northern Ireland registration is a matter for the Magistrates' Courts, and in Scotland for the Sheriff Courts. These courts also have jurisdiction in respect of other maintenance matters including the enforcement of foreign maintenance orders. Foreign maintenance creditors cannot, however, have recourse to any of the above courts directly, but must apply to the Secretary of State ([57]), who will transmit the order to the appropriate court. This arrangement was made in the interest of the foreign maintenance creditors, because Magistrates' Courts and Sheriff Courts have lay justices and no administrative machinery.

As regards jurisdiction in respect of appeals which may be brought by either the creditor or the debtor under the 1968 Convention, the usual system will continue to apply, i.e. the appeal is decided by the court which registered the order or refused such registration. It is impossible for a maintenance order to be amended during registration proceedings, even if it is claimed that the circumstances have changed (see paragraph 104 *et seq.*).

The special situation regarding maintenance orders in the United Kingdom offers a series of advantages to the maintenance creditor. After forwarding the order to the Secretary of State, he has virtually no further need to concern himself with the progress of the proceedings or with their enforcement. The rest will be done free of charge. The Secretary of State transmits the order to the appropriate court and, unless the maintenance creditor otherwise requests, the clerk of that court will be regarded as the representative *ad litem* within the meaning of Article 33, second paragraph, second sentence. In England and Wales and in Northern Ireland the clerk in question will also be responsible for taking the necessary enforcement measures and for ensuring that the creditor receives the proceeds obtained. Only in Scotland need the creditor under the order seek the services of a solicitor when applying for enforcement following registration of an order. The Law Society of Scotland undertakes to provide solicitors whose fees are, if necessary, paid in accordance with the principles of legal aid. Should the maintenance debtor move to another judicial area in the United Kingdom (see paragraph 11), a maintenance order will, unlike other judgments, be automatically registered with the court which then has jurisdiction. For agreements concerning maintenance, see paragraph 226.

3. Other adjustment problems

219. (a) The United Kingdom asked whether Article 34 excludes the possibility of notifying the debtor that an application for registration of a foreign judgment has been lodged. One of the aims of Article 34 is to secure the element of surprise, which is essential if measures of enforcement are to be effective. Therefore, although this provision does not expressly forbid notifying the debtor in the proceedings of the application for the grant of an enforcement order, such notification should be confined to very exceptional cases. An example might be an application for registration made a long time after the original judgment was given. In any case, the court may not consider submissions from the debtor, whether or not he was notified in advance.

220. (b) The appeal provided for in Article 36 can be based, *inter alia*, on the grounds that the judgment does not come within the scope of the 1968 Convention, that it is not yet enforceable, or that the obligation imposed by the judgment has already been complied with. However, the substance of the judgment to be enforced or the procedure by which it came into existence can be reviewed only within the limits of Articles 27 and 28. For the adjustment of maintenance orders, see paragraph 108.

221. (c) The Working Party discussed Article 39 at length. The provision in question is modelled on the French legal system and legal systems related to it, to which the institution of 'huissier' is familiar. Under these systems, measures of enforcement in respect of movable property or contractual claims belonging to the debtor can be taken, without involving the court, by instructing a 'huissier' to deal with their execution. It is for the creditor to choose between the available

methods of enforcement. The enforcing agency has no discretion whatsoever in the matter. The legal postion obtaining in the United Kingdom (especially in England and Wales and also in Scotland) and Ireland is quite different. In the United Kingdom it is the court which has given or registered the judgment which has jurisdiction over measures of enforcement. In Ireland it is the court which has given or enforced the judgment. The court also has some discretion as to which enforcement measures it will sanction. Protective measures confined to securing enforcement of a claim do not yet exist.

This position will have to be altered by the implementing legislation of these States, which will have to introduce protective measures, in so far as this consequence does not arise as an automatic result of the entry into force of the 1968 Convention for one of these States (see paragraph 256).

The 1968 Convention does not guarantee specific measures of enforcement to the creditor. Neither is it in any way incompatible with the 1968 Convention to leave the measures of enforcement entirely to the court. The 1968 Convention contains no express provision obliging the Member States to employ an institution similar to the French 'huissier'. Even within its original scope, creditors have to apply directly to the court in the case of certain measures of enforcement; in Germany, for example, they would be required to do so in the case of enforcement against immovable property. It is certain however that in the German text the phrase 'in das Vermögen des Schuldners' ('against the property of the party against whom enforcement is sought') does not mean that measures of enforcement are permissible as against third parties. The words quoted above could be omitted without changing the meaning of the provision. The question under what conditions measures of enforcement are possible against persons other than the judgment debtor is to be answered solely on the basis of national law. But the qualifications contained in Article 39 must also be observed.

The court enforcing the judgment need not be the one which grants the order of enforcement or registers the foreign judgment. Therefore, for the purposes of enforcement under the 1968 Convention, Denmark can retain its present system, by which execution is entrusted to a special enforcement judge.

222. (d) For the problems presented by the system of '*astreintes*', which applies in some Member States, see paragraph 213.

223. (e) In its present form, Article 44 does not provide for the case of a party who had been granted only partial legal aid in the State in which the judgment was given. Although this did not involve an adjustment problem specifically due to the accession of the new Member States, the Working Party decided to propose an amendment. The Working Party's discussions revealed that if the text were to remain in force in its present form, it could result in some undesirable complications. The Working Party's proposal was largely based on the formulation of Article 15 of the Hague Convention of 2 October 1973 on the recognition and enforcement of decisions relating to maintenance obligations which has now come into force. This provision opts for a generous solution: even if only partial legal aid was granted in the State of origin, full aid is to be granted in the enforcement proceedings.

This has a number of further advantages:

As the main application of Article 44 as amended relates to maintenance claims, the amended version contributes to the harmonization of provisions in international conventions.

Moreover, it leads to a general simplification of applications.

Since the rules concerning the granting of partial legal aid are not the same in all the Contracting States, the amended version also ensures a uniform application of the legal aid provisions.

Lastly, it secures the suprise effect of enforcement measures abroad, by avoiding procedural delays caused by difficult calculations concerning the applicant's share in the costs.

The first paragraph of Article 44 does not, however, oblige States which do not at present have a system of legal aid in civil matters to introduce such a system.

224. (f) The reason for the new second paragraph of Article 44 relates to the jurisdiction of the Danish administrative authorities (see paragraph 67) whose services are free. No question of legal aid therefore arises. The new provision is designed to ensure that the enforcement of Danish maintenance orders is not, for this reason, at a disadvantage in the other EEC countries by comparison with maintenance orders from EEC countries other than Denmark.

Section 3

Common provisions

225. The discussion of Articles 46 to 49 centred on whether the new Member States, in accordance with their legal tradition, could require an affidavit, in particular to the effect that none of the grounds for refusing recognition, specified in Articles 27 and 28, obtain. Affidavit evidence is certainly admissible in appellate proceedings, where the debtor appeals against registration or against a declaration of enforceability, or the creditor against a refusal to register. However, all the other means of giving evidence which are normally admissible must also be available in those proceedings.

The addition to Article 46 (2) is proposed for the reasons given in paragraphs 182 and 194.

CHAPTER 6

AUTHENTIC INSTRUMENTS AND COURT SETTLEMENTS

226. In England and Ireland there is no equivalent of enforceable instruments. In Scotland, instruments establishing a clearly defined obligation to perform a contract can be entered in a public register. An extract from the public register can then serve as a basis for enforcement in the same way as a court judgment. Such extracts are covered by Article 50.

In the United Kingdom, the courts having jurisdiction for recognition and enforcement of maintenance orders are different from those concerned with other kinds of judgment (see paragraphs 210 and 218). It is for the internal law of the United Kingdom to determine whether foreign court settlements concerning maintenance should be treated as maintenance orders or as other judgments.

CHAPTER 7

GENERAL PROVISIONS

227. The outcome of the discussion of Articles 52 and 53 has already been recorded elsewhere (see paragraphs 73 *et seq.*, and 119).

CHAPTER 8

TRANSITIONAL PROVISIONS

228. Article 54 continues to apply to the relationships between the original Member States. For their relationships with the new Member States, and the relationships of the new Member States with each other, an appropriate transitional provision is included in Article 34 of the proposed Accession Convention. It is closely modelled on Article 54 of the 1968 Convention, but takes into

account the fact that the latter has already been in force in its present form between the original Member States since 1 February 1973, and also the fact that some amendments are to be made to it. Finally, the Interpretation Protocol of 3 June 1971 also had to be taken into account in the transitional rules. The detailed provisions are as follows ([58]):

I. JURISDICTION

229. 1. The provisions on jurisdiction in the 1968 Convention apply in the new Member States only in their amended version and only to proceedings instituted after the Accession Convention has come into force, and hence after the 1968 Convention has come into force, in the State in question (Article 34 (1)).

230. 2. The amended version also applies to proceedings instituted in the original Member States after that date. Jurisdiction in respect of proceedings instituted in the original Member States before that date but after 1 February 1973 will continue to be determined in accordance with the original text of the 1968 Convention (Article 34 (1)). It is to be noted, as regards the relationships of the old Member States with each other, that under Article 39 of the Accession Convention the amended version can only come into force simultaneously for all six of them.

II. RECOGNITION AND ENFORCEMENT

1. *END OF THE TRANSITIONAL PERIOD*

231. The recognition and enforcement of judgments are in all respects governed by the Convention as amended, provided the transitional period had already ended at the time of institution of the proceedings. For this purpose, the Accession Convention must have come into force by that time both in the State of origin and in the State subsequently addressed (Article 34 (1)). It is not sufficient for the Accession Convention to be in force in the former State only, since rules of exorbitant jurisdiction may still be invoked under Article 4 of the 1968 Convention against domiciliaries of the State subsequently addressed if that State was not also a party to the Accession Convention at the time of institution of the proceedings. This would render an obligation to recognize and enforce a judgment in that State without any preliminary review unacceptable.

If we assume that the Accession Convention comes into force for the original Member States of the Community and Denmark on 1 January 1981 and an action is brought in Germany against a person domiciled in Denmark on 3 January 1981, then a judgment on 1 July 1981 finding in favour of the plaintiff would be enforceable irrespective of transitional provisions, even if, say, the United Kingdom did not become a party to the Convention until 1 December 1981. However, if in this example the action was brought and judgment given against a person domiciled in the United Kingdom, Article 34 (1) would not govern recognition and enforcement in the United Kingdom. That would be a true transitional case.

Paragraphs (2) and (3) of Article 34 deal with judgments during the transitional period, i.e. judgments given after the Accession Convention has come into force in the State addressed, but in proceedings which were instituted at a time when, either in the State of origin or in the State addressed, the Accession Convention was not yet in force. In Article 34 (2) and (3) a distinction is drawn between cases involving only the original Member States of the Community and those involving new Member States as well.

2. Among the original Member States of the Community

232. Article 34 (2) makes the recognition and enforcement of judgments among the original Member States of the Community subject without any restriction to the 1968 Convention as amended, even if the actions were started before the entry into force of the Accession Convention, which will necessarily be simultaneous in those States (see the end of paragraph 230). This amounts indirectly to a statement that the situation as regards the recognition and enforcement of judgments among those States remains that in Article 54 of the 1968 Convention in the case of judgments given before the entry into force of the Accession Convention. The most important implication of Article 34 (2) is that in proceedings for the recognition of judgments among the original Member States of the Community there is to be no consideration of whether the court giving the

judgment whose recognition is sought would have had jurisdiction after the entry into force of the Accession Convention. If the action was started after 1 February 1973 then the jurisdiction of the court giving the judgment whose recognition is sought may no longer be examined. The point is of note since that court's jurisdiction could still have been founded on exorbitant jurisdictional rules where domiciliaries of the new Member States are concerned.

To illustrate the point with an example, if a Frenchman were in 1978 to bring an action in the French courts pursuant to Article 14 of the Civil Code against a person domiciled in Ireland, which would be possible under Article 4 of the 1968 Convention, and judgment was given in favour of the plaintiff in 1982; then, assuming the Accession Convention came into force for the original Member States of the Community and Ireland in 1981, the judgment would have to be recognized and enforced in Germany, but not in Ireland.

3. Where new Member States are involved

233. The arrangements obtaining under Article 34 (3) for the recognition and enforcement of judgments between the original Member States and the new Member States, or as between the new Member States, differ somewhat from those applying among the original Member States. Article 34 (3) is concerned with the possibility of recognition and enforcement being sought in one of the new Contracting States of a judgment from an original Contracting State or from another new Contracting State. Apart from the cases referred to in paragraph 231, this is possible after the end of the transitional period, subject to three requirements being met.

234. (a) The judgment must have been given after the Accession Convention came into force in both States.

235. (b) In addition, the proceedings must have been instituted, in the words of the Convention, before 'the date of entry into force of this Convention, between the State of origin and the State addressed'. The purport of this is that, at the time when the proceedings were instituted, the Accession Convention may have come into force either in the State of the court giving the judgment for which recognition is sought, or in the State in which recognition and enforcement are subsequently sought, but not in both of these States.

236. (c) Finally, the jurisdiction of the court giving the judgment for which recognition is sought must satisfy certain criteria which the court in the State addressed must check. These criteria exactly match what Article 54 of the 1968 Convention laid down regarding transitional cases which were pending when that Convention came into force between the six original Member States. In proceedings for recognition, the jurisdiction of the court which gave judgment is to be accepted as having been valid, provided one of two requirements is met:

(aa) The judgment must be recognized where the court in the State of origin would have had jurisdiction if the Accession Convention had already been in force as between the two States at the time when the proceedings were instituted.

(bb) The judgment must also be recognized where the court's jusrisdiction was covered at the time when the proceedings were instituted by another international convention which was in force between the two States.

Reverting to the example in paragraph 232, the position would be as follows: the French judgment would indeed have been given after the Accession Convention had come into force in Ireland and France. The proceedings would have been instituted at a time when the Accession Convention was not yet in force in France (or in Ireland). Had this Convention already been in force as between France and Ireland at that time, the French courts would no longer have been able to found their jurisdiction on Article 14 of the Civil Code and hence, it must further be assumed, would have been unable to assume jurisdiction. Lastly, there is no bilateral convention between France and Ireland concerning the direct or indirect jurisdiction of the courts. Consequently, the judgment would not have had to be recognized in Ireland.

If one changes the example so that it now concerns France and the United Kingdom, one has to take into consideration the Convention between those two States of 18 January 1934 providing for the reciprocal enforcement of judgments. However, jurisdiction deriving from

Article 14 of the Civil Code is not admitted under that Convention; thus the judgment would not have to be recognized in the United Kingdom either.

If the example concerned Germany and the United Kingdom, and the defendant resident in the United Kingdom had agreed orally before the commencement of the proceedings that the German courts should have jurisdiction, then under the 1968 Convention the judgment would have to be recognized and enforced in the United Kingdom. Under Article IV (1) (a) of the Convention between the United Kingdom and Germany of 14 July 1960, oral agreement is sufficient to give grounds for jurisdiction for the purposes of recognition ('indirect' jurisdiction). However, the German court would have had to be a 'Landgericht', since 'Amtsgericht' judgments are not required to be recognized under that Convention (Article I (2)). In the event of a written agreement on jurisdiction, even the judgment of an 'Amtsgericht' would have to be recognized, under Article 34 (3) of the Accession Convention, as the 'Amtsgericht' would in that case have assumed jurisdiction under circumstances in which jurisdiction would also have had to be assumed if the Accession Convention had been in force between Germany and the United Kingdom.

CHAPTER 9

RELATIONSHIP TO OTHER CONVENTIONS

I. ARTICLES 55 AND 56

237. The Working Party included in Article 55 the bilateral conventions between the United Kingdom and other Member States of the Community. No such conventions have been concluded by Ireland and Denmark.

II. ARTICLE 57 (59)

1. *THE BASIC STRUCTURE OF THE PROPOSED PROVISION*

238. Great difficulties arose when an attempt was made to explain to the new Member States the exact scope of Article 57, the main reason being the statement that the Convention 'shall not affect' any conventions in relation to particular matters, without stating how the provisions in such conventions could be reconciled with those of the 1968 Convention where they covered only part of the matters governed by the latter, which is usually the case. Special conventions can be divided into three groups. Many of them contain only provisions on direct jurisdiction, as in the case with the Warsaw Convention of 12 October 1929 for the unification of certain rules relating to international carriage by air and the Additional Protocols thereto (*), and the Brussels Convention relating to the arrest of seagoing ships which is of great importance for maritime law (Article 7) (see paragraph 121). Most conventions govern only the recognition and enforcement of judgments, and merely refer indirectly to jurisdiction in so far as it constitutes a precondition for recognition. This is the case with the Hague Convention of 15 April 1958 on the recognition and enforcement of decisions relating to maintenance obligations towards children. Finally, there are also Conventions which contain provisions directly regulating jurisdiction as well as recognition and enforcement, as for example the Berne Convention on carriage by rail and the Mannheim Convention for the navigation of the Rhine. It is irrelevant for present purposes whether the conventions contain additional provisions on the applicable law or rules of substantive law.

239. (a) It is clear beyond argument that where a special convention contains no provisions directly governing jurisdiction, the jurisdiction provisions of the 1968 Convention apply. It is equally clear that where all the Contracting States are parties to a special convention containing provisions on

(*) Not to be confused with the Brussels Convention of the same date for the unification of certain rules relating to penal jurisdiction in matters of collision.

jurisdiction, those provisions prevail. But for situations between these two extremes the solution provided by Article 57 is a great deal less clear. This is particularly the case for a number of questions, which arise where only the State of origin and the State addressed are parties to the special convention. The problems become acute where only one of these two States is a party. If both States are parties to a special convention which governs only direct jurisdiction, will the provisions of the 1968 Convention regarding examination of jurisdiction by the court of its own motion (Article 20), *lis pendens* (Article 21) and enforcement apply? Do the provisions of the 1968 Convention on the procedure for recognition and enforcement apply, if a special convention on the recognition and enforcement of judgments does not deal with procedure? Can a person domiciled in a Contracting State which is not a party to a special convention be sued in the courts of another Contracting State on the basis of jurisdiction provisions in the special conventions, or can the State of domicile which is not a party to the special convention claim that the jurisdiction rules of the 1968 Convention must be observed? Must a judgment given in a court which has jurisdiction only under a special convention be recognized and enforced even in a Contracting State which is not a party to that particular special convention? And, finally, what is the position where the special convention does not claim to be exclusive?

240. (b) Tentative and conflicting views were expressed within the Working Party as to how these problems were to be solved in interpreting Article 57 in its original form. It become clear that it would not be practicable to provide a precise solution to all of them, particularly since it is impossible to predict the form of future conventions. It was however appropriate, in the interests of clarifying the obligations about to be assumed by the new Member States, to include in the Accession Convention an authentic interpretation which concerns some problems which are of especial importance. The opportunity was taken to make a drafting improvement to the present Article 57 of the 1968 Convention — the new paragraph 1 of this Article — which will speak of recognition or enforcement. By reason of the purely drafting nature of the amendment to the text, the provision laying down the authentic interpretation of the new Article 57 (1) also applies to the present version.

The solution arrived at is based on the following principles. The 1968 Convention contains the rules generally applicable in all Member States; provisions in special conventions are special rules which every State may make prevail over the 1968 Convention by becoming a party to such a convention. In so far as a special convention does not contain rules covering a particular matter the 1968 Convention applies. This is also the case where the special convention includes rules of jurisdiction which do not altogether fit the inter-connecting provisions of the various parts of the 1968 Convention, especially those governing the relationship between jurisdiction and enforcement. The overriding considerations are simplicity and clarity of the legal position.

The most important consequence of this is that provisions on jurisdiction contained in special conventions are to be regarded as if they were provisions of the 1968 Convention itself, even if only one Member State is a Contracting Party to such a special convention. Even Member States which are not Contracting Parties to the special convention must therefore recognize and enforce decisions given by courts which have jurisdiction only under the special convention. Furthermore, in the context of two States which are parties to a special convention, a person who wishes to obtain the recognition or enforcement of a judgment may rely upon the procedural provisions of the 1968 Convention on recognition and enforcement.

At the same time, the Working Party did not wish to reach a final conclusion on the question whether the general principle outlined above could be consistently applied in all its ramifications. To take a critical example, it was left open whether exclusive jurisdiction under the provisions of a special convention must invariably be applied. The same applies to the question whether a case of *lis pendens* arising from a special convention is covered by Article 21 of the 1968 Convention. The Working Party therefore preferred to provide expressly for the application of Article 20 and to leave the solution of the outstanding problems to legal literature and case law. For the implications of an authentic interpretation of Article 57 for maritime jurisdiction, see paragraph 121.

2. *EXAMPLES*

241. A river boatman domiciled in the Netherlands is liable for damages arising from an accident which occurred on the upper Rhine. It is however no

longer possible to determine whether the harmful event occurred on German or French territory or from where the damage emanated.

242. It is not possible in such a case for either German or French courts to assume jurisdiction under Article 5 (3) or any other provision of the 1968 Convention. According to Article 34 (2) (c) and Article 35a of the revised Rhine navigation Convention of 17 October 1868 in the version of the Protocol of 25 October 1972 ([60]), jurisdiction in such cases belongs to the court of the State which was the first or only one seised of the matter. That court must, however, take into account Article 20 of the 1968 Convention, even though no equivalent of this Article exists in the Rhine navigation Convention. For example, if the defendant fails to enter an appearance, the court must of its own motion (see paragraph 22) ascertain whether all means have been exhausted of determining exactly where the accident occurred, for only if this cannot be determined does the court have jurisdiction under the abovementioned provisions of the Rhine navigation Convention.

243. If the court first seised of the matter was French, then any judgment of that court must be recognized in Germany. The Rhine navigation Convention is even stricter than the 1968 Convention in forbidding any re-examination of the original judgment in the State addressed. According to the correct interpretation of Article 57 of the 1968 Convention the judgment creditor has the choice of availing himself of the enforcement procedure provided by the Rhine navigation Convention or by the 1968 Convention. However, if he proceeds under the 1968 Convention the court may not refuse recognition on any of the grounds given in Article 27 or Article 28 of the 1968 Convention. Unlike the enforcement procedure itself, the conditions for recognition and enforcement are exclusively governed by the special conventions — in this example, the Rhine navigation Convention.

244. If, however, a judgment has been given in the court with jurisdiction at the place of destination pursuant to Article 28 (1) of the Warsaw Convention of 12 October 1929 for the unification of certain rules relating to international carriage by air, the 1968 Convention applies fully to both recognition and enforcement, because the Warsaw Convention contains no provisions at all on these matters. The same applies where in maritime law the jurisdiction of the court of origin was based on the provisions governing arrest contained in the 1952 Brussels Convention (see paragraph 121).

245. If the boatman in the above example on Rhine navigation had been domiciled in Luxembourg, which is not a party to the Rhine navigation Convention, the position would be as follows: any jurisdiction assumed in France or Germany pursuant to the Rhine navigation Convention can no longer be regarded in Luxembourg as an infringement of the 1968 Convention. Under the provisions and procedure of the 1968 Convention, Luxembourg is obliged to recognize and enforce a judgment given by the German or French Rhine navigation courts. If, conversely, the boatman is sued in the court of his Luxembourg domicile, which is also permissible, under the 1968 Convention, Germany and France would have to accept this, even though they are parties to the Rhine navigation Convention which does not recognize jurisdiction based on domicile.

3. *UNDERTAKINGS IN CONVENTIONS BETWEEN STATES NOT TO RECOGNIZE JUDGMENTS*

246. Whether Article 57 also covers conventions under which one Member State of the Community undertakes not to recognize judgments given in another Member State remains an open question. It could be argued that the admissible scope of such conventions was governed exclusively by Article 59.

International obligations of this sort can result from a special convention which provides for the exclusive jurisdiction of the courts of one of the Contracting Parties. Such an obligation can however also result indirectly from the fact that the exercise of jurisdiction under the special convention is linked to a special regime of liability. For example, the Paris Convention of 1960 on third party liability in the field of nuclear energy, apart from laying down rules of jurisdiction, recognition and enforcement:

1. places the sole liability for damage on the operator of a nuclear installation;

2. makes his liability an absolute one;

3. sets maximum limits to his liability;

4. requires him to insure against his liability;

5. allows a Contracting State to provide additional compensation from public funds.

The recognition and enforcement of a judgment which is given in a State not party to such a special convention and which is based on legal principles quite different from those outlined above could seriously undermine the operation of that special convention.

The 1968 Convention should always be interpreted in such a way that no limitations of liability contained in international conventions are infringed. The question however remains open whether this result is to be achieved by applying the public policy provision of Article 27 (1), by analogy with the new paragraph (5) of Article 27, or by a broad interpretation of Article 57.

For conventions limiting liability in maritime law, see paragraph 124 *et seq.*

4. *PRECEDENCE OF SECONDARY COMMUNITY LAW*

247. Within the Working Party opinion was divided as to whether secondary Community law, or national laws adopted pursuant to secondary Community law, prevail over international agreements concluded between the Member States, in particular in the case of a convention provided for in Article 220 of the Treaty of Rome. There was, however, agreement that national and Community law referred to above should prevail over the 1968 Convention. This decision is embodied in Article 57; the provision is based on Article 25 of the preliminary draft Convention on the law applicable to contractual and non-contractual obligations.

5. *CONSULTATIONS BEFORE THE FUTURE ACCESSION BY MEMBER STATES OF THE COMMUNITY TO FURTHER AGREEMENTS*

248. By their accession to the Convention, the new Member States are also bound by the Joint Declaration made by the Contracting States at the time of the signing of the 1968 Convention. In the Declaration the States declare that they will arrange for regular periodic contacts between their representatives. The Working Party was unanimously of the opinion that consultations should also take place when a Member State intended to accede to a convention which would prevail over the 1968 Convention by virtue of Article 57.

III. ARTICLE 59

249. This provision refers only to judgments given against persons domiciled or habitually resident outside the Community. Such persons may also be sued on the basis of jurisdictional provisions which could not be invoked in the case of persons domiciled within the Community, and which are classed as exorbitant and disallowed pursuant to the second paragraph of Article 3. Nevertheless, any judgment which may have been given is to be recognized and enforced in accordance with the 1968 Convention. As the Jenard report explains, it is intended that the Contracting States should remain free to conclude conventions with third States excluding the recognition and enforcement of judgments based on exorbitant jurisdictions — even though the 1968 Convention permits this in exceptional cases. The aim of the proposed amendment to Article 59 is further to limit the possibility of recognition and enforcement.

250. The way this will work may be illustrated by an example. If a creditor has a claim to be satisfied in France against a debtor domiciled in that country, then Danish courts have no jurisdiction under any circumstances to decide this issue, even if the debtor has property in Denmark and even if the claim is secured on immovable property there. Supposing the debtor is domiciled in Norway, then if Danish national law so allows Danish courts may very well claim jurisdiction, e.g. on the basis of the presence in Denmark of property owned by the debtor. Normally, the judgment given in such a case would also be enforceable in the United Kingdom. The United Kingdom could however undertake in a convention with Norway an obligation to refuse recognition and enforcement of such a judgment. This kind of treaty obligation may not however extend to a case where the jurisdiction of the Danish courts is based on the ground that immovable property in Denmark constitutes security for the debt. In such circumstances, the judgment would be enforceable even in the United Kingdom.

CHAPTER 10

FINAL PROVISIONS

1. *IRELAND*

251. Ireland has no territorial possessions outside the integral parts of its territory.

2. *UNITED KINGDOM*

252. The term 'United Kingdom' does not include the Channel Islands, the Isle of Man, Gibraltar or the Sovereign Base Areas in Cyprus. There is no obligation on the United Kingdom to extend the scope of the 1968 Convention to include these territories, even though it is responsible for their external relations. It might, however, be useful if the United Kingdom were to extend the 1968 Convention and it should be authorized to do so. It would have to undertake the necessary 'adjustments' itself, and there was no need to provide for them in the Accession Convention. The following adjustments would be required: indication of any exorbitant jurisdictions in the second paragraph of Article 3; a declaration as to whether in the newly included territories every appeal should be regarded as an ordinary appeal for the purposes of Articles 30 and 38; a declaration as to whether registration in any such territory in accordance with the second paragraph of Article 31 is effective only within its area; establishing which courts are competent under Articles 32, 37 and 40, the form in which the application should be made, and whether the adjustments in respect of the United Kingdom contained in the second paragraph of Article 37 as amended and in Article 41 as amended should also apply in the newly included territories. If any international conventions should apply to any one of the territories in question, appropriate adjustments would also have to be made to Article 55.

The penultimate paragraph of the proposed addition to Article 60 relates to the fact that judgments of courts in these territories which do not belong to the United Kingdom can be challenged in the last instance before the Judicial Committee of the Privy Council. It would be illogical to bring Privy Council decisions within the scope of the 1968 Convention if they related to disputes arising in territories to which the 1968 Convention does not apply.

3. *DENMARK*

253. For the purposes of EEC law, Greenland is included in the European territory of Denmark. The special constitutional positions of the Faroe Islands led to a solution corresponding closely to that proposed for the territories for whose foreign relations the United Kingdom is responsible. This had to allow for the fact that both appellate and first instance proceedings which relate to the Faroes and are therefore conducted under the Code of Civil Procedure specially enacted for these islands can be brought in Copenhagen.

4. *CHANGES IN A STATE'S TERRITORY*

254. The Working Party was unanimous that any territory which becomes independent of the mother country thereby ceases to be a member of the European Community and, consequently, can no longer be a party to the 1968 Convention. It was unnecessary to provide for this expressly and, in any case, to have drafted such a provision would have gone beyond the Working Party's terms of reference.

CHAPTER 11

ADJUSTMENTS TO THE PROTOCOL OF 3 JUNE 1971 ON THE INTERPRETATION BY THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES OF THE 1968 CONVENTION

1. *FORMAL ADJUSTMENTS*

255. Formal adjustments to the Interpretation Protocol were few and fairly obvious. It became necessary to make only one short addition to its provisions: the courts in the new Member States which, in accordance with Article 2 (1) and Article 3, are required to request the Court of

Justice to give preliminary rulings on questions of interpretation, had to be designated ([61]). In the United Kingdom, unlike the other Member States, not only the highest court within the country has been included, as it is more difficult to refer a matter to the House of Lords than it is to have recourse to the highest courts on the continent. Therefore, at least the appellate proceedings provided for in the second paragraph of Article 37 and in Article 41 of the 1968 Convention should in the United Kingdom also terminate in a court which is obliged to request a preliminary ruling from the Court of Justice. The expression 'appellate capacity' in Article 2 (2) should not be construed in a narrow technical sense, but in the sense of any challenge before a higher jurisdiction, so that it might be taken also to include the French 'contredit'.

The remaining formal adjustments concerned merely the scope (Article 1) and territorial application of the Protocol. Article 6, which deals with the latter point, is wholly based on Article 60 of the 1968 Convention (see paragraphs 251 to 254). Which authorities are to be designated as competent within the meaning of the third paragraph of Article 4 is a question to be decided entirely by the new Member States.

2. *THE SPECIAL NATURE OF IMPLEMENTING LEGISLATION IN THE UNITED KINGDOM AND IRELAND*

256. The extension of the Interpretation Protocol to the United Kingdom and Ireland will, however, in all probability also present a procedural problem. A long-standing legal tradition in these States does not allow provisions of international treaties to become directly applicable as national law. In the United Kingdom legislation has to be passed transforming such provisions into national law. In many cases the legislative enactment does not follow precisely the wording of the treaty. The usual form of legislation in this State often calls for a more detailed phraseology than that used in a treaty. The treaty and the corresponding national law are, therefore, to be carefully distinguished.

If the implementing legislation in the United Kingdom follows the usual pattern, courts in that country would only rarely be concerned with the interpretation of the 1968 Convention, but mostly with interpretation of the national implementing legislation. Only when the latter is not clear would it be open to a court, under the existing rules of construction in that country, to refer to the treaty on which the legislation is based, and only when the court is then faced with a problem of interpretation of the treaty may it turn to the European Court of Justice. If the provisions of implementing legislation are clear in themselves, the courts in the United Kingdom may as a rule refer neither to the text of the treaty nor to any decision by an international court on its interpretation.

This would undoubtedly lead to a certain disparity in the application of the Interpretation Protocol of 3 June 1971. The Working Party was of the opinion that this disparity could best be redressed if the United Kingdom could in some way ensure in its implementing legislation that the 1968 Convention will there too be endowed with the status of a source of law, or may at any rate be referred to directly when applying the national implementing legislation.

In the event of a judgment of the European Court of Justice being inconsistent with a provision of the United Kingdom implementing legislation, the latter would have to be amended.

It is also the case in Ireland that international agreements to which that State is a party are not directly applicable as national law. Lately, however, a number of Acts putting international agreements into force in national law have taken the form of an incorporation of the text of the agreement into national law. If the Act putting into force the 1968 Convention as amended by the Accession Convention were to take this form, the problems described above in relation to the United Kingdom would not arise in the case of Ireland.

ANNEX I

Extract from the Protocol to the preliminary draft Bankruptcy Convention (1975) (see paragraph 54)

Certain details of this list have been amended by later documents which, however, are not themselves final.

(aa) *Bankruptcy proceedings:*

Belgium:

'faillite' — 'faillissement';

Denmark:

'Konkurs';

Federal Republic of Germany:

'Konkurs';

France:

'liquidation des biens';

Ireland:

'bankruptcy', 'winding-up in bankruptcy of partnerships','winding-up by the court under Sections 213, 344 and 345 of the Companies Act 1963', 'creditors' voluntary winding-up under Section 256 of the Companies Act 1963';

Italy:

'fallimento';

Luxembourg:

'faillite';

Netherlands:

'faillissement';

United Kingdom:

'bankruptcy' (England, Wales and Northern Ireland), 'sequestration' (Scotland), 'administration in bankruptcy of the estates of persons dying insolvent' (England, Wales and Northern Ireland), 'compulsory winding-up of companies', 'winding-up of companies under the supervision of the court'.

(bb) *Other proceedings:*

Belgium:

'concordat judiciaire' — 'gerechtelijk akkoord',
'sursis de paiement' — 'uitstel van betaling';

Denmark:

'tvangsakkord',
'likvidation af insolvente aktieselskaber eller anpartsselskaber',
'likvidation af banker eller sparekasser, der har standset deres betalinger';

Federal Republic of Germany:

'gerichtliches Vergleichsverfahren';

France:

'règlement judiciaire',
'procédure de suspension provisoire des poursuites et d'apurement collectif du passif de certaines entreprises';

Ireland:

'arrangements under the control of the court', 'arrangements, reconstructions and compositions of companies whether or not in the course of liquidation where sanction of the court is required and creditors' rights are affected';

Italy:

'concordato preventivo',
'amministrazione controllata',
'liquidazione coatta amministrativa' — in its judicial stage;

Luxembourg:

'concordat préventif de la faillite',
'sursis de paiement',
'régime spécial de liquidation applicable aux notaires';

Netherlands:

'surséance van betaling',
'regeling, vervat in de wet op de vergadering van houders van schuldbrieven aan toonder';

United Kingdom:

'compositions and schemes of arrangement' (England and Wales),
'compositions' (Northern Ireland),
'arrangements under the control of the court' (Northern Ireland),
'judicial compositions' (Scotland),
'arrangements, reconstructions and compositions of companies whether or not in the course of liquidation where sanction of the court is required and creditors' rights are involved',
'creditors' voluntary winding-up of companies',
'deeds of arrangement approved by the court' (Northern Ireland).

ANNEX II

(1) When references are given to Articles without any further mention, reference is to the 1968 version of the Convention.

(2) The Royal Decree of 13 April 1938, reproduced in 'Bundesanzeiger' 1953, No 105, p. 1 and in Bülow-Arnold, 'Internationaler Rechtsverkehr', 925.5.

(3) For this concept, see the Jenard report, Chapter II, B and C, and Chapter IV, A and B.

(4) Zweigert-Kötz, 'Einführung in die Rechtsvergleichung auf dem Gebiet des Privatrechts', Vol. 1 (1971), p. 78 *et seq.*

(5) Case No 29/76 [1976] ECR 1541. The formal part of the Judgment reads as follows:

1. In the interpretation of the concept 'civil and commercial matters' for the purposes of the application of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, in particular Title III thereof, reference must not be made to the law of one of the States concerned but, first, to the objectives and scheme of the Convention and, secondly, to the general principles which stem from the corpus of the national legal systems;
2. A judgment given in an action between a public authority and a person governed by private law, in which the public authority has acted in the exercise of its powers, is excluded from the area of application of the Convention.

(6) Law No 75—617, JO 1975, 7171.

(7) In the text of Law No 75—617 (note (6)).

(8) Document of the Commission of the European Communities XI/449/75—F.

(9) The word 'analogous' does not appear in Article 1 (1) simply because the proceedings in question are listed in a Protocol.

(10) See the Report on the Convention on bankruptcy, winding-up arrangements, compositions and similar proceedings by Noël-Lemontey (16.775/XIV/70) Chapter 3, section I.

(11) See preliminary draft Bankruptcy Convention, Article 17 and Protocol thereto, Articles 1 and 2 (note 8).

(12) *op. cit.*

(13) 1975 preliminary draft (see note (8)), Article 1 (1), subparagraph (3), and Article II of the Protocol. See Noël-Lemontey report (note (10)) for reasons for exclusion.

(14) Although it does not have its own legal personality it corresponds by and large to the 'offene Handelsgesellschaft' in German law and the 'société en nom collectif' in French law.

(15) In the form of a 'private company' it corresponds to the continental 'Gesellschaft mit beschränkter Haftung' (company with limited liability) and in the form of a 'public company' to the continental 'Aktiengesellschaft' (joint stock company).

(16) UK: Bankruptcy Act 1914, Sections 119 and 126. See Tridmann-Hicks-Johnson, 'Bankruptcy Law and Practice' (1970), page 272.

(17) In respect of Great Britain — Companies Act 1948; in respect of Northern Ireland — Companies Acts 1960 and Companies (Amendment) Act 1963; in respect of Ireland — Company Act 1963, Section 213.

(18) 'if ... the company is unable to pay its debts'.

(19) Decree No 75—1123 of 5 December 1975, (JO) 1975, 1251.

(20) The adjustment proposed for Article 57 admittedly has certain repercussions on the scope of Article 20 (see paragraph 240).

(21) The following cases may be mentioned with regard to difficulties of interpretation which have arisen hitherto in judicial practice in connection with the application of Articles 5 and 6: Corte Cassazione Italiana of 4 June 1974, 'Giur. it.' 1974, 18 (with regard to the concept of place of performance); Corte Cassazione Italiana No 3397 of 20 October 1975 (place of performance in the case of deliveries via a forwarding agent who has an obligation to instal); Tribunal de Grande Instance Paris D 1975, 638 with commentary by Droz (place where the harmful event occurred in cases of illegal publication in the press); Court of Justice of the European Communities, 6 October 1976, Case No 12/76 [1976] ECR 1473.

(22) In the judgments referred to the formal parts of the judgments read as follows:

The 'place of performance of the obligation in question' within the meaning of Article 5 (1) of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters is to be determined in accordance with the law which governs the obligation in question according to the rules of conflict of laws of the court before which the matter is brought (Case No 12/76).

In disputes in which the grantee of an exclusive sales concession is charging the grantor with having infringed the exclusive concession, the word 'obligation' contained in Article 5 (1) of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters refers to the contractual obligation forming the basis of the legal proceedings, namely the obligation of the grantor which corresponds to the contractual right relied upon by the grantee in support of the application (Case No 14/76 [1976] ECR 1497).

In disputes concerning the consequences of the infringement by the grantor of a contract conferring an exclusive concession, such as the payment of damages or the dissolution of the contract, the obligation to which reference must be made for the purposes of applying Article 5 (1) of the Convention is that which the contract imposes on the grantor and the non-performance of which is relied upon by the grantee in support of the application for damages or for the dissolution of the contract (Case No 14/76).

In the case of actions for payment of compensation by way of damages, it is for the national court to ascertain whether, under the law applicable to the contract, an independent contractual obligation or an obligation replacing the unperformed contractual obligation is involved (Case No 14/76).

When the grantee of an exclusive sales concession is not subject either to the control or to the direction of the grantor, he cannot be regarded as being at the head of a branch, agency or other establishment of the grantor within the meaning of Article 5 (5) of the Convention of 27 September 1968 (Case No 14/76).

Where the place of the happening of the event which may give rise to liability in tort, delict or quasi-delict and the place where that event results in damage are not identical, the expression 'place where the harmful event occurred' in Article 5 (3) of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it (Case No 21/76 [1976] ECR 1735).

The result is that the defendant may be sued, at the option of the plaintiff, either in the courts for the place where the damage occurred or in the courts for the place of the event which gives rise to and is at the origin of that damage (Case No 21/76).

(23) Divorce law of 1 December 1970, No 898, Article 5.

(24) Law of 11 July 1975, new Article 281 of the Code civil.

(25) Chapter III, end of Section IV.

(26) Stein-Jonas (Münzberg) (note (27)), paragraph 765 a II 3 with reference to case law in note (28)).

(27) Stein-Jonas (Leipold) 'Kommentar zur Zivilprozeßordnung', 19th ed., paragraph 323 II 2 c and other references.

(28) In the case of France: Cour de Cassation of 21 July 1954 D 1955, 185.

(29) Magistrates' Court Rules 1952 r 34 (2), and Rayden's 'Law and Practice in Divorce and Family Matters' (1971), p. 1181.

(30) Bromley, 'Family Law', 4th ed. (1971), p. 451 containing references to case-law.

(31) Section 9 of the Maintenance orders (reciprocal enforcement) Act 1972.

(32) A.E. Anton, 'Private International Law' (1967), p. 470; Graveson, 'The Conflict of Laws' (1969), p. 565; Lord President Clyde in Clarks Trustee Petitioners 1966 SLT 249, p. 251.

(33) *op. cit.*

(34) The new Convention on limitation of liability for maritime claims, signed in London on 19 November 1976, was not yet in force at the end of the Working Party's discussions.

(35) The Court of Justice of the European Communities has already decided in this sense: see judgment of 6 October 1976 (Case No 14/76).

(36) In 1974 the premium income from overseas business amounted to no less than £ 3 045 million, £ 520 million of which consisted of business with Member States of the EEC, and 10 % of which was accounted for by re-insurance business. A sizeable proportion of this insurance market consisted of marine and aviation insurance. For these classes alone the overseas premium income amounted to £ 535 million including £ 50 million worth of business with other EEC countries.

(37) Extract from 'Pflichtversicherung in den Europäischen Gemeinschaften', a study by Professor Ernst Steindorff, Munich.

(38) The Landgericht of Aachen (NJW 76,487) refused to endorse this standpoint.

(39) Germany: Bürgerliches Gesetzbuch, Book 3, Sections 3—8; France: Code civil, Book 2, and Book 3, Title XVII, Title XVIII, Chapters II and III; Italy: Codice civile, Book 3, Titles 4—6, Book 6, Title 3, Chapter 2, Section III, and Chapter 4.

(40) Megarry and Baker, 'The Law of Real Property', 5th ed. (1969), p. 71 *et seq.*, p. 79 *et seq.*

(41) Megarry and Baker, *op. cit.*, p. 546.

(42) R. David, 'Les grands systèmes de droit contemporains', 5th ed. (1973) No 311.

(43) Stein-Jonas (Pohle) (note (27)), paragraph 24 III 2.

(44) Code de procédure civile, Article 46, third indent; Vincent, 'Procédure Civile', 16th ed. (1973) No. 291.

(45) From past case law: Brunswick Landgericht, Recht der internationalen Wirtschaft/Außenwirtschaftsdienst des Betriebsberaters (RIW/AWD) 74, 346 (written confirmation must actually be preceded by oral agreement); Hamburg Oberlandesgericht (RIW/AWD) 1975, 498 (no effective jurisdiction agreement where general terms of business are exchanged which are mutually contradictory); Munich Oberlandesgericht (RIW/AWD) 75,694; Italian Corte di Cassazione No 3397 of 20 October 1975 (written confirmation, containing a jurisdiction clause for the first time, is not of itself sufficient); Bundesgerichtshof, MDR 77, p. 1013 (confirmation of an order by the seller not sufficient when the buyer has previously refused the incorporation); Heidelberg Landgericht (RIW/AWD) 76, p. 532 (reference to general conditions of sale not sufficient); Frankfurt Oberlandesgericht (RIW/AWD) 76, p. 532 (reference to general conditions of sale for the first time in the confirmation of the order from the supplier; reminder from the seller does not conclusively incorporate the jurisdiction clause included in the conditions); Düsseldorf Oberlandesgericht (RIW/AWD) 76, p. 297 (jurisdiction clause contained in the condition of a bill of lading of no effect against persons who themselves have given no written declaration); Pretura of Brescia, Foro it. 1976 No 1, Column I 250 (subsequent national law prevails over Article 17); Tribunal of Aix-en-Provence of 10 May 1974, Dalloz 74, p. 760 (jurisdiction agreements in favour of the courts of the employer's domicile may be entered into even in contracts of employment); Tribunal de commerce of Brussels, Journal des Tribunaux 1976, 210 (Article 17 has precedence over contrary national law).

(46) As correctly stated by von Hoffmann (RIW/AWD) 1973, 57 (63); Droz ('Compétence judiciaire et effets des jugements dans le marché commun') No 216 *et seq.*, Weser ('Convention communautaire sur la compétence judiciaire et l'exécution des décisions') No 265.

(47) In the case of an orally concluded contract, the requirements of the first paragraph of Article 17 of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters as to form are satisfied only if the vendor's confirmation in writing accompanied by notification of the general conditions of sale has been accepted in writing by the purchaser (Case No 25/76, [1976] ECR 1851.

The fact that the purchaser does not raise any objections against a confirmation issued unilaterally by the other party does not amount to acceptance on his part of the clause conferring jurisdiction unless the oral agreement comes within the framework of a continuing trading relationship between the parties which is based on the general conditions of one of them, and those conditions contain a clause conferring jurisdiction (Case No 25/76).

Where a clause conferring jurisdiction is included among the general conditions of sale of one of the parties, printed on the back of a contract, the requirement of a writing under the first paragraph of Article 17 of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters is fulfilled only if the contract signed by both parties contains an express reference to those general conditions (Case No 24/76 [1976] ECR 1831).

In the case of a contract concluded by reference to earlier offers, which were themselves made with reference to the general conditions of one of the parties including a clause conferring jurisdiction, the requirement of a writing under the first paragraph of Article 17 of the Convention is satisfied only if the reference is express and can therefore be checked by a party exercising reasonable care (Case No 24/76).

(48) For further questions in Section 8, see paragraphs 22 and 240.

(49) Germany: Article 253 (1) of the Zivilprozeßordnung; France: Article 54 of the Code de procédure civile.

(50) For details see Droz (note (46)) No 448.

(51) Italy: Article 798 (1) together with Article 395 (1) of the Codice di procedura civile; France: Batiffol, 'Droit international privé' 5th ed. (1971), No 727.

(52) Article 3 (1) (c) (2) of the German-British Treaty of 14 July 1960; Article 3 (1) (c) (ii) of the Franco-British Treaty of 18 January 1934.

(53) From a comparative law point of view: Walther J. Habscheid, 'Introduction à la procédure judiciaire, les systèmes de procédures civiles', published by the Association internationale de droit comparé, Barcelona 1968.

(54) Stein-Jonas (Grunsky) (note (27)), introduction to paragraph 511 I 1; Rosenberg-Schwab, 'Zivilprozeßrecht', 11th ed., paragraph 135 I 1 b.

(55) Case No 43/77 (Industrial Diamond Supplies v. Riva).

(56) Cour de Cassation, 25 February 1937 Pas. 1937 I 73.

(57) Exact name and address: If the judgment is to be executed in Scotland — Secretary of State for Scotland, Scottish Office, New St. Andrew's House, St. James Centre, Edinburgh EH1 3 SX; Otherwise — Secretary of State for the Home Department, Home Office, 50 Queen Anne's Gate. London SW1H 9AT.

(58) Typical case law examples for Article 54: Hamburg Landgericht (RIW/AWD) 74, 403 *et seq.*; Frankfurt Oberlandesgericht (RIW/AWD) 76, 107.

(59) The original and new Member States of the Community, or some of them, are already parties to numerous international conventions governing jurisdiction and the recognition and enforcement of judgments in particular areas of law. The following should be mentioned, including those already listed in the Jenard report:

1. The revised Mannheim Convention for the navigation of the Rhine of 17 October 1868 together with the Revised Agreement of 20 November 1963 and the Additional Protocol of 25 October 1972 (Belgium, Germany, France, Netherlands, United Kingdom);

2. The Warsaw Convention of 12 October 1929 for the unification of certain rules relating to international carriage by air and the Amending Protocol of 28 September 1955 and Supplementary Convention of 18 September 1961 (all nine States) with the Additional Protocols of 8 March 1971 and 25 September 1975 (not yet in force);

3. The Brussels International Convention of 10 May 1952 on certain rules concerning civil jurisdiction in matters of collision (Belgium, Germany, France, United Kingdom);

4. The Brussels International Convention of 10 May 1952 relating to the arrest of seagoing ships (Belgium, Germany, France, United Kingdom);

5. The Rome Convention of 7 October 1952 relating to damage caused by foreign aircraft to third parties on the surface (Belgium, Luxembourg);

6. The London Agreement of 27 February 1953 on German external debts (all nine States);

7. (a) The Hague Convention of 1 March 1954 on civil procedure (Belgium, Denmark, Germany, France, Italy, Luxembourg, Netherlands),

   (b) The Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil and commercial matters (Belgium, Denmark, France, Italy, Luxembourg, Netherlands, United Kingdom),

   (c) The Hague Convention of 18 March 1970 on the taking of evidence abroad in civil or commercial matters (Denmark, France, Italy, Luxembourg, United Kingdom);

8. The Geneva Convention of 19 May 1956 together with its Protocol of Signature on the contract for the international carriage of goods by road (CMR) (Belgium, Denmark, Germany, France, Italy, Luxembourg, Netherlands, United Kingdom);

9. The Convention of 27 October 1956 between the Grand Duchy of Luxembourg, the Federal Republic of Germany and the French Republic on the canalization of the Moselle, with the Additional Protocol of 28 November 1976 (the three signatory States);
10. The Hague Convention of 15 April 1958 on the recognition and enforcement of decisions relating to maintenance obligations in respect of children (Belgium, Denmark, Germany, France, Italy, Netherlands);
11. The Hague Convention of 15 April 1958 on the jurisdiction of the contractual forum in matters relating to the international sale of goods (not yet ratified);
12. The Paris Convention of 29 July 1960 on third party liability in the field of nuclear energy (Belgium, France, Germany), together with the Paris Additional Protocol of 28 January 1964 (Belgium, Denmark, France, Germany, Italy), and the Brussels Convention and Annex thereto of 31 January 1963 supplementary to the Paris Convention of 29 July 1960 and the Paris Additional Protocol to the Supplementary Convention of 28 January 1964 (Denmark, France, Germany, Italy, United Kingdom);
13. The Supplementary Convention of 26 February 1966 to the International Convention of 25 February 1961 concerning the carriage of passengers and luggage by rail (CIV) on the liability of railways for death or injury to passengers, amended by Protocol II of the Diplomatic Conference for the entry into force of the CIM and CIV International Agreements of 7 February 1970 concerning the extension of the period of validity of the Supplementary Convention of 26 February 1966 (all nine States);
14. The Brussels Convention of 25 May 1962 on the liability of operators of nuclear ships and Additional Protocol (Germany)
15. The Brussels International Convention of 27 May 1967 for the unification of rules relating to the carriage of passengers' luggage by sea (not yet in force);
16. The Brussels International Convention of 27 May 1967 for the unification of certain rules relating to maritime liens and mortgages (not yet in force);
17. The Brussels International Convention of 29 November 1969 on civil liability for oil pollution damage (Belgium, Denmark, France, Germany, Netherlands, United Kingdom) and the International Convention to supplement that Convention of 18 December 1971 on the establishment of an international fund for compensation for oil pollution damage (Denmark, France, Germany, United Kingdom);
18. The Berne International Conventions of 7 February 1970 on the carriage of goods by rail (CIM) and the carriage of passengers and luggage by rail (CIV), together with the Additional Protocol and Protocol I of 9 November 1973 of the Diplomatic Conference for the implementation of the Conventions (all nine States with the exception of Ireland for Protocol I);
19. The Athens Convention of 13 December 1974 on the carriage by sea of passengers and their luggage (not yet in force);
20. The European Agreement of 30 September 1957 covering the international carriage of dangerous goods by road (ADR) (United Kingdom) and the Additional Protocol of 21 August 1975 (United Kingdom) (not yet in force);
21. The Geneva Convention of 1 March 1973 on the contract for the international carriage of passengers and baggage by road (CUR) (not yet in force);
22. The Hague Convention of 2 October 1973 on the recognition and enforcement of decisions relating to maintenance obligations (no Community Member State is a party to this Convention).

([60]) See note ([59]) (1).

([61]) The expression 'court' should not be taken as meaning the opposite of other jurisdictions (such as tribunals) but means the legal body which is declared competent in each case.

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82/972/EEC: Convention on the accession of the Hellenic Republic to the Convention on jurisdiction and enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice with the adjustments made to them by the Convention on the accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland

CONVENTION on the accession of the Hellenic Republic to the Convention on jurisdiction and enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice with the adjustments made to them by the Convention on the accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland (82/972/EEC)

PREAMBLE

THE HIGH CONTRACTING PARTIES TO THE TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY,

CONSIDERING that the Hellenic Republic, in becoming a Member of the Community, undertook to accede to the Convention on jurisdiction and enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice, with the adjustments made to them by the Convention on the accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland, and to this end undertook to enter into negotiations with the Member States of the Community in order to make the necessary adjustments thereto,

HAVE DECIDED to conclude this Convention, and to this end have designated as their plenipotentiaries:

HIS MAJESTY THE KING OF THE BELGIANS:

Jean GOL,

Deputy Prime Minister,

Minister for Justice and for Institutional Reform;

HER MAJESTY THE QUEEN OF DENMARK:

Erik NINN-HANSEN,

Minister for Justice;

THE PRESIDENT OF THE FEDERAI REPUBLIC OF GERMANY:

Hans Arnold ENGELHARD,

Federal Minister for Justice;

Dr Günther KNACKSTEDT,

Ambassador of the Federal Republic of Germany in Luxembourg;

THE PRESIDENT OF THE HELLENIC REPUBLIC:

Georges-Alexandre MANGAKIS,

Minister for Justice;

THE PRESIDENT OF THE FRENCH REPUBLIC:

Robert BADINTER,

Keeper of the Seals,

Minister for Justice;

THE PRESIDENT OF IRELAND:

Seân DOHERTY,

Minister for Justice;

THE PRESIDENT OF THE ITALIAN REPUBLIC:

Clelio DARIDA,

Minister for Justice;

HIS ROYAL HIGHNESS THE GRAND DUKE OF LUXEMBOURG:

Colette FLESCH,

Vice-President of the Government,

Minister for Justice;

HER MAJESTY THE QUEEN OF THE NETHERLANDS:

J. de RUITER,

Minister for Justice;

HER MAJESTY THE QUEEN OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND:

Peter Lovat FRASER, Esquire,

Solicitor-General for Scotland, Lord Advocate's department;

WHO, meeting within the Council, having exchanged their full powers, found in good and due form,

HAVE AGREED AS FOLLOWS:

TITLE I General provisions

Article 1

1. The Hellenic Republic hereby accedes to the Convention on jurisdiction and enforcement of judgments in civil and commercial matters, signed at Brussels on 27 September 1968 (hereinafter called "the 1968 Convention"), and to the Protocol on its interpretation by the Court of Justice, signed at Luxembourg on 3 June 1971 (hereinafter called "the 1971 Protocol"), with the adjustments made to them by the Convention on the accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice, signed at Luxembourg on 9 October 1978 (hereinafter called "the 1978 Convention").

2. The accession of the Hellenic Republic extends, in particular, to Articles 25 (2), 35 and 36 of the 1978 Convention.

Article 2

The adjustments made by this Convention to the 1968 Convention and the 1971 Protocol, as adjusted by the 1978 Convention, are set out in Titles II to IV.

TITLE II Adjustments to the 1968 Convention

Article 3

The following shall be inserted between the third and fourth indents in the second subparagraph of Article 3 of the 1968 Convention, as amended by Article 4 of the 1978 Convention: ! PIC FILE= "T0045411"!

Article 4

The following shall be inserted between the third and fourth indents in the first subparagraph of Article 32 of the 1968 Convention, as amended by Article 16 of the 1978 Convention: ! PIC FILE= "T0045412"!

Article 5

1. The following shall be inserted between the third and fourth indents of the first subparagraph of Article 37 of the 1968 Convention, as amended by Article 17 of the 1978 Convention: ! PIC FILE= "T0045413"!

2. The following shall be substituted for the first indent of the second subparagraph of Article 37 of the 1968 Convention, as amended by Article 17 of the 1978 Convention:

"- in Belgium, Greece, France, Italy, Luxembourg and in the Netherlands, by an appeal in cassation,".

Article 6

The following shall be inserted between the third and fourth indents of the first subparagraph of Article 40 of the 1968 Convention, as amended by Article 19 of the 1978 Convention: ! PIC FILE= "T0045414"!

Article 7

The following shall be substituted for the first indent of Article 41 of the 1968 Convention, as amended by Article 20 of the 1978 Convention:

"- in Belgium, Greece, France, Italy, Luxembourg and in the Netherlands, by an appeal in cassation,".

Article 8

The following shall be inserted at the appropriate place in chronological order in the list of Conventions set out in Article 55 of the 1968 Convention, as amended by Article 24 of the 1978

Convention:

"- the Convention between the Kingdom of Greece and the Federal Republic of Germany for the reciprocal recognition and enforcement of judgments, settlements and authentic instruments in civil and commercial matters, signed in Athens on 4 November 1961,".

TITLE III Adjustment to the Protocol annexed to the 1968 Convention

Article 9

In the first sentence of the Article Vb added to the Protocol annexed to the 1968 Convention by Article 29 of the 1978 Convention there shall be added after the word "Denmark" a comma and the words "in Greece".

TITLE IV Adjustments to the 1971 Protocol

Article 10

The following subparagraph shall be added to Article 1 of the 1971 Protocol, as amended by Article 30 of the 1978 Convention:

"The Court of Justice of the European Communities shall also have jurisdiction to give rulings on the interpretation of the Convention on the accession of the Hellenic Republic to the Convention of 27 September 1968 and to this Protocol, as adjusted by the 1978 Convention."

Article 11

The following shall be inserted between the third and fourth indents of point 1 of Article 2 of the 1971 Protocol, as amended by Article 31 of the 1978 Convention: ! PIC FILE= "T0045415"!

TITLE V Transitional provisions

Article 12

1. The 1968 Convention and the 1971 Protocol, as amended by the 1978 Convention and this Convention, shall apply only to legal proceedings instituted and to authentic instruments formally drawn up or registered after the entry into force of this Convention in the State of origin and, where recognition or enforcement of a judgment or authentic instrument is sought, in the State addressed.

2. However, judgments given after the date of entry into force of this Convention between the State of origin and the State addressed in proceedings instituted before that date shall be recognized and enforced in accordance with the provisions of Title III of the 1968 Convention, as amended by the 1978 Convention and this Convention, if jurisdiction was founded upon rules which accorded with the provisions of Title II of the 1968 Convention, as amended, or with the provisions of a convention which was in force between the State of origin and the State addressed when the proceedings were instituted.

TITLE VI Final provisions

Article 13

The Secretary-General of the Council of the European Communities shall transmit a certified copy of the 1968 Convention, of the 1971 Protocol and of the 1978 Convention in the Danish, Dutch, English, French, German, Irish and Italian languages to the Government of the Hellenic Republic.

The texts of the 1968 Convention, of the 1971 Protocol and of the 1978 Convention, drawn up in the Greek language, shall be annexed to this Convention. The texts drawn up in the Greek language shall be authentic under the same conditions as the other texts of the 1968 Convention, the 1971 Protocol and the 1978 Convention.

Article 14

This Convention shall be ratified by the signatory States. The instruments of ratification shall be deposited with the Secretary-General of the Council of the European Communities.

Article 15

This Convention shall enter into force, as between the States which have ratified it, on the first day of the third month following the deposit of the last instrument of ratification by the Hellenic Republic and those States which have put into force the 1978 Convention in accordance with Article 39 of that Convention.

It shall enter into force for each Member State which subsequently ratifies it on the first day of the third month following the deposit of its instrument of ratification.

Article 16

The Secretary-General of the Council of the European Communities shall notify the signatory States of:

(a) the deposit of each instrument of ratification;

(b) the dates of entry into force of this Convention for the Contracting States.

Article 17

This Convention, drawn up in a single original in the Danish, Dutch, English, French, German, Greek, Irish and Italian languages, all eight texts being equally authentic, shall be deposited in the archives of the General Secretariat of the Council of the European Communities. The Secretary-General shall transmit a certified copy to the Government of each signatory State.

Til bekræftelse heraf har undertegnede behørigt befuldmægtigede underskrevet denne konvention.

Zu Urkund dessen haben die hierzu gehörig befugten Unterzeichneten ihre Unterschriften unter dieses

Übereinkommen gesetzt.

! PIC FILE= "T0045416"!

In witness whereof the undersigned, being duly authorized thereto, have signed this Convention.

En foi de quoi, les soussignés, dûment autorisés à cet effet, ont signé la présente convention.

Da fhianu sin, shínigh na daoine seo thíos, arna n-udaru go cuí chuige sin, an Coinbhinsiun seo.

In fede di che, i sottoscritti, debitamente autorizzati a tal fine, hanno firmato la presente convenzione.

Ten blijke waarvan de ondergetekenden, daartoe behoorlijk gemachtigd, hun handtekening onder dit Verdrag hebben geplaats.

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! PIC FILE= "T0045418"!

! PIC FILE= "T0045419"!

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COUNCIL

Report

on the accession of the Hellenic Republic to the Community Convention on jurisdiction and the enforcement of judgments in civil and commercial matters

(86/C 298/01)

FOREWORD

This report is the last work to flow from the pen of Professor Demetrios I. Evrigenis, who, as always, was the moving spirit and a principal actor in its creation. It was almost complete when he died, in the prime of life, in Strasbourg on 27 January 1986 when about to return to Thessaloniki to discuss some final matters with me, his co-author. His sudden death obliged me to settle them alone, few in number and little of consequence as they were. The problems of international jurisdiction and the enforcement of the judgments of foreign courts, which absorbed his energies so productively throughout his academic life, have thus become the theme of his parting words at its inexorable end. This work is dedicated to his memory with gratitude and respect.

K. D. KERAMEUS

CONTENTS

I. BACKGROUND TO AND STRUCTURE OF THE CONVENTION

1. On 25 October 1982, representatives of the ten Member States of the European Communities at that time signed the Convention on the accession of the Hellenic Republic to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice with the amendments made to them by the Convention on the accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland. The conclusion of this Convention was provided for in Article 3 (2) of the Act concerning the conditions of accession of the Hellenic Republic and the adjustments to the Treaties annexed to the Treaty of 28 May 1979 concerning the accession of the Hellenic Republic to the European Economic Community and to the European Atomic Energy Community. In accordance with that provision 'the Hellenic Republic undertakes to accede to the conventions provided for in Article 220 of the EEC Treaty and to the protocols on the interpretation of those conventions by the Court of Justice, signed by the Member States of the Community as originally or at present constituted, and to this end it undertakes to enter into negotiations with the present Member States in order to make the necessary adjustments thereto'. To date, the only existing convention based on Article 220 of the EEC Treaty is the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters.

2. In preparation for the negotiations for accession to this Convention, the Hellenic Republic drew up a memorandum with proposed adjustments which was forwarded in October 1981 to the other Member States via the Council. The Permanent Representatives Committee convened an *ad hoc* Working Party composed of experts from the Member States and Commission representatives which met on two occasions in Brussels, on 14 December 1981 and 5 April 1982. From these meetings there emerged a draft Convention on the accession of the Hellenic Republic, which was approved by the Permanent Representatives Committee on 11 June 1982 and was signed on 25 October 1982 by representatives of the Member States at a conference of the Ministers for Justice of the Member States in Luxembourg.

3. Before presenting and commenting on the Convention on Greece's accession, it will be useful to list all the individual texts making up the current version of the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters. These texts are as follows:

3.1.1. Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (hereinafter referred to as the '1968 Convention').

3.1.2. Protocol (hereinafter referred to as the '1968 Protocol').

3.1.3. Joint Declaration (hereinafter referred to as the '1968 Joint Declaration').

The texts referred to in points 3.1.1 to 3.1.3 were signed in Brussels on 27 September 1968 and entered into force on 1 February 1972. The Greek versions were published in *Official Journal of the European Communities* No L 388 of 31 December 1982, page 7.

3.2.1. Protocol on the interpretation by the Court of Justice of the European Communities of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (hereinafter referred to as the '1971 Protocol').

3.2.2. Joint Declaration (hereinafter referred to as the '1971 Joint Declaration').

The texts referred to in points 3.2.1 and 3.2.2 were signed in Luxembourg on 3 June 1971 and entered into force on 1 September 1975. The Greek versions were published in *Official Journal of the European Communities* No L 388 of 31 December 1982, page 20.

3.3.1. Convention on the accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, and the Protocol on its interpretation by the Court of Justice of the European Communities (hereinafter referred to as the '1978 Accession Convention').

3.3.2. Joint Declaration (hereinafter referred to as the '1978 Joint Declaration').

The texts referred to in points 3.3.1 and 3.3.2 were signed in Luxembourg on 9 October 1978 (*). The Greek versions were published in *Official Journal of the European Communities* No L 388 of 31 December 1982, page 24.

3.4.1. Convention on the accession of the Hellenic Republic to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice with the amendments made to them by the Convention on the accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland (hereinafter referred to as the '1982 Accession Convention').

This Convention was signed in Luxembourg on 25 October 1982 and published in *Official Journal of the European Communities* No L 388 of 31 December 1982, pages 1 to 6.

All the above texts were published in an unofficial consolidated version prepared by the General Secretariat of the Council, in *Official Journal of the European Communities* No C 97 of 11 April 1983, pages 2 to 29. For the publication of the above texts in the other Community languages, see the table given on page 1 of *Official Journal of the European Communities* No C 97 of 11 April 1983.

4. Explanatory reports were drawn up on the texts referred to in points 3.1.1. to 3.3.2. The report on the 1968 Convention, Protocol and Joint Declaration and the report on the 1971 Protocol and Joint Declaration were drawn up by Mr P. Jenard, Director in the Belgian Ministry of Foreign Affairs and External Trade (1). The report on the 1978 Accession Convention and Joint Declaration was drawn up by Mr P. Schlosser, Professor at the University of Munich (2). A Greek translation of these reports appears in the present edition of the Official Journal. The reports in question contain the background to the preparation of the texts and explain and elucidate the provisions of the texts in relation to the autonomous law of the Contracting Parties. They are of considerable assistance in interpreting the Convention.

5. **Technical legal aspects of accession to the Convention**

As in the case of the accession of Denmark, Ireland and the United Kingdom, in the case of the accession of Greece the Contracting Parties preferred to draft a Convention incorporating adjustments supplementing the existing 1968, 1971 and 1978 texts instead of directly revising them. This solution has clear advantages. It relieves the Contracting Parties of the obligation to ratify once more those parts of the existing Convention which have not been amended through the new accession and, at the same time, permits a clear distinction to be made between the successive stages in the development of the Convention. There are, however, disadvantages, as the result is a gradual accumulation of texts effecting repeated indirect changes to the original Convention. The number of such independent texts is bound to increase with each new enlargement of the Community and, consequently, with each further accession to the Convention. This multiplicity of sources will, of course, create further problems of interpretation in determining the law applicable in a particular case. Of assistance on this point are the consolidations of the texts of the Convention into a single corpus which are usually prepared after each new accession by the Council General Secretariat (3). Anyone seeking to interpret the Convention must not forget, however, that these consolidations are unofficial and therefore do not have binding force.

6. **Brief description of the 1982 Convention**

In contrast to the 1978 Accession Convention, the 1982 Accession Convention did not involve any substantial changes to the text either of the 1968 Convention or the 1971 Protocol, as already amended by the 1978 Accession Convention. The adjustments made to those texts by the 1982 Convention are purely technical and are restricted to additions required as a result of the accession of the new Contracting Party. Greece, as shown by the memorandum which it submitted for the negotiations for its accession to the Convention (4), felt that it could accept the Convention in its entirety, as already amended by the 1978 texts. Two points which might have led to substantial amendments were finally dealt with in the minutes of the *ad hoc* Committee. These points are dealt with below (5).

7. **Structure of the 1968/1978/1982 Convention**

The Convention governs, on the one hand, the international jurisdiction of the courts, and, on the other, the recognition and enforcement of judgments, authentic instruments and court settlements. Given its content, it may be classified as a 'double' convention. In other words, in addition to provisions governing the recognition and enforcement of foreign judgments, it contains direct rules on jurisdiction defining the court competent to deal with a dispute, in contrast to 'single' conventions which deal with jurisdiction only indirectly as a pre-condition for the recognition and enforcement of foreign judgments. The Convention is divided into eight Titles and deals successively with the scope of the Convention itself (Title I, Article 1), jurisdiction (Title II, Articles 2 to 24), recognition and enforcement (Title III, Articles 25 to 49), authentic instruments and court settlements (Title IV, Articles 50 to 51). Title V (Articles 52 to 53) contains general provisions and Title VI (Article 54) transitional provisions to which must be added the provisions of Articles 34 to 36 of the 1978 Convention and of Article 12 of the 1982 Convention. Title VII (Articles 55 to 59) governs the relationship of the Convention to other conventions while Title VIII (Articles 60 to 68) contains the final provisions, to which must be added the corresponding provisions of the 1978 Convention (Articles 37 to 41) and the 1982 Convention (Articles 13 to 17). The 1968 Protocol contains a set of specific provisions.

For the 1971 Protocol on the interpretation of the Convention by the Court of Justice and the amendments thereto in the 1978 and 1982 texts, see Section III. D below, points 91 to 99.

II. THE GREEK SYSTEM OF INTERNATIONAL JURISDICTION AND ENFORCEMENT OF JUDGMENTS OF FOREIGN COURTS

8. After the foundation of the modern Greek State (1830) positive legislation in respect of international jurisdiction and the recognition and enforcement of the judgments of foreign courts went through two major phases. These two phases are quite distinct as regards international jurisdiction ([6]) and less so as regards the recognition and enforcement of foreign judgments ([7]). The following brief account concludes with a description of the international convention provisions governing these matters in force in Greece ([8]).

9. The civil procedure of 1834, which was drawn up by the Bavarian jurist G. L. von Maurer and which applied from 25 January 1835 until 15 September 1968 followed French legal thinking (Articles 14 and 15 of the French Civil Code) in providing for the nationality of the litigants to be the main criterion of international jurisdiction. Thus, under Article 28 of the 1834 civil procedure, Greek courts possessed jurisdiction where *either* the plaintiff *or* the defendant were Greek. As a result, a Greek national could sue a foreign national, and *vice versa,* before the Greek courts irrespective of the geographical location of the dispute or of any other connecting factor providing a link with the Greek State. In addition, however, pursuant to Article 27 of the civil procedure, the international jurisdiction of the Greek civil courts also extended to actions between foreign nationals if they had agreed to submit their dispute to the Greek courts, or if certain, very few, special jurisdictions applied, or if considerations of public policy were involved ([9]).

10. The basis of the system was changed by the introduction of the Civil Code (23 February 1946). Under Article 7 (1) of the law introducing the Code, Articles 27 and 28 of the civil procedure were repealed; Article 126 of the law stipulated that foreign nationals were subject to the jurisdiction of Greek courts and could sue or be sued in the same manner as Greek nationals in accordance with the provisions governing jurisdiction. Thus, at least in the case of foreign nationals, jurisdiction was dissociated from the nationality of the litigants and became a function of place: in litigation between foreign nationals or where only the defendant was a foreign national the Greek civil courts had jurisdiction in every case, provided that any one such court had territorial competence for the dispute in question.

11. However, opinions differed regarding disputes under private international law where the defendant was a Greek national. According to the 'resultant' theory ([10]), the purpose of the legislator in drafting Article 126 of the law introducing the Civil Code was fully to equate foreign and Greek nationals as regards jurisdiction. Consequently, just as, under Article 126, international jurisdiction with regard to foreign nationals was nothing more nor less than the sum total, or the resultant of various particular jurisdictions, so in the case of Greek nationals international jurisdiction could not be exercised by the Greek State unless such nationals were also linked by some general or special jurisdiction to the area of jurisdiction of a Greek civil court, their Greek nationality being insufficient for this purpose. On the other hand, the 'distinction' theory ([11]), which finally prevailed in jurisprudence in the period up to 1968, distinguished between foreign and Greek defendants, requiring only in the case of the former that some form of jurisdiction should exist and in the case of the latter merely that they possess Greek nationality. This conception of jurisdiction as a function of nationality proved in practice to be an unfortunate privilege for Greeks in that it allowed them to be sued in Greek courts without there being any other connecting factor than their nationality, whereas possession of Greek nationality was not sufficient for a *plaintiff* to be able to bring proceedings against a foreign national in Greek courts ([12]).

12. The introduction of the new Code of Civil Procedure (on 16 September 1968) marked the final break with the French system and led to the predominance of the 'resultant' theory. Under Article 53 of the law introducing the Code, Article 126 of the Civil Code was repealed and Article 3 (1) of the Code of Civil Procedure laid down that Greek and foreign nationals were subject to the jurisdiction of the civil courts in so far as a Greek court was competent. The fact that Greek and foreign nationals were referred to on the same basis and on the same level and that Article 3 (1) of the Code of Civil Procedure was stated to be the prime source of international jurisdiction under Greek law resulted, to use the expression frequently encountered in jurisprudence, in Greek law switching from the principle of nationality to the principle of territoriality. Since that time, and irrespective of the nationality of any of the litigants, the pre-requisite for international jurisdiction to lie with the Greek State has been, as a rule, that the dispute must be subject to the general or special jurisdiction of a Greek civil court ([13]). Only by way of exception, namely in matrimonial disputes and disputes between parents and children, will the Greek nationality of any of the litigants of itself constitute a basis of jurisdiction on the part of the Greek courts (Code of Civil Procedure, Articles 612 and 622).

13. The various individual jurisdictions which thus together make up international jurisdiction under modern Greek law do not diverge all that much from general practice under the laws of the other Community

countries ([14]). General jurisdiction is based on the domicile or seat, and secondarily on the residence, of the defendant (Code of Civil Procedure, Articles 22 to 26 and 32). General jurisdiction is automatically set aside when any of the six *special exclusive jurisdictions* under the Code of Civil Procedure applies: jurisdiction of the court for the place where the property is situated in the case of disputes concerning rights *in rem* or similar rights in, or tenancies of, immovable property (Code of Civil Procedure, Article 29); jurisdiction in matters relating to succession, vested in the court for the last place of domicile of the testator (Code of Civil Procedure, Article 30, see also Article 810); jurisdiction based on related actions, where the court hearing the main action has jurisdiction in respect of ancillary proceedings (Code of Civil Procedure, Article 31); jurisdiction in respect of company disputes, covering disputes between a company and its members and between the members themselves, in so far as they arise out of the company relationship, vested in the court for the place where the company has its seat (Code of Civil Procedure, Article 27); jurisdiction in respect of management under a court order, vested in the local court which made the order (Code of Civil Procedure, Article 28); jurisdiction in respect of counter-claims (Code of Civil Procedure, Article 34), although it should be noted that under Greek law the filing of a counter-claim is not obligatory, nor is any substantive connection required between the defendant's counter-claim and the claim brought by the plaintiff.

The general section of the Code of Civil Procedure also lays down six *concurrent special jurisdictions* with the plaintiff being able to choose between them and general jurisdiction (Code of Civil Procedure, Article 41): jurisdiction in respect of legal acts, with either the place where the act was drawn up or the place of performance being taken as connecting factors (Code of Civil Procedure, Article 33); jurisdiction in respect of criminal offences, which in the case of civil disputes arising from acts giving rise to criminal proceedings lies either with the court for the place where the offence was committed or with the court for the place where the consequences of the offence occurred (Code of Civil Procedure, Article 35, Criminal Code, Article 16); jurisdiction in respect of management other than under a court order, which lies with the court for the place of management (Code of Civil Procedure, Article 36); jurisdiction where identical law is applicable, which, mainly in case of jointly defended proceedings, allows the defendants to be sued in a court which has jurisdiction for any one of them (Code of Civil Procedure, Article 37); jurisdiction in matrimonial disputes, which vests in the court for the last place of joint residence of the spouses (Code of Civil Procedure, Article 39); jurisdiction in respect of claims relating to property, where proceedings may be instituted both before the court for the place where the defendant has resided for a reasonable length of time (Code of Civil Procedure, Article 38), and, mainly where proceedings involve a defendant not domiciled in Greece, before the court for the place where property belonging to the defendant or the object in litigation is situated (Code of Civil Procedure, Article 40). With regard to special procedures (Code of Civil Procedure, Articles 591 to 681) Articles 616, 664 and 678 provide for additional forms of concurrent special jurisdiction which in principle favour the plaintiff.

14. The possibility of basing jurisdiction on an agreement between the litigants is very widely recognized in disputes concerning property (Code of Civil Procedure, Articles 3, paragraphs 1, 42 to 44). The agreement may in principle be informal, an agreement in writing being required only where it relates to a potential future dispute. An informal agreement may in principle also be tacit, and be inferred from a defendant's failure to challenge the jurisdiction of the court when entering an appearance at the first hearing of the case. An express agreement is required only where special exclusive jurisdiction is to be set aside. There is a legal presumption that a court on which jurisdiction is conferred has exclusive jurisdiction. In addition, no substantive connecting factor is required between the dispute to which the conferral of jurisdiction relates and the Greek State. The only bar lies in the prohibition against submitting to Greek jurisdiction disputes concerning immovable property situated outside Greece (Code of Civil Procedure, Article 4, first subparagraph, *in fine*). Lastly, just as jurisdiction may be conferred, it may also be removed with the submission of a dispute to a foreign court; such agreements are not considered as infringements of Greek sovereignty or as contrary to public policy; recourse to foreign courts merely has to be possible so that there is no international denial of justice.

15. Jurisdiction of the Greek State with regard to the substance of a dispute is not a pre-condition for provisional measures to be taken. Of course, such measures may be ordered by the court before which the principal case is pending (Code of Civil Procedure, Articles 684 and 683 (2)). However, they can also be ordered by the court with competence *ratione materiae* nearest to the place where they are to be implemented (Code of Civil Procedure, Article 683 (3)). Hence, the fact that the principal action is pending before a foreign court or, even where not so pending, is subject to the international jurisdiction of a State other than Greece does not prevent provisional measures being taken in Greece.

16. Lack of jurisdiction is in general examined by the court of its own motion. However, since jurisdiction can in principle also be based on a defendant's failure to challenge when entering an appearance ([15]), the question of lack of jurisdiction is only examined by the court of its own motion where the defendant *does not* enter an appearance at the first hearing or where he appears and does not challenge but his silence cannot constitute a basis for implied jurisdiction because the dispute relates to immovable property situated outside Greece (Code of Civil Procedure, Article 4, first subparagraph), or because the object of the dispute is not property, or because the law provides for exclusive jurisdiction (Code of Civil Procedure, Article 4, first subparagraph, Article 42 (1), first and second subparagraphs, Article 46, first subparagraph, Article 263 (a)).

Where jurisdiction is found to be lacking, the action will be dismissed as inadmissible (Code of Civil Procedure, Article 4, second subparagraph) and there will be no referral to a foreign court. However, if despite lack of jurisdiction a judgment is given in the case, it may be challenged in law but will not be void unless it infringes the rules of extraterritoriality (Code of Civil Procedure, Article 313 (1) (e)).

17. Under the old civil procedure of 1834 (Articles 858 to 860) a distinction was made in the enforcement in Greece of judgments of foreign courts according to the nationality of the party against whom enforcement was sought ([16]). If that party was a foreigner, enforcement was authorized by the presiding judge of a court of first instance and three conditions had to be satisfied:

(a) the foreign instrument had to be enforceable in the State of origin;

(b) that State must have possessed jurisdiction (which was assessed according to Greek law);

(c) the instrument must not be contrary to Greek public policy.

On the other hand, if the party against whom enforcement was sought was Greek, jurisdiction to authorize enforcement was vested in the three member courts of first instance and two further conditions had to be satisfied:

(d) the judgment could not be in contradiction with proven fact, a requirement which led to a limited review of the foreign judgment as to its substance, and

(e) no events must have occurred to invalidate the claim included in the foreign instrument. These conditions, which were required by law for enforcement to be authorized, were also extended by judicial practice to the simple recognition of the *res judicata* status of foreign judgments ([17]).

18. Here, too ([18]), the new Code of Civil Procedure eliminated all distinction between Greek and foreign nationals ([19]). Irrespective of the nationality of the party against whom enforcement is sought, the following conditions must now be satisfied for the enforcement of a foreign judgment to be authorized in Greece (Code of Civil Procedure, Articles 905 (2) (3), 323, points 2 to 5):

(a) it must be enforceable under the law of the place where it was delivered;

(b) the dispute must have been subject in accordance with Greek law to the jurisdiction of the State in which the judgment originates;

(c) the party against whom the judgment has been given must not have been deprived of the right of defence, or the right of participation in general in the proceedings;

(d) the foreign judgment must not conflict with a judgment which has become *res judicata* delivered by a Greek court in proceedings between the same parties and in the same dispute;

(e) the foreign judgment must not conflict with public morality or public policy. Apart fro these conditions, there is no requirement as to reciprocity or application of the substantive law defined as applicable under Greek private international law, nor may the procedural legality or the correctness as to substance of the foreign judgment be verified ([20]). Lastly, as regards the enforcement of other foreign instruments, these need merely be enforceable under the law of the place where they were issued and must not be contrary to public morality or public policy (Code of Civil Procedure, Article 905 (2)).

19. The distinction between Greek and foreign nationals has also been abolished as regards both jurisdiction ([21]) to authorize enforcement and the relevant procedure. In every case, jurisdiction is vested in the single-member court of first instance in the area of jurisdiction in which the debtor is domiciled or, where this is inapplicable, is resident; where neither connecting factor applies jurisdiction is vested in the single-member court of first instance in Athens. The procedure followed is that applicable in non-contentious proceedings (Code of Civil Procedure, Article 905 (1)), and an enforcement order may be challenged by means of an ordinary appeal, reasoned appeal against a default judgment, judicial review and appeal in cassation (Code of Civil Procedure, Article 905 (1), second subparagraph, Article 760 to 772), none of which have suspensive effect under the law (Code of Civil Procedure, Articles 763, 770, 771 and 774). A foreign instrument, the enforcement of which has been authorized, is enforced in accordance with the enforcement procedure and measures provided for under Greek law ([22]).

20. *Recognition* of the *res judicata* status of foreign judgments is basically subject to the same conditions. The only difference is that instead of the judgment having to be enforceable under the law of the place where it was delivered ([23]), it must have *res judicata* status under Greek law (Code of Civil Procedure, Article 323, point 1). Recognition of *res judicata* status is not subject to any special procedure (Code of Civil Procedure, Article 323 pr.) and such status may be recognized as an incidental matter by any judicial or administrative authority ([24]). Only in the case of the recognition of the *res judicata* force of foreign judgments concerning the status of persons, in particular with respect to divorce, must the same procedure be followed as for authorization of enforcement (Code of Civil Procedure, Article 905 (4)).

21. Greece is not a contracting party to any bilateral international conventions which directly govern jurisdiction ([25]). Any clauses in agreements placing foreign nationals on the same legal footing as Greek nationals are no longer relevant ([26]), from the point of view of jurisdiction, since such assimilation is now a rule of

Greek internal law further to Article 126 of the law introducing the Civil Code and Article 3 (1) of the Code of Civil Procedure ([27]).

22. Greece is a contracting party to eight 'single' ([28]) bilateral conventions concerning recognition and the enforcement of judgments of foreign courts; these are with Czechoslovakia (1927, Law 3617/1928), Yugoslavia (1959, Decree 4007/1959), the Federal Republic of Germany (1961, Law 4305/1963), Romania (1972, Decree 429/1974), Hungary (1979, Law 1149/1981, Articles 24 to 31), Poland (1979, Law 1184/1981, Articles 21 to 31), Syria (1981, Law 1450/1984, Articles 21 to 29) and Cyprus (1984, Law 1548/1985, Articles 21 to 28). As regards their content, these conventions do not differ substantially from Greek internal law in the Code of Civil Procedure, and they apply irrespective of the nationality of the litigants. They do not permit review as to substance, and they do not make recognition dependent on the substantive law applied in the foreign judgment except in questions concerning the status of persons. The most detailed of these conventions, that between Greece and Germany ([29]), covers the enforcement not only of court judgments but also of court settlements and authentic instruments (Articles 13 to 16); it also covers non-contentious proceedings (Article 1 (1), subparagraph 1) and interim orders (Article 6) and allows recognition to be refused on grounds of lack of jurisdiction solely where the courts of the country in which recognition is sought have *exclusive* jurisdiction, or where the court which gave the judgment heard the case exclusively on the basis of jurisdiction in respect of matters relating to property (Article 3 (3) (4)).

23. Multilateral conventions ([30]) which apply in Greece include the Vienna Convention on Diplomatic Relations of 18 April 1961 (Decree 503/1970) and the Vienna Convention on Consular Relations of 24 April 1963 (Law 90/1975), which deal in detail with extra-territoriality. Other conventions applicable include those of 7 February 1970 on the International Carriage of Goods (CIM), Passengers and Luggage (CIV) by Rail (Emergency Law 365/1968), which contain provisions governing jurisdiction (Article 44) and the enforcement of judgments of foreign courts (Article 56). The New York Multilateral Convention of 20 June 1956 on the Recovery abroad of Maintenance, which applies in Greece (Decree 4421/1964), also contains provisions on the enforcement of foreign judgments (Articles 5 and 6). In the area of maritime law there are the Brussels Conventions of 10 May 1952 on Certain Rules concerning Civil Jurisdiction in matters of Collision (Law 4407/1964) and on the Unification of Certain Rules relating to the Arrest of Sea-going Ships (Decree 4570/1966, in particular Article 7 on international jurisdiction). As regards air law there is the Warsaw Convention on the Unification of Certain Rules relating to International Carriage by Air (Emergency Law 596/1937, in particular Article 28 (1) and Article 32 on jurisdiction). In the area of arbitration law there is the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (Decree 4220/1961). However, Greece has not signed the International Conventions of The Hague of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, and of 2 October 1973 on the Recognition and Enforcement of Decisions relating to Maintenance Obligations; it has signed (but not yet ratified) the earlier Hague Convention of 15 April 1958 concerning the Recognition and Enforcement of Decisions relating to Maintenance Obligations towards Children. It has also signed, but not yet ratified, the Luxembourg European Convention of 20 May 1980 (within the framework of the Council of Europe) on the Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children.

III. THE COMMUNITY CONVENTION ON JURISDICTION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS

A. SCOPE OF THE CONVENTION

24. *The Convention concerns issues of international points of contact.* In so far as it governs the *international* jurisdiction of the courts the Convention obviously concerns international issues or, to use the normal definition, issues which contain a foreign element. This characteristic, which is inherent in the very nature of the Convention, is stressed in the third paragraph of the preamble; this refers in French to determining the 'compétence de (...) juridictions dans l'ordre international' (jurisdiction of the courts at international level), which the Greek version of the Convention renders as 'international jurisdiction'. Furthermore, both in the title and in the text of the Convention the term 'jurisdiction'(French: 'compétence judiciaire') is translated in

Greek as 'international jurisdiction' in line with normal Greek terminology which distinguishes between international jurisdiction and internal competence.

25. The Convention also governs the recognition and enforcement of *foreign* judgments, i.e. judgments delivered in one Contracting State recognition or enforcement of which is sought in another Contracting State; the same applies as regards authentic instruments and court settlements.

26. *The Convention relates to civil and commercial matters.* The meaning of the expression 'civil and commercial matters' (Article 1, first paragraph) is not defined in the Convention.

However, Article 1 specifies that civil or commercial matters are to be classified as such irrespective of the nature of the court before which they are heard or which gave judgment and of whether the proceedings are contentious or non-contentious. Hence the criterion which applies is substantive rather than procedural. According to the Court of Justice of the European Communities (31), it is essentially determined by the legal relationships between the parties to the action or the subject-matter of the action.

27. Although the drafters of the Convention did not attempt to define or to give clear guidance as to the meaning of the expression 'civil and commercial matters', there can be no doubt that it is to be determined on the basis of the Convention. The concept is therefore independent and is not determined by reference to any specific national legal order. Its meaning should accordingly not be sought in the law of the Contracting State of the court seised or even in the law of the State, whether a Contracting State or not, governing the substance of the action. The Court of Justice of the European Communities confirmed this principle of interpretation in its Judgment of 14 October 1976 (32) when it emphasized the independent nature of the concept and stated that it should be interpreted by reference, on the one hand, to the objectives and scheme of the Convention and, on the other, to the general principles which stem from the corpus of the national legal systems. This in the Court's view makes it necessary to ensure, as far as possible, that the rights and obligations which derive from the Convention for the Contracting States and the persons to whom it applies are equal and uniform. The same approach as regards interpretation can be found in more recent judgments of the Court (33).

28. Civil and commercial matters must be distinguished from disputes of public law, which do not come within the scope of the Convention. In the view of the Court of Justice, it would appear that these two categories can be distinguished on the basis of a traditional feature of public law in continental jurisprudence, namely the exercise of sovereign powers (34). The problem assumed a new dimension when the Convention was opened for accession by States belonging to the family of Anglo-Saxon law which do not in principle recognize the distinction between private law and public law. The existence side-by-side in the Community of divergent approaches of this kind naturally creates difficulties in seeking an independent, generally applicable definition. The Court will be impeded in performing its interpretative function in the absence of general principles common to all the legal systems of the Contracting Parties from which a single criterion can be deduced for distinguishing matters which can be classified as coming under public law. A partial solution to the problem was attempted with the addition made by the 1978 Convention (Article 3) to the original text of the first paragraph of Article 1 of the Convention; the addition specifies that the Convention does not extend 'in particular, to revenue, customs or administrative matters'. This distinction, which may have been self-evident in the case of the majority of the Contracting Parties (including Greece), was necessary in the case of those States — Ireland and the United Kingdom — where the distinction between private and public law is not as firmly and extensively established in positive law or in current jurisprudence.

29. Civil and commercial matters also include relationships arising from contracts of employment. This approach, which is in line with prevailing Greek legal thinking, has been confirmed by the Court of Justice of the European Communities (35).

30. **Exclusions**

The second paragraph of Article 1 specifies a series of matters which are excluded from the scope of the Convention. Most represent a genuine limitation of the civil and commercial matters covered, with their exclusion being necessitated for different reasons in every instance. This is the case as regards the relationships listed in point 1 (status or legal capacity of natural persons, rights and property arising out of a matrimonial relationship and succession), point 2 (bankruptcy, proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings), and point 4 (arbitration). The exclusion contained in point 3 (social security) is justified both by the fact that social security comes under public law in some countries

whilst it falls in the borderline area between private law and public law in others, and because social security matters are increasingly governed by secondary Community legislation.

31. Point 1 of the second paragraph of Article 1 refers to the status or legal capacity of natural persons, rights and property arising out of a matrimonial relationship and succession. The exclusion of these matters from the scope of the Convention was necessitated by their specific characteristics, which are reflected in the great variety of ways they are dealt with at national level in both substantive law and private international law. Their inclusion in the Convention would have meant either that these specific characteristics would have had to be levelled out or, alternatively, that such matters would have been dealt with in a rather inconsistent manner from the point of view of international jurisdiction, although consistency is one of the main aims of the Convention. Faced with this dilemma, the drafters of the Convention preferred to exclude these relationships from its scope.

32. Interpreting these exclusions, the Court of Justice of the European Communities has ruled that the enforcement of a judicial decision on the placing under seal or the freezing of the assets of the spouse as a provisional measure in the course of proceedings for divorce does not fall within the scope of the Convention ([36]). The Court took the same view in the case of an application on the part of the wife for the Court to order the husband, as a provisional protective measure, to deliver up a document in order to prevent its use as evidence in a dispute concerning a husband's management of his wife's property, because the management was closely connected with the proprietary relationship resulting directly from the marriage bond ([37]).

33. Matters relating to maintenance, however, come within the scope of the Convention, as is apparent from Article 5, point 2, which governs jurisdiction with regard to maintenance obligations. As was perhaps to be expected, problems have arisen from the common practice of linking maintenance claims with proceedings relating to the status of persons, and, in particular, with divorce proceedings. The Court of Justice of the European Communities has ruled that the Convention is applicable to an interim maintenance award under a divorce judgment ([38]). This point is expressly dealt with in the 1978 amendment to Article 5, point 2, of the Convention.

34. Point 2 of the second paragraph of Article 1 excludes from the scope of the Convention bankruptcies, proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangements, composition and analogous proceedings. These matters had to be excluded given that the Member States of the Community intended, and still intend, to draft a separate Community bankruptcy convention. In relation to Article 16, point 2, which stipulates that, in proceedings which have as their object the dissolution of companies or other legal persons or associations of natural or legal persons, the courts of the Contracting State in which the company, legal person or association has its seat have exlusive jurisdiction, this exclusion may give rise to problems where the dissolution is a consequence of bankruptcy, winding up, judicial arrangement, composition, or analogous proceedings ([39]).

35. Arbitration, a form of proceedings encountered in civil and, in particular, commercial matters, (Article 1, second paragraph, point 4) is excluded because of the existence of numerous multilateral international agreements in this area. Proceedings which are directly concerned with arbitration as the principal issue, e.g. cases where the court is instrumental in setting up the arbitration body, judicial annulment or recognition of the validity or the defectiveness of an arbitration award, are not covered by the Convention. However, the verification, as an incidental question, of the validity of an arbitration agreement which is cited by a litigant in order to contest the jurisdiction of the court before which he is being sued pursuant to the Convention, must be considered as falling within its scope.

36. Social security, which is excluded from the Convention by point 3 of the second paragraph of Article 1, is regarded in some national legal systems as a matter of public law and in others as a mixed legal category on the borderline between public law and private law. Although it could perhaps be argued that this feature alone would be enough to exclude social security from the scope of the Convention as defined in the first paragraph of Article 1, its express exclusion was nevertheless thought to be desirable. There were, however, other reasons as well for excluding social security from the scope of the Convention, such as the fact that it is governed by the Treaties and by secondary Community legislation, and the fact that there are numerous bilateral social security agreements between the Community Member States. The drafters of the Convention considered that this legal situation should not be disturbed by extending the Convention to regulate social security.

37. It should, however, be noted that this exclusion concerns relationships directly connected with the insurance aspect and, particularly, relationships between the insuring body and the insured party, his successors in title and the employer. Ancillary matters, such as direct claims of the injured party against the

insuring body or subrogation of the insuring body to the claims of an injured party as against a third party responsible for the injury or damage, are in principle covered by ordinary legal rules and come within the scope of the Convention.

B. JURISDICTION

38. **General state of the law**

In common with Greek internal law (Code of Civil Procedure, Article 3, paragraph 1, 22) the Convention (Article 2, first paragraph) bases international jurisdiction on the domicile of the defendant. The fundamental provision in the first paragraph of Article 2 expressly dissociates jurisdiction from nationality and, secondly, *requires* proceedings against persons domiciled in the territory of a Contracting State to be brought before the courts of that State except where the Convention itself provides otherwise (specifically in Articles 5 to 18). Consequently, the domicile of a defendant in a Contracting State, irrespective of whether he is a national of such a State, also serves as the criterion for defining the application of the Convention externally. Given that the first paragraph of Article 2 excludes nationality as a factor in determining jurisdiction, the second paragraph provides for the positive assimilation of foreigners to nationals of the State concerned by making the former subject to the rules of jurisdiction applicable to the latter ([40]).

39. The Convention does not itself define domicile; instead, reference is made to the internal law of the State in the territory of which domicile is being investigated for the case in point (Article 52). However, the mere place of residence of the defendant was rejected as a basis of jurisdiction ([41]). Consequently, under the Convention, Article 38 of the Greek Code of Civil Procedure may not be invoked in order to extend the jurisdiction of the Greek courts. For the rest, however, the exclusion of residence as an independent basis of jurisdiction on a par with domicile does not affect the application of Article 23 (1) of the Code of Civil Procedure: if the defendant is domiciled in a non-Contracting State but is resident in a Contracting State, Article 2 will of course not be applicable, but nor can recourse be had to Article 23 (1) of the Code of Civil Procedure which consistently prefers domicile wherever it may be found to exist; if, however, a defendant has no domicile at all but has his place of residence in Greece, then, since such residence constitutes the party's closest geographical connecting factor and thus justifies the application of Article 23 (1) of the Code of Civil Procedure, it must be regarded as satisfying the purpose of Article 2 and hence as constituting a basis of jurisdiction.

40. As is apparent from the first paragraph of Article 2, since the Convention governs solely international jurisdiction and not in principle territorial competence, it merely requires that the courts of the State of domicile of the defendant be responsible without stipulating that it be heard by the *particular* court for the place where the defendant is domiciled. The Convention, however, contains no particular provisions determining the legal domicile of certain parties because, as stated above, it generally refers that issue to the internal law of the State concerned. The third paragraph of Article 52 nevertheless stipulates the law applicable when determining the dependent domicile in question. However, the Convention does not easily accommodate national provisions which displace the material time and replace the present domicile by a previous domicile. Thus, the Convention takes precedence over Article 24 of the Code of Civil Procedure, which applies to Greek public servants posted abroad without extraterritorial status (e.g. teachers at Greek schools or works supervisors for Greek workers in another Contracting State) and makes them subject to the jurisdiction of the courts of their place of domicile before being sent abroad. Accordingly, if a Greek teacher previously domiciled in Athens is posted to the Greek school in Munich and becomes domiciled there, general jurisdiction will henceforth be vested exclusively in the Munich courts, and no longer in the Athens courts.

41. The Convention treats the seat of companies and other legal persons as their domicile (Article 53, first paragraph, first sentence). The seat is determined in accordance with the rules of private international law of the court seised (Article 53, first paragraph, second sentence). The basic rule is the same as that in Article 25 of the Code of Civil Procedure, as regards including associations of natural persons who pursue a common aim without legal personality, since it was the intention when framing the Convention ([42]) that they should be covered by the 'company'.

42. **Special bases**

Article 3 enunciates the general principle of the Convention, that persons domiciled in a Contracting State may be sued in the courts of another Contracting State only to the extent permitted under the special jurisdictions stipulated in Articles 5 to 18 of the Convention ([43]). Hence, as regards matters within its scope, the Convention does not allow of the existence of special jurisdictions other than those it itself specifies. However, the restriction applies only to matters within its scope ([44]). In disputes involving no foreign element, it will therefore still be possible, after the Convention's entry into force, for persons domiciled in Greece to be sued in *Greek* courts other than the court of their place of domicile by virtue of special jurisdictions under the

Greek courts other than the court of their place of domicile by virtue of special jurisdictions under the Greek Code of Civil Procedure, even where such jurisdictions are not provided for in the Convention. The exhaustive nature of the special jurisdictions which, according to the Convention, provide the basis for determining jurisdiction becomes apparent once a person is to be sued in a Contracting State other than his State of domicile. The Convention thus allows general jurisdiction of domicile as a basis for international jurisdiction to be set aside only in favour of special jurisdictions exhaustively enumerated in the Convention itself. This approach is not unknown in Greek internal law. Under Article 22 of the Code of Civil Procedure, a person may be sued before a court other than that of his place of domicile only where the law so provides, i.e. where special jurisdiction is stipulated.

43. In this connection, the Convention gives a specific, but only indicative, list of bases of jurisdiction provided for under national procedural rules but considered under the Convention to be exorbitant (*règles de compétence exorbitantes*). These include rules which base jurisdiction on the fact that either the plaintiff or the defendant is a national of the State in question (Belgium, France, Luxembourg, Netherlands), on the service of a writ of summons on national territory on a defendant who is temporarily present there (Ireland, United Kingdom), on the seizure of property situated on national territory (United Kingdom), on the presence on national territory of property belonging to the defendant (Denmark, Federal Republic of Germany, Greece, United Kingdom) or on other forms of unfavourable treatment of foreign nationals (Italy). Consequently, Greek courts will in future be unable to base their jurisdiction on the special jurisdiction in respect of property under Article 40 of the Code of Civil Procedure, if the defendant is domiciled in any Contracting State. The existence, in a State, of property belonging to the defendant, and even the presence there of the object in litigation, are not regarded by the Convention as constituting a sufficient connecting factor to provide a basis of jurisdiction.

44. Both the general provisions of the Convention and the exclusion of exorbitant bases of jurisdiction in the second paragraph of Article 3 relate solely to defendants domiciled in a Contracting State, irrespective of the domicile and, of course, the nationality of the plaintiff. However, where a defendant is not domiciled in a Contracting State the Convention does not contain any rules of its own but refers to the internal law of the State of the court hearing the action (Article 4, first paragraph). As against such a defendant, the Convention permits any person domiciled in a Contracting State, whatever his nationality, to avail himself of the law of that State, including, of course, the rules of exorbitant jurisdiction which are excluded under the second paragraph of Article 3 (Article 4, second paragraph). Consequently, although defendants are treated unequally according to whether or not they are domiciled in a Contracting State, plaintiffs at least enjoy equal treatment irrespective of nationality, provided they are domiciled in a Contracting State. However, the judgment handed down will, in any event, be recognized and enforced in accordance with the Convention. Apart from the possibility of prorogation of jurisdiction pursuant to Articles 17 and 18, an express exception to the principle that the application of the Convention is dependent on the defendant being domiciled in a Contracting State is constituted by the exclusive jurisdiction provided for under Article 16. In the five categories of proceedings listed in Article 16, the Convention considers that the very close link between the dispute and the territory of a Contracting State must prevail over the fact that the defendant is not domiciled in the territory of any of the Contracting States. Thus, in addition to the domicile of the defendant, the Convention also uses the situation of immovable property, the seat of legal persons, the place where entries have been made in public registers and the place where a judgment has been or is to be enforced as objective ([45]) connecting factors for defining its application.

45. The following sections 2 to 6 of Title II (Articles 5 to 18) contain special rules directly governing jurisdiction. They lay down special bases of jurisdiction, in some cases supplementing general jurisdiction based on domicile, (e.g. Article 5 dealing with certain categories of proceedings and Article 6 dealing with certain categories of persons, in particular defendants), and in others excluding such jurisdiction (Article 16). For certain categories of proceedings which, it was felt, required special procedural arrangements, such as matters relating to insurance and consumer contracts, the relevant Sections 3 (Articles 7 to 12a) and 4 (Articles 13 to 15) lay down self-contained rules on jurisdiction in the sense that, of all the other provisions of the Convention relating to jurisdiction, only Article 4 dealing with the case of defendants with no domicile in a Contracting State ([46]) and Article 5, point 5, dealing with disputes arising out of the operation of a branch, apply as well. Consequently, in the case of matters relating to insurance and in the case of consumer contracts, the domicile of the parties to the dispute is taken into account as a possible basis of jurisdiction only in so far as it is specifically referred to in the relevant section, and recourse may not be had to the general provision in Article 2.

46. **Special concurrent jurisdiction**

Articles 5 to 6a, which lay down a series of objective (Article 5) and subjective (Article 6) connecting factors, specify the cases in which the Convention allows a

person domiciled in one Contracting State to be sued in another such State. In other words, they provide for 'special jurisdiction', which, provided that a defendant is domiciled in a Contracting State and that the bases of the special jurisdiction exist, in the case in question, in the territory of another Contracting State, assign jurisdiction to the latter State as well as to the State of domicile of the defendant. The choice is a matter for the plaintiff and is expressed when proceedings are instituted ([47]).

47. Article 5 of the original Convention contained five cases of special jurisdiction (points 1 to 5), namely matters relating to contracts, to maintenance obligations, to tort, delict or quasi-delict, to civil claims for damages in criminal courts and to disputes arising out of the operations of a branch. With the accession of Denmark, Ireland and the United Kingdom, the 1978 Accession Convention added two further cases, namely disputes relating to trusts and disputes relating to the payment of remuneration in respect of salvage. Article 5 is one of the most important and most frequently applied articles of the Convention.

48. Article 5, point 1, regarding matters relating to contracts establishes the jurisdiction of the court of the place of performance of the obligation in question. The place of performance is thus recognized as a connecting factor which, for the purposes of jurisdiction, can apply with respect to all matters arising out of the operation of a contract. According to the case law of the Court of Justice of the European Communities, this special jurisdiction may be invoked even where the existence of the contract on which the claim is based is in dispute between the parties ([48]). Matters relating to a contract can also include obligations in regard to the payment of a sum of money which have their basis in the relationship existing between an association and its members, irrespective of whether the obligations in question arise simply from the act of becoming a member or from that act in conjunction with one or more decisions made by organs of the association ([49]). The definition of the courts referred to in the Article gives rise to greater difficulties than the delimitation of the matters covered. Thus, it has been held that the place of performance of an obligation is to be determined in accordance with the law which governs the obligation in question according to the rules of private international law of the court before which the matter is brought ([50]). If the national law applicable so permits, the place of performance may be specified by the parties without it being necessary for their agreement to fulfil the formal conditions required under Article 17 of the Convention for prorogation of jurisdiction ([51]). Finally, as regards the obligation the place of performance of which constitutes the basis of special jurisdiction, whereas the Court previously defined it as the contractual obligation (of any kind) forming the basis of the legal proceedings ([52]), it now appears to be limited, in the case of proceedings based on a number of obligations possibly to be performed in a number of places, to the obligation which characterizes the contract ([53]).

49. Special jurisdiction based on the place of performance of a contractual obligation differs from current Greek internal law (Code of Civil Procedure, 33) in two respects. Firstly, it relates only to disputes concerning contracts, with unilateral legal acts not being covered by the actual wording of the provision. However, if the term 'contract' in Article 5, point 1, is interpreted specifically within the framework of the Convention, it would probably include quasi-contractual obligations within the meaning of Article 33 (2) of the Code of Civil Procedure, whereas it remains an open question whether disputes arising from unilateral legal acts are covered. Secondly, under Article 5 only the place of performance of the obligation is considered to be relevant and not also, as in Article 33 (1) of the Greek Code of Civil Procedure, the place where the contract was concluded. Finally, in line with current Greek legal thinking, it is clear under the Convention that the place of performance means the place where the obligation has been or is to be performed, obviously as determined by the parties or under the law applicable ([54]). It should be noted here that with regard to disputes between the master and a member of the crew of a sea-going ship registered in Denmark, in Greece or in Ireland, Article Vb of the 1968 Protocol provides for the possibility of intervention by the competent diplomatic or consular officers.

50. Article 5, point 2, basically provides that jurisdiction in respect of maintenance claims, whatever their legal origin or content ([55]), can also be exercised by the courts for the place where the maintenance creditor is domiciled or habitually resident. This affords the latter a degree of legal protection since he is thus not obliged to call upon a court some distance away from the place where he is established. The 1978 Accession Convention extended this form of special jurisdiction. It now includes maintenance proceedings which are combined, or heard jointly, with proceedings concerning the status of a person — which do not, in themselves, come within the scope of the Convention — and the jurisdiction of the court hearing the main action is thus extended to ancillary maintenance proceedings, unless such jurisdiction is based solely on the nationality of one of the parties. The dependence of the maintenance claim on the main action concerning the status of a person will therefore extend jurisdiction in every case where the latter is not construed solely on the basis of the nationality of one of the parties. Accordingly, since Greek

law provides by way of exception that in matrimonial disputes, and disputes between parents and children, international jurisdiction can be based simply on the nationality of any one of the parties (Code of Civil Procedure, Articles 612 and 622), the combining, or joint hearing, of such proceedings with maintenance proceedings (Code of Civil Procedure, Articles 592 (2) and 614 (2)) is not an option which can be exercised under the Convention unless there is a further criterion other than nationality on which international jurisdiction can be based.

51. Article 5, point 3, provides for the special jurisdiction of the *forum delicti commissi*. This covers all obligations, pecuniary or otherwise, resulting from torts, delicts or quasi-delicts, and refers them to the courts for the place where the harmful event occurred. According to the Court of Justice of the European Communities ([56]), this can be either the place where the damage occurred or the place of the event giving rise to it. While this interpretation of the Convention on the subject of the relevant place is in line with current Greek law, the Convention nevertheless differs from Greek law in that, as it does not require that an act giving rise to criminal proceedings must have been committed (Code of Civil Procedure, 35), it also covers claims resulting from purely civil delicts.

52. Civil claims for damages (or restitution) based on an *act giving rise to criminal proceedings* are covered by Article 5, point 4. Under this provision, the possibility of bringing a civil action in the context of criminal proceedings constitutes an independent basis of jurisdiction, with the result that the criminal court, even if sitting elsewhere than 'the place where the harmful event occurred' (Article 5, point 3) ([57]), can acquire jurisdiction in respect of the civil action to the extent that its internal law so permits. While national legal systems thus remain free to determine whether civil actions in such circumstances are permissible and how criminal courts should proceed with respect to such actions, national codes of criminal procedure are directly affected by Article II of the 1968 Protocol. In particular, this Article provides (in the first paragraph) for the possibility of representation ('by persons qualified to do so') for defendants domiciled in a Contracting State who are being prosecuted in the criminal courts of another Contracting State of which they are not nationals for an offence which was not intentionally committed. According to the Court of Justice of the European Communities, this provision applies if subsequent civil proceedings have been, or may be, brought ([58]). By comparison with this provision, Greek law (Code of Criminal Procedure, 340, paragraph 2, first subparagraph) is in principle more strict, in that it permits a defendant to be represented only where he is accused of a petty offence or a minor crime carrying a financial penalty, a fine or a prison sentence of not more than three months, and not in every case of prosecution for an offence not intentionally committed. Consequently, under the Convention, Article 340, paragraph 2, first subparagraph, of the Code of Criminal Procedure will be replaced by Article II of the 1968 Protocol where it applies ([59]).

53. Jurisdiction in the case of disputes arising out of the operations of a branch, agency or other establishment (Article 5, point 5) is recognized under Greek law only in the form of jurisdiction based on partial domicile for business purposes (Civil Code, Article 51, subparagraph 3, as amended by Article 2 of Law 1329/1983; Code of Civil Procedure, Article 23, paragraph 2) and has not been commonly applied as a basis of jurisdiction. However, as regards the application of the Convention, the Court of Justice of the European Communities has delivered three judgments clarifying the meaning of the provision in question. Firstly, it did not apply the provision to the case of a sole agent who was not subject either to the control or to the direction of the principal ([60]). Secondly, it interpreted the meaning of a 'branch', stressing in particular that it must have the appearance of permanency as a place of business and as an extension of a parent body, and the meaning of disputes arising out of 'operations', which it considered as comprising contractual and non-contractual obligations concerning the management of the branch itself and undertakings entered into in the name of the parent body ([61]). Thirdly, it did not apply the provision in the case of an independent commercial agent entitled to represent several undertakings at the same time and who being free to arrange his own time and work did no more than transmit orders to the parent undertaking ([62]).

54. The provision contained in Article 5, point 6, is foreign to Greek law, which does not recognize trusts as such. This provision was added under the 1978 Accession Convention and it stipulates that the disputes to which it refers and which concern the creation or operation of a trust are subject to the jurisdiction of the Contracting State in which the trust is domiciled.

55. Article 5, point 7, introduces into the Convention as a basis of special jurisdiction the arrestment of cargo or freight in disputes concerning remuneration in respect of salvage at sea. Following the uncertainties which existed prior to the introduction of the Code of Civil Procedure, arrestment is not recognized as a basis of jurisdiction under modern Greek internal law. The latter, of course, recognizes jurisdiction based on property (Code of Civil Procedure, Article 40) in the more

general sense, but precisely this jurisdiction is not allowed under the Convention (63). Article 5, point 7, of the Convention has to some extent re-introduced jurisdiction based on property, but in a very restricted form, i.e. only in the case of disputes concerning remuneration in respect of the salvage of a cargo or freight and further subject, in accordance with the traditional approach under common law (64), to the condition that the cargo or freight has been or could have been arrested.

56. The bases of special jurisdiction under Article 6 of the Convention which arise from personal connecting factors are in substance known in Greek law. The main differences between the Convention and the Greek Code of Civil Procedure relate to the following three points which correspond to the three special jurisdictions under the Convention:

(a) Jurisdiction in the case of joint proceedings is confined under the Convention to the courts for the place where any one of the defendants is *domiciled*. Greek law goes further and permits the institution of joint proceedings before the court which is vested with either general or some special form of jurisdiction in respect of any one of the defendants.

(b) Article 6, point 2, of the Convention limits jurisdiction based on related actions (see Code of Civil Procedure, Article 31) as a basis of international jurisdiction to third party proceedings. However, even in such instances it is not allowed as a basis of jurisdiction if it is found that the sole purpose of the third party proceedings was to distort the normal limits of international jurisdiction by removing the third party from the jurisdiction of the court which would be competent in his case. As third party proceedings are not recognized under German law, the Federal Republic of Germany preferred not to recognize this basis of jurisdiction in the case of its courts and instead to retain the requirements of notice of proceedings (German Code of Civil Procedure, 72 to 74, 1968 Protocol, Article V).

(c) Whereas jurisdiction based on a counter-claim does not, under Greek law, require that the opposing claims be related (Code of Civil Procedure, Articles 34 and 268), the Convention limits this jurisdictional basis and requires that the counter-claim must arise 'from the same contract or facts on which the original claim was based'.

57. Under Article 6a, which was added by the 1978 Accession Convention, a court with jurisdiction in actions relating to liability arising from the use or operation of a ship also has jurisdiction over claims for limitation of such liability. This makes it legally easier for shipowners to limit their liability since they will be able to institute proceedings for such limitation before the courts of their place of domicile.

58. Matters relating to insurance

The whole of Section 3 (Articles 7 to 12a) which governs international jurisdiction in matters relating to insurance, is essentially concerned with the legal protection of policy-holders *vis-à-vis* insurers. It provides for proceedings to be brought against an insurer before the courts for the place where the policy-holder is domiciled (Article 8, point 2), or, in the case of liability insurance or insurance of immovable property, before the courts for the place where the harmful event occurred (Article 9). The same points of contact also apply in the case of actions brought by an injured party directly against the insurer, where such direct actions are permitted (Article 10, second paragraph). In addition, in so far as the law of the court permits third party proceedings, the Convention extends jurisdiction to cover the case of an insurer being joined in proceedings which an injured party has brought against the insured (Article 10, first paragraph), obviously without there being the restriction laid down by Article 6, point 2, in respect of false third party proceedings. There is also a corresponding legal requirement imposed on the insurer in cases where it is he who institutes proceedings. An insurer 'may bring proceedings only in the courts of the Contracting State in which the defendant is domiciled, irrespective of whether he is the policy-holder, the insured or a beneficiary' (Article 11, first paragraph). Lastly, Articles 12 and 12a provide limited scope for prorogation by permitting agreements between the parties provided that they are entered into after the dispute has arisen (Article 12, point 1) or that they are to the advantage of the party in dispute with the insurer (Article 12, points 2 and 3).

59. Consumer contracts

The content in Section 4 (Articles 13 to 15) dealing with jurisdiction over consumer contracts (it has been found that sale of a machine on instalment credit terms by one company to another is not a contract of this nature) (65) is in substance similar and are also unknown in Greek internal law. Thus, a seller or a lender may be sued in the courts for the place where the buyer or borrower (the consumer) is domiciled (Article 14, first paragraph), whereas a seller suing a buyer, or a lender suing a borrower, can only do so in the courts where the defendant is domiciled (Article 14, second paragraph).

Here too there is limited scope for prorogation, agreements between the parties being permitted only if they are entered into after the dispute has arisen (Article 15, point 1) or if they are to the advantage of the buyer or borrower (i.e. the consumer) (Article 15, point 2, see also point 3).

60. **Special exclusive jurisdiction.**

As in the case of Greek internal law (Code of Civil Procedure, Articles 27 to 31 and Article 34), the Convention (Article 16) specifies a number of bases of *exclusive* jurisdiction in the sense that if the pre-conditions for any one of them are fulfilled, a plaintiff may not sue before the courts of the Contracting State in which the defendant is domiciled as in the case of the matters covered by Articles 5 and 6, and, irrespective of whether or not the defendant is domiciled in a Contracting State, may sue only before the courts of the State vested with the relevant exclusive jurisdiction. The list of bases of exclusive jurisdiction given in the Convention (Article 16) is in several respects more restrictive than under Greek internal law. Under the Convention (Article 16, point 1), 'proceedings which have as their object rights *in rem* in, or tenancies of, immovable property' are subject to the jurisdiction of the *forum rei sitae* but, unlike Article 29 (1) of the Greek Code of Civil Procedure, this does not appear to cover claims against any person in possession *(actiones in rem scriptae)*, proceedings for compensation for expropriation ([66]) or disputes relating to the transfer of a usufructuary right in immovable property ([67]).

In contrast to the generalized jurisdiction in respect of company disputes under Greek law (Code of Civil Procedure, Article 27), which includes disputes arising out of the relationship between a company and its members and between the members themselves, the Convention (Article 16, point 2) limits the corresponding exclusive jurisdiction to proceedings concerned with validity, nullity or dissolution — albeit not only as regards companies but as regards legal persons in general — and not only as regards the existence of the legal persons as such but also as regards the validity of the decisions of their organs. Similarly, in Article 16, point 5 (enforcement of judgments), the Convention is narrower than Greek internal law, not as regards the proceedings covered but as regards the courts stated to have jurisdiction; reference is made only to the courts of the Contracting State in which the judgment has been or is to be enforced ([68]) and not also to the courts vested with general jurisdiction in respect of the third party entering the objection, which courts may be competent under Greek law pursuant to Article 933 (2) in conjunction with Article 584 of the Code of Civil Procedure in cases where an order has been granted but other enforcement measures have not (yet) been taken. Nor does this point cover, under the enforcement procedure, objections which are based on claims over which the courts of the State of enforcement have no jurisdiction ([69]). Lastly, the Convention does not recognize jurisdiction based on related actions to the extent provided in Article 31 (1) of the Code of Civil Procedure: it confines such jurisdiction to third party proceedings (Article 6, point 2; but see also Article 22) ([70]) and assigns it concurrent status only. By contrast with these restrictive features, the Convention (Article 16, points 3 and 4) confers exclusive jurisdiction in proceedings which have as their object the validity of entries in public registers and proceedings concerned with the registration or validity of patents, trademarks, designs or other similar rights upon the courts of the State in which the relevant records are kept. The former category, namely entries in public registers, may be considered, at least as regards rights *in rem* in immovable property, as covered in Greek internal law by Articles 29 (1) and 791 (2) of the Code of Civil Procedure taken together. As regards the latter category, relating to proceedings concerned with industrial property ([71]), Greek internal law provides for wider, and not exclusive, jurisdiction, with competence in respect of trademarks devolving upon the normal administrative tribunals. With particular reference to European (as opposed to Community) patents which are not valid throughout the Community, it is specified that exclusive jurisdiction rests with the courts of the particular Contracting State with respect to which the validity of the patent in the particular case is challenged (Article Vd of the 1968 Protocol) ([72]).

61. **Prorogation of jurisdiction**

The rules on prorogation of jurisdiction occupy a central position in the Convention and have repeatedly been the subject of interpretations by the Court of Justice of the European Communities. Exactly as in the presumption in Article 44 of the Code of Civil Procedure, the Convention firstly recognizes the exclusive nature of agreements conferring jurisdiction (Article 17, first paragraph, first sentence *in fine*) and allows either a specific court or the *courts in general* of a Contracting State to be designated as having jurisdiction ([73]). Again in common with Greek internal law (Code of Civil Procedure, Article 43), the Convention allows jurisdiction to be conferred in respect of disputes which may arise in the future only where they are in connection 'with a particular legal relationship' (Article 17, first paragraph, first sentence). However, in contrast to Greek law (Code of Civil Procedure, Articles 42 and 43) no distinction is made as regards the form of the agreement conferring jurisdiction according to whether it relates to present or future disputes (Article 17, first paragraph, first sentence: '... disputes which have arisen or which may arise...').

62. The Convention is more strict in its requirements as to the form an agreement conferring jurisdiction must take than Greek internal law, which does not in principle require that the agreement be in writing (Code of Civil Procedure, Article 42, see also the exception in Article 43). The Convention is basically oriented towards such agreements being formulated in writing and requires them to be in one of the following three forms:

(a) agreement in writing;

(b) oral agreement evidenced in writing;

and

(c) in international trade or commerce, a form which accords with practices in that trade or commerce of which the parties are or ought to have been aware.

With regard to forms (a) and (b), the Court of Justice of the European Communities has ruled that the requirement as to written form is fulfilled if the clause conferring jurisdiction is included among the general conditions printed on the back of a contract, provided that the contract contains an express reference to those general conditions ([74]); it has also ruled that in the case of an orally concluded contract, the vendor's written confirmation must have been accepted in writing by the purchaser, oral acceptance by the purchaser being sufficient only within the framework of a continuing trading relationship between the parties which is based on the general conditions of one of them, which conditions must contain a clause conferring jurisdiction ([75]). Recent judgments of the Court of Justice have become even more liberal. The Court has ruled that the second form, i.e. oral agreement evidenced in writing, can be complied with if the clause conferring jurisdiction is printed on a bill of lading which has been signed by only the carrier ([76]) and, more generally, if the clause has been confirmed in writing by one party only, provided that the document concerned has been received by the other and that the latter has raised no objection ([77]). In addition, agreements conferring jurisdiction which pre-date the entry into force of the Convention, and which would have been void under the national law in force at that time, can be regarded as valid if the proceedings were instituted after the entry into force of the Convention, the existence of jurisdiction being assessed, pursuant to Article 54, in accordance with Title II of the Convention ([78]). Finally, prorogation of jurisdiction is also rendered easier by the Court of Justice's view that agreement between the parties with regard to the place of performance, which constitutes a basis of jurisdiction pursuant to Article 5, point 1 ([79]), is clearly a substantive agreement and is not subject to the formal conditions laid down in Article 17 for prorogation of jurisdiction ([80]).

63. The Court of Justice of the European Communities has also widened the subjective and objective limits of agreements conferring jurisdiction. Thus, in the case of a contract of insurance for the benefit of a third party, it has ruled that the third party (the insured) may rely on conferral of jurisdiction even where he was not a party to the contract and did not sign the clause conferring jurisdiction provided that the consent of the insurer in that respect has been clearly manifested ([81]). The same holds true in the case of a third party holding a bill of lading *vis-à-vis* the carrier, provided that the national law applicable considers the third party to have succeeded to the shipper's rights and obligations ([82]). Further, as regards the objective scope of agreements conferring jurisdiction, the Court of Justice has found that the court before which a dispute has thereby been brought is not prohibited from taking into account a set-off connected with the legal relationship in dispute ([83]).

64. The effect of agreements conferring jurisdiction is limited by two factors under the Convention. The existence of exclusive jurisdiction under Article 16 cannot, in the case in point, simply be circumvented, as in Greek law (Code of Civil Procedure, Article 42 (1), second paragraph), by an express agreement conferring jurisdiction, but is a bar to *any form* of prorogation. This is also true in the case of conflict with Articles 12 or 15 of the Convention which permit agreements conferring jurisdiction in the case of matters relating to insurance and in the case of consumer contracts, provided that they are entered into after the dispute has arisen, or that they are to the advantage of the policyholder, buyer or borrower ([84]). An agreement conferring jurisdiction is however not invalidated by the fact that it is drawn up in a language other than that prescribed by the legislation of a Contracting State ([85]). Under the Convention, the effect of agreements conferring jurisdiction also differs according to the domicile of the parties. The rules of the Convention apply in full if at least one of the parties is domiciled in a Contracting State (Article 17, first paragraph, first sentence). If none of the parties is so domiciled and the agreement confers jurisdiction on the courts of a Contracting State, its effect will be determined according to the law of that State, and the courts of other Contracting States might as a result lose any legitimate jurisdiction they might otherwise have. The third sentence of the first paragraph of Article 17 is specifically aimed at ensuring that this effect of loss of jurisdiction is dealt with in a uniform manner: it allows the courts of other Contracting States to have jurisdiction only if the courts chosen in the agreement have declined it ([86]), which means that the courts of other Contracting Parties may not examine

the validity of the agreement conferring jurisdiction as an incidental issue.

65. As in the case of Greek internal law (Code of Civil Procedure, Article 42 (2), 3 (1)) the Convention (Article 18) also provides for tacit conferral of jurisdiction where a defendant enters an appearance before a court which lacks jurisdiction and he does not plead the court's lack of jurisdiction. The Court of Justice of the European Communities ([87]) has widened this basis of jurisdiction to cover unrelated counter-claims which, though not subject to the jurisdiction of the court, are lodged by the defendant and contested by the plaintiff in court in proceedings on the substance of the case. There can be tacit conferral even if jurisdiction has already been expressly conferred on another court pursuant to Article 17 ([88]). Furthermore, as in the case of Greek law, according to the consistent judicial practice of the Court of Justice of the European Communities ([89]), a defendant wishing to challenge a tacit conferral of jurisdiction is not obliged to confine his defence to contesting the court's jurisdiction, but may also make subsidiary submissions on the substance of the action in order not to be left without a defence in case the court finds that it has jurisdiction.

66. **Examination as to jurisdiction**

As in the case of Greek internal law (Code of Civil Procedure, Articles 4, 46, first subparagraph and 263 (a)), under the Convention (Articles 19 and 20) a court must in principle examine of its own motion whether it has jurisdiction. This rule applies without exception where, by virtue of Article 16, the courts of another Contracting State have exclusive jurisdiction (Article 19) which cannot be set aside either by an express (Article 17, third paragraph) or tacit (Article 18 *in fine*) agreement conferring jurisdiction; the rule is indeed so strict that it requires the national court to declare of its own motion that it has no jurisdiction where the courts of another Contracting State have exclusive jurisdiction, even if, as in the case of ordinary appeals (Code of Civil Procedure, Articles 522, 533 (1) and 535 (1)) and further appeals (in cassation) (Code of Civil Procedure, Article 562 (4) by implication and 577 (3)), the national rules of procedure limit the court's reviewal to the grounds raised by the parties and these do not include a claim of lack of jurisdiction ([90]). However, if the defendant is domiciled in a Contracting State — the classic case to which the Convention applies ([91]) — the fact that jurisdiction may be implied where a defendant enters an appearance before a court without contesting its jurisdiction (Article 18) means that, as under Greek law (Code of Civil Procedure, Article 4, first subparagraph, see also Article 263 (a)), a court will of its own motion examine jurisdiction only where the defendant does not enter an appearance (Article 20, first paragraph). As for the subject-matter itself, the court's examination will of course be confined to the grounds from which jurisdiction may be derived pursuant to the Convention (Article 20, first paragraph *in fine*). The Convention adds the rule, which is new to Greek law ([92]) that before giving a judgment in default, the court must verify 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 at least that all necessary steps have been taken to this end (Article 20, second paragraph). This transitional provision has, however, already been replaced (Article 20, third paragraph) by Article 15 of the Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil and commercial matters, which Greece has ratified ([93]). As well as this, and on a more general basis, the second paragraph of Article IV of the 1968 Protocol provides that documents for service may also be sent by the appropriate public officers of the State in which they have been drawn up directly to the appropriate public officers of the State in which the addressee is to be found, thus enabling there to be direct communication between public officers in the Contracting States ([94]).

67. **Lis pendens**

Article 21 of the Convention expressly regulates jurisdiction in cases of *lis pendens* in a way which corresponds to Greek internal law (Code of Civil Procedure, Article 222 (1)), but instead of obliging courts other than that first seised to stay their proceedings (as under the Code of Civil Procedure, Article 222 (2)), it requires them to dismiss the action on the grounds that they lack jurisdiction (Article 21, first paragraph, directly, and Article 21, second paragraph, by implication). Only as an exception may a court which would be required to decline jurisdiction stay its proceedings if the jurisdiction of the other court is contested (Article 21, second paragraph). However, the question of when proceedings may be regarded as having been instituted, and thus as definitively pending, in particular whether the filing of an action is enough, or whether notice must also be served, is one to be determined in accordance with the national law of each of the courts concerned ([95]).

68. **Related actions**

The Convention also provides for a corresponding possibility of stay of proceedings in the case of related actions (Article 22). Under the Convention, related actions do not constitute an independent basis of jurisdiction, but possible grounds for staying proceedings before any court other than that first seised where proceedings are pending before the courts of two or more Contracting States ([96]). In addition to a stay of

proceedings, the Convention also allows a court other than that first seised to decline jurisdiction in respect of a related action pending before it if the following three conditions are all fulfilled:

(a) one of the parties so requests;

(b) the court first seised has jurisdiction over both actions; such jurisdiction cannot however be based on the fact that they are related except in the cases covered by Article 6, point 2 ([97]);

(c) the law of the court other than that first seised permits the consolidation of related actions pending in different courts ([98]).

This last condition is not recognized by Greek law, which allows actions to be heard jointly if they are in principle pending in the same court (Code of Civil Procedure, Article 246). Under the Convention, Greek courts would therefore be able to stay their proceedings, but not to decline jurisdiction in favour of the courts of another Contracting State. Lastly, the Convention gives a quasi-legislative definition of related actions (Article 22, third paragraph) which is vaguer and thus broader than the definition given to the concept in Greek internal law (Code of Civil Procedure, Article 31(1)).

69. The rule that the court first seised takes precedence, as contained in Greek law (Code of Civil Procedure, Article 41, 221(1), point (c)) and expressed in the provisions on *lis pendens* and related actions in the Convention, also applies under the latter in particular in the rare instances where several courts have exclusive jurisdiction (Article 23). In such cases, exclusive jurisdiction as to the subject-matter gives way to the criterion as to time, i.e. to the rule of precedence of the court first seised of the action.

70. **Provisional and protective measures**

Although, in matters falling within its scope ([99]), the Convention does not prevent the court vested with international jurisdiction as to the substance from ordering provisional and protective measures, it also allows the simultaneous application of the various national laws in respect of provisional or protective measures in order not to impede the operation of interim judicial protection. Thus, Article 24 of the Convention leaves the courts of a Contracting State free to order provisional or protective measures available under the law of that State even if, under the Convention, the courts of another Contracting State have jurisdiction as to the substance of the matter; this is in line with the principle that jurisdiction in respect of provisional or protective measures is separate, as expressed in Greek internal law in Articles 683 (3) and 889 (1) of the Code of Civil Procedure: the limitation that a particular court has jurisdiction as to the substance of the dispute does not in principle affect the possibility of provisional or protective measures being taken by other courts.

C. RECOGNITION AND ENFORCEMENT

71. Recognition and enforcement of judgments is dealt with in Title III (Articles 25 to 49). Title IV (Articles 50 and 51) deals with the enforcement of authentic instruments and court settlements.

72. Title III begins with a definition of judgments which are to be recognized or enforced in accordance with the Convention (Article 25) and is divided into three sections, the first of which (Articles 26 to 30) covers the recognition of judgments, the second (Articles 31 to 45) the enforcement of judgments, while the third (Articles 46 to 49) contains common provisions concerning the whole Title.

73. Such judgments will be recognized and enforced as fall within the scope of the Convention, i.e. judgments in civil and commercial matters subject to the qualifications and exceptions laid down in Article 1 ([100]). Moreover, in accordance with Article 25, the judgments concerned must have been delivered by a court in a Contracting State, whatever such judgments may be called nationally (e.g. decree, order, decision or writ of execution) and irrespective of the nationality or domicile of the parties. Under the same provision, the determination of costs or expenses by an officer of the court is also deemed to be a judgment. The Court of Justice of the European Communities has, however, found that judicial decisions authorizing provisional or protective measures which have been delivered without the party against which they are directed having been summoned to appear and which are intended to be enforced in their country of issue without prior service cannot be recognized or enforced under the Convention ([101]).

74. The Convention draws a distinction between the recognition and enforcement of judgments. This distinction, which has always been known in Greek procedural law, is legally enshrined in the Code of Civil Procedure (Articles 323, 780, 905; see also Articles 903, 906).

75. **Recognition**

By its recognition a judgemnt generates the same legal effects in the State addressed as those conferred on it by the State in which the judgment was given. The Convention facilitates considerably the free movement

of judgments in the Contracting States to a reasonable degree. As regards the recognition of judgments, this principle is expressed at two levels: firstly, at procedural level, by providing for automatic recognition, i.e. without any prior special assessment by a judicial body (Article 26, first paragraph). This solution is also known in Greek law, in respect of the recognition of the *res judicata* force of foreign judgments (Code of Civil Procedure, Article 323) ([102]). It should be noted that the Convention allows the recognition of foreign judgments at whatever stage in the judicial proceedings, including, therefore, decisions which have not acquired the force of *res judicata*. However, if an ordinary appeal has been lodged against a judgment or, in particular in the case of judgments given in Ireland or the United Kingdom, if enforcement is suspended in the State in which the judgment was given by reason of an appeal, the court of the State addressed may stay the proceedings for recognition of the judgment. Secondly, the principle applies in respect of the conditions for recognition, which are comparatively limited and are negatively framed, thereby constituting grounds for refusing recognition rather than positive conditions (Articles 27 and 28; see also Code of Civil Procedure, Article 323).

76. The automatic recognition of judgments at procedural level obviously operates in cases where there is no dispute between the interested parties as to the validity of the judgment in the State addressed. If, as often happens in commerce, the validity of the judgment is disputed, the party wishing to rely on it may seek recognition either as a principal or incidental issue. Where the application for recognition is the principal issue, the rules of Sections 1 and 2 of Title III governing the enforcement of judgments apply. If the recognition of a judgment is sought as an incidental question, the court of the Contracting State entertaining the principal proceedings will also have jurisdiction over the question of recognition (Article 26, second and third paragraphs). These rules also successfully resolve in a more general context the problems which arose in Greece from the lack of a special procedure for the recognition of foreign judgments and which led to the addition of paragraph 4 to Article 905 of the Code of Civil Procedure.

77. Articles 27 and 28 set forth a series of grounds for refusing recognition. A comparison of these grounds with the corresponding conditions in Article 323 of the Code of Civil Procedure shows similarities and differences which it is not possible to detail in this report ([103]). The point to be emphasized is that as a consequence of its character as a 'double' convention ([104]), the Convention does not in principle allow the State addressed to review the jurisdiction of the court which gave the judgment (Article 28, third paragraph), in contrast to the provisions in point 2 of Article 323 of the Code of Civil Procedure. To the list of grounds for refusing recognition of foreign judgments must be added that laid down by Article II of the 1968 Protocol.

78. This solution can be explained if two facts are taken into account: firstly, that jurisdiction both in the State in which the judgment was given and in the State addressed is dealt with in a uniform manner by the Convention and, secondly that, in as much as Article 29 (see also Article 34, third paragraph) contains the general rule that foreign judgments may not be reviewed as to their substance, the court of the State addressed does not have the power to carry out a substantive examination of the findings on which the court of the State in which the judgment was given based its jurisdiction ([105]). There is a basically irrefutable presumption that the judgment to be recognized was given by a court which had jurisdiction in accordance with the Convention. The Convention also rules out the possibility of the court in the State addressed invoking public policy as a ground for reviewing any breach of the rules on jurisdiction by the court of the State in which the judgment was given. Thus, according to the second phrase in the third paragraph of Article 28, 'the test of public policy referred to in point 1 of Article 27 may not be applied to the rules relating to jurisdiction'.

79. To a limited degree, however, the Convention does allow the State addressed to review the jurisdiction of the Court which delivered the judgment. According to the first paragraph of Article 28, a judgment will not be recognized if it conflicts with the provisious of Sections 3, 4 and 5 of Title II, i.e. the rules on jurisdiction relating to insurance matters (Articles 7 to 12a), consumer contracts (Articles 13 to 15) and cases of exclusive jurisdiction (Article 16). The case provided for in Article 59 also requires there to be a possibility of reviewing the jurisdiction of the court which delivered the judgment and for that reason it has been included in the exceptions listed in the first paragraph of Article 28. It should nevertheless be noted that in its examination of jurisdiction in cases covered by this exhaustive list of exceptions, the court or authority in the State addressed which is called upon to recognize the judgment 'shall be bound by the findings of fact on which the court of the State in which the judgment was given based its jurisdiction' (Article 28, second paragraph). Consequently, the examination carried out in the State addressed will concern the legal aspects of the considerations on which the court of the State in which the judgment was given based its jurisdiction.

80. As has already been pointed out, the Convention does not allow a foreign judgment to be reviewed as to

its substance (Article 29). The court or authority of the State addressed which is called upon to recognize the judgment is not entitled to review the substantive or legal soundness of the conclusions of the court which gave the judgment or to refuse to recognize the judgment if it discovers a substantive or legal defect. The rule prohibiting reviews as to substance is, however, subject to certain restrictions: as was observed above, the first and second paragraphs of Article 28 permit a legal review of the judgment as regards certain bases of jurisdiction ([106]). The possibility of review must, out of logical necessity, also be accepted with respect to point 4 of Article 27, which requires in each case an examination both of the factual and legal aspects of the judgment to be recognized. Moreover, examination of the judgment to ensure that recognition is not contrary to public policy in the State addressed (Article 27, point 1) may lead to a re-assessment of its factual or legal considerations. Subject to these reservations, the rule that a judgment may not be reviewed as to its substance is one of the principles of the Convention.

81. Article 30 provides for the possibility of staying recognition proceedings if an ordinary appeal has been logded against the judgment in the State in which it was given. The meaning of the concept of 'ordinary appeal' is to be interpreted on an autonomous basis and covers any appeal which is such that it may result in the annulment or the amendment of the judgment under appeal, and the lodging of which is bound to a period which is laid down by law and which is linked to the actual judgment ([107]).

82. **Enforcement**

While the recognition of foreign judgments does not require a specific procedure to be followed, enforcement of such judgments is only possible if an order for enforcement has been issued in the State addressed or, in the case of the United Kingdom, if the judgments are registered for enforcement. The order for enforcement and, *mutatis mutandis,* registration for enforcement presuppose that a judgment has been given in a Contracting State and is enforceable in that State; the order is then issued or registration effected by the court (specifically defined in the Convention) of the State in which enforcement is sought, following an application which any interested party may submit for the enforcement of the judgment.

83. The procedure for making such applications is governed by the law of the State in which enforcement is sought. If the applicant is not domiciled within the area of jurisdiction of the court applied to, he must, in accordance with the requirements laid down by the law of the State in which enforcement is sought, either give an address for service of process or appoint a representative *ad litem* in that area; the choice of domicile must, as a matter of principle, be made in accordance with the procedures laid down under the law of the State in which enforcement is sought, or, failing this, at the latest on service of the enforcing judgement and the sanctions provided for under this law can in no case adversely affect the objectives of the Convention ([108]). The documents which are to accompany the application are specified in Articles 46 and 47 (Article 33).

84. The procedure for obtaining enforcement of foreign judgments is exclusive in the sense that a successful party must resort to it in order to obtain satisfaction of his claim and cannot, instead, initiate the same proceedings anew in any other State in which the Convention applies ([109]). The procedure operates on three levels of jurisdiction:

(a) The application is submitted to the court specifically designated for each State of enforcement. For Greece the Μουομελές Πρωτοδικειο has jurisdiction (Article 32, first paragraph). The jurisdiction of local courts is determined by reference to the place of domicile of the party against whom enforcement is sought or by reference to the place of enforcement where that party is not domiciled in the State of enforcement (Article 32, second paragraph).

The procedure for issuing the order for enforcement is simple and rapid. There is no obligation to inform the party against whom enforcement is sought of the submission of the application or of the date of the proceedings, and even if that party learns of the proceedings, he is not entitled at this stage to appear or make submissions on the application. The court must give its decision without delay. The foreign judgment may not be reviewed as to its substance and the application may be refused only for one of the reasons specified in Articles 27 and 28 (Article 34). The appropriate officer of the court will without delay bring the decision to the notice of the applicant in accordance with the procedure laid down by the law of the State in which enforcement is sought (Article 35).

(b) The party against whom enforcement is sought has the right to lodge an appeal against the decision granting the application with the court designated for each Contracting State in Article 37. The appeal must be lodged within one month of service of the decision authorizing enforcement if the party against whom enforcement is sought is domiciled in the State of enforcement (Article 36, first paragraph). This time limit will be two months from the date on which the decision is served on that party in person or at his residence if the latter is in a Contracting State other than that in which the decision authorizing enforcement is given. No extension of time may be granted on account of distance (Article 36, second paragraph). The Convention does not deal with the situation where the party against whom enforcement is sought is domiciled outside the territory of the Contracting States. In such cases it is accepted that the time

limit will be one month which may be extended on account of distance in accordance with the law of the State authorizing enforcement of the foreign judgment ([110]). The Court of Justice of the European Communities has ruled that appeals under Article 31 are the only appeals which may be lodged against decisions authorizing enforcement of foreign judgments and has excluded the possibility of lodging any other appeals available under national law ([111]). In Greece the Εφετείο has jurisdiction to hear appeals. Appeals are to be lodged and heard in accordance with the rules governing procedure in contentious matters (Article 37). The court having jurisdiction to hear an appeal by the party against whom enforcement is sought may, on the application of that party, stay the proceedings if an ordinary appeal ([112]) has been lodged against the judgment in the State in which that judgment was given or if the time for such an appeal has not yet expired. The same court may make enforcement conditional on the provision of a security (Article 38); the provision of a security will be ordered in the judgment on the appeal ([113]).

(c) The second paragraph of Article 37 gives an exhaustive list, for each Contracting State, of the types of further appeal which may be filed against the judgment given on the appeal lodged, in accordance with Article 36 and the first paragraph of Article 37, by the party against whom enforcement is sought. In Greece only an appeal in cassation is allowed.

85. A party seeking enforcement of a foreign judgment also has the right to lodge an appeal if an application submitted in accordance with Articles 31 *et seq.* is refused. The courts with jurisdiction to hear such appeals are specified for each Contracting State in the first paragraph of Article 40. In Greece such appeals are heard by the Εφετείο. When the appeal is heard, the person against whom enforcement is sought must be summoned ([114]), and if he fails to appear the provisions of the second and third paragraphs of Article 20 of the Convention apply. A judgment given on such an appeal may be contested only by one form of appeal in each Contracting State, as specified in Article 41. In Greece this may only be by an appeal in cassation.

86. Throughout the time specified for an appeal against the decision authorizing enforcement of the foreign judgment ([115]) and until any such appeal has been determined, no measures of enforcement may be taken other than protective measures taken against the property of the party against whom enforcement is sought. The decision authorizing enforcement of the foreign judgment constitutes the legal basis for taking such measures (Article 39), without any special leave or subsequent confirmation being required of the national court ([116]).

87. The court of the State in which enforcement is sought may authorize partial enforcement of the foreign judgment if that judgment was given in respect of several matters and enforcement cannot be authorized for all of them, or if the applicant requests partial enforcement of the judgment (Article 42). Articles 44 and 45 deal with legal aid and prohibit any sort of security being required of a party applying for enforcement of a foreign judgment, in accordance with the Convention, on the grounds of his status as a foreigner or because he is not domiciled or resident in the State in which enforcement is sought. It should also be noted that Article III of the 1968 Protocol prohibits any charge, duty or fee calculated by reference to the value of the matter in issue from being levied in the State in which enforcement is sought in proceedings for the issue of an order for enforcement.

88. Articles 46 to 49 specify, in the interests of simplification, the supporting documents which a party seeking authorization of enforcement of a foreign judgment must produce before the court. Translation of such documents into the language of the proceedings is not obligatory, although it may be required by the court. The translation may be certified by any person qualified to do so in any of the Contracting States. In particular, it should be noted that Article 49 relieves the party concerned of any obligation to legalize documents which he submits.

89. **Enforcement of authentic instruments and court settlements**

Title IV contains provisions governing enforcement of authentic instruments (Article 50) and court settlements (Article 51). This concerns authentic instruments which have been drawn up or registered and are enforceable in a Contracting State. They will be declared enforceable in another Contracting State in accordance with the procedures laid down in Articles 31 *et seq.* An application for a foreign authentic instrument to be declared enforceable may be refused only if enforcement of the instrument is contrary to public policy in the State in which enforcement is sought (Article 50, first paragraph). The same rules also apply for the enforcement of court settlements approved by a court in a Contracting State and enforceable in that State (Article 51). These provisions of the Convention lay down arrangements which are in substance identical to those under Greek law (Articles 904 and 905 of the Code of Civil Procedure).

90. **General provisions**

Title V (Articles 52 and 53) lays down rules and connecting factors establishing the law applicable for determining the domicile of natural persons and the seat of a company or other legal person and also the domicile of trusts. In order to determine whether a party is domiciled in a Conctracting State, including the State in which the proceedings were initiated, the court will apply the internal law of that State. It will apply the internal law of the relevant Contracting State,

to the exclusion of the rules of private international law (Article 52, first and second paragraphs) ([117]). If however, in accordance with a party's national law his domicile depends on that of another person or on the seat of an authority, his domicile will be determined in accordance with his national law (Article 52, third paragraph). The Convention does not, however, contain rules governing the domicile of a party outside the territory of the Contracting States. In this case the court seised of the matter will rule on the basis of the *lex fori* ([118]). Finally, in order to determine the seat of a company or other legal person or the domicile of a trust, the court seised of the matter will apply its rules of private international law (Article 53) ([119]).

D. THE 1971 PROTOCOL ON INTERPRETATION

91. Aware of the need to ensure that the Convention was applied as effectively as possible, to prevent differences of interpretation from restricting its unifying effect, and to avoid possible claims and disclaimers of jurisdiction, the Contracting States, in the Joint Declaration of 1968, expressed their intention to study these questions and in particular to examine the possibility of conferring jurisdiction in certain matters of interpretation on the Court of Justice of the European Communities and, if necessary, to negotiate an agreement to that effect. This undertaking resulted in the 1971 Protocol which confers jurisdiction on the Court of Justice of the European Communities to interpret the Convention. The Protocol has, of course, been adjusted by the 1978 and 1982 Accession Conventions.

92. The arrangements provided for in the 1971 Protocol are largely in line with the provisions of Article 177 of the EEC Treaty; that Article lays down that the national court can, or, in appropriate cases, must, refer questions on the interpretation of Community law and of the validity of acts by Community institutions to the Court of Justice for preliminary rulings. However, certain modifications were necessary in view of the particular nature of the matters governed by the Convention. The authors of the Protocol attempted to keep these changes to a minimum in their desire to maintain unity in the judicial practice of the Court of Justice of the European Communities in giving preliminary rulings on interpretation, as laid down by the Treaty, and not to disturb the system of cooperation which had been established over a period of many years between the Community Court and national courts. This intention is also clear from Article 5 (1) of the Protocol, which states that the provisions of the Treaty and of the Protocol on the Statute of the Court of Justice relating to preliminary rulings also apply to any proceedings for the interpretation of the Convention and the other instruments referred to in Article 1 of the Protocol, except where the latter provides otherwise.

93. The jurisdiction conferred upon the Court of Justice of the European Communities to give rulings on interpretation concerns the instruments referred to in Article 1 of the Protocol. These instruments are the 1968 Convention, the 1968 Protocol and the 1971 Protocol, together with the instruments adjusting them, i.e. the 1978 and 1982 Accession Conventions.

94. The Protocol provides for three types of referral for preliminary rulings to the Court of Justice of the European Communities: firstly, optional referral by certain courts; secondly, obligatory referral by certain courts and, thirdly, referral 'in the interests of the law' by the competent national authorities.

95. Under Article 3 of the Protocol, both optional and obligatory referrals for a preliminary ruling are provided for where a question of interpretation of the Convention or of one of the other instruments referred to in Article 1 of the Protocol is raised in a case pending and a decision on the question of interpretation is necessary to enable the national court to give judgment.

96. Referrals may be made by the courts of the Contracting States when they are sitting in an appellate capacity (Article 2, point 2, and Article 3 (2) of the Protocol), and the courts of the Contracting States mentioned in Article 37 of the Convention where they are exercising the jurisdiction laid down in that provision (Article 2, point 3, and Article 3 (2) of the Protocol).

97. Referrals for a preliminary ruling on questions of interpretation must be made by the national courts mentioned in Article 2, point 1, of the Protocol. These are the national supreme courts which are specifically listed for the majority of Contracting States, with the exception of the United Kingdom and Greece. These two exceptions were made on the grounds of the judicial structure of the countries in question. In particular in the case of Greece it was considered advisable not to refer exclusively by name to the two main supreme courts, the Άρειος Πάγος and the Συμβούλιο της Επικρατείας, in order to extend the power to submit requests for preliminary rulings to the other supreme judicial bodies with general or specific jurisdiction, such as the special supreme court referred to in Article 100 of the Constitution and the Ελεγκτικό Συνέδριο. If only exceptionally, the matters falling within the jurisdiction of such courts may involve questions of interpretation of the Convention.

98. A request for the interpretation of the Convention or of one of the other instruments referred to in

Article 1 of the Protocol may be submitted to the Court of Justice of the European Communities by the competent national authorities in accordance with Article 4 (1). In accordance with Article 4 (3), these authorities are the Procurators-General of the Courts of Cassation of the Contracting States or any other authority designated by a Contracting State (see also Article 10 (c)). This possibility of obtaining an interpretation 'in the interests of the law' may be exercised by the national authorities when judgments by courts in their country conflict with the interpretation already given either by the Court of Justice of the European Communities or by one of the courts of another Contracting State referred to in point 1 or 2 of Article 2. This power, however, only exists in respect of judgments which have become *res judicata*. Article 4 (2) of the Protocol specifies that the interpretation given in such cases by the Court of Justice of the European Communities does not affect the judgments by national courts which gave rise to the request for interpretation. Finally, in accordance with Article 4 (4), requests for interpretation submitted to the Court of Justice of the European Communities pursuant to Article 4 are to be notified to the Contracting States, to the Commission and to the Council of the European Communities, which are then entitled within two months of the notification to submit statements of case or written observations to the Court; new Member States who have not yet signed the Convention but will accede to it in the future are also entitled to submit observations ([120]). To accommodate the particular nature of requests for interpretation submitted pursuant to Article 4 of the Protocol, Article 4 (4) thus amends Article 20 of the Protocol on the Statute of the Court of Justice annexed to the Treaty establishing the European Economic Community, in accordance with which the decision of a national court or tribunal which submits a request for a preliminary ruling is notified by the Registrar of the Court of Justice of the European Communities to the parties, to the Member States and to the Commission, and also to the Council if the act, the validity or interpretation of which is in dispute, originates from the Council.

99. The frequency with which national courts submit requests for interpretation to the Court of Justice of the European Communities may be described as satisfactory. Application of the Protocol has already led to nearly fifty rulings being given by the Court of Justice.

E. TRANSITIONAL AND FINAL PROVISIONS. PROBLEMS OF TERMINOLOGY

100. Transitional provisions

The 1968 Convention (Title VI, Article 54) and the 1978 Accession Convention (Title V, Articles 34 to 36) contain a number of transitional provisions. Transitional provisions are also contained in the 1982 Convention on the Accession of Greece. In accordance in particular with Article 12 of the 1982 Accession Convention, the 1968 Convention and the 1971 Protocol, as amended by the 1978 and 1982 Accession Conventions, apply only to legal proceedings instituted and to authentic instruments formally drawn up or registered after the entry into force of the 1982 Convention in the State of origin and, where recognition or enforcement of a judgment or authentic instrument is sought, in the State addressed. Paragraph 2 of the Article, however, states that the provisions on recognition and enforcement in the Convention (Title III) also apply to judgments given in proceedings instituted before the entry into force of the 1982 Accession Convention, such entry into force being defined in particular in Article 12 (1) of that Convention, if jurisdiction was founded upon rules of the Community Convention or any other convention which was in force between the State of origin and the State addressed when the proceedings were instituted.

101. Relationship between the Convention and other conventions and Community law

Title VII (Articles 55 to 59) contains a number of provisions regarding the position of the numerous, in particular bilateral, conventions on jurisdiction and enforcement of judgements previously concluded between the Contracting States. The Convention, as a Community instrument, naturally supersedes these more particular conventions (Article 55) to the extent that it coincides with them in terms of date of application and the subject matter covered (Article 56) ([121]). Moreover, the Convention does not affect the validity, or prevent the conclusion by the Contracting Parties, of conventions which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments, nor does it affect corresponding existing or possible future legal acts of Community bodies or provisions of national law harmonized in implementation of such acts (Article 57).

102. Language versions of the Convention

All the texts of the Convention ([122]) have drawn up in the eight official languages of the Community, as constituted after the accession of Greece: Danish, Dutch, English, French, German, Greek, Irish and Italian (Article 68 of the 1968 Convention, Article 37, first paragraph, and Article 41 of the 1978 Accession Convention, Article 13, first paragraph, and Article 17 of the 1982 Accession Convention). All the language versions are equally authentic (Article 68 of the 1968 Convention, Article 37, second paragraph, and Article 41 of the 1978 Accession Convention, Article 13, second paragraph, and Article 17 of the 1982 Accession Convention).

103. Terminological problems in the Greek version of the Convention

There follows a list of points in the Greek version of the Convention which require clarification or correction:

(a) In the first sentence of the first paragraph of Article 1, the word 'δικαστήριο' (court) was preferred to the word 'δικαιοδοσία' (jurisdiction) in order to avoid the suggestion that a distinction is being made between contentious and non-contentious proceedings, when in fact the provision relates to the nature of the court itself (e.g. civil, criminal, administrative).

(b) In the section on *lis pendens* (Articles 21 to 23), a general rather than a technical term, 'επιλαμβάνεται', was used for the court 'seised', in order not to prejudge the solution to the question which has already been referred to the Court of Justice of the European Communities ([123]) as to whether this is a term with its own specific meaning in the Convention, or a general reference to the internal rules on jurisdiciton of the Contracting States. Similar considerations led to the use of the more general expression 'αναστολή της διαδικασίας' (stay of proceedings) in preference to 'αναστολή της αποφάσεως' (stay of judgment) (Article 21, second paragraph, Article 22, first paragraph).

(c) In Article 24, 'provisional, including protective, measures' has been rendered by the general and established term 'ασφαλιστικά μέτρα' instead of 'προσωρινά' or 'συντηρητικά μέτρα' (provisional or safeguard measures) to avoid giving the impression that distinctions previously made in Greek procedural law are being revived.

(d) In the second paragraph of Article 26 and the first paragraph of Article 31, reference is made to 'κάθε ενδιαφερόμενος' (any interested party) rather than to 'κάθε διάδικος' (any litigant) as being entitled to apply for the recognition or enforcement of a judgment. The general term has been used in order to avoid the impression that the text of the Convention itself confines such entitlement to the litigants in the original proceedings before the foreign court.

(e) In point 2 of Article 16 clearly 'ακυρότητα' (nullity) and not 'εγκυρότητα' is meant in contrast to the immediately following term 'κύρος' (validity).

(f) The meaning of 'καταχώριση' (article 16, point 4, of the Convention) and of 'εγγραφή' (Article V d of the 1968 Protocol) of patents is the same. What is involved in both cases is the public act which formally protects the right of the inventor. Both terms render the term 'registration' into Greek.

104. Entry into force of the Convention

The 1968 Convention entered into force on 1 February 1973 and the 1971 Protocol on 1 September 1975. As at 31 March 1986 the 1978 Accession Convention had been ratified by five States; it has not yet entered into force ([124]). The entry into force of the 1982 Accession Convention is governed by Article 15, in accordance with which the Convention 'shall enter into force, as between the States which have ratified it, on the first day of the third month following the deposit of the last instrument of ratification by the Hellenic Republic and those States which have put into force the 1978 Convention in accordance with Article 39 of that Convention'. The entry into force of the 1982 Accession Convention therefore depends on the entry into force of the 1978 Accession Convention and on the ratification of the 1982 Accession Convention by Greece.

(1) OJ No C 59, 5. 3. 1979, pp. 1 to 65 and pp. 66 to 70.
(2) OJ No C 59, 5. 3. 1979, pp. 71 to 151.
(3) See point 3 *in fine*.
(4) See point 2.
(5) See points 49 and 52.
(6) See points 9 to 16.
(7) See points 17 to 20.
(8) See points 21 to 23.
(9) On all these questions, see Frangistas, Δικαιοδοσία επί διεθνών διαφορών ιδιωτικού δικαίου (1934), *passim*, in particular 26 to 96.
(10) Frangistas, in Ερμηνεία του αστικού κώδικος ΕισΝ 126 αριθ. 12-22; Rammos, Στοιχεία ελληνικής πολιτικής δικονομίας I/1[5] (1961) 148, 146; Mitsopoulos, Problèmes de juridiction internationale en droit grec, *Εράνιον προς Γ. Σ. Μαριδάκην* II (1963) 301-312.
(11) Maridakis, Η δικαιοδοσία της ελληνικής Πολιτείας επί ελλήνων κατοικούντων εις την αλλοδαπήν, *Νέον δίκαιον* 1956, 1-5; P. Valindras, *Εφημερίς των Ελλήνων Νομικών* 1950, 532-533.
(12) See Evrigenis, Το ιδιωτικόν διεθνές δίκαιον εις την ελληνικήν νομολογίαν, Armenopoulos 1964, 409 *et seq.* (465-490, in particular 470-478).
(13) See however, Maridakis, Ιδιωτικόν διεθνές δίκαιον καθά ισχύει εις την Ελλάδα II[2] (1968) 188-191, in which he continues to defend the 'distinction' theory under the Code of Civil Procedure.
(14) For the following, see Rammos, Εγχειρίδιον αστικού δικονομικού δικαίου I (1978) 185-233; Mitsopoulos, Πολιτική δικονομία A (1972) 204-261; Kerameas, Αστικό δικονομικό δίκαιο. Γενικό Μέρος (1986) 48-85.
(15) See point 14.
(16) For the following; see Maridakis, Η εκτέλεσις αλλοδαπών αποφάσεων κατά το ισχύον εις την Ελλάδα δίκαιον[2] (1946), in particular 60-120; by the same author, Η αντίφασις των αλλοδαπών αποφάσεων εις αποδεδειγμένα πράγματα (1930)· *Ευρυγένη*, Ζητήματα εκ της εκτελέσεως και αναγνωρίσεως αλλοδαπών αποφάσεων, *Επιστημονική Επετηρίς της Σχολής των Νομικών και Οικονομικών Επιστημών του Αριστοτελειου Πανεπιστημίου Θεσσαλονικης* VIII: Μνημόσυνον Γεωργίου Σ. Σιμωνέτου (1957) 323 – 360.
(17) Evrigenis, *ibid.*, 329 and point 8.
(18) See point 12.
(19) For the following, see principally Maridakis, Η εκτέλεσις αλλοδαπών αποφάσεων κατά το ισχύον εις την Ελλάδα δίκαιον[3] (1970), *passim*, in particular 54-109.
(20) Maridakis, *ibid*, 66-99.
(21) See point 17.
(22) See Maridakis, (footnote 19) 83-85.
(23) See point 18, condition (a).
(24) See Maridakis (footnote 19) 107.
(25) In specific areas, jurisdiction is directly governed by certain *multilateral* conventions; see point 23 below.
(26) Frangistas and Gesiou-Faltsi, Αι διεθνείς συβάσεις της Ελλάδος εις το αστικόν δικονομικόν δίκαιον, Συμβατικά κείμενα και ερμηνευτικαί συμβολαί (1976) ιστ' - ιθ'.
(27) See points 10 and 12.
(28) See point 7.
(29) For this Convention in particular, see Kerameus, Rechtsmittelfestigkeit und Vollstreckung von ausländischen Entscheidungen, *Multitudo legum ius unum: Festschrift für Wilhelm Wengler* II (1973) 383-395. P. Gesiou-Faltsi, Zeitschrift für Zivilprozess 96 (1983) 67-89. Pouliadis, Die Bedeutung des deutsch-griechischen Vertrages vom 4. 11. 1961 für die Anerkennung und Vollstreckung deutscher Entscheidungen in der griechischen Praxis, IPrax 5 (1985) 357-369.
(30) See Frangistas and Gesiou-Faltsi (footnote 26), p. 241-292.
(31) Judgment of 16. 12. 1980, Case 814/79, Ruffer v. Netherlands, paragraph 14.
(32) Judgment of Case 29/76, LTU v. Eurocontrol.
(33) Judgment of 14. 10. 1976, 22. 2. 1979, Case 133/78, Gourdain v. Nadler. See also Judgment of 22. 11. 1978, Case 33/78, Somafer v. Saar-Ferngas.
(34) Judgments of 14. 10. 1976 and 16. 12. 1980 referred to above in footnotes 32 and 31.
(35) Judgment of 13. 11. 1979, Case 25/79, Sanicentral v. Collin.
(36) Judgment of 27. 3. 1979, Case 143/78, de Cavel v. de Cavel I.
(37) Judgment of 31. 3. 1982, Case 25/81, C.H.W. v. G.J.H.
(38) Judgment of 6. 3. 1980, Case 120/79, de Cavel v. de Cavel II.
(39) Jenard, report, page 10, section IV *in fine; Schlosser*, report, paragraphs 55 *et seq.*
(40) *Cf.* Code of Civil Procedure, 3, paragraph 1, and, previously, the Law introducing the Civil Code, Article 126.
(41) See Jenard, report, pages 15 and 16.
(42) Jenard, report, page 57, *re* Article 53.
(43) See point 38.
(44) See point 24.
(45) See point 38.
(46) See point 44.
(47) See Code of Civil Procedure, Articles 41 and 221 paragraph 1, subparagraph c.
(48) Judgment of 4. 3. 1982, Case 38/81, Effer v. Kanter.
(49) Judgment of 22. 3. 1983, Case 34/82, Martin Peters v. ZNAV.
(50) Judgment of 6. 10. 1976, Case 12/76, Tessili v. Dunlop.
(51) Judgment of 17. 1. 1980, Case 56/79, Zelger v. Salinitri.
(52) Judgment of 6. 10. 1976, Case 14/76, de Bloos v. Bouyer.
(53) Judgment of 26. 5. 1982, Case 133/81, Ivenell v. Schwab. If, however, the obligation which characterices the contract does not form the subject of the dispute, all depends on the obligation which provides the basis for the action; Judgment of 15.1.1987, Case 266/85, Shenavi v. Kreischer.
(54) See Judgment of 6. 10. 1976, referred to in footnote 52.
(55) Schlosser, report, pages 101 to 103, points 91 to 97.
(56) Judgment of 30. 11. 1976, Case 21/76, Bier v. Mines de potasse d'Alsace.
(57) See Jenard, report, page 26 I.
(58) Judgment of 26. 5. 1981, Case 157/80, Rinkau.
(59) The possibility of the defendant's being represented was extended, by Article 6 (3) of Law 1653 of 8 November 1986 to offences liable to up to six months imprisonment.
(60) Judgment of 6. 10. 1976, see footnote 52.
(61) Judgment of 22. 11. 1978, see footnote 33.
(62) Judgment of 18. 3. 1981, Case 139/80, Blanckaert & Willems v. Trost.
(63) See point 43 *in fine*.
(64) See Schlosser, report, pages 108 and 109, points 121, 122; Collins, The Civil Jurisdiction and Judgments Act 1982 (1983) 65.
(65) Judgment of 21. 6. 1978, Case 150/77, Bertrand v. Ott.
(66) See Schlosser, report, page 120, point 163.
(67) Despite the restrictive interpretation of this provision (Judgment of 14. 12. 1977, Case 73/77, Sanders v. Van der Putte), the Court of Justice of the EC recently ruled that the exclusive jurisdiction provided for in Article 16, point 1, also applies to proceedings in respect of the payment of rent, and that this includes short-term lettings of holiday homes: Judgment of 15. 1. 1985, Case 241/83, Rösler v. Rottwinkel.
(68) As in the case of third party objections under Greek law: Code of Civil Procedure, 936, paragraph 1, third subparagraph.
(69) 'Clear abuse of the process', Judgment of 4. 7. 1985, Case 220/84, Autoteile v. Malhé.
(70) See point 68.
(71) But not including disputes between employees and employers over their respective patent rights arising out of the contract of employment: Judgment of 15. 11. 1983, Case 288/82, Duijnstee v. Goderbauer.
(72) See Schlosser, report, page 123, point 173.

(73) Each party may also designate a different group of courts in which it may be sued: Judgment of 9. 11. 1978, Case 23/78, Meeth v. Glacetal. If an agreement conferring jurisdiction has been stipulated in favour of only one of the parties, the convention (Article 17, fourth paragraph) allows this party to bring the matter before any other court with jurisdiction under the Convention. At all events, the Court of Justice of the EC took the view (in its Judgment given on 24. 6. 1987 in Case 22/85, Anterist v. Crédit Lyonnais) that, for such an agreement to exist in favour of only one of the parties, it would not be enough for the parties to have agreed on the international jurisdiction of a court or courts of a contracting State in the territory of which the 'advantaged' party is domiciled, but the common desire to favour the party must be clearly brought to light.

(74) Judgment of 14. 12. 1976, Case 24/76, Estasis Salotti v. RÜWA. However, in the particular case of persons domiciled in Luxembourg, the second paragraph of Article I of the 1968 Protocol requires that an express and specific clause conferring jurisdiction, which the Court of Justice of the European Communities has held to be the case (Judgment of 6. 5. 1980, Case 784/79, Porta-Leasing v. Prestige International) when the provision in question is separate, has been signed and is contained in the same document as the principal contract between the parties.

(75) Judgment of 14. 12. 1976, Case 25/76, Segoura v. Bonakdarian.

(76) Judgment of 19. 6. 1984, Case 71/83, Tilly Russ v. Haven.

(77) Judgment of 11. 7. 1985, Case 221/84, Berghoefer v. ASA. Along the same lines, now also Judgment of 11. 11. 1986 in Case 313/85, Iveco Fiat v. Van Hool, concerning the written prorogation of an agreement conferring jurisdiction.

(78) Judgment of 13. 11. 1979, see footnote 35.

(79) See points 48 and 49.

(80) Judgment of 17. 1. 1980, see footnote 51.

(81) Judgment of 14. 7. 1983, Case 201/82, Gerling v. Amministrazione del Tesoro dello Stato.

(82) Judgment of 19. 6. 1984, see footnote 76.

(83) Judgment of 9. 11. 1978, see footnote 73.

(84) See above, point 58 *in fine* and point 59 *in fine*.

(85) Judgment of 24. 6. 1981, Case 150/80, Elefanten Schuh v. Jacqmain.

(86) See Schlosser, report, page 124, paragraphs 176 and 177.

(87) Judgment of 7. 3. 1985, Case 38/84, Spitzley v. Sommer.

(88) Judgments of 24. 6. 1981, see footnote 84 and 7. 3. 1985, see footnote 87.

(89) Judgments of 24. 6. 1981, see footnote 84; 22.10.1981, Case 27/81, Rohr v. Ossberger; 31. 3. 1982, see footnote 37; 14. 7. 1983, see footnote 81.

(90) Judgment of 15. 11. 1983, see footnote 71.

(91) See points 38 and 44.

(92) See Jenard, report, pp. 39 to 41.

(93) Law No 1334/1983.

(94) See Jenard, report, pp. 40 and 41.

(95) Judgment of 7. 6. 1984, Case 129/83, Zelger v. Salinitri.

(96) Judgment of 24. 6. 1981, see footnote 84; a similar rule exists in Greek law in the Code of Civil Procedure, Articles 249 and 250.

(97) See point 56.

(98) See Jenard, report, page 41.

(99) Judgment of 31. 3. 1982, see footnote 37.

(100) See points 24 to 37.

(101) Judgment of 21. 5. 1980, Case 125/79, Denilauler v. Couchet Frères.

(102) However, as regards the recognition of the *res judicata* force of foreign judgments concerning status, see Code of Civil Procedure, Article 905, point 4, ΑΠ (supreme court) 569/1972, *Legal Gazette*, 1972, 1427, ΑΠ 1007/1982, *Legal Gazette* 1983, 1006.

(103) The question of whether, in the case of a judgment given in default, the document which instituted the proceedings was served on the defendant in sufficient time to enable him to arrange for his defence (Article 27, point 2, of the Convention) is, according to the case law of the Court of Justice of the European Communities, to be examined by the court of the State in which enforcement is sought separately and without reference to the law on service applicable in the State of origin (Judgment of 16. 6. 1981, Case 166/80, Klomps v. Michel; the point was made more clearly recently: Judgment of 11. 6. 1985, Case 49/84, Debaecker v. Bouwman) or to the opinion of the court which delivered the judgment recognition or enforcement of which is sought (Judgment of 15. 7. 1982, Case 228/81, Pendy Plastic v. Pluspunkt).

(104) See point 7.

(105) Jenard, report, page 46.

(106) See point 79.

(107) Judgment of 22. 11. 1977, Case 43/77, Industrial Diamond Supplies v. Riva.

(108) Judgment of 10. 7. 1986, Case 198/85, Carron v. Federal Republic of Germany.

(109) Judgment of 30. 11. 1976, Case 42/76, De Wolf v. Cox.

(110) Jenard, report, page 51.

(111) Judgment of 2. 7. 1985, Case 148/84, Deutsche Genossenschaftsbank v. Brasserie du Pêcheur.

(112) See point 81 and footnote 107.

(113) Judgment of 27. 11. 1984, Case 258/83, Brennero v. Wendel.

(114) See Judgment of 12. 7. 1984, Case 178/83, P. v. K.

(115) See point 84 (b).

(116) Judgment of 3. 10. 1985, Case 119/84, Capelloni v. Pelkmans.

(117) Jenard, report, page 17.

(118) Jenard, report, page 16.

(119) See also point 41.

(120) Judgment of 6. 10. 1976, see footnote 50.

(121) Judgment of 14. 7. 1977, Cases 9 and 10/77, Bavaria v. Eurocontrol.

(122) See point 3.

(123) See footnote 95.

(*) *Editor's note*

Since this report was drawn up the 1978 Accession Convention entered into force, in relations between the six original Member States of the European Communities and the Kingdom of Denmark, on 1 November 1986. It will enter into force, with regard to the United Kingdom of Great Britain and Nothern Ireland, on 1 January 1987.

The Greek language edition of *Official Journal of the European Communities* also contains the Greek version of the Reports by Mr P. JENARD and Professor Pr. P. SCHLOSSER. These reports are published in Danish, Dutch, English, French, German and Italian, in *Official Journal of the European Communities* No C 59 of 5 March 1979.

89/535/EEC: Convention on the accession of the Kingdom of Spain and the Portuguese Republic to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice with the adjustments made to them by the Convention on the accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland and the adjustments made to them by the Convention on the accession of the Hellenic Republic

(1) CONVENTION on the accession of the Kingdom of Spain and the Portuguese Republic to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice with the adjustments made to them by the Convention on the accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Nothern Ireland and the adjustments made to them by the Convention on the accession of the Hellenic Republic (89/535/EEC)

PREAMBLE

THE HIGH CONTRACTING PARTIES TO THE TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY,

CONSIDERING that the Kingdom of Spain and the Portuguese Republic, in becoming members of the Community, undertook to accede to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice, with the adjustments made to them by the Convention on the accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland and the adjustments made to them by the Convention on the accession of the Hellenic Republic, and to this end undertook to enter into negotiations with the Member States of the Community in order to make the necessary adjustments thereto,

MINDFUL that on 16 September 1988 the Member States of the Community and the Member States of the European Free Trade Association concluded in Lugano the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, which extends the principles of the Brussels Convention to the States becoming parties to that Convention,

HAVE DECIDED to conclude this Convention and to this end have designated as their Plenipotentiaries:

The de Almeida Cruz, Desantes Real, Jenard Report on the Convention on the Accession of Spain and Portugal will also be published in the same section of the Official Journal.

HIS MAJESTY THE KING OF THE BELGIANS:

Mr Jacques de LENTDECKER

Head of Private Office of the Ministry of Justice

HER MAJESTY THE QUEEN OF DENMARK:

Mrs Jette Birgitte SELSOE

Chargé d'Affaires a.i. at the Embassy of Denmark in Madrid

THE PRESIDENT OF THE FEDERAL REPUBLIC OF GERMANY:

Dr Georg TREFFTZ

Minister Plenipotentiary at the Embassy of the Federal Republic of Germany in Madrid

Dr Klaus KINKEL

State Secretary at the Federal Ministry for Justice

THE PRESIDENT OF THE HELLENIC REPUBLIC:

Mr Giannis SKOULARIKIS

Minister for Justice

HIS MAJESTY THE KING OF SPAIN:

Mr Enrique MUGICA HERZOG

Minister for Justice

THE PRESIDENT OF THE FRENCH REPUBLIC:

Mr Pierre ARPAILLANGE

Keeper of the Seals

Minister for Justice

THE PRESIDENT OF IRELAND:

Mr Patrick WALSHE

Ambassador Extraordinary and Plenipotentiary of Ireland to Spain

THE PRESIDENT OF THE ITALIAN REPUBLIC:

Mr Giuliano VASSALLI

Minister for Justice

HIS ROYAL HIGHNESS THE GRAND DUKE OF LUXEMBOURG:

Mr Ronald MAYER

Ambassador Extraordinary and Plenipotentiary of Luxembourg to Spain

HER MAJESTY THE QUEEN OF THE NETHERLANDS:

Mr Frits KORTHALS ALTES

Minister for Justice

Mr J. SPOORMAKER

First Secretary at the Embassy

THE PRESIDENT OF THE PORTUGUESE REPUBLIC:

Mr Fernando NOGUEIRA

Minister responsible for relations with the Prime Minister's Office and Minister for Justice

HER MAJESTY THE QUEEN OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND:

Mr John PATTEN

Minister of State, Home Office

WHO, meeting within the Council, having exchanged their Full Powers, found in good and due form,

HAVE AGREED AS FOLLOWS:

TITLE I

General provisions

Article 1

The Kingdom of Spain and the Portuguese Republic hereby accede to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, signed at Brussels on 27 September 1968 (hereinafter called 'the 1968 Convention') and to the Protocol on its interpretation by the Court of Justice, signed at Luxembourg on 3 June 1971 (hereinafter called 'the 1971 Protocol'), with the adjustments made to them:

- by the Convention signed at Luxembourg on 9 October 1978 (hereinafter called 'the 1978 Convention'), on the accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice,

- by the Convention, signed at Luxembourg on 25 October 1982 (hereinafter called 'the 1982 Convention'), on the accession of the Hellenic Republic to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice, with the adjustments made to them by the Convention on the accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland.

Article 2

The substantive adjustments made by this Convention to the 1968 Convention and the 1971 Protocol, as adjusted by the 1978 Convention and the 1982 Convention, are set out in Titles II to V. The formal adjustments to the 1968 Convention, as amended by the 1978 Convention and the 1982 Convention, are set out separately for each authentic version concerned in Annex I, which forms an integral part of this Convention.

TITLE II

Adjustments to the 1968 Convention

Article 3

The following shall be inserted between the ninth and tenth indents of the second paragraph of Article 3 of the 1968

Convention, as amended by Article 4 of the 1978 Convention and Article 3 of the 1982 Convention:

'- in Portugal: Article 65 (1) (c), Article 65 (2) and Article 65A (c) of the code of civil procedure (Codigo de Processo Civil) and Article 11 of the code of labour procedure (Codigo de Processo de Trabalho),'

Article 4

The following shall be substituted for Article 5 (1) of the 1968 Convention, as amended by Article 5 of the 1978 Convention:

'1. in matters relating to a contract, in the courts for the place of performance of the obligation in question; in matters relating to individual contracts of employment, this place is that where the employee habitually carries out his work, or if the employee does not habitually carry out his work in any one country, the employer may also be sued in the courts for the place where the business which engaged the employee was or is now situated;'.

Article 5

The following point 4 shall be added to Article 6 of the 1968 Convention:

'4. in matters relating to a contract, if the action may be combined with an action against the same defendant in matters relating to rights in rem in immovable property, in the court of the Contracting State in which the property is situated.'

Article 6

The following shall be substituted for Article 16 (1) of the 1968 Convention:

'1. (a) in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, the courts of the Contracting State in which the property is situated;

(b) however, in proceedings which have as their object tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months, the courts of the Contracting State in which the defendant is domiciled shall also have jurisdiction, provided that the landlord and the tenant are natural persons and are domiciled in the same Contracting State;'.

Article 7

In Article 17 of the 1968 Convention, as amended by Article 11 of the 1978 Convention,

- the following shall be substituted for the first paragraph:

'If the parties, one or more of whom is domiciled in a Contracting State, have agreed that a court or the courts of a Contracting State are to have jurisdiction to settle

any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction. Such an agreement conferring jurisdiction shall be either:

(a) in writing or evidenced in writing, or

(b) in a form which accords with practices which the parties have established between themselves, or

(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

Where such an agreement is concluded by parties, none of whom is domiciled in a Contracting State, the courts of other Contracting States shall have no jurisdiction over their disputes unless the

court or courts chosen have declined jurisdiction.';

- the following shall be added as a final paragraph:

'In matters relating to individual contracts of employment an agreement conferring jurisdiction shall have legal force only if it is entered into after the dispute has arisen or if the employee invokes it to seise courts other than those for the defendant's domicile or those specified in Article 5 (1).'

Article 8

The following shall be substituted for Article 21 of the 1968 Convention:

'Article 21

Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.'

Article 9

The following shall be substituted for the first paragraph of Article 31 of the 1968 Convention:

'A judgment given in a Contracting State and enforceable in that State shall be enforced in another Contracting State when, on the application of any interested party, it has been declared enforceable there.'

Article 10

The following shall be inserted between the fourth and fifth indents of the first paragraph of Article 32 of the 1968 Convention, as amended by Article 16 of the 1978 Convention and Article 4 of the 1982 Convention:

'- in Spain, to the Juzgado de Primera Instancia,'

and the following shall be inserted between the ninth and tenth indents thereof:

'- in Portugal, to the Tribunal Judicial de Círculo,'.

Article 11

1. The following shall be inserted between the fourth and fifth indents of the first paragraph

of Article 37 of the 1968 Convention, as amended by Article 17 of the 1978 Convention and Article 5 of the 1982 Convention:

'- in Spain, with the Audiencia Provincial,'

and the following shall be inserted between the ninth and tenth indents thereof:

'- in Portugal, with the Tribunal da Relaçao,'.

2. The following shall be substituted for the first indent of the second paragraph of Article 37 of the 1968 Convention, as amended by Article 17 of the 1978 Convention and Article 5 of the 1982 Convention:

'- in Belgium, Greece, Spain, France, Italy, Luxembourg and in the Netherlands, by an appeal in cassation,'

and the following shall be inserted between the fourth and fifth indents thereof:

'- in Portugal, by an appeal on a point of law,'.

Article 12

The following shall be inserted between the fourth and fifth indents of the first paragraph of Article 40 of the 1968 Convention, as amended by Article 19 of the 1978 Convention and Article 6 of the 1982 Convention:

'- in Spain, to the Audiencia Provincial,'

and the following shall be inserted between the ninth and tenth indents thereof:

'- in Portugal, to the Tribunal da Relaçao,'.

Article 13

The following shall be substituted for the first indent of Article 41 of the 1968 Convention, as amended by Article 20 of the 1978 Convention and Article 7 of the 1982 Convention:

'- in Belgium, Greece, Spain, France, Italy, Luxembourg and in the Netherlands, by an appeal in cassation,'

and the following shall be inserted between the fourth and fifth indents thereof:

'- in Portugal, by an appeal on a point of law,'.

Article 14

The following shall be substituted for the first paragraph of Article 50 of the 1968 Convention:

'A document which has been formally drawn up or registered as an authentic instrument and is enforceable in one Contracting State shall, in another Contracting State, be declared enforceable there, on application made in accordance with the procedures provided for in Article 31 et seq. The application may be refused only if enforcement of the instrument is contrary to public policy in the State addressed.'

Article 15

The third paragraph of Article 52 of the 1968 Convention shall be deleted.

Article 16

The following shall be substituted for Article 54 of the 1968 Convention:

'Article 54

The provisions of the Convention shall apply only to legal proceedings instituted and to documents formally drawn up or registered as authentic instruments after its entry into force in the State of origin and, where recognition or enforcement of a judgment or authentic instrument is sought, in the State addressed.

However, judgments given after the date of entry into force of this Convention between the State of origin and the State addressed in proceedings instituted before that date shall be recognized and enforced in accordance with the provisions of Title III if jurisdiction was founded upon rules which accorded with those provided for either in Title II of this Convention or in a convention concluded between the State of origin and the State addressed which was in force when the proceedings were instituted.

If the parties to a dispute concerning a contract had agreed in writing before 1 June 1988 for Ireland or before 1 January 1987 for the United Kingdom that the contract

was to be governed by the law of Ireland or of a part of the United Kingdom, the courts of Ireland or of that part of the United Kingdom shall retain the right to exercise jurisdiction in the dispute.'.

Article 17

The following Article shall be added to Title VI of the 1968 Convention:

'Article 54A

For a period of three years from 1 November 1986 for Denmark and from 1 June 1988 for Ireland, jurisdiction in maritime matters shall be determined in these States not only in accordance with the provisions of Title II, but also in accordance with the provisions of paragraphs 1 to 6 following. However, upon the entry into force of the International Convention relating to the arrest of sea-going ships, signed at Brussels on 10 May 1952, for one of these States, these provisions shall cease to have effect for that State.

1. A person who is domiciled in a Contracting State may be sued in the courts of one of the States mentioned above in respect of a maritime claim if the ship to which the claim relates or any other ship owned by him has been arrested by judicial process within the territory of the latter State

to secure the claim, or could have been so arrested there but bail or other security has been given, and either:

(a) the claimant is domiciled in the latter State, or

(b)

the claim arose in the latter State, or

(c)

the claim concerns the voyage during which the arrest was made or could have been made, or

(d)

the claim arises out of a collision or out of damage caused by a ship to another ship or to goods or persons on board either ship, either by the execution or non-execution of a manoeuvre or by the non-observance of regulations, or

(e)

the claim is for salvage, or

(f)

the claim is in respect of a mortgage or hypothecation of the ship arrested.

2. A claimant may arrest either the particular ship to which the maritime claim relates, or any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship. However, only the particular ship to

which the maritime claim relates may be arrested in respect of the maritime claims set out in (5) (o), (p) or (q) of this Article.

3. Ships shall be deemed to be in the same ownership when all the shares therein are owned by the same person or persons.

4. When in the case of a charter by demise of a ship the charterer alone is liable in respect of a maritime claim relating to that ship, the claimant may arrest that ship or any other ship owned by the charterer, but no other ship owned by the owner may be arrested in respect of such claim. The same shall apply to any case in which a person other than the owner of a ship is liable in respect of a maritime claim relating to that ship.

5. The expression 'maritime claim' means a claim arising out of one or more of the following:

(a)

damage caused by any ship either in collision or otherwise;

(b)

loss of life or personal injury caused by any ship or occurring in connection with the operation on any ship;

(c)

salvage;

(d)

agreement relating to the use or hire of any ship whether by charterparty or otherwise;

(e)

agreement relating to the carriage of goods

in any ship whether by charterparty or otherwise;

(f)

loss of or damage to goods including baggage carried in any ship;

(g)

general average;

(h)

bottomry;

(i)

towage;

(j)

pilotage;

(k)

goods or materials wherever supplied to a ship for her operation or maintenance;

(l)

construction, repair or equipment of any ship or dock charges and dues;

(m)

wages of masters, officers or crew;

(n)

master's disbursements, including disbursements made by shippers, charterers or agents on behalf of a ship or her owner;

(o)

dispute as to the title to or ownership of any ship;

(p)

disputes between co-owners of any ship as to the onwership, possession, employment or earnings of that ship;

(q)

the mortgage or hypothecation of any ship.

6. In Denmark, the expression 'arrest' shall be deemed as regards the maritime claims referred to in 5 (o) and (p) of this Article, to include a 'forbud', where that is the only procedure allowed in respect of such a claim under Articles 646 to 653 of the law on civil procedure (lov om rettens pleje).'

Article 18

The following shall be inserted at the appropriate places in chronological order in the list of

Conventions set out in Article 55 of the 1968 Convention, as amended by Article 24 of the 1978 Convention and Article 8 of the 1982 Convention:

'- the Convention between Spain and France on the recognition and enforcement of judgment and arbitration awards in civil and commercial matters, signed at Paris on 28 May 1969,

'- the Convention between Spain and Italy regarding legal aid and the recognition and enforcement of judgments in civil and commercial matters, signed at Madrid on 22 May 1973,

'- the Convention between Spain and the Federal Republic of Germany on the recognition and enforcement of judgments, settlements and enforceable authentic instruments in civil and commercial matters, signed at Bonn on 14 November 1983.'

Article 19

The following shall be substituted for Article 57 of the 1968 Convention, as amended by Article 25 of the 1978 Convention:

'Article 57

1. This Convention shall not affect any conventions to which the Contracting States are or will be parties and which in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments.

2. With a view to its uniform interpretation, paragraph 1 shall be applied in the following manner:

(a) this Convention shall not prevent a court of a Contracting State which is a party to a convention on a particular matter from assuming jurisdiction in accordance with that Convention, even where the defendant is domiciled in another Contracting State which is not a party to that Convention. The court hearing the action shall, in any event, apply Article 20 of this Convention;

(b) judgments given in a Contracting State by a court in the exercise of jurisdiction provided for in a convention on a particular matter shall be

recognized and enforced in the other Contracting State in accordance with this Convention.

Where a convention on a particular matter to which both the State of origin and the State addressed are parties lays down conditions for the recognition or enforcement of judgments, those conditions shall apply. In any event, the provisions of this Convention which concern the procedure for recognition and enforcement of judgments may be applied.

3. This Convention shall not affect the application of provisions which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments and which are or will be contained in acts of the institutions of the European Communities or in national laws harmonized in implementation of such acts.'

Article 20

The following shall be substituted for Article 58 of the 1968 Convention:

'Article 58

Until such time as the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, signed at Lugano on 16 September 1988, takes effect with regard to France and the Swiss Confederation, this Convention shall not affect the rights granted to Swiss nationals by the Convention between France and the Swiss Confederation on jurisdiction and enforcement of judgments in civil matters, signed at Paris on 15 June 1869.'

Article 21

Article 60

of the 1968 Convention, as amended by Article 27 of the 1978 Convention, shall be deleted.

Article 22

Article 64

(c) of the 1968 Convention shall be deleted.

TITLE III

Adjustments to the Protocol annexed to the 1968 Convention

Article 23

The following shall be substituted for Article Vb added to the Protocol annexed to the 1968 Convention by Article 29 of the 1978 Convention and amended by Article 9 of the 1982 Convention:

'Article Vb

In proceedings involving a dispute between the master and a member of the crew of a sea-going ship registered in Denmark, in Greece, in Ireland or in Portugal, concerning remuneration or other conditions of service, a court in a Contracting State shall establish whether the diplomatic or consular officer responsible for the ship has been notified of the dispute. It shall stay the proceedings so long as he has not been notified. It shall of its own motion decline jurisdiction if the officer, having been duly notified, has exercised the powers accorded to him in the matter by a consular convention, or in the absence of such a convention has, within the time allowed, raised any objection to the exercise of such jurisdiction.'

TITLE IV

Adjustments to the 1971 Protocol

Article 24

The following paragraph shall be added to Article 1 of the 1971 Protocol, as amended by Article 30 of the 1978 Convention and Article 10 of the 1982 Convention:

'The Court of Justice of the European Communities shall also have jurisdiction to give rulings on the interpretation of the Convention on the accession of the Kingdom of Spain and the Portuguese Republic to the Convention of 27 September 1968 and to this Protocol, as adjusted by the 1978 Convention and the 1982 Convention.'

Article 25

The following shall be inserted between the fourth and fifth indents of Article 2 (1) of the 1971 Protocol, as amended by Article 31 of the 1978 Convention and Article 11 of the 1982 Convention:

'- in Spain: el Tribunal Supremo,'

and the following shall be inserted between the ninth and tenth indents thereof:

'- in Portugal: o Supremo Tribunal de Justiça and o Supremo Tribunal Administrativo,'.

Article 26

Article 6

of the 1971 Protocol, as amended by Article 32 of the 1978 Convention, shall be deleted.

Article 27

Article 10

(d) of the 1971 Protocol, as amended by Article 33 of the 1978 Convention, shall be deleted.

TITLE V

Adjustments to the 1978 Convention and the 1982 Convention

Article 28

1. Articles 25 (2), 35 and 36 of the 1978 Convention shall be deleted.

2. Article 1 (2) of the 1982 Convention shall be deleted.

TITLE VI

Transitional provisions

Article 29

1. The 1968 Convention and the 1971 Protocol, as amended by the 1978 Convention, the 1982 Convention and this Convention, shall apply only to legal proceedings instituted and to authentic instruments formally drawn up or registered after the entry into force of this Convention in the State of origin and, where recognition or enforcement of a judgment or authentic instrument is sought, in the State addressed.

2. However, judgments given after the date of entry into force of this Convention between the State of origin and the State addressed in proceedings instituted before that date shall be recognized and enforced in accordance with the provisions ot Title III of the 1968 Convention, as amended by the 1978 Convention, the 1982 Convention and this Convention, if jurisdiction was founded upon rules which accorded with the provisions of Title II of the 1968 Convention, as amended, or with the provisions of a convention which was in force between the State of origin and the State addressed when the proceedings were instituted.

TITLE VII

Final provisions

Article 30

1. The Secretary-General of the Council of the European Communities shall transmit a certified copy of the 1968

Convention, of the 1971 Protocol, of the 1978 Convention and of the 1982 Convention in the Danish, Dutch, English, French, German, Greek, Irish and Italian languages to the Governments of the Kingdom of Spain and of the Portuguese Republic.

2. The texts of the 1968 Convention, of the 1971 Protocol, of the 1978 Convention and of the 1982 Convention, drawn up in the Portuguese and Spanish languages, are set out in Annexes II, III, IV and V to this Convention. The texts drawn up in the Portuguese and Spanish languages shall be authentic under the same conditions as the other texts of the 1968 Convention, the 1971 Protocol, the 1978 Convention and the 1982 Convention.

Article 31

This Convention shall be ratified by the signatory States. The instruments of ratification shall

be deposited with the Secretary-General of the Council of the European Communities.

Article 32

1. This Convention shall enter into force on the first day of the third month following the date on which two signatory States, of which one is the Kingdom of Spain or the Portuguese Republic, deposit their instruments of ratification.

2. This Convention shall take effect in relation to any other signatory State on the first day of the third month following the deposit of its instrument of ratification.

Article 33

The Secretary-General of the Council of the European Communities shall notify the signatory States of:

(a) the deposit of each instrument of ratification;

(b) the dates of entry into force of this Convention for the Contracting States.

Article 34

This Convention, drawn up in a single original in the Danish, Dutch, English, French, German, Greek, Irish, Italian, Portuguese and Spanish languages, all 10 texts being equally authentic, shall be deposited in the archives of the General Secretariat of the Council of the European Communities. The Secretary-General shall transmit a certified copy to the Government of each signatory State.

(1) The General Secretariat of the Council will shortly be publishing in the 'C' edition of the Official Journal of the European Communities a consolidated version, having no binding effect, of the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and the Protocol on its interpretation by the Court of Justice, incorporating the amendments and additions made by the three Accession Conventions (the 1978 Convention on the accession of Denmark, Ireland and the United Kingdom, the 1982 Convention on the accession of Greece and this, the 1989 Convention on the accession of Spain and Portugal).

ANNEX I

FORMAL ADJUSTMENTS REFERRED TO IN ARTICLE 2 (a)

Danish version

1. Artikel 3, stk. 2, andet led, affattes saaledes:

"- i Danmark: paragraf 246, stk. 2 og 3, i lov om rettens pleje".

2. Artikel 4, stk. 2, in fine:

I stedet for:

". . . der er naevnt i artikel 3, andet afsnit"

laeses:

". . . der er naevnt i artikel 3, stk. 2".

3. Artikel 6, nr. 2, affattes saaledes:

"2. som tredjemand i sager om opfyldelse af en forpligtelse eller som tredjemand i andre tilfaelde, ved den ret...

(reste uaendret)".

4. Artikel 11, stk. 1:

I stedet for:

". . . artikel 10, tredje afsnit..."

laeses:

". . . artikel 10, stk. 3...".

5. Artikel 13, nr. 3, affattes saaledes:

". . . eller loesoeregenstande, og saafremt".

6. Artikel 15, nr. 1, affattes saaledes:

". . . er indgaaet, efter at tvisten...".

7. Artikel 28, stk. 3:

I stedet for:

"Med forbehold af bestemmelserne i foerste afsnit..."

laeses:

"Med forbehold af bestemmelserne i stk. 1...".

8. Artikel 32, andet led:

I stedet for:

". . . underretten"

laeses:

". . . byretten".

9. Artikel 32, stk. 2, in fine:

I stedet for:

". . . ved anvendelsen af foerste afsnit"

laeses:

". . . ved anvendelsen af stk. 1".

10. Artikel 40, stk. 2:

I stedet for:

". . . i artikel 20, andet og tredje afsnit,..."

laeses:

". . . i artikel 20, stk. 2 og 3,...".

11. Artikel 46, nr. 2:

I stedet for:

". . . eller en tilsvarende retsakter..."

laeses:

". . . eller en tilsvarende retsakt...".

12. Artikel 49:

I stedet for:

". . . og artikel 48, andet afsnit,..."

laeses:

". . . og artikel 48, stk. 2,...".

13. Artikel 55, stk. 1:

I stedet for:

". . . i artikel 54, andet afsnit,..."

laeses:

". . . i artikel 54, stk. 2,...".

14. Artikel 59, stk. 1, in fine:

I stedet for:

". . . i artikel 3, andet afsnit"

laeses:

". . . i artikel 3, stk. 2".

PROTOKOLLEN

15. Artikel V, stk. 1, foerste punktum:

I stedet for:

". . . i sager om opfyldelse af en forpligtelse eller ved intervention..."

laeses:

". . . i sager om opfyldelse af en forpligtelse eller i andre tilfaelde . ..".

16. Artikel V, stk. 1, andet punktum:

I stedet for:

"I denne stat..., inddrages i sagen..."

laeses:

"I denne stat..., sagsoeges ved dens domstole...".

PROTOKOLLEN VEDROERENDE DOMSTOLENS FORTOLKNING

17. Artikel 2, nr. 1, sidste led:

I stedet for:

". . . artikel 37, andet afsnit,..."

laeses:

". . . artikel 37, stk. 2,...".

(b)

German version

1. Artikel 3: Der zweite Gedankenstrich muss wie folgt lauten:

"- in Daenemark: Artikel 246 Absaetze 2 und 3 der Zivilprozessordnung (Lov om rettens pleje);"

2. Artikel 12: Am Ende der Nummern 1, 2 und 3 wird das Wort "oder" gestrichen und durch ein Komma ersetzt.

3. Artikel 13: Unter Nummer 2 muss es statt "oder um ein anderes Kreditgeschaeft handelt, die zur Finanzierung eines Kaufs derartiger Sachen bestimmt sind" heissen: "oder ein anderes Kreditgeschaeft handelt, das zur Finanzierung eines Kaufs derartiger Sachen bestimmt ist".

4. Artikel 14: In Absatz 1 muss es statt "gegen die andere Vertragspartei..., in dessen Hoheitsgebiet diese Vertragspartei ihren Wohnsitz hat" heissen: "gegen den anderen Vertragspartner..., in dessen Hoheitsgebiet dieser Vertragspartner seinen Wohnsitz hat".

5. Artikel 14: In Absatz 2 muss es statt "der anderen Vertragspartei" heissen: "des anderen Vertragspartners".

6. Artikel 15: Am Ende von Nummer 1 wird das Wort "oder" gestrichen und durch ein Komma ersetzt.

7. Artikel 16: Unter Nummer 2 muss es statt "die Gueltigkeit, Nichtigkeit" heissen: "die Gueltigkeit, die Nichtigkeit".

8. Artikel 20: In Absatz 3 muss es statt "fuer Zivil- und Handelssachen" heissen: "in Zivil- oder Handelssachen".

9. Artikel 22: In Absatz 1 muss es statt "die Entscheidung aussetzen" heissen: "das Verfahren aussetzen".

10. Artikel 27: Unter Nummer 2 muss es statt "ordnungsmaessig" heissen: "ordnungsgemaess".

11. Artikel 27: Unter Nummer 4 muss es statt "wenn das Gericht des Urteilsstaats... die ehelichen Gueterstaende, das Gebiet des Erbrechts" heissen: "wenn das Gericht des Ursprungsstaats... die ehelichen Gueterstaende oder das Gebiet des Erbrechts.. .".

12. Artikel 28: In den Absaetzen 2 und 3 muss es statt "des Urteilsstaats" jeweils heissen: "des Ursprungsstaats".

13. Artikel 29: Statt "auf ihre Gesetzmaessigkeit" muss es heissen: "in der Sache selbst".

14. Artikel 30: In Absatz 2 muss es statt "im Urteilsstaat" heissen: "im Ursprungsstaat".

15. Artikel 32: In Absatz 1 muss der zweite Gedankenstrich wie folgt lauten:

"- in Daenemark an das "byret";"

16. Artikel 32: In Absatz 1 muss es unter den Nummern 1, 2 und 3 des das Vereinigte Koenigreich betreffenden Gedankenstrichs statt "im Falle von Entscheidungen" jeweils heissen: "fuer Entscheidungen".

17. Artikel 34: In Absatz 2 muss es statt "in Artikel 27 und 28" heissen: "in den Artikeln 27

und 28".

18. Artikel 34: In Absatz 3 muss es statt "auf ihre Gesetzmaessigkeit" heissen: "in der Sache selbst".

19. Artikel 37: In Absatz 1 muss es unter den Nummern 1, 2 und 3 des das Vereinigte Koenigreich betreffenden Gedankenstrichs statt "im Falle von Entscheidungen" jeweils heissen: "fuer Entscheidungen".

20. Artikel 38: In Absatz 1 muss es statt "seine Entscheidung aussetzen, wenn gegen die Entscheidung im Urteilsstaat" heissen: "das Verfahren aussetzen, wenn gegen die Entscheidung im Ursprungsstaat".

21. Artikel 38: In Absatz 2 muss es statt "im Urteilsstaat" heissen: "im Ursprungsstaat".

22. Artikel 39: In Absatz 1 muss es statt "Massregeln zur Sicherung" heissen: "Massnahmen zur Sicherung".

23. Artikel 39: In Absatz 2 muss es statt "Massregeln zu betreiben" heissen: "Massnahmen zu veranlassen".

24. Artikel 40: In Absatz 1 muss es unter den Nummern 1, 2 und 3 des das Vereinigte Koenigreich betreffenden Gedankenstrichs statt "im Falle von Entscheidungen" jeweils heissen: "fuer Entscheidungen".

25. Artikel 43: Statt "des Urteilsstaats" muss es heissen: "des Ursprungsstaats".

26. Artikel 44: In Absatz 1 muss es statt "ist dem Antragsteller in dem Staat, in dem die Entscheidung ergangen ist, ganz oder teilweise das Armenrecht... nach den Artikeln 32 bis 35 hinsichtlich des Armenrechts" heissen: "ist dem Antragsteller im Ursprungsstaat ganz oder teilweise Prozesskostenhilfe... nach den Artikeln 32 bis 35 hinsichtlich der Prozesskostenhilfe".

27. Artikel 44: In Absatz 2 muss es statt "Bewilligung des Armenrechts" heissen: "Bewilligung der Prozesskostenhilfe".

28. Artikel 47: Unter Nummer 1 muss es statt "nach dem Recht des Urteilsstaats" heissen: "nach dem Recht des Ursprungsstaats".

29. Artikel 47: Unter Nummer 2 muss es statt "das Armenrecht im Urteilsstaat geniesst" heissen: "Prozesskostenhilfe im Ursprungsstaat erhaelt".

30. Artikel 56: In Absatz 2 muss es statt "die Urkunden" heissen: "die oeffentlichen Urkunden".

31. Artikel Vb des dem UEbereinkommen beigefuegten Protokolls:

In Satz 2 muss es statt "Sie haben die Entscheidung auszusetzen" heissen: "Sie haben das Verfahren auszusetzen".

(c)

Greek version

1. ^Arthro 3

I defteri periptosi tis paragrafoy 2 echei os exis:

"- sti Dania: to arthro 246 paragrafoi 2 kai 3 toy Lon om rettens pleje (nomoy politikis dikonomias).

2. ^Arthro 4, defteri paragrafos

Stin proti seira, i lexi "enagomenoy" ginetai "enagomenoy".

3. ^Arthro 5

To simeio 7 stoicheio v) ligei se teleia kai to arthro "i" sto epomeno edafio metatrepetai se kefa-

leio I.

To diazefktiko "i" metaxy ton stoicheion a) kai v) grafetai se choristi grammi.

4. ^Arthro 6

Ta simeia 1, 2 kai 3 ligoyn se ano teleia.

5. ^Arthro 6a

Stin teleftaia seira, meta ti lexi "periorismo" prostithetai i lexi "aftis".

6. ^Arthro 8

Ta dyo diazefktika moria grafontai se choristi seira metaxy ton simeion 1 kai 2, 2 kai 3.

7. ^Arthro 12

iOla ta diazefktika moria grafontai se choristi seira metaxy ton simeion. Sto simeio 1, i lexi "genesi" ginetai "gennisi".

8. ^Arthro 12a

Sto simeio 2 a), triti seira, to "1 a)" ginetai "1^a)".

Sto simeio 2 v), to "1 ypo v)" ginetai "1^v)".

Sto simeio 3, to "1 ypo a)" ginetai "1^a)" kai i lexi "schetika" ginetai "schetiki".

9. ^Arthro 15

Sto simeio 1, i lexi "genesi" ginetai "gennisi".

Ta diazefktika moria grafontai se choristi seira metaxy ton simeion 1 kai 2, 2 kai 3.

10. ^Arthro 16

Sto simeio 2, anti "se thema egkyrotitas, kyroys i.^.^." grafetai "se themata kyroys, akyrotitas i^.^.^.".

11. ^Arthro 17

Sto simeio 1 to diazefktiko i tithetai sto telos ton ypoparagrafon a, v, g, d kai e.

12. ^Arthro 27

Ta simeia 1, 2, 3 kai 4 ligoyn se ano teleia.

Sto simeio 4, proti seira, i lexi "ekdosei" grafetai "ekdosei".

Sto simeio 5, tetarti seira, i frasi "i apofasi afti" antikathistatai apo ti frasi "i teleftaia afti apofasi".

13. ^Arthro 31

Sti defteri paragrafo, tithetai komma meta tis lexeis "proigoymenos" kai "endiaferomenoy".

14. ^Arthro 32

I defteri periptosi tis protis paragrafoy echei os exis:

"- sti Dania: sto byret ".

15. ^Arthro 34

Stin proti paragrafo, sto telos, i lexi "paratiriseon" antikathistatai apo ti lexi "protaseon".

16. ^Arthro 52

Stin proti paragrafo, sto telos, i antonymia "toy" metatithetai meta ti lexi "esoteriko".

17. ^Arthro 54

I proti paragrafos diatyponetai os exis:

"Oi diataxeis tis paroysas symvaseos efarmozontai mono stis agoges poy askoyntai, kathos kai sta dimosia engrafa poy ekdidontai, meta tin enarxi ischyos tis."

I defteri paragrafos diatyponetai os exis:

"Apofaseis, pantos poy ekdidontai meta tin enarxi ischyos tis paroysas symvaseos, katopin agogis poy echei askithei prin apo tin imerominia afti, anagnorizontai kai ekteloyntai symfona me tis diataxeis toy titloy III, an oi efarmosthentes kanones diethnoys dikaiodosias einai symfonoi i me tis diataxeis toy titloy II i me symvasi poy, kata tin imerominia askiseos tis agogis, ischye metaxy toy kratoys proelefseos kai toy kratoys anagnoriseos i ekteleseos."

18. ^Arthro 56

I defteri paragrafos diatyponetai os exis:

"Synechizoyn na paragoyn apotelesmata os pros tis apofaseis poy ekdothikan kai ta engrafa poy syntachthikan prin^.^.^.".

19. ^Arthro 57

Stin paragrafo 1, proti seira, oi lexeis "ton opoion" antikathistantai apo tis lexeis "stis opoies".

To stoicheio v), stin archi, diatyponetai os exis:

"Apofaseis poy ekdidontai apo dikastirio symvallomenoy kratoys kata tin askisi diethnoys dikaiodosias toy vasei symvaseos schetikis^.^.^.".

20. ^Arthro 59

Stin paragrafo 1, triti seira, antikathistantai oi lexeis "diethnoys dikaiodosias" apo ti lexi "anagnoriseos".

I defteri paragrafos, stin archi, diatyponetai os exis:

"Pantos, symvallomeno kratos den borei na desmefthei^.^.^.".

Stin idia paragrafo, triti seira, meta ti lexi "kratos" tithetai komma kai stin teleftaia seira, i lexi "enagomenoy" grafetai "enagomenoy".

(d)

English version

1. Article 3

Read second indent of second paragraph as follows:

'- in Denmark: Article 246 (2) and (3) of the law on civil procedure (Lov om rettens pleje),'.

2. Article 27

Read beginning of point 4 as follows:

'4. if the court of the State of origin, in order...'.

Read beginning of point 5 as follows:

'5. if the judgment is irreconcilable with an earlier judgment given in a non-contracting State involving...'.

3. Article 28

Read end of second paragraph as follows:

'. . . on which the court of the State of origin based its jurisdiction.'.

Read beginning of third paragraph as follows:

'Subject to the provisions of the first paragraph, the jurisdiction of the court of the State of origin may not be reviewed;...'.

4. Article 30

Read end of second paragraph as follows:

'. . . if enforcement is suspended in the State of origin by reason of an appeal.'.

5. Article 32

Read second indent as follows:

'- in Denmark, to the byret,'.

6. Article 38

Read beginning of first paragraph as follows:

'The court with which the appeal under Article 37 (1) is lodged may, on the application of the appellant, stay the proceedings if an ordinary appeal has been lodged against the judgment in the State of origin or if the time...'.

Read beginning of second paragraph as follows:

'Where the judgment was given in Ireland or the United Kingdom, any form of appeal available in the State of origin shall be treated.. .'.

7. Article 43

Read end of Article as follows:

'. . . by the courts of the State of origin.'.

8. Article 44

Read first paragraph as follows:

'An applicant who, in the State of origin, has benefited from complete or partial legal aid or exemption from costs or expenses, shall be entitled, in the procedures provided for in Articles 32 to 35, to benefit from the most favourable legal aid or the most extensive exemption from costs or expenses provided for by the law of the State addressed.'

9. Article 47

Read point 1 as follows:

'1. documents which establish that, according to the law of the State of origin, the judgment is enforceable and has been served;'.

Read end of point 2 as follows:

'. . . legal aid in the State of origin.'.

10. Article 51

Read end of Article as follows:

'. . . enforceable in the State addressed under the same conditions as authentic instruments.'.

(e)

French version

1. Article 3 second alinéa

Le deuxième tiret est remplacé par le texte suivant:

"- au Danemark: l'article 246 paragraphes 2 et 3 de la loi sur la procédure civile (Lov om rettens pleje)".

2. Article 32 premier alinéa

Le deuxième tiret est remplacé par le texte suivant:

"- au Danemark, au byret".

3. Article 44 premier alinéa

L'expression "l'Etat où la décision a été rendue" est remplacée par "l'Etat d'origine".

(f)

Irish version

1. Airteagal 3: Cuirfear an méid seo a leanas in ionad an dara fleasc:

'- sa Danmhairg: Airteagal 246 (2) agus (3) den dlí ar nos imeachta sibhialta (Lov om rettens pleje),'

2. Airteagal 12:

Cuirfear an méid seo a leanas in ionad phointe 3:

'3. a chuirfear i gcrích idir sealbhoir polasaí agus arachoir, a bhfuil sainchonaí no gnathchonaí orthu araon sa Stat Conarthach céanna trath an chonartha a chur i gcrích agus arb é is éifeacht do dlínse a thabhairt do chuirteanna an Stait sin fiu i gcas an teagmhas díobhalach a tharlu ar an gcoigrích, ar an gcoinníoll nach bhfuil an comhaontu sin contrartha do dhlí an Stait sin,'

3. Airteagal 25:

Cuirfear na focail 'ar chostais no chaiteachais' in ionad na bhfocal 'ar chostais no caiteachais' ag deireadh an Airteagail.

4. Airteagal 27:

Cuirfear na focail 'cuirt an Stait tionscnaimh' in ionad na bhfocal 'cuirt an Stait inar tugadh an breithiunas' i bpointe 4.

5. Airteagal 28:

- Cuirfear na focail 'foralacha Roinn 3, 4 no 5 de Theideal II' in ionad na bhfocal 'foralacha alt 3, 4 no 5 de Theideal II' sa chéad mhír.

- Cuirfear na focail 'an Stait tionscnaimh' in ionad na bhfocal 'an Stait inar tugadh an breithiunas' sa dara agus sa tríu mír.

6. Airteagal 30:

Cuirfear na focail 'sa Stat tionscnaimh' in ionad na bhfocal 'sa Stat inar tugadh an breithiunas'

sa dara mír.

7. Airteagal 31:

Cuirfear na focail 'nuair a bheidh sé dearbhaithe, ar iarratas o aon phairtí leasmhar, go bhfuil sé infhorghníomhaithe sa Stat eile sin' in ionad na bhfocal 'nuair a bheidh, ar iarratas o aon phairtí leasmhar, ordu a fhorghníomhaithe eisithe sa Stat eile sin' ag deireadh na chéad mhíre.

8. Airteagal 32:

Cuirfear na focail 'an tribunal de première instance no rechtbank van eerste aanleg' in ionad na bhfocal 'an 'tribunal première instance' no an 'rechtbank van eerste aanleg' sa chéad fhleasc.

- Cuirfear an méid seo leanas in ionad an dara fleasc:

'- sa Danmhairg, an byret,'.

9. Airteagal 38:

- Cuirfear na focail 'sa Stat tionscnaimh' in ionad na bhfocal 'sa Stat inar tugadh an breithiunas' sa chéad mhír.

- Cuirfear na focail 'sa Stat tionscnaimh' in ionad na bhfocal 'sa Stat inar tugadh é' sa dara mír.

10. Airteagal 43:

Cuirfear na focail 'cuirteanna an Stait tionscnaimh' in ionad na bhfocal 'cuirteanna an Stait inar tugadh an breithiunas'.

11. Airteagal 44:

Cuirfear na focail 'sa Stat tionscnaimh' in ionad na bhfocal 'sa Stat inar tugadh an breithiunas'.

12. Airteagal 47:

Cuirfear na focail 'de réir dhlí an Stait tionscnaimh' in ionad na bhfocal 'de réir dlí an Stait inar tugadh an breithiunas' i bpointe 1.

13. Airteagal 50:

- Cuirfear na focail 'a dhearbhu, i Stat conarthach eile, go bhfuil sé

infhorghníomhaithe ann' in ionad na bhfocal 'ordu a fhorghníomhaithe a eisiuint i

Stat Conarthach eile' agus na focail 'sa Stat chun a ndéantar an t-iarratas' in ionad na bhfocal 'sa Stat a n-iarrtar forghníomhu ann' sa chéad mhír.

- Cuirfear na focail 'a barantulacht' in ionad na bhfocal 'a bharantulacht' sa dara mír.

14. Airteagal 51:

Cuirfear na focail 'an Stat chun a ndéantar an t-iarratas' in ionad na bhfocal 'an Stat a n-iarrtar forghníomhu ann'.

15. Airteagal 55:

- Cuirfear an focal 'fhorghníomhu' in ionad an fhocail 'forghníomhu' sa chéad fhleasc, sa dara, sa séu, sa seachtu agus san ochtu fleasc, sa chéad fhleasc déag, sa daran fleasc déag agus sa chuigiu fleasc déag.

- Cuirfear an focal 'comhalartach' in ionad an fhocail 'frithphairteach' sa cheathru, sa chuigiu, sa naou agus sa deichiu fleasc, sa tríu fleasc déag agus sa cheathru fleasc déag.

- Cuirfear an focal 'frithphairteach' in ionad an fhocail 'comhalartach' sa seachtu fleasc agus sa dara fleasc déag.

16. Airteagal 56:

Cuirfear na focail 'i leith breithiunas a tugadh agus doiciméad a tarraingíodh suas go foirmiuil no a claraíodh mar ionstraimí barantula' in ionad na bhfocal 'i leith breithiunas a tugadh agus ionstraimí barantula a tarraingíodh suas go foirmiuil no a claraíodh mar ionstraimí barantula' sa dara mír.

17. Airteagal 59:

Cuirfear na focail 'i gcoinbhinsiun um aithint agus fhorghníomhu breithiunas' in ionad na bhfocal 'i gcoinbhinsiun um aithint agus forghníomhu breithiunas' sa chéad mhír.

18. Protacal, Airteagal IV: Cuirfear na focail 'oifigeach an Stait tionscnaimh' in ionad na bhfocal 'oifigeach Stat a thionscanta' sa dara mír.

(g)

Italian version

1. Articolo 3, secondo comma:

- secondo trattino:

leggi:

"- in Danimarca: l'articolo 246, paragrafi 2 e 3 della legge sulla procedura civile (Lov om rettens pleje).";

- ultimo trattino, lettera c):

anziché:

"c) sul sequestro, ottenuto dall'attore, di beni esistenti nel Regno Unito.",

leggi:

"c)

sul sequestro, ottenuto dall'attore, di beni situati nel Regno Unito".

2. Articolo 12 bis, prima frase:

anziché:

"I rischi di cui all'articolo 12, 5°, sono i seguenti:",

leggi:

"I rischi di cui all'articolo 12, punto 5, sono i seguenti:".

3. Articolo 28, ultimo comma:

anziché:

"Salva l'applicazione... contemplato dall'articolo 27, 1°.",

leggi:

"Salva l'applicazione... contemplato dall'articolo 27, punto 1".

4. Articolo 32, primo comma, secondo trattino:

leggi:

"- in Danimarca, al byret,".

5. Articolo 38, primo comma:

anziché:

"il giudice dell'opposizione...",

leggi:

"Il giudice davanti al quale è proposta l'opposizione...".

6. Articolo 44, primo comma:

anziché:

"L'istante che, nello Stato in cui è stata resa la decisione, ha beneficiato ...",

leggi:

"L'istante che, nello Stato di origine, ha beneficiato...".

7. Articolo 51:

anziché:

"Le transazioni... nello Stato di origine sono tali nello Stato richiesto . ..",

leggi:

"Le transazioni... nello Stato di origine hanno efficacia esecutiva nello Stato richiesto...".

PROTOCOLLO

8. Articolo I:

anziché:

"Qualsiasi persona... in applicazione dell'articolo 5, 1°,.. .",

leggi:

"Qualsiasi persona... in applicazione dell'articolo 5, punto 1,. . .".

9. Articolo V, secondo comma:

anziché:

"Le decisioni rese negli Stati contraenti in virtù dell'articolo 6, 2°, e . . .",

leggi:

"Le decisioni rese negli Stati contraenti in virtù dell'articolo 6, punto 2, e ...".

10. Articolo V quinquies:

anziché:

"Fatta salva... sul brevetto europeo per mercato comune,...",

leggi:

"Fatta salva... sul brevetto europeo per il mercato comune,.. .".

(h)

Dutch version

1. Artikel 1, eerste lid, tweede zin:

in plaats van: "Het omvat inzonderheid niet-fiscale zaken, zaken van douane of administratiefrechtelijke zaken."

leze men: "Het heeft inzonderheid geen betrekking op fiscale zaken, douanezaken of administratiefrechtelijke zaken.".

2. Artikel 2,

tweede lid:

in plaats van: "Voor hen, die"

leze men: "Voor degenen die".

3. Artikel 3

- eerste lid:

in plaats van: "Zij, die"

leze men: "Degenen die";

- tweede lid:

het tweede streepje wordt als volgt gelezen:

"- in Denemarken: artikel 246, leden 2 en 3, van de wet op de burgerlijke rechtsvordering (lov om rettens pleje)".

4. Artikel 5

- punt 2:

in plaats van: "... eis is welke verbonden is..."

leze men: "... eis is die verbonden is...";

- punt 7:

in plaats van: "... het gerecht in wiens rechtsgebied..."

leze men: "... het gerecht in het rechtsgebied waarvan...".

5. Artikel 6,

punt 2:

in plaats van: "... de afgeroepene"

leze men: "... de opgeroepene".

6. Artikel 6 bis:

in plaats van: "... de interne wet van deze Staat"

leze men: "... het nationale recht van deze Staat".

7. Afdeling 3

(titel):

in plaats van: "Bevoegdheid bij geschillen inzake verzekeringen"

leze men: "Bevoegdheid in verzekeringszaken".

8. Artikel 8,

punt 2:

in plaats van: "... het gerecht van de plaats waar de verzekeringsnemer zijn woonplaats heeft,"

leze men: "... het gerecht van de woonplaats van de verzekeringnemer,".

9. Artikel 11,

eerste lid:

in plaats van: "... op welk grondgebied de verweerder"

leze men: "... op het grondgebied waarvan de verweerder".

10. Artikel 12,

punt 3:

in plaats van: "waarbij een verzekeringsnemer en een verzekeraar, die op het tijdstip van het sluiten van de overeenkomst"

leze men: "waarbij een verzekeringnemer en een verzekeraar die, op het tijdstip waarop de overeenkomst wordt gesloten".

11. Artikel 12 bis - punt 2, aanhef:

in plaats van: "... met uitzondering van de..."

leze men: "... met uitzondering van die...";

- punt 2, onder a):

in plaats van: "... voor zover bevoegdheid toekennende overeenkomsten ter zake niet zijn verboden..."

leze men: "... voor zover ter zake overeenkomsten tot aanwijzing van een bevoegde rechter niet zijn verboden...".

12. Artikel 13,

punt 3, onder a):

in plaats van: "publiciteit"

leze men: "reclame".

13. Artikel 14,

derde lid:

in plaats van: "het gerecht, voor hetwelk"

leze men: "het gerecht, waarvoor".

14. Artikel 16,

punt 4:

in plaats van: "de Verdragsluitende Staat, op welks grondgebied"

leze men: "de Verdragsluitende Staat op het grondgebied waarvan".

15. Artikel 18:

in plaats van: "Buiten de gevallen dat zijn bevoegdheid voortspruit"

leze men: "Buiten de gevallen waarin zijn bevoegdheid voortvloeit".

16. Artikel 20,

derde lid in fine:

in plaats van: "strekt ter uitvoering van dat verdrag"

leze men: "overeenkomstig het bepaalde in dat Verdrag moest geschieden.".

17. Artikel 22

- tweede lid:

in plaats van: "... het gerecht bij hetwelk de zaak het eerst is aangebracht bevoegd is..."

leze men: "... het gerecht waarbij de zaak het eerst is aangebracht, bevoegd is...";

- derde lid:

in plaats van: "... haar gelijktijdige behandeling..."

leze men: "... hun gelijktijdige behandeling".

18. Artikel 23:

in plaats van: "... het gerecht bij hetwelk..."

leze men: "... het gerecht waarbij...".

19. Artikel 27,

punt 2:

in plaats van: "... nodig was aan de verweerder, tegen wie..."

leze men: "... nodig was, aan de verweerder tegen wie...".

20. Artikel 30,

tweede lid:

in plaats van: "De rechterlijke autoriteit van een Verdragsluitende Staat, bij wie de erkenning van een in Ierland of het Verenigd Koninkrijk gegeven beslissing, waarvan de tenuitvoerlegging door een daartegen aangewend rechtsmiddel in de Staat van herkomst is geschorst, wordt ingeroepen, kan zijn uitspraak aanhouden."

leze men: "De rechterlijke autoriteit van een Verdragsluitende Staat, bij wie de erkenning wordt ingeroepen van een in Ierland of het Verenigd Koninkrijk gegeven beslissing, waarvan de tenuitvoerlegging door een daartegen aangewend rechtsmiddel in de Staat van herkomst is geschorst, kan haar uitspraak aanhouden.".

21. Artikel 31,

tweede lid:

in plaats van: "... op verzoek van elke belanghebbende partij in dat deel van het Verenigd Koninkrijk..."

leze men: "... ten verzoeke van iedere belanghebbende partij in het betrokken deel van het Verenigd Koninkrijk...".

22. Artikel 32,

eerste lid:

- zevende streepje:

in plaats van: "de "corte d'appello" "

leze men: "het "corte d'appello" ";

- het tweede streepje wordt als volgt gelezen:

"- in Denemarken, tot de "byret";".

23. Artikel 32,

tweede lid:

in plaats van: "Het betrokken bevoegde gerecht"

leze men: "Het relatief bevoegde gerecht".

24. Artikel 36,

tweede lid in fine:

in plaats van: "... met het oog op..."

leze men: "... op grond van...".

25. Voetnoot (2), artikel 36, punt 4:

in fine toevoegen na het woord "vordering", de woorden "ter zake van het schip.".

26. Artikel 37,

eerste lid:

- eerste streepje:

het woord "het" schrappen;

- vijfde streepje:

in plaats van: "de "cour d'appel" "

leze men: "het "cour d'appel" ";

- zevende streepje:

in plaats van: "de "corte d'appello" "

leze men: "het "corte d'appello" ";

- achtste streepje:

in plaats van: "de "Cour supérieure..." "

leze men: "het "Cour supérieure..." ";

- tweede lid, tweede streepje:

in plaats van: "het "hoejesteret" "

leze men: "de "hoejesteret" ".

27. Artikel 38,

tweede lid, derde regel:

een komma invoegen tussen de woorden "ingesteld" en "voor".

28. Artikel 40,

eerste lid, eerste streepje:

het woord "de" schrappen.

29. Artikel 40

- vijfde streepje:

in plaats van: "de "cour d'appel" "

leze men: "het "cour d'appel" ";

- zevende streepje:

in plaats van: "de "corte d'appello" "

leze men: "het "corte d'appello" ";

- achtste streepje:

in plaats van: "de "Cour supérieure..." "

leze men: "het "Cour supérieure..." ".

30. Artikel 41,

vierde streepje:

in plaats van: "een "Supreme Court" "

leze men: "het "Supreme Court" ".

31. Artikel 44,

tweede lid, negende regel:

in plaats van: "... om hem voor gehele of gedeeltelijke kosteloze rechtsbijstand..."

leze men: "... om hem geheel of gedeeltelijk voor kosteloze rechtsbijstand...".

32. Artikel 45:

in plaats van: "De partij, die..."

leze men: "Aande partij die...".

33. Artikel 59,

tweede lid, punt 2:

de woorden "die gesteld is" schrappen.

34. Artikel II,

eerste lid:

in plaats van: "... welks onderdaan zij niet zijn..."

leze men: "... waarvan zij geen onderdaan zijn...".

35. Artikel II,

tweede lid, in fine:

in plaats van: "... noch te worden ten uitvoer gelegd."

leze men: "... noch ten uitvoer worden gelegd.".

36. Artikel IV,

eerste lid:

in plaats van: "voorzien"

leze men: "bepaald".

37. Artikel IV,

tweede lid:

in plaats van: "... de Staat op welks grondgebied..."

leze men: "... de Staat op het grondgebied waarvan...".

38. Artikel IV,

tweede lid:

in plaats van: "... het stuk aan degene, voor wie het bestemd is uit te reiken." EWG:L666UMBA02.92 27. 9. 1989

En fe de lo cual, los abajo firmantes, debidamente autorizados a tal efecto, han firmado el presente Convenio.

Til bekraeftelse heraf har undertegnede behoerigt befuldmaegtigede underskrevet denne konvention.

Zu Urkund dessen haben die hierzu gehoerig befugten Unterzeichneten dieses UEbereinkommen unterschrieben.

Se pístvsh tvn anvtérv, oi zpografontew plhrejozsioi, deontvw ejozsiodothménoi prow tozto, éuesan thn zpografh tozw katv apo thn parozsa szmbash.

In witness whereof the undersigned, being duly authorized thereto, have signed this Convention.

En foi de quoi, les soussignés, dûment autorisés à cet effet, ont signé la présente convention.

Da fhianu sin, chuir na daoine thíos-sínithe, arna n-udaru go cuí chiuge sin, a lamh leis an gCoinbhinsiun seo.

In fede di che, i sottoscritti, debitamente autorizzati a tal fine, hanno firmato la presente convenzione.

Ten blijke waarvan de ondergetekenden, daartoe behoorlijk gemachtigd, hun handtekening onder dit Verdrag hebben gesteld.

Em fé do que, os signatarios, devidamente autorizados para o efeito, apuseram as suas assinaturas no final da presente convençao.

Hecho en Donostia - San Sebastian, a veintiseis de mayo de mil novecientos ochenta y nueve.

Udfaerdiget i Donostia - San Sebastian, den seksogtyvende maj nitten hundrede og niogfirs.

Geschehen zu Donostia - San Sebastian am sechsundzwanzigsten Mai neunzehnhundertneunundachtzig.

iEgine sth Donostia - San Sebastian, stis eikosi exi Maioy chilia enniakosia ogdonta ennea.

Done at Donostia - San Sevastian, on tie tsentz-sichti daz of Maz in tie zear one tiothsand nine ithndred and eigitz-nine.

Fait a Donostia - San Sevastian, le oingt-sich mai mil nethf psent qthatre-oingt-nethf.

Arna dieanami in Donostia - San Sevastian, an se la is fipsie de Viealtaine sa viliain mle naoi gpsead opsito a naoi.

Fatto a Donostia - San Sevastian, addi oentisei mangio millenooepsentottantanooe.

Gedaan te Donostia - San Sevastian, de yesentsintigste mei negentienionderd negenentapsitig.

Feito em Donostia - San Sevastian, em ointe e seis de Maio de mil nooepsentos e oitenta e nooe.

Pothr Sa Maxeste le Roi des Velges

Ooor Yixne Maxesteit de Koning der Velgen

For Iendes Maxest t Danmarks Dronning

Fthr den Pr sidenten der Vthndesrepthvlik Dethtspsiland

Gia ton Proedro tis Ellinikis Dimokratias

Por Sth Maxestad el Rez de Espana

Pothr le president de la Repthvliqthe fran aise

Tiar pseann Thapsitaran na iEireann

Per il presidente della Repthvvlipsa italiana

Pothr Son Altesse Rozale le Grand-Dthps de Lthchemvothrg

Ooor Iare Maxesteit de Koningin der Nederlanden

Pelo Presidente da Repvlipsa Portthgthesa

For Ier Maxestz tie Qtheen of tie Thnited Kingdom of Great Vritain and Nortiern Ireland

ANEXO II CONVENIO relativo a la competencia judicial y a la ejecucion de resoluciones judiciales en materia civil y mercantil PREAMBULO

LAS ALTAS PARTES CONTRATANTES DEL TRATADO CONSTITUTIVO DE LA COMUNIDAD ECONOMICA EUROPEA,

Deseando aplicar las disposiciones del artículo 220 de dicho Tratado en virtud del cual se comprometían a garantizar la simplificacion de las formalidades a las que estan sometidos el reconocimiento y la ejecucion recíprocos de las resoluciones judiciales,

Preocupadas por fortalecer en la Comunidad la proteccion jurídica de las personas establecidas en la misma,

Considerando que es importante, a este fin, determinar la competencia de sus jurisdicciones en el orden internacional, facilitar el reconocimiento y establecer un procedimiento rapido al objeto de garantizar la ejecucion de las resoluciones judiciales, de los documentos publicos con fuerza ejecutiva y de las transacciones judiciales,

Han decidido celebrar el presente Convenio y han designado con tal fin como plenipotenciarios:

SU MAJESTAD EL REY DE LOS BELGAS:

al Señor Pierre HARMEL, Ministro de Asuntos Exteriores;

EL PRESIDENTE DE LA REPUBLICA FEDERAL DE ALEMANIA:

al Señor Willy BRANDT, Vicecanciller, Ministro de Asuntos Exteriores;

EL PRESIDENTE DE LA REPUBLICA FRANCESA:

al Señor Michel DEBRE, Ministro de Asuntos Exteriores;

EL PRESIDENTE DE LA REPUBLICA ITALIANA:

al Señor Giuseppe MEDICI, Ministro de Asuntos Exteriores;

SU ALTEZA REAL EL GRAN DUQUE DE LUXEMBURGO:

al Señor Pierre GREGOIRE, Ministro de Asuntos Exteriores;

SU MAJESTAD LA REINA DE LOS PAISES BAJOS:

al Señor J. M. A. H. LUNS, Ministro de Asuntos Exteriores;

QUIENES, reunidos en el seno del Consejo, después de haber intercambiado sus plenos poderes, reconocidos en buena y debida forma,

HAN CONVENIDO LAS DISPOSICIONES SIGUIENTES:

TITULO I

AMBITO DE APLICACION

Artículo 1 El presente Convenio se aplicara en materia civil y mercantil con independencia de la naturaleza del organo jurisdiccional.

Se excluira del ambito de aplicacion del presente Convenio:

1. el estado y la capacidad de las personas físicas, los regímenes matrimoniales, los testamentos y las sucesiones;

2. la quiebra, los convenios entre quebrado y acreedores y demas procedimientos analogos;

3. la Seguridad Social;

4. el arbitraje.

TITULO II

COMPETENCIA JUDICIAL

Seccion 1

Disposiciones generales

Artículo 2 Salvo lo dispuesto en el presente Convenio, las personas domiciliadas en un Estado contratante estaran sometidas, sea cual fuere su nacionalidad, a los organos jurisdiccionales de dicho Estado.

A las personas que no tuvieren la nacionalidad del Estado en que estén domiciliadas les seran de aplicacion las reglas de competencia judicial que se aplicaren a los nacionales.

Artículo 3 Las personas domiciliadas en un Estado contratante solo podran ser demandadas ante los tribunales de otro Estado contratante en virtud de las reglas establecidas en las Secciones 2 a 6 del presente Título.

En particular, no podra invocarse frente a ellas:

- en Bélgica: el artículo 15 del Codigo Civil y las disposiciones de los artículos 52, 52bis y 53 de la ley de 25 de marzo de 1876 sobre la competencia;

- en la Republica Federal de Alemania: el artículo 23 de la Ley de Enjuiciamiento Civil;

- en Francia: los artículos 14 y 15 del Codigo Civil;

- en Italia: el artículo 2 y los apartados 1 y 2 del artículo 4 de la Ley de Enjuiciamento Civil;

- en Luxemburgo: los artículos 14 y 15 del Codigo Civil;

- en los Países Bajos: el parrafo tercero del artículo 126 y el artículo 127 de la Ley de Enjuiciamiento Civil.

Artículo 4 Si el demandado no estuviere domiciliado en un Estado contratante la competencia judicial se regira, en cada Estado contratante, por la ley de este Estado, sin perjuicio de la aplicacion de lo dispuesto en el artículo 16.

Toda persona, sea cual fuere su nacionalidad, domiciliada en el territorio de un Estado contratante podra invocar contra dicho demandado, del mismo modo que los nacionales de este Estado, las reglas de competencia judicial vigentes en el mismo y, en particular, las previstas en el parrafo segundo del artículo 3.

Seccion 2

Competencias especiales

Artículo 5 Las personas domiciliadas en un Estado contratante podran ser demandadas en otro Estado contratante:

1. en materia contractual, ante el tribunal del lugar en el que hubiere sido o debiere ser cumplida la obligacion;

2. en materia de alimentos, ante el tribunal del lugar del domicilio o de la residencia habitual del acreedor de alimentos;

3. en materia delictual o cuasidelictual, ante el tribunal del lugar donde se hubiere producido el hecho dañoso;

4. si se tratare de acciones por daños y perjuicios o de acciones de restitucion fundamentadas en un acto que diere lugar a un procedimiento penal, ante el tribunal que conociere de dicho proceso, en la medida en que, de conformidad con su ley, dicho tribunal pudiere conocer de la accion civil;

5. si se tratare de litigios relativos a la explotacion de sucursales, agencias o cualquier otro establecimiento, ante el tribunal en que se hallaren sitos.

Artículo 6 Las personas a las que se refiere el artículo anterior podran también ser demandadas:

1. si hubiere varios demandados, ante el tribunal del domicilio de cualquiera de ellos;

2. si se tratare de una demanda sobre obligaciones de garantía o para la intervencion de terceros en el proceso, ante el tribunal que estuviere conociendo de la demanda principal, salvo que ésta se hubiere formulado con el unico objeto de provocar la intervencion de un tribunal distinto del correspondiente al demandado;

3. si se tratare de una reconvencion derivada del contrato o hecho en que se fundamentare la demanda inicial, ante el tribunal que estuviere conociendo de esta ultima.

Seccion 3

Competencia en materia de seguros

Artículo 7 En materia de seguros, se determinara la competencia con arreglo a las disposiciones de la presente Seccion, sin perjuicio de lo dispuesto en el artículo 4 y en el apartado 5 del artículo 5.

Artículo 8 El asegurador domiciliado en un Estado contratante podra ser demandado ante los tribunales

de dicho Estado, o, en otro Estado contratante, ante el tribunal del lugar donde tuviere su domicilio el tomador del seguro, o, si varios aseguradores fueren demandados, ante los tribunales del Estado contratante en el que uno de ellos tuviere su domicilio.

Si la ley del tribunal que conozca del supuesto estableciere dicha competencia, el asegurador podra, asimismo, ser demandado, en un Estado contratante distinto del de su

domicilio, ante el tribunal del lugar donde el intermediario que hubiere intervenido en la celebracion del contrato de seguro tuviere su domicilio, siempre que dicho domicilio figurare en la poliza o en la propuesta de seguro.

Cuando el asegurador no estuviere domiciliado en un Estado contratante pero tuviere sucursales, agencias o cualquier otro establecimiento en un Estado contratante, se le considerara, para los litigios relativos a su explotacion, domiciliado en dicho Estado.

Artículo 9 El asegurador podra, ademas, ser demandado ante el tribunal del lugar en que se hubiere producido el hecho dañoso cuando se tratare de seguros de responsabilidad o de seguros relativos a inmuebles. La misma regla sera de aplicacion cuando se tratare de seguros que se refirieren a inmuebles y a bienes muebles cubiertos por una misma poliza y afectados por el mismo siniestro.

Artículo 10 En materia de seguros de responsabilidad civil, el asegurador podra ser demandado igualmente ante el tribunal que conociere de la accion de la persona perjudicada contra el asegurado, cuando la ley de este tribunal lo permitiere.

Las disposiciones de los artículos 7, 8 y 9 seran aplicables en los casos de accion directa entablada por el perjudicado contra el asegurador cuando la accion directa fuere posible.

El mismo tribunal sera competente cuando la ley reguladora de esta accion directa previere la posibilidad de demandar al tomador del seguro o al asegurado.

Artículo 11 Salvo lo dispuesto en el parrafo tercero del artículo 10, la accion del asegurador solo podra ser ejercitada ante los tribunales del Estado contratante en cuyo territorio estuviere domiciliado el demandado, ya sea tomador del seguro, asegurado o beneficiario.

Las disposiciones de la presente Seccion no afectaran al derecho de interponer una reconvencion ante el tribunal que estuviere conociendo de una demanda inicial de conformidad con la presente Seccion.

Artículo 12 Unicamente prevaleceran sobre las disposiciones de la presente Seccion los convenios:

1. posteriores al nacimiento del litigio, o

2. que permitieren al tomador del seguro, al asegurado o al beneficiario formular demandas ante tribunales distintos de los indicados en la presente Seccion, o

3. que, habiéndose celebrado entre un tomador de seguro y un asegurador domiciliados en un mismo Estado contratante, atribuyeren, aunque el hecho dañoso se hubiere

producido en el extranjero, competencia a los tribunales de dicho Estado, a no ser que la ley de éste prohibiere tales convenios.

Seccion 4

Competencia en materia de venta y préstamos a plazos

Artículo 13 En materia de venta a plazos de mercaderías o de un préstamo a plazos directamente vinculado a la financiacion de la venta de tales bienes, la competencia quedara determinada por la presente Seccion, sin perjuicio de lo dispuesto en el artículo 4 y en el punto 5 del artículo 5.

Artículo 14 El vendedor y el prestamista domiciliados en un Estado contratante podran ser demandados ante los tribunales de dicho Estado o ante los tribunales del Estado contratante en el que tuviere su domicilio el comprador o el prestatario.

La accion del vendedor contra el comprador y la del prestamista contra el prestatorio solo podra interponerse ante los tribunales del Estado en el que el demandado tuviere su domicilio.

Estas disposiciones no afectaran al derecho de presentar una reconvencion ante el tribunal que entendiere de una demanda principal de conformidad con la presente Seccion.

Artículo 15 Unicamente prevaleceran sobre las disposiciones de la presente Seccion los convenios:

1. posteriores al nacimiento del litigio, o

2. que permitieren al comprador o al prestatario formular demandas ante tribunales distintos de los indicados en la presente Seccion, o

3. que habiéndose celebrado entre el comprador y el vendedor o entre el prestatario y el prestamista, domiciliados o con residencia habitual en el mismo Estado contratante, atribuyeren competencia a los tribunales de dicho Estado, a no ser que la ley de éste prohibiere tales convenios.

Seccion 5

Competencias exclusivas

Artículo 16 Son exclusivamente competentes, sin consideracion del domicilio:

1. en materia de derechos reales inmobiliarios y de contratos de arrendamiento de bienes inmuebles, los tribunales del Estado contratante donde el inmueble se hallare sito;

2. en materia de validez, nulidad o disolucion de sociedades y personas jurídicas que tuvieran su domicilio en un Estado contratante, o de decisiones de sus organos, los tribunales de dicho Estado;

3. en materia de validez de las inscripciones en los registros publicos, los tribunales del Estado contratante en que se encontrare el registro;

4. en materia de inscripciones o validez de patentes, marcas, diseños o dibujos y modelos, y demas derechos analogos sometidos a deposito o registro, los tribunales del Estado contratante en que se hubiere solicitado, efectuado o tenido por efectuado el deposito o registro

en virtud de lo dispuesto en algun convenio internacional;

5. en materia de ejecucion de las resoluciones judiciales, los tribunales del Estado contratante del lugar de la ejecucion.

Seccion 6

Prorroga de la competencia

Artículo 17 Si, mediante un convenio escrito o mediante un convenio verbal confirmado por escrito, las partes, cuando al menos una de ellas tuviere su domicilio en un Estado contratante, hubieren acordado que un tribunal o los tribunales de un Estado contratante fueren competentes para conocer de cualquier litigio que hubiere surgido o que pudiere surgir con ocasion de una determinada relacion jurídica, tal tribunal o tales tribunales seran los unicos competentes.

No surtiran efectos los convenios atributivos de competencia si fueren contrarios a las disposiciones de los artículos 12 y 15 o si excluyeren la competencia de tribunales exclusivamente competentes en virtud del artículo 16.

Cuando se celebrare un convenio atributivo de competencia en favor de una sola de las partes, ésta conservara su derecho de acudir ante cualquier otro tribunal que fuere competente en virtud del presente Convenio.

Artículo 18 Con independencia de los casos en los que su competencia resultare de otras disposiciones del presente Convenio, sera competente el tribunal de un Estado contratante ante el que compareciere el demandado. Esta regla no sera de aplicacion si la comparecencia tuviere por objeto impugnar la competencia o si existiere otra jurisdiccion exclusivamente competente en virtud del artículo 16.

Seccion 7

Comprobacion de la competencia judicial y de la

admisibilidad

Artículo 19 El tribunal de un Estado contratante, que conociere a título principal de un litigio para el que los tribunales de otro

Estado contratante fueren exclusivamente competentes en virtud del artículo 16, se declarara de oficio incompetente.

Artículo 20 Cuando el demandado domiciliado en un Estado contratante fuere emplazado por un tribunal de otro Estado contratante y no compareciere, dicho tribunal se declarara de oficio incompetente si su competencia no estuviere fundamentada en las disposiciones del presente Convenio.

Este tribunal estara obligado a suspender el procedimiento en tanto no se acreditare que el demandado ha podido recibir la cédula de emplazamiento con tiempo suficiente para defenderse o que se ha tomado toda diligencia a tal fin.

La disposiciones del parrafo precedente se sustituiran por las del artículo 15 del Convenio de La Haya, de 15 de noviembre de 1965, relativo a la notificacion o traslado en el extranjero de documentos judiciales y extrajudiciales en materia civil o mercantil, si la cédula de emplazamiento hubiere de ser remitida al extranjero, en cumplimiento del presente Convenio.

Seccion 8

Litispendencia y conexidad

Artículo 21 Cuando se formularen demandas con el mismo objeto y la misma causa entre las mismas partes ante tribunales de Estados contratantes distintos, el tribunal ante el que se formulare la segunda demanda debera, incluso de oficio, inhibirse en favor del tribunal ante el que se interpuso la primera.

El tribunal que debería inhibirse podra suspender el procedimiento si fuere impugnada la competencia del otro tribunal.

Artículo 22 Cuando se presentaren demandas conexas ante tribunales de Estados contratantes diferentes y estuvieren pendientes en primera instancia, el tribunal ante el que se hubiere presentado la demanda posterior podra suspender el procedimiento.

Este tribunal podra de igual modo inhibirse, a instancia de una de las partes, a condicion de que su ley permita la acumulacion de asuntos conexos y de que el tribunal ante el que se hubiere presentado la primera demanda fuere competente para conocer de ambas demandas.

Se consideraran conexas, a los efectos del presente artículo, las demandas vinculadas entre sí por una relacion tan estrecha que sería oportuno tramitarlas y juzgarlas al mismo tiempo a fin de evitar resoluciones que podrían ser inconciliables si los asuntos fueren juzgados separadamente.

Artículo 23 Cuando en demandas sobre un mismo asunto los tribunales de varios Estados contratantes se declararen exclusivamente competentes, el desistimiento se llevara a cabo en favor del tribunal ante el que se hubiere presentado la primera demanda.

Seccion 9

Medidas provisionales y cautelares

Artículo 24 Podran solicitarse medidas provisionales o cautelares previstas por la ley de un Estado contratante a las autoridades judiciales de dicho Estado, incluso si, en virtud del presente Convenio, un tribunal de otro Estado contratante fuere competente para conocer sobre el fondo.

TITULO III

RECONOCIMIENTO Y EJECUCION

Artículo 25 Se entendera por "resolucion", a los efectos del presente Convenio, cualquier decision adoptada por un tribunal de un Estado contratante con independencia de la denominacion que recibiere, tal como auto, sentencia, providencia o mandamiento de ejecucion, así como el acto por el cual el secretario judicial liquidare las costas del proceso.

Seccion 1

Reconocimiento

Artículo 26 Las resoluciones dictadas en un Estado contratante seran reconocidas en los demas Estados contratantes, sin que fuere necesario recurrir a procedimiento alguno.

En caso de oposicion, cualquier parte interesada que invocare el reconocimiento a título principal podra solicitar, por el procedimiento previsto en las Secciones 2 y 3 del presente Título, que se reconozca la resolucion.

Si el reconocimiento se invocare como cuestion incidental ante un tribunal de un Estado contratante, dicho tribunal sera competente para entender del mismo.

Artículo 27 Las resoluciones no se reconoceran:

1. si el reconocimiento fuere contrario al orden publico del Estado requerido;

2. cuando se dictaren en rebeldía del demandado, si no se hubiere entregado o notificado al mismo la cédula de emplazamiento, de forma regular y con tiempo suficiente para defenderse;

3. si la resolucion fuere inconciliable con una resolucion dictada en un litigio entre las mismas partes en el Estado requerido;

4. si el tribunal del Estado de origen, para dictar su resolucion, hubiere desconocido, al decidir de una cuestion relativa al estado o capacidad de las personas físicas, a los regímenes matrimoniales, a los testamentos o a las sucesiones, una regla de Derecho internacional privado del Estado requerido, a menos que se hubiere llegado al mismo resultado mediante la aplicacion de las normas de Derecho internacional privado del Estado requerido.

Artículo 28 Asimismo, no se reconoceran las resoluciones si se hubiere desconocido las disposiciones de las Secciones 3, 4 y 5 del Título II, así como el caso previsto en el artículo 59.

En la apreciacion de las competencias mencionadas en el parrafo anterior, el tribunal requerido quedara vinculado por las apreciaciones de hecho sobre las cuales el tribunal del Estado de origen hubiere fundamentado su competencia.

Sin perjuicio de las disposiciones del parrafo primero, no podra procederse a la fiscalizacion de la competencia del tribunal del Estado de origen; el orden publico contemplado en el punto 1

del artículo 27 no afectara a las reglas relativas a la competencia judicial.

Artículo 29 La resolucion extranjera en ningun caso podra ser objeto de una revision en cuanto al fondo.

Artículo 30 El tribunal de un Estado contratante ante el que se hubiere solicitado el reconocimiento de una resolucion dictada en otro Estado contratante podra suspender el procedimiento si dicha resolucion fuere objeto de un recurso ordinario.

Seccion 2

Ejecucion

Artículo 31 Las resoluciones dictadas en un Estado contratante que allí fueren ejecutorias se ejecutaran en otro Estado contratante cuando, a instancia de cualquier parte interesada, sean revestidas de la formula ejecutoria en este ultimo Estado.

Artículo 32 La solicitud se presentara:

- en Bélgica ante el "Tribunal de première instance" o "Rechtbank van eerste aanleg",

- en la Republica Federal de Alemania, ante el Presidente de una sala del "Landgericht",

- en Francia, ante el Presidente del "Tribunal de grande instance",

- en Italia, ante la "Corte d'appello",

- en Luxemburgo, ante el Presidente del "Tribunal d'arrondissement",

- en los Países Bajos, ante el Presidente del "Arrondissementsrechtbank".

La competencia territorial se determinara por el domicilio de la parte contra la que se solicitare la ejecucion. Si dicha parte no estuviere domiciliada en el Estado requerido, la competencia se determinara por el lugar de ejecucion.

Artículo 33 Las modalidades de presentacion de la solicitud se determinaran con arreglo a la ley del Estado en el que se solicitare la ejecucion.

El solicitante debera elegir domicilio para la notificacion del procedimiento en un lugar que correspondiere a la competencia judicial de la autoridad que conociere de la solicitud. No obstante, si la ley del Estado en el que se solicitare la ejecucion no conociere la eleccion de domicilio, el solicitante designara un mandatario ad litem.

Se adjuntaran a la solicitud los documentos mencionados en los artículos 46 y 47.

Artículo 34 El tribunal ante el que se presentare la solicitud se pronunciara en breve plazo sin que la parte contra la cual se solicitare la ejecucion pueda, en esta fase del procedimiento, formular observaciones.

La solicitud solo podra desestimarse por alguno de los motivos previstos en los artículos 27 y 28.

La resolucion extranjera en ningun caso podra ser objeto de una revision en cuanto al fondo.

Artículo 35 El secretario judicial notificara de inmediato la resolucion al solicitante de conformidad con las modalidades determinadas por la ley del Estado requerido.

Artículo 36 Si se otorgare la ejecucion, la parte contra la cual se hubiere solicitado podra interponer recurso contra la resolucion dentro del mes siguiente a la fecha de su notificacion.

Si dicha parte estuviere domiciliada en un Estado contratante distinto de aquél en el que se dictare la resolucion por la que se otorgare la ejecucion, el plazo sera de dos meses a partir del día en

que tuviere lugar la notificacion, ya fuere personal, ya en su domicilio. Dicho plazo no admitira prorroga en razon de la distancia.

Artículo 37 El recurso contra la resolucion que otorgare la ejecucion se presentara, segun las normas que rigen el procedimiento contradictorio:

- en Bélgica ante el "Tribunal de première instance" o "Rechtbank van eerste aanleg",

- en la Republica Federal de Alemania, ante el "Oberlandesgericht",

- en Francia, ante la "Cour d'appel",

- en Italia, ante la "Corte d'appello",

- en Luxemburgo, ante la "Cour supérieure de Justice" reunida para entender en materia de apalacion civil,

- en los Países Bajos, ante el "Arrondissementsrechtbank".

La resolucion dictada sobre el recurso solo podra ser objeto de un recurso de casacion y, en la Republica Federal de Alemania, de una "Rechtsbeschwerde".

Artículo 38 El tribunal que conociere del recurso podra, a instancia de la parte que lo hubiese interpuesto, suspender el procedimiento si la resolucion extranjera hubiese sido objeto de recurso ordinario en el Estado de origen o si el plazo para interponerlo no hubiere expirado; en este ultimo caso, el tribunal podra conceder un aplazamiento a efectos de la interposicion de dicho recurso.

Dicho tribunal podra igualmente subordinar la ejecucion a la constitucion de una garantía que él mismo determinara.

Artículo 39 Durante el plazo del recurso previsto en el artículo 36 y hasta que se hubiere resuelto sobre el mismo, solamente se podran adoptar medidas cautelares sobre los bienes de la parte contra la que se hubiere solicitado la ejecucion.

La resolucion que otorgare la ejecucion incluira la autorizacion para adoptar tales medidas cautelares.

Artículo 40 Si la solicitud fuere desestimada, el solicitante podra interponer recurso:

- en Bélgica, ante la "Cour d'appel" o el "Hof van Beroep";

- en la Republica Federal de Alemania, ante el "Oberlandesgericht";

- en Francia, ante la "Cour d'appel";

- en Italia, ante la "Corte d'appello";

- en Luxemburgo, ante la "Cour supérieure de justice" reunida para entender en materia de apelacion civil,

- en los Países Bajos, ante el "Gereschtshof".

La parte contra la que se hubiere solicitado la ejecucion sera citada de comparecencia ante el tribunal que conociere del recurso. En caso de incomparecencia se aplicaran las disposiciones de los parrafos segundo y tercero del artículo 20, aunque dicha parte no estuviere domiciliada en uno de los Estados contratantes.

Artículo 41 La resolucion que decidiere del recurso previsto en el artículo 40 solo podra ser objeto de un recurso de casacion

y, en la Republica Federal de Alemania, de un "Rechtsbeschwerde".

Artículo 42 Cuando la resolucion extranjera se hubiere pronunciado sobre varias pretensiones de

la demanda y la ejecucion no pudiere otorgarse para la totalidad de ellas, el tribunal concedera la ejecucion para una o varias de las mismas.

El solicitante podra instar una ejecucion parcial.

Artículo 43 Las resoluciones extranjeras que condenaren el pago de multas coercitivas solamente podran ejecutarse en el Estado requerido cuando la cuantía hubiere sido fijada definitivamente por el tribunal del Estado de origen.

Artículo 44 El solicitante que hubiere obtenido el beneficio de justicia gratuita en el Estado en el que se hubiere dictado la resolucion gozara del mismo, sin nuevo examen, en el procedimiento previsto en los artículos 32 a 35.

Artículo 45 A la parte que instare en un Estado contratante la ejecucion de una resolucion dictada en otro Estado contratante no podra exigírsele caucion o deposito alguno, sea cual fuere su denominacion, por su condicion de extranjero o por no estar domiciliadoo no ser residente en el Estado requerido.

Seccion 3

Disposiciones comunes

Artículo 46 La parte que invocare el reconocimiento o instare la ejecucion de una resolucion debera presentar:

1. una copia auténtica de dicha resolucion;

2. si se tratare de una resolucion dictada en rebeldía, el original o una copia auténtica del documento que acreditare la entrega o notificacion de la demanda o de documento equivalente a la parte declarada en rebeldía.

Artículo 47 La parte que instare la ejecucion debera presentar ademas:

1. cualquier documento que acreditare que, segun la ley del Estado de origen, la resolucion es ejecutoria y ha sido notificada;

2. un documento justificativo de que el solicitante goza, en su caso, de beneficio de justicia gratuita en el Estado de origen.

Artículo 48 De no presentarse los documentos mencionados en el apartado 2 del artículo 46 y en el apartado 2 del artículo 47, el tribunal podra fijar un plazo para la presentacion de los mismos, aceptar documentos equivalentes o dispensar de ellos si se considerare suficientemente ilustrado.

Si el tribunal lo exigiere, se presentara una traduccion de los documentos; la traduccion estara certificada por una persona autorizada a tal fin en uno de los Estados contratantes.

Artículo 49 No se exigira legalizacion ni formalidad analoga alguna en lo que se refiriere a los documentos mencionados en los artículos 46, 47 y en el parrafo segundo del artículo 48, y en su caso, al poder para pleitos.

TITULO IV

DOCUMENTOS PUBLICOS CON FUERZA EJECUTIVA Y TRANSACCIONES JUDICIALES

Artículo 50 Los documentos publicos con fuerza ejecutiva, formalizados en un Estado contratante, seran, a instancia de parte, revestidos de la formula ejecutoria en otro Estado contratante, con arreglo al procedimiento previsto en los artículos 31 y siguientes. La solicitud solo podra desestimarse cuando la ejecucion del documento fuere contraria al orden publico del Estado requerido.

El documento presentado debera reunir las condiciones necesarias de autenticidad en el Estado de origen.

Seran aplicables, en la medida en que fuere necesario, las disposiciones de la Seccion 3 del Título III.

Artículo 51 Las transacciones celebradas ante el tribunal durante un proceso y ejecutorias en el Estado de origen seran ejecutorias en el Estado requerido, en las mismas condiciones que los documentos publicos con fuerza ejecutiva.

TITULO V

DISPOSICIONES GENERALES

Artículo 52 Para determinar si una parte esta domiciliada en el Estado contratante cuyos tribunales conocieren del asunto, el tribunal aplicara su ley interna.

Cuando una parte no estuviere domiciliada en el Estado cuyos tribunales conocieren del asunto, el tribunal, para determinar si dicha parte lo esta en otro Estado contratante, aplicara la ley de dicho Estado.

No obstante, para determinar el domicilio de una parte, se aplicara su ley nacional si, segun ésta, su domicilio dependiere del de otra persona o de la sede de una autoridad.

Artículo 53 A los efectos del presente Convenio, la sede de las sociedades y de otras personas jurídicas quedara asimilada al domicilio. Sin embargo, para determinar dicha sede, el tribunal que conociere del asunto aplicara las reglas de su Derecho internacional privado.

TITULO VI

DISPOSICIONES TRANSITORIAS

Artículo 54 La disposiciones del presente Convenio solamente seran aplicables a las acciones judiciales ejercitadas y a los documentos publicos con fuerza ejecutiva formalizados con posterioridad a su entrada en vigor.

Sin embargo, las resoluciones dictadas después de la fecha de entrada en vigor del presente Convenio como consecuencia de acciones ejercitadas con anterioridad a esta fecha seran reconocidas y ejecutadas en el Estado requerido con arreglo a las disposiciones del Título III, si las reglas de competencia aplicadas se ajustaren a las prevista en el Título II o en un Convenio en vigor entre el Estado de origen y el Estado requerido al ejercitarse la accion.

TITULO VII

RELACIONES CON LOS DEMAS CONVENIOS

Artículo 55 Sin perjuicio de lo dispuesto en el parrafo segundo del artículo 54, y en el artículo 56, el presente Convenio sustituira, entre los Estados que son partes del mismo, a los convenios celebrados entre dos o mas de estos Estados, a saber:

- el Convenio entre Bélgica y Francia sobre competencia judicial y sobre valor y ejecucion de las resoluciones

judiciales, laudos arbitrales y documentos publicos con fuerza ejecutiva, firmado en Paris el 8 de julio de 1899;

- el Convenio entre Bélgica y los Países Bajos sobre competencia judicial territorial, quiebra, y sobre valor y ejecucion de resoluciones judiciales, laudos arbitrales y documentos publicos con fuerza ejecutiva, firmado en Bruselas el 28 de marzo de 1925;

- el Convenio entre Francia e Italia sobre ejecucion de sentencias en materia civil y mercantil, firmado en Roma el 3 de junio de 1930;

- el Convenio entre Alemania e Italia sobre reconocimiento y ejecucion de resoluciones judiciales en materia civil y mercantil, firmado en Roma el 9 de marzo de 1936;

- el Convenio entre la Republica Federal de Alemania y el Reino de Bélgica relativo al conocimiento y la ejecucion recíprocos en materia civil y mercantil de las resoluciones judiciales, laudos arbitrales y documentos publicos con fuerza ejecutiva, firmado en Bonn el 30 de junio de 1958;

- el Convenio entre el Reino de los Países Bajos y la Republica Italiana sobre reconocimiento y ejecucion de resoluciones judiciales en materia civil y mercantil firmado en Roma el 17 de abril de 1959;

- el Convenio entre el Reino de Bélgica y la Republica Italiana relativo al reconocimiento y la ejecucion de resoluciones judiciales y otros títulos ejecutivos en materia civil y mercantil, firmado en Roma el 6 de abril de 1962;

- el Convenio entre el Reino de los Países Bajos y la Republica Federal de Alemania sobre reconocimiento y ejecucion mutuos de resoluciones judiciales y otros títulos ejecutivos civil y mercantil, firmado en La Haya el 30 de agosto de 1962,

- y en tanto esté en vigor:

- el Tratado entre Bélgica, los Países Bajos y Luxemburgo sobre competencia judicial, quiebra y valor y ejecucion de resoluciones judiciales, laudos arbitrales y documentos publicos con fuerza ejecutiva, firmado en Bruselas el 24 de noviembre de 1961.

Artículo 56 El Tratado y los Convenios mencionadas en el artículo 55 continuaran surtiendo sus efectos en las materias a las que no se aplicare el presente Convenio.

Dicho Tratado y dichos Convenios continuaran surtiendo sus efectos en lo relativo a las resoluciones dictadas y los documentos publicos con fuerza ejecutiva formalizados antes de la entrada en vigor del presente Convenio.

Artículo 57 El presente Convenio no afectara a los convenios en que los Estados contratantes fueren o llegaren a ser parte y que, en materias particulares, regularen la competencia judicial, el reconocimiento o la ejecucion de las resoluciones.

Artículo 58 Lo dispuesto en el presente Convenio no afectara los derechos reconocidos a los nacionales suizos por el Convenio celebrado el 15 de junio de 1869 entre Francia y la Confederacion Suiza sobre competencia judicial y ejecucion de sentencias en materia civil.

Artículo 59 El presente Convenio no impedira que un Estado contratante se comprometa con un Estado tercero, en virtud de un Convenio sobre reconocimiento y ejecucion de resoluciones judiciales, a no reconocer una resolucion dictada en otro Estado contratante contra un demandado que tuviere su domicilio o su residencia habitual en un Estado tercero cuando, en el caso previsto en el artículo 4, la resolucion solo hubiere podido fundamentarse en un criterio de competencia contemplado en el parrafo segundo del artículo 3.

TITULO VIII

DISPOSICIONES FINALES

Artículo 60 El presente Convenio se aplicara en el territorio europeo de los Estados contratantes y en los departamentos y territorios franceses de Ultramar.

El Reino de los Países Bajos podra declarar en el momento de la firma o de la ratificacion del presente Convenio, o en cualquier momento posterior, mediante notificacion al Secretario General del Consejo de las Comunidades Europeas, que el presente Convenio sera aplicable en Surinam y en las Antillas neerlandesas. En ausencia de tal declaracion, en lo relativo a las Antillas

neerlandesas, los procedimientos que se desarrollaren en el territorio europeo del Reino como consecuencia de un recurso de casacion contra las resoluciones de los tribunales de las Antillas neerlandesas se consideraran como procedimientos desarrollados ante esos tribunales.

Artículo 61 El presente Convenio sera ratificado por los Estados signatarios. Los instrumentos de ratificacion se depositaran ante

el Secretario General del Consejo de las Comunidades Europeas.

Artículo 62 El presente Convenio entrara en vigor el primer día del tercer mes siguiente al del déposito del instrumento de ratificacion del Estado signatario que realice esta formalidad en ultimo lugar.

Artículo 63 Los Estados contratantes reconocen que todo Estado que se convierta en miembro de la Comunidad Economica Europea tendra la obligacion de aceptar que el presente Convenio se tome come base para las negociaciones necesarias con objeto de asegurar la aplicacion del ultimo parrafo del artículo 220 del Tratado constitutivo de la Comunidad Economica Europea en las relaciones entre los Estados contratantes y ese Estado.

Las adaptaciones necesarias podran ser objeto de un convenio especial entre los Estados contratantes, por una parte, y ese Estado, por otra.

Artículo 64 El Secretario General del Consejo de las Comunidades Europeas notificara a los Estados signatorios:

a) el deposito de cada uno de los instrumentos de ratificacion;

b)

la fecha de entrada en vigor del presente Convenio;

c)

las declaraciones recibidas en aplicacion del parrafo segundo del artículo 60;

d)

las declaraciones recibidas en aplicacion del artículo IV del Protocolo;

e)

las comunicaciones hechas en aplicacion del artículo VI del Protocolo.

Artículo 65 El Protocolo que, de comun acuerdo entre los Estados contratantes, se adjunta como anejo al presente Convenio, forma parte integrante del mismo.

Artículo 66 El presente Convenio tendra una duracion ilimitada.

Artículo 67 Cada Estado contratante podra solicitar la revision del presente Convenio. En tal caso, el Presidente del Consejo de las Comunidades Europeas convocara una conferencia de revision.

Artículo 68 El presente Convenio, redactado en un solo ejemplar en lengua alemana, en lengua francesa, en lengua italiana y en lengua neerlandesa, cuyos cuatro textos son igualmente auténticos, sera depositado en los archivos de la Secretaría del Consejo de las Comunidades Europeas. El Secretario General remitira una copia autenticada conforme a cada uno de los Gobiernos de los Estados signatarios.

En fe de lo cual, los plenipotenciarios abajo firmantes suscriben el presente Convenio.

Zu Urkund dessen haben die unterzeichneten Bevollmaechtigten ihre Unterschrift unter dieses UEbereinkommen gesetzt.

En foi de quoi les plénipotentiaires soussignés ont apposé leur signature au bas de la présente

convention.

In fede di che i plenipotenziari sottoscritti hanno apposto le loro firme in calce alla presente convenzione.

Ten blijke waarvan de onderscheiden gevolmachtigden hun handtekening onder dit Verdrag hebben gesteld.

Hecho en Bruselas, el veintisiete de septiembre de mil novecientos sesenta y ocho.

Geschehen zu Bruessel am siebenundzwanzigsten September neunzehnhundertachtundsechzig.

Fait à Bruxelles, le vingt-sept septembre mil neuf cent soixante-huit.

Fatto a Bruxelles, addi ventisette settembre millenovecentosessantotto.

Gedaan te Brussel, op zevenentwintig september negentienhonderd achtenzestig.

Por Su Majestad el Rey de los Belgas,

Pierre HARMEL

Por el Presidente de la Republica Federal de Alemania,

Willy BRANDT

Por el Presidente de la Republica Francesa,

Michel DEBRE

Por el Presidente de la Republica Italiana,

Giuseppe MEDICI

Por Su Alteza Real el Gran Duque de Luxemburgo,

Pierre GREGOIRE

Por Su Majestad la Reina de los Países Bajos,

J. M. A. H. LUNS

PROTOCOLO

As altas partes contratantes acordaram nas disposiçoes seguintes que ficam anexas à convençao:

Artigo Ig. Qualquer pessoa domiciliada no Luxemburgo, demandada perante o tribunal de um outro Estado contratante nos termos do ponto 1 do artigo 5g., pode arguir a incompetência desse tribunal. O tribunal em causa declarar-se-a oficiosamente incompetente se o requerido nao comparecer.

Qualquer pacto atributivo de jurisdiçao na acepçao do artigo 17g., so produzira efeitos em relaçao a uma pessoa domiciliada no Luxemburgo se esta expressa e especificamente o aceitar.

Artigo IIg. Sem prejuízo de disposiçoes nacionais mais favoraveis, as pessoas domiciliadas num Estado contratante e contra quem corre processo por infracçao involuntaria nos tribunais com competência penal de outro Estado contratante de que nao sejam nacionais podem entregar a sua defesa a pessoas para tanto habilitadas, mesmo que nao compareçam pessoalmente.

Todavia, o tribunal a que foi submetida a questao pode ordenar a comparência pessoal; se tal nao ocorrer, a decisao proferida na acçao cível sem que a pessoa em causa tenha tido a possibilidade de assegurar a sua defesa pode nao ser reconhecida nem executada nos outros Estados contratantes.

Artigo IIIg. Nenhum imposto, direito ou taxa, proporcional ao valor do litígio, sera cobrado no Estado requerido no processo de concessao da formula executoria.

Artigo IVg. Os actos judiciais e extrajudiciais praticados no territorio de um Estado contratante e que devam ser objecto de notificaçao ou citaçao a pessoas que se encontrem no territorio de outro Estado contratante serao transmitidos na forma

prevista em convençoes ou acordos celebrados entre os Estados contratantes.

Desde que o Estado destinatario a tal nao se oponha mediante declaraçao dirigida ao secretario-geral do Conselho das Comunidades Europeias, esses actos podem também ser transmitidos directamente pelos oficiais de justiça do Estado em que forem praticados aos oficiais de justiça do Estado em cujo territorio se encontre o destinatario do acto. Neste caso, o oficial de justiça do Estado de origem transmitira uma copia do acto ao oficial de justiça do Estado requerido, que tem competência para a enviar ao destinatario. Essa remessa sera feita na forma prevista pela lei do Estado requerido. E sera comprovada por certidao enviada directamente ao oficial de justiça do Estado de origem.

Artigo Vg. A competência judiciaria prevista no ponto 2 do artigo 6g. e no artigo 10g., no que respeita ao chamamento de um garante à acçao ou a qualquer incidente de intervençao de terceiro, nao pode ser invocada na Republica Federal da Alemanha. Nesse Estado, as pessoas domiciliadas no territorio de outro Estado contratante podem ser chamadas a tribunal nos termos dos artigos 68g. e 72g., 73g. e 74g. do Codigo de Processo Civil relativos à litis denunciatio.

As decisoes proferidas nos outros Estados contratantes por força do ponto 2 do artigo 6g. e do artigo 10g. serao reconhecidas e executadas na Republica Federal da Alemanha, em conformidade com o título III. Os efeitos produzidos relativamente a terceiros, nos termos dos artigos 68g. e 72g., 73g. e 74g. do Codigo de Processo Civil, por decisoes proferidas nesse Estado serao igualmente reconhecidos nos outros Estados contratantes.

Artigo VIg. Os Estados contratantes comunicarao ao secretario-geral do Conselho das Comunidades Europeias os textos das suas disposiçoes legislativas que venham a alterar, quer os artigos das respectivas leis que sao mencionados na convençao quer os tribunais que sao designados na secçao 2 do título III da convençao.

Zu Urkund dessen haben die unterzeichneten Bevollmaechtigten ihre Unterschrift unter dieses Protokoll gesetzt.

En foi de quoi les plénipotentiaires soussignés ont apposé leur signature au bas du présent protocole.

In fede di che i plenipotenziari sottoscritti hanno apposto le loro firme in calce al presente protocollo.

Ten blijke waarvan de onderscheiden gevolmachtigden hun handtekening onder dit Protocol hebben gesteld.

Em fé do que os plenipotenciarios abaixo-assinados apuseram as suas assinaturas no final do presente protocolo.

Geschehen zu Bruessel am siebenundzwanzigsten September neunzehnhundertachtundsechzig.

Fait à Bruxelles, le vingt-sept septembre mil neuf cent soixante-huit.

Fatto a Bruxelles, addi ventisette settembre millenovecentosessantotto.

Gedaan te Brussel, op zevenentwintig september negentienhonderd achtenzestig.

Feito em Bruxelas, aos vinte e sete de Setembro de mil novecentos e sessenta e oito.

Pierre HARMEL

Giuseppe MEDICI

Willy BRANDT

Pierre GREGOIRE

Michel DEBRE

J. M. A. H. LUNS

DECLARAÇAO COMUM

Os governos do Reino da Bélgica, da Republica Federal da Alemanha, da Republica Francesa, da Republica Italiana, do Grao-Ducado do Luxemburgo e do Reino dos Países Baixos;

Aquando da assinatura da convençao relativa à competência judiciaria e à execuçao de decisoes em matéria civil e comercial;

Desejosos de assegurar uma aplicaçao tao eficaz quanto possível das suas disposiçoes;

Preocupados em evitar que divergências de interpretaçao da convençao prejudiquem o seu caracter unitario;

Conscientes de que na aplicaçao da convençao podem surgir conflitos positivos ou negativos de competência;

Declaram-se dispostos:

1. A estudar essas questoes e, nomeadamente, a examinar a possibilidade de atribuir competência em determinadas matérias ao Tribunal de Justiça das Comunidades Europeias e a negociar, se for caso disso, um acordo para o efeito.

2. A estabelecer contactos periodicos entre os seus representantes.

Zu Urkund dessen haben die unterzeichneten Bevollmaechtigten ihre Unterschrift unter diese Gemeinsame Erklaerung gesetzt.

En foi de quoi les plénipotentiaires soussignés ont apposé leur signature au bas de la présente déclaration commune.

In fede di che i plenipotenziari sottoscritti hanno apposto le loro firme in calce alla presente dichiarazione comune.

Ten blijke waarvan de onderscheiden gevolmachtigden hun handtekening onder deze Gemeen-

schappelijke Verklaring hebben gesteld.

Em fé do que os plenipotenciarios abaixo-assinados apuseram as suas assinaturas no final da presente declaraçao comum.

Geschehen zu Bruessel am siebenundzwanzigsten September neunzehnhundertachtundsechzig.

Fait à Bruxelles, le vingt-sept septembre mil neuf cent soixante-huit.

Fatto a Bruxelles, addi ventisette settembre millenovecentosessantotto.

Gedaan te Brussel, op zevenentwintig september negentienhonderd achtenzestig.

Feito em Bruxelas, aos vinte e sete de Setembro de mil novecentos e sessenta e oito.

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ANEXO III

PROTOCOLO relativo a interpretaçao pelo Tribunal de Justiça da convençao de 27 de Setembro de 1968 relativa à competência judiciaria e à execuçao de decisoes em matéria civil e comercial AS ALTAS PARTES CONTRATANTES NO TRATADO QUE INSTITUI A COMUNIDADE ECONOMICA EUROPEIA,

REPORTANDO-SE à declaraçao anexa à convençao, relativa à competência judiciaria e à execuçao de decisoes em matéria civil e comercial, assinada em Bruxelas em 27 de Setembro de 1968,

DECIDIRAM concluir um protocolo que atribua competência ao Tribunal de Justiça das Comunidades Europeias para a interpretaçao da referida convençao e, para esse efeito, designaram como plenipotenciarios:

SUA MAJESTADE O REI DOS BELGAS:

Sr. Alfons VRANCKX,

Ministro da Justiça;

O PRESIDENTE DA REPUBLICA FEDERAL DA ALEMANHA:

Sr. Gerhard JAHN,

Ministro Federal da Justiça;

O PRESIDENTE DA REPUBLICA FRANCESA:

Sr. René PLEVEN

Ministro da Justiça;

O PRESIDENTE DA REPUBLICA ITALIANA:

Sr. Erminio PENNACCHINI,

Subsecretario de Estado do Ministério da Justiça e das Amnistias;

SUA ALTEZA REAL O GRAO-DUQUE DO LUXEMBURGO:

Sr. Eugéne SCHAUS,

Ministro da Justiça,

Vice-Presidente do Governo;

SUA MAJESTADE A RAINHA DOS PAISES BAIXOS:

Sr. C. H. F. POLAK,

Ministro da Justiça;

OS QUAIS, reunidos no Conselho, depois de terem trocado os seus plenos poderes reconhecidos em boa e devida forma,

ACORDARAM NO SEGUINTE:

Artigo 1g. O Tribunal de Justiça das Comunidades Europeias é competente para decidir sobre a interpretaçao da convençao relativa à competência judiciaria e à execuçao de decisoes em matéria civil e comercial e do protocolo anexo a essa convençao, assinados em Bruxelas em 27 de Setembro de 1968, bem como do presente protocolo.

Artigo 2g. Os seguintes tribunais têm o poder de pedir ao Tribunal de Justiça que se pronuncie, a título prejudicial, sobre uma questao de interpretaçao:

1. Na Bélgica: a "Cour de cassation" (her Hof van Cassatie) e o "Conseil d'Etat" (de Raad van State),

na Republica Federal da Alemanha: o "obersten Gerichtshoefe des Bundes",

em França: a "Cour de cassation" e o "Conseil d'Etat",

em Italia: a "Corte suprema de cassazione",

no Luxemburgo: a "Cour supérieure de justice", decidindo como "Cour de cassation",

nos Países Baixos: o "Hoge Raad".

2. Os tribunais dos Estados contratantes, quando decidam um recurso.

3. Nos casos previstos no artigo 37g. da convençao, os tribunais mencionados no referido artigo.

Artigo 3g. 1. Sempre que uma questao relativa à interpretaçao da convençao e dos outros textos mencionados no artigo 1g. seja suscitada em causa pendente perante um dos tribunais referidos no ponto 1 do artigo 2g., esse tribunal é obrigado, se considerar que uma decisao sobre essa questao é necessaria ao julgamento da causa, a submeter a questao ao Tribunal de Justiça.

2. Sempre que uma questao dessa natureza for suscitada perante um dos tribunais referidos nos pontos 2 e 3 do artigo 2g., esse tribunal pode, nas condiçoes definidas no no 1, pedir ao Tribunal de Justiça que sobre ela se pronuncie.

Artigo 4g. 1. A autoridade competente de um Estado contratante pode pedir ao Tribunal de Justiça que se pronuncie sobre uma questao de interpretaçao da convençao e dos outros textos referidos no artigo 1g., se as decisoes proferidas pelos tribunais desse Estado estiverem em contradiçao com a interpretaçao dada, quer pelo Tribunal de Justiça quer por uma decisao de um tribunal de um outro Estado contratante referido nos pontos 1 e 2 do artigo 2g. O disposto no presente numero so se aplica às decisoes com força de caso julgado.

2. A interpretaçao dada pelo Tribunal de Justiça na sequência de tal pedido nao produz efeitos quanto às decisoes relativamente às quais lhe tenha sido pedida interpretaçao.

3. Sao competentes para apresentar ao Tribunal de Justiça um pedido de interpretaçao, nos termos do no 1, os procuradores-gerais junto dos Tribunais Supremos dos Estados contratantes ou qualquer outra autoridade designada por um Estado contratante.

4. O escrivao do Tribunal de Justiça notificara do pedido os Estados contratantes, a Comissao e o Conselho das Comunidades Europeias que, no prazo de dois meses a contar dessa notificaçao, terao o direito de apresentar ao Tribunal memorandos ou observaçoes por escrito.

5. O processo previsto no presente artigo nao da lugar nem à cobrança nem ao reembolso de preparos e custas.

Artigo 5g. 1. Sem prejuízo de disposiçao contraria do presente protocolo, as disposiçoes do Tratado que institui a Comunidade Economica Europeia e as do protocolo relativo ao Estatuto do Tribunal de Justiça que lhe é anexo, aplicaveis quando o Tribunal é chamado a pronunciar-se a título prejudicial, aplicam-se igualmente ao processo de interpretaçao da convençao e dos outros textos referidos no artigo 1g.

2. O regulamento processual do Tribunal de Justiça sera, se necessario, adaptado e completado nos termos do artigo 188g. do Tratado que institui a Comunidade Economica Europeia.

Artigo 6g. O presente protocolo aplica-se ao territorio europeu dos Estados contratantes, bem como aos departamentos e territorios franceses ultramarinos.

O Reino dos Países Baixos pode declarar, no momento da assinatura ou da ratificaçao do presente protocolo ou em qualquer momento posterior, mediante notificaçao ao secretario-geral do Conselho das Comunidades Europeias, que o presente protocolo sera aplicavel às Antilhas Neerlandesas.

Artigo 7g. O presente protocolo sera ratificado pelos Estados signatarios. Os instrumentos de ratificaçao serao depositados junto do secretario-geral do Conselho das Comunidades Europeias.

Artigo 8g. O presente protocolo entrara em vigor no primeiro dia do terceiro mês seguinte ao do deposito do instrumento de ratificaçao pelo Estado signatario que tiver procedido a essa formalidade em ultimo lugar. Todavia, a data mais proxima possível da entrada em vigor do presente protocolo sera a da entrada em vigor da convençao de 27 de Setembro de 1968, relativa à competência judiciaria e à execuçao de decisoes em matéria civil e comercial.

Artigo 9g. Os Estados contratantes reconhecem que qualquer Estado que se torne membro da Comunidade Economica Europeia e ao qual seja aplicavel o artigo 63g. da convençao relativa à competência judiciaria e à execuçao de decisoes em matéria civil e comercial deve aceitar as disposiçoes do presente protocolo, sob reserva das necessarias adaptaçoes.

Artigo 10g. O secretario-geral do Conselho das Comunidades Europeias notificara os Estados signatarios:

a) Do deposito de qualquer instrumento de ratificaçao;

b) Da data de entrada em vigor do presente protocolo;

c) Das declaraçoes recebidas nos termos do no 3 do ar-

tigo 4g.;

d) Das declaraçoes recebidas nos termos do segundo paragrafo do artigo 6g.

Artigo 11g. Os Estados contratantes comunicarao ao secretario-geral do Conselho das Comunidades Europeias os textos das suas disposiçoes legislativas que impliquem uma alteraçao da lista dos tribunais, designados no ponto 1 do artigo 2g.

Artigo 12g. O presente protocolo tem vigência ilimitada.

Artigo 13g. Cada Estado contratante pode pedir a revisao do presente protocolo. Nesse caso, sera convocada pelo presidente do Conselho das Comunidades Europeias uma conferência de revisao.

Artigo 14g. O presente protocolo, redigido num unico exemplar nas línguas alema, francesa, italiana e neerlandesa, fazendo fé qualquer dos quatro textos, sera depositado nos arquivos do Secretariado do Conselho das Comunidades Europeias. O secretario-geral remetera uma copia autenticada a cada um dos Governos dos Estados signatarios.

Zu Urkund dessen haben die unterzeichneten Bevollmaechtigten ihre Unterschrift unter dieses Protokoll gesetzt.

En foi de quoi les plénipotentiaires soussignés ont apposé leur signature au bas du présent protocole.

In fede di che i plenipotenziari sottoscritti hanno apposto le loro firme in calce al presente protocollo.

Ten blijke waarvan de onderscheiden gevolmachtigden hun handtekening onder dit Protocol hebben gesteld.

Em fé do que os plenipotenciarios abaixo-assinados apuseram as suas assinaturas no final do presente protocolo.

Geschehen zu Luxemburg am dritten Juni neunzehnhunderteinundsiebzig.

Fait à Luxembourg, le trois juin mil neuf cent soixante et onze.

Fatto a Lussemburgo, addi tre giugno millenovecentosettantuno.

Gedaan te Luxemburg, de derde juni negentienhonderd eenenzeventig.

Feito no Luxemburgo, aos três de Junho de mil novecentos e setenta e um.

Alfons VRANCKX

Ermínio PENNACCHINI

Gerhard JAHN

Eugéne SCHAUS

René PLEVEN

C. H. F. POLAK

DECLARAÇAO COMUM

Os Governos do Reino da Bélgica, da Republica Federal da Alemanha, da Republica Francesa, da Republica Italiana, do Grao-Ducado do Luxemburgo e do Reino dos Países Baixos,

Aquando da assinatura do protocolo relativo à interpretaçao pelo Tribunal de Justiça da convençao de 27 de Setembro de 1968, relativa à competência judiciaria e à execuçao de decisoes em matéria civil e comercial,

Desejando assegurar uma aplicaçao tao eficaz e uniforme quanto possível das suas disposiçoes,

Declaram-se prontos a organizar, em ligaçao com o Tribunal de Justiça, uma troca de informaçoes relativa às decisoes proferidas pelos tribunais mencionados no ponto 1 do artigo 2g. do referido protocolo, em aplicaçao da convençao e do protocolo de 27 de Setembro de 1968.

Zu Urkund dessen haben die unterzeichneten Bevollmaechtigten ihre Unterschrift unter diese Gemeinsame Erklaerung gesetzt.

En foi de quoi les plénipotentiaires soussignés ont apposé leur signature au bas de la présente déclaration commune.

In fede di che i plenipotenziari sottoscritti hanno apposto le loro firme in calce alla presente dichiarazione comune.

Ten blijke waarvan de onderscheiden gevolmachtigden hun handtekening onder deze Gemeenschappelijke Verklaring hebben gesteld.

Em fé do que os plenipotenciarios abaixo-assinados apuseram as suas assinaturas no final da presente declaraçao comum.

Geschehen zu Luxemburg am dritten Juni neunzehnhunderteinundsiebzig.

Fait à Luxembourg, le trois juin mil neuf cent soixante et onze.

Fatto a Lussemburgo, addi tre giugno millenovecentosettantuno.

Gedaan te Luxemburg, de derde juni negentienhonderd eenenzeventig.

Feito no Luxemburgo, aos três de Junho de mil novecentos e setenta e um.

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ANEXO IV

CONVENÇAO relativa à adesao do Reino da Dinamarca, da Irlanda e do Reino Unido da Gra-Bretanha e da Irlanda do Norte à convençao relativa à competência judiciaria e à execuçao de decisoes em matéria civil e comercial, bem como ao protocolo relativo à sua interpretaçao pelo Tribunal de Justiça

PREAMBULO

AS ALTAS PARTES CONTRATANTES NO TRATADO QUE INSTITUI A COMUNIDADE ECONOMICA EUROPEIA,

CONSIDERANDO que o Reino da Dinamarca, a Irlanda e o Reino Unido da Gra-Bretanha e da Irlanda do Norte, ao tornarem-se membros da Comunidade, se comprometeram a aderir à convençao relativa à competência judiciaria e à execuçao de decisoes em matéria civil e comercial e ao protocolo relativo à interpretaçao dessa convençao pelo Tribunal de Justiça e a encetar negociaçoes para o efeito com os Estados-membros originarios da Comunidade para lhes introduzir as adaptaçoes necessarias,

DECIDIRAM celebrar a presente convençao e, para o efeito, designaram como plenipotenciarios:

SUA MAJESTADE O REI DOS BELGAS:

Renaat VAN ELSLANDE,

Ministro da Justiça;

SUA MAJESTADE A RAINHA DA DINAMARCA:

Nathalie LIND,

Ministro da Justiça;

O PRESIDENTE DA REPUBLICA FEDERAL DA ALEMANHA:

Dr. Hans-Jochen VOGEL,

Ministro Federal da Justiça;

O PRESIDENTE DA REPUBLICA FRANCESA:

Alain PEYREFITTE,

Ministro da Justiça;

O PRESIDENTE DA IRLANDA:

Gerard COLLINS,

Ministro da Justiça;

O PRESIDENTE DA REPUBLICA ITALIANA:

Paolo BONIFACIO,

Ministro da Justiça;

SUA ALTEZA REAL O GRAO-DUQUE DO LUXEMBURGO:

Robert KRIEPS,

Ministro da Educaçao Nacional,

Ministro da Justiça;

SUA MAJESTADE A RAINHA DOS PAISES BAIXOS:

Prof. J. DE RUITER,

Ministro da Justiça;

SUA MAJESTADE A RAINHA DO REINO UNIDO DA GRA-BRETANHA E IRLANDA DO NORTE:

The Right Honourable the Lord ELWYN-JONES, C. H.,

Lord High Chancellor of Great Britian;

OS QUAIS, reunidos no Conselho, depois de terem trocado os seus plenos poderes, reconhecidos em boa e devida forma,

ACORDARAM NO SEGUINTE:

TITULO I

Disposiçoes gerais

Artigo 1g. O Reino da Dinamarca, a Irlanda e o Reino Unido da Gra-Bretanha e da Irlanda do Norte aderem à convençao relativa à competência judiciaria e à execuçao de decisoes em matéria civil e comercial, assinada em Bruxelas em 27 de Setembro de 1968, a seguir denominada "convençao de 1968", e ao protocolo relativo à sua interpretaçao pelo Tribunal de Justiça, assinado no Luxemburgo em 3 de Junho de 1971, a seguir denominado "protocolo de 1971".

Artigo 2g. As adaptaçoes introduzidas pela presente convençao à convençao de 1968 e ao protocolo de 1971 constam dos títulos II a IV.

TITULO II

Adaptaçoes da convençao de 1968

Artigo 3g. Ao primeiro paragrafo do artigo 1g. da convençao de 1968 é aditado o seguinte período:

"Nao abrange, nomeadamente, as matérias fiscais, aduaneiras e administrativas."

Artigo 4g. O segundo paragrafo do artigo 3g. da convençao de 1968 passa a ter a seguinte redacçao:

"Contra elas nao podem ser invocadas, nomeadamente:

- na Bélgica: o artigo 15g. do Codigo Civil (Code civil - Burgerlijk Wetboek) e o artigo 638g. do Codigo Judiciario (Code judiciaire - Gerechtelijk Wetboek),

- na Dinamarca: os no.s 2 e 3 do artigo 246g. da Lei de Processo Civil (Lov om rettens pleje),

- na Republica Federal da Alemanha: o artigo 23g. do Codigo de Processo Civil (Zivilprozessordnung),

- em França: os artigos 14g. e 15g. do Codigo Civil (Code civil),

- na Irlanda: as disposiçoes relativas à competência fundada em acto que determine o início da instância, comunicado ou notificado ao requerido que se encontre temporariamente na Irlanda,

- em Italia: o artigo 2g. e os no.s 1 e 2 do artigo 4g. do Codigo de Processo Civil (Codice di procedura civile),

- no Luxemburgo: os artigos 14g. e 15g. do Codigo Civil (Code civil),

- nos Países Baixos: o no 3 do artigo 126g.e o artigo 127g. do Codigo de Processo Civil (Wetboek van Burgerlijke Rechtsvordering),

- no Reino Unido: as disposiçoes relativas à competência fundada:

a) Em acto que determine o início da instância, comunicado ou notificado ao requerido que se encontre temporariamente no Reino Unido;

b) Na existência no Reino Unido de bens pertencentes ao requerido;

c) No arresto, pelo requerente, de bens situados no Reino Unido."

Artigo 5g. 1. O ponto 1 do artigo 5g. da convençao de 1968 passa a ter a seguinte redacçao na versao em língua francesa:

"1. en matière contractuelle, devant le tribunal du lieu où l'obligation qui sert de base à la demande a été ou doit être exécutée;".

2. O ponto 1 do artigo 5g. da convençao de 1968 passa a ter a seguinte redacçao na versao em língua neerlandesa;

"1. ten aanzien van verbintenissen uit overeenkomst: voor het gerecht van de plaats, waar de verbintenis, die aan de eis ten grondsag ligt, is uitgevoerd of moet worden uitgevoerd;".

3. O ponto 2 do artigo 5g. da convençao de 1968 passa a ter a seguinte redacçao:

"2. Em matéria de obrigaçao alimentar, perante o tribunal do lugar em que o credor de alimentos tem o seu domicílio ou a sua residência habitual ou, tratando-se de pedido acessorio de acçao sobre o estado das pessoas, perante o tribunal competente segundo a lei do foro, salvo se esta competência for unicamente fundada na nacionalidade de uma das partes;"

4. Ao artigo 5g. da convençao de 1968 sao aditadas as seguintes disposiçoes:

"6. Na qualidade de fundador, de trustee ou de beneficiario de um trust constituído, quer nos termos da lei quer por escrito ou por acordo verbal confirmado por escrito, perante os tribunais do Estado contratante em cujo territorio o trust tem o seu domicílio;

"7. Se se tratar de um litígio relativo a reclamaçao sobre remuneraçao devida por assistência ou salvamento de que tenha beneficiado uma carga ou um frete, perante o tribunal em cuja jurisdiçao esta carga ou o respectivo frete:

a) Tenha sido arrestado para garantir esse pagamento, ou

b) Poderia ter sido arrestado, para esse efeito, se nao tivesse sido prestada cauçao ou outra garantia;

esta disposiçao so se aplica quando se alegue que o requerido tem direito sobre a carga ou sobre o frete ou que tinha tal direito no momento daquela assistência ou daquele salvamento.

Artigo 6g. A secçao 2 do título II da convençao de 1968 é aditado o seguinte artigo:

"Artigo 6g. A

Sempre que, por força da presente convençao, um tribunal de um Estado contratante for competente para conhecer das acçoes de responsabilidade emergente da utilizaçao ou da exploraçao de um navio, esse tribunal, ou qualquer outro que, segundo a lei interna do mesmo Estado, se lhe substitua, sera também competente para conhecer dos pedidos relativos à limitaçao daquela responsabilidade."

Artigo 7g. O artigo 8g. da convençao de 1968 passa a ter a seguite redacçao:

"Artigo 8g.

O segurador domiciliado no territorio de um Estado contratante pode ser demandado:

1. Perante os tribunais do Estado em que tiver domicílio, ou

2. Noutro Estado contratante, perante o tribunal do lugar em que o tomador do seguro tiver o seu domicílio, ou

3. Tratando-se de um co-segurador, perante o tribunal de um Estado contratante onde tiver sido instaurada acçao contra o segurador principal.

O segurador que, nao tendo domicílio no territorio de um Estado contratante, possua sucursal, agência ou qualquer outro estabelecimento num Estado contratante, sera considerado, quanto aos litígios relativos à exploraçao daqueles, como tendo domicílio no territorio desse Estado."

Artigo 8g. O artigo 12g. da convençao de 1968 passa a ter a seguinte redacçao:

"Artigo 12g.

As partes so podem convencionar derrogaçoes ao disposto na presente secçao, desde que tais convençoes:

1. Sejam posteriores ao nascimento do litígio, ou

2. Permitam ao tomador do seguro, ao segurado, ou ao beneficiario recorrer a tribunais que nao sejam os indicados na presente secçao, ou

3. Sejam concluídas entre um tomador do seguro e um segurador, ambos com domicílio num mesmo Estado contratante, e tenham por efeito atribuir competência aos tribunais desse Estado, mesmo que o facto danoso ocorra no estrangeiro, salvo se a lei desse Estado nao permitir tais convençoes, ou

4. Sejam concluídas por um tomador do seguro que nao tenha domicílio num Estado contratante, salvo se se tratar de um seguro obrigatorio ou relativo a imovel sito num Estado contratante, ou

5. Digam respeito a um contrato de seguro que cubra um ou mais dos riscos enumerados no artigo 12g.A."

Artigo 9g. A secçao 3 do título II da convençao de 1968 é aditado o seguinte artigo:

"Artigo 12g.A

Os riscos a que se refere o ponto 5 do artigo 12g. sao os seguintes:

1. Qualquer dano:

a) Em navios de mar, nas instalaçoes ao largo da costa e no alto mar ou em aeronaves, causado por eventos relacionados com a sua utilizaçao para fins comerciais;

b) Nas mercadorias que nao sejam bagagens dos passageiros, durante um transporte realizado por aqueles navios ou aeronaves, quer na totalidade quer em combinaçao com outros meios de transporte.

2. Qualquer responsabilidade, com excepçao da relativa aos danos corporais dos passageiros ou à perda ou aos danos nas suas bagagens:

a) Resultante da utilizaçao ou da exploraçao dos navios, instalaçoes ou aeronaves, em conformidade com a alínea a) do ponto 1, desde que a lei do Estado contratante de matrícula da aeronave nao proíba as clausulas atributivas de jurisdiçao no seguro de tais riscos;

b) Pela perda ou pelos danos causados em mercadorias durante um transporte, nos termos da alínea b) do ponto 1.

3. Qualquer perda pecuniaria relacionada com a utilizaçao ou a exploraçao dos navios, instalaçoes ou aeronaves, em conformidade com a alínea a) do ponto 1, nomeadamente a perda do frete ou do benefício do afretamento.

4. Qualquer risco ligado acessoriamente a um dos indicados nos pontos 1 a 3."

Artigo 10g. A secçao 4 do título II da convençao de 1968 passa a ter a seguinte redacçao:

"Secçao 4

Competência em matéria de contratos celebrados pelos consumidores

Artigo 13g.

Em matéria de contrato celebrado por uma pessoa para finalidade que possa ser considerada estranha à sua actividade comercial ou profissional, a seguir denominada "o consumidor", a competência sera determinada pela presente secçao, sem prejuízo do disposto no artigo 4g. e no ponto 5 do artigo 5g.:

1. Quando se trate de empréstimo a prestaçoes de bens moveis corporeos.

2. Quando se trate de empréstimo a prestaçoes ou de outra operaçao de crédito relacionados com o financiamento da venda de tais bens.

3. Relativamente a qualquer outro contrato que tenha por objecto a prestaçao de serviços ou o fornecimento de bens moveis corporeos se:

a) A celebraçao do contrato tiver sido precedida no Estado do domicílio do consumidor de uma proposta que lhe tenha sido especialmente dirigida ou de anuncio publicitario, e

b) O consumidor tiver praticado nesse Estado os actos necessarios para a celebraçao do contrato.

O co-contratante do consumidor que, nao tendo domicílio no territorio de um Estado contratante, possua sucursal, agência ou qualquer outro estabelecimento num Estado Contratante sera considerado, quanto aos litígios relativos à exploraçao daqueles, como tendo domicílio no territorio desse Estado.

O disposto na presente secçao nao se aplica ao contrato de transporte.

Artigo 14g.

O consumidor pode intentar uma acçao contra a outra parte no contrato, quer perante os tribunais do Estado contratante em cujo territorio estiver domiciliada essa parte quer perante os tribunais do Estado contratante em cujo territorio estiver domiciliado o consumidor.

A outra parte no contrato so pode intentar uma acçao contra o consumidor perante os tribunais do Estado contratante em cujo territorio estiver domiciliado o consumidor.

Estas disposiçoes nao prejudicam o direito de formular um pedido reconvencional perante o tribunal em que tiver sido instaurada a acçao principal, nos termos da presente secçao.

Artigo 15g.

As partes so podem convencionar derrogaçoes ao disposto na presente secçao desde que tais convençoes:

1. Sejam posteriores ao nascimento do litígio, ou

2. Permitam ao consumidor recorrer a tribunais que nao sejam os indicados na presente secçao, ou

3. Sejam concluídas entre o consumidor e o seu co-contratante, ambos com domicílio ou residência habitual, no momento da celebraçao do contrato, num mesmo Estado contratante, e atribuam competência aos tribunais desse Estado, salvo se a lei desse Estado nao permitir tais convençoes."

Artigo 11g. O artigo 17g. da convençao de 1968 passa a ter a seguinte redacçao:

"Artigo 17g.

Se as partes, das quais pelo menos uma se encontre domiciliada no territorio de um Estado contratante, tiverem convencionado que um tribunal ou os tribunais de um Estado contratante têm competência para decidir quaisquer litígios que tenham surgido ou que possam surgir de uma determinada relaçao jurídica, esse tribunal ou esses tribunais terao competência exclusiva. Este pacto atributivo de jurisdiçao deve ser celebrado por escrito ou verbalmente com confirmaçao escrita, no comércio internacional, mediante forma reconhecida pelos usos nesse domínio, que as partes conheçam ou devam conhecer. Sempre que tal pacto atributivo de jurisdiçao for celebrado por partes, das quais nenhuma tenha domicílio num Estado contratante, os tribunais dos outros Estados contratantes nao podem conhecer do litígio, a menos que o tribunal ou os tribunais escolhidos se tenham declarado incompetentes.

O tribunal ou os tribunais de um Estado contratante, a que o acto constitutivo de um trust atribuir competência, têm competência exclusiva para conhecer da acçao contra um fundador, um trustee ou um beneficiario de um trust, se se tratar de relaçoes entre essas pessoas ou dos seus direitos ou obrigaçoes no âmbito do trust.

Os pactos atributivos de jurisdiçao, bem como as estipulaçoes similares de actos constitutivos de trust, nao produzirao efeitos se forem contrarios ao disposto nos artigos 12g. e 15g., ou se os tribunais cuja competência pretendam afastar tiverem competência exclusiva por força do artigo 16g.

Se um pacto atributivo de jurisdiçao tiver sido concluído a favor apenas de uma das partes, esta mantém o direito de recorrer a qualquer outro tribunal que seja competente, por força da presente convençao."

Artigo 12g. O segundo paragrafo do artigo 20g. da convençao de 1968 passa a ter a seguinte redacçao:

"O juiz deve suspender a instância, enquanto nao se verificar que a esse requerido foi dada a oportunidade de receber o acto que iniciou a instância, ou acto equivalente, em tempo util para apresentar a sua defesa, ou enquanto nao se verificar que para o efeito foram efectuadas todas as diligências."

Artigo 13g. 1. O ponto 2 do artigo 27g. da convençao de 1968 passa a ter a seguinte redacçao:

"2. Se o acto que determinou o início da instância, ou acto equivalente, nao tiver sido comunicado ou notificado ao requerido revel, regularmente e em tempo util, por forma a permitir-lhe a defesa;".

2. Ao artigo 27g. da convençao de 1968 sao aditadas as seguintes disposiçoes:

"5. Se a decisao for inconciliavel com outra anteriormente proferida num Estado nao contratante entre as mesmas partes, em acçao com o mesmo pedido e a mesma causa de pedir, desde que a decisao proferida anteriormente reuna as condiçoes necessarias para ser reconhecida no Estado requerido."

Artigo 14g. Ao artigo 30g. da convençao de 1968 é aditado o seguinte paragrafo:

"A autoridade judicial de um Estado contratante, perante o qual se invocar o reconhecimento de uma decisao proferida na Irlanda ou no Reino Unido e cuja execuçao for suspensa no Estado de origem por força da interposiçao de um recurso, pode suspender a instância."

Artigo 15g. Ao artigo 31g. da convençao de 1968 é aditado o seguinte paragrafo:

"Todavia, no Reino Unido, tais decisoes sao executadas na Inglaterra e no País de Gales, na Escocia ou na Irlanda

do Norte, depois de registadas para execuçao, a requerimento de qualquer parte interessada, numa dessas regioes do Reino Unido, conforme o caso."

Artigo 16g. O primeiro paragrafo do artigo 32g. da convençao de 1968 passa a ter a seguinte redacçao:

"O requerimento deve ser apresentado:

- na Bélgica, no "tribunal de première instance" ou "rechtbank van eerste aanleg",

- na Dinamarca, no "byret",

- na Republica Federal da Alemanha, ao presidente de uma câmara do "Landgericht",

- em França, ao presidente do "tribunal de grande instance",

- na Irlanda, no "High Court",

- em Italia, na "corte d'appello",

- no Luxemburgo, ao presidente do "tribunal d'arrondissement",

- nos Países Baixos, ao presidente do "arrondissementsrechtbank",

- no Reino Unido:

1. Na Inglaterra e no País de Gales, no "High Court of Justice" ou, tratando-se de uma decisao em matéria de obrigaçao alimentar, no "Magistrates' Court" por intermédio do "Secretary of State";

2. Na Escocia, no "Court of Session" ou, tratando-se de decisao em matéria de obrigaçao alimentar, no "Sheriff Court" por intermédio do "Secretary of State";

3. Na Irlanda do Norte, no "High Court of Justice" ou, tratando-se de decisao em matéria de obrigaçao alimentar, no "Magistrates'Court" por intermédio do "Secretary of State"."

Artigo 17g. O artigo 37g. da convençao de 1968 passa a ter a seguinte redacçao:

"Artigo 37g.

O recurso sera interposto de acordo com as regras do processo contraditorio:

- na Bélgica, para o "tribunal de première instance" ou "rechtbank van eerste aanleg",

- na Dinamarca, para o "landsret",

- na Republica Federal da Alemanha, para o "Oberlandesgericht",

- em França, para a "Cour d'appel,

- na Irlanda, para o "High Court",

- em Italia, para a "corte d'appello",

- no Luxemburgo, para a "Cour supérieure de justice", decidindo em matéria civil,

- nos Países Baixos, para o "arrondissementsrechtbank",

- no Reino Unido:

1. Na Inglaterra e no País de Gales, para o "High Court of Justice" ou, tratando-se de decisao em matéria de obrigaçao alimentar, para o "Magistrates'Court";

2. Na Escocia, para o "Court of Session" ou, tratando-se de decisao em matéria de obrigaçao alimentar, para o "Sheriff Court";

3. Na Irlanda do Norte, para o "High Court of Justice" ou, tratando-se de decisao em matéria de obrigaçao alimentar, para o "Magistrates' Court".

A decisao proferida no recurso apenas pode ser objecto:

- na Bélgica, em França, em Italia, no Luxemburgo e nos Países Baixos, de recurso de cassaçao,

- na Dinamarca, de recurso para o "hoejesteret", com autorizaçao do Ministro da Justiça,

- na Republica Federal da Alemanha, de uma "Rechtsbeschwerde",

- na Irlanda, de recurso sobre uma questao de direito para o "Supreme Court",

- no Reino Unido, de um unico recurso sobre uma questao de direito."

Artigo 18g. Ao artigo 38g. da convençao de 1968 é aditado, apos o primeiro paragrafo, um novo paragrafo com a seguinte redacçao:

"Quando a decisao tiver sido proferida na Irlanda ou no Reino Unido, qualquer via de recurso admissível no estado de origem é considerada como recurso ordinario para efeitos da aplicaçao do primeiro paragrafo."

Artigo 19g. O primeiro paragrafo do artigo 40g. da convençao de 1968 passa a ter a seguinte redacçao:

"Se o requerimento for indeferido, o requerente pode interpor recurso:

- na Bélgica, para a "Cour d'appel" ou para o "hof van beroep",

- na Dinamarca, para o "landsret",

- na Republica Federal da Alemanha, para o "Oberlandesgericht",

- em França, para a "Cour d'appel",

- na Irlanda, para o "High Court",

- em Italia, para a "corte d'appello",

- no Luxemburgo, para a "Cour supérieure de justice", decidindo em matérial civil,

- nos Países Baixos, para o "gerechtshof",

- no Reino Unido:

1. Na Inglaterra e no País de Gales, para o "High Court of Justice" ou, tratando-se de decisao em matéria de obrigaçao alimentar, para o "Magistrates' Court";

2. Na Escocia, para o "Court of Session" ou, tratando-se de decisao em matéria de obrigaçao alimentar, para o "Sheriff Court";

3. Na Irlanda do Norte, para o "High Court of Justice" ou, tratando-se de decisao em matéria de obrigaçao alimentar, para o "Magistrates' Court"."

Artigo 20g. O artigo 41g. da convençao de 1968 passa a ter a seguinte redacçao:

"Artigo 41g.

A decisao proferida no recurso previsto no artigo 40g.apenas pode ser objecto:

- na Bélgica, em França, em Italia, no Luxemburgo e nos Países Baixos, de recurso de cassaçao,

- na Dinamarca, de recurso para o "hoejesteret", com autorizaçao do Ministro da Justiça,

- na Republica Federal da Alemanha, de uma "Rechtsbeschwerde",

- na Irlanda, de recurso sobre uma questao de direito para o "Supreme Court",

- no Reino Unido, de um unico recurso sobre uma questao de direito."

Artigo 21g. O artigo 44g. da convençao de 1968 passa a ter a seguinte redacçao:

"Artigo 44g.

O requerente que, no Estado de origem, tiver beneficiado no todo ou em parte de assistência judiciaria ou de inseçao de preparos e custas, beneficiara, no processo previsto nos artigos 32g. a 35g., da

assistência mais favoravel ou da isençao mais ampla prevista no direito do Estado requerido.

O requerente que solicitar a execuçao de uma decisao proferida na Dinamarca por uma autoridade administrativa em matéria de obrigaçao alimentar, pode alegar no Estado requerido o benefício do disposto no primeiro paragrafo, se apresentar documento emanado do Ministério da Justiça dinamarquês, certificando que se encontra nas condiçoes economicas que lhe permitem beneficiar no todo ou em parte de assistência judiciaria ou de isençao de preparos e custas."

Artigo 22g. O ponto 2 do artigo 46g. da convençao de 1968 passa a ter a seguinte redacçao:

"2. Tratando-se de decisao proferida à revelia, o original ou uma copia autenticada do documento que certifique que o acto que determinou o início da instância ou um acto equivalente foi comunicado ou notificado à parte revel."

Artigo 23g. Ao artigo 53g. da convençao de 1968 é aditado o seguinte paragrafo:

"Para determinar se um trust tem domicílio no territorio de um Estado contratante a cujos tribunais tenha sido submetida a questao, o juiz aplicara as normas do seu direito internacional privado."

Artigo 24g. Ao artigo 55g. da convençao de 1968 sao acrescentados os seguintes travessoes a inserir nos respectivos lugares da lista das convençoes, de acordo com a ordem cronologica:

- a convençao entre o Reino Unido e a França relativa à execuçao recíproca de sentenças em matéria civil e comercial, acompanhada de um protocolo, assinada em Paris em 18 de Janeiro de 1934,

- a convençao entre o Reino Unido e a Bélgica relativa à execuçao recíproca de sentenças em matéria civil e comercial, acompanhada de um protocolo, assinada em Paris em 2 de Maio de 1934,

- a convençao entre o Reino Unido e a Republica Federal da Alemanha relativa ao reconhecimento e execuçao recíprocos de sentenças em matéria civil e comercial, assinada em Bona em 14 de Julho de 1960,

- a convençao entre o Reino Unido e a Republica Italiana relativa ao reconhecimento e execuçao recíprocos de sentenças em matéria civil e comercial, assinada em Roma em 7 de Fevereiro de 1964, acompanhada de um protocolo assinado em Roma em 14 de Julho de 1970,

- a convençao entre o Reino Unido e o Reino dos Países Baixos relativa ao reconhecimento e execuçao recíprocos de sentenças em matéria civil e comercial, assinada na Haia em 17 de Novembro de 1967.

Artigo 25°. 1. O artigo 57g. da convençao de 1968 passa a ter a seguinte redacçao:

"Artigo 57g.

A presente convençao nao prejudica as convençoes de que os Estados contratantes sejam ou venham a ser partes e que, em matérias especiais, regulem a competência judiciaria, o reconhecimento ou a execuçao de decisoes.

A presente convençao nao prejudica a aplicaçao das disposiçoes que, em matérias especiais, regulem a competência judiciaria, o reconhecimento ou a execuçao de decisoes e que se incluam ou venham a ser incluídas nos actos das instituiçoes das Comunidades Europeias ou nas legislaçoes nacionais harmonizadas em execuçao desses actos."

2. Para assegurar a sua interpretaçao uniforme, o primeiro paragrafo do artigo 57g. sera aplicado do seguinte modo:

a) A convençao de 1968 alterada nao impede que um tribunal de um Estado contratante que seja parte numa convençao relativa a uma matéria especial se declare competente em conformidade com uma tal convençao, mesmo que o requerido tenha domicílio no territorio de um Estado contratante que nao seja parte nessa conven-

çao. Em qualquer caso, o tribunal chamado a pronunciar-se aplicara o artigo 20g. da convençao de 1968 alterada;

b) As decisoes proferidas num Estado contratante por um tribunal cuja competência se fundamente numa conven-

çao relativa a uma matéria especial serao reconhecidas e executadas nos outros Estados contratantes, nos termos da convençao de 1968 alterada.

Se uma convençao relativa a uma matéria especial, de que sejam parte o Estado de origem e o Estado requerido, estabeleceu as condiçoes para o reconhecimento e execuçao de decisoes, tais condiçoes devem ser respeitadas. Em qualquer caso, pode aplicar-se o disposto na con-

vençao de 1968 alterada no que respeita ao processo de reconhecimento e execuçao de decisoes.

Artigo 26g. Ao artigo 59g. da convençao de 1968 é aditado o seguinte paragrafo:

"Todavia, nenhum Estado contratante pode vincular-se perante um Estado terceiro a nao reconhecer uma decisao proferida em outro Estado contratante por um tribunal cuja competência se fundamente na existência nesse Estado de bens pertencentes ao requerido ou na apreensao pelo autor de bens aí situados:

1. Se o pedido que, incidir sobre a propriedade ou posse dos referidos bens, tiver como finalidade obter a autorizaçao para deles dispor ou se relacionar com outro litígio a eles respeitante, ou

2. Se os bens constituírem a garantia de um crédito que seja objecto do litígio."

Artigo 27g. O artigo 60g. da convençao de 1968 a ter a seguinte redacçao:

"Artigo 60g.

A presente convençao aplica-se ao territorio europeu dos Estados contratantes, incluindo a Gronelândia, aos departamentos e territorios franceses ultramarinos, bem como a Mayotte.

O Reino dos Países Baixos pode declarar no momento da assinatura ou da ratificaçao da presente convençao, ou em qualquer momento posterior, mediante notificaçao ao secretario-geral do conselho das Comunidades Europeias, que a presente Convençao sera aplicavel às Antilhas Neerlandesas. Na falta de tal declaraçao, os processos pendentes no territorio europeu do Reino, na sequência de um recurso de cassaçao de decisoes dos tribunais das Antilhas Neerlandesas, serao considerados como processos pendentes nesses tribunais.

Em derrogaçao ao disposto no primeiro paragrafo, a presente convençao nao se aplica:

1. As ilhas Faroé, salvo declaraçao em contrario do Reino da Dinamarca;

2. Aos territorios europeus situados fora do Reino Unido e cujas relaçoes internacionais sejam asseguradas pelo Reino Unido, salvo declaraçao em contrario do Reino Unido em relaçao a qualquer um desses territorios.

Estas declaraçoes podem ser feitas em qualquer momento, mediante notificaçao ao secretario-geral do Conselho das Comunidades Europeias.

Os processos de recurso interpostos no Reino Unido de decisoes proferidas pelos tribunais situados num dos territorios indicados no ponto 2 do terceiro paragrafo serao considerados como processos pendentes nesses tribunais.

As causas que, no Reino da Dinamarca, forem reguladas pela Lei de Processo Civil das ilhas Faroé (Lov for Faeroerne om rettens pleje) serao consideradas como causas pendentes nos tribunais das ilhas Faroé."

Artigo 28g. A alínea c) do artigo 64g. da convençao de 1968 passa a ter a seguinte redacçao:

"c) Das declaraçoes recebidas nos termos do artigo 60g.;"

TITULO III

Adaptaçoes do protocolo anexo à convençao de 1968

Artigo 29g. Ao protocolo anexo à convençao de 1968 sao aditados os seguintes artigos:

"Artigo Vg. A

Em matéria de obrigaçao alimentar, os termos "juíz", "tribunal", e "autoridade judicial", abrangem as autoridades administrativas dinamarquesas.

Artigo Vg. B

Nos litígios entre o capitao e um membro da tripulaçao de um navio de mar matriculado na Dinamarca ou na

Irlanda, relativos às remuneraçoes ou outras condiçoes de serviço, os tribunais de um Estado contratante devem verificar se o agente diplomatico ou consular com autoridade sobre o navio foi informado do litígio. Os tribunais devem suspender a instância enquanto o agente nao for informado. Devem, mesmo oficiosamente, declarar-se incompetentes se aquele agente, devidamente informado, tiver exercido as atribuiçoes que lhe sao reconhecidas na matéria por uma convençao consular ou, na falta de tal convençao, tiver suscitado objecçoes quanto à competência no prazo fixado.

Artigo Vg. C

Sempre que, no âmbito do no 5 do artigo 69g. da convençao relativa à patente europeia do Mercado Comum, assinada no Luxemburgo em 15 de Dezembro de 1975, os artigos 52g. e 53g. da presente convençao sejam aplicaveis às disposiçoes relativas à residence, nos termos da versao inglesa daquela primeira convençao, considera-se que o termo residence usado nesse texto tem o mesmo alcance que o termo "domicílio" que consta dos artigos 52g. e 53g. da presente convençao.

Artigo Vg. D

Sem prejuízo da competência do Instituto Europeu de Patentes, nos termos da convençao relativa à emissao de patentes europeias, assinada em Munique em 5 de Outubro de 1973, os tribunais de cada Estado contratante sao os unicos competentes, sem consideraçao de domicílio, em matéria de inscriçao ou de validade de uma patente europeia emitida para esse Estado e que nao seja uma patente comunitaria nos termos do disposto no artigo 86g. da convençao relativa à patente europeia para o Mercado Comum, assinada no Luxemburgo em 15 de Dezembro de 1975."

TITULO IV

Adaptaçoes ao protocolo de 1971

Artigo 30g. Ao artigo 1g. do protocolo de 1971 é aditado o seguinte paragrafo:

"O Tribunal de Justiça das Comunidades Europeias é igualmente competente para decidir sobre a interpretaçao da convençao relativa à adesao do Reino da Dinamarca, da Irlanda e do Reino Unido da Gra-Bretanha e da Irlanda do Norte à convençao de 27 de Setembro de 1968, bem como ao presente protocolo."

Artigo 31g. O ponto 1 d o artigo 2g. do protocolo de 1971 passa a ter a seguinte redacçao:

"1. - na Bélgica: a "Cour de cassation" (het Hof van Cassatie) e o "Conseil d'Etat" (de Raad van State),

- na Dinamarca: "hoejesteret",

- na Republica Federal da Alemanha: o "obersten Gerichtshoefe des Bundes",

- em França: a "Cour de cassation" e o "Conseil d'Etat",

- na Irlanda: O "Supreme Court",

- na Italia: a "Corte suprema di cassazione",

- no Luxemburgo: a "Cour supérieure de justice", decidindo como "Cour de cassation",

- nos Países Baixos: o "Hoge Raad",

- no Reine Unido: a "House of Lords" e os tribunais a que a causa tenha sido submetida, nos termos do segundo paragrafo do artigo 37g. ou do artigo 41g. da convençao;"

Artigo 32g. O artigo 6g. do protocolo de 1971 passa a ter a seguinte redacçao:

"Artigo 6g.

O presente protocolo aplica-se ao territorio europeu dos Estados contratantes, incluindo a Gronelândia, aos departamentos e territorios franceses ultramarinos, bem como a Mayotte.

O Reino dos Países Baixos pode declarar, no momento da assinatura ou da ratificaçao do presente protocolo ou em qualquer momento posterior, mediante notificaçao ao secretario-geral do Conselho das Comunidades Europeias, que o presente protocolo sera aplicavel às Antilhas Neerlandesas.

Em derrogaçao ao disposto no primeiro paragrafo, o presente protocolo nao se aplica:

1. As ilhas Faroé, salvo declaraçao em contrario do Reino da Dinamarca;

2. Aos territorios europeus situados fora do Reino Unido e cujas relaçoes internacionais sejam asseguradas pelo Reino Unido, salvo declaraçao em contrario do Reino Unido em relaçao a qualquer um desses territorios.

Estas declaraçoes podem ser feitas em qualquer momento, mediante notificaçao ao secretario-geral do Conselho das Comunidades Europeias."

Artigo 33g. A alínea d) do artigo 10g. do protocolo de 1971 passa a ter a seguinte redacçao:

"d) Das declaraçoes recebidas nos termos do artigo 6g.".

TITULO V

Disposiçoes transitorias

Artigo 34g. 1. A convençao de 1968 e o protocolo de 1971, com a redacçao que lhes é dada pela presente convençao, sao

aplicaveis apenas às acçoes judiciais intentadas e aos actos autênticos exarados posteriormente à entrada em vigor da presente convençao no Estado de origem e aos pedidos de reconhecimento ou de execuçao de uma decisao ou de um acto autêntico apos a entrada em vigor da presente convençao no Estado requerido.

2. Todavia, nas relaçoes entre os seis Estados partes na convençao de 1968, as decisoes proferidas apos a data de entrada em vigor da presente convençao, na sequência de acçoes intentadas antes dessa data, serao reconhecidas e executadas em conformidade com o disposto no título III da convençao de 1968 alterada.

3. Além disso, nas relaçoes entre os seis Estados que sao parte na convençao de 1968 e os três Estados referidos no artigo 1g. da presente convençao, bem como nas relaçoes entre estes três ultimos,

as decisoes proferidas apos a data de entrada em vigor da presente convençao nas relaçoes entre o Estado de origem e o Estado requerido, na sequência de acçoes intentadas antes dessa data, serao reconhecidas e executadas em conformidade com o disposto no título III da convençao de 1968 alterada, se a competência se tiver fundamentado em regras conformes com o disposto no título II alterado da convençao de 1968 ou com disposiçoes previstas em convençao vigente entre o Estado de origem e o Estado requerido aquando da instauraçao da acçao.

Artigo 35g. Se, por documento escrito anterior à entrada em vigor da presente convençao, as partes em litígio sobre um contrato tiverem acordado em aplicar a esse contrato o direito irlandês ou o direito de uma regiao do Reino Unido, os tribunais da Irlanda ou dessa regiao do Reino Unido conservam a faculdade de conhecer do litígio.

Artigo 36g. Durante os três anos seguintes à entrada em vigor da convençao de 1968, em relaçao ao Reino da Dinamarca e à Irlanda, a competência em matéria marítima em cada um desses Estados sera determinada, nao so nos termos da referida convençao, mas também nos termos dos pontos 1 a 6 a seguir enunciados. Todavia, estas disposiçoes deixarao de ser aplicadas em cada um desses Estados a partir do momento em que a convençao internacional para a unificaçao de certas regras relativas ao arresto de navios de mar, assinada em Bruxelas em 10 de Maio de 1952, entre em vigor nesses Estados.

1. Uma pessoa domiciliada no territorio de um Estado contratante pode ser demandada por um crédito marítimo perante os tribunais de um dos Estados atras mencionados quando o navio a que esse crédito se refere, ou qualquer outro navio de que essa pessoa é proprietaria, foi objecto de um arresto judicial no territorio de um desses Estados para garantir o crédito, ou poderia ter sido objecto de um arresto nesse mesmo Estado, ainda que tenha sido prestada cauçao ou outra garantia, nos casos seguintes:

a) Se o autor tiver domicílio no territorio desse Estado;

b) Se o crédito marítimo tiver sido constituído nesse Estado;

c) Se o crédito marítimo tiver sido constituído no decurso de uma viagem durante a qual tiver sido efectuado ou pudesse ter sido efectuado o arresto;

d) Se o crédito resultar de abalroaçao ou de danos causados por um navio, em virtude de execuçao ou omissao de manobra ou de inobservância dos regulamentos, quer a outros navio quer às coisas ou às pessoas que se encontrem a bordo;

e)

Se o crédito resultar de assistência ou salvamento;

f)

Se o crédito estiver garantido por hipoteca marítima ou mortgage sobre o navio arrestado.

2. Pode ser arrestado, tanto o navio a que se reporta o crédito marítimo, como qualquer outro pertencente àquele que, à data da constituiçao do crédito marítimo, era proprietario do navio a que o crédito se refere. Todavia, para os créditos previstos nas alíneas o), p) ou q) do ponto 5, apenas pode ser arrestado o navio a que o crédito se refere.

3. Considera-se que varios navios têm o mesmo proprietario quando todas as partes da propriedade pertencem à mesmas ou às mesmas pessoas.

4. No caso de fretamento de um navio com transferência de gestao nautica, quando so o afretador responder por um crédito marítimo relativo a esse navio, pode ser arrestado esse ou qualquer outro navio pertencente ao afretador, mas nenhum outro navio pertencente ao proprietario podera ser arrestado

por tal crédito marítimo. O mesmo se aplica a todos os casos em que uma pessoa que nao o proprietario é devedora de um crédito marítimo.

5. Entende-se por "crédito marítimo" a alegaçao de um direito ou de um crédito provenientes de uma das causas seguintes:

a) Danos causados por um navio, quer por abalroaçao quer por outro modo;

b) Perda de vidas humanas ou danos corporais causados pelo navio ou resultantes da sua exploraçao;

c) Assistência e salvaçao;

d) Contratos relativos à utilizaçao ou ao aluguer do navio por carta-partida ou por outro meio;

e)

Contratos relativos ao transporte de mercadorias por navio, em virtude de carta-partida, conhecimento ou outro meio;

f)

Perda ou dano de mercadorias e bagagens transportadas em navio;

g)

Avaria comum;

h)

Empréstimo a risco;

i)

Reboque;

j)

Pilotagem;

k)

Fornecimentos de produtos ou de material feitos a um navio para a sua exploraçao ou conservaçao, qualquer que seja o lugar onde esses fornecimentos se façam;

l)

Construçao, reparaçoes, equipamento de um navio ou despesas de estiva;

m)

Soldadas do capitao, oficiais ou tripulantes;

n)

Desembolsos do capitao e os efectuados pelos carregadores, afretadores ou agentes por conta do navio ou do seu proprietario;

o)

Propriedade contestada de um navio;

p)

Co-propriedade de um navio, ou sua posse, ou sua exploraçao, ou direito aos produtos da exploraçao de um navio em co-propriedade;

q)

Qualquer hipoteca marítima e qualquer mortgage.

6. Na Dinamarca, a expressao "arresto judicial" abrange, no que diz respeito aos créditos marítimos referidos nas alíneas o) e p) do ponto anterior, o termo forbud, quando esse processo for o unico admitido no caso concreto pelos artigos 646g. a 653g. da Lei de processo civil ("Lov om rettens pleje").

TITULO VI

Disposiçoes finais

Artigo 37g. O Secretariado-geral do Conselho das Comunidades Europeias remetera aos Governos do Reino da Dinamarca, da Irlanda e do Reino Unido da Gra-Bretanha e da Irlanda do Norte, em língua alema, francesa, italiana e neerlandesa, uma copia autenticada da convençao de 1968 e do protocolo de 1971.

Os textos da convençao de 1968 e do protocolo de 1971, redigidos nas línguas dinamarquesa, inglesa e irlandesa, serao anexados à presente convençao (1). Os textos redigidos nas línguas dinamarquesa, inglesa e irlandesa fazem fé nas mesmas condiçoes que os textos originarios da convençao de 1968 e do protocolo de 1971.

Artigo 38g. A presente convençao sera ratificada pelos Estados signatarios. Os instrumentos de ratificaçao serao depositados junto do secretario-geral do Conselho das Comunidades Europeias.

Artigo 39g. A presente convençao entrara em vigor nas relaçoes entre os Estados que a tiverem ratificado no primeiro dia do terceiro mês seguinte ao do deposito do ultimo instrumento de ratificaçao pelos Estados-membros originarios da Comunidade e por um novo Estado-membro.

A presente convençao entrara em vigor, em cada novo Estado-membro que a ratifique posteriormente, no primeiro dia do terceiro mês seguinte ao do deposito do respectivo instrumento de ratificaçao.

Artigo 40g. O secretario-geral do Conselho das Comunidades Europeias notificara os Estados signatarios:

a) Do deposito de qualquer instrumento de ratificaçao;

b) Das datas de entrada em vigor da presente convençao nos Estados contratantes.

Artigo 41g. A presente convençao, redigida num unico exemplar nas línguas alema, dinamarquesa, francesa, inglesa, irlandesa, italiana e neerlandesa, fazendo fé qualquer dos sete textos, sera depositada nos arquivos do Secretariado do Conselho das Comunidades Europeias. O secretario-geral remetera uma copia autenticada da presente convençao a cada um dos governos dos Estados signatarios.

Til bekraeftelse heraf har undertegnede befuldmaegtigede underskrevet denne konvention.

Zu Urkund dessen haben die unterzeichneten Bevollmaechtigten ihre Unterschriften unter dieses UEbereinkommen gesetzt.

In witness whereof, the undersigned Plenipotentiaries have signed this Convention.

En foi de quoi, les plénipotentiaires soussignés ont apposé leurs signatures au bas de la présente convention,

Da fhianu sin, chuir na Lanchumhachtaigh thíos-sínithe a lamh leis an gCoinbhinsiun seo.

In fede di che, i plenipotenziari sottoscritti hanno apposto le loro firme in calce alla presente convenzione.

Ten blijke waarvan de ondergetekende gevolmachtigden hun handtekening onder dit Verdrag hebben

gesteld.

Em fé do que os plenipotenciarios abaixo-assinados apuseram as suas assinaturas no final da presente convençao.

Udfaerdiget i Luxembourg, den niende oktober nitten hundrede og otteoghalvfjerds.

Geschehen zu Luxemburg am neunten Oktober neunzehnhundertachtundsiebzig.

Done at Luxembourg on the ninth day of October in the year one thousand nine hundred and seventy-eight.

Fait à Luxembourg, le neuf octobre mil neuf cent soixante-dix-huit.

Arna dhéanamh i Lucsamburg, an naou la de Dheireadh Fomhair sa bhliain míle naoi gcéad seachto a hocht.

Fatto a Lussemburgo, addi nove ottobre millenovecentosettantotto.

Gedaan te Luxemburg, de negende oktober negentienhonderd achtenzeventig.

Feito no Luxemburgo, aos nove de Outubro de mil novecentos e setenta e oito.

Renaat VAN ELSLANDE

Nathalie LIND

Dr. Hans-Jochen VOGEL

Alain PEYREFITTE

Gerard COLLINS

Paolo BONIFACIO

Robert KRIEPS

Prof. J. de RUITER

Lord ELWYN-JONES, C. H.

(1) JO no L 304 de 30. 10. 1978, pp. 17, 36 e 55. DECLARAÇAO COMUM

OS REPRESENTANTES DOS GOVERNOS DOS ESTADOS-MEMBROS DA COMUNIDADE ECONOMICA EUROPEIA, REUNIDOS NO CONSELHO,

Desejosos de assegurar que, no espírito da convençao de 27 de Setembro de 1968, seja igualmente realizada, na medida do possível, a uniformizaçao das competências judiciarias no domínio marítimo;

Considerando que a convençao internacional para a unificaçao de certas regras sobre o arresto de navios de mar, assinada em Bruxelas em 10 de Maio de 1952, contém disposiçoes sobre a competência judiciaria;

Considerando que nem todos os Estados-membros sao parte da referida convençao,

Formulam o desejo de que os Estados-membros que sao Estados costeiros e que nao se tornaram ainda parte da convençao de 10 de Maio de 1952 a ratifiquem ou a ela adiram no mais breve prazo.

Udfaerdiget i Luxembourg, den niende oktober nitten hundrede og otteoghalvfjerds.

Geschehen zu Luxemburg am neunten Oktober neunzehnhundertachtundsiebzig.

Done at Luxembourg on the ninth day of October in the year one thousand nine hundred and seventy-eight.

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Alain PEYREFITTE

Gerard COLLINS

Paolo BONIFACIO

Robert KRIEPS

Prof. J. de RUITER

Lord ELWYN-JONES, C. H.

ANEXO V

CONVENÇAO relativa à adesao da Republica Helénica à convençao relativa à competência judiciaria e à execuçao de decisoes em matéria civil e comercial, bem como ao protocolo relativo à sua interpretaçao pelo Tribunal de Justiça, com as adaptaçoes que lhes foram introduzidas pela convençao relativa à adesao do Reino da Dinamarca, da Irlanda e do Reino Unido da Gra-Bretanha e da Irlanda do Norte
PREAMBULO

AS ALTAS PARTES CONTRATANTES NO TRATADO QUE INSTITUI A COMUNIDADE ECONOMICA EUROPEIA,

CONSIDERANDO que a Republica Helénica, ao tornar-se membro da Comunidade, se comprometeu a aderir à convençao relativa à competência judiciaria e à execuçao de decisoes em matéria civil e comercial e ao protocolo relativo à interpretaçao dessa convençao pelo Tribunal de Justiça, com as adaptaçoes que lhes foram introduzidas pela convençao relativa à adesao do Reino da Dinamarca, da Irlanda e do Reino Unido da Gra-Bretanha e da Irlanda do Norte, e a encetar negociaçoes para o efeito com os Estados-membros da Comunidade para lhes introduzir as adaptaçoes necessarias,

DECIDIRAM celebrar a presente convençao e, para o efeito, designaram como plenipotenciarios:

SUA MAJESTADE O REI DOS BELGAS:

Jean GOL,

Vice Primeiro-Ministro,

Ministro da Justiça e da Reforma Institucional;

SUA MAJESTADE A RAINHA DA DINAMARCA:

Erik NINN-HANSEN,

Ministro da Justiça;

O PRESIDENTE DA REPUBLICA FEDERAL DA ALEMANHA:

Hans Arnold ENGELHARD,

Ministro Federal da Justiça,

Dr. Gunther KNACKSTEDT,

Embaixador da Republica Federal da Alemanha no Luxemburgo;

O PRESIDENTE DA REPUBLICA HELENICA:

Georges-Alexandre MANGAKIS,

Ministro da Justiça;

O PRESIDENTE DA REPUBLICA FRANCESA:

Robert BADINTER,

Ministro da Justiça;

O PRESIDENTE DA IRLANDA:

Sean DOHERTY,

Ministro da Justiça;

O PRESIDENTE DA REPUBLICA ITALIANA:

Clelio DARIDA,

Ministro da Justiça;

SUA ALTEZA REAL O GRAO-DUQUE DO LUXEMBURGO:

Colette FLESCH,

Vice-Presidente do Governo,

Ministro da Justiça;

SUA MAJESTADE A RAINHA DOS PAISES BAIXOS:

J. de RUITER,

Ministro da Justiça;

SUA MAJESTADE A RAINHA DO REINO UNIDO DA GRA-BRETANHA E DA IRLANDA DO NORTE:

Peter Lovat FRASER, esquire,

Solicitor-General para a Escocia, Departamento do Lord Advocate;

OS QUAIS, reunidos no Conselho, depois de terem trocado os seus plenos poderes, reconhecidos em boa e devida forma,

ACORDARAM NO SEGUINTE:

TITULO I

Disposiçoes gerais

Artigo 1g. 1. A Republica Helénica adere à convençao relativa à competência judiciaria e à execuçao de decisoes em matéria civil e comercial, assinada em Bruxelas em 27 de Setembro de 1968, a seguir denominada "convençao de 1968", e ao protocolo relativo à sua interpretaçao pelo Tribunal de Justiça, assinado no Luxemburgo em 3 de Junho de 1971, a seguir denominado "protocolo de 1971", com as adaptaçoes que lhes foram introduzidas pela convençao relativa à adesao do Reino da Dinamarca, da Irlanda

e do Reino Unido da Gra-Bretanha e da Irlanda do Norte à convençao relativa à competência judiciaria e à execuçao de decisoes em matéria civil e comercial, assim como ao protocolo relativo à sua interpretaçao pelo Tribunal de Justiça, assinada no Luxemburgo em 9 de Outubro de 1978 e a seguir denominada "convençao de 1978".

2. A adesao da Republica Helénica é extensiva, nomeadamente, ao no 2 do artigo 25g. e aos artigos 35g. e 36g. da convençao de 1978.

Artigo 2g. As adaptaçoes introduzidas pela presente convençao na convençao de 1968 e no protocolo de 1971, tal como foram adaptadas pela convençao de 1978, constam dos títulos II

a IV.

TITULO II

Adaptaçoes da convençao de 1968

Artigo 3g. Ao segundo paragrafo do artigo 3g. da convençao de 1968, com a redacçao que lhe foi dada pelo artigo 4g. da convençao

de 1978, é aditado, entre o terceiro e o quarto travessoes, o seguinte travessao:

"- na Grécia: o artigo 40g. do Codigo de Processo Civil ("Kvdikaw politikhw Dikonomíaw")".

Artigo 4g. A primeiro paragrafo do artigo 32g. da convençao de 1968, com a redacçao que lhe foi dada pelo artigo 16g. da convençao de 1978, é aditado, entre o terceiro e o quarto travessoes, o seguinte travessao:

"- na Grécia ao "monomeléw prvtodikeío",".

Artigo 5g. 1. Ao primeiro paragrafo do artigo 37g. da convençao de 1968, alterado pelo artigo 17g. da convençao de 1978, é aditado, entre o terceiro e o quarto travessoes, o seguinte travessao:

"- na Grécia, para o "efeteío",".

2. No segundo paragrafo do artigo 37g. da convençao de 1968, com a redacçao que lhe foi dada pelo artigo 17g. da convençao de 1978, o primeiro travessao passa a ter a seguinte redacçao:

"- na Bélgica, na Grécia, em França, em Italia, no Luxemburgo e nos Países Baixos, de recurso de cassaçao,"

Artigo 6g. Ao primeiro paragrafo do artigo 40g. da convençao de 1968, com a redacçao que lhe foi dada pelo artigo 19g. da convençao de 1978, é aditado, entre o terceiro e o quarto travessoes, o seguinte travessao:

"- na Grécia, para o "efeteío",".

Artigo 7g. No artigo 41g. da convençao de 1968, com a redacçao que lhe foi dada pelo artigo 20g. da convençao de 1978, o primeiro travessao passa a ter a seguinte redacçao:

"- na Bélgica, na Grécia, em França, em Italia, no Luxemburgo e nos Países Baixos, de recurso de cassaçao,".

Artigo 8g. Ao artigo 55g. da convençao de 1968, na redacçao que lhe foi dada pelo artigo 24g. da convençao de 1978, é aditado o seguinte travessao a inserir no respectivo lugar da lista das convençoes de acordo com a ordem cronologica:

"- a convençao entre o Reino da Grécia e a Republica Federal da Alemanha relativa ao reconhecimento e execuçao recíprocos de sentenças, transacçoes e actos autênticos em matéria civil e comercial, assinada em Atenas em 4 de Novembro de 1961."

TITULOIII

Adaptaçao do protocolo anexo à convençao de 1968

Artigo 9g. No artigo Vg.B aditado ao protocolo anexo à convençao de 1968 pelo artigo 29g. da convençao de 1978, sao inseridos, no primeiro período, os termos, antecedidos por uma vírgula, "na Grécia", a seguir ao termo "Dinamarca".

TITULO IV

Adaptaçoes do protocolo de 1971

Artigo 10g. Ao artigo 1g. do protocolo de 1971, com a redacçao que lhe foi dada pelo artigo 30g. da convençao de 1978, é aditado o seguinte paragrafo:

"O Tribunal de Justiça das Comunidades Europeias é

igualmente competente para decidir sobre a interpretaçao da convençao relativa à adesao da Republica Helénica à convençao de 27 de Setembro de 1968 e ao presente protocolo, tal como foram adaptados pela convençao de 1978."

Artigo 11g. Ao ponto 1 do artigo 2g. do protocolo de 1971, com a redacçao que lhe foi dada pelo artigo 31g. da convençao de 1978, é aditado, entre o terceiro e o quarto travessoes, o seguinte travessao:

"- na Grécia, "ta anvtata dikasthria",".

TITULO V

Disposiçoes transitorias

Artigo 12g. 1. A convençao de 1968 e o protocolo de 1971, com a redacçao que lhes foi dada pela convençao de 1978 e que lhe é

dada pela presente convençao, sao aplicaveis apenas às acçoes judiciais intentadas e aos actos autênticos exarados posteriormente à entrada em vigor da presente convençao no Estado de origem e aos pedidos de reconhecimento ou de execuçao de uma decisao ou de um acto autêntico apos

a entrada em vigor da presente convençao no Estado requerido.

2. Todavia, nas relaçoes entre o Estado de origem e o Estado de origem e o Estado requerido, as decisoes proferidas apos a data de entrada em vigor da presente convençao na sequência de acçoes intentadas antes dessa data serao reconhecidas e executadas em conformidade com o disposto no título III da convençao de 1968, com a redacçao que lhe foi dada pela convençao de 1978 e que lhe é dada pela presente convençao, se a competência se tiver fundamentado em regras conformes com o disposto no título II alterado da convençao de 1968 ou com disposiçoes previstas em con-

vençao vigente entre o Estado de origem e o Estado requerido aquando da instauraçao da acçao.

TITULO VI

Disposiçoes finais

Artigo 13g. O secretario-geral do Conselho das Comunidades Europeias remetera ao Governo da Republica Helénica, nas línguas alema, dinamarquesa, francesa, inglesa, irlandesa, italiana e neerlandesa, uma copia autenticada da convençao de 1968, do protocolo de 1971 e da convençao de 1978.

Os textos da convençao de 1968, de protocolo de 1971 e da convençao de 1978, redigidos em língua grega, serao anexados à presente convençao. Os textos redigidos em língua grega fazem fé nas mesmas condiçoes que os outros textos da convençao de 1968, do protocolo de 1971 e da convençao de 1978.

Artigo 14g. A presente convençao sera ratificada pelos Estados signatarios. Os instrumentos de ratificaçao serao depositados junto do secretario-geral do Conselho das Comunidades Europeias.

Artigo 15g. A presente convençao entrara em vigor nas relaçoes entre os Estados que a tiverem ratificado no primeiro dia do terceiro mês seguinte ao do deposito do ultimo instrumento de ratificaçao pela Republica Helénica a pelos Estados que tiverem posto em vigor a convençao de 1978 em conformidade com o artigo 39g. da referida convençao.

A presente convençao entrara em vigor, em cada Estado-membro que a ratifique posteriormente, no primeiro dia do terceiro mês seguinte ao do deposito do respectivo instrumento de ratificaçao.

Artigo 16g. O secretario-geral do Conselho das Comunidades Europeias notificara os Estados signatarios:

a) Do deposito de qualquer instrumento de ratificaçao;

b) Das datas de entrada em vigor de presente convençao nos Estados contratantes.

Artigo 17g. A presente convençao, redigida num unico exemplar nas línguas alema, dinamarquesa, francesa, grega, inglesa, irlandesa, italiana e neerlandesa, fazendo fé qualquer dos oito textos, sera depositada nos arquivos do Secretariado do Conselho das Comunidades Europeias. O secretario-geral remetera uma copia autenticada da presente convençao a cada um dos governos dos Estados signatarios.

Til bekraeftelse heraf har undertegnede behoerigt befuldmaegtigede underskrevet denne konvention.

Zu Urkund dessen haben die hierzu gehoerig befugten Unterzeichneten ihre Unterschriften unter dieses UEbereinkommen gesetzt.

Se pístvsh tvn anvtérv, oi zpografontew plhrejozsioi éuesan thn zpografh tozw katv apo thn parozsa szmbash.

In witness whereof, the undersigned being duly authorized thereto, have signed this Convention.

En foi de quoi, les soussignés, dûment autorisés à cet effet, ont signé la présente convention.

Da fhianu sin, shínigh na daoine seo thíos, arna n-udaru go cuí chuige sin, an Coinbhinsiun seo.

In fede di che, i sottoscritti, debitamente autorizzati a tal fine, hanno firmato la presente convenzione.

Ten blijke waarvan de ondergetekenden, daartoe behoorlijk gemachtigd, hun handtekening onder dit Verdrag hebben geplaatst.

Em fé do que os plenipotenciarios abaixo-assinados apuseram as suas assinaturas no final da presente convençao.Udfaerdiget i Luxembourg, den femogtyvende oktober nitten hundrede og toogfirs.

Geschehen zu Luxemburg am fuenfundzwanzigsten Oktober neunzehnhundertzweiundachtzig.

iEgine sto Lozjembozrgo, stiw eíkosi pénte Oktvbríoz xília enniakosia ogdonta dzo.

Done at Luxembourg on the twenty-fifth day of October in the year one thousand nine hundred and eighty-two.

Fait à Luxembourg, le vingt-cinq octobre mil neuf quatre-vingt-deux.

Arna dhéanamh i Lucsamburg, an cuigiuu la is fiche de mhí Dheireadh Fomhair sa bhliain míle naoi gcéad ochto a do.

Fatto a Lussemburgo, addi venticinque ottobre millenovecentottantadue.

Gedaan te Luxemburg, de vijfentwintigste oktober negentienhonderd tweeentachtig.

Feito no Luxemburgo, aos vinte e cinco de Outubro de mil novecentos e oitenta e dois.

Jean GOL

Erik NINN-HANSEN

Hans Arnold

ENGELHARD

Dr. Guenther

KNACKSTEDT

Georges-Alexandre

MANGAKIS

Robert BADINTER

Sean DOHERTY

Clelio DARIDA

Colette FLESCH

J. de RUITER

Peter Lovat FRASER

JOINT DECLARATION concerning the ratification of the Convention on the accession of the Kingdom of Spain and the Portuguese Republic to the 1968 Brussels Convention

Upon signature of the Convention on the accession of the Kingdom of Spain and the Portuguese Republic to the 1968 Brussels Convention, done at Donostia - San Sebastian on 26 May 1989,

THE REPRESENTATIVES OF THE GOVERNMENTS OF THE MEMBER STATES OF THE EUROPEAN COMMUNITIES, MEETING WITHIN THE COUNCIL,

DESIROUS that, in particular with a view to the completion of the internal market, application of the Brussels Convention and of the 1971 Protocol should be rapidly extended to the entire Community,

WELCOMING the conclusion on 16 September 1988 of the Lugano Convention which extends the principles of the Brussels Convention to those States becoming parties to the Lugano Convention, designed principally to govern relations between the Member States of the European Economic Community (EEC) and those of the European Free Trade Association (EFTA) with regard to the legal protection of persons established in any of those States and to the simplification of formalities for the reciprocal recognition and enforcement of judgments,

CONSIDERING that the Brussel Convention has as its legal basis Article 220 of the Treaty of Rome and is interpreted by the Court of Justice of the European Communities,

MINDFUL that the Lugano Convention does not affect the application of the Brussels Convention as regards relations between Member States of the European Economic Community, since such relations must be governed by the Brussels Convention,

NOTING that the Lugano Convention is to enter into force after two States, of which one is a member of the European Communities and the other a member of the European Free Trade Association, have deposited their instruments of ratification,

DECLARE THEMSELVES READY to take every appropriate measure with a view to ensuring that national procedures for the ratification of the Convention on the accession of the Kingdom of Spain and the Portuguese Republic to the Brussels Convention, signed today, are completed as soon as possible and, if possible, by 31 December 1992 at the latest.

En fe de lo cual, los abajo firmantes suscriben la presente Declaracion comun.

Til bekraeftelse heraf har undertegnede underskrevet denne erklaering.

Zu Urkund dessen haben die Unterzeichneten diese Erklaerung unterschrieben.

Se pistvsh tvn anvtérv, oi katvui zpégracan thn parozsa dhlvsh.

In witness whereof the undersigned have signed this declaration.

En foi de quoi, les soussignés ont signé la présente déclaration.

Da fhianu sin, chuir na daoine thíos-sínithe a lamh leis an Dearbhu seo.

In fede di che, i sottoscritti hanno firmato la presente dichiarazione.

Ten blijke waarvan de ondergetekenden hun handtekening onder deze verklaring hebben gesteld.

Em fé do que, os abaixo-assinados apuseram a sua assinatura no final da presente declaraçao comum.

Hecho en Donostia - San Sebastian, a veintiseis de mayo de mil novecientos ochenta y nueve.

Udfaerdiget i Donostia - San Sebastian, den seksogtyvende maj nitten hundrede og niogfirs.

Geschehen zu Donostia - San Sebastian am sechsundzwanzigsten Mai neunzehnhundertneunundachtzig.

iEgine sth Donostia - San Sebastian, stis eikosi exi Maioy chilia enniakosia ogdonta ennea.

Done at Donostia - San Sevastian on tie tsentz-sichti daz of Maz in tie zear one tiothsand nine ithndred and eigitz-nine.

Fait a Donostia - San Sevastian, le oingt-sich mai mil nethf psent qthatre-oingt-nethf.

Arna dieanami in Donostia - San Sevastian, an se la s fipsie de Viealtaine sa viliain mle gpsead opsito a naoi.

Fatto a Donostia - San Sevastian, addi oentisei mangio millenooepsentottantanooe.

Gedaan te Donostia - San Sevastian, de yesentsintigste mei negentienionderd negenentapsitig.

Feito em Donostia - San Sevastian, em ointe e seis de Maio de mil nooepsentos e oitenta e nooe.

Pour le gouvernement du royaume de Belgique

Voor de Regering van het Koninkrijk Belgie

For regeringen for Kongeriget Danmark

Fuer die Regierung der Bundesrepublik Deutschland

Gia thn Kzbérnhsh thw Ellhnikhw Dhmokratíaw

Por el Gobierno del Reino de España

Pour le gouvernement de la République française

Thar ceann Rialtas na hEireann

Per il governo della Repubblica italiana

Pour le gouvernement du grand-duché de Luxembourg

Voor de Regering van het Koninkrijk der Nederlanden

Pelo Governo da Republica Portuguesa

For the Government of the United Kingdom of Great Britain and Northern Ireland

PROTOCOLO

Las Altas Partes Contratantes han convenido las siguientes disposiciones anejas al Convenio:

Artículo I Cualquier persona domiciliada en Luxemburgo que fuere emplazada ante un tribunal de otro Estado contratante, en aplicacion del apartado 1 del artículo 5, podra impugnar la competencia de dicho tribunal. Este tribunal se declarara de oficio incompetente si no compareciere el demandado.

Cualquier convenio atributivo de jurisdiccion en el sentido del artículo 17 solo producira efectos con respecto a una persona domiciliada en Luxemburgo cuando ésta lo hubiere expresa y especialmente aceptado.

Artículo II Sin perjuicio de las disposiciones nacionales mas favorables, las personas domiciliadas en un Estado contratante y perseguidas por infracciones involuntarias ante los organos jurisdiccionales sancionadores de otro Estado contratante del que no fueren nacionales podran, aunque no comparecieren personalmente, defenderse por medio de las personas autorizadas a tal fin.

No obstante, el tribunal que conociere del asunto podra ordenar la comparecencia personal; si ésta no tuviere lugar, la resolucion dictada sobre la accion civil sin que la persona encausada hubiere tenido la posibilidad de defenderse podra no ser reconocida ni ejecutada en los demas Estados contratantes.

Artículo III El Estado requerido no percibira impuesto, derecho ni tasa alguna, proporcional al valor del litigio, en el procedimiento de exequatur.

Artículo IV Los documentos judiciales y extrajudiciales extendidos en un Estado contratante y que debieren ser notificados a personas que se encontraren en el territorio de otro Estado contra-

tante, se transmitiran del modo previsto por los convenios o acuerdos celebrados entre los Estados contratantes.

A no ser que el Estado de destino se oponga a ello mediante declaracion formulada al Secretario General del Consejo de las Comunidades Europeas, tales documentos también podran ser enviados directamente por las personas autorizadas al efecto en el Estado en que se extendieren los documentos, a las personas autorizadas al efecto en el Estado en que se encontrare el destinatario del documento. En este caso, la persona autorizada al efecto en el Estado de origen, transmitira una copia del documento a la persona habilitada al efecto en el Estado requerido, que sea competente para hacerla llegar al destinatario. Esta entrega se hara en la forma prevista por la ley del Estado requerido. Se dejara constancia de la misma mediante certificacion enviada directamente a la persona autorizada al efecto en el Estado de origen.

Artículo V La competencia judicial prevista en el punto 2 del artículo 6 y en el artículo 10 para la demanda sobre obligaciones de garantía o para la intervencion de terceros en el proceso, no podra ser invocada en la Republica Federal de Alemania. En este Estado, cualquier persona domiciliada en otro Estado contratante podra ser demandada ante los tribunales en aplicacion de los artículos 68 y 72, 73 y 74 de la Ley de enjuiciamiento civil sobre litis denunciatio.

Las resoluciones dictadas en los demas Estados contratantes en virtud del punto 2 del artículo 6 y del artículo 10 seran reconocidas y ejecutadas en la Republica Federal de Alemania de conformidad con el Título III. Los efectos frente a terceros producidos en aplicacion de los artículos 68 y 72, 73 y 74 de la Ley de enjuiciamiento civil, por resoluciones dictadas en este Estado, seran igualmente reconocidos en los demas Estados contratantes.

Artículo VI Los Estados contratantes comunicaran al Secretario General del Consejo de las Comunidades Europeas los textos de sus disposiciones legales que modifiquen los artículos de sus leyes que se mencionan en el Convenio y los juzgados y tribunales designados en el Título III, Seccion 2 del Convenio.

En fe de lo cual, los plenipotenciarios abajo firmantes suscriben el presente Protocolo.

Zu Urkund dessen haben die unterzeichneten Bevollmaechtigten ihre Unterschrift unter dieses Protokoll gesetzt.

En foi de quoi les plénipotentiaires soussignés ont apposé leur signature au bas du présent protocole.

In fede di che i plenipotenziari sottoscritti hanno apposto le loro firme in calce al presente protocollo.

Ten blijke waarvan de onderscheiden gevolmachtigden hun handtekening onder dit Protocol hebben gesteld.

Hecho en Bruselas, el veintisiete de septiembre de mil novecientos sesenta y ocho.

Geschehen zu Bruessel am siebenundzwanzigsten September neunzehnhundertachtundsechzig.

Fait à Bruxelles, le vingt-sept septembre mil neuf cent soixante-huit.

Fatto a Bruxelles, addi ventisette settembre millenovecentosessantotto.

Gedaan te Brussel, op zevenentwintig september negentienhonderd achtenzestig.

Por Su Majestad el Rey de los Belgas,

Pierre HARMEL

Por el Presidente de la Republica Federal de Alemania,

Willy BRANDT

Por el Presidente de la Republica Francesa,

Michel DEBRE

Por el Presidente de la Republica Italiana,

Giuseppe MEDICI

Por Su Alteza Real el Gran Duque de Luxemburgo,

Pierre GREGOIRE

Por Su Majestad la Reina de los Países Bajos,

J. M. A. H. LUNS

DECLARACION COMUN

Los Gobiernos del Reino de Bélgica, de la Republica Federal de Alemania, de la Republica Francese, de la Republica Italiana, del Gran Ducado de Luxemburgo y del Reino de los Países Bajos.

En el momento de la firma del Convenio relativo a la competencia judicial y a la ejecucion de resoluciones judiciales en materia civil y mercantil.

Deseando garantizar una aplicacion tan eficaz como sea posible de sus disposiciones,

Preocupados por evitar que las divergencias de interpretacion del Convenio perjudiquen su caracter unitario,

Conscientes del hecho de que podrían presentarse conflictos positivos o negativos de competencia en la aplicacion del Convenio,

se declaran dispuestos:

1. a estudiar estas cuestiones y, en particular, a examinar la posibidad de atribuir ciertas competencias al Tribunal de Justicia de las Comunidades Europeas, y a negociar, en su caso, un acuerdo a tal fin;

2. a establecer contactos periodicos entre sus representantes.

En fe de lo cual, los plenipotenciarios abajo firmantes suscriben la presente Declaracion comun.

Zu Urkund dessen haben die unterzeichneten Bevollmaechtigten ihre Unterschrift unter diese Gemeinsame Erklaerung gesetzt.

En foi de quoi les plénipotentiaires ont apposé leur signature au bas de la présente déclaration commune.

In fede di che i plenipotenziari sottoscritti hanno apposto le loro firme in calce alla presente dichiarazione comune.

Ten blijke waarvan de onderscheiden gevolmachtigden hun handtekening onder deze Gemeenschappelijke Verklaring hebben gesteld.

Hecho en Bruselas, el veintisiete de septiembre de mil novecientos sesenta y ocho.

Geschehen zu Bruessel am siebenundzwanzigsten September neunzehnhundertachtundsechzig.

Fait à Bruxelles, le vingt-sept septembre mil neuf cent soixante-huit.

Fatto a Bruxelles, addi ventisette settembre millenovecentosessantotto.

Gedaan te Brussel, op zevenentwintig september negentienhonderd achtenzestig.

Pierre HARMEL

Guiseppe MEDICI

Willy BRANDT

Pierre GREGOIRE

Michel DEBRE

J. M. A. H. LUNS

ANEXO III

PROTOCOLO relativo a la interpretacion por el Tribunal de Justicia del Convenio de 27 de septiembre de 1968 sobre la competencia judicial y la ejecucion de resoluciones judiciales en materia civil y mercantil LAS ALTAS PARTES CONTRATANTES DEL TRATADO CONSTITUTIVO DE LA COMUNIDAD ECONOMICA EUROPEA,

CON REFERENCIA a la Declaracion anexa al Convenio relativo a la competencia judicial y a la ejecucion de resoluciones judiciales en materia civil y mercantil, firmado en Bruselas el 27 de septiembre de 1968,

HAN DECIDIDO celebrar un Protocolo que atribuya competencia al Tribunal de Justicia de la Comunidades Europeas para la interpretacion de dicho Convenio y han designado con tal fin como plenipotenciarios:

SU MAJESTAD EL REY DE LOS BELGAS:

al señor Alfons VRANCKX,

Ministro de Justicia;

EL PRESIDENTE DE LA REPUBLICA FEDERAL DE ALEMANIA:

al señor Gerhard JAHN,

Ministro federal de Justicia;

EL PRESIDENTE DE LA REPUBLICA FRANCESA:

al señor René PLEVEN,

Ministro de Justicia;

EL PRESIDENTE DE LA REPUBLICA ITALIANA:

al señor Erminio PENNACCHINI,

Subsecretario de Estado en el Ministerio de Justicia y Gracia;

SU ALTEZA REAL EL GRAN DUQUE DE LUXEMBURGO:

al señor Eugène SCHAUS;

Ministro de Justicia,

Vicepresidente del Gobierno;

SU MAJESTAD LA REINA DE LOS PAISES BAJOS:

al señor C. H. F. POLAK,

Ministro de Justicia;

QUIENES, reunidos en el seno del Consejo, después de haber intercambiado sus plenos poderes, reconocidos en buena y debida forma,

HAN CONVENIDO LAS DISPOSICIONES SIGUIENTES:

Artículo 1 El Tribunal de Justicia de las Comunidades Europeas sera competente para decidir sobre la interpretacion del Convenio relativo a la competencia judicial y la ejecucion de resoluciones judiciales en materia civil y mercantil y del Protocolo anexo a este Convenio, firmados en Bruselas el 27 de septiembre de 1968, así como sobre la interpretacion del presente Protocolo.

Artículo 2 Podran solicitar al Tribunal de Justicia que decida a título prejudicial sobre cuestiones de interpretacion los siguientes organos jurisdiccionales:

1. en Bélgica: la Cour de cassation (het Hof van Cassatie) y le Conseil d'Etat (de Raad van State),

en la Republica Federal de Alemania: die obersten Gerichtshoefe des Bundes,

en Francia: la Cour de cassation y le Conseil d'Etat,

en Italia: la Corte suprema die cassazione,

en Luxemburgo: la Cour supérieure de justice actuando como Cour de cassation,

en los Países Bajos: de Hoge Raad;

2. los organos jurisdiccionales de los Estados contratantes cuando decidan en apelacion;

3. en los casos previstos en el artículo 37 del Convenio,

los organos jurisdiccionales mencionados en dicho artículo.

Artículo 3 1. Cuando se planteen cuestiones relativas a la interpretacion del Convenio y de los

demas textos mencionados en el artículo 1 en asuntos pendientes ante un organo jurisdiccional de los indicados en el punto 1 del artículo 2, si este organo jurisdiccional estima que es necesaria una decision sobre tal cuestion para dictar sentencia, debera pedir al Tribunal de Justicia que se pronuncie sobre tal cuestion.

2. Cuando esta cuestion se plantee ante un organo jurisdiccional de los indicados en los puntos 2 y 3 del artículo 2, este organo jurisdiccional, en las condiciones determinadas en el apartado 1, podra solicitar al Tribunal de Justicia que se pronuncie.

Artículo 4 1. La autoridad competente de un Estado contratante estara facultada para pedir al Tribunal de Justicia que se pronuncie sobre una cuestion de interpretacion del Convenio y de los demas textos mencionados en el artículo 1, si las resoluciones dictadas por los organos jurisdiccionales de ese Estado estuvieren en contradiccion con la interpretacion dada bien por el Tribunal de Justicia, bien por una resolucion de uno de los organos jurisdiccionales de otro Estado contratante mencionados en los puntos 1 y 2 del artículo 2. Las disposiciones del presente apartado solo se aplicaran a las resoluciones que tengan fuerza de cosa juzgada.

2. La interpretacion que diere el Tribunal de Justicia como consecuencia de la solicitud no afectara a las resoluciones con ocasion de las cuales se hubiere pedido la interpretacion.

3. Seran competentes para presentar al Tribunal de Justicia solicitudes de interpretacion, en el sentido del apartado 1, los Fiscales Generales de los Tribunales de casacion de los Estados contratantes o cualesquiera otras autoridades designadas por un Estado contratante.

4. El Secretario del Tribunal de Justicia notificara la solicitud a los Estados contratantes, a la Comision y al Consejo de las Comunidades Europeas quienes, en un plazo de dos meses a partir de esta notificacion, podran presentar memorias u observaciones escritas al Tribunal.

5. El procediemiento previsto en el presente artículo no dara lugar a la percepcion ni a la devolucion de las costas judiciales.

Artículo 5 1. Mientras el presente Protocolo no disponga otra cosa, las disposiciones del Tratado constitutivo de la Comunidad Economica Europea y las del Protocolo sobre el Estatuto del Tribunal de Justicia anexo a dicho Tratado, que son aplicables cuando se solicita al Tribunal que decida a título prejudicial, se aplicaran igualmente al procedimiento de interpretacion del Convenio y de los demas textos mencionados en el artículo 1.

2. El Reglamento de procedimiento del Tribunal de Justicia se adaptara y completara, cuando fuere necesario, conforme al artículo 188 del Tratado constitutivo de la Comunidad Economica Europea.

Artículo 6 El presente Protocolo se aplicara en el territorio europeo de los Estados contratantes y en los departamentos y territorios franceses de Ultramar.

El Reino de los Países Bajos podra declarar, en el momento de la firma o de la ratificacion del presente Protocolo, o en cualquier momento posterior, mediante notificacion al Secretario General del Consejo de las Comunidades Europeas, que el presente Protocolo sera aplicable en Surinam y en las Antillas neerlandesas.

Artículo 7 El presente Protocolo sera ratificado por los Estados signatarios. Los instrumentos de ratificacion se depositaran ante el Secretario General del Consejo de las Comunidades Europeas.

Artículo 8 El presente Protocolo entrara en vigor el primer día del tercer mes siguiente al del deposito del instrumento de ratificacion del Estado signatario que proceda a esta formalidad en ultimo lugar. No obstante, tal entrada en vigor no se producira antes de la entrada en vigor del Convenio de 27 de septiembre de 1968 relativo a la competencia judicial y a la ejecucion de resoluciones judiciales en materia civil y mercantil.

Artículo 9 Los Estados contratantes reconocen que todo Estado que se convierta en miembro de la Comunidad Economica Europea y al que se aplique el artículo 63 del Convenio relativo a la competencia judicial y a la ejecucion de resoluciones judiciales en materia civil y mercantil debera aceptar las disposiciones del presente Protocolo, sin perjuicio de las adaptaciones necesarias.

Artículo 10 El Secretario General del Consejo de las Comunidades Europeas notificara a los Estados signatorios:

a) el deposito de cada uno de los instrumentos de ratificacion;

b) la fecha de entrada en vigor del presente Protocolo:

c) las declaraciones recibidas en aplicacion del apartado 3 del artículo 4;

d) las declaraciones recibidas en aplicacion del parrafo segundo del artículo 6.

Artículo 11 Los Estados contratantes comunicaran al Secretario General del Consejo de las Comunidades Europeas los textos de sus disposiciones legales que impliquen modificacion de la lista de organos jurisdiccionales designadas en el punto 1 del artículo 2.

Artículo 12 El presente Protocolo se celebra por un período de tiempo ilimitado.

Artículo 13 Cada Estado contratante podra solicitar la revision del presente Protocolo. En este caso, el Presidente del Consejo de las Comunidades Europeas convocara una conferencia de revision.

Artículo 14 El presente Protocolo, redactado en un solo ejemplar en las lenguas alemana, francesa, italiana y neerlandesa, cuyos cuatro textos son igualmente auténticos, sera depositado en los archivos de la Secretaría del Consejo de las Comunidades Europeas. El Secretario General remitira una copia autenticada conforme a cada uno de los Gobiernos de los Estados signatarios.

En fe de lo cual, los plenipotenciarios abajo firmantes suscriben el presente Protocolo.

Zu Urkund dessen haben die unterzeichneten Bevollmaechtigten ihre Unterschrift unter dieses Protokoll gesetzt.

En foi de quoi les plénipotentiaires soussignés ont apposé leur signature au bas du présent protocole.

In fede di che i plenipotenziari sottoscritti hanno apposto le loro firme in calce al presente protocollo.

Ten blijke waarvan de onderscheiden gevolmachtigden hun handtekening onder dit Protocol hebben gesteld.

Hecho en Luxemburgo, el tres de junio de mil novecientos setenta y uno.

Geschehen zu Luxemburg am dritten Juni neunzehnhunderteinundsiebzig.

Fait à Luxembourg, le trois juin mil neuf cent soixante et onze.

Fatto a Lussemburgo, addi tre giugno millenovecentosettantuno.

Gedaan te Luxemburg, de derde juni negentienhonderd eenenzeventig.

Por Su Majestad el Rey de los Belgas,

Alfons VRANCKX

Por el Presidente de laRepublica Federal de Alemania,

Gerhard JAHN,

Por el Presidente de la Republica Francesa,

René PLEVEN

Por el Presidente de la Republica Italiana,

Erminio PENNACCHINI

Por Su Alteza Real el Gran Duque de Luxemburgo,

Eugène SCHAUS

Por Su Majestad la Reina de los Países Bajos,

C. H. F. POLAK

DECLARACION COMUN

Los Gobiernos del Reino de Bélgica, de la Republica Federal de Alemania, de la Republica Francesa, de la Republica Italiana, del Gran Ducado de Luxemburgo y del Reino de los Países Bajos,

En el momento de la firma del Protocolo relativo a la interpretacion por el Tribunal de Justicia del Convenio de 27 de septiembre de 1968 relativo a la competencia judicial y la ejecucion de resoluciones judiciales en materia civil y mercantil,

Deseando asegurar una aplicacion tan eficaz y uniforme como sea posible de sus disposiciones,

Se declaran dispuestos a organizar, conjuntamente con el Tribunal de Justicia un intercambio de informaciones relativas a las resoluciones dictadas por los organos jurisdiccionales mencionados en el punto 1 del artículo 2 de dicho Protocolo en aplicacion del Convenio y del Protocolo de 27 de septiembre de 1968.

En fe de lo cual, los plenipotenciarios abajo firmantes suscriben la presente Declaracion comun.

Zu Urkund dessen haben die unterzeichneten Bevollmaechtigen ihre Unterschrift unter diese Gemeinsame Erklaerung gesetzt.

En foi de quoi les plénipotentiaires soussignés ont apposé leur signature au bas de la présente déclaration commune.

In fede di che i plenipotenziari sottoscritti hanno apposto le loro firme in calce alla presente dichiarazione comune.

Ten blijke waarvan de onderscheiden gevolmachtigden hun handtekening onder deze Gemeenschappelijke Verklaring hebben gesteld.

Hecho en Luxemburgo, el tres de junio de mil novecientos setenta y uno.

Geschehen zu Luxemburg am dritten Juni neunzehnhunderteinundsiebzig.

Fait à Luxembourg, le trois juin mil neuf cent soixante et onze.

Fatto a Lussemburgo, addi tre giugno millenovecentosettantuno.

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Por Su Majestad el Rey de los Belgas,

Alfons VRANCKX

Por el Presidente de la Republica Federal de Alemania,

Gerhard JAHN

Por el Presidente de la Republica Francesa,

René PLEVEN

Por el Presidente de la Republica Italiana,

Erminio PENNACCHINI

Por Su Alteza Real el Gran Duque du Luxemburgo,

Eugène SCHAUS

Por su Majestad la Reina de los Países Bajos,

C. H. F. POLAK

ANEXO IV

CONVENIO relativo a la adhesion de Dinamarca, Irlanda y el Reino Unido de Gran Bretaña e Irlanda del Norte al Convenio relativo a la competencia judicial y a la ejecucion de resoluciones judiciales en materia civil y mercantil, así como al Protocolo relativo a su interpretacion por el Tribunal de Justicia

PREAMBULO

LAS ALTAS PARTES CONTRATANTES DEL TRATADO CONSTITUTIVO DE LA COMUNIDAD ECONOMICA EUROPEA,

CONSIDERANDO que el Reino de Dinamarca, Irlanda y el Reino Unido de Gran Bretaña e Irlanda del Norte, al convertirse en miembros de la Comunidad, se comprometieron a adherirse al Convenio relativo a la competencia judicial y a la ejecucion de resoluciones judiciales en materia civil y mercantil, así como al Protocolo relativo a su interpretacion por el Tribunal de Justicia, y a entablar, a tal fin, negociaciones con los Estados miembros originarios de la Comunidad para introducir en aquéllos las adaptaciones necesarias,

HAN DECIDIDO celebrar el presente Convenio y han designado con tal fin como plenipotenciarios:

SU MAJESTAD EL REY DE LOS BELGAS:

a Renaat VAN ELSLANDE,

Ministro de Justicia;

SU MAJESTAD LA REINA DE DINAMARCA:

a Nathalie LIND,

Ministra de Justicia;

EL PRESIDENTE DE LA REPUBLICA FEDERAL DE ALEMANIA:

al doctor Hans-Jochen VOGEL,

Ministro de Justicia;

EL PRESIDENTE DE LA REPUBLICA FRANCESA:

a Alain PEYREFITTE,

Ministro de Justicia;

EL PRESIDENTE DE IRLANDA:

a Gerard COLLINS,

Ministro de Justicia;

EL PRESIDENTE DE LA REPUBLICA ITALIANA:

a Paolo BONIFACIO,

Ministro de Justicia;

SU ALTEZA REAL EL GRAN DUQUE DE LUXEMBURGO:

a Robert KRIEPS,

Ministro de Educacion Nacional,

Ministro de Justicia;

SU MAJESTAD LA REINA DE LOS PAISES BAJOS:

al profesor J. DE RUITER,

Ministro de Justicia;

SU MAJESTAD LA REINA DEL REINO UNIDO DE GRAN BRETAÑA E IRLANDA DEL NORTE:

a The Right Honourable the Lord ELWYN-JONES, C. H.

Lord High Chancellor of Great Britain;

QUIENES, reunidos en el seno del Consejo, después de haber intercambiado sus plenos poderes, reconocidos en buena y debida forma,

HAN CONVENIDO LAS DISPOSICIONES SIGUIENTES:

TITULO I

Disposiciones Generales

Artículo 1 El Reino de Dinamarca, Irlanda y el Reino Unido de Gran Bretaña e Irlanda del Norte se adhieren al Convenio relativo a la competencia judicial y a la ejecucion de resoluciones judiciales en materia civil y mercantil, firmado en Bruselas el 27 de septiembre de 1968, en lo sucesivo denominado "Convenio de 1968", así como al Protocolo relativo a su interpretacion por el Tribunal de Justicia, firmado en Luxemburgo el 3 de junio de 1971, en lo sucesivo denominado "Protocolo de 1971".

Artículo 2 Las adaptaciones del Convenio de 1968 y del Protocolo de 1971 figuran en los Títulos II a IV del presente Convenio.

TITULO II

Adaptaciones del Convenio de 1968

Artículo 3 El parrafo primero del artículo 1 del Convenio de 1968 se completara con las disposiciones siguientes:

"No incluira, en particular, las materias fiscal, aduanera y administrativa."

Artículo 4 El parrafo segundo del artículo 3 del Convenio de 1968 se sustituira por las disposiciones siguientes:

"En particular, no podra invocarse frente a ellas:

- en Bélgica: el artículo 15 del Codigo civil (Code civil - Burgerlijk Wetboek) y el artículo 638 de la Ley

de Enjuiciamiento (Code Judiciaire - Gerechtelijk Wetboek);

- en Dinamarca: los apartados 2 y 3 del artículo 246

de la Ley de enjuiciamiento civil (Lov om rettens pleje);

- en la Republica Federal de Alemania: el artículo 23 de la Ley de enjuiciamiento civil (Zivilprozessordnung);

- en Francia: los artículo 14 y 15 del Codigo civil (Code civil);

- en Irlanda: las reglas que atribuyen la competencia judicial con fundamento en una cédula de emplazamiento entregada al demandado que se encontrare ocasionalmente en Irlanda;

- en Italia: el artículo 2 y el artículo 4, apartados 1 y 2, de la Ley de enjuiciamiento civil (Codice di procedura civile);

- en Luxemburgo: los artículos 14 y 15 del Codigo civil (Code civil);

- en los Países Bajos: el artículo 126, parrafo tercero, y el artículo 127 de la Ley de enjuiciamiento civil (Wetboek van Burgerlijke Rechtsvordering);

- en el Reino Unido: las reglas que atribuyen la competencia judicial con fundamento en:

a) una cédula de emplazamiento entregada al demandado que se encontrare ocasionalmente en el Reino Unido;

b) la existencia en el Reino Unido de bienes pertencientes al demandado;

c) el embargo por el demandante de bienes sitos en el Reino Unido."

Artículo 5 1. El punto 1 del artículo 5 del Convenio de 1968 se sustituira, en el texto en la lengua francesa, por las disposiciones siguientes:

"1. en matière contractuelle, devant le tribunal du lieu où l'obligation qui sert de base à la demande a été ou doit être exécutée;"

2. El punto 1 del artículo 5 del Convenio de 1968 se sustituira, en el texto en la lengua neerlandesa, por las disposiciones siguientes:

"1. ten aanzien van verbintenissen uit overeenkomst: voor het gerecht van de plaats, waar de verbintenis, die aan de eis ten grondslag ligt, is uitgevoerd of moet worden uitgevoerd;"

3. El punto 2 del artículo 5 del Convenio de 1968 se sustituira por las disposiciones siguientes:

"2. en materia de alimentos, ante el tribunal del lugar del domicilio o de la residencia habitual del acreedor de alimentos o, si se tratare de una demanda incidental a una accion relativa al estado de las personas, ante el tribunal competente segun la ley del foro para conocer de ésta, salvo que tal competencia se fundamentare exclusivamente en la nacionalidad de una de las partes;".

4. El artículo 5 del Convenio de 1968 se completara con las disposiciones siguientes:

"6. en su condicion de fundador, trustee o beneficiario de un trust constituido ya en aplicacion de la ley, ya por escrito o por un acuerdo verbal confirmado por escrito, ante los tribunales del Estado contratante en cuyo territorio estuviere domiciliado el trust;

"7. si se tratare de un litigio relativo al pago de la remuneracion reclamada en razon del auxilio o el salvamento de los que se hubiere beneficiado un cargamento o un flete, ante el tribunal en cuya jurisdiccion dicho cargamento o flete:

a) hubiere sido embargado para garantizar dicho pago, o

b) hubiere podido ser embargado a tal fin, pero se ha prestado una caucion o cualquier otra garantía;

esta disposicion solo se aplicara cuando se pretendiere que el demandado tiene un derecho sobre el cargamento o el flete o que tenía tal derecho en el momento de dicho auxilio o salvamento."

Artículo 6 La Seccion 2 del Título II del Convenio de 1968 se completara con el artículo siguiente:

"Artículo 6 bis

Cuando, en virtud del presente Convenio, un tribunal de un Estado contratante fuere competente para conocer de acciones de responsabilidad derivadas de la utilizacion o la explotacion de un buque, dicho tribunal o cualquier otro que le sustituyere en virtud de la ley interna de dicho Estado conocera también de la demanda relativa a la limitacion de esta responsabilidad."

Artículo 7 El artículo 8 del Convenio de 1968 se sustituira por las disposiciones siguientes:

"Artículo 8

El asegurador domiciliado en un Estado contratante podra ser demandado:

1. ante los tribunales del Estado donde tuviere su domicilio, o

2. en otro Estado contratante, ante el tribunal del lugar donde tuviere su domicilio el tomador del seguro, o

3. si se tratare de un coasegurador, ante los tribunales del Estado contratante que entendiere de la accion entablada contra el primer firmante del coaseguro.

Cuando el asegurador no estuviere domiciliado en un Estado contratante pero tuviere sucursales, agencias o cualquier otro establecimiento en un Estado contratante se le considerara, para los litigios relativos a su explotacion, domiciliado en dicho Estado."

Artículo 8 El artículo 12 del Convenio de 1968 se sustituira por las disposiciones siguientes:

"Artículo 12

Unicamente prevaleceran sobre las disposiciones de la presente Seccion los convenios:

1. posteriores al nacimiento del litigio, o

2. que permitieren al tomador del seguro, al asegurado o al beneficiario formular demandas, ante tribunales distintos de los indicados en la presente Seccion, o

3. que, habiéndose celebrado entre un tomador de seguro y un asegurador, domiciliados o con residencia habitual en el mismo Estado contratante en el momento de la celebracion del contrato, atribuyeren, aunque el hecho dañoso se hubiere producido en el extranjero, competencia a los tribunales de dicho Estado, a no ser que la ley de éste prohibiere tales convenios, o

4. celebrados con un tomador de seguro que no estuviere domiciliado en un Estado contratante, a no ser que se tratare de un seguro obligatorio o se refiriere a un inmueble sito en un Estado contratante, o

5. que se refirieren a un contrato de seguro que cubriere uno o varios de los riesgos enumerados en el artículo 12 bis."

Artículo 9 La Seccion 3 del Título II del Convenio de 1968 se completara con el artículo siguiente:

"Artículo 12 bis

Los riesgos contemplados en el punto 5 del artículo 12 son los siguientes:

1. Todo daño a:

a) buques de navegacion marítima, instalaciones costeras y en alta mar o aeronaves, causado por hechos sobrevenidos en relacion con su utilizacion para fines comerciales;

b) mercancías distintas de los equipajes de los pasajeros, durante un transporte realizado por

dichos buques o aeronaves, bien en su totalidad o bien en combinacion con otros modos de transporte;

2. Toda responsabilidad, con excepcion de la derivada de los daños corporales a los pasajeros o de los daños a sus equipajes,

a) resultante de la utilizacion o la explotacion de los buques, instalaciones o aeronaves, de conformidad con la letra a) del punto 1, cuando la ley del Estado contratante en el que estuviere matriculada la aeronave no prohibiere los convenios atributivos de jurisdiccion en el aseguramiento de tales riesgos,

b) por las mercancías durante uno de los transportes contemplados en la letra b) del punto 1;

3. Toda pérdida pecuniaria ligada a la utilizacion o a la explotacion de buques, instalaciones o aeronaves de conformidad con la letra a) del punto 1, en particular la del flete o el beneficio del fletamento;

4. Todo riesgo accesorio a cualquiera de los contemplados en los puntos 1 a 3."

Artículo 10 La Seccion 4 del Título II del Convenio de 1968 de sustituira por las disposiciones siguientes:

"Seccion 4

Competencia en materia de contratos celebrados por los consumidores

Artículo 13

En materia de contratos celebrados por una persona para un uso que pudiere considerarse ajeno a su actividad profesional, en lo sucesivo denominada "el consumidor", la competencia quedara determinada por la presente Seccion, sin perjuicio de lo dispuesto en el artículo 4 y en el punto 5 del artículo 5:

1. cuando se tratare de una venta a plazos de mercaderías,

2. cuando se tratare de un préstamo a plazos o de otra operacion de crédito vinculada a la financiacion de la venta de tales bienes,

3. para cualquier otro contrato que tuviere por objeto una prestacion de servicios o un suministro de mercaderías, si:

a) la celebracion del contrato hubiese sido precedida, en el Estado del domicilio del consumidor, de una oferta, especialmente hecha o de publicidad; y

b) el consumidor hubiere realizado en este Estado los actos necesarios para la celebracion de dicho contrato.

Cuando el cocontratante del consumidor no estuviere domiciliado en un Estado contratante, pero poseyere una sucursal, agencia o cualquier otro establecimiento en un Estado contratante, se considerara para todos los litigios relativos a su explotacion que esta domiciliado en dicho Estado.

La presente Seccion no se aplicara al contrato de transporte.

Artículo 14

La accion entablada por un consumidor contra la otra parte contratante podra interponerse ante los tribunales del Estado contratante en que estuviere domiciliada dicha parte o ante los tribunales del Estado contratante en que estuviere domiciliado el consumidor.

La accion entablada contra el consumidor por la otra parte contratante solo podra interponerse ante los tribunales del Estado contratante en que estuviere domiciliado el consumidor.

Estas disposiciones no afectaran al derecho de presentar una reconvencion ante el tribunal que entendiere de una demanda principal de conformidad conla presente Seccion.

Artículo 15

Unicamente prevaleceran sobre las disposiciones de la presente Seccion los convenios:

1. posteriores al nacimiento del litigio, o

2. que permitieren al consumidor formular demandas ante tribunales distintos de los indicados en la presente Seccion, o

3. que habiéndose celebrado entre un consumidor y su cocontratante, domiciliados o con residencia habitual en el mismo Estado contratante en el momento de la celebracion del contrato, atribuyeren competencia a los tribunales de dicho Estado, a no ser que la ley de éste prohibiere tales convenios."

Artículo 11 El artículo 17 del Convenio de 1968 se sustituira por las disposiciones siguientes:

"Artículo 17

Si las partes, cuando al menos una de ellas tuviere su domicilio en un Estado contratante, hubieren acordado que un tribunal o los tribunales de un Estado contratante fueren competentes para conocer de cualquier litigio que hubiere surgido o que pudiere surgir con ocasion de una determinada relacion jurídica, tal tribunal o tales tribunales seran los unicos competentes. Tal convenio atributivo de competencia debera celebrarse bien por escrito, bien verbalmente con confirmacion escrita, bien, en el comercio internacional, en una forma conforme a los usos en ese ambito y que las partes conocieren o debieren conocer. Cuando ninguna de las partes que hubieren celebrado un acuerdo de este tipo estuviere domiciliada en un Estado contratante, los tribunales de los demas Estados contratantes solo podran conocer del litigio cuando el tribunal o los tribunales designados hubieren declinado su competencia.

El tribunal o los tribunales de un Estado contratante a los que el documento constitutivo de un trust hubiere atribuido competencia seran exclusivamente competentes para conocer de una accion contra el fundador, el trustee o el beneficiario de un trust si se tratare de relaciones entre estas personas o de sus derechos u obligaciones en el marco del trust.

No surtiran efecto los convenios atributivos de competencia ni las estipulaciones similares de documentos constitutivos de un trust si fueren contrarios a las disposiciones de los artículos 12 y 15 o si excluyeren la competencia de tribunales exclusivamente competentes en virtud del artículo 16.

Cuando se celebrare un convenio atributivo de competencia en favor de una sola de las partes, ésta conservara su derecho de acudir ante cualquier otro tribunal que fuere competente en virtud del presente Convenio."

Artículo 12 El parrafo segundo del artículo 20 del Convenio de 1968 se sustituira por las disposiciones siguientes:

"Este tribunal estara obligado a suspender el procedimiento en tanto no se acreditare que el demandado ha podido recibir la cédula de emplazamiento o documento equivalente con tiempo suficiente para defenderse o que se ha tomado toda diligencia a tal fin."

Artículo 13 1. El apartado 2 del artículo 27 del Convenio de 1968 se sustituira por las disposiciones siguientes:

"2. cuando se dictaren en rebeldía del demandado, si no se hubiere entregado o notificado al mismo la cédula de emplazamiento o documento equivalente, de forma regular y con tiempo suficiente para defenderse;".

2. El artículo 27 del Convenio de 1968 se completara con las disposiciones siguientes:

"5. si la resolucion fuere inconciliable con una resolucion dictada con anterioridad en un Estado no contratante entre las mismas partes en un litigio que tuviere el mismo objeto y la misma causa, cuando esta ultima resolucion reuniere las condiciones necesarias para su reconocimiento en el Estado requerido."

Artículo 14 El artículo 30 del Convenio de 1968 se completara con el parrafo siguiente:

"El tribunal de un Estado contratante ante el que se hubiere solicitado el reconocimiento de una resolucion dictada en Irlanda o en el Reino Unido podra suspender el procedimiento si la ejecucion estuviere suspendida en el Estado de origen como consecuencia de la interposicion de un recurso."

Artículo 15 El artículo 31 del Convenio de 1968 se completara con el parrafo siguiente:

"No obstante, en el Reino Unido, estas resoluciones se ejecutaran en Inglaterra y el País de Gales, en Escocia o en

Irlanda del Norte, previo registro con fines de ejecucion, a instancia de la parte interesada, en una u otra de esas partes del Reino Unido, segun el caso."

Artículo 16 El parrafo primero del artículo 32 del Convenio de 1968 se sustituira por las disposiciones siguientes:

"La solicitud se presentara:

- en Bélgica, ante el "Tribunal de première instance" o "Rechtbank van eerste aanleg";

- en Dinamarca, ante el "byret";

- en la Republica Federal de Alemania, ante el Presidente de una sala del "Landgericht";

- en Francia, ante el Presidente del "Tribunal de grande instance";

- en Irlanda, ante la "High Court";

- en Italia, ante la "Corte d'appello";

- en Luxemburgo, ante el Presidente del "Tribunal d'arrondissement";

- en los Países Bajos, ante el Presidente del "Arrondissementsrechtbank";

- en el Reino Unido:

1. en Inglaterra y el País de Gales, ante la "High Court of Justice" o, si se tratare de una resolucion en materia de alimentos, ante la "Magistrates' Court", por mediacion del "Secretary of State";

2. en Escocia, ante la "Court of Session" o, si se tratare de una resolucion en materia de alimentos, ante la "Sheriff Court", por mediacion del "Secretary of State";

3. en Irlanda del Norte, ante la "High Court of Justice" o, si se tratare de una resolucion en materia de alimentos, ante la "Magistrates' Court", por mediacion del "Secretary of State"."

Artículo 17 El artículo 37 del Convenio de 1968 se sustituira por las disposiciones siguientes:

"Artículo 37

El recurso se presentara, segun las normas que rigen el procedimiento contradictorio:

- en Bélgica, ante el "Tribunal de première instance" o "Rechtbank van eerste aanleg";

- en Dinamarca, ante el "Landsret";

- en la Republica Federal de Alemania, ante el "Oberlandesgericht";

- en Francia, ante la "Court d'appel";

- en Irlanda, ante la "High court";

- en Italia, ante la "Corte d'appello";

- en Luxemburgo, ante la "Cour supérieure de justice" reunida para entender en materia de apelacion civil;

- en los Países Bajos, ante el "Arrondissementsrechtbank";

- en el Reino Unido:

1. en Inglaterra y País de Gales, ante la "High Court of Justice" o, si se tratare de una resolucion en materia de alimentos, ante la "Magistrates' Court";

2. en Escocia, ante la "Court of Session" o, si se tratare de una resolucion en materia de alimentos, ante la "Sheriff Court";

3. en Irlanda del Norte,ante la "High Court of Justice" o, si se tratare de una resolucion en materia de alimentos, ante la "Magistrates' Court".

La resolucion dictada sobre el recurso solo podra ser objeto:

- en Bélgica, Francia, Italia, Luxemburgo y los Países Bajos, de un recurso de casacion;

- en Dinamarca, de un recurso ante el "Hoejesteret", previa autorizacion del Ministro de Justicia;

- en la Republica Federal de Alemania, de una "Rechtsbeschwerde";

- en Irlanda, de un recurso sobre una cuestion de derecho ante la "Supreme Court";

- en el Reino Unido, de un recurso unico sobre una cuestion de derecho."

Artículo 18 El artículo 38 del Convenio de 1968 se completara con la adicion, después del parrafo primero, del nuevo parrafo siguiente:

"Cuando la resolucion se hubiere dictado en Irlanda o en el Reino Unido, toda vía de recurso prevista en el Estado de origen sera considerada como un recurso ordinario a los efectos de la aplicacion del parrafo primero."

Artículo 19 El parrafo primero del artículo 40 del Convenio de 1968 se sustituira por las disposiciones siguientes:

"Si la solicitud fuere desestimada, el solicitante podra interponer recurso:

- en Bélgica, ante la "Cour d'appel" o el "Hof van Beroep";

- en Dinamarca, ante el "Landsret";

- en la Republica Federal de Alemania, ante el "Oberlandesgericht";

- en Francia, ante la "Cour d'appel";

- en Irlanda, ante la "High Court";

- en Italia, ante la "Corte d'appello";

- en Luxemburgo, ante la "Cour supérieure de justice" reunida para entender en materia de apelacion civil;

- en los Países Bajos, ante el "Gerechtshof";

- en el Reino Unido:

1. en Inglaterra y País de Gales, ante la "High Court of Justice" o, si se tratare de una resolucion

en materia de alimentos, ante la "Magistrates' Court";

2. en Escocia, ante la "Court of Session", o, si se tratare de una resolucion en materia de alimentos, ante la "Sheriff Court";

3. en Irlanda del Norte, ante la "High Court of Justice" o, si se tratare de una resolucion en materia de alimentos, ante la "Magistrates' Court"."

Artículo 20 El artículo 41 del Convenio de 1968 se sustituira por las disposiciones siguientes:

"Artículo 41

La resolucion que decidiere del recurso previsto en el artículo 40 solo podra ser objeto:

- en Bélgica, Francia, Italia, Luxemburgo y los Países Bajos, de un recurso de casacion;

- en Dinamarca, de un recurso ante el "Hoejesteret", previa autorizacion del Ministro de Justicia;

- en la Republica Federal de Alemania, de una "Rechtsbeschwerde";

- en Irlanda, de un recurso sobre una cuestion de derecho ante la "Supreme Court";

- en el Reino Unido, de un recurso sobre una cuestion de derecho."

Artículo 21 El artículo 44 del Convenio de 1968 se sustituira por las disposiciones siguientes:

"Artículo 44

El solicitante que en el Estado de origen hubiere obtenido total o parcialmente el beneficio de justicia gratuita o una exencion de costas y gastos gozara, en el procedimiento previsto en los artículos 32 a 35, del beneficio de justicia gratuita mas favorable o de la exencion mas amplia prevista por el derecho del Estado requerido.

El solicitante que instare la ejecucion de una resolucion dictada en Dinamarca por una autoridad administrativa en materia de alimentos podra invocar en el Estado requerido el beneficio de las disposiciones del parrafo primero si presentare un documento expedido por el Ministerio de Justicia danés que acreditare que cumple los requisitos economicos para poder beneficiarse total o parcialmente de la justicia gratuita o de una exencion de costas y gastos."

Artículo 22 El punto 2 del artículo 46 del Convenio de 1968 se sustituira por las disposiciones siguientes:

"2. si se tratare de una resolucion dictada en rebeldía, el original o una copia auténtica del documento que acreditare la entrega o notificacion de la demanda o de documento equivalente a la parte declarada en rebeldía."

Artículo 23 El artículo 53 del Convenio de 1968 se completara con el parrafo siguiente:

"Para determinar si un trust esta domiciliado en el Estado contratante cuyos tribunales conocen del asunto, el tribunal aplicara las reglas de su Derecho internacional privado."

Artículo 24 El artículo 55 del Convenio de 1968 se completara añadiendo los convenios siguientes, que se insertaran en el lugar que les corresponda en la lista segun orden cronologico:

- el Convenio entre el Reino Unido y Francia sobre la ejecucion recíproca de sentencias en materia civil y mercantil, acompañado de un Protocolo, firmado en París el 18 de enero de 1934;

- el Convenio entre el Reino Unido y Bélgica sobre la ejecucion recíproca de sentencias en materia

civil y mercantil, acompañado de unProtocolo, firmado en Bruselas el 2 de mayo de 1934;

- el Convenio entre el Reino Unido y la Republica Federal de Alemania sobre el reconocimiento y la ejecucion recíproca de sentencias en materia civil y mercantil, firmado en Bonn el 14 de julio de 1960;

- el Convenio entre el Reino Unido y la Republica Italiana sobre el reconocimiento y la ejecucion recíprocos de sentencias en materia civil y mercantil, firmado en Roma el 7 de febrero de 1964, acompañado de un Protocolo firmado en Roma el 14 de julio de 1970;

- el Convenio entre el Reino Unido y el Reino de los Países Bajos sobre el reconocimiento y la ejecucion recíproca de sentencias en materia civil, firmado en La Haya el 17 de noviembre de 1967.

Artículo 25 1. El artículo 57 del Convenio de 1968 se sustituira por las disposiciones siguientes:

"Artículo 57

El presente Convenio no afectara a los convenios en que los Estados contratantes fueren o llegaren a ser parte y que, en materias particulares, regularen la competencia judicial, el reconocimiento o la ejecucion de las resoluciones.

El presente Convenio no prejuzgara la aplicacion de las disposiciones que, en materias particulares, regularen la competencia judicial, el reconocimiento o la ejecucion de las resoluciones y que estén o estuvieren contenidas en los actos de las instituciones de las Comunidades Europeas o en las legislaciones nacionales armonizadas en ejecucion de dichos actos."

2. Con el fin de asegurar su interpretacion uniforme, el parrafo primero del artículo 57, se aplicara de la siguiente manera:

a) El Convenio de 1968 modificado no impedira que un tribunal de un Estado contratante que fuere parte en un convenio relativo a una materia particular pudiera fundamentar su competencia en dicho Convenio; aunque el demandado estuviere domiciliado en un Estado contratante no parte en tal Convenio. El tribunal que conociere del asunto aplicara, en todo caso, el artículo 20 del Convenio de 1968 modificado.

b) Las resoluciones dictadas en un Estado contratante por un tribunal que hubiere fundado su competencia en un convenio relativo a una materia particular seran reconocidas y ejecutadas en los demas Estados contratantes con arreglo al Convenio de 1968 modificado.

Cuando un convenio relativo a una materia particular en el que fueren parte el Estado de origen y el Estado requerido estableciere las condiciones para el reconocimiento o la ejecucion de resoluciones se aplicaran dichas condiciones. En todo caso, podran aplicarse las disposiciones del Convenio de 1968 modificado relativas al procedimiento de reconocimiento y ejecucion de resoluciones.

Artículo 26 El artículo 59 del Convenio de 1968 se completara con el parrafo siguiente:

"Sin embargo, ningun Estado contratante podra comprometerse con un Estado tercero a no reconocer una resolucion dictada en otro Estado contratante por un tribunal cuya competencia se hubiere fundamentado en la existencia en dicho Estado de bienes pertenecientes al demandado o en el embargo por parte del demandante de bienes existentes en dicho Estado:

1. si la demanda se refiriere a la propiedad o a la posesion de dichos bienes, persiguiere obtener la autorizacion de disponer de los mismos o se relacionare con otro litigio relativo a dichos bienes, o

2. si los bienes constituyeren la garantía de un crédito que hubiere sido objeto de la demanda."

Artículo 27 El artículo 60 del Convenio de 1968 se sustituira por las disposiciones siguientes:

"Artículo 60

El presente Convenio se aplicara en el territorio europeo de los Estados contratantes, incluida Groenlandia, en los departamentos y territorios franceses de Ultramar y en Mayotte.

El Reino de los Países Bajos podra declarar en el momento de la firma o de la ratificacion del presente Convenio, o en cualquier momento posterior, mediante notificacion al Secretario General del Consejo de las Comunidades Europeas, que el presente Convenio sera aplicable en las Antillas neerlandesas. En ausencia de tal declaracion, en lo relativo a las Antillas neerlandesas, los procedimientos que se desarrollaren en el territorio europeo del Reino como consecuencia de un recurso de casacion contra las resoluciones de los tribunales de las Antillas neerlandesas se consideraran como procedimientos que se estuvieren desarrollando ante esos tribunales.

Sin perjuicio de lo dispuesto en el parrafo primero, el presente Convenio no se aplicara:

1. en las islas Feroe, salvo declaracion contraria del Reino de Dinamarca;

2. en los territorios europeos situados fuera del Reino Unido y cuyas relaciones internacionales asuma éste, salvo declaracion contraria del Reino Unido respecto a cualquiera de tales territorios.

Estas declaraciones podran hacerse en cualquier momento, por vía de notificacion al Secretario General del Consejo de las Comunidades Europeas.

Los recursos interpuestos en el Reino Unido contra resoluciones dictadas por tribunales situados en alguno de los territorios a los que se refiere el punto 2 del parrafo tercero se consideraran como procedimientos que se estuvieren desarrollando ante dichos tribunales.

Los litigios a los que, en el Reino de Dinamarca, se aplique la ley de procedimiento civil para las islas Feroe (Lov for Faeroerne om rettens pleje) se consideraran como litigios que se estuvieren desarrollando ante los tribunales de las islas Feroe."

Artículo 28 La letra c) del artículo 64 del Convenio de 1968 se sustituira por las disposiciones siguientes:

"c) Las declaraciones recibidas en aplicacion del artículo 60;".

TITULO III

Adaptaciones del Protocolo anejo al Convenio de 1968

Artículo 29 El Protocolo anejo el Convenio de 1968 se completara con los artículos siguientes:

"Artículo V bis

En materia de alimentos, los términos "juez", "tribunal" y "jurisdiccion" comprenderan las autoridades administrativas danesas.

Artículo V ter

En los litigios entre el capitan y un miembro de la tripulacion de un buque matriculado en Dinamarca o

Irlanda, relativos a las remuneraciones y demas condiciones del servicio, los tribunales de un Estado contratante deberan comprobar si el agente diplomatico o funcionario consular competente respecto al buque ha sido informado del litigio. Deberan suspender el procedimiento en tanto no se hubiere informado a dicho agente. Deberan inhibirse, incluso de oficio, si este agente, debidamente informado, hubiere ejercitado las competencias que en la materia le reconociere un convenio consular o, a falta de tal convenio, hubiere formulado objeciones sobre la competencia en el plazo fijado.

Artículo V quater

Cuando, en el marco del apartado 5 del artículo 69 del Convenio relativo a la patente europea para el mercado comun, firmado en Luxemburgo el 15 de diciembre de 1975, se apliquen los artículos 52 y 53 del presente Convenio a las disposiciones relativas a la residence segun el texto inglés del primer Convenio, el término "residence" empleado en dicho texto se considerara que tiene el mismo alcance que el término "domicilio" que figura en los artículos 52 y 53 antes citados.

Artículo V quinquies

Sin perjuicio de la competencia de la Oficina Europea de Patentes segun al Convenio sobre la patente europea, firmado en Munich el 5 de octubre de 1973, los tribunales de cada Estado contratante seran los unicos competentes, sin consideracion del domicilio, en materia de registro o validez de una patente europea expedida para este Estado y que no fuere una patente comunitaria por aplicacion de las disposiciones del artículo 86 del Convenio relativo a la patente europea para el mercado comun, firmado en Luxemburgo el 15 de diciembre de 1975."

TITULO IV

Adaptaciones del Protocolo de 1971

Artículo 30 El artículo 1 del Protocolo de 1971 se completara con el parrafo siguiente:

"El Tribunal de Justicia de las Comunidades Europeas sera igualmente competente para decidir sobre la interpretacion del Convenio relativo a la adhesion del Reino de Dinamarca, de Irlanda y del Reino Unido de Gran Bretaña e Irlanda del Norte al Convenio de 27 de septiembre de 1968 y al presente Protocolo."

Artículo 31 El punto 1 del artículo 2 del Protocolo de 1971 se sustituira por las disposiciones siguientes:

"1. - en Bélgica: "la Cour de cassation" (het Hof van Cassatie) y "le Conseil d'Etat" (de Raad van State),

- en Dinamarca: "hoejesteret",

- en la Republica Federal de Alemania: "die obersten Gerichtshoefe des Bundes",

- en Francia: "la Cour de cassation" y "le Conseil d'etat",

- en Irlanda: "the Supreme Court",

- en Italia: "la Corte suprema di cassazione",

- en Luxemburgo: "la Cour supérieure de justice" actuando como Cour de cassation,

- en los Países Bajos: "de Hoge Raad",

- en el Reino Unido: "the House of Lords" y los organos jurisdiccionales a los que se recurra en virtud del parrafo segundo del artículo 37 o del artículo 41 del Convenio;".

Artículo 32 El artículo 6 del Protocolo de 1971 se sustituira por las disposiciones siguientes:

"Artículo 6

El presente protocolo se aplicara en el territorio europeo de los Estados contratantes, incluida Groenlandia, en los departamentos y territorios franceses de Ultramar y en Mayotte.

El Reino de los Países Bajos podra declarar, en el momento de la firma o de la ratificacion del presente Protocolo, o en cualquier momento posterior, mediante notificacion al Secretario General del Consejo de las Comunidades Europeas, que el presente Protocolo sera aplicable en las Antillas neerlandesas.

No obstante lo dispuesto en el parrafo primero, el presente Protocolo no se aplicara:

1. a las islas Feroe, salvo declaracion contraria del Reino de Dinamarca;

2. a los territorios europeos situados fuera del Reino Unido y cuyas relaciones internacionales asuma éste, salvo declaracion contraria del Reino Unido respecto a cualquiera de tales territorios.

Estas declaraciones podran hacerse en cualquier momento, por vía de notificacion al Secretario General del Consejo de las Comunidades Europeas."

Artículo 33 La letra d) del artículo 10 del Protocolo de 1971 se sustituira por las disposiciones siguientes:

"d) las declaraciones recibidas en aplicacion del artículo 6."

TITULO V

Disposiciones transitorias

Artículo 34 1. El Convenio de 1968 y el Protocolo de 1971, modificados por el presente Convenio, solo seran aplicables a las

acciones judiciales ejercitadas y a los documentos publicos con fuerza ejecutiva formalizados con posterioridad a la entrada en vigor del presente Convenio en el Estado de origen y a las solicitudes de reconocimiento o ejecucion de una resolucion o de un documento publico con fuerza ejecutiva en el Estado requerido.

2. Sin embargo, las resoluciones dictadas después de la fecha de entrada en vigor del presente Convenio entre los seis Estados que son parte del Convenio de 1968 como consecuencia de acciones ejercitadas con anterioridad a esta fecha seran reconocidas y ejecutadas con arreglo a las disposiciones del Título III del Convenio de 1968 modificado.

3. Por otra parte, en las relaciones entre los seis Estados que son parte del Convenio de 1968 y los tres Estados que se mencionan en el artículo 1 del presente Convenio, así como en las relaciones entre estos tres ultimos, las resoluciones dictadas después de la fecha de entrada en vigor del presente Convenio en las relaciones entre el Estado de origen y el Estado requerido como consecuencia de acciones ejercitadas con anterioridad a esa fecha seran reconocidas y ejecutadas con arreglo a las disposiciones del Título III del Convenio de 1968 modificado, si las reglas de competencia aplicadas se ajustaren a las previstas en el Título II modificado o en un Convenio en vigor entre el Estado de origen y el Estado requerido al ejercitarse la accion.

Artículo 35 Si, mediante escrito anterior a la entrada en vigor del presente Convenio, las partes en litigio a proposito de un contrato hubieren acordado aplicar a este contrato el derecho irlandés o el derecho de una parte del Reino Unido, los tribunales de Irlanda o de esta parte del Reino Unido conservaran la competencia para conocer de este litigio.

Artículo 36 Durante los tres años siguientes a la entrada en vigor del Convenio de 1968 en Dinamarca e Irlanda, respectivamente, la competencia en materia marítima en cada uno de esos Estados se determinara no solo con arreglo a las disposiciones de dicho Convenio, sino también con arreglo a los puntos 1 a 6 del presente artículo. Sin embargo, estas disposiciones dejaran de ser aplicables en cada uno de esos Estados cuando el Convenio internacional para la unificacion de ciertas reglas en materia de embargo preventivo de buques, firmado en Bruselas el 10 de mayo de 1952, entrare en vigor con respecto a cada uno de ellos.

1. Una persona domiciliada en un Estado contratante podra ser demandada por un crédito marítimo ante los tribunales de uno de los Estados antes mencionados mas arriba cuando el buque al que se refiriere el crédito o cualquier otro buque de su propiedad hubiere sido objeto de embargo judicial

en el territorio de este ultimo Estado en garantía del crédito, o hubiere podido ser objeto de embargo pero se hubiere prestado fianza u otra garantía, en los casos siguientes:

a) si el demandante estuviere domiciliado en ese Estado;

b) si el crédito marítimo hubiere nacido en ese Estado;

c) si el crédito marítimo hubiere nacido en el curso de un viaje durante el cual se hubiere practicado o hubiere podido practicarse el embargo;

d) si el crédito proviniere de un abordaje o un daño causado por un buque, por ejecucion u omision de una maniobra o por inobservancia de los reglamentos, bien a otro buque, o bien a las cosas o personas que se encontraren a bordo de cualquiera de ellos;

e)

si el crédito derivare de auxilio o salvamento;

f)

si el crédito estuviere garantizado por una hipoteca naval u otra forma de garantía semejante sobre el buque embargado.

2. El acreedor podra embargar el buque al que se refiriere el crédito marítimo o cualquier otro buque perteneciente a quien hubiere sido propietario del buque al que se refiriere el crédito cuando se hubiere originado el crédito marítimo. No obstante, cuando se tratare de los créditos previstos en las letras o), p), o q) del apartado 5, solo podra ser embargado el buque al que se refiriere el crédito.

3. Se reputara que los buques tienen el mismo propietario cuando todas las partes de la propiedad pertenecieren a una misma persona o a las mismas personas.

4. En el caso de fletamento de un buque con cesion de la gestion nautica, cuando el fletador fuere el unico responsable de un crédito marítimo relativo a dicho buque, podra el demandante embargar dicho buque o cualquier otro que perteneciere al fletador, pero no podra ser embargado en virtud de tal crédito marítimo ningun otro buque perteneciente al propietario. La misma regla sera de aplicacion en los casos en que de un crédito marítimo respondiere una persona distinta del propietario.

5. Se entendera por "crédito marítimo" la alegacion de un derecho o de un crédito que tuviere una o varias de las causas siguientes:

a) daños causados por un buque, sea por abordaje, sea de cualquier otro modo;

b) pérdidas de vidas humanas o daños corporales causados por un buque o provenientes de la explotacion de un buque;

c) asistencia y salvamento;

d) contratos relativos a la utilizacion o al arriendo de un buque mediante poliza de fletamento o de otro modo;

e)

contratos relativos al transporte de mercancías por un buque en virtud de una poliza de fletamento, de un conocimiento o de cualquier otra forma;

f)

pérdidas o daños a las mercancías y equipajes transportados por un buque;

g)

avería comun;

h)

préstamo a la gruesa;

i)

remolque;

j)

pilotaje;

k)

suministro de productos o de material, cualquiera que sea el lugar en que se realizaren, hechos a un buque para su explotacion o su conservacion;

l)

construccion, reparaciones, equipo de un buque o gastos de dique;

m)

salarios del capitan, oficialidad o tripulacion;

n)

desembolsos del capitan y los efectuados por los cargadores, fletadores o los agentes por cuenta del buque o de su propietario;

o)

la propiedad impugnada de un buque;

p)

la copropiedad de un buque o su posesion, o su explotacion o los derechos a los productos de explotacion de un buque en condominio;

q)

cualquier hipoteca naval y cualquier otra forma de garantía semejante.

6. En Dinamarca, la expresion "embargo judicial" incluira, en lo relativo a los créditos marítimos mencionados mas arriba en las letras o) y p), el "forbud", siempre que este procedimiento fuere el unico admitido respecto de tal crédito en los artículos 646 a 653 de la Ley de enjuiciamiento civil ("Lov om rettens pleje").

TITULO VI

Disposiciones finales

Artículo 37 El Secretario General del Consejo de las Comunidades Europeas remitira a los Gobiernos del Reino de Dinamarca, de Irlanda y del Reino Unido de Gran Bretaña e Irlanda del Norte una copia autenticada conforme del Convenio de 1968 y del Protocolo de 1971, en lengua alemana, lengua francesa, lengua italiana y lengua neerlandesa.

Los textos del Convenio de 1968 y del Protocolo de 1971, redactados en lengua inglesa, en lengua danesa y en lengua irlandesa, figuran en los anexos del presente Convenio (1). Los textos redactados en lengua inglesa, lengua danesa y en lengua irlandesa son auténticos en las mismas condiciones que los textos originales del Convenio de 1968 y del Protocolo de 1971.

Artículo 38 El presente Convenio sera ratificado por los Estados signatarios. Los instrumentos de ratificacion seran depositados ante el Secretario General del Consejo de las Comunidades Europeas.

Artículo 39 El presente Convenio entrara en vigor, en las relaciones entre los Estados que lo hubieren ratificado, el primer día del tercer mes siguiente al deposito del ultimo instrumento de ratificacion por los Estados miembros originarios de la Comunidad y un nuevo Estado miembro.

El presente Convenio entrara en vigor, para cada Estado miembro que lo ratifique con posterioridad, el primer día del tercer mes siguiente al deposito de su instrumento de ratificacion.

Artículo 40 El Secretario General del Consejo de las Comunidades Europeas notificara a los Estados signatarios:

a) el deposito de cada uno de los instrumentos de ratificacion;

b) las fechas de entrada en vigor del presente Convenio para los Estados contratantes.

Artículo 41 El presente Convenio, redactado en un solo ejemplar en las lenguas alemana, danesa, francesa, inglesa, irlandesa, italiana y neerlandesa, cuyos siete textos son igualmente auténticos, sera depositado en los archivos de la Secretaría General del Consejo de las Comunidades Europeas. El Secretario General remitira una copia autenticada conforme a dada uno de los Gobiernos de los Estados signatarios.

En fe de lo cual, los plenipotenciarios abajo firmantes suscriben el presente Convenio.

Til bekraeftelse heraf har undertegnede befuldmaegtigede underskrevet denne konvention.

Zu Urkund dessen haben die unterzeichneten Bevollmaechtigten ihre Unterschriften unter dieses UEbereinkommen gesetzt.

In witness whereof, the undersigned Plenipotentiaries have affixed their signatures below this Convention.

En foi de quoi, les plénipotentiaires soussignés ont apposé leurs signatures au bas de la présente convention.

Da fhianu sin, chuir na Lanchumhachtaigh thíos-sínithe a lamh leis an gCoinbhinsiun seo.

In fede di che i plenipotenziari sottoscritti hanno apposto le loro firme in calce alla presente convenzione.

Ten blijke waarvan de ondergetekenden gevolmachtigden hun handtekening onder dit Verdrag hebben gesteld.

Hecho en Luxemburgo, el nueve de octubre de mil novecientos setenta y ocho.

Udfaerdiget i Luxembourg, den niende oktober nitten hundrede og otteoghalvfjerds.

Geschehen zu Luxemburg am neunten Oktober neunzehnhundertachtundsiebzig.

Done at Luxembourg on the ninth day of October in the year one thousand nine hundred and seventy-eight.

Fait à Luxembourg, le neuf octobre mil neuf cent soixante-dix-huit.

Arna dhéanamh i Lucsamburg, an naou la de Dheireadh Fomhair sa bhliain míle naoi gcéad seachto a hocht.

Fatto a Lussemburgo, addi nove ottobre millenovecentosettantotto.

Gedaan te Luxemburg, de negende oktober negentienhonderd achtenzeventig.

Por Su Majestad el Rey de los Belgas,

Renaat VAN ELSLANDE

Por Su Majestad la Reina de Dinamarca,

Nathalie LIND

Por el Presidente de la Republica Federal de Alemania,

Hans-Jochen VOGEL

Por el Presidente de la Republica Francesa,

Alain PEYREFITTE

Por el Presidente de Irlanda,

Gerard COLLINS

Por el Presidente de la Republica Italiana,

Paolo BONIFACIO

Por Su Alteza Real el Gran Duque de Luxemburgo,

Robert KRIEPS

Por Su Majestad la Reina de los Países Bajos,

J. DE RUITER

Por Su Majestad la Reina del Reino Unido de Gran Bretaña e Irlanda del Norte,

Lord ELWYN-JONES, C. H.

(1) DO No L 304 de 30. 10. 1978, p. 17, 36 y 55. DECLARACION COMUN

LOS REPRESENTANTES DE LOS GOBIERNOS DE LOS ESTADOS MIEMBROS DE LA COMUNIDAD ECONOMICA EUROPEA, REUNIDOS EN EL SENO DEL CONSEJO,

Deseando asegurar que, en el espíritu del Convenio de 27 de septiembre de 1968, la uniformidad de las competencias judiciales se realice también, en toda la medida de lo posible, en materia marítima;

Considerando que el Convenio internacional para la unificacion de determinadas reglas sobre el embargo preventivo de los buques de mar, firmado en Bruselas el 10 de mayo de 1952, contiene disposiciones sobre la competencia judicial;

Considerando que no todos los Estados miembros forman parte de dicho Convenio;

Hacen votos para que los Estados miembros que son Estados costeros y que aun no sean parte en el Convenio de 10 de mayo de 1952 lo ratifiquen o se adhieran a él a la mayor brevedad.

Hecho en Luxemburgo, el nueve de octubre de mil novecientos setenta y ocho.

Udfaerdiget i Luxembourg, den niende oktober nitten hundrede og otteoghalvfjerds.

Geschehen zu Luxemburg am neunten Oktober neunzehnhundertachtundsiebzig.

Done at Luxembourg on the ninth day of October in the year one thousand nine hundred and seventy-eight.

Fait à Luxembourg, le neuf octobre mil neuf cent soixante-dix-huit.

Arna dhéanamh i Lucsamburg, an naou la de Dheireadh Fomhair sa bhliain míle naoi gcéad seachto a hocht.

Fatto a Lussemburgo, addi nove ottobre millenovecentosettantotto.

Gedaan te Luxemburg, de negende oktober negentienhonderd achtenzeventig.

Por su Majestad el Rey de los Belgas,

Renat VAN ELSLANDE

Por Su Majestad la Reina de Dinamarca,

Nathalie LIND

Por el Presidente de la Republica Federal de Alemania,

Hans-Jochen VOGEL

Por el Presidente de la Republica Francesa,

Alain PEYREFITTE

Por el Presidente de Irlanda,

Gerard COLLINS

Por el Presidente de la Republica Italiana,

Paolo BONIFACIO

Por Su Alteza Real el Gran Duque de Luxemburgo,

Robert KRIEPS

Por Su Majestad la Reina de los Países Bajos,

J. DE RUITER

Por Su Majestad la Reina del Reino Unido de Gran Bretaña e Irlanda del Norte,

Lord ELWYN-JONES, C. H.

ANEXO V

CONVENIO relativo a la adhesion de la Republica Helénica al Convenio relativo a la competencia judicial y a la ejecucion de resoluciones judiciales en materia civil y mercantil, así como al Protocolo relativo a su interpretacion por el Tribunal de Justicia, con las adaptaciones introducidas por el Convenio relativo a la adhesion del Reino de Dinamarca, de Irlanda y del Reino Unido de Gran Bretaña e Irlanda del Norte PREAMBULO

LAS ALTAS PARTES CONTRATANTES DEL TRATADO CONSTITUTIVO DE LA COMUNIDAD ECONOMICA EUROPEA,

CONSIDERANDO que, la Republica Helénica, al convertirse en miembro de la Comunidad, se comprometio a adherirse al Convenio relativo a la competencia judicial y a la ejecucion de resoluciones judiciales en materia civil y mercantil, así como al Protocolo relativo a su interpretacion por el Tribunal de Justicia, con las adaptaciones introducidas por el Convenio relativo a la adhesion del Reino de Dinamarca, de Irlanda y del Reino Unido de Gran Bretaña e Irlanda del Norte, y a entablar, a tal fin, negociaciones con los Estados miembros de la Comunidad para introducir en aquéllos las adaptaciones necesarias,

HAN DECIDIDO celebrar el presente Convenio y han designado con tal fin como plenipotenciarios:

SU MAJESTAD EL REY DE LOS BELGAS:

a Jean GOL,

Viceprimer Ministro,

Ministro de Justicia y de Reformas Institucionales;

SU MAJESTAD LA REINA DE DINAMARCA:

a Erik NINN-HANSEN,

Ministro de Justicia;

EL PRESIDENTE DE LA REPUBLICA FEDERAL DE ALEMANIA:

a Hans Arnold ENGELHARD,

Ministro Federal de Justicia;

al Dr. Guenther KNACKSTEDT,

Embajador de la Republica Federal de Alemania en Luxemburgo;

EL PRESIDENTE DE LA REPUBLICA HELENICA:

a Georges-Alexandre MANGAKIS,

Ministro de Justicia;

EL PRESIDENTE DE LA REPUBLICA FRANCESA:

a Robert BADINTER,

Ministro de Justicia;

EL PRESIDENTE DE IRLANDA:

a Sean DOHERTY,

Ministro de Justicia;

EL PRESIDENTE DE LA REPUBLICA ITALIANA:

a Clelio DARIDA,

Ministro de Justicia;

SU ALTEZA REAL EL GRAN DUQUE DE LUXEMBURGO:

a Colette FLESCH,

Vicepresidente del Gobierno, Ministra de Justicia;

SU MAJESTAD LA REINA DE LOS PAISES BAJOS:

a J. de RUITER,

Ministro de Justicia;

SU MAJESTAD LA REINA DEL REINO UNIDO DE GRAN BRETAÑA E IRLANDA DEL NORTE:

a Peter Lovat FRASER, Esquire,

Solicitor-General para Escocia, Departamento del Lord Advocate,

QUIENES, reunidos en el seno del Consejo, después de haber intercambiado sus plenos poderes, reconocidos en buena y debida forma,

HAN CONVENIDO LAS DISPOSICIONES SIGUIENTES:

TITULO I

Disposiones generales

Artículo 1 1. La Republica Helénica se adhiere al Convenio relativo a la competencia judicial y a la ejecucion de resoluciones judiciales en materia civil y mercantil, firmado en Bruselas el 27 de septiembre de 1968, en lo sucesivo denominado "Convenio de 1968", así como al Protocolo relativo a su interpretacion por el Tribunal de Justicia, firmado en Luxemburgo el 3 de junio de 1971, en lo sucesivo denominado "Protocolo de 1971", con las adaptaciones introducidas por el Convenio relativo a la adhesion del Reino de Dinamarca, de Irlanda y del Reino Unido de Gran Bretaña e Irlanda del Norte al Convenio relativo a la competencia judicial y a la ejecucion de resoluciones judiciales en materia civil y mercantil, así como al Protocolo relativo a su interpretacion por el Tribunal de Justicia, firmado en Luxemburgo el 9 de octubre de 1978, en lo sucesivo denominado "Convenio de 1978".

2. La adhesion de la Republica Helénica se extendera, en particular, al apartado 2 del artículo 25 y a los artículos 35

y 36 del Convenio de 1978.

Artículo 2 Las adaptaciones introducidas por el presente Convenio en el Convenio de 1968 y en el Protocolo de 1971, tal como fueron adaptados por el Convenio de 1978, figuran en los Títulos II a IV.

TITULO II

Adaptaciones del Convenio de 1968

Artículo 3 En el parrafo segundo del artículo 3 del Convenio de 1968, modificado por el artículo 4 del Convenio de 1978, se insertara el guion siguiente entre el tercer y cuarto guion:

"- en Grecia: el artículo 40 de la Ley de enjuiciamiento civil (Kvdikaw Politikhw Dikonomíaw),".

Artículo 4 En el parrafo primero del artículo 32 del Convenio de 1968, modificado por el artículo 16 del Convenio de 1978, se insertara el guion siguiente entre el tercer y cuarto guion:

"- en Grecia, al monomelέw prvtodikeío,".

Artículo 5 1. En el parrafo primero del artículo 37 del Convenio de 1968, modificado por el artículo 17 del Convenio de 1978, se insertara el guion siguiente entre el tercer y cuarto guion:

"- en Grecia, ante el efeteío,".

2. En el parrafo segundo artículo 37 del Convenio de 1968, modificado por el artículo 17 del Convenio de 1978, el primer guion se sustituira por el texto siguiente:

"- en Bélgica, Grecia, Francia, Italia, Luxemburgo y los Países Bajos, de un recurso de casacion,".

Artículo 6 En el parrafo primero del artículo 40 del Convenio de 1968, modificado por el artículo 19 del Convenio de 1978, se insertara el guion siguiente entre el tercer y cuarto guion:

"- en Grecia, ante el epseteio,".

Artículo 7 En el artículo 41 del Convenio de 1968, modificado por el artículo 20 del Convenio de 1970, el primer guion se sustituira por el texto siguiente:

"- en Bélgica, Grecia, Francia, Italia, Luxemburgo y los Países Bajos, de un recurso de casacion,".

Artículo 8 El artículo 55 del Convenio de 1968, modificado por el artículo 24 del Convenio de 1978, se completara con la siguiente adicion, que se insertara en el lugar que le corresponda en la lista de convenios segun orden cronologico:

"- el Convenio entre el Reino de Grecia y la Republica Federal de Alemania relativo al reconocimiento y la ejecucion recíprocos de resoluciones judiciales, transacciones judiciales y documentos publicos

con fuerza ejecutiva en materia civil y mercantil, firmado en Atenas el 4 de noviembre de 1961,".

TITULO III

Adaptacion del Protocolo anejo al Convenio de 1968

Artículo 9 La primera frase del artículo V ter añadido al Protocolo anjeo al Convenio de 1968, modificado por el artículo 29

del Convenio de 1978, se completara con inclusion de una

coma y las palabras "en Grecia" después del término "Dinamarca".

TITULO IV

Adaptaciones del Protocolo de 1971

Artículo 10 El artículo 1 del Protocolo de 1971, modificado por el artículo 30 del Convenio de 1978, se completara con el parrafo siguiente:

"El Tribunal de Justicia de las Comunidades Europeas sera igualmente competente para decidir sobre la interpretacion del Convenio relativo a la adhesion de la Republica Helénica al Convenio de 27 de septiembre de 1968 y al presente Protocolo, tal y como fueron adaptados por el Convenio de 1978."

Artículo 11 En el punto 1 del artículo 2 del Protocolo de 1971, modificado por el artículo 31 del Convenio de 1978, se insertara el guion siguiente entre el tercer y cuarto guion:

"- en Grecia, ta anvtata dikasthria,".

TITULO V

Disposiciones transitorias

Artículo 12 1. El Convenio de 1968 y el Protocolo de 1971, modificados por el Convenio de 1978 y por el presente Convenio,

solo seran aplicables a las acciones judiciales ejercitadas y a los documentos publicos con fuerza ejecutiva formalizados con posterioridad a la entrada en vigor del presente Convenio en el Estado de origen y a las solicitudes de reconocimiento o ejecucion de una resolucion o de un documento publico con fuerza ejecutiva en el Estado requerido.

2. Sin embargo, las resoluciones dictadas después de la fecha de entrada en vigor del presente Convenio entre el Estado de origen y el Estado requerido como consecuencia de acciones ejercitadas con anterioridad a esta fecha seran reconocidas y ejecutadas en el Estado requerido con arreglo a las disposiciones del Título III del Convenio de 1968, modificado por el Convenio de 1978 y por el presente Convenio, si las reglas de competencia aplicadas se ajustaren a las previstas en el Título II modificado del Convenio de 1968 o en un Convenio en vigor entre el Estado de origen y el Estado requerido al ejercitarse la accion.

TITULO VI

Disposiciones finales

Artículo 13 El Secretario General del Consejo de las Comunidades Europeas remitira al Gobierno de la Republica Helénica una copia autenticada conforme del Convenio de 1968, del Protocolo de 1971 y del Convenio de 1978, en las lenguas alemana, danesa, francesa, inglesa, irlandesa, italiana y neerlandesa.

Los textos del Convenio de 1968, del Protocolo de 1971 y del Convenio de 1978, redactados en lengua

griega, figuran en los anexos del presente Convenio. Los textos redactados en lengua griega son auténticos en las mismas condiciones que los otros textos del Convenio de 1968, del Protocolo de 1971 y del Convenio de 1978.

Artículo 14 El presente Convenio sera ratificado por los Estados signatarios. Los instrumentos de ratificacion se depositaran

ante el Secretario General del Consejo de las Comunidades Europeas.

Artículo 15 El presente Convenio entrara en vigor, en las relaciones entre los Estados que lo hubieren ratificado, el primer día del tercer mes siguiente al deposito del ultimo instrumento de ratificacion por parte de la Republica Helénica y los Estados que hubieren puesto en vigor el Convenio de 1978 de conformidad con lo dispuesto en el artículo 39 de dicho Convenio.

Con respecto a cada Estado miembro que lo ratifique con posterioridad, el presente Convenio entrara en vigor el primer día del tercer mes siguiente al deposito de su instrumento de ratificacion.

Artículo 16 El Secretario General del Consejo de las Comunidades Europeas notificara a los Estados signatarios:

a) el deposito de cada uno de los instrumentos de ratificacion;

b) las fechas de entrada en vigor del presente Convenio para los Estados contratantes.

Artículo 17 El presente Convenio, redactado en un solo ejemplar en las lenguas alemana, danesa, francesa, griega, inglesa, irlandesa, italiana y neerlandesa, cuyos ocho textos son igualmente auténticos, sera depositado en los archivos de la Secretaría del Consejo de las Comunidades Europeas. El Secretario General remitira una copia autenticada conforme a cada uno de los Gobiernos de los Estados signatarios.

En fe de lo cual, los abajo firmantes, debidamente autorizados con tal fin, suscriben el presente Convenio.

Til bekraeftelse heraf har undertegnede behoerigt befuldmaegtigede underskrevet denne konvention.

Zu Urkund dessen haben die hierzu gehoerig befugten Unterzeichneten ihre Unterschriften unter dieses UEbereinkommen gesetzt.

Se pístvsh tvn anvtérv, oi zpografontew plhrejozsioi éuesan thn zpografh tozw katv apo thn parozsa szmbash.

In witness whereof the undersigned, being duly authorized thereto, have signed this Convention.

En foi de quoi, les soussignés, dûment autorisés à cet effet, ont signé la présente convention.

Da fhianu sin, shínigh na daoine seo thíos, arna n-udaru go cuí chuige sin, an Coinbhinsiun seo.

In fede di che i sottoscritti, debitamente autorizzati a tal fine, hanno firmato la presente convenzione.

Ten blijke waarvan de ondergetekenden, daartoe behoorlijk gemachtigd, hun handtekening onder dit Verdrag hebben geplaatst.

Hecho en Luxemburgo, el veinticinco de octubre de mil novecientos ochenta y dos.

Udfaerdiget i Luxembourg, den femogtyvende oktober nitten hundrede og toogfirs.

Geschehen zu Luxemburg am fuenfundzwanzigsten Oktober neunzehnhundertzweiundachtzig.

iEgine sto Lozjembozrgo, stiw eíkosi pénte Oktvbrío z xília enniakosia ogdonta dzo.

Done at Luxembourg on the twenty-fifth day of October in the year one thousand nine hundred and eighty-two.

Fait à Luxembourg, le vingt-cinq octobre mil neuf cent quatre-vingt-deux.

Arna dhéanamh i Lucsamburg an cuigiu la is fiche de mhí Dheireadh Fomhair sa bhliain, míle naoi gcéad ochto a do.

Fatto a Lussemburgo, addi venticinque ottobre millenovecentoottantadue.

Gedaan te Luxemburg, de vijfentwintigste oktober negentienhonderd tweeentachtig.

Por Su Majestad el Rey de los Belgas,

Jean GOL

Por Su Majestad la Reina de Dinamarca,

Erik NINN-HANSEN

Por el Presidente de la Republica Federal de Alemania,

Hans Arnold ENGELHARD

Dr. Guenther KNACKSTEDT

Por el Presidente de la Republica Helénica,

Georges-Alexandre MANGAKIS

Por el Presidente de la Republica Francesa,

Robert BADINTER

Por el Presidente de Irlanda,

Sean DOHERTY

Por el Presidente de la Republica Italiana,

Clelio DARIDA

Por Su Alteza Real el Gran Duque de Luxemburgo,

Colette FLESCH

Por Su Majestad la Reina de los Países Bajos,

J. de RUITER

Por Su Majestad la Reina del Reino Unido de Gran Bretaña e Irlanda del Norte,

Peter Lovat FRASER

ANEXO II

CONVENÇAO relativa à competência judiciaria e à execuçao de decisoes em matéria civil e comercial
PREAMBULO

AS ALTAS PARTES CONTRATANTES NO TRATADO QUE INSTITUI A COMUNIDADE ECONOMICA EUROPEIA,

Desejando dar execuçao ao disposto no artigo 220g. do referido Tratado, por força do qual se obrigaram a assegurar a simplificaçao das formalidades a que se encontram subordinados o reconhecimento e a execuçao recíprocos das decisoes judiciais,

Preocupados em reforçar na Comunidade a protecçao jurídica das pessoas estabelecidas no seu territorio,

Considerando que, para esse fim, é necessario determinar a competência dos seus orgaos jurisdicionais

na ordem internacional, facilitar o reconhecimento e instaurar um processo rapido que garanta a execuçao das decisoes, bem como dos actos autênticos e das transacçoes judiciais,

Decidiram concluir a presente convençao e, para esse efeito, designaram como plenipotenciarios:

SUA MAJESTADE O REI DOS BELGAS:

Sr. Pierre HARMEL, Ministro dos Negocios Estrangeiros;

O PRESIDENTE DA REPUBLICA FEDERAL DA ALEMANHA:

Sr. Willy BRANDT, Vice-Chanceler, Ministro dos Negocios Estrangeiros;

O PRESIDENTE DA REPUBLICA FRANCESA:

Sr. Michel DEBRE, Ministro dos Negocios Estrangeiros;

O PRESIDENTE DE LA REPUBLICA ITALIANA:

Sr. Giuseppe MEDICI, Ministro dos Negocios Estrangeiros;

SUA ALTEZA REAL O GRAO-DUQUE DO LUXEMBURGO:

Sr. Pierre GREGOIRE, Ministro dos Negocios Estrangeiros;

SUA MAJESTADE A RAINHA DOS PAISES BAIXOS:

Sr. J. M. A. H. LUNS, Ministro dos Negocios Estrangeiros,

OS QUAIS, reunidos no Conselho, depois de terem trocado os seus plenos poderes reconhecidos em boa e devida forma,

ACORDARAM NO SEGUINTE:

TITULO I

AMBITO DE APLICACAO

Artigo 1g. A presente convençao aplica-se em matéria civil e comercial e independentemente da natureza da jurisdiçao.

Sao excluídos da sua aplicaçao:

1. O estado e a capacidade das pessoas singulares, os regimes matrimoniais, os testamentos e as sucessoes.

2. As falências, as concordatas e outros processos analogos.

3. A segurança social.

4. A arbitragem.

TITULO II

COMPETENCIA

Secçao 1

Disposiçoes gerais

Artigo 2g. Sem prejuízo do disposto na presente convençao, as pessoas domiciliadas no territorio de um Estado contratante devem ser demandadas, independentemente da sua nacionalidade, perante os tribunais desse Estado.

As pessoas que nao possuam a nacionalidade do Estado em que estao domiciliadas ficam sujeitas nesse

Estado às regras de competência aplicaveis aos nacionais.

Artigo 3g. As pessoas domiciliadas no territorio de um Estado contratante so podem ser demandadas perante os tribunais de um outro Estado contratante por força das regras enunciadas nas secçoes 2 a 6 do presente título.

Contra elas nao podem ser invocadas, nomeadamente:

- na Bélgica: o artigo 15g. do Codigo Civil e o disposto nos artigos 52g., 52g.A e 53g. da lei de 25 de Março de 1876 sobre a competência,

- na Republica Federal da Alemanha: o artigo 23g. do Codigo de Processo Civil,

- em França: os artigos 14g. e 15g. do Codigo Civil,

- na Italia: o artigo 2g. e os no.s 1 e 2 do artigo 4g. do Codigo de Processo Civil,

- no Luxemburgo: os artigos 14g. e 15g. do Codigo Civil,

- nos Países Baixos: o terceiro paragrafo do artigo 126g. e o artigo 127g. do Codigo de Processo Civil.

Artigo 4g. Se o requerido nao tiver domicílio no territorio de um Estado contratante, a competência sera regulada em cada Estado contratante pela lei desse Estado, sem prejuízo da aplicaçao do disposto no artigo 16g.

Qualquer pessoa, independentemente da sua nacionalidade, com domicílio no territorio de um Estado contratante, pode, tal como os nacionais, invocar contra esse requerido as regras de competência que estejam em vigor nesse Estado

e, nomeadamente, as previstas no segundo paragrafo do artigo 3g.

Secçao 2

Competências especiais

Artigo 5g. O requerido com domicílio no territorio de um Estado contratante pode ser demandado num outro Estado contratante:

1. Em matéria contratual, perante o tribunal do lugar onde a obrigaçao foi ou deva ser cumprida.

2. Em matéria de obrigaçao alimentar, perante o tribunal do lugar em que o credor de alimentos tem o seu domicílio ou a sua residência habitual.

3. Em matéria excontratual, perante o tribunal do lugar onde ocorreu o facto danoso.

4. Se se tratar de acçao de indemnizaçao ou de acçao de restituiçao fundadas numa infracçao, perante o tribunal onde foi intentada a acçao publica, na medida em que, de acordo com a sua lei, esse tribunal possa conhecer da acçao cível.

5. Se se tratar de um litígio relativo à exploraçao de uma sucursal, de uma agência ou de qualquer outro estabelecimento, perante o tribunal do lugar da sua situaçao.

Artigo 6g. O requerido com domicílio no territorio de um Estado contratante pode também ser demandado:

1. Se houver varios requeridos, perante o tribunal do domicílio de qualquer um deles.

2. Se se tratar de chamamento de um garante à acçao ou de qualquer incidente de intervençao de terceiro, perante o tribunal onde foi instaurada a acçao principal, salvo se esta tiver sido proposta apenas com o intuito de subrair o terceiro à jurisdiçao do tribunal que seria competente nesse caso.

3. Se se tratar de um pedido reconvencional que derive do contrato ou do facto em que se fundamenta a acçao principal, perante o tribunal onde esta ultima foi instaurada.

Secçao 3

Competência em matéria de seguros

Artigo 7g. En matéria de seguros, a competência é determinada pela presente secçao, sem prejuízo do disposto no artigo 4g. e no ponto 5 do artigo 5g.

Artigo 8g. O segurador domiciliado no territorio de um Estado contratante pode ser demandado, quer perante os tribunais desse Estado quer noutro Estado contratante, perante o tribunal do lugar em que o tomador de seguro tiver o seu domicílio ou, no caso de varios seguradores serem requeridos, perante os tribunais do Estado contratante onde um deles tiver o seu domicílio.

Se a lei do país chamado a pronunciar-se previr tal competência, o segurador pode também ser demandado, num Estado contratante que nao seja o do seu domicílio, perante o

tribunal em cuja jurisdiçao o intermediario que interveio na celebraçao do contrato de seguro tiver o seu domicílio, desde que esse domicílio seja mencionado na apolice ou na proposta de seguro.

O segurador que, nao tendo domicílio no territorio de um Estado contratante, possua uma sucursal ou uma agência num Estado contratante, sera considerado, quanto aos litígios relativos à exploraçao dessa sucursal ou dessa agência, como tendo domicílio no territorio desse Estado.

Artigo 9g. O segurador pode também ser demandado perante o tribunal do lugar onde o facto danoso ocorreu quando se trate de um seguro de responsabilidade civil ou de um seguro que tenha por objecto bens imoveis. Aplica-se a mesma regra quando se trata de um seguro que incida simultaneamente sobre bens imoveis e moveis cobertos pela mesma apolice e atingidos pelo mesmo sinistro.

Artigo 10g. Em matéria de seguros de responsabilidade civil, o segurador pode também ser chamado perante o tribunal onde for proposta a acçao do lesado contra o segurado, desde que a lei desse tribunal assim o permita.

O disposto nos artigos 7g., 8g. e 9g. aplica-se no caso de acçao intentada pelo lesado directamente contra o segurador, sempre que tal acçao directa seja possível.

Se o direito aplicavel a essa acçao directa previr o incidente do chamamento do tomador do seguro ou do segurado, o mesmo tribunal sera igualmente competente quanto a eles.

Artigo 11g. Sem prejuízo do disposto no terceiro paragrafo do artigo 10g., o segurador so pode intentar uma acçao perante os tribunais do Estado contratante em cujo territorio estiver domiciliado o requerido, quer este seja tomador do seguro, segurado ou beneficiario.

O disposto na presente secçao nao prejudica o direito de formular um pedido reconvencional perante o tribunal em que tiver sido instaurada a acçao principal nos termos da presente secçao.

Artigo 12g. As partes so podem convencionar derrogaçoes ao disposto na presente secçao, desde que tais convençoes:

1. Sejam posteriores ao nascimento do litígio, ou

2. Permitam ao tomador de seguro, ao segurado, ou ao beneficiario recorrer a tribunais que nao sejam os indicados na presente secçao, ou

3. Sejam concluídas entre um tomador do seguro e um segurador, ambos com domicílio num mesmo Estado contratante, e tenham por efeito atribuir competência

aos tribunais desse Estado, mesmo que o facto danoso ocorra no estrangeiro, salvo se a lei desse

Estado nao permitir tais convençoes.

Secçao 4

Competência em matéria de vendas e de empréstimo a

prestaçoes

Artigo 13g. En matéria de venda a prestaçoes de bens moveis corporeos ou de empréstimo a prestaçoes directamente relacionado com o financiamento da venda de tais bens, a competência sera determinada pela presente secçao, sem prejuízo do disposto no artigo 4g. e no ponto 5 do artigo 5g.

Artigo 14g. O vendedor e o credor domiciliados no territorio de um Estado contratante podem ser demandados, quer perante os tribunais desse Estado quer perante os tribunais do Estado contratante em cujo territorio o comprador ou o mutuario tiveram o seu domicílio.

A acçao do vendedor contra o comprador e a acçao do credor contra o mutuario so podem ser intentadas perante os tribunais do Estado em cujo territorio o requerido tiver o seu domicílio.

Estas disposiçoes nao prejudicam o direito de formular um pedido reconvencional perante o tribunal em que tiver sido instaurada a acçao principal, nos termos da presente secçao.

Artigo 15g. As partes so podem convencionar derrogaçoes ao disposto na presente secçao desde que tais convençoes:

1. Sejam posteriores ao nascimento do litígio, ou

2. Permitam ao comprador ou ao mutuario recorrer a tribunais que nao sejam os indicados na presente secçao, ou

3. Sejam concluídas entre o comprador e o vendedor ou entre o mutuario e o credor, ambos com domicílio ou residência habitual num mesmo Estado contratante, e atribuam competência aos tribunais desse Estado, salvo se a lei desse Estado nao permitir tais convençoes.

Secçao 5

Competências exclusivas

Artigo 16g. Têm competência exclusiva, qualquer que seja o domicílio:

1. Em matéria de direitos reais sobre imoveis e de arrendamento de imoveis, os tribunais do Estado contratante onde o imovel se encontre situado.

2. Em matéria de validade, de nulidade ou de dissoluçao das sociedades ou outras pessoas colectivas que tenham a sua sede no territorio de um Estado contratante ou das decisoes dos seus orgaos, os tribunais desse Estado.

3. Em matéria de validade de inscriçoes em registos publicos, os tribunais do Estado contratante em cujo territorio esses registos estejam conservados.

4. Em matéria de inscriçao ou de validade de patentes, marcas, desenhos e modelos, e outros direitos analogos sujeitos a deposito ou a registo, os tribunais do Estado contratante em cujo territorio o deposito ou o registo tiver sido requerido, efectuado ou considerado efectuado nos termos de uma convençao internacional.

5. Em matéria de execuçao de decisoes, os tribunais do Estado contratante do lugar da execuçao.

Secçao 6

Extensao de competência

Artigo 17g. Se, mediante pacto escrito ou pacto verbal confirmado por escrito, as partes, das quais

pelo menos uma se encontre domiciliada no territorio de um Estado contratante, tiverem designado um tribunal ou os tribunais de um Estado contratante competentes para decidir quaisquer litígios que tenham surgido ou que possam surgir de uma determinada relaçao jurídica, esse tribunal ou esses tribunais terao competência exclusiva.

Os pactos atributivos de jurisdiçao nao produzirao efeitos se forem contrarios ao disposto nos artigos 12g. e 15g. ou se os tribunais cuja competência pretendam afastar tiverem competência exclusiva por força do artigo 16g.

Se um pacto atributivo de jurisdiçao tiver sido concluído a favor apenas de uma das partes, esta mantém o direito de recorrer a qualquer outro tribunal que seja competente por força da presente convençao.

Artigo 18g. Para além dos casos em que a competência resulte de outras disposiçoes da presente convençao, é competente o tribunal de um Estado contratante perante o qual o requerido compareça. Esta regra nao é aplicavel se a comparência tiver como unico objectivo arguir a incompetência ou se existir outro tribunal com compêtencia exclusiva por força do artigo 16g.

Secçao 7

Verificaçao da competência e da admissibilidade

Artigo 19g. O juiz de um Estado contratante, perante o qual tiver sido proposta, a título principal, uma acçao relativamente à qual

tenha competência exclusiva um tribunal de outro Estado contratante por força do artigo 16g., declarar-se-a oficiosamente incompetente.

Artigo 20g. Quando o requerido domiciliado no territorio de um Estado contratante for demandado perante um tribunal de outro Estado contratante e nao compareça, o juiz declarar-se-a oficiosamente incompetente se a sua competência nao resultar das disposiçoes da presente convençao.

O juiz deve suspender a instância enquanto nao se verificar que a esse requerido foi dada a oportunidade de receber o acto que iniciou a instância em tempo util para apresentar a sua defesa, ou enquanto nao se verificar que para o efeito foram efectuadas todas as diligências.

O disposto no paragrafo anterior sera substituído pelo disposto no artigo 15g. da convençao de Haia, de 15 de Novembro de 1965, relativa à citaçao e à notificaçao no estrangeiro dos actos judiciais e extrajudiciais em matéria civil ou comercial, se o acto que iniciou a instância tiver sido transmitido em execuçao dessa convençao.

Secçao 8

Litispendência e conexao

Artigo 21g. Quando acçoes com o mesmo pedido e a mesma causa de pedir e entre as mesmas partes forem submetidas à apreciaçao de tribunais de diferentes Estados contratantes, o tribunal a que a acçao foi submetida em segundo lugar deve, mesmo oficiosamente, declarar-se incompetente em favor do tribunal a que a acçao foi submetida em primeiro lugar.

O tribunal que deveria declarar-se incompetente pode suspender a instância no caso de ser impugnada a competência do outro tribunal.

Artigo 22g. Quando acçoes conexas forem submetidas a tribunais de diferentes Estados contratantes e estiverem pendentes em primeira instância, o tribunal a que a acçao foi submetida em segundo lugar pode suspender a instância.

Este tribunal pode igualmente declarar-se incompetente, a pedido de uma das partes, desde que a

sua lei permita a apensaçao de acçoes conexas e o tribunal a que a acçao foi submetida em primeiro lugar seja competente para conhecer das duas acçoes.

Para efeitos do presente artigo, consideram-se conexas as acçoes ligadas entre si por um nexo tao estreito que haja interesse em que sejam instruídas e julgadas simultaneamente para evitar soluçoes que poderiam ser inconciliaveis se as causas fossem julgadas separadamente.

Artigo 23g. Sempre que as acçoes forem da competência exclusiva de varios tribunais, qualquer tribunal a que a acçao tenha sido submetida posteriormente deve declarar-se incompetente em favor daquele a que a acçao tenha sido submetida em primeiro lugar.

Secçao 9

Medidas provisorias e cautelares

Artigo 24g. As medidas provisorias ou cautelares previstas na lei de um Estado contratante podem ser requeridas às autoridades judiciais desse Estado, mesmo que, por força da presente convençao, um tribunal de outro Estado contratante seja competente para conhecer da questao de fundo.

TITULO III

RECONHECIMENTO E EXECUÇAO

Artigo 25g. Para efeitos da presente convençao, considera-se "decisao" qualquer decisao proferida por um tribunal de um Estado contratante independentemente da designaçao que lhe for dada, tal como acordao, sentença, despacho judicial ou mandado de execuçao, bem como a fixaçao pelo secretario do tribunal do montante das custas do processo.

Secçao 1

Reconhecimento

Artigo 26g. As decisoes proferidas num Estado contratante sao reconhecidas nos outros Estados contratantes, sem necessidade de recurso a qualquer processo.

Em caso de impugnaçao, qualquer parte interessada que invoque o reconhecimento a título principal pode pedir, nos termos do processo previsto nas secçoes 2 e 3 do presente título, o reconhecimento da decisao. Se o reconhecimento for invocado a título incidental perante um tribunal de um Estado contratante, este sera competente para dele conhecer.

Artigo 27g. As decisoes nao serao reconhecidas:

1. Se o reconhecimento for contrario à ordem publica do Estado requerido.

2. Se o acto que determinou o início da instância ou acto equivalente nao tiver sido comunicado ou notificado ao requerido revel, regularmente e em tempo util, por forma a permitir-lhe a defesa.

3. Se a decisao for inconciliavel com outra decisao proferida quanto às mesmas partes no Estado requerido.

4. Se o tribunal do Estado de origem, ao proferir a sua decisao, tiver desrespeitado regras de direito internacional privado do Estado requerido na apreciaçao de questao relativa ao estado ou à capacidade das pessoas singulares, aos regimes matrimoniais, aos testamentos e às sucessoes, a nao ser que a sua decisao conduza ao mesmo resultado a que se chegaria se tivessem sido aplicadas as regras de direito internacional privado do Estado requerido.

Artigo 28g. As decisoes nao serao igualmente reconhecidas se tiver sido desrespeitado o disposto nas secçoes 3, 4 e 5 do título II ou no caso previsto no artigo 59g.

Na apreciaçao das competências referidas no paragrafo anterior, a autoridade requerida estara vinculada

às decisoes sobre a matéria de facto com base nas quais o tribunal do Estado de origem tiver fundamentado a sua competência.

Sem prejuízo do disposto nos primeiros e segundo paragrafos, nao pode proceder-se ao controlo da competência dos tribunais do Estado de origem; as regras relativas à competências nao dizem respeito à ordem publica a que se refere o ponto 1 do artigo 27g.

Artigo 29g. As decisoes estrangeiras nao podem, em caso algum, ser objecto de revisao de mérito.

Artigo 30g. A autoridade judicial de um Estado contratante, perante o qual se invocar o reconhecimento de uma decisao proferida em outro Estado contratante, pode suspender a instância se essa decisao for objecto de recurso ordinario.

Secçao 2

Execuçao

Artigo 31g. As decisoes proferidas num Estado contratante e que nesse Estado tenham força executiva podem ser executadas em outro Estado contratante depois de nele terem sido declaradas executorias, a requerimento de qualquer parte interessada.

Artigo 32g. O requerimento deve ser apresentado:

- na Bélgica, no "tribunal de première instance" ou "rechtbank van eerste aanleg",

- na Republica Federal da Alemanha, ao presidente de uma câmara do "Landgericht",

- em França, ao presidente do "tribunal de grande

instance",

- em Italia, na "corte d'appello",

- no Luxemburgo, ao presidente do "tribunal d'arrondissement",

- nos Países Baixos, ao presidente de "arrondissementsrechtbank".

O tribunal territorialmente competente determina-se pelo domicílio da parte contra a qual a execuçao for promovida. Se esta parte nao estiver domiciliada no territorio do Estado requerido, a competência determina-se pelo lugar da execuçao.

Artigo 33g. A forma de apresentaçao do requerimento regula-se pela lei do Estado requerido.

O requerente deve escolher domicílio na area de jurisdiçao do tribunal em que tiver sido apresentado o requerimento.

Todavia, se a lei do Estado requerido nao previr a escolha de domicílio, o requerente designara um mandatario ad litem.

Os documentos referidos nos artigos 46g. e 47g. devem ser juntos ao requerimento.

Artigo 34g. O tribunal em que for apresentado o requerimento decidira em curto prazo, nao podendo a parte contra a qual a execuçao é promovidaapresentar observaçoes nesta fase do processo.

O requerimento so pode ser indeferido por qualquer dos motivos previstos nos artigos 27g. e 28g.

As decisoes estrangeiras nao podem, em caso algum, ser objecto de revisao de mérito.

Artigo 35g. A decisao proferida sobre o requerimento sera imediatamente levada ao conhecimento do requerente por iniciativa do secretario do tribunal, na forma determinada pela lei do Estado requerido.

Artigo 36g. Se a execuçao for autorizada, a parte contra a qual a execuçao é promovida pode interpor

recurso da decisao no prazo de um mês a contar da sua notificaçao.

Se esta parte estiver domiciliada em Estado contratante diferente daquele onde foi proferida a decisao que autoriza a execuçao, o prazo sera de dois meses e começara a correr desde o dia em que tiver sido feita a citaçao pessoal ou domiciliaria. Este prazo nao é susceptível de prorrogaçao em razao da distância.

Artigo 37g. O recurso sera interposto de acordo com as regras do processo contraditorio:

- na Bélgica, para o "tribunal de première instance" ou "rechtbank van eerste aanleg",

- na Republica Federal da Alemanha, para o "Oberlandesgericht",

- em França, para a "Cour d'appel",

- em Italia, para a "corte d'appello",

- no Luxemburgo, para a "Cour supérieure de justice", decidindo em matéria civil,

- nos Países Baixos, para o "arrondissementsrechtbank".

A decisao proferida no recurso apenas pode ser objecto de um recurso de cassaçao e, na Republica Federal da Alemanha, de uma "Rechtsbeschwerde".

Artigo 38g. O tribunal de recurso pode, a pedido da parte que o tiver interposto, suspender a instância, se a decisao estrangeira for, no Estado de origem, objecto de recurso ordinario ou se o prazo para o interpor nao tiver expirado; neste caso, o tribunal pode fixar um prazo para a interposiçao desse recurso.

O tribunal pode ainda sujeitar a execuçao à constituiçao de uma garantia por ele determinada.

Artigo 39g. Durante o prazo de recurso previsto no artigo 36g. e na pendência de decisao sobre o mesmo, so podem tomar-se medidas cautelares sobre os bens da parte contra a qual a execuçao foi promovida.

A decisao de permitir a execuçao implica a autorizaçao para tomar tais medidas.

Artigo 40g. Se o requerimento for indeferido, o requerente pode interpor recurso:

- na Bélgica, para a "Cour d'appel" ou para o "hof van beroep",

- na Republica Federal da Alemanha, para o "Oberlandesgericht",

- em França, para a "Cour d'appel",

- em Italia, para a "corte d'appello",

- no Luxemburgo, para a "Cour supérieure de justice", decidindo em matéria civil,

- nos Países Baixos, para o "gerechtshof".

A parte contra a qual é promovida a execuçao deve ser notificada para comparecer no tribunal de recurso. Se faltar, é aplicavel o disposto no segundo e terceiro paragrafos do artigo 20g., ainda que a parte nao esteja domiciliada no territorio de um dos Estados contratantes.

Artigo 41g. A decisao proferida no recurso previsto no artigo 40g. apenas pode ser objecto de um recurso de cassaçao e, na Republica Federal da Alemanha, de uma "Rechtsbeschwerde".

Artigo 42g. Quando a decisao estrangeira se tiver pronunciado sobre varios pedidos e a execuçao nao possa ser autorizada quanto a todos, a autoridade judicial concedera a execuçao relativamente a um ou varios de entre eles.

O requerente pode pedir execuçao parcial.

Artigo 43g. As decisoes estrangeiras que condenem em sançoes pecuniarias compulsorias so sao executorias no Estado requerido se o respectivo montante tiver sido definitivamente fixado pelos tribunais do Estado de origem.

Artigo 44g. O requerente a quem tenha sido concedida assistência judiciaria no Estado onde a decisao foi proferida beneficiara dessa assistência, sem nova apreciaçao, no processo previsto nos artigos 32g. a 35g.

Artigo 45g. Nao pode ser exigida qualquer cauçao ou deposito, seja qual for a sua designaçao, com fundamento na qualidade de estrangeiro ou na falta de domicílio ou de residência no país, à parte que requerer a execuçao, num Estado contratante, de decisao proferida noutro Estado contratante.

Secçao 3

Disposiçoes comuns

Artigo 46g. A parte que invocar o reconhecimento ou requerer a execuçao de uma decisao deve apresentar:

1. Uma certidao da decisao que satisfaça os necessarios requisitos de autenticidade.

2. Tratando-se de decisao proferida à revelia, o original ou uma copia autenticada do documento que certifique que o acto determinou o início da instância ou um acto equivalente foi comunicado ou notificado à parte revel.

Artigo 47g. A parte que requerer a execuçao deve ainda apresentar:

1. Qualquer documento comprovativo de que, segundo a lei do Estado de origem, a decisao é executoria e foi notificada.

3. Se for caso disso, documento comprovativo de que o requerente beneficia de assistência judiciaria no Estado de origem.

Artigo 48g. Na falta de apresentaçao dos documentos referidos no ponto 2 do artigo 46g. e no ponto 2 do artigo 47g., a autoridade judicial pode fixar um prazo para a sua apresentaçao, aceitar documentos equivalentes ou, se se julgar suficientemente esclarecida, dispensa-los. Deve ser apresentada uma traduçao dos documentos desde que a autoridade judicial a exija; a traduçao deve ser autenticada por pessoa habilitada para o efeito num dos Estados contratantes.

Artigo 49g. Nao é exigível a legalizaçao ou outra formalidade analoga dos documentos referidos nos artigos 46g., 47g. e segundo paragrafo do artigo 48g., bem como, se for caso disso, da procuraçao ad litem.

TITULO IV

ACTOS AUTENTICOS E TRANSACÇCES JUDICIAIS

Artigo 50g. Os actos autênticos exarados num Estado contratante e que nesse Estado tenham força executiva sao declarados executorios, mediante requerimento, noutro Estado contratante, segundo o processo previsto nos artigos 31g. e seguintes. O requerimento so pode ser indeferido se a execuçao do acto autêntico for contraria à ordem publica do Estado requerido.

O acto apresentado deve preencher os requisitos necessarios para a sua autenticidade no Estado de origem.

E aplicavel, se necessario, o disposto na secçao 3 do título III.

Artigo 51g. As transacçoes celebradas perante o juiz no decurso de um processo e que no Estado de origem tenham força executiva sao executorias no Estado requerido nas mesmas condiçoes que os actos autênticos.

TITULO V

DISPOSIÇCES GERAIS

Artigo 52g. Para determinar se uma parte tem domicílio no territorio do Estado contratante a cujos tribunais é submetida a questao, o juiz aplica a sua lei interna.

Quando a parte nao tiver domicílio no Estado a cujos tribunais foi submetida a questao, o juiz, para determinar se a parte tem domicílio noutro Estado contratante, aplica a lei desse Estado.

Todavia, para determinar o domicílio da parte, é aplicavel a sua lei nacional se, segundo esta, o seu domicílio depender do domicílio de uma outra pessoa ou da sede de uma autoridade.

Artigo 53g. Para efeitos da aplicaçao da presente convençao, a sede das sociedades e das pessoas colectivas é equiparada ao domicílio. Todavia, para determinar a sede, o tribunal a que foi submetida a questao aplica as regras do seu direito internacional privado.

TITULO VI

DISPOSIÇCES TRANSITORIAS

Artigo 54g. As disposiçoes da presente convençao sao aplicaveis apenas às acçoes judiciais intentadas e aos actos autênticos exarados posteriormente à sua entrada em vigor.

Todavia, as decisoes proferidas apos a data de entrada em vigor da presente convençao na sequência de acçoes intentadas antes dessa data sao reconhecidas e executadas em conformidade com o disposto no título III se as regras de competência aplicadas forem conformes com as previstas, quer no título II quer em convençao em vigor entre o Estado de origem e o Estado requerido aquando da instauraçao da acçao.

TITULO VII

RELAÇCES COM OUTRAS CONVENÇCES

Artigo 55g. Sem prejuízo no disposto no segundo paragrafo do artigo 54g. e no artigo 56g., a presente convençao substitui, entre os Estados que nela sao parte, as convençoes concluídas entre dois ou mais desses Estados, a saber:

- a convençao entre a Bélgica e a França relativa à competência judiciaria, ao valor e execuçao de decisoes

judiciais, sentenças arbitrais e actos autênticos, assinada em Paris em 8 de Julho de 1899,

- a convençao entre a Bélgica e os Países Baixos relativa à competência judiciaria territorial, à falência, bem como ao valor e execuçao de decisoes judiciais, sentenças arbitrais e actos autênticos, assinada em Bruxelas em

28 de Março de 1925,

- a convençao entre a França e a Italia relativa à execuçao de sentenças em matéria civil e comercial, assinada em Roma em 3 de Junho de 1930,

- a convençao entre a Alemanha e a Italia relativa ao reconhecimento e execuçao de decisoes judiciais em matéria civil e comercial, assinada em Roma em 9 de Março de 1936,

- a convençao entre a Republica Federal da Alemanha e o Reino da Bélgica relativa ao reconhecimento e execuçao recíprocos, em matéria civil e comercial, de decisoes judiciais, sentenças arbitrais e actos autênticos, assinada em Bona em 30 de Junho de 1958,

- a convençao entre o Reino dos Países Baixos e a Republica Italiana relativa ao reconhecimento

e execuçao de decisoes judiciais em matéria civil e comercial, assinada em Roma em 17 de Abril de 1959,

- a convençao entre o Reino da Bélgica e a Republica Italiana relativa ao reconhecimento e execuçao de decisoes judiciais e outros títulos executivos em matéria civil e comercial, assinada em Roma em 6 de Abril de 1962,

- a convençao entre o Reino dos Países Baixos e a Republica Federal da Alemanha relativa ao reconhecimento e execuçao mutuos de decisoes judiciais e outros títulos executivos em matéria civil e comercial, assinada na Haia em 30 de Agosto de 1962,

e, na medida em que esteja em vigor:

- o tratado entre a Bélgica, os Países Baixos e o Luxemburgo relativo à competência judiciaria, à falência, ao valor e execuçao de decisoes judiciais, sentenças arbitrais e actos autênticos, assinado em Bruxelas em 24 de Novembro de 1961.

Artigo 56g. O tratado e as convençoes referidos no artigo 55g. continuarao a produzir efeitos quanto às matérias a que a presente convençao nao seja aplicavel.

Esse tratado e essas convençoes continuarao a produzir efeitos relativamente às decisoes proferidas e aos actos exarados antes da entrada em vigor da presente convençao.

Artigo 57g. A presente convençao nao prejudica as convençoes de que os Estados contratantes sejam ou venham a ser parte e que, em matérias especiais, regulem a competência judiciaria, o reconhecimento ou a execuçao de decisoes.

Artigo 58g. O disposto na presente convençao nao prejudica os direitos reconhecidos aos nacionais suíços pela convençao concluída em 15 de Junho de 1869 entre a França e a Confederaçao Suíça relativa à competência judiciaria e à execuçao de sentenças em matéria civil.

Artigo 59g. A presente convençao nao impede que um Estado contratante se vincule perante um Estado terceiro, nos termos de uma convençao relativa ao reconhecimento e execuçao de decisoes, a nao reconhecer uma decisao proferida, nomeadamente noutro Estado contratante, contra requerido que tinha domicílio ou residência habitual no territorio do Estado terceiro, quando, num dos casos previstos no artigo 4g., a decisao so pudesse fundamentar-se numa das competências referidas no segundo paragrafo do artigo 3°.

TITULO VIII

DISPOSIÇCES FINAIS

Artigo 60g. A presente convençao é aplicavel no territorio europeu dos Estados contratantes, nos departamentos franceses ultramarinos e nos territorios franceses ultramarinos.

O Reino dos Países Baixos pode declarar aquando da assinatura ou da ratificaçao da presente convençao ou em qualquer momento posterior, mediante notificaçao ao secretario-geral do Conselho das Comunidades Europeias, que a presente convençao sera aplicavel ao Suriname e às Antilhas Neerlandesas. Na falta de tal declaraçao, os processos pendentes no territorio europeu do Reino, na sequência de um recurso de cassaçao de decisoes dos tribunais das Antilhas Neerlandesas, serao considerados como processos pendentes nesses tribunais.

Artigo 61g. A presente convençao sera ratificada pelos Estados signatarios. Os instrumentos de ratificaçao serao depositados junto do secretario-geral do Conselho das Comunidades Europeias.

Artigo 62g. A presente convençao entrara em vigor no primeiro dia do terceiro mês seguinte ao do deposito do instrumento de ratificaçao do Estado signatario que tiver procedido a essa formalidade em ultimo lugar.

Artigo 63g. Os Estados contratantes reconhecem que qualquer Estado que se torne membro da Comunidade Economica Europeia assumira a obrigaçao de aceitar a presente convençao como base das negociaçoes necessarias para assegurar a execuçao do ultimo paragrafo do artigo 220g. do Tratado que institui a Comunidade Economica Europeia, nas relaçoes entre os Estados contratantes e esse Estado.

As adaptaçoes necessarias podem ser objecto de uma con-

vençao especial entre os Estados contratantes, por um lado, e esse Estado, pour outro.

Artigo 64g. O secretario-geral do Conselho das Comunidades Europeias notificara os Estados signatarios:

a) Do deposito de qualquer instrumento de ratificaçao;

b) Da data de entrada em vigor da presente convençao;

c) Das declaraçoes recebidas nos termos do segundo paragrafo do artigo 60g.;

d) Das declaraçoes recebidas nos termos do artigo IV do protocolo;

e) Das comunicaçoes feitas nos termos do artigo VI do protocolo.

Artigo 65g. O protocolo que, por acordo mutuo dos Estados contratantes, consta em anexo à presente convençao, é dela parte integrante.

Artigo 66g. A presente convençao tem vigência ilimitada.

Artigo 67g. Cada um dos Estados contratantes pode pedir a revisao da presente convençao. Nesse caso, o Presidente do Conselho das Comunidades Europeias convocara uma conferência de revisao.

Artigo 68g. A presente convençao, redigida num unico exemplar nas línguas alema, francesa, italiana e neerlandesa, fazendo fé qualquer dos quatro textos, sera depositada nos arquivos do Secretariado do Conselho das Comunidades Europeias. O secretario-geral remetera uma copia autenticada da presente convençao a cada um dos governos dos Estados signatarios.

Zu Urkund dessen haben die unterzeichneten Bevollmaechtigten ihre Unterschrift unter dieses UEbereinkommen gesetzt.

En foi de quoi les plénipotentiaires soussignés ont apposé leur signature au bas de la présente convention.

In fede di che i plenipotenziari sottoscritti hanno apposte le loro firme in calce alla presente convenzione.

Ten blijke waarvan de onderscheiden gevolmachtigden hun handtekening onder dit Verdrag hebben gesteld.

Em fé do que os plenipotenciarios abaixo-assinados apuseram as suas assinaturas no final da presente convençao.

Geschehen zu Bruessel am siebenundzwanzigsten September neunzehnhundertachtundsechzig.

Fait à Bruxelles, le vingt-sept septembre mil neuf cent soixante-huit.

Fatto a Bruxelles, addi ventisette settembre millenovecentosessantotto.

Gedaan te Brussel, op zevenentwintig september negentienhonderd achtenzestig.

Feito em Bruxelas, aos vinte e sete de Setembro de mil novecentos e sessenta e oito.

Pierre HARMEL

Giuseppe MEDICI

Willy BRANDT

Pierre GREGOIRE

Michel DEBRE

J. M. A. H. LUNS

DOCNUM 41989A0535

AUTHOR REPRESENTATIVES OF THE MEMBER STATES MEETING IN THE COUNCIL

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COUNCIL

REPORT ON THE CONVENTION

on the accession of the Kingdom of Spain and the Portuguese Republic to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice with the adjustments made to them by the Convention on the accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britian and Northern Ireland and the adjustments made to them by the Convention on the accession of the Hellenic Republic

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(Signed at Donostia/San Sebastian on 26 May 1989)

by

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In addition to the draft Convention and the other instruments drawn up by the government experts, the draft explanatory report was submitted to the Governments of the Member States of the European Communities prior to the Conference of representatives of the Governments of the Member States held in San Sebastian on 26 May 1989.

This report takes account of the comments made by certain Governments. It takes the form of an authorized commentary on the Convention of 26 May 1989.

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NB: References are to the Articles of the Brussels Convention and are followed in brackets by the relevant Articles of the Accession Convention.

CHAPTER I

GENERAL CONSIDERATIONS

1. Introductory remarks

1. By Article 220 of the Treaty establishing the European Economic Community, the Member States agreed to enter into negotiations with each other, so far as necessary, `with a view to securing for the benefit of their nationals the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards'.

   From this provision has developed, in this specific field, a genuine European legal area which, as will be seen, is destined to extend well beyond the relations between the Member States of the European Communities.

2. Three Conventions have been concluded under Article 220 of the Treaty of Rome prior to the Convention on the accession of Spain and Portugal:

   1. the Brussels Convention of 27 September 1968 on jurisdiction and

the enforcement of judgments in civil and commercial matters, supplemented by the Protocol of 3 June l971 on its interpretation by the Court of Justice;

2. the Luxembourg Convention of 9 October 1978 on the accession of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland to the Brussels Convention and to the 1971 Protocol;

3. the Luxembourg Convention of 25 October 1982 on the accession of Greece to the Brussels Convention as adjusted by the 1978 Convention and the 1971 Protocol.

In addition, negotiations with the Member States of the European Free Trade Association resulted in the Lugano Convention of 16 September 1988, based very largely on the 1968 Brussels Convention as adjusted by the Accession Conventions of 1978 and 1982.

Before entering on a detailed commentary on the Convention on the accession of Spain and Portugal, a brief description of the previous Conventions is helpful.

2. Previous Conventions concluded under Article 220 of the Treaty of Rome

1. Brussels Convention of 27 September 1968

3. This Convention on jurisdiction and the enforcement of judgments in civil and commercial matters was concluded between the six original Member States of the European Communities, the Six being Belgium, the Federal Republic of Germany, France, Italy, Luxembourg and the Netherlands [FN 1]. The Convention entered into Force between the six Member States concerned on 1 February 1973.

The Brussels Convention is supplemented by a Protocol signed in Luxembourg on 3 June 1971 conferring on the Court of Justice of the European Communities jurisdiction to interpret the Convention [FN 2]. This Protocol entered into force on 1 September 1975.

4. The Brussels Convention is based on a number of fundamental principles [FN 3]:

- it applies only to matters relating to property,

- it lays down rules of direct jurisdiction, i.e. applying from the beginning of proceedings,

- the defendant's domicile, and not his nationality, is considered to be the basic rule for determining the jurisdiction of the courts,

- no derogation from this rule is allowed, unless expressly provided for in the Convention,

- the defendant's rights must have been respected in the State of origin,

- the grounds for refusing recognition and enforcement are limited in the interests of ensuring the greatest possible freedom of movement of judgments in the Community,

- the exequatur procedure is unified and simplified,

- any State which becomes a member of the European Economic Community is required to accept the Convention as a basis for the negotiations necessary to ensure the implementation of Article 220 of the Treaty of Rome; however, the necessary adjustments may be the subject of special conventions (Article 63).

2. Luxembourg Convention of 9 October 1978

5. After Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland joined the European Communities (Europe of Nine), a new Convention was concluded on the accession of those three States to the 1968 Convention and to the 1971 Protocol [FN 4].

6. That Convention, which is in conformity with Article 220 of the Treaty of Rome and Article 63 of the Brussels Convention, entered into force for Denmark on 1 November 1986, for the United Kingdom on 1 January 1987 and for Ireland on 1 June 1988.

7. The Convention of 9 October 1978 is thus currently in force between nine Member States of the Communities. While it introduced into the Brussels Convention a number of quite significant amendments, it left unchanged the basic principles of that Convention, as summarized in paragraph 4 above.

3. Luxembourg Convention of 25 October 1982

8. After Greece became a member of the Communities (Europe of Ten), the Luxembourg Convention of 25 October 1982 [FN 5] was concluded on its accession to the 1968 Brussels Convention and to the 1971 Protocol, with the adjustments made to them by the 1978 Convention.

That Convention entered into force between Greece and the other States parties to the 1978 Convention on 1 April 1989, with the exception of the United Kingdom, for which it entered into force on 1 October 1989.

The amendments made by the Luxembourg Convention to the Brussels Convention and to the 1971 Protocol are technical only [FN 6].

3. Lugano Convention of 16 September 1988

9. The Member States of the European Free Trade Association [FN 7] were desirous of concluding with the Member States of the European Communities a Convention based on the principles of the 1968 Brussels Convention.

Preparatory proceedings began in 1985 and were completed relatively quickly. They resulted in a Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, which was opened for signature in Lugano on 16 September 1988, at the close of a diplomatic conference held at the invitation of the Swiss Government [FN 8].

10. Without entering into great detail, it is important here to note that the Lugano Convention is also based on the fundamental principles of the Brussels Convention [FN 9] and that many of its Articles are identical to those of that Convention.

Where amendments have been made to the Brussels Convention, these can often be regarded as improvements. It was therefore natural that they should be taken into account in the preparatory negotiations, within the Communities, for the accession of Spain and Portugal to the Brussels Convention (see Chapter V).

The relationship between the Brussels and Lugano Conventions is dealt with in a specific Article (Article 54b) [FN 10] of the Lugano Convention.

The Jenard-Moller Report (paragraphs 14 to 17) has the following to say on the subject:

`As shown above, although the structure of the two Conventions is identical and they contain a great number of comparable provisions, they remain separate Conventions.

Application of the two Conventions is governed by Article 54b. The first point to note is that this Article primarily concerns the courts of member countries of the European Communities, these being the only courts which may be required to deliver judgments pursuant to either Convention. Courts in EFTA Member States are not bound by the Brussels Convention since the EFTA States are not parties to that Convention.

However, Article 54b is relevant for the courts of EFTA countries since it was felt advantageous that Article 54b should, for reasons of clarity, contain details relating to lis pendens, related actions, recognition and enforcement of judgments.

The philosophy of Article 54b is as follows:

According to paragraph 1, the Brussels Convention continues to apply in relations between Member States of the European Communities.

This applies in particular where:

(a) a person, of whatever nationality, domiciled in one Community State, e.g. France, is summoned to appear before a court in another such State, e.g. Italy. The plaintiff's nationality and domicile are immaterial;

(b) a judgment has been delivered in one European Community Member State, e.g. France, and must be recognized or enforced in another such State, e.g. Italy.

The Brussels Convention also applies where a person domiciled outside the territory of a European Community Member State and outside the territory of any other State party to the Lugano Convention, e.g. in the United States, is summoned to appear before a court in a European Community Member State (Article 4 of the Brussels Convention).

In each of these three instances, the Court of Justice of the European Communities has jurisdiction under the 1971 Protocol to rule on problems which may arise with regard to the interpretation of the Brussels Convention.

However, under paragraph 2, the court of a European Community Member State must apply the Lugano Convention where:

1. a defendant is domiciled in the territory of a State which is party to the Lugano Convention and an EFTA member or is deemed to be so domiciled under Articles 8 or 13 of the Convention. For instance, if a person domiciled in Norway is summoned before a French court, jurisdiction will be vested in that court only in the cases for which the Lugano Convention provides. In particular the rules of exorbitant jurisdiction provided for in Article 4 of the Brussels Convention may not be relied on as against that person;

2. the courts of an EFTA Member State possess exclusive jurisdiction (Article 16) or jurisdiction by prorogation (Article 17). The courts of Member States of the European Communities may not, for instance, be seised of a dispute relating to real rights in immovable property situated in the territory of a State party to the Lugano Convention and an EFTA Member State, notwithstanding Article 16 (1) of the Brussels Convention, which does not apply unless the immovable property is situated in the territory of a State party to the 1968 Convention;

3. recognition or enforcement of a judgment delivered in a State party to the Lugano Convention and an EFTA Member State is being sought in a Community Member State (paragraph 2 (c)).

   Paragraph 2 also provides that the Lugano Convention applies where a judgment delivered in a Community Member State is to be enforced in an EFTA Member State party to the Lugano Convention.

   This does not resolve potential conflicts between the two Conventions, but it does define their respective scope. Obviously, if a judgment has been delivered in a State party to the Lugano Convention and an EFTA Member State and is to be enforced either in a Community Member State or in an EFTA Member State, the Brussels Convention does not apply;

4. Article 54b also contains provisions relating to lis pendens (Article 21) and related actions (Article 22). Under Article 54b (2) (b) a court in a Community Member State must apply these Articles of the Lugano Convention if a court in an EFTA Member State is seised of the same dispute or a related application.

   Apart from the greater clarity which they bring, these provisions serve a double purpose: to remove all uncertainty, and to ensure that judgments delivered in the different States concerned do not conflict;

5. Article 54b (3) lays down that a court in an EFTA Member State may refuse recognition or enforcement of a judgment delivered by a court in a Community Member State if the grounds on which the latter court has based its jurisdiction are not provided for in the Lugano Convention and if recognition or enforcement is being sought against a party who is domiciled in any EFTA Contracting State.

   These grounds for refusal are additional to those provided for in Article 28, and arise essentially from a guarantee sought by the EFTA Member States. The cases involved can be expected to arise relatively seldom, since with regard to rules of jurisdiction the Conventions are extremely similar. The possibility nevertheless remains. The case would arise in the event of a judgment on a contract of employment delivered by a court in a Community Member State which had erroneously based its jurisdiction with regard to

a person domiciled in an EFTA Member State either on Article 4 or Article 5 (1) of the Brussels Convention, i.e. in a manner inconsistent with Article 5 (1) of the Lugano Convention, which includes a specific provision on contracts of employment, or on an agreement conferring jurisdiction which predated the origin of the dispute (Article 17).

However, in the interests of freedom of movement of judgments, the judgment will be recognized and enforced provided that this can be done in accordance with the rules of common law of the State addressed, in particular its common law rules on the jurisdiction of foreign courts;

6. For convenience, we have used the term `EFTA Member States' in the above examples. Obviously, the same arrangements would apply to States which are not members of either the EEC of EFTA but accede to the Lugano Convention (see Article 62 (1) (b)).'

CHAPTER II

ACCESSION OF SPAIN AND PORTUGAL TO THE 1968 CONVENTION

11. Article 3 (2) of the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic to the European Communities states that the new Member States undertake to accede to the conventions provided for in Article 220 of the EEC Treaty... and also to the protocols on the interpretation of those conventions by the Court of Justice, signed by the Member States of the Community as originally constituted or as enlarged and to this end they undertake to enter into negotiations with the present Member States in order to make the necessary adjustments thereto' [FN 11].

The only Convention in force that is based on Article 220 is the Brussels Convention of 27 September l968 as adjusted by the 1978 and 1982 Conventions.

12. At the request of the two Governments concerned, and ad hoc working party was set up and held its first meeting in Brussels on 20 February l989 under the chairmanship of Mr A. Boixareu Carrera, First Secretary at the Permanent Representation of Spain to the European Communities.

As rapporteurs, the Permanent Representatives Committee appointed Mr Martinho de Almeida Cruz, Judge at First Instance, Legal Counsellor at the Permanent Representation of Portugal to the European Communities. Mr Manuel Desantes Real, Professor in the Law Faculty of the University of Alicante and Mr Paul Jenard, Honorary Director of Administration at the Belgian Ministry of Foreign Affairs.

The ad hoc working party met three times between 20 February and 10 April 1989 [FN 12].

13. This report deals with:

- the technical adjustments to the Brussels Convention (Chapter IV),

- the adjustments which take account of the Lugano Convention (Chapter V).

In addition, particular attention is given to the final provisions of the Accession Convention, especially as regards its entry into force and territorial application (Chapter VI).

The amendments to the 1971 Protocol on the interpretation of the Convention by the Court of Justice, although only technical, are dealt with in a separate chapter (Chapter VII).

CHAPTER III

INTRODUCTORY REMARKS

In the interests of clarity, we have referred in the report to the corresponding Articles of the Brussels Convention. However, Articles 1 and 2 of Accession Convention have no equivalent in the Brussels Convention.

Article 1 containing the undertaking by Spain and Portugal to accede to the Brussels Convention as adjusted by the subsequent Conventions gives rise to no particular comment.

Article 2 includes the provision that the formal adjustments to those Conventions are set out in Annex I to the 1989 Convention, of which it forms an integral part. This provision is designed, in the interests of legal security, to align the various language versions on those of the Lugano Convention, as a number of minor errors in the earlier Conventions were discovered during these negotiations. As Annex I forms an integral part of the Convention, it is the adjusted texts that will be authentic.

CHAPTER IV

TECHNICAL ADJUSTMENTS MADE TO THE BRUSSELS CONVENTION BY THE CONVENTION ON THE ACCESSION OF SPAIN AND PORTUGAL

14. The adjustments concern only:

- exorbitant jurisdictional bases [Article 3 (Article 3)],
- the list of Spanish and Portuguese courts with jurisdiction to apply Title III regarding the recognition and enforcement of judgments,
- bilateral Conventions concerned by the Accession Convention.

1. Exorbitant jurisdictional bases [Article 3 (Article 3)]

15. Portugal:

Articles 65 (1) (c), 65 (2) and 65a (c) of the Code of Civil Procedure and Article 11 of the Code of Labour Procedure.

This provision, inserted in Article 3 of the Accession Convention, is included in the Lugano Convention; on the basis of information provided by the Portuguese delegation, the Jenard-Moller Report

comments as follows (paragraph 31):

`Article 65 of Chapter II of the Code of Civil Procedure provides that a foreign national may be sued in a Portuguese court where:

- (paragraph 1 (c)) the plaintiff is Portuguese and, if the situation were reversed, he could be sued in the courts of the State of which the defendant is a national,

- (paragraph 2) under Portuguese law, the court with jurisdiction would be that of the defendant's domicile, if the latter is a foreigner who has been resident in Portugal for more than six months or who is fortuitously on Portuguese territory provided that, in the latter case, the obligation which is the subject of the dispute was entered into in Portugal.

Article 65a (c) of the Code of Civil Procedure confers exclusive jurisdiction on Portuguese courts for actions relating to employment relationships if any of the parties is of Portuguese nationality.

Article 11 of the Code of Labour Procedure gives jurisdiction to Portuguese labour courts for disputes concerning a Portuguese worker where the contract was concluded in Portugal.'

16. Spain

Articles 21 and 25 of the Spanish Ley Organica del Poder Judicial of 1 July 1985 governing the international jurisdiction of Spanish civil and social courts are directly based on the Brussels Convention, although drafted unilaterally. There are thus no such exorbitant bases in Spain.

In any event, the particulars for insertion in Article 3 of the Convention are not exhaustive since neither is the list contained in that Article, which merely cites examples, thus if there were any exorbitant jurisdiction, it, too, would be inapplicable.

2. Spanish and Portuguese courts having jurisdiction to apply Title III of the Convention

17. The additions are essentially technical in nature.

The formal adjustments to Articles 32 to 41 (Articles 10 to 13) relate exclusively to the courts having jurisdiction and the types of appeal that may be lodged against their judgments.

With regard to Portugal, it should be pointed out that the term `appeal on a point of law' used in Articles 37 and 41 relates to the restriction of the grounds of appeal to an incorrect application of the law as opposed to an incorrect assessment of the facts.

3. Relationship to existing Conventions and Community acts

a) Bilateral Conventions [Article 55 (Article 18)]

18. The list of bilateral Conventions on the recognition and the enforcement of judgments (of general scope) covers the Conventions concluded by Spain with France, Italy and the Federal Republic of

Germany. Portugal has concluded no such Conventions with the Member States of the European Communities.

For the scope of Article 55 of the Brussels Convention the reader is referred to page 59 of the Jenard Report.

Article 58 (Article 20): Franco-Swiss Convention

19. During the negotiations on the Accession Convention it was considered advisable to specify the scope of Article 58 of the 1968 Convention with regard to the application of the Franco-Swiss Convention on jurisdiction and enforcement of judgments in civil matters, signed at Paris on 15 June 1869.

The attention accorded to this Convention is due not to its age but to the fact that it will cease to have effect once the Lugano Convention enters into force between France and the Swiss Confederation. The aim here was to prevent any conflict between the Brussels Convention and the Lugano Convention.

(b) Multilateral Conventions [Article 57 (Article 19)]

20. This matter is covered by Article 57. Article 57 (2) lays down a much more detailed system for settling conflicts of convention between the Brussels Convention and Conventions concluded on a particular matter. This provision was adopted in the 1978 Accession Convention (see Schlosser Report, paragraphs 238 to 246). In the interests of clarity it was thought preferable that it should be reproduced as such in Article 57 (2), just as it was included in the Lugano Convention, although with some differences from that Convention in order to ensure greater freedom of movement of judgments in the Community (see Jenard-Moller Report, paragraphs 81 to 83).

(c) Community acts [Article 57 (3) (Article 19)]

21. This provision, which appears in the 1978 Convention, has been incorporated as such.

It should be noted that no Community act (Regulation or Directive) has so far contained any provision relating to jurisdiction and the recognition and enforcement of judgments.

The problem of Community acts in relations between the Member States of the European Communities, i.e. in the Convention on the accession of Spain and Portugal, undoubtedly differs considerably from that which arises in relations with third countries. It is thus normal that on this point the Accession Convention should depart from the Lugano Convention (see Protocol 3 and relevant Declaration, and Jenard-Moller Report, paragraphs 120 to 128).

4. Special consideration regarding Spain: Actions on a warranty or guarantee

22. Third party intervention in proceedings is not governed by explicit rules in the Spanish legal system and the want of proper procedures is the source of procedural uncertainty. This legal hiatus has been severely criticized in the works of legal experts, who have recommended that it be remedied in the near future. However,

this has not prevented acceptance of third party proceedings in some fields of jurisprudence or in civil laws governing certain specific cases, e.g. Article 124 (3) of Law No 11 of 20 March l986 on patents and Article 1482 [FN 13] of the Civil Code, regarding eviction. Generally speaking, it is the latter rule which is applicable in cases of non-voluntary third party proceedings; in the negotiations between the Member States of the European Communities and those of the European Free Trade Association, it was therefore judged advisable to include it in Article V of Protocol 1. Article 1482 is referred to, albeit indirectly, in Articles 638 (gift), 1145 (joint and several obligations), 1529 (assignment of claims), 1540 (exchange), 1553 (tenancy) 1681 (obligations of partners), 1830 (surety), 1831 (co-surety), etc. of the Civil Code.

When the problem arose during the negotiations for Spanish and Portuguese accession to the Brussels Convention, the Spanish delegation concluded that jurisprudence in this area could soon develop beyond the limited case of Article 1482 of the Civil Code. It therefore seemed wiser to omit any reference to Spain in Article V of Protocol 1, with there to be no difference in interpretation between the Lugano Convention and the Brussels Convention.

CHAPTER V

AMENDMENTS INCORPORATED FROM THE LUGANO CONVENTION

1. Article 5 (1) (Article 4): Contract of employment

23. (a) In negotiations for the Lugano Convention, the EFTA Member States requested that the question of the contract of employment should, where Article 5 and Article 17 were concerned (on the latter Article, see 27 below), be covered by independent provisions in order to ensure that the interpretation of it was that given on a number of occasions by the Court of Justice (see in particular the judgment of the Court of 26 May 1982 in Ivenel v. Schwab, Case 133/81, ECR 1982, p. 1891, and that given on 15 January 1987 in Shenavai v. Kreischer, Case 266/85, ECR 1987, pp. 239 to 257). Under the new Article 5 (1) of the Lugano Convention on the question of the contract of employment, the place of performance of the obligation in question is taken to mean that where the employee habitually carries out his work; if he does not habitually carry out his work in any one country, this place is the place of business through which he was engaged (see Jenard-Moller Report, paragraphs 35 to 44).

(b) Following signature of the Lugano Convention, the working party took cognizance of the judgment given by the Court of Justice on 15 February 1989 (Six Constructions v. Humbert, Case 32/88). In the case, the French Cour de Cassation (Court of Cassation) had requested a ruling, inter alia, on the following question: `what is the obligation to be taken into account for the purposes of the application of Article 5 (1) of the Brussels Convention of 27 September 1968 where the court is faced with claims based on obligations arising under a contract of employment binding an employee resident in France to a company having its registered office in Belgium which sent him to several countries outside Community territory?'

Although in the operative part of this judgment the Court of Justice restricts itself to pointing out that `Article 5 (1) of the Convention must be interpreted as meaning that, as regards contracts of employment, the obligation to be taken into consideration is that which characterizes the contract, in particular the obligation to carry out the duties agreed', it stresses obiter dictum the need to ensure adequate protection for the contracting party in the weaker position from the social point of view i.e. the employee concluding that `the particular characteristics of contracts of employment do not justify an interpretation under which Article 5 (1) of the Convention would allow the place where the business which engaged the employee is situated to be taken into consideration in cases where it would be difficult or impossible to say in which State the work had been carried out'.

(c) The solution adopted attempts to improve on that adopted by the Lugano Convention without departing from it too greatly, while following the guidelines laid down by the Court of Justice on the protection of the weaker party in the contractual relationship (note the same concern for protection in Article 17 (5) at 27 below). It was therefore agreed that, where the employee does not habitually carry out his work in any one country, the assumption contained in the last part of Article 5 (1) of the Lugano Convention is to operate in favour of the employee only. In order to avoid all ambiguity, the text states that the employee may bring proceedings before the courts for the place where the business [FN 14] which engaged him was situated either at the time of engagement or at the time when proceedings are brought. This stipulation was found necessary following discussions held within the working party on the degree to which the Six Contructions v. Humbert ruling should be taken into account.

(d) It follows from the same concern to protect the employee that the expression `in any one country' also includes cases where the work has been carried out, in whole or in part, outside Community territory.

(e) The effect of this provision is that, in any dispute between an employer and an employee, where the employee does not habitually carry out his work in any one country (whether or not within the Community):

1. the employer can only bring an action before the courts indicated in general terms in Article 2;

2. the employee can bring proceedings before the courts indicated in general terms in Article 2 or those in the last part of Article 5 (1) (the courts within the jurisdiction of which the business which engaged the employee is or was situated).

2. Article 6 (4) (Article 5): Combinations of actions in rem and in personam

24. This provision is taken directly from the text of the Lugano Convention. The Jenard-Moller Report (paragraphs 46 and 47) gives the following commentary on it:

`When a person has a mortgage on immovable property the owner of that property is quite often also personally liable for the secured debt. Therefore it has in some States been made possible to combine an action concerning the personal liability of the owner with an action for the enforced sale of the immovable property. This presupposes of course that the court for the place where the immovable property is situated also has jurisdiction as to actions concerning the personal liability of the owner.

It was agreed that it was practical that an action concerning the personal liability of the owner of an immovable property could be combined with an action for the enforced sale of the immovable property in those States where such a combination of actions was possible. Therefore it was deemed appropriate to include in the Convention a provision according to which a person domiciled in a Contracting State also may be sued in matters relating to a contract, if the action may be combined with an action against the same defendant in matters relating to rights in rem in immovable property, in the court of the Contracting State in which the property is situated.

To illustrate, let us assume that a person domiciled in France is the owner of an immovable property situated in Norway. This person has raised a loan which is secured through a mortgage on his immovable property in Norway. In the eventuality of the loan not being repaid when due, if the creditor wants to bring an action for the enforced sale of the immovable property, the Norwegian court has exclusive jurisdiction under Article 16 (1). This court has however, under the present provision, moreover jurisdiction as to an action against the owner of the property concerning his personal liability for the debt, if the creditor wants to combine the latter action with an action for the enforced sale of the property.

It goes without saying that this jurisdictional basis cannot exist by itself. It must necessarily be supplemented by legal criteria which determine on which conditions such a combination is possible. Thus the provisions already existing in or which in the future may be introduced into the legal systems of the Contracting States with reference to the combining of the abovementioned actions remain unaffected by the Lugano Convention.

It goes without saying however that the combination of the two actions which this paragraph deals with have to be instituted by the "same claimant". The "same claimant" includes of course also a person to whom another person has transferred his rights or his successor.

3. Article 16 (1) (Article 6): Tenancies

25. (a) Taking into consideration the Lugano Convention and the intention, according to the Jenard (page 35) and Schlosser (paragraph 164) Reports, of the drafters of the Brussels Convention, the working party decided to insert a new subparagraph (b) in Article 16 (1), containing a special provision on short-term tenancies. This insertion was necessary in view of the fact that, in giving a ruling on the provision as drafted in 1968, the Court had been obliged to interpret literally Article 16 (1) of the Convention and to decide that it applied to all proceedings concerning the payment of rent, including cases of short-term rental of holiday

accommodation (judgment of 15 January 1985, Rosler v. Rottwinkel, Case 241/83, ECR 1985, pp. 99 to 129).

(b) Because of the interpretation given by the Court to Article 16 (1), the Member States of EFTA and a number of Member States of the Communities expressed interest in including in the Lugano Convention a provision relating to tenancies of immovable property for limited periods. An agreement covering this was reached by which Article 16 (1) would be supplemented by the addition of a new subparagraph (b) (see Jenard-Moller Report, paragraph 49 et seq.).

(c) The solution adopted by the Accession Convention differs from that contained in the Lugano Convention. In the first place, it is more restrictive: under subparagraph (b), the plaintiff may also bring an action before the courts of the Contracting State in the territory of which the defendant has his domicile where the proceedings concern tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months - this refers in particular to contracts agreed for holiday purposes - if (and only if) the tenant and the landlord are natural persons domiciled in the same Contracting State. Legal persons are excluded on the grounds that they are generally concerned with commercial transactions.

Secondly, this provision is not accompanied by any reservation option, since the introduction of a reservation was considered hardly conceivable in connection with a Convention based on Article 220 of the Treaty of Rome. It should be noted that Article 1b in Protocol 1 to the Lugano Convention allows for the possibility of entering a reservation by which any Contracting State may declare that it will not recognize or enforce a decision on tenancies of immovable property if the property concerned is situated on the territory of the State entering the reservation, even where the tenancy is of the type referred to in Article 16 (1) (b) and where the jurisdiction of the court of the State of origin is based on the domicile of the defendant (see Jenard-Moller Report, paragraph 3).

(d) As already pointed out in the Jenard-Moller Report (paragraph 54), `Article 16 (1) applies only if the property is situated in the territory of a Contracting State. The text is sufficiently explicit on this point. If the property is situated in the territory of a third State, the other provisions of the Convention apply, e.g. Article 2 if the defendant is domiciled in the territory of a Contracting State, and Article 4 if he is domiciled in the territory of a third State, etc.'

4. Article 17 (Article 7): Agreements conferring jurisdiction

(a) Form of agreements conferring jurisdiction

26. Paragraph 1 of Article 17 is once again directly from the text of the Lugano Convention.

The Jenard-Moller Report deals with this point at some length (see paragraphs 55 to 59); in summary, it says that, under the new arrangements adopted, agreements conferring jurisdiction should be:

- in writing or evidenced in writing; this is in accordance with the terms of the 1968 Convention,

- or in a form which accords with practices which the parties have established between themselves; on this, see the judgment of the Court of Justice of 14 December 1976, Case 25/76, Segoura v. Bonakdarian, ECR 1976, pp. 1851 to 1863,

- or, in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware (this is in accordance with the amendments made by the 1978 Convention to the 1968 Convention), but in addition this usage in such trade or commerce must be widely known to, and regularly observed by parties to contracts of the type involved in the particular trade or commerce concerned.

These conditions supplementary to the text of the 1978 Convention were taken from Article 9 (2) of the 1980 Vienna Convention on International Contracts for the Sale of Goods.

(b) Agreements conferring jurisdiction in matters relating to contracts of employment [Article 17 (5) (Article 7)]

27. (a) This paragraph relates to agreements conferring jurisdiction in matters relating to contracts of employment.

There is no one provision of the 1968 Brussels Convention, as modified by the 1978 and 1982 Conventions, which expressly deals with this subject, although it has given rise to a judgment of the Court of Justice [FN 15].

(b) During negotiations for the Lugano Convention, the representatives of the Member States of EFTA proposed the addition of a new paragraph to Article 17 to the effect that agreements conferring jurisdiction in the matter of an individual contract of employment should only have legal force if they are entered into after the dispute has arisen. The addition was accepted in view of the fact that the idea underlying this provision was the protection of the employee who from the socioeconomic point of view is regarded as the weaker in the contractual relationship (see Jenard-Moller Report, paragraph 60).

(c) It was natural that this amendment made by the Lugano Convention to the Brussels Convention should be the subject of particularly careful study during the negotiations on the Accession Convention, having regard also to the judgment given on 15 February 1989 by the Court of Justice, in which the Court, too, in its grounds for judgment gave particular attention to the protection of the weaker party, i.e. the employee (Case 32/88, Six Constructions v. P. Humbert, OJ No C 62, 11. 3. 1979, p. 7; see also 23 above).

(d) The solution adopted by the Accession Convention differs from that contained in the Lugano Convention in its emphasis on protection of the employee.

In other words, the solution incorporated in the Lugano Convention was considered too radical: this would be the case in particular where the agreement conferring jurisdiction, while entered into

prior to the dispute arising, could in the employee's own view be favourable to him. For this reason the new paragraph 5 in Article 17 of the Convention provides that the agreement conferring jurisdiction may only take effect where it is entered into after the dispute has arisen - as in the Lugano Convention - or if the employee invokes it to seise courts other than those for the defendant's domicile or those specified in Article 5 (1)', which moderates the radicality of the Lugano Convention.

(e) It follows from this provision that:

1. The employee, in any dispute with the employer, may refer the dispute to the agreed courts having jurisdiction, even if the agreement conferring jurisdiction was entered into prior to the dispute arising.

2. Under the terms of the new provision this option is only open to the employee so that he may himself refer the dispute to the court to which prorogation is made; he could not make use of it in exceptional circumstances, e.g. if he were summoned to appear before the courts of his domicile. The latter possibility is denied him for the sake of protecting legal security and avoiding delaying action.

3. Finally, if the clause conferring jurisdiction attributes it to a court in the State of the defendant's domicile, the court to which prorogation has specially been made would have jurisdiction if the Convention is invoked by the employee. This should be the case, given that the deciding factor is the employee's choice and that where protection of employees is concerned the legal systems of different Contracting States are not all in agreement.

(f) In this new construction, the choice between the courts having jurisdiction (courts of the State of the defendant's domicile, place of performance of the contract of employment or to which prorogation has been made) thus lies entirely at the discretion of the employee in his capacity as plaintiff.

5. Article 21 (Article 8): Lis pendens

28. Article 21 of the Brussels Convention has been brought into line with Article 21 of the Lugano Convention, which lays down that in cases of lis pendens a court other than the one first seised, instead of declining jurisdiction of its own motion, must stay its proceedings of its own motion until the jurisdiction of the first court seised has been established. The Jenard-Moller Report (paragraph 64) contains the following commentary on this:

`Only this Article has been amended in Section 8.

Article 21 of the Brussels Convention provides that in cases of lis pendens, any court other than the court first seised must of its own motion decline jurisdiction in favour of that court and may stay its proceedings if the jurisdiction of the other court is contested.

The representatives of the EFTA Member States thought this solution

was too radical.

They observed that an action often had to be brought in order to comply with a time limit or stop further time from running, and that opinions differed as to whether a time limit had been complied with where an action had been brought before a court lacking jurisdiction internationally.

Thus, in their view, if an action was brought before a judge who would have had jurisdiction, but was not the first to be seised, that judge would of his own motion have to decline jurisdiction in favour of the court first seised. However, that court might perhaps decide that it did not have jurisdiction. In that case, both actions would have been dismissed with the result that the time limits might have run out and the action be time barred.

These remarks have been taken into consideration.

Article 21 has been amended so that the court other than the court first seised will of its own motion stay its proceedings until the jurisdiction of the other court has been established.

A court other than the one first seised will not decline jurisdiction in favour of the court first seised until the jurisdiction of the latter has been established (see Schlosser Report, paragraph 176).

The Court of Justice has ruled that the concepts employed in Article 21 to define a case of lis pendens should be considered to be `independent' (point 11 of the grounds for judgment) and that the term lis pendens to which Article 21 refers covers a case where a party brings an action before a court in a Contracting State for a declaration that an international sales contract is inoperative or for the termination thereof whilst an action by the other party to secure performance of the said contract is pending before a court in another Contracting State' (judgment of 8 December 1987 in Case 144/86, Gubisch v. Palumbo, OJ No C 8, 13. 1. 1988, p. 3).

6. Articles 31 and 50 (Articles 9 and 14)

29. The expression `when the order for its enforcement has been issued', used in the Brussels Convention has been replaced by when it has been declared enforceable', as in the Lugano Convention. This amendment to the Brussels Convention was adopted in order to bring the two Conventions into line, particularly since the two expressions may be considered virtually equivalent (see also the Jenard-Moller Report, paragraph 68 and 69, on this).

7. Article 52, third paragraph (Article 15)

30. The third paragraph of Article 52 has been deleted, in line with the Lugano Convention, as pointed out in the Jenard-Moller Report. This course was taken in view particularly of developments since the 1968 Convention was drafted as regards the domicile of married women (for further explanation, see the Jenard-Moller Report, paragraph 53).

8. Article 54 (Article 16): Transitional provisions

31. 1. Only technical adjustments have been made to the first and second paragraphs of this Article. No modification to the substance has been made (see Jenard Report, pp. 57 and 58, Schlosser Report, paragraphs 228 to 235 and Jenard-Moller Report, paragraph 74).

2. During negotiations for the 1989 Accession Convention it was considered appropriate to reproduce the third paragraph of Article 54 of the Lugano Convention and specify the scope of the words `this Convention'. This paragraph corresponds to Article 35 of the 1978 Accession Convention (see Schlosser Report, paragraphs 121 et seq.) and was declared to extend to the accession of the the Hellenic Republic by virtue of Article 1 (2) of the 1982 Accession Convention. For reasons of clarity, the 1989 Accession Convention defines what is to be understood by date of entry into force'. It was agreed that the provision shall only apply to agreements in writing dating from before 1 January 1987 where the United Kingdom is concerned and 1 June 1988 where Ireland is concerned.

9. Article 54a (Article 17)

32. This Article corresponds to Article 36 of the 1978 Accession Convention and Article 54a of the Lugano Convention (see Schlosser Report, paragraphs 121 et seq.. and Jenard-Moller Report, paragraph 75).

It should be noted that despite the wording of Article 54a of the Lugano Convention this provision does not apply to Greece, as Greece has ratified the Brussels Convention of 10 May l952 on the Arrest of Seagoing Ships. That Convention will also shortly be ratified by Denmark, and the approval procedure is under way in Ireland.

CHAPTER VI

FINAL PROVISIONS

1. Territorial application

33. This question was specifically dealt with by Article 60 of the 1968 Convention, as amended by Article 27 of the 1978 Accession Convention. Those two Articles are rescinded by Article 21 of this Accession Convention.

Under those Articles 60 and 27, the 1968 and 1978 Conventions applied to the European territory of the Contracting States, hut special provisions applied to France, Denmark, the Netherlands and the United Kingdom.

In accordance with those provisions and with statements made, where in existence, the situation at the date of signature of the Convention on the accession of Spain and Portugal is as follows:

(a) France: The 1968 Convention as modified by the 1978 Convention applies to all territories which are an integral part of the French Republic (see Articles 71 et seq. of the Constitution), including therefore the French Overseas Departments (Guadeloupe, Martinique, Guiana, Reunion), the Overseas Territories (Polynesia, New Caledonia, Southern and Antarctic Territories) and the

individual territorial collectivities (Saint Pierre and Miquelon, Mayotte).

(b) Denmark: The 1978 Convention does not apply:

- either to the Faroe Islands, in the absence of any declaration to that effect.

- or to Greenland, as Denmark declared upon deposit of its instrument of ratification that the Convention did not extend to Greenland.

(c) The Netherlands: Since 1 January 1986, the Kingdom of the Netherlands consists of three countries, namely: the Netherlands, the Netherlands Antilles (the islands of Bonaire, Curacao, Sint Maarten (Netherlands part of the island), Sint Eustatius and Saba) and Aruba.

It should be noted here that the 1968 Convention stated that the Government of the Netherlands could declare the Convention applicable to Surinam and the Netherlands Antilles and that, in the absence of such declaration with respect to the Netherlands Antilles, proceedings taking place in the European territory of the Kingdom as a result of an appeal in cassation against the judgment of a court in the Netherlands Antilles should be deemed to be proceedings in the latter court.

In the 1978 Convention, the same provision was adopted except in relation to Surinam (Article 27 of the Accession Convention). The Convention therefore does not extend to Surinam. Upon deposit of the Netherlands' instrument of ratification regarding the 1978 Convention, it was expressly stated that the instrument included the declaration that the ratification applied only to the Kingdom in Europe.

As regards other territories which since 1986 have been part of the Kingdom of the Netherlands, it should be noted that the Convention's application was extended to Aruba on 30 June 1986.

(d) United Kingdom: The 1978 Convention (Article 27) providing that the Convention applied only to the European territory of the Contracting States specified that it did not apply to European territories situated outside the United Kingdom for the international relations of which the United Kingdom was responsible, in the absence of a declaration to the contrary by the United Kingdom with respect to such a territory (on these territories, see Schlosser Report, paragraph 252). No such declaration has been made by the United Kingdom.

34. In conclusion, on the date of the opening for signature of the Convention on the accession of Spain and Portugal, the 1968 Convention as modified by the 1978 and 1982 Conventions:

(a) applied to all territories which are an integral part of the French Republic;

(b) in the case of Denmark, did not apply to Greenland or the Faroe Islands;

(c) in the case of the Netherlands, applied only to the Kingdom's territory in Europe and to Aruba;

(d) in the case of the United Kingdom, did not apply to European territories situated outside the United Kingdom for the international relations of which the United Kingdom was responsible.

2. Effect of deletion of Article 60

35. The deletion of Article 60 is in agreement with the solution adopted in the Lugano Convention which also includes no clause on territorial application (see Jenard-Moller Report, paragraphs 91 to 96). The Convention could therefore be applicable to non-European territories.

36. (a) Territories affected

France: See 33 above.

Spain: The Convention applies to the whole territory of the Kingdom of Spain.

Portugal: The Convention applies to the whole territory of the Portuguese Republic. An extension of the Convention to Macao and East Timor would be possible.

Denmark: Denmark could extend the application of the Convention to the Faroe Islands and Greenland.

The Netherlands: The Netherlands could extend application to the Netherlands Antilles, extension to Aruba having already been accomplished.

United Kingdom: The list of non-European territories for the international relations of which the United Kingdom is responsible is given in Annex III.

It should be noted that in the negotiations leading up to the Lugano Convention, the United Kingdom indicated that, of its non-European territories, Anguilla, Bermuda, the British Virgin Islands, Montserrat, the Turks and Caicos Islands and Hong Kong were ones to which there might be a real prospect of the Convention being extended.

37. (b) Transitional situations

1. It could happen that before entry into force of the Accession Convention with regard to one of the States concerned (e.g. Denmark or the United Kingdom), that State might make declarations of extension on the basis of Article 60 of the 1978 Convention.

In our view, such declarations would become effective with regard to the States which were parties to the 1978 Convention and would continue to apply with regard to Spain and Portugal as from the entry into force of the Accession Convention between those countries and the territory concerned.

2. The effect of the progressive implementation of the Convention on the accession of Spain and Portugal is that for a transitional period this Convention and the 1968 Convention, as modified by the 1978 and 1982 Conventions will be governing relations between the Member States of the Communities simultaneously. To illustrate this, the following example may be taken: if Spain and the Netherlands are the first two States ratifying the Convention on the accession of Spain and Portugal, that Convention will govern relations between them, but between the Netherlands and the other States which have ratified the 1978 and 1982 Conventions it will be the provisions of those two Conventions which will remain applicable.

   This duality is not without implications for the territorial application of the Conventions. If it is supposed that after ratifying the Convention on the accession of Spain and Portugal the Netherlands wishes to extend it to the Netherlands Antilles, its declaration of extension would have to be made not only on the basis of Article 60 of the 1968 Convention [FN 16] so that the extension will be effective with regard to the other States which are party to that Convention, but also in conformity with the rules of public international law so that it will be effective with regard to Spain and Portugal.

3. Concerning the United Kingdom, under Article 60 (16) of the 1978 Convention, the United Kingdom may extend the Convention's application `to European territories' situated outside the United Kingdom for the international relations of which it is responsible.

   The 1978 Convention does not give the United Kingdom the right to extend the application of this Convention to non-European territories for the international relations of which it is responsible.

   Extension of the Convention even to non-European territories for the international relations of which the United Kingdom is responsible will therefore be governed in accordance with the rules of public international law.

38. The situation might prove somewhat complex for a time, but this demonstrates that there is every incentive to ensure that the Convention on the accession of Spain and Portugal is ratified as soon as possible by all the Member States of the Communities.

3. Entry into force

39. 1. Under Article 32 of the 1989 Accession Convention, it will enter into force when it has been ratified by two signatory States one of which is the Kingdom of Spain or the Portuguese Republic.

2. An accelerated entry into force of the Convention has been intentionally sought after. This intention was confirmed by the Declaration annexed to the Convention, which establishes a link between the Brussels Convention and the completion of the internal market and urges the States to adopt appropriate measures for ratification as soon as possible and, if possible, by 31 December 1992.

The effect of Article 32 is that the Convention could enter into force between Spain and Portugal if they were the first countries to ratify it.

3. It was understood that even in such circumstances the Court of Justice would have jurisdiction to give a ruling on the interpretation of the Accession Convention.

CHAPTER VII

LUXEMBOURG PROTOCOL OF 3 JUNE 1971

40. In general it may be said that the 1971 Protocol has been adapted to successive Accession Conventions. Its basic structure, which falls within the framework of Article 177 of the Treaty of Rome, has not been altered.

The considerations contained in the Jenard Report (OJ No C 59, 5. 3. 1979, p. 66), Schlosser Report (paragraphs 255 and 256) and Evrigenis-Kerameus Report (paragraphs 91 to 99) are therefore appropriate for consultation purposes.

The necessary technical adjustments consequent upon the accession of Spain and Portugal were made.

Articles 26 and 27 of the 1989 Accession Convention have deleted Articles 6 and 10 (d) of the Protocol relating to the Convention's territorial application.

CHAPTER VIII

CONCLUSIONS

1. The situation as revealed in this report may appear to be fairly complex, as the specialist finds himself confronted with a number of international instruments applying to a single area.

2. Without denying this complexity, one should not lose sight of the fact that this is a process which involves a very great effort on the part of 18 European States for the purpose of achieving, in the specific area of jurisdiction and recognition and enforcement of judgments in civil and commercial matters, a true European judicial area resting on common foundations. This creation has been brought about by successive accretions resulting from the extension of the Communities and from the interest shown by the EFTA countries in the Brussels Convention.

3. As a remedy, consideration should first be given to early ratification by all the States concerned of the Convention on the accession of Spain and Portugal, in accordance with the terms of the Declaration and because of the links between the Convention and the single market to which it draws attention. The situation would then certainly be clearer with the Brussels Convention brought up to date, as it were, by all the Member States of the Communities. This apart, arrangements have been adopted - as we described in our discussion of the final provisions (Chapter VI) - to speed up the implementation of this Accession Convention.

4. An early ratification of the Lugano Convention is of no less interest.

At a practical level, it would protect persons domiciled in a Member State of the Communities in that they could no longer be required to appear before the courts of EFTA Member States on exorbitant bases, and it would also ensure free movement of judgments. In economic terms, the EFTA countries are the European Communities' principal customer ahead even of the United States and Japan together; conversely, the Communities represent the EFTA countries' most important market. The Lugano Convention should resolve any disputes that may arise in the course of such trade.

5. Since 1 October 1989 the Brussels Convention has been in force between 10 Member States of the Communities.

   The following summary indicates the various stages which have been reached:

   1. The 1968 Brussels Convention entered into force on 1 February 1973 between Belgium, the Federal Republic of Germany, France, Italy, Luxembourg and the Netherlands. The Protocol of 3 June 1971 entered into force between those six countries on 1 September 1975.

   2. The 1968 Convention was replaced by the 1978 Convention in relations between those six States and Denmark with effect from 1 November 1986, between all of those and the United Kingdom with effect from 1 January 1987 and between all of those and Ireland with effect from 1 June 1988.

   3. The 1982 Convention on the accession of Greece entered into force on 1 April 1989 between Greece and Belgium, the Federal Republic of Germany, Denmark, France, Ireland, Italy, Luxembourg and the Netherlands. It has applied to the United Kingdom since 1 October 1989.

   4. The 1989 Accession Convention will enter into force when it has been ratified by two signatory States one of which is the Kingdom of Spain or the Portuguese Republic.

   5. The Lugano Convention of 16 September 1988 will enter into force when it has been ratified by two States one of which is a member of the Communities and the other a member of EFTA.

ANNEX I

*** Table Omitted ***

Protocol Report	Publication in OJ	Entry into force in OJ	Declaration of territorial application	Notification
1968 Convention Brussels: 27. 9. 1968	L 299,31. 12. 1972			

1971 Protocol L204,2.8. 1975
Luxembourg: 3.6. 1971

Between the six original Federal Republic of Germany:
Member States (`): to Berlin
l. 2. 1973 Netherlands: Kingdom in
(L299,31. 12.1972) Europe $ Aruba

Between the Six: Federal Republic of Germany:

1.9.1975
(L 204,2. 8. 1975)
to Berlin
1978 Convention L 304, 30. 10. 1978
Luxembourg: 9. 10. 1978
(Irish special edition L 388)
Between the Six and Den-
mark:
11. 1986
(C285, 12. 11.1986)
Between the Six $ Denmark
and United Kingdom:
1.1987
(C285, l2. 11.1986)
Between the Six $ Denmark
$ United Kingdom and Ire-
land:
1.6. 1988
(C 125, 12.5. 1988)
1982 Convention
Luxembourg: 25. 10. 1982 1- Denmark: not to Greenland
Federal Republic of Germany:
to Berlin
L 388, 31. 12. 1982
Between the Six $ Denmark
$ Ireland and Greece:
1.4. 1989
(C 37, 14. 2. 1989)
Between the Six $ Denmark
$ Ireland $ Greece and
United Kingdom:
10.1989
(C 249, 30. 9. 1989)
1989 Convention
San Sebastian: 26. 5. 1989
Consolidated text of
1968,' 1978 Conventions
1971 Protocol
1968 1978/'1982 Conven-
tions
1971 Protocol

Lugano Convention
Lugano: 16. 9. 1988

Jenard Report
1968 Convention
1971 Protocol
Schlosser Report

1978 Convention

Evrigenis-Kerameus Report
1982 Convention $ Greek ver-
sions of Jenard and Schlosser
Reports
L285,3. 10.1989
(Irish special edition L 285)
L304,30. 10.1978
C97, 11.4.1983

L319,25. 11.1988

C 59,5. 3. 1979 1-

C298,24. 11.1986

Denmark: not to Greenland
Federal Republic of Germany:
to Berlin
(1) The Six: Belgium. Federal Republic of Germany, France, Italy, Luxembourg and the Netherlands.

ANNEX II

List of participants

CHAIRMAN

Mr A. BOIXAREU CARRERA	First Secretary Permanent Representation of Spain to the European Communities

BELGIUM

Mr G. GENOT	Counsellor Ministry of Foreign Affairs
Mr J. MATTHIUS	Administrative Secretary Ministry of Justice

DENMARK

Mr H.C. ST*VLB*K	Ministry of Justice
Miss H. LINDEGAARD	Legal Attache Permanent Representation to the European Communities

FEDERAL REPUBLIC OF GERMANY

Mr C. BOHMER	Federal Ministry of Justice
Mr D. WELP	Federal Ministry of Justice
Mr B. SCHMID-STEINHAUSER	Permanent Representation to the European Communities

GREECE	
Mrs M. TOUSSIS-SCORDAMAGLIA	First Secretary, Legal Affairs Permanent Representation to the European Communities
Mrs C. SAMONI-RANTOY	Ministry of Foreign Affairs
Mrs H. RIGA	Director Ministry of Justice
SPAIN	
Mr J. DE MIGUAL ZARAGOZA	Assistant Director Ministry of Justice
Mr M. DESANTES REAL	Professor, Law Faculty, University of Alicante Ministry of Justice
FRANCE	
Mr CORMAILLE DE VALBRAY	Ministry of Justice
Mr J. P. BERAUDO	Magistrate Ministry of Justice
IRELAND	
Mr C. O'HUIGINN	Principal Department of Justice
ITALY	
Mr A. SAGGIO	Consigliere di Cassazione Ministry of Justice
Mr R. FOGLIA	Consigliere di Cassazione Ministry of Justice
Mrs A. D'ALESSANDRO	Ministry of Industry
LUXEMBOURG	
Mrs A. CLEMANG	Justice Attache Ministry of Justice
NETHERLANDS	
Herr P. MEIJKNECHT	Ministry of Justice
Mr G. BORCHARDT	Permanent Representation to the European Communities
PORTUGAL	
Mr M. DE ALMEIDA CRUZ	Judge at First Instance, Legal Counsellor Permanent Representation to the

	European Communities
Mr L. FERNANDEZ	Director Ministry of Foreign Affairs
Mr A. RIBEIRO	Director Ministry of Justice
UNITED KINGDOM	
Mr D. GLADWELL	Lord Chancellor's Department
Mr R. WHITE	Lord Chancellor's Department
COMMISSION OF THE EUROPEAN COMMUNITIES	
Mr P. JENARD	Counsellor Honorary Director of Administration, Belgian Ministry of Foreign Affairs
Mr F. DANIS	Administrator, DG III
GENERAL SECRETARIAT OF THE COUNCIL OF THE EUROPEAN COMMUNITIES	
Mr V. SCORDAMAGLIA	Director DG C Internal Market
Mr O. PETERSEN	Principal administrator DG C Internal Market
Miss G. MALESY	Principal secretary DG C Internal Market

ANNEX III

List of non-European territories for whose international relations the United Kingdom is responsible

- Caribbean and North Atlantic: Anguilla, Bermuda, Cayman Islands, Montsertat, Turks and Caicos Islands, British Virgin Islands;
- South Atlantic: British Antarctic Territory, Falkland Islands, South Georgia and the South Sandwich Islands, St Helena and dependencies (Ascension Island) (Tristan da Cunha);
- Indian Ocean: British Indian Ocean Territory;
- South Pacific: Pitcairn Island, Henderson, Ducie and Oeno;
- Hong Kong.

FOOTNOTES

1- The Convention was published in OJ No L 299, 31. 12. 1972. It was accompanied by an explanatory report drawn up by Mr P. Jenard, published in OJ No C 59, 5. 3. 1979, hereinafter referred to as the Jenard Report.

2- The Protocol was published in OJ No L 204, 2. 8. 1975. For its scope, see Jenard Report, pp. 66 to 70.

3- For a fuller account of these principles, see Jenard-Moller Report, paragraph 13. Details of that report are given in footnote 5 on page 39.

4- This Convention, signed in Luxembourg on 9 October 1978, was published in OJ No L 304, 30. 10. 1978. It was the subject of a report drawn up by Prof. P. Schlosser, published in OJ No C 59, 5. 3. 1979, hereinafter referred to as the Schlosser Report.

5- Published in OJ No L 388, 31. 12. 1982. It is accompanied by an explanatory report drawn up by Professors D. Evrigenis and K. D. Kerameus, published in OJ No C 298, 24. 11. 1986, hereinafter referred to as the Evrigenis-Kerameus Report.

6- For the convenience of practitioners, an unofficial consolidated version of the three Conventions (1968, 1978 and 1982) was drawn up by the Council General Secretariat and published in OJ No C 97, 11.4. 1983. A table giving the dates of publication of the various instruments is provided in Annex I to this report.

7- Present EFTA membership: Austria, Finland, Iceland, Norway, Sweden and Switzerland.

8- Published in OJ No L 319, 25. 11. 1988. The Convention is accompanied by an explanatory report drawn up jointly by Mr P. Jenard and Mr G. Moller, hereinafter referred to as the Jenard-Moller Report.

9- See paragraph 4 above.

10- Article 54b states:
`1. This Convention shall not prejudice the application by the Member States of the European Communities of the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, signed at Brussels on 27 September 1968 and of the Protocol on interpretation of that Convention by the Court of Justice, signed at Luxembourg on 3 June 1971, as amended by the Conventions of Accession to the said Convention and the said Protocol by the States acceding to the European Communities, all of these Conventions and the Protocol being hereinafter referred to as the `Brussels Convention'.
2. However, this Convention shall in any event be applied:
(a) in matters of jurisdiction, where the defendant is domiciled in the territory of a Contracting State which is not a member of the European Communities, or where Articles 16 or 17 of this Convention confer a jurisdiction on the courts of such a Contracting State;
(b) in relation to a lis pendens or to related actions as provided for in Articles 21 and 22, when proceedings are instituted in a Contracting State which is not a member of the European Communities and in a Contracting State which is a member of the European Communities;
(c) in matters of recognition and enforcement, where either the State of origin or the State addressed is not a member of the European Communities.
3. In addition to the grounds provided for in Title III, recognition

or enforcement may be refused if the ground of jurisdiction on which the judgment has been based differs from that resulting from this Convention and recognition or enforcement is sought against a party who is domiciled in a Contracting State which is not a member of the European Communities, unless the judgment may otherwise be recognized or enforced under any rule of law in the State addressed.'

11- See OJ No L 302, l5. 11. 1985.

12- For the list of participants, see Annex II.

13- Article 1482 of the Spanish Civil Code:
`The purchaser against whom an action for eviction is brought shall request, within the period specified by the Code of Civil Procedure for replying to the action, that it be served on the vendor(s) as soon as possible.
Service shall be in the manner specified in the said Code for service on defendants.
The time limit for reply by the purchaser shall be suspended until the expiry of the period notified to the vendor(s) for appearing and replying to the action, which shall correspond to the periods laid down for all defendants by the Code of Civil Procedure and shall run from the date of the service referred to in the first paragraph of this Article.
If those cited in eviction proceedings fail to appear in the manner and time specified, the period allowed for replying to the action shall be extended in respect of the purchaser.'

14- The term `place of business', as in the Lugano Convention, is to be understood in the broad sense; in particular, it covers any entity such as a branch or agency with no legal personality (see Jenard-Moller Report, paragraph 43). On the concept of `place of business' see also the judgments of the Court of Justice of 22 November 1978 (Somafer v. Ferngas, Case 33/78, ECR 1978, pp. 2183-2195) and 19 December 1987 (Schotte v. Rothschild, Case 218/86, OJ No C 2, 6. 1. 1988, p. 3).

15- See judgment of the Court of Justice of 13 November 1979 in Case 25/79, Sanicentral v. Collin, ECR 1979, pp. 3423 to 3431.

16- Article 60 here means Article 60 of the 1968 Convention, as modified by Article 27 of the 1978 Convention.

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Convention on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice, with the adjustments made to them by the Convention on the accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland, by the Convention on the accession of the Hellenic Republic and by the Convention on the accession of the Kingdom of Spain and the Portuguese Republic

CONVENTION on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice, with the adjustments made to them by the Convention on the accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland, by the Convention on the accession of the Hellenic Republic and by the Convention on the accession of the Kingdom of Spain and the Portuguese Republic (97/C 15/01)

PREAMBLE THE HIGH CONTRACTING PARTIES TO THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY,

CONSIDERING that the Republic of Austria, the Republic of Finland and the Kingdom of Sweden, in becoming members of the European Union, undertook to accede to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice, with the adjustments made to them by the Convention on the accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland, the adjustments made to them by the Convention on the accession of the Hellenic Republic and the adjustments made to them by the Convention of the Kingdom of Spain and the Portuguese Republic, and to this end undertook to enter into negotiations with the Member States of the Community in order to make the necessary adjustments thereto,

MINDFUL that, on 16 September 1988, the Member States of the European Community and the Member States of the European Free Trade Association (EFTA) concluded in Lugano the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, which extends the principles of the Brussels Convention to the States becoming parties to that Convention,

HAVE AGREED AS FOLLOWS:

TITLE I General provisions

Article 1

The Republic of Austria, the Republic of Finland and the Kingdom of Sweden hereby accede to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, signed at Brussels on 27 September 1968 (hereinafter referred to as 'the 1968 Convention`) and to the Protocol on its interpretation by the Court of Justice, signed at Luxembourg on 3 June 1971 (hereinafter referred to as 'the 1971 Protocol`), with all the adjustments and amendments made to them:

(a) by the Convention, signed at Luxembourg on 9 October 1978 (hereinafter referred to as 'the 1978 Convention`), on the accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, and to the Protocol on its interpretation by the Court of Justice;

(b) by the Convention, signed at Luxembourg on 25 October 1982 (hereinafter referred to as 'the 1982 Convention`), on the accession of the Hellenic Republic to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, and to the Protocol on its interpretation by the Court of Justice, with the adjustments made to them by the Convention on the accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland;

(c) by the Convention, signed in San Sebastian on 26 May 1989 (hereinafter referred to as 'the 1989 Convention`), on the accession of the Kingdom of Spain and the Portuguese Republic to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, and to the Protocol on its interpretation by the Court of Justice, with the adjustments made to them by the Convention on the accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland and the adjustments made to them by the Convention on the accession of the Hellenic Republic.

TITLE II Adjustments to the 1968 Convention

Article 2

The following indents shall be inserted in the second paragraph of Article 3 of the 1968 Convention, as amended by Article 4 of the 1978 Convention, Article 3 of the 1982 Convention and Article 3 of the 1989 Convention:

(a) between the 9th and 10th indents:

'- in Austria: Article 99 of the Law on Court Jurisdiction (Jurisdiktionsnorm),`;

(b) between the 10th and 11th indents:

'- in Finland: the second, third and fourth sentences of the first paragraph of Section 1 of Chapter 10 of the Code of Judicial Procedure (oikeudenkaeymiskaari/raettegaangsbalken),

- in Sweden: the first sentence of the first paragraph of Section 3 of Chapter 10 of the Code of Judicial Procedure (raettegaangsbalken),`.

Article 3

The following indents shall be inserted in Article 32 (1) of the 1968 Convention, as amended by Article 16 of the 1978 Convention, Article 4 of the 1982 Convention and Article 10 of the 1989 Convention:

(a) between the 10th and 11th indents:

'- in Austria, to the Bezirksgericht,`;

(b) between the 11th and 12th indents:

'- in Finland, to the kaeraejaeoikeus/tingsraett,

- in Sweden, to the Svea hovraett,`.

Article 4

1. The following indents shall be inserted in Article 37 (1) of the 1968 Convention, as amended by Article 17 of the 1978 Convention, Article 5 of the 1982 Convention and Article 11 of the 1989 Convention:

(a) between the 10th and 11th indents:

'- in Austria with the Bezirksgericht,`;

(b) between the 11th and 12th indents:

'- in Finland, with the hovioikeus/hovraett,

- in Sweden, with the Svea hovraett,`.

2. The following shall be inserted in Article 37 (2) of the 1968 Convention, as amended by Article 17 of the 1978 Convention, Article 5 of the 1982 Convention and the second paragraph of Article 11 of the 1989 Convention:

(a) between the fourth and fifth indents:

'- in Austria, in the case of an appeal, by a Revisionsrekurs and, in the case of opposition proceedings, by a Berufung with the possibility of a revision,`;

(b) between the fifth and sixth indents:

'- in Finland, by an appeal to korkein oikeushoegsta domstolen,

- in Sweden by an appeal to Hoegsta domstolen`.

Article 5

The following indents shall be inserted in Article 40 (1) of the 1968 Convention, as amended by Article 19 of the 1978 Convention, Article 6 of the 1982 Convention and Article 12 of the 1989 Convention:

(a) between the 10th and 11th indents:

'- in Austria, to the Bezirksgericht,`;

(b) between the 11th and 12th indents:

'- in Finland, to hovioikeus/hovraetten,

- in Sweden, to the Svea hovraett,`.

Article 6

The following indents shall be inserted in Article 41 of the 1968 Convention, as amended by Article 20 of the 1978 Convention, Article 7 of the 1982 Convention and Article 13 of the 1989 Convention:

(a) between the fourth and fifth indents:

'- in Austria, by a Revisionsrekurs,`;

(b) between the fifth and sixth indents:

'- in Finland, by an appeal to korkein oikeus/hoegsta domstolen,

- in Sweden, by an appeal to Hoegsta domstolen,`.

Article 7

The following shall be inserted at the approporiate places in chronological order in the list of Conventions set out in Article 55 of the 1968 Convention, as amended by Article 24 of the 1978 Convention, Article 8 of the 1982 Convention and Article 18 of the 1989 Convention:

'- the Convention between the Kingdom of Belgium and Austria on the reciprocal recognition and enforcement of judgments and authentic instruments relating to maintenance obligations, signed at Vienna on 25 October 1957,

- the Convention between the Federal Republic of Germany and Austria on the reciprocal recognition and enforcement of judgments, settlements and authentic instruments in civil and commercial matters, signed at Vienna on 6 June 1959,

- the Convention between the Kingdom of Belgium and Austria on the reciprocal recognition and enforcement of judgments, arbitral awards and authentic instruments in civil and commercial matters, signed at Vienna on 16 June 1959,

- the Convention between the United Kingdom and Austria providing for the reciprocal recognition and enforcement of judgments in civil and commercial matters, signed at Vienna on 14 July 1961, with amending Protocol signed at London on 6 March 1970,

- the Convention between the Kingdom of the Netherlands and Austria on the reciprocal recognition and enforcement of judgments and authentic instruments in civil and commercial matters, signed at The Hague on 6 February 1963,

- the Convention between France and Austria on the recognition and enforcement of judgments and authentic instruments in civil and commercial matters, signed at Vienna on 15 July 1966,

- the Convention between Luxembourg and Austria on the recognition and enforcement of judgments and authentic instruments in civil and commercial matters, signed at Luxembourg on 29 July 1971,

- the Convention between Italy and Austria on the recognition and enforcement of judgments in civil and commercial matters, of judicial settlements and of authentic instruments, signed at Rome on 16 November 1971,

- the Convention between Finland, Iceland, Norway, Sweden and Denmark on the recognition and enforcement of judgments in civil matters, signed at Copenhagen on 11 October 1977,

- the Convention between Austria and Sweden on the recognition and enforcement of judgments in civil matters, signed at Stockholm on 16 September 1982,

- the Convention between Austria and Spain on the recognition and enforcement of judgments, settlements and enforceable authentic instruments in civil and commercial matters, signed at Vienna on 17 February 1984,

- the Convention between Finland and Austria on the recognition and enforcement of judgments in civil matters, signed at Vienna on 17 November 1986.`

TITLE III Adjustments to the Protocol annexed to the 1968 Convention

Article 8

The following shall be substituted for Article V of the Protocol annexed to the 1968 Convention:

'Article V

The jurisdiction specified in Articles 6 (2) and 10 in actions on a warranty or guarantee or in any other third party proceedings may not be resorted to in the Federal Republic of Germany or in Austria. Any person domiciled in another Contracting State may be sued in the courts:

- of the Federal Republic of Germany, pursuant to Articles 68, 72, 73 and 74 of the code of civil procedure (Zivilprozessordnung) concerning third-party notices,
- of Austria, pursuant to Article 21 of the code of civil procedure (Zivilprozessordnung) concerning third-party notices.

Judgments given in the other Contracting States by virtue of Article 6 (2) or 10 shall be recognized and enforced in the Federal Republic of Germany and in Austria in accordance with Title III. Any effects which judgments given in those States may have on third parties by application of the provisions in the preceding paragraph shall also be recognized in the other Contracting States.`

Article 9

The following shall be added to Article Va of the Protocol annexed to the 1968 Convention:

'In Sweden, in summary proceedings concerning orders to pay (betalningsfoerelaeggande) and assistance (handraeckning), the expression "court" includes the "Swedish enforcement service" (kronofogdemyndighet).`

Article 10

The following article shall be added to the Protocol annexed to the 1968 Convention:

'Article Ve:

Arrangements relating to maintenance obligations concluded with administrative authorities or authenticated by them shall also be regarded as authentic instruments within the meaning of the first paragraph of Article 50 of the Convention.`

TITLE IV Adjustments to the 1971 Protocol

Article 11

The following paragraph shall be added to Article 1 of the 1971 Protocol, as amended by Article 30 of the 1978 Convention, Article 10 of the 1982 Convention and Article 24 of the 1989 Convention:

'The Court of Justice of the European Communities shall also have jurisdiction to give rulings on the interpretation of the Convention on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the Convention of 27 September 1968 and to this Protocol, as adjusted by the 1978 Convention, the 1982 Convention and the 1989 Convention.`

Article 12

The following indents shall be inserted in Article 2 (1) of the 1971 Protocol, as amended by Article 31 of the 1978 Convention, Article 11 of the 1982 Convention and Article 25 of the 1989 Convention:

(a) between the 9th and 10th indents:

'- in Austria, the Oberste Gerichtshof, the Verwaltungsgerichtshof and the Verfassungsgerichtshof,`;

(b) between the 10th and 11th indents:

'- in Finland, korkein oikeus/hoegsta domstolen and korkein hallintooikeus/hoegsta foervaltningsdomstolen,

- in Sweden, Hoegsta domstolen, Regeringsraetten, Arbetsdomstolen and Marknadsdomstolen,`.

TITLE V Transitional provisions

Article 13

1. The 1968 Convention and the 1971 Protocol, as amended by the 1978 Convention, the 1982 Convention, the 1989 Convention and by this Convention, shall apply only to legal proceedings instituted and to authentic instruments formally drawn up or registered after the entry into force of this Convention in the State of origin and, where recognition or enforcement of a judgment or authentic instrument is sought, in the State addressed.

2. However, judgments given after the date of entry into force of this Convention between the State of origin and the State addressed in proceedings instituted before that date shall be recognized and enforced in accordance with the provisions of Title III of the 1968 Convention, as amended by the 1978 Convention, the 1982 Convention, the 1989 Convention and this Convention, if jurisdiction was founded upon rules which accorded with the provisions of Title II, as amended, of the 1968 Convention, or with the provisions of a convention which was in force between the State of origin and the State addressed when the proceedings were instituted.

TITLE VI Final provisions

Article 14

1. The Secretary-General of the Council of the European Union shall transmit a certified copy of the 1968 Convention, of the 1971 Protocol, of the 1978 Convention, of the 1982 Convention and of the 1989 Convention in the Danish, Dutch, English, French, German, Greek, Irish, Italian, Spanish and Portuguese languages to the Governments of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden.

2. The texts of the 1968 Convention, of the 1971 Protocol, of the 1978 Convention, of the 1982 Convention and of the 1989 Convention, drawn up in the Finnish and Swedish languages, shall be authentic under the same conditions as the other texts of the 1968 Convention, the 1971 Protocol, the 1978 Convention, the 1982 Convention and the 1989 Convention.

Article 15

This Convention shall be ratified by the signatory States. The instruments of ratification shall be deposited with the Secretary-General of the Council of the European Union.

Article 16

1. This Convention shall enter into force on the first day of the third month following the date on which two signatory States, one of which is the Republic of Austria, the Republic of Finland or the Kingdom of Sweden, deposit their instruments of ratification.

2. This Convention shall produce its effects for any other signatory State on the first day of the third month following the deposit of its instrument of ratification.

Article 17

The Secretary-General of the Council of the European Union shall notify the signatory States of:

(a) the deposit of each instrument of ratification;

(b) the dates of entry into force of this Convention for the Contracting States.

Article 18

This Convention, drawn up in a single original in the Danish, Dutch, English, Finnish, French, German, Greek, Irish, Italian, Portuguese, Spanish and Swedish languages, all 12 texts being equally authentic, shall be deposited in the archives of the General Secretariat of the Council of the European Union. The Secretary-General shall transmit a certified copy to the Government of each signatory State.

Hecho en Bruselas, el veintinueve de noviembre de mil novecientos noventa y seis.

Udfaerdiget i Bruxelles, den niogtyvende november nitten hundrede og seksoghalvfems.

Geschehen zu Bruessel am neunundzwanzigsten November neunzehnhundertsechsundneunzig.

êaéíaa oôéo Añoi¡eeaao, oôéo aassêïoé aaíí¡a Iïaaiâñssïo össeéa aaííéaêueoéa aaíaaí«íôa ¡ié.

Done at Brussels on the twenty-ninth day of November in the year one thousand nine hundred and ninety-six.

Fait à Bruxelles, le vingt-neuf novembre mil neuf cent quatre-vingt-seize.

Arna dhéanamh sa Bhruiséil, an naou la is fiche de Shamhain, míle naoi gcéad nocha a sé.

Fatto a Bruxelles, addi ventinove novembre millenovecentonovantasei.

Gedaan te Brussel, de negenentwintigste november negentienhonderd zesennegentig.

Feito em Bruxelas, em vinte e nove de Novembro de mil novecentos e noventa e seis.

Tehty Brysselissae kahdentenakymmenentenaeyhdeksaentenae paeivaenae marraskuuta vuonna tuhatyhdeksaensataayhdeksaenkymmentaekuusi.

Som skedde i Bryssel den tjugonionde november nittonhundranittiosex.

Pour le gouvernement du royaume de Belgique

Voor de Regering van het Koninkrijk Belgie

Fuer die Regierung des Koenigreichs Belgien

! REFERENCE TO A GRAPHIC!

For regeringen for Kongeriget Danmark

! REFERENCE TO A GRAPHIC!

Fuer die Regierung der Bundesrepublik Deutschland

! REFERENCE TO A GRAPHIC!

Aéa ôçí êoâ¡ñíçoç ôço AAeeçíéê«o AEçiïêñaôssao

! REFERENCE TO A GRAPHIC!

Por el Gobierno del Reino de España

! REFERENCE TO A GRAPHIC!

Pour le gouvernement de la République française

! REFERENCE TO A GRAPHIC!

Thar ceann Rialtas na hEireann

For the Government of Ireland

! REFERENCE TO A GRAPHIC!

Per il governo della Repubblica italiana

! REFERENCE TO A GRAPHIC!

Pour le gouvernement du Grand-Duché de Luxembourg

! REFERENCE TO A GRAPHIC!

Voor de Regering van het Koninkrijk der Nederlanden

! REFERENCE TO A GRAPHIC!

Fuer die Regierung der Republik OEsterreich

! REFERENCE TO A GRAPHIC!

Pelo Governo da Republica Portuguesa

! REFERENCE TO A GRAPHIC!

Suomen hallituksen puolesta

Paa finska regeringens vaegnar

! REFERENCE TO A GRAPHIC!

Paa svenska regeringens vaegnar

! REFERENCE TO A GRAPHIC!

For the Government of the United Kingdom of Great Britain and Northern Ireland

! REFERENCE TO A GRAPHIC!

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Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

Council Regulation (EC) No 44/2001

of 22 December 2000

on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and Article 67(1) thereof,

Having regard to the proposal from the Commission(1),

Having regard to the opinion of the European Parliament(2),

Having regard to the opinion of the Economic and Social Committee(3),

Whereas:

(1) The Community has set itself the objective of maintaining and developing an area of freedom, security and justice, in which the free movement of persons is ensured. In order to establish progressively such an area, the Community should adopt, amongst other things, the measures relating to judicial cooperation in civil matters which are necessary for the sound operation of the internal market.

(2) Certain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market. Provisions to unify the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities with a view to rapid and simple recognition and enforcement of judgments from Member States bound by this Regulation are essential.

(3) This area is within the field of judicial cooperation in civil matters within the meaning of Article 65 of the Treaty.

(4) In accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty, the objectives of this Regulation cannot be sufficiently achieved by the Member States and can therefore be better achieved by the Community. This Regulation confines itself to the minimum required in order to achieve those objectives and does not go beyond what is necessary for that purpose.

(5) On 27 September 1968 the Member States, acting under Article 293, fourth indent, of the Treaty, concluded the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by Conventions on the Accession of the New Member States to that Convention (hereinafter referred to as the "Brussels Convention")(4). On 16 September 1988 Member States and EFTA States concluded the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, which is a parallel Convention to the 1968 Brussels Convention. Work has been undertaken for the revision of those Conventions, and the Council has approved the content of the revised texts. Continuity in the results achieved in that revision should be ensured.

(6) In order to attain the objective of free movement of judgments in civil and commercial matters, it is necessary and appropriate that the rules governing jurisdiction and the recognition and enforcement of judgments be governed by a Community legal instrument which is binding and directly applicable.

(7) The scope of this Regulation must cover all the main civil and commercial matters apart from certain well-defined matters.

(8) There must be a link between proceedings to which this Regulation applies and the territory of the Member States bound by this Regulation. Accordingly common rules on jurisdiction should, in principle, apply when the defendant is domiciled in one of those Member States.

(9) A defendant not domiciled in a Member State is in general subject to national rules of jurisdiction applicable in the territory of the Member State of the court seised, and a defendant domiciled in a Member State not bound by this Regulation must remain subject to the Brussels Convention.

(10) For the purposes of the free movement of judgments, judgments given in a Member State bound by this Regulation should be recognised and enforced in another Member State bound by this Regulation, even if the judgment debtor is domiciled in a third State.

(11) The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction.

(12) In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close link between the court and the action or in order to facilitate the sound administration of justice.

(13) In relation to insurance, consumer contracts and employment, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules provide for.

(14) The autonomy of the parties to a contract, other than an insurance, consumer or employment contract, where only limited autonomy to determine the courts having jurisdiction is allowed, must be respected subject to the exclusive grounds of jurisdiction laid down in this Regulation.

(15) In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in two Member States. There must be a clear and effective mechanism for resolving cases of lis pendens and related actions and for obviating problems flowing from national differences as to the determination of the time when a case is regarded as pending. For the purposes of this Regulation that time should be defined autonomously.

(16) Mutual trust in the administration of justice in the Community justifies judgments given in a Member State being recognised automatically without the need for any procedure except in cases of dispute.

(17) By virtue of the same principle of mutual trust, the procedure for making enforceable in one Member State a judgment given in another must be efficient and rapid. To that end, the declaration that a judgment is enforceable should be issued virtually automatically after purely formal checks of the documents supplied, without there being any possibility for the court to raise of its own motion any of the grounds for non-enforcement provided for by this Regulation.

(18) However, respect for the rights of the defence means that the defendant should be able to appeal in an adversarial procedure, against the declaration of enforceability, if he considers one of the grounds for non-enforcement to be present. Redress procedures should also be available to the claimant where his application for a declaration of enforceability has been rejected.

(19) Continuity between the Brussels Convention and this Regulation should be ensured, and transitional

provisions should be laid down to that end. The same need for continuity applies as regards the interpretation of the Brussels Convention by the Court of Justice of the European Communities and the 1971 Protocol(5) should remain applicable also to cases already pending when this Regulation enters into force.

(20) The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and to the Treaty establishing the European Community, have given notice of their wish to take part in the adoption and application of this Regulation.

(21) Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty establishing the European Community, is not participating in the adoption of this Regulation, and is therefore not bound by it nor subject to its application.

(22) Since the Brussels Convention remains in force in relations between Denmark and the Member States that are bound by this Regulation, both the Convention and the 1971 Protocol continue to apply between Denmark and the Member States bound by this Regulation.

(23) The Brussels Convention also continues to apply to the territories of the Member States which fall within the territorial scope of that Convention and which are excluded from this Regulation pursuant to Article 299 of the Treaty.

(24) Likewise for the sake of consistency, this Regulation should not affect rules governing jurisdiction and the recognition of judgments contained in specific Community instruments.

(25) Respect for international commitments entered into by the Member States means that this Regulation should not affect conventions relating to specific matters to which the Member States are parties.

(26) The necessary flexibility should be provided for in the basic rules of this Regulation in order to take account of the specific procedural rules of certain Member States. Certain provisions of the Protocol annexed to the Brussels Convention should accordingly be incorporated in this Regulation.

(27) In order to allow a harmonious transition in certain areas which were the subject of special provisions in the Protocol annexed to the Brussels Convention, this Regulation lays down, for a transitional period, provisions taking into consideration the specific situation in certain Member States.

(28) No later than five years after entry into force of this Regulation the Commission will present a report on its application and, if need be, submit proposals for adaptations.

(29) The Commission will have to adjust Annexes I to IV on the rules of national jurisdiction, the courts or competent authorities and redress procedures available on the basis of the amendments forwarded by the Member State concerned; amendments made to Annexes V and VI should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission(6),

HAS ADOPTED THIS REGULATION:

CHAPTER I

SCOPE

Article 1

1. This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.

2. The Regulation shall not apply to:

(a) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession;

(b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;

(c) social security;

(d) arbitration.

3. In this Regulation, the term "Member State" shall mean Member States with the exception of Denmark.

CHAPTER II

JURISDICTION

Section 1

General provisions

Article 2

1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.

2. Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State.

Article 3

1. Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter.

2. In particular the rules of national jurisdiction set out in Annex I shall not be applicable as against them.

Article 4

1. If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Articles 22 and 23, be determined by the law of that Member State.

2. As against such a defendant, any person domiciled in a Member State may, whatever his nationality, avail himself in that State of the rules of jurisdiction there in force, and in particular those specified in Annex I, in the same way as the nationals of that State.

Section 2

Special jurisdiction

Article 5

A person domiciled in a Member State may, in another Member State, be sued:

1. (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;

(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:

- in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,

- in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided,

(c) if subparagraph (b) does not apply then subparagraph (a) applies;

2. in matters relating to maintenance, in the courts for the place where the maintenance creditor is domiciled or habitually resident or, if the matter is ancillary to proceedings concerning the status of a person, in the court which, according to its own law, has jurisdiction to entertain those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties;

3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;

4. as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the court seised of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings;

5. as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated;

6. as settlor, trustee or beneficiary of a trust created by the operation of a statute, or by a written instrument, or created orally and evidenced in writing, in the courts of the Member State in which the trust is domiciled;

7. as regards a dispute concerning the payment of remuneration claimed in respect of the salvage of a cargo or freight, in the court under the authority of which the cargo or freight in question:

(a) has been arrested to secure such payment, or

(b) could have been so arrested, but bail or other security has been given;

provided that this provision shall apply only if it is claimed that the defendant has an interest in the cargo or freight or had such an interest at the time of salvage.

Article 6

A person domiciled in a Member State may also be sued:

1. where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine

them together to avoid the risk of irreconcilable judgments resulting from separate proceedings;

2. as a third party in an action on a warranty or guarantee or in any other third party proceedings, in the court seised of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case;

3. on a counter-claim arising from the same contract or facts on which the original claim was based, in the court in which the original claim is pending;

4. in matters relating to a contract, if the action may be combined with an action against the same defendant in matters relating to rights in rem in immovable property, in the court of the Member State in which the property is situated.

Article 7

Where by virtue of this Regulation a court of a Member State has jurisdiction in actions relating to liability from the use or operation of a ship, that court, or any other court substituted for this purpose by the internal law of that Member State, shall also have jurisdiction over claims for limitation of such liability.

Section 3

Jurisdiction in matters relating to insurance

Article 8

In matters relating to insurance, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5.

Article 9

1. An insurer domiciled in a Member State may be sued:

(a) in the courts of the Member State where he is domiciled, or

(b) in another Member State, in the case of actions brought by the policyholder, the insured or a beneficiary, in the courts for the place where the plaintiff is domiciled,

(c) if he is a co-insurer, in the courts of a Member State in which proceedings are brought against the leading insurer.

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

Article 10

In respect of liability insurance or insurance of immovable property, the insurer may in addition

be sued in the courts for the place where the harmful event occurred. The same applies if movable and immovable property are covered by the same insurance policy and both are adversely affected by the same contingency.

Article 11

1. In respect of liability insurance, the insurer may also, if the law of the court permits it, be joined in proceedings which the injured party has brought against the insured.

2. Articles 8, 9 and 10 shall apply to actions brought by the injured party directly against the insurer, where such direct actions are permitted.

3. If the law governing such direct actions provides that the policyholder or the insured may be joined as a party to the action, the same court shall have jurisdiction over them.

Article 12

1. Without prejudice to Article 11(3), an insurer may bring proceedings only in the courts of the Member State in which the defendant is domiciled, irrespective of whether he is the policyholder, the insured or a beneficiary.

2. The provisions of this Section shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.

Article 13

The provisions of this Section may be departed from only by an agreement:

1. which is entered into after the dispute has arisen, or

2. which allows the policyholder, the insured or a beneficiary to bring proceedings in courts other than those indicated in this Section, or

3. which is concluded between a policyholder and an insurer, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which has the effect of conferring jurisdiction on the courts of that State even if the harmful event were to occur abroad, provided that such an agreement is not contrary to the law of that State, or

4. which is concluded with a policyholder who is not domiciled in a Member State, except in so far as the insurance is compulsory or relates to immovable property in a Member State, or

5. which relates to a contract of insurance in so far as it covers one or more of the risks set out in Article 14.

Article 14

The following are the risks referred to in Article 13(5):

1. any loss of or damage to:

(a) seagoing ships, installations situated offshore or on the high seas, or aircraft, arising from perils which relate to their use for commercial purposes;

(b) goods in transit other than passengers' baggage where the transit consists of or includes carriage by such ships or aircraft;

2. any liability, other than for bodily injury to passengers or loss of or damage to their baggage:

(a) arising out of the use or operation of ships, installations or aircraft as referred to in point 1(a) in so far as, in respect of the latter, the law of the Member State in which such aircraft are registered does not prohibit agreements on jurisdiction regarding insurance of such risks;

(b) for loss or damage caused by goods in transit as described in point 1(b);

3. any financial loss connected with the use or operation of ships, installations or aircraft as referred to in point 1(a), in particular loss of freight or charter-hire;

4. any risk or interest connected with any of those referred to in points 1 to 3;

5. notwithstanding points 1 to 4, all "large risks" as defined in Council Directive 73/239/EEC(7), as amended by Council Directives 88/357/EEC(8) and 90/618/EEC(9), as they may be amended.

Section 4

Jurisdiction over consumer contracts

Article 15

1. In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5, if:

(a) it is a contract for the sale of goods on instalment credit terms; or

(b) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or

(c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.

2. Where a consumer enters into a contract with a party who is not domiciled in the Member State but has a branch, agency or other establishment in one of the Member States, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State.

3. This Section shall not apply to a contract of transport other than a contract which, for an inclusive price, provides for a combination of travel and accommodation.

Article 16

1. A consumer may bring proceedings against the other party to a contract either in the courts

of the Member State in which that party is domiciled or in the courts for the place where the consumer is domiciled.

2. Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled.

3. This Article shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.

Article 17

The provisions of this Section may be departed from only by an agreement:

1. which is entered into after the dispute has arisen; or

2. which allows the consumer to bring proceedings in courts other than those indicated in this Section; or

3. which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which confers jurisdiction on the courts of that Member State, provided that such an agreement is not contrary to the law of that Member State.

Section 5

Jurisdiction over individual contracts of employment

Article 18

1. In matters relating to individual contracts of employment, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5.

2. Where an employee enters into an individual contract of employment with an employer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, the employer shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.

Article 19

An employer domiciled in a Member State may be sued:

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

2. in another Member State:

(a) in the courts for the place where the employee habitually carries out his work or in the courts for the last place where he did so, or

(b) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.

Article 20

1. An employer may bring proceedings only in the courts of the Member State in which the employee is domiciled.

2. The provisions of this Section shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.

Article 21

The provisions of this Section may be departed from only by an agreement on jurisdiction:

1. which is entered into after the dispute has arisen; or

2. which allows the employee to bring proceedings in courts other than those indicated in this Section.

Section 6

Exclusive jurisdiction

Article 22

The following courts shall have exclusive jurisdiction, regardless of domicile:

1. in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated.

However, in proceedings which have as their object tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months, the courts of the Member State in which the defendant is domiciled shall also have jurisdiction, provided that the tenant is a natural person and that the landlord and the tenant are domiciled in the same Member State;

2. in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or of the validity of the decisions of their organs, the courts of the Member State in which the company, legal person or association has its seat. In order to determine that seat, the court shall apply its rules of private international law;

3. in proceedings which have as their object the validity of entries in public registers, the courts of the Member State in which the register is kept;

4. in proceedings concerned with the registration or validity of patents, trade marks, designs, or other similar rights required to be deposited or registered, the courts of the Member State in which the deposit or registration has been applied for, has taken place or is under the terms of a Community instrument or an international convention deemed to have taken place.

Without prejudice to the jurisdiction of the European Patent Office under the Convention on the Grant of European Patents, signed at Munich on 5 October 1973, the courts of each Member State shall have exclusive jurisdiction, regardless of domicile, in proceedings concerned with the registration or validity of any European patent granted for that State;

5. in proceedings concerned with the enforcement of judgments, the courts of the Member State in which the judgment has been or is to be enforced.

Section 7

Prorogation of jurisdiction

Article 23

1. If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:

(a) in writing or evidenced in writing; or

(b) in a form which accords with practices which the parties have established between themselves; or

(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to "writing".

3. Where such an agreement is concluded by parties, none of whom is domiciled in a Member State, the courts of other Member States shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction.

4. The court or courts of a Member State on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between these persons or their rights or obligations under the trust are involved.

5. Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Articles 13, 17 or 21, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 22.

Article 24

Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 22.

Section 8

Examination as to jurisdiction and admissibility

Article 25

Where a court of a Member State is seised of a claim which is principally concerned with a matter over which the courts of another Member State have exclusive jurisdiction by virtue of Article 22, it shall declare of its own motion that it has no jurisdiction.

Article 26

1. Where a defendant domiciled in one Member State is sued in a court of another Member 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 Regulation.

2. 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 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.

3. Article 19 of 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(10) shall apply instead of the provisions of paragraph 2 if the document instituting the proceedings or an equivalent document had to be transmitted from one Member State to another pursuant to this Regulation.

4. Where the provisions of Regulation (EC) No 1348/2000 are not applicable, Article 15 of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters shall apply if the document instituting the proceedings or an equivalent document had to be transmitted pursuant to that Convention.

Section 9

Lis pendens - related actions

Article 27

1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

Article 28

1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.

2. Where these actions are pending at first instance, any court other than the court first seised

may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.

3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

Article 29

Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court.

Article 30

For the purposes of this Section, a court shall be deemed to be seised:

1. at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have service effected on the defendant, or

2. if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have the document lodged with the court.

Section 10

Provisional, including protective, measures

Article 31

Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter.

CHAPTER III

RECOGNITION AND ENFORCEMENT

Article 32

For the purposes of this Regulation, "judgment" means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court.

Section 1

Recognition

Article 33

1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.

2. Any interested party who raises the recognition of a judgment as the principal issue in a dispute may, in accordance with the procedures provided for in Sections 2 and 3 of this Chapter, apply for a decision that the judgment be recognised.

3. If the outcome of proceedings in a court of a Member State depends on the determination of an incidental question of recognition that court shall have jurisdiction over that question.

Article 34

A judgment shall not be recognised:

1. if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought;

2. where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;

3. if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought;

4. if it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed.

Article 35

1. Moreover, a judgment shall not be recognised if it conflicts with Sections 3, 4 or 6 of Chapter II, or in a case provided for in Article 72.

2. In its examination of the grounds of jurisdiction referred to in the foregoing paragraph, the court or authority applied to shall be bound by the findings of fact on which the court of the Member State of origin based its jurisdiction.

3. Subject to the paragraph 1, the jurisdiction of the court of the Member State of origin may not be reviewed. The test of public policy referred to in point 1 of Article 34 may not be applied to the rules relating to jurisdiction.

Article 36

Under no circumstances may a foreign judgment be reviewed as to its substance.

Article 37

1. A court of a Member State in which recognition is sought of a judgment given in another Member State may stay the proceedings if an ordinary appeal against the judgment has been lodged.

2. A court of a Member State in which recognition is sought of a judgment given in Ireland or the United Kingdom may stay the proceedings if enforcement is suspended in the State of origin, by reason of an appeal.

Section 2

Enforcement

Article 38

1. A judgment given in a Member State and enforceable in that State shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there.

2. However, in the United Kingdom, such a judgment shall be enforced in England and Wales, in Scotland, or in Northern Ireland when, on the application of any interested party, it has been registered for enforcement in that part of the United Kingdom.

Article 39

1. The application shall be submitted to the court or competent authority indicated in the list in Annex II.

2. The local jurisdiction shall be determined by reference to the place of domicile of the party against whom enforcement is sought, or to the place of enforcement.

Article 40

1. The procedure for making the application shall be governed by the law of the Member State in which enforcement is sought.

2. The applicant must give an address for service of process within the area of jurisdiction of the court applied to. However, if the law of the Member State in which enforcement is sought does not provide for the furnishing of such an address, the applicant shall appoint a representative ad litem.

3. The documents referred to in Article 53 shall be attached to the application.

Article 41

The judgment shall be declared enforceable immediately on completion of the formalities in Article

53 without any review under Articles 34 and 35. The party against whom enforcement is sought shall not at this stage of the proceedings be entitled to make any submissions on the application.

Article 42

1. The decision on the application for a declaration of enforceability shall forthwith be brought to the notice of the applicant in accordance with the procedure laid down by the law of the Member State in which enforcement is sought.

2. The declaration of enforceability shall be served on the party against whom enforcement is sought, accompanied by the judgment, if not already served on that party.

Article 43

1. The decision on the application for a declaration of enforceability may be appealed against by either party.

2. The appeal is to be lodged with the court indicated in the list in Annex III.

3. The appeal shall be dealt with in accordance with the rules governing procedure in contradictory matters.

4. If the party against whom enforcement is sought fails to appear before the appellate court in proceedings concerning an appeal brought by the applicant, Article 26(2) to (4) shall apply even where the party against whom enforcement is sought is not domiciled in any of the Member States.

5. An appeal against the declaration of enforceability is to be lodged within one month of service thereof. If the party against whom enforcement is sought is domiciled in a Member State other than that in which the declaration of enforceability was given, the time for appealing shall be two months and shall run from the date of service, either on him in person or at his residence. No extension of time may be granted on account of distance.

Article 44

The judgment given on the appeal may be contested only by the appeal referred to in Annex IV.

Article 45

1. The court with which an appeal is lodged under Article 43 or Article 44 shall refuse or revoke a declaration of enforceability only on one of the grounds specified in Articles 34 and 35. It shall give its decision without delay.

2. Under no circumstances may the foreign judgment be reviewed as to its substance.

Article 46

1. The court with which an appeal is lodged under Article 43 or Article 44 may, on the application of the party against whom enforcement is sought, stay the proceedings if an ordinary appeal has been lodged against the judgment in the Member State of origin or if the time for such an appeal has not yet expired; in the latter case, the court may specify the time within which such an appeal is to be lodged.

2. Where the judgment was given in Ireland or the United Kingdom, any form of appeal available in the Member State of origin shall be treated as an ordinary appeal for the purposes of paragraph 1.

3. The court may also make enforcement conditional on the provision of such security as it shall determine.

Article 47

1. When a judgment must be recognised in accordance with this Regulation, nothing shall prevent the applicant from availing himself of provisional, including protective, measures in accordance with the law of the Member State requested without a declaration of enforceability under Article 41 being required.

2. The declaration of enforceability shall carry with it the power to proceed to any protective measures.

3. During the time specified for an appeal pursuant to Article 43(5) against the declaration of enforceability and until any such appeal has been determined, no measures of enforcement may be taken other than protective measures against the property of the party against whom enforcement is sought.

Article 48

1. Where a foreign judgment has been given in respect of several matters and the declaration of enforceability cannot be given for all of them, the court or competent authority shall give it for one or more of them.

2. An applicant may request a declaration of enforceability limited to parts of a judgment.

Article 49

A foreign judgment which orders a periodic payment by way of a penalty shall be enforceable in the Member State in which enforcement is sought only if the amount of the payment has been finally determined by the courts of the Member State of origin.

Article 50

An applicant who, in the Member State of origin has benefited from complete or partial legal aid or exemption from costs or expenses, shall be entitled, in the procedure provided for in this Section,

to benefit from the most favourable legal aid or the most extensive exemption from costs or expenses provided for by the law of the Member State addressed.

Article 51

No security, bond or deposit, however described, shall be required of a party who in one Member State applies for enforcement of a judgment given in another Member State on the ground that he is a foreign national or that he is not domiciled or resident in the State in which enforcement is sought.

Article 52

In proceedings for the issue of a declaration of enforceability, no charge, duty or fee calculated by reference to the value of the matter at issue may be levied in the Member State in which enforcement is sought.

Section 3

Common provisions

Article 53

1. A party seeking recognition or applying for a declaration of enforceability shall produce a copy of the judgment which satisfies the conditions necessary to establish its authenticity.

2. A party applying for a declaration of enforceability shall also produce the certificate referred to in Article 54, without prejudice to Article 55.

Article 54

The court or competent authority of a Member State where a judgment was given shall issue, at the request of any interested party, a certificate using the standard form in Annex V to this Regulation.

Article 55

1. If the certificate referred to in Article 54 is not produced, the court or competent authority may specify a time for its production or accept an equivalent document or, if it considers that it has sufficient information before it, dispense with its production.

2. If the court or competent authority so requires, a translation of the documents shall be produced. The translation shall be certified by a person qualified to do so in one of the Member States.

Article 56

No legalisation or other similar formality shall be required in respect of the documents referred to in Article 53 or Article 55(2), or in respect of a document appointing a representative ad litem.

CHAPTER IV

AUTHENTIC INSTRUMENTS AND COURT SETTLEMENTS

Article 57

1. A document which has been formally drawn up or registered as an authentic instrument and is enforceable in one Member State shall, in another Member State, be declared enforceable there, on application made in accordance with the procedures provided for in Articles 38, et seq. The court with which an appeal is lodged under Article 43 or Article 44 shall refuse or revoke a declaration of enforceability only if enforcement of the instrument is manifestly contrary to public policy in the Member State addressed.

2. Arrangements relating to maintenance obligations concluded with administrative authorities or authenticated by them shall also be regarded as authentic instruments within the meaning of paragraph 1.

3. The instrument produced must satisfy the conditions necessary to establish its authenticity in the Member State of origin.

4. Section 3 of Chapter III shall apply as appropriate. The competent authority of a Member State where an authentic instrument was drawn up or registered shall issue, at the request of any interested party, a certificate using the standard form in Annex VI to this Regulation.

Article 58

A settlement which has been approved by a court in the course of proceedings and is enforceable in the Member State in which it was concluded shall be enforceable in the State addressed under the same conditions as authentic instruments. The court or competent authority of a Member State where a court settlement was approved shall issue, at the request of any interested party, a certificate using the standard form in Annex V to this Regulation.

CHAPTER V

GENERAL PROVISIONS

Article 59

1. In order to determine whether a party is domiciled in the Member State whose courts are seised of a matter, the court shall apply its internal law.

2. If a party is not domiciled in the Member State whose courts are seised of the matter, then, in order to determine whether the party is domiciled in another Member State, the court shall apply

the law of that Member State.

Article 60

1. For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its:

(a) statutory seat, or

(b) central administration, or

(c) principal place of business.

2. For the purposes of the United Kingdom and Ireland "statutory seat" means the registered office or, where there is no such office anywhere, the place of incorporation or, where there is no such place anywhere, the place under the law of which the formation took place.

3. In order to determine whether a trust is domiciled in the Member State whose courts are seised of the matter, the court shall apply its rules of private international law.

Article 61

Without prejudice to any more favourable provisions of national laws, persons domiciled in a Member State who are being prosecuted in the criminal courts of another Member State of which they are not nationals for an offence which was not intentionally committed may be defended by persons qualified to do so, even if they do not appear in person. However, the court seised of the matter may order appearance in person; in the case of failure to appear, a judgment given in the civil action without the person concerned having had the opportunity to arrange for his defence need not be recognised or enforced in the other Member States.

Article 62

In Sweden, in summary proceedings concerning orders to pay (betalningsföreläggande) and assistance (handräckning), the expression "court" includes the "Swedish enforcement service" (kronofogdemyndighet).

Article 63

1. A person domiciled in the territory of the Grand Duchy of Luxembourg and sued in the court of another Member State pursuant to Article 5(1) may refuse to submit to the jurisdiction of that court if the final place of delivery of the goods or provision of the services is in Luxembourg.

2. Where, under paragraph 1, the final place of delivery of the goods or provision of the services is in Luxembourg, any agreement conferring jurisdiction must, in order to be valid, be accepted in writing or evidenced in writing within the meaning of Article 23(1)(a).

3. The provisions of this Article shall not apply to contracts for the provision of financial services.

4. The provisions of this Article shall apply for a period of six years from entry into force of

this Regulation.

Article 64

1. In proceedings involving a dispute between the master and a member of the crew of a seagoing ship registered in Greece or in Portugal, concerning remuneration or other conditions of service, a court in a Member State shall establish whether the diplomatic or consular officer responsible for the ship has been notified of the dispute. It may act as soon as that officer has been notified.

2. The provisions of this Article shall apply for a period of six years from entry into force of this Regulation.

Article 65

1. The jurisdiction specified in Article 6(2), and Article 11 in actions on a warranty of guarantee or in any other third party proceedings may not be resorted to in Germany and Austria. Any person domiciled in another Member State may be sued in the courts:

(a) of Germany, pursuant to Articles 68 and 72 to 74 of the Code of Civil Procedure (Zivilprozessordnung) concerning third-party notices,

(b) of Austria, pursuant to Article 21 of the Code of Civil Procedure (Zivilprozessordnung) concerning third-party notices.

2. Judgments given in other Member States by virtue of Article 6(2), or Article 11 shall be recognised and enforced in Germany and Austria in accordance with Chapter III. Any effects which judgments given in these States may have on third parties by application of the provisions in paragraph 1 shall also be recognised in the other Member States.

CHAPTER VI

TRANSITIONAL PROVISIONS

Article 66

1. This Regulation shall apply only to legal proceedings instituted and to documents formally drawn up or registered as authentic instruments after the entry into force thereof.

2. However, if the proceedings in the Member State of origin were instituted before the entry into force of this Regulation, judgments given after that date shall be recognised and enforced in accordance with Chapter III,

(a) if the proceedings in the Member State of origin were instituted after the entry into force of the Brussels or the Lugano Convention both in the Member State or origin and in the Member State addressed;

(b) in all other cases, if jurisdiction was founded upon rules which accorded with those provided for either in Chapter II or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted.

CHAPTER VII

RELATIONS WITH OTHER INSTRUMENTS

Article 67

This Regulation shall not prejudice the application of provisions governing jurisdiction and the recognition and enforcement of judgments in specific matters which are contained in Community instruments or in national legislation harmonised pursuant to such instruments.

Article 68

1. This Regulation shall, as between the Member States, supersede the Brussels Convention, except as regards the territories of the Member States which fall within the territorial scope of that Convention and which are excluded from this Regulation pursuant to Article 299 of the Treaty.

2. In so far as this Regulation replaces the provisions of the Brussels Convention between Member States, any reference to the Convention shall be understood as a reference to this Regulation.

Article 69

Subject to Article 66(2) and Article 70, this Regulation shall, as between Member States, supersede the following conventions and treaty concluded between two or more of them:

- the Convention between Belgium and France on Jurisdiction and the Validity and Enforcement of Judgments, Arbitration Awards and Authentic Instruments, signed at Paris on 8 July 1899,

- the Convention between Belgium and the Netherlands on Jurisdiction, Bankruptcy, and the Validity and Enforcement of Judgments, Arbitration Awards and Authentic Instruments, signed at Brussels on 28 March 1925,

- the Convention between France and Italy on the Enforcement of Judgments in Civil and Commercial Matters, signed at Rome on 3 June 1930,

- the Convention between Germany and Italy on the Recognition and Enforcement of Judgments in Civil and Commercial Matters, signed at Rome on 9 March 1936,

- the Convention between Belgium and Austria on the Reciprocal Recognition and Enforcement of Judgments and Authentic Instruments relating to Maintenance Obligations, signed at Vienna on 25 October 1957,

- the Convention between Germany and Belgium on the Mutual Recognition and Enforcement of Judgments, Arbitration Awards and Authentic Instruments in Civil and Commercial Matters, signed at Bonn on 30 June 1958,

- the Convention between the Netherlands and Italy on the Recognition and Enforcement of Judgments in Civil and Commercial Matters, signed at Rome on 17 April 1959,

- the Convention between Germany and Austria on the Reciprocal Recognition and Enforcement of Judgments, Settlements and Authentic Instruments in Civil and Commercial Matters, signed at

Vienna on 6 June 1959,

- the Convention between Belgium and Austria on the Reciprocal Recognition and Enforcement of Judgments, Arbitral Awards and Authentic Instruments in Civil and Commercial Matters, signed at Vienna on 16 June 1959,

- the Convention between Greece and Germany for the Reciprocal Recognition and Enforcement of Judgments, Settlements and Authentic Instruments in Civil and Commercial Matters, signed in Athens on 4 November 1961,

- the Convention between Belgium and Italy on the Recognition and Enforcement of Judgments and other Enforceable Instruments in Civil and Commercial Matters, signed at Rome on 6 April 1962,

- the Convention between the Netherlands and Germany on the Mutual Recognition and Enforcement of Judgments and Other Enforceable Instruments in Civil and Commercial Matters, signed at The Hague on 30 August 1962,

- the Convention between the Netherlands and Austria on the Reciprocal Recognition and Enforcement of Judgments and Authentic Instruments in Civil and Commercial Matters, signed at The Hague on 6 February 1963,

- the Convention between France and Austria on the Recognition and Enforcement of Judgments and Authentic Instruments in Civil and Commercial Matters, signed at Vienna on 15 July 1966,

- the Convention between Spain and France on the Recognition and Enforcement of Judgment Arbitration Awards in Civil and Commercial Matters, signed at Paris on 28 May 1969,

- the Convention between Luxembourg and Austria on the Recognition and Enforcement of Judgments and Authentic Instruments in Civil and Commercial Matters, signed at Luxembourg on 29 July 1971,

- the Convention between Italy and Austria on the Recognition and Enforcement of Judgments in Civil and Commercial Matters, of Judicial Settlements and of Authentic Instruments, signed at Rome on 16 November 1971,

- the Convention between Spain and Italy regarding Legal Aid and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, signed at Madrid on 22 May 1973,

- the Convention between Finland, Iceland, Norway, Sweden and Denmark on the Recognition and Enforcement of Judgments in Civil Matters, signed at Copenhagen on 11 October 1977,

- the Convention between Austria and Sweden on the Recognition and Enforcement of Judgments in Civil Matters, signed at Stockholm on 16 September 1982,

- the Convention between Spain and the Federal Republic of Germany on the Recognition and Enforcement of Judgments, Settlements and Enforceable Authentic Instruments in Civil and Commercial Matters, signed at Bonn on 14 November 1983,

- the Convention between Austria and Spain on the Recognition and Enforcement of Judgments, Settlements and Enforceable Authentic Instruments in Civil and Commercial Matters, signed at Vienna on 17 February 1984,

- the Convention between Finland and Austria on the Recognition and Enforcement of Judgments in Civil Matters, signed at Vienna on 17 November 1986, and

- the Treaty between Belgium, the Netherlands and Luxembourg in Jurisdiction, Bankruptcy, and the Validity and Enforcement of Judgments, Arbitration Awards and Authentic Instruments, signed at Brussels on 24 November 1961, in so far as it is in force.

Article 70

1. The Treaty and the Conventions referred to in Article 69 shall continue to have effect in relation to matters to which this Regulation does not apply.

2. They shall continue to have effect in respect of judgments given and documents formally drawn up or registered as authentic instruments before the entry into force of this Regulation.

Article 71

1. This Regulation shall not affect any conventions to which the Member States are parties and which in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments.

2. With a view to its uniform interpretation, paragraph 1 shall be applied in the following manner:

(a) this Regulation shall not prevent a court of a Member State, which is a party to a convention on a particular matter, from assuming jurisdiction in accordance with that convention, even where the defendant is domiciled in another Member State which is not a party to that convention. The court hearing the action shall, in any event, apply Article 26 of this Regulation;

(b) judgments given in a Member State by a court in the exercise of jurisdiction provided for in a convention on a particular matter shall be recognised and enforced in the other Member States in accordance with this Regulation.

Where a convention on a particular matter to which both the Member State of origin and the Member State addressed are parties lays down conditions for the recognition or enforcement of judgments, those conditions shall apply. In any event, the provisions of this Regulation which concern the procedure for recognition and enforcement of judgments may be applied.

Article 72

This Regulation shall not affect agreements by which Member States undertook, prior to the entry into force of this Regulation pursuant to Article 59 of the Brussels Convention, not to recognise judgments given, in particular in other Contracting States to that Convention, against defendants domiciled or habitually resident in a third country where, in cases provided for in Article 4 of that Convention, the judgment could only be founded on a ground of jurisdiction specified in the second paragraph of Article 3 of that Convention.

CHAPTER VIII

FINAL PROVISIONS

Article 73

No later than five years after the entry into force of this Regulation, the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a report on the

application of this Regulation. The report shall be accompanied, if need be, by proposals for adaptations to this Regulation.

Article 74

1. The Member States shall notify the Commission of the texts amending the lists set out in Annexes I to IV. The Commission shall adapt the Annexes concerned accordingly.

2. The updating or technical adjustment of the forms, specimens of which appear in Annexes V and VI, shall be adopted in accordance with the advisory procedure referred to in Article 75(2).

Article 75

1. The Commission shall be assisted by a committee.

2. Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468/EC shall apply.

3. The Committee shall adopt its rules of procedure.

Article 76

This Regulation shall enter into force on 1 March 2002.

This Regulation is binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

Done at Brussels, 22 December 2000.

For the Council

The President

C. Pierret

(1) OJ C 376, 28.12.1999, p. 1.

(2) Opinion delivered on 21 September 2000 (not yet published in the Official Journal).

(3) OJ C 117, 26.4.2000, p. 6.

(4) OJ L 299, 31.12.1972, p. 32.

OJ L 304, 30.10.1978, p. 1.

OJ L 388, 31.12.1982, p. 1.

OJ L 285, 3.10.1989, p. 1.

OJ C 15, 15.1.1997, p. 1.

For a consolidated text, see OJ C 27, 26.1.1998, p. 1.

(5) OJ L 204, 2.8.1975, p. 28.

OJ L 304, 30.10.1978, p. 1.

OJ L 388, 31.12.1982, p. 1.

OJ L 285, 3.10.1989, p. 1.

OJ C 15, 15.1.1997, p. 1.

For a consolidated text see OJ C 27, 26.1.1998, p. 28.

(6) OJ L 184, 17.7.1999, p. 23.

(7) OJ L 228, 16.8.1973, p. 3. Directive as last amended by Directive 2000/26/EC of the European Parliament and of the Council (OJ L 181, 20.7.2000, p. 65).

(8) OJ L 172, 4.7.1988, p. 1. Directive as last amended by Directive 2000/26/EC.

(9) OJ L 330, 29.11.1990, p. 44.

(10) OJ L 160, 30.6.2000, p. 37.

ANNEX I

Rules of jurisdiction referred to in Article 3(2) and Article 4(2)

The rules of jurisdiction referred to in Article 3(2) and Article 4(2) are the following:

- in Belgium: Article 15 of the Civil Code (Code civil/Burgerlijk Wetboek) and Article 638 of the Judicial Code (Code judiciaire/Gerechtelijk Wetboek);

- in Germany: Article 23 of the Code of Civil Procedure (Zivilprozessordnung),

- in Greece, Article 40 of the Code of Civil Procedure (! ISO_7! E¦äéêao áïeéôéê«o Æéêîíïißao);

- ! ISO_1! in France: Articles 14 and 15 of the Civil Code (Code civil),

- in Ireland: the rules which enable jurisdiction to be founded on the document instituting the proceedings having been served on the defendant during his temporary presence in Ireland,

- in Italy: Articles 3 and 4 of Act 218 of 31 May 1995,

- in Luxembourg: Articles 14 and 15 of the Civil Code (Code civil),

- in the Netherlands: Articles 126(3) and 127 of the Code of Civil Procedure (Wetboek van Burgerlijke Rechtsvordering),

- in Austria: Article 99 of the Court Jurisdiction Act (Jurisdiktionsnorm),

- in Portugal: Articles 65 and 65A of the Code of Civil Procedure (Codigo de Processo Civil) and Article 11 of the Code of Labour Procedure (Codigo de Processo de Trabalho),

- in Finland: the second, third and fourth sentences of the first paragraph of Section 1 of Chapter 10 of the Code of Judicial Procedure (oikeudenkäymiskaari/rättegångsbalken),

- in Sweden: the first sentence of the first paragraph of Section 3 of Chapter 10 of the Code of Judicial Procedure (rättegångsbalken),

- in the United Kingdom: rules which enable jurisdiction to be founded on:

(a) the document instituting the proceedings having been served on the defendant during his temporary presence in the United Kingdom; or

(b) the presence within the United Kingdom of property belonging to the defendant; or

(c) the seizure by the plaintiff of property situated in the United Kingdom.

ANNEX II

The courts or competent authorities to which the application referred to in Article 39 may be submitted are the following:

- in Belgium, the "tribunal de première instance" or "rechtbank van eerste aanleg" or "erstinstanzliches Gericht",

- in Germany, the presiding judge of a chamber of the "Landgericht",

- in Greece, the "! ISO_7! öïíïiåe¡o áñùôïäéêåßï",

- ! ISO_1! in Spain, the "Juzgado de Primera Instancia",

- in France, the presiding judge of the "tribunal de grande instance",

- in Ireland, the High Court,

- in Italy, the "Corte d'appello",

- in Luxembourg, the presiding judge of the "tribunal d'arrondissement",

- in the Netherlands, the presiding judge of the "arrondissementsrechtbank";

- in Austria, the "Bezirksgericht",

- in Portugal, the "Tribunal de Comarca",

- in Finland, the "käräjäoikeus/tingsrätt",

- in Sweden, the "Svea hovrätt",

- in the United Kingdom:

(a) in England and Wales, the High Court of Justice, or in the case of a maintenance judgment, the Magistrate's Court on transmission by the Secretary of State;

(b) in Scotland, the Court of Session, or in the case of a maintenance judgment, the Sheriff Court on transmission by the Secretary of State;

(c) in Northern Ireland, the High Court of Justice, or in the case of a maintenance judgment, the Magistrate's Court on transmission by the Secretary of State;

(d) in Gibraltar, the Supreme Court of Gibraltar, or in the case of a maintenance judgment, the Magistrates' Court on transmission by the Attorney General of Gibraltar.

ANNEX III

The courts with which appeals referred to in Article 43(2) may be lodged are the following:

- in Belgium,

(a) as regards appeal by the defendant: the "tribunal de première instance" or "rechtbank van eerste aanleg" or "erstinstanzliches Gericht",

(b) as regards appeal by the applicant: the "Cour d'appel" or "hof van beroep",

- in the Federal Republic of Germany, the "Oberlandesgericht",
- in Greece, the "! ISO_7! Åöåôåßï",
- ! ISO_1! in Spain, the "Audiencia Provincial",
- in France, the "cour d'appel",
- in Ireland, the High Court,
- in Italy, the "corte d'appello",
- in Luxembourg, the "Cour supérieure de Justice" sitting as a court of civil appeal,
- in the Netherlands:

(a) for the defendant: the "arrondissementsrechtbank",

(b) for the applicant: the "gerechtshof",

- in Austria, the "Bezirksgericht",
- in Portugal, the "Tribunal de Relaçao",
- in Finland, the "hovioikeus/hovrätt",
- in Sweden, the "Svea hovrätt",
- in the United Kingdom:

(a) in England and Wales, the High Court of Justice, or in the case of a maintenance judgment, the Magistrate's Court;

(b) in Scotland, the Court of Session, or in the case of a maintenance judgment, the Sheriff Court;

(c) in Northern Ireland, the High Court of Justice, or in the case of a maintenance judgment, the Magistrate's Court;

(d) in Gibraltar, the Supreme Court of Gibraltar, or in the case of a maintenance judgment, the Magistrates' Court.

ANNEX IV

The appeals which may be lodged pursuant to Article 44 are the following

- in Belgium, Greece, Spain, France, Italy, Luxembourg and the Netherlands, an appeal in cassation,
- in Germany, a "Rechtsbeschwerde",
- in Ireland, an appeal on a point of law to the Supreme Court,
- in Austria, a "Revisionsrekurs",
- in Portugal, an appeal on a point of law,
- in Finland, an appeal to the "korkein oikeus/högsta domstolen",
- in Sweden, an appeal to the "Högsta domstolen",
- in the United Kingdom, a single further appeal on a point of law.

ANNEX V

Certificate referred to in Articles 54 and 58 of the Regulation on judgments and court settlements

(English, inglés, anglais, inglese,...)

1. Member State of origin

2. Court or competent authority issuing the certificate

2.1. Name

2.2. Address

2.3. Tel./fax/e-mail

3. Court which delivered the judgment/approved the court settlement(1)

3.1. Type of court

3.2. Place of court

4. Judgment/court settlement(2)

4.1. Date

4.2. Reference number

4.3. The parties to the judgment/court settlement(3)

4.3.1. Name(s) of plaintiff(s)

4.3.2. Name(s) of defendant(s)

4.3.3. Name(s) of other party(ies), if any

4.4. Date of service of the document instituting the proceedings where judgment was given in default of appearance

4.5. Text of the judgment/court settlement(4) as annexed to this certificate

5. Names of parties to whom legal aid has been granted

The judgment/court settlement(5) is enforceable in the Member State of origin (Articles 38 and 58 of the Regulation) against:

Name:

Done at ... , date...

Signature and/or stamp...

(1) Delete as appropriate.

(2) Delete as appropriate.

(3) Delete as appropriate.

(4) Delete as appropriate.

(5) Delete as appropriate.

ANNEX VI

Certificate referred to in Article 57(4) of the Regulation on authentic instruments

(English, inglés, anglais, inglese.....)

1. Member State of origin

2. Competent authority issuing the certificate

2.1. Name

2.2. Address

2.3. Tel./fax/e-mail

3. Authority which has given authenticity to the instrument

3.1. Authority involved in the drawing up of the authentic instrument (if applicable)

3.1.1. Name and designation of authority

3.1.2. Place of authority

3.2. Authority which has registered the authentic instrument (if applicable)

3.2.1. Type of authority

3.2.2. Place of authority

4. Authentic instrument

4.1. Description of the instrument

4.2. Date

4.2.1. on which the instrument was drawn up

4.2.2. if different: on which the instrument was registered

4.3. Reference number

4.4. Parties to the instrument

4.4.1. Name of the creditor

4.4.2. Name of the debtor

5. Text of the enforceable obligation as annexed to this certificate

The authentic instrument is enforceable against the debtor in the Member State of origin (Article 57(1) of the Regulation)

Done at ..., date...

Signature and/or stamp...

DOCNUM 32001R0044

AUTHOR Council

FORM	Regulation
TREATY	European Community
TYPDOC	3 ; secondary legislation ; 2001 ; R
PUBREF	Official Journal L 012 , 16/01/2001 P. 0001 - 0023
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INFORCE	2002/03/01=EV
ENDVAL	9999/99/99
LEGBASE	11997E061-PTC..... 11997E067-P1.....
LEGCIT	41968A0927(01)..... 41971A0603(02)..... 31973L0239..... 41978A1009(01)..... 41978A1009(01)..... 41982A1025(01)..... 41982A1025(01)..... 31988L0357..... 41989A0535..... 41989A0535..... 31990L0618..... 11997E005..... 11997E065..... 11997E293..... 11997E299..... 41997A0115(01)..... 41997A0115(01)..... 41998Y0126(01)..... 41998Y0126(02)..... 31999D0468..... 32000R1348.....
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SUB	Approximation of laws ; Justice and home affairs
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MISCINF	CNS 99/0154
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Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

Agreement

between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

THE EUROPEAN COMMUNITY, hereinafter referred to as "the Community",

of the one part, and

THE KINGDOM OF DENMARK, hereinafter referred to as "Denmark",

of the other part,

HAVE AGREED AS FOLLOWS:

Article 1

Aim

1. The aim of this Agreement is to apply the provisions of the Brussels I Regulation and its implementing measures to the relations between the Community and Denmark, in accordance with Article 2(1) of this Agreement.

2. It is the objective of the Contracting Parties to arrive at a uniform application and interpretation of the provisions of the Brussels I Regulation and its implementing measures in all Member States.

3. The provisions of Articles 3(1), 4(1) and 5(1) of this Agreement result from the Protocol on the position of Denmark.

Article 2

Jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

1. The provisions of the Brussels I Regulation, which is annexed to this Agreement and forms part thereof, together with its implementing measures adopted pursuant to Article 74(2) of the Regulation and, in respect of implementing measures adopted after the entry into force of this Agreement, implemented by Denmark as referred to in Article 4 of this Agreement, and the measures adopted pursuant to Article 74(1) of the Regulation, shall under international law apply to the relations between the Community and Denmark.

2. However, for the purposes of this Agreement, the application of the provisions of that Regulation shall be modified as follows:

(a) Article 1(3) shall not apply.

(b) Article 50 shall be supplemented by the following paragraph (as paragraph 2):

"2. However, an applicant who requests the enforcement of a decision given by an administrative authority in Denmark in respect of a maintenance order may, in the Member State addressed, claim the benefits referred to in the first paragraph if he presents a statement from the Danish Ministry of Justice to the effect that he fulfils the financial requirements to qualify for the grant

of complete or partial legal aid or exemption from costs or expenses."

(c) Article 62 shall be supplemented by the following paragraph (as paragraph 2):

"2. In matters relating to maintenance, the expression "court" includes the Danish administrative authorities."

(d) Article 64 shall apply to seagoing ships registered in Denmark as well as in Greece and Portugal.

(e) The date of entry into force of this Agreement shall apply instead of the date of entry into force of the Regulation as referred to in Articles 70(2), 72 and 76 thereof.

(f) The transitional provisions of this Agreement shall apply instead of Article 66 of the Regulation.

(g) In Annex I the following shall be added: "in Denmark: Article 246(2) and (3) of the Administration of Justice Act (lov om rettens pleje)".

(h) In Annex II the following shall be added: "in Denmark, the "byret"".

(i) In Annex III the following shall be added: "in Denmark, the "landsret"".

(j) In Annex IV the following shall be added: "in Denmark, an appeal to the "Højesteret" with leave from the "Procesbevillingsnævnet"".

Article 3

Amendments to the Brussels I Regulation

1. Denmark shall not take part in the adoption of amendments to the Brussels I Regulation and no such amendments shall be binding upon or applicable in Denmark.

2. Whenever amendments to the Regulation are adopted Denmark shall notify the Commission of its decision whether or not to implement the content of such amendments. Notification shall be given at the time of the adoption of the amendments or within 30 days thereafter.

3. If Denmark decides that it will implement the content of the amendments the notification shall indicate whether implementation can take place administratively or requires parliamentary approval.

4. If the notification indicates that implementation can take place administratively the notification shall, moreover, state that all necessary administrative measures enter into force on the date of entry into force of the amendments to the Regulation or have entered into force on the date of the notification, whichever date is the latest.

5. If the notification indicates that implementation requires parliamentary approval in Denmark, the following rules shall apply:

(a) Legislative measures in Denmark shall enter into force on the date of entry into force of the amendments to the Regulation or within 6 months after the notification, whichever date is the latest;

(b) Denmark shall notify the Commission of the date upon which the implementing legislative measures enter into force.

6. A Danish notification that the content of the amendments has been implemented in Denmark, in accordance with paragraphs 4 and 5, creates mutual obligations under international law between Denmark and the Community. The amendments to the Regulation shall then constitute amendments to this Agreement and shall be considered annexed hereto.

7. In cases where:

(a) Denmark notifies its decision not to implement the content of the amendments; or

(b) Denmark does not make a notification within the 30-day time-limit set out in paragraph 2; or

(c) Legislative measures in Denmark do not enter into force within the time-limits set out in paragraph 5,

this Agreement shall be considered terminated unless the parties decide otherwise within 90 days or, in the situation referred to under (c), legislative measures in Denmark enter into force within the same period. Termination shall take effect three months after the expiry of the 90-day period.

8. Legal proceedings instituted and documents formally drawn up or registered as authentic instruments before the date of termination of the Agreement as set out in paragraph 7 are not affected hereby.

Article 4

Implementing measures

1. Denmark shall not take part in the adoption of opinions by the Committee referred to in Article 75 of the Brussels I Regulation. Implementing measures adopted pursuant to Article 74(2) of that Regulation shall not be binding upon and shall not be applicable in Denmark.

2. Whenever implementing measures are adopted pursuant to Article 74(2) of the Regulation, the implementing measures shall be communicated to Denmark. Denmark shall notify the Commission of its decision whether or not to implement the content of the implementing measures. Notification shall be given upon receipt of the implementing measures or within 30 days thereafter.

3. The notification shall state that all necessary administrative measures in Denmark enter into force on the date of entry into force of the implementing measures or have entered into force on the date of the notification, whichever date is the latest.

4. A Danish notification that the content of the implementing measures has been implemented in Denmark creates mutual obligations under international law between Denmark and the Community. The implementing measures will then form part of this Agreement.

5. In cases where:

(a) Denmark notifies its decision not to implement the content of the implementing measures; or

(b) Denmark does not make a notification within the 30-day time-limit set out in paragraph 2,

this Agreement shall be considered terminated unless the parties decide otherwise within 90 days. Termination shall take effect three months after the expiry of the 90-day period.

6. Legal proceedings instituted and documents formally drawn up or registered as authentic instruments before the date of termination of the Agreement as set out in paragraph 5 are not affected hereby.

7. If in exceptional cases the implementation requires parliamentary approval in Denmark, the Danish notification under paragraph 2 shall indicate this and the provisions of Article 3(5) to (8) shall apply.

8. Denmark shall notify the Commission of texts amending the items set out in Article 2(2)(g) to (j) of this Agreement. The Commission shall adapt Article 2(2)(g) to (j) accordingly.

Article 5

International agreements which affect the Brussels I Regulation

1. International agreements entered into by the Community based on the rules of the Brussels I Regulation shall not be binding upon and shall not be applicable in Denmark.

2. Denmark will abstain from entering into international agreements which may affect or alter the scope of the Brussels I Regulation as annexed to this Agreement unless it is done in agreement with the Community and satisfactory arrangements have been made with regard to the relationship between this Agreement and the international agreement in question.

3. When negotiating international agreements that may affect or alter the scope of the Brussels I Regulation as annexed to this Agreement, Denmark will coordinate its position with the Community and will abstain from any actions that would jeopardise the objectives of a Community position within its sphere of competence in such negotiations.

Article 6

Jurisdiction of the Court of Justice of the European Communities in relation to the interpretation of the Agreement

1. Where a question on the validity or interpretation of this Agreement is raised in a case pending before a Danish court or tribunal, that court or tribunal shall request the Court of Justice to give a ruling thereon whenever under the same circumstances a court or tribunal of another Member State of the European Union would be required to do so in respect of the Brussels I Regulation and its implementing measures referred to in Article 2(1) of this Agreement.

2. Under Danish law, the courts in Denmark shall, when interpreting this Agreement, take due account of the rulings contained in the case law of the Court of Justice in respect of provisions of the Brussels Convention, the Brussels I Regulation and any implementing Community measures.

3. Denmark may, like the Council, the Commission and any Member State, request the Court of Justice to give a ruling on a question of interpretation of this Agreement. The ruling given by the Court of Justice in response to such a request shall not apply to judgments of courts or tribunals of the Member States which have become res judicata.

4. Denmark shall be entitled to submit observations to the Court of Justice in cases where a question has been referred to it by a court or tribunal of a Member State for a preliminary ruling concerning the interpretation of any provision referred to in Article 2(1).

5. The Protocol on the Statute of the Court of Justice of the European Communities and its Rules of Procedure shall apply.

6. If the provisions of the Treaty establishing the European Community regarding rulings by the Court of Justice are amended with consequences for rulings in respect of the Brussels I Regulation, Denmark may notify the Commission of its decision not to apply the amendments in respect of this Agreement. Notification shall be given at the time of the entry into force of the amendments or within 60 days thereafter.

In such a case this Agreement shall be considered terminated. Termination shall take effect three months after the notification.

7. Legal proceedings instituted and documents formally drawn up or registered as authentic instruments before the date of termination of the Agreement as set out in paragraph 6 are not affected hereby.

Article 7

Jurisdiction of the Court of Justice of the European Communities in relation to compliance with the Agreement

1. The Commission may bring before the Court of Justice cases against Denmark concerning non-compliance with any obligation under this Agreement.

2. Denmark may bring a complaint before the Commission as to the non-compliance by a Member State of its obligations under this Agreement.

3. The relevant provisions of the Treaty establishing the European Community governing proceedings before the Court of Justice as well as the Protocol on the Statute of the Court of Justice of the European Communities and its Rules of Procedure shall apply.

Article 8

Territorial application

1. This Agreement shall apply to the territories referred to in Article 299 of the Treaty establishing the European Community.

2. If the Community decides to extend the application of the Brussels I Regulation to territories currently governed by the Brussels Convention, the Community and Denmark shall cooperate in order to ensure that such an application also extends to Denmark.

Article 9

Transitional provisions

1. This Agreement shall apply only to legal proceedings instituted and to documents formally drawn up or registered as authentic instruments after the entry into force thereof.

2. However, if the proceedings in the Member State of origin were instituted before the entry into force of this Agreement, judgments given after that date shall be recognised and enforced in accordance with this Agreement,

(a) if the proceedings in the Member State of origin were instituted after the entry into force of the Brussels or the Lugano Convention both in the Member State of origin and in the Member State addressed;

(b) in all other cases, if jurisdiction was founded upon rules which accorded with those provided for either in this Agreement or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted.

Article 10

Relationship to the Brussels I Regulation

1. This Agreement shall not prejudice the application by the Member States of the Community other than Denmark of the Brussels I Regulation.

2. However, this Agreement shall in any event be applied:

(a) in matters of jurisdiction, where the defendant is domiciled in Denmark, or where Article 22 or 23 of the Regulation, applicable to the relations between the Community and Denmark by virtue of Article 2 of this Agreement, confer jurisdiction on the courts of Denmark;

(b) in relation to a lis pendens or to related actions as provided for in Articles 27 and 28 of the Brussels I Regulation, applicable to the relations between the Community and Denmark by virtue of Article 2 of this Agreement, when proceedings are instituted in a Member State other than Denmark and in Denmark;

(c) in matters of recognition and enforcement, where Denmark is either the State of origin or the State addressed.

Article 11

Termination of the agreement

1. This Agreement shall terminate if Denmark informs the other Member States that it no longer wishes to avail itself of the provisions of Part I of the Protocol on the position of Denmark, in accordance with Article 7 of that Protocol.

2. This Agreement may be terminated by either Contracting Party giving notice to the other Contracting Party. Termination shall be effective six months after the date of such notice.

3. Legal proceedings instituted and documents formally drawn up or registered as authentic instruments before the date of termination of the Agreement as set out in paragraph 1 or 2 are not affected hereby.

Article 12

Entry into force

1. The Agreement shall be adopted by the Contracting Parties in accordance with their respective procedures.

2. The Agreement shall enter into force on the first day of the sixth month following the notification by the Contracting Parties of the completion of their respective procedures required for this purpose.

Article 13

Authenticity of texts

This Agreement is drawn up in duplicate in the Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovene, Slovak, Spanish and Swedish languages, each of these texts being equally authentic.

Hecho en Bruselas, el diecinueve de octubre del dos mil cinco.

V Bruselu dne devatenactého íjna dva tisíce pt.

Udfærdiget i Bruxelles den nittende oktober to tusind og fem.

Geschehen zu Brüssel am neunzehnten Oktober zweitausendfünf.

Kahe tuhande viienda aasta oktoobrikuu üheksateistkümnendal päeval Brüsselis.

, .

Done at Brussels on the nineteenth day of October in the year two thousand and five.

Fait à Bruxelles, le dix-neuf octobre deux mille cinq.

Fatto a Bruxelles, addi diciannove ottobre duemilacinque.

Brisel, divtksto piekt gada devipadsmitaj oktobr.

Priimta du tkstaniai penkt met spalio devyniolikt dien Briuselyje.

Kelt Brüsszelben, a kettezer ötödik év október tizenkilencedik napjan.

Magmul fi Brussel, fid-dsatax jum ta' Ottubru tas-sena elfejn u amsa.

Gedaan te Brussel, de negentiende oktober tweeduizend vijf.

Sporzdzono w Brukseli dnia dziewitnastego padziernika roku dwa tysice pitego.

Feito em Bruxelas, em dezanove de Outubro de dois mil e cinco.

V Bruseli da devätnasteho oktobra dvetisícpä.

V Bruslju, devetnajstega oktobra leta dva tiso pet.

Tehty Brysselissä yhdeksäntenätoista päivänä lokakuuta vuonna kaksituhattaviisi.

Som skedde i Bryssel den nittonde oktober tjugohundrafem.

Por la Comunidad Europea

Za Evropské spoleenství

For Det Europæiske Fællesskab

Für die Europäische Gemeinschaft

Euroopa Ühenduse nimel

For the European Community

Pour la Communauté européenne

Per la Comunità europea

Eiropas Kopienas vrd

Europos bendrijos vardu

Az Europai Közösség részérl

Gall-Komunità Ewropea

Voor de Europese Gemeenschap

W imieniu Wspolonoty Europejskiej

Pela Comunidade Europeia

Za Europske spoloenstvo

Za Evropsko skupnost

Euroopan yhteisön puolesta

På Europeiska gemenskapens vägnar

Por el Reino de Dinamarca

Za Danské kralovství

For Kongeriget Danmark

Für das Königreich Dänemark

Taani Kuningriigi nimel

For the Kingdom of Denmark

Pour le Royaume de Danemark

Per il Regno di Danimarca

Dnijas Karalistes vrd

Danijos Karalysts vardu

A Dan Kiralysag részérl

Gar-Renju tad-Danimarka

Voor het Koninkrijk Denemarken

W imieniu Krolestwa Danii

Pelo Reino da Dinamarca

Za Danske kraovstvo

Za Kraljevino Dansko

Tanskan kuningaskunnan puolesta

På Konungariket Danmarks vägnar

[1] OJ L 299, 31.12.1972, p. 32; OJ L 304, 30.10.1978, p. 1; OJ L 388, 31.12.1982, p. 1; OJ L 285, 3.10.1989, p. 1; OJ C 15, 15.1.1997, p. 1. For a consolidated text, see OJ C 27, 26.1.1998, p. 1.

[2] OJ L 319, 25.11.1988, p. 9.

[3] OJ L 12, 16.1.2001, p. 1. Regulation as last amended by Commission Regulation (EC) No 2245/2004 (OJ L 381, 28.12.2004, p. 10).

[4] OJ L 204, 2.8.1975, p. 28; OJ L 304, 30.10.1978, p. 1; OJ L 388, 31.12.1982, p. 1; OJ L 285, 3.10.1989, p. 1; OJ C 15, 15.1.1997, p. 1. For a consolidated text see OJ C 27, 26.1.1998, p. 28.

ANNEX

Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, as amended by Commission Regulation (EC) No 1496/2002 of 21 August 2002 amending Annex I (the rules of jurisdiction referred to in Article 3(2) and Article 4(2)) and Annex II (the list of competent courts and authorities) to Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters and by Commission Regulation (EC) No 2245/2004 of 27 December 2004 amending Annexes I, II, III and IV to Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

DOCNUM	22005A1116(01)
AUTHOR	European Community ; Denmark
FORM	Agreement
TREATY	European Community
PUBREF	OJ L 299, 16.11.2005, p. 62-70 (ES, CS, DA, DE, ET, EL, EN, FR, IT, LV, LT, HU, NL, PL, PT, SK, SL, FI, SV) OJ L 173M , 27.6.2006, p. 128-136 (MT)
DOC	2005/10/19
INFORCE	2007/07/01=EV
ENDVAL	9999/99/99
SIGNED	2005/10/19=BRUXELLES
LEGBASE	12002E061 12002E300 12002E300
LEGCIT	41968A0927(01) 41988A0592 11997D/PRO/05 32001R0044 12002E299 12002E068 41971A0603(02)
MODIFIES	32001R0044 Amendment

MODIFIED	Relation 32005D0790 Adopted by 32006D0325 from 27/04/2006
SUBSPREP	Relation 22007X0404(02)
SUB	Justice and home affairs
REGISTER	19200000
AUTLANG	The official languages ; German ; English ; Danish ; Spanish ; Estonian ; Finnish ; French ; Greek ; Hungarian ; Italian ; Latvian ; Lithuanian ; Maltese ; Dutch ; Polish ; Portuguese ; Slovenian ; Slovak ; Swedish ; Czech
MISCINF	DEN/PREAV 6 MOISS
DATES	of document: 19/10/2005 of effect: 01/07/2007; Entry into force See Art 12.2 + 22007X0404(02) of signature: 19/10/2005; Brussels end of validity: 99/99/9999

Information concerning the date of entry into force of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

Information concerning the date of entry into force of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

The Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [1] signed in Brussels on 19 October 2005 will enter into force on 1 July 2007 in accordance with Article 12(2) of the Agreement.

[1] OJ L 299, 16.11.2005, p. 62.

DOCNUM	22007X0404(02)
AUTHOR	Council
FORM	Info
TREATY	European Community
PUBREF	OJ L 94, 4.4.2007, p. 70-70 (BG, ES, CS, DA, DE, ET, EL, EN, FR, IT, LV, LT, HU, NL, PL, PT, RO, SK, SL, FI, SV) OJ L 4M , 8.1.2008, p. 324-324 (MT)
PUB	2007/04/04
DOC	2007/04/04
ENDVAL	9999/99/99
EARLACTS	22005A1116(01) Relation
SUB	Justice and home affairs
REGISTER	19200000
DATES	of document: 04/04/2007; Date of publication end of validity: 99/99/9999

2006/325/EC: Council Decision of 27 April 2006 concerning the conclusion of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

Council Decision

of 27 April 2006

concerning the conclusion of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

(2006/325/EC)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) thereof, in conjunction with the first sentence of the first subparagraph of Article 300(2) and the first subparagraph of Article 300(3) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament [1],

Whereas:

(1) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, Denmark is not bound by the provisions of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2], nor subject to their application.

(2) The Commission has negotiated an Agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of Regulation (EC) No 44/2001.

(3) The Agreement was signed, on behalf of the European Community, on 19 October 2005, subject to its possible conclusion at a later date, in accordance with Council Decision 2005/790/EC of 20 September 2005 [3].

(4) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community, the United Kingdom and Ireland are taking part in the adoption and application of this Decision.

(5) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, Denmark is not taking part in the adoption of this Decision and is not bound by it or subject to its application.

(6) The Agreement should be approved,

HAS DECIDED AS FOLLOWS:

Article 1

The Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters is hereby approved on behalf of the Community.

Article 2

The President of the Council is hereby authorised to designate the person empowered to make the notification provided for in Article 12(2) of the Agreement.

Done at Luxembourg, 27 April 2006.

For the Council

The President

L. Prokop

[1] Opinion delivered on 23 March 2006 (not yet published in the Official Journal).

[2] OJ L 12, 16.1.2001, p. 1. Regulation as last amended by Commission Regulation (EC) No 2245/2004 (OJ L 381, 28.12.2004, p. 10).

[3] OJ L 299, 16.11.2005, p. 61.

DOCNUM	32006D0325
AUTHOR	Council
FORM	Decision sui generis
TREATY	European Community
PUBREF	OJ L 120, 5.5.2006, p. 22-22 (ES, CS, DA, DE, ET, EL, EN, FR, IT, LV, LT, HU, NL, PL, PT, SK, SL, FI, SV) OJ L 294M , 25.10.2006, p. 8-8 (MT)
PUB	2006/05/05
DOC	2006/05/27
INFORCE	2006/04/27=EV
ENDVAL	9999/99/99
LEGBASE	12002E061 12002E300 12002E300
LEGCIT	11997D/PRO/05 32001R0044 32005D0790

11997D/PRO/04

MODIFIES	22005A1116(01) Adoption from 27/04/2006 52005PC0145(02) Adoption
SUB	Justice and home affairs
REGISTER	19200000
PREPWORK	PR;COMM;CO 2005/0145 FIN PCONS;; AV ;PE;RENDU 23/03/2006
MISCINF	CNS 2005/0055 N/APPL DK
DATES	of document: 27/05/2006 of effect: 27/04/2006; Entry into force Date of document end of validity: 99/99/9999

52005PC0145(02)
OC>

Proposal for a Council Decision concerning the conclusion of the Agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of Council Regulation (EC) No 44/2001 on jurisdiction and the recognitions and enforcement of judgments in civil and commercial matters

[pic] ¦ COMMISSION OF THE EUROPEAN COMMUNITIES ¦

Brussels, 15.4.2005

COM(2005) 145 final

2005/0055 (CNS)

Proposal for a

COUNCIL DECISION

concerning the signing of the Agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of Council Regulation (EC) No 44/2001 on jurisdiction and the recognitions and enforcement of judgments in civil and commercial matters

Proposal for a

COUNCIL DECISION

concerning the conclusion of the Agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of Council Regulation (EC) No 44/2001 on jurisdiction and the recognitions and enforcement of judgments in civil and commercial matters

(presented by the Commission)

EXPLANATORY MEMORANDUM

1. Political and legal background

Pursuant to Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on the European Union and the Treaty establishing the European Community, Denmark does not participate in Title IV of the Treaty. As a consequence, Community instruments adopted in the field of, among others, judicial cooperation in civil matters are not binding upon or applicable in Denmark.

One of these Community instruments is Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. This Regulation has replaced the Brussels Convention of 1968 on the same matter, to which Denmark is a party. The Regulation contains revised and modernized rules of the Brussels Convention and applies to all Member States except Denmark; the United Kingdom and Ireland having exercised their right to opt in.

The non-application of Regulation 44/2001 in Denmark results in a most unsatisfactory legal situation: Not only does Denmark continue to apply the old rules of the Brussels Convention, but also all other Member States have to apply these rules, i.e. a set of rules different from the one they use in their mutual relations, when it comes to the recognition and enforcement of Danish decisions. This constitutes a step backwards given that prior to the entry into force of Regulation 44/2001 the rules of the Brussels Convention applied uniformly in all Member States. The current situation therefore jeopardizes the uniformity and legal certainty of the Community rules.

Denmark expressed at several occasions its interest to participate in the new regime. After in depth discussions, the Commission accepted to negotiate parallel agreements with Denmark, provided that the following conditions were fulfilled: Such a solution would have to be of an exceptional

nature and apply for a transitional period only, the participation of Denmark in the Community regime would have to be fully in the interests of the Community and its citizens and the requirements imposed on Denmark would have to be identical to those imposed on all Member States, so as to ensure that rules with the same content are applied in Denmark and in the other Member States.

In view of the situation outlined above, the Commission considered it to be in the Community interest to extend to Denmark the provisions of Regulations 44/2001 and Council Regulation (EC) No 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, which is closely linked to Regulation 44/2001. The agreement extending the provisions of Regulation 1348/2000 to Denmark is the subject matter of a separate Council decision.

The Commission presented on 28th June 2002 a recommendation for a Council Decision authorizing the Commission to open negotiations for the conclusion of two agreements between the European Community and Denmark, extending both Regulation 44/2001 and Regulation 1348/2000 to Denmark.

The Council decided on 8 May 2003 to exceptionally authorize the Commission to negotiate an agreement with Denmark with the view to make the provisions of Regulation 44/2001 as well as the provisions of Regulation 1348/2000 applicable to Denmark under international law.

2. Results of the Negotiations

The Commission negotiated the parallel agreement extending to Denmark the provisions of Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters in accordance with the Council's negotiating directives, carefully ensuring that rights and obligations of Denmark under this agreement correspond to rights and obligations of the other Member States.

As a result, the parallel agreement contains, in particular, the following provisions:

- appropriate rules on the role of the Court of Justice to ensure the uniform interpretation of the instrument applied by the parallel agreement between Denmark and the other Member States;

- a mechanism to enable Denmark to accept future amendments by the Council to the basic instrument and the future implementing measures to be adopted under Article 202 of the EC Treaty;

- a clause providing that the agreement is considered terminated if Denmark refuses to accept such future amendments and implementing measures;

- rules specifying Denmark's obligations in negotiations with third countries for agreements concerning matters covered by the parallel agreement;

- the possibility of denouncing the parallel agreement by giving notice to the other Contracting Party.

3. Conclusions

In view of the positive outcome of the negotiations, the Commission recommends that the Council adopt the following two decisions:

Firstly, a decision concerning the signing of the Agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of Regulation 44/2001 on jurisdiction and the recognitions and enforcement of judgments in civil and commercial matters

Secondly, a decision concerning the conclusion by the European Community of the Agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of Regulation 44/2001 on jurisdiction and the recognitions and enforcement of judgments in civil and commercial matter.

B3>**52005PC0145(02)**

Proposal for a

COUNCIL DECISION

concerning the signing of the Agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of Council Regulation (EC) No 44/2001 on jurisdiction and the recognitions and enforcement of judgments in civil and commercial matters

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and in conjunction with the first subparagraph of Article 300(2) thereof,

Having regard to the proposal from the Commission[1],

Whereas:

1. In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and the Treaty establishing the European Community, Denmark is not bound by the provisions of Regulation (EC) No 44/2001[2], nor subject to their application.

2. By Decision of 8 May 2003, the Council authorised the Commission to negotiate an agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of the a

3. bove-mentioned Regulation.

4. The Commission has negotiated such agreement, on behalf of the Community, with the Kingdom of Denmark.

5. The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the TEU and the TEC, are taking part in the adoption and application of this Decision.

6. In accordance with Articles 1 and 2 of the above-mentioned Protocol on the position of Denmark, Denmark is not taking part in the adoption and application of this Decision.

7. The Agreement, initialled at Brussels on 17 January 2005, should be signed.

HAS DECIDED AS FOLLOWS:

Sole Article

Subject to a possible conclusion, the President of the Council is hereby authorised to designate the person(s) empowered to sign, on behalf of the European Community, the Agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Done at Brussels,

For the Council

The President

2005/0055 (CNS)

Proposal for a

COUNCIL DECISION

concerning the conclusion of the Agreement between the European Community and the Kingdom of Denmark

B4>**52005PC0145(02)**

extending to Denmark the provisions of Council Regulation (EC) No 44/2001 on jurisdiction and the recognitions and enforcement of judgments in civil and commercial matters

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c), in conjunction with the first subparagraph of Article 300(2) and the first subparagraph of Article 300 (3) thereof,

Having regard to the proposal from the Commission[3],

Having regard to the opinion of the European Parliament[4],

Whereas:

(1) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and the Treaty establishing the European Community, Denmark is not bound by the provisions of Regulation (EC) No 44/2001[5], nor subject to their application.

(2) The Commission has negotiated an agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of the above-mentioned Regulation.

(3) The Agreement was signed, on behalf of the European Community, on .....2005, subject to its possible conclusion at a later date, in accordance with Decision.../.../EC of the Council of [.....].

(4) The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the TEU and the TEC, are taking part in the adoption and application of this Decision.

(5) In accordance with Articles 1 and 2 of the above-mentioned Protocol on the position of Denmark, Denmark is not taking part in the adoption and application of this Decision.

(6) This Agreement should be approved.

HAS DECIDED AS FOLLOWS:

Article 1

The Agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters is approved on behalf of the Community.

The text of the Agreement is attached to this Decision.

Article 2

The President of the Council is hereby authorised to designate the person empowered to make the notification provided for in Article 12(2) of the Agreement.

Done at Brussels,

For the Council

The President

B5>**52005PC0145(02)**

ANNEX

AGREEMENT

between the European Community and

the Kingdom of Denmark

on

jurisdiction and the recognition and enforcement

of judgments in civil and commercial matters

THE EUROPEAN COMMUNITY,

hereinafter referred to as the Community, of the one part, and

THE KINGDOM OF DENMARK,

hereinafter referred to as Denmark, of the other part,

1. DESIRING to unify the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities with a view to rapid and simple recognition and enforcement of judgments within the Community,

2. WHEREAS the Member States on 27 September 1968, acting under Article 293, fourth indent, of the Treaty establishing the European Community, concluded the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by Conventions on the Accession of the New Member States to that Convention (the "Brussels Convention").[6] On 16 September 1988 Member States and EFTA States concluded the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters[7], which is a parallel Convention to the 1968 Brussels Convention.

3. WHEREAS the main content of the Brussels Convention has been taken over in the Council Regulation No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[8] (the Brussels I Regulation),

4. REFERRING to the Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty establishing the European Community (the Protocol on the position of Denmark) pursuant to which the Brussels I Regulation shall not be binding upon or applicable in Denmark,

5. STRESSING that a solution to the unsatisfactory legal situation arising from differences in applicable rules on jurisdiction, recognition and enforcement of judgments within the Community must be found,

6. DESIRING that the provisions of the Brussels I Regulation, future amendments hereto and the implementing measures relating to it should under international law apply to the relations between the Community and Denmark being a Member State with a special position with respect to Title IV of the Treaty establishing the European Community,

7. STRESSING that continuity between the Brussels Convention and this Agreement should be ensured, and that transitional provisions as in the Brussels I Regulation should be applied to this agreement as well. The same need for continuity applies as regards the interpretation of the Brussels Convention by the Court of Justice of the European Communities and the 1971 Protocol[9] which should remain applicable also to cases already pending when this Agreement enters into force,

8. STRESSING that the Brussels Convention also continues to apply to the territories of the Member States which fall within the territorial scope of that Convention and which are excluded from this Agreement,

9. STRESSING the importance of proper co-ordination between the Community and Denmark with regard to the negotiation and conclusion of international agreements that may affect or alter the scope of the Brussels I Regulation,

10. STRESSING that Denmark should seek to join international agreements entered into by the Community where Danish participation in such agreements is relevant for the coherent application of the Brussels I Regulation and this Agreement,

11. STATING that the Court of Justice of the European Communities should have jurisdiction in order to secure the uniform application and interpretation of this Agreement including the provisions of the Brussels I Regulation and any implementing Community measures forming part of this Agreement,

12. REFERRING to the jurisdiction conferred to the Court of Justice of the European Communities pursuant to Article 68(1) of the Treaty establishing the European Community to give rulings on preliminary questions relating to the validity and interpretation of acts of the institutions of the Community based on Title IV of the Treaty, including the validity and interpretation of this Agreement, and to the circumstance that this provision shall not be binding upon or applicable in Denmark, as results from the Protocol on the position of Denmark,

13. CONSIDERING that the Court of Justice of the European Communities should have jurisdiction under the same conditions to give preliminary rulings on questions concerning the validity and interpretation of this Agreement which are raised by a Danish court or tribunal , and that Danish courts and tribunals should therefore request preliminary rulings under the same conditions as courts and tribunals of other Member States in respect of the interpretation of the Brussels I Regulation and its implementing measures,

14. REFERRING to the provision that, pursuant to Article 68(3) of the Treaty establishing the European Community, the Council of the European Union, the European Commission and the Member States may request the Court of Justice of the European Communities to give a ruling on the interpretation of acts of the institutions of the Community based on Title IV of the Treaty, including the interpretation of this Agreement, and the circumstance that this provision shall not be binding upon or applicable in Denmark, as results from the Protocol on the position of Denmark,

15. CONSIDERING that Denmark should, under the same conditions as other Member States in respect of the Brussels I Regulation and its implementing measures, be accorded the possibility to request the Court of Justice of the European Communities to give rulings on questions relating to the interpretation of this Agreement,

16. STRESSING that under Danish law the courts in Denmark should - when interpreting this Agreement including the provisions of the Brussels I Regulation and any implementing Community measures forming part of this Agreement - take due account of the rulings contained in the case law of the Court of Justice of the European Communities and of the courts of the Member States of the European Communities in respect of provisions of the Brussels Convention, the Brussels I Regulation and any implementing Community measures,

17. CONSIDERING that it should be possible to request the Court of Justice of the European Communities to rule on questions relating to compliance with obligations under this Agreement pursuant to the provisions of the Treaty establishing the European Community governing proceedings before the Court,

18. WHEREAS, by virtue of Article 300(7) of the Treaty establishing the European Community,

this Agreement binds Member States; it is therefore appropriate that Denmark, in the case of non-compliance by a Member State, should be able to seize the Commission as guardian of the Treaty,

HAVE AGREED AS FOLLOWS:

ARTICLE 1

Aim

1. The aim of this Agreement is to apply the provisions of Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Brussels I Regulation) and its implementing measures to the relations between the Community and Denmark, in accordance with Article 2(1).

2. It is the objective of the Contracting Parties to arrive at a uniform application and interpretation of the provisions of the Brussels I Regulation and its implementing measures in all Member States.

3. The provisions of Articles 3(1), 4(1) and 5(1) of this Agreement result from the Protocol on the position of Denmark.

ARTICLE 2

Jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

1. The provisions of the Brussels I Regulation, which is annexed to this Agreement and forms part thereof, together with its implementing measures adopted pursuant to Article 74(2) of the Regulation and - in respect of implementing measures adopted after the entry into force of this Agreement - implemented by Denmark as referred to in Article 4 of this Agreement, and the measures adopted pursuant to Article 74(1) of the Regulation, shall under international law apply to the relations between the Community and Denmark.

2. However, for the purposes of this Agreement, the application of the provisions of that Regulation shall be modified as follows:

8. Article 1(3) shall not apply.

9. Article 50 shall be supplemented by the following paragraph (as paragraph 2):2. However, an applicant who requests the enforcement of a decision given by an administrative authority in Denmark in respect of a maintenance order may, in the Member State addressed, claim the benefits referred to in the first paragraph if he presents a statement from the Danish Ministry of Justice to the effect that he fulfils the financial requirements to qualify for the grant of complete or partial legal aid or exemption from costs or expenses.

10. Article 62 shall be supplemented by the following paragraph (as paragraph 2):2. In matters relating to maintenance, the expression 'court' includes the Danish administrative authorities.

11. Article 64 shall apply to seagoing ships registered in Denmark as well as in Greece and Portugal.

12. The date of entry into force of this Agreement shall apply instead of the date of entry into force of the Regulation as referred to in Articles 70(2), 72 and 76 thereof.

13. The transitional provisions of this Agreement shall apply instead of Art. 66 of the Regulation.

14. In Annex I the following shall be added: in Denmark: Article 246(2) and (3) of the Administration

B8>**52005PC0145(02)**

of Justice Act (lov om rettens pleje).

15. In Annex II the following shall be added: in Denmark, the byret '.

16. In Annex III the following shall be added: in Denmark, the landsret '.

17. In Annex IV the following shall be added: in Denmark, an appeal to the Højesteret ' with leave from the Procesbevillingsnævnet '.

ARTICLE 3

Amendments to the Brussels I Regulation

1. Denmark shall not take part in the adoption of amendments to the Brussels I Regulation and no such amendments shall be binding upon or applicable in Denmark.

2. Whenever amendments to the Regulation are adopted Denmark shall notify the Commission of its decision whether or not to implement the content of such amendments. Notification shall be given at the time of the adoption of the amendments or within 30 days hereafter.

3. If Denmark decides that it will implement the content of the amendments the notification shall indicate whether implementation can take place administratively or requires parliamentary approval.

4. If the notification indicates that implementation can take place administratively the notification shall, moreover, state that all necessary administrative measures enter into force on the date of entry into force of the amendments to the Regulation or have entered into force on the date of the notification, whichever date is the latest.

5. If the notification indicates that implementation requires parliamentary approval in Denmark the following rules shall apply:

18. Legislative measures in Denmark shall enter into force on the date of entry into force of the amendments to the Regulation or within 6 months after the notification, whichever date is the latest;

19. Denmark shall notify the Commission of the date upon which the implementing legislative measures enter into force.

6. A Danish notification that the content of the amendments has been implemented in Denmark, cf. paragraph 4 and 5, creates mutual obligations under international law between Denmark and the Community. The amendments to the Regulation shall then constitute amendments to this Agreement and shall be considered annexed hereto.

7. In case:

20. Denmark notifies its decision not to implement the content of the amendments; or

21. Denmark does not make a notification within the 30 days time limit set out in paragraph 2; or

22. Legislative measures in Denmark do not enter into force within the time limits set out in paragraph 5;

this Agreement shall be considered terminated unless the parties decide otherwise within 90 days or, in the situation referred to under c, legislative measures in Denmark enter into force within the same period. Termination shall take effect 3 months after the expiry of the 90 days period.

8. Legal proceedings instituted and documents formally drawn up or registered as authentic instruments before the date of termination of the Agreement as set out in paragraph 7 are not affected hereby.

ARTICLE 4

Implementing measures

1. Denmark shall not take part in the adoption of opinions by the Committee referred to in Article 75 of the Brussels I Regulation. Implementing measures adopted pursuant to Article 74(2) shall not be binding upon and shall not be applicable in Denmark.

2. Whenever implementing measures are adopted pursuant to Article 74(2) of the Regulation, the implementing measures shall be communicated to Denmark. Denmark shall notify the Commission of its decision whether or not to implement the content of the implementing measures. Notification shall be given upon receipt of the implementing measures or within 30 days hereafter.

3. The notification shall state that all necessary administrative measures in Denmark enter into force on the date of entry into force of the implementing measures or have entered into force on the date of the notification, whichever date is the latest.

4. A Danish notification that the content of the implementing measures has been implemented in Denmark creates mutual obligations under international law between Denmark and the Community. The implementing measures will then form part of this Agreement.

5. In case:

23. Denmark notifies its decision not to implement the implementing measures; or

24. Denmark does not make a notification within the 30 days time limit set out in paragraph 2;

this Agreement shall be considered terminated unless the parties decide otherwise within 90 days. Termination shall take effect 3 months after the expiry of the 90 days period.

6. Legal proceedings instituted and documents formally drawn up or registered as authentic instruments before the date of termination of the Agreement as set out in paragraph 5 are not affected hereby.

7. If in exceptional cases the implementation requires parliamentary approval in Denmark, the Danish notification under paragraph 2 shall indicate this and the provisions of Article 3(5)-(8) shall apply.

8. Denmark shall notify the Commission of texts amending the items set out in Article 2(2)(f)-(i) of this Agreement. The Commission shall adapt Article 2(2)(f)-(i) accordingly.

ARTICLE 5

International agreements which affect the Agreement

1. International agreements entered into by the Community based on the rules of the Brussels I Regulation shall not be binding upon and shall not be applicable in Denmark.

2. Denmark will abstain from entering into international agreements which may affect or alter the scope of the Brussels I Regulation as annexed to this Agreement unless it is done in agreement with the Community and satisfactory arrangements have been made with regard to the relationship between this Agreement and the international agreement in question.

3. When negotiating international agreements that may affect or alter the scope of the Brussels I Regulation as annexed to this Agreement , Denmark will co-ordinate its position with the Community and will abstain from any actions that would jeopardise the objectives of a Community position within its sphere of competence in such negotiations.

ARTICLE 6

Jurisdiction of the Court of Justice of the European Communities in relation to the interpretation of the Agreement

1. Where a question on the validity or interpretation of this Agreement is raised in a case pending before a Danish court or tribunal, that court or tribunal shall request the Court of Justice to give a ruling thereon whenever under the same circumstances a court or tribunal of another Member State of the European Union would be required to do so in respect of the Brussels I Regulation and its implementing measures referred to in Article 2(1).

2. Under Danish law, the courts in Denmark shall, when interpreting this Agreement, take due account of the rulings contained in the case law of the Court of Justice in respect of provisions of the Brussels Convention, the Brussels I Regulation and any implementing Community measures.

3. Denmark may, like the Council, the Commission and any Member State, request the Court of Justice to give a ruling on a question of interpretation of this Agreement. The ruling given by the Court of Justice in response to such a request shall not apply to judgments of courts or tribunals of the Member States which have become res judicata.

4. Denmark shall be entitled to submit observations to the Court of Justice in cases where a question has been referred to it by a court or tribunal of a Member State for a preliminary ruling concerning the interpretation of any provision referred to in Article 2(1).

5. The Protocol on the Statute of the Court of Justice of the European Communities and its Rules of Procedure shall apply.

6. If the provisions of the Treaty establishing the European Community regarding rulings by the Court of Justice are amended with consequences for rulings in respect of the Brussels I Regulation, Denmark may notify the Commission of its decision not to apply the amendments in respect of this Agreement. Notification shall be given at the time of the entry into force of the amendments or within 60 days hereafter.

In such a case this Agreement shall be considered terminated. Termination shall take effect 3 months after the notification.

7. Legal proceedings instituted and documents formally drawn up or registered as authentic instruments before the date of termination of the Agreement as set out in paragraph 6 are not affected hereby.

ARTICLE 7

Jurisdiction of the Court of Justice of the European Communities in relation to compliance with the Agreement

1. The Commission may bring before the Court of Justice cases against Denmark concerning non-compliance with any obligation under this Agreement.

2. Denmark may bring a complaint to the Commission as to the non-compliance by a Member State of its obligations by virtue of this Agreement.

3. The relevant provisions of the Treaty establishing the European Community governing proceedings before the Court of Justice as well as the Protocol on the Statute of the Court of Justice of the European Communities and its Rules of Procedure shall apply.

ARTICLE 8

Territorial application

1. This Agreement shall apply to the territories referred to in Article 299 of the Treaty establishing the European Community.

2. If the Community decides to extend the application of the Brussels I Regulation to territories currently governed by the Brussels Convention, the Community and Denmark shall cooperate in order to ensure that such an application also extends to Denmark.

ARTICLE 9

Transitional provisions

1. This Agreement shall apply only to legal proceedings instituted and to documents formally drawn up or registered as authentic instruments after the entry into force thereof.

2. However, if the proceedings in the Member State of origin were instituted before the entry into force of this Agreement, judgments given after that date shall be recognised and enforced in accordance with this Agreement,

25. if the proceedings in the Member State of origin were instituted after the entry into force of the Brussels or the Lugano Convention both in the Member State of origin and in the Member State addressed;

26. in all other cases, if jurisdiction was founded upon rules which accorded with those provided for either in this Agreement or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted.

ARTICLE 10

Relationship to the Brussels I Regulation

1. This Agreement shall not prejudice the application by the Member States of the Community other than Denmark of the Brussels I Regulation.

2. However, this Agreement shall in any event be applied:

27. in matters of jurisdiction, where the defendant is domiciled in Denmark, or where Article 22 or 23 of the Regulation, applicable to the relations between the Community and Denmark by virtue of Article 2 of this Agreement, confer jurisdiction on the courts of Denmark;

28. in relation to a lis pendens or to related actions as provided for in Articles 27 and 28 of

the Brussels I Regulation, applicable to the relations between the Community and Denmark by virtue of article 2 of this Agreement, when proceedings are instituted in a Member State other than Denmark and in Denmark;

29. in matters of recognition and enforcement, where Denmark is either the State of origin or the State addressed.

ARTICLE 11

Termination of the agreement

1. This Agreement shall terminate if Denmark informs the other Member States that it no longer wishes to avail itself of the provisions of Part I of the Protocol on the position of Denmark, cf. Article 7 of that Protocol.

2. This Agreement may be terminated by either Contracting Party giving notice to the other Contracting Party. Termination shall be effective six months after the date of such notice.

3. Legal proceedings instituted and documents formally drawn up or registered as authentic instruments before the date of termination of the Agreement as set out in paragraph 1 or 2 are not affected hereby.

ARTICLE 12

Entry into force

1. The Agreement shall be adopted by the Contracting Parties in accordance with their respective procedures.

2. The Agreement shall enter into force on the first day of the sixth month following the notification by the Contracting Parties of the completion of their respective procedures required for this purpose.

ARTICLE 13

Authenticity of texts

This Agreement is drawn up in duplicate in the Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovene, Slovak, Spanish and Swedish languages, each of these texts being equally authentic.

Annex

Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, as amended by Commission Regulation No. 1496/2002 of 21 August 2002 amending Annex I (the rules of jurisdiction referred to in Article 3(2) and Article 4(2)) and Annex II (the list of competent courts and authorities) to Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgements

in civil and commercial matters and by Commission Regulation (EC) No. 1937/2004 of 9 November 2004 amending Annexes I, II, III and IV to Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[1] OJ C , , p..

[2] OJ L 12, 16.1.2001,p1

[3] OJ C , , p..

[4] OJ C , , p..

[5] OJ L12,16.1.2001,p.1

[6] OJ L 299, 31.12.1972, p. 32. OJ L 304, 30.10.1978, p. 1. OJ L 388, 31.12.1982, p. 1. OJ L 285, 3.10.1989, p. 1. OJ C 15, 15.1.1997, p. 1. For a consolidated text, see OJ C 27, 26.1.1998, p. 1.

[7] OJ L 319, 25.11.1988, p. 9

[8] OJ L 12 , 16.1.2001, p. 1

[9] OJ L 204, 2.8.1975, p. 28, OJ L 304, 30.10.1978, p. 1, OJ L 388, 31.12.1982, p. 1, OJ L 285, 3.10.1989, p. 1, OJ C 15, 15.1.1997, p. 1. For a consolidated text see OJ C 27, 26.1.1998, p. 28.

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AUTHOR	European Commission
FORM	Proposal for a decision sui generis
TREATY	European Community
DOC	2005/04/15
DESPATCH	2005/04/15
ENDVAL	2006/04/27
LEGBASE	12002E061 12002E300 12002E300
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2005/790/EC: Council Decision of 20 September 2005 on the signing, on behalf of the Community, of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

Council Decision

of 20 September 2005

on the signing, on behalf of the Community, of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

(2005/790/EC)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) thereof, in conjunction with the first sentence of the first subparagraph of Article 300(2) thereof,

Having regard to the proposal from the Commission,

Whereas:

(1) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, Denmark is not bound by the provisions of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [1], nor subject to their application.

(2) By Decision of 8 May 2003, the Council authorised exceptionally the Commission to negotiate an agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of the abovementioned Regulation.

(3) The Commission has negotiated such agreement, on behalf of the Community, with the Kingdom of Denmark.

(4) The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community, are taking part in the adoption and application of this Decision.

(5) In accordance with Articles 1 and 2 of the abovementioned Protocol on the position of Denmark, Denmark is not taking part in the adoption of this Decision and is not bound by it or subject to its application.

(6) The Agreement, initialled at Brussels on 17 January 2005, should be signed,

HAS DECIDED AS FOLLOWS:

Article 1

The signing of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters is hereby approved on behalf of the Community, subject to the Council Decision concerning the conclusion of the said Agreement.

The text of the Agreement is attached to this Decision.

Article 2

The President of the Council is hereby authorised to designate the person(s) empowered to sign the Agreement on behalf of the Community subject to its conclusion.

Done at Brussels, 20 September 2005.

For the Council

The President

M. Beckett

[1] OJ L 12, 16.1.2001, p. 1. Regulation as last amended by Commission Regulation (EC) No 2245/2004 (OJ L 381, 28.12.2004, p. 10).

DOCNUM	32005D0790
AUTHOR	Council
FORM	Decision sui generis
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52005PC0145(01)

OC>

Proposal for a Council Decision concerning the signing of the Agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of Council Regulation (EC) No 44/2001 on jurisdiction and the recognitions and enforcement of judgments in civil and commercial matters

[pic] ¦ COMMISSION OF THE EUROPEAN COMMUNITIES ¦

Brussels, 15.4.2005

COM(2005) 145 final

2005/0055 (CNS)

Proposal for a

COUNCIL DECISION

concerning the signing of the Agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of Council Regulation (EC) No 44/2001 on jurisdiction and the recognitions and enforcement of judgments in civil and commercial matters

Proposal for a

COUNCIL DECISION

concerning the conclusion of the Agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of Council Regulation (EC) No 44/2001 on jurisdiction and the recognitions and enforcement of judgments in civil and commercial matters

(presented by the Commission)

EXPLANATORY MEMORANDUM

1. Political and legal background

Pursuant to Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on the European Union and the Treaty establishing the European Community, Denmark does not participate in Title IV of the Treaty. As a consequence, Community instruments adopted in the field of, among others, judicial cooperation in civil matters are not binding upon or applicable in Denmark.

One of these Community instruments is Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. This Regulation has replaced the Brussels Convention of 1968 on the same matter, to which Denmark is a party. The Regulation contains revised and modernized rules of the Brussels Convention and applies to all Member States except Denmark; the United Kingdom and Ireland having exercised their right to opt in.

The non-application of Regulation 44/2001 in Denmark results in a most unsatisfactory legal situation: Not only does Denmark continue to apply the old rules of the Brussels Convention, but also all other Member States have to apply these rules, i.e. a set of rules different from the one they use in their mutual relations, when it comes to the recognition and enforcement of Danish decisions. This constitutes a step backwards given that prior to the entry into force of Regulation 44/2001 the rules of the Brussels Convention applied uniformly in all Member States. The current situation therefore jeopardizes the uniformity and legal certainty of the Community rules.

Denmark expressed at several occasions its interest to participate in the new regime. After in depth discussions, the Commission accepted to negotiate parallel agreements with Denmark, provided that the following conditions were fulfilled: Such a solution would have to be of an exceptional

nature and apply for a transitional period only, the participation of Denmark in the Community regime would have to be fully in the interests of the Community and its citizens and the requirements imposed on Denmark would have to be identical to those imposed on all Member States, so as to ensure that rules with the same content are applied in Denmark and in the other Member States.

In view of the situation outlined above, the Commission considered it to be in the Community interest to extend to Denmark the provisions of Regulations 44/2001 and Council Regulation (EC) No 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, which is closely linked to Regulation 44/2001. The agreement extending the provisions of Regulation 1348/2000 to Denmark is the subject matter of a separate Council decision.

The Commission presented on 28th June 2002 a recommendation for a Council Decision authorizing the Commission to open negotiations for the conclusion of two agreements between the European Community and Denmark, extending both Regulation 44/2001 and Regulation 1348/2000 to Denmark.

The Council decided on 8 May 2003 to exceptionally authorize the Commission to negotiate an agreement with Denmark with the view to make the provisions of Regulation 44/2001 as well as the provisions of Regulation 1348/2000 applicable to Denmark under international law.

2. Results of the Negotiations

The Commission negotiated the parallel agreement extending to Denmark the provisions of Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters in accordance with the Council's negotiating directives, carefully ensuring that rights and obligations of Denmark under this agreement correspond to rights and obligations of the other Member States.

As a result, the parallel agreement contains, in particular, the following provisions:

- appropriate rules on the role of the Court of Justice to ensure the uniform interpretation of the instrument applied by the parallel agreement between Denmark and the other Member States;

- a mechanism to enable Denmark to accept future amendments by the Council to the basic instrument and the future implementing measures to be adopted under Article 202 of the EC Treaty;

- a clause providing that the agreement is considered terminated if Denmark refuses to accept such future amendments and implementing measures;

- rules specifying Denmark's obligations in negotiations with third countries for agreements concerning matters covered by the parallel agreement;

- the possibility of denouncing the parallel agreement by giving notice to the other Contracting Party.

3. Conclusions

In view of the positive outcome of the negotiations, the Commission recommends that the Council adopt the following two decisions:

Firstly, a decision concerning the signing of the Agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of Regulation 44/2001 on jurisdiction and the recognitions and enforcement of judgments in civil and commercial matters

Secondly, a decision concerning the conclusion by the European Community of the Agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of Regulation 44/2001 on jurisdiction and the recognitions and enforcement of judgments in civil and commercial matter.

B3>**52005PC0145(01)**

Proposal for a

COUNCIL DECISION

concerning the signing of the Agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of Council Regulation (EC) No 44/2001 on jurisdiction and the recognitions and enforcement of judgments in civil and commercial matters

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and in conjunction with the first subparagraph of Article 300(2) thereof,

Having regard to the proposal from the Commission[1],

Whereas:

1. In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and the Treaty establishing the European Community, Denmark is not bound by the provisions of Regulation (EC) No 44/2001[2], nor subject to their application.

2. By Decision of 8 May 2003, the Council authorised the Commission to negotiate an agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of the a

3. bove-mentioned Regulation.

4. The Commission has negotiated such agreement, on behalf of the Community, with the Kingdom of Denmark.

5. The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the TEU and the TEC, are taking part in the adoption and application of this Decision.

6. In accordance with Articles 1 and 2 of the above-mentioned Protocol on the position of Denmark, Denmark is not taking part in the adoption and application of this Decision.

7. The Agreement, initialled at Brussels on 17 January 2005, should be signed.

HAS DECIDED AS FOLLOWS:

Sole Article

Subject to a possible conclusion, the President of the Council is hereby authorised to designate the person(s) empowered to sign, on behalf of the European Community, the Agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Done at Brussels,

For the Council

The President

2005/0055 (CNS)

Proposal for a

COUNCIL DECISION

concerning the conclusion of the Agreement between the European Community and the Kingdom of Denmark

extending to Denmark the provisions of Council Regulation (EC) No 44/2001 on jurisdiction and the recognitions and enforcement of judgments in civil and commercial matters

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c), in conjunction with the first subparagraph of Article 300(2) and the first subparagraph of Article 300 (3) thereof,

Having regard to the proposal from the Commission[3],

Having regard to the opinion of the European Parliament[4],

Whereas:

(1) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and the Treaty establishing the European Community, Denmark is not bound by the provisions of Regulation (EC) No 44/2001[5], nor subject to their application.

(2) The Commission has negotiated an agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of the above-mentioned Regulation.

(3) The Agreement was signed, on behalf of the European Community, on .....2005, subject to its possible conclusion at a later date, in accordance with Decision.../.../EC of the Council of [.....].

(4) The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the TEU and the TEC, are taking part in the adoption and application of this Decision.

(5) In accordance with Articles 1 and 2 of the above-mentioned Protocol on the position of Denmark, Denmark is not taking part in the adoption and application of this Decision.

(6) This Agreement should be approved.

HAS DECIDED AS FOLLOWS:

Article 1

The Agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters is approved on behalf of the Community.

The text of the Agreement is attached to this Decision.

Article 2

The President of the Council is hereby authorised to designate the person empowered to make the notification provided for in Article 12(2) of the Agreement.

Done at Brussels,

For the Council

The President

B5>**52005PC0145(01)**

ANNEX

AGREEMENT

between the European Community and

the Kingdom of Denmark

on

jurisdiction and the recognition and enforcement

of judgments in civil and commercial matters

THE EUROPEAN COMMUNITY,

hereinafter referred to as the Community, of the one part, and

THE KINGDOM OF DENMARK,

hereinafter referred to as Denmark, of the other part,

1. DESIRING to unify the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities with a view to rapid and simple recognition and enforcement of judgments within the Community,

2. WHEREAS the Member States on 27 September 1968, acting under Article 293, fourth indent, of the Treaty establishing the European Community, concluded the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by Conventions on the Accession of the New Member States to that Convention (the "Brussels Convention").[6] On 16 September 1988 Member States and EFTA States concluded the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters[7], which is a parallel Convention to the 1968 Brussels Convention.

3. WHEREAS the main content of the Brussels Convention has been taken over in the Council Regulation No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[8] (the Brussels I Regulation),

4. REFERRING to the Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty establishing the European Community (the Protocol on the position of Denmark) pursuant to which the Brussels I Regulation shall not be binding upon or applicable in Denmark,

5. STRESSING that a solution to the unsatisfactory legal situation arising from differences in applicable rules on jurisdiction, recognition and enforcement of judgments within the Community must be found,

6. DESIRING that the provisions of the Brussels I Regulation, future amendments hereto and the implementing measures relating to it should under international law apply to the relations between the Community and Denmark being a Member State with a special position with respect to Title IV of the Treaty establishing the European Community,

7. STRESSING that continuity between the Brussels Convention and this Agreement should be ensured, and that transitional provisions as in the Brussels I Regulation should be applied to this agreement as well. The same need for continuity applies as regards the interpretation of the Brussels Convention by the Court of Justice of the European Communities and the 1971 Protocol[9] which should remain applicable also to cases already pending when this Agreement enters into force,

8. STRESSING that the Brussels Convention also continues to apply to the territories of the Member States which fall within the territorial scope of that Convention and which are excluded from this Agreement,

9. STRESSING the importance of proper co-ordination between the Community and Denmark with regard to the negotiation and conclusion of international agreements that may affect or alter the scope of the Brussels I Regulation,

10. STRESSING that Denmark should seek to join international agreements entered into by the Community where Danish participation in such agreements is relevant for the coherent application of the Brussels I Regulation and this Agreement,

11. STATING that the Court of Justice of the European Communities should have jurisdiction in order to secure the uniform application and interpretation of this Agreement including the provisions of the Brussels I Regulation and any implementing Community measures forming part of this Agreement,

12. REFERRING to the jurisdiction conferred to the Court of Justice of the European Communities pursuant to Article 68(1) of the Treaty establishing the European Community to give rulings on preliminary questions relating to the validity and interpretation of acts of the institutions of the Community based on Title IV of the Treaty, including the validity and interpretation of this Agreement, and to the circumstance that this provision shall not be binding upon or applicable in Denmark, as results from the Protocol on the position of Denmark,

13. CONSIDERING that the Court of Justice of the European Communities should have jurisdiction under the same conditions to give preliminary rulings on questions concerning the validity and interpretation of this Agreement which are raised by a Danish court or tribunal , and that Danish courts and tribunals should therefore request preliminary rulings under the same conditions as courts and tribunals of other Member States in respect of the interpretation of the Brussels I Regulation and its implementing measures,

14. REFERRING to the provision that, pursuant to Article 68(3) of the Treaty establishing the European Community, the Council of the European Union, the European Commission and the Member States may request the Court of Justice of the European Communities to give a ruling on the interpretation of acts of the institutions of the Community based on Title IV of the Treaty, including the interpretation of this Agreement, and the circumstance that this provision shall not be binding upon or applicable in Denmark, as results from the Protocol on the position of Denmark,

15. CONSIDERING that Denmark should, under the same conditions as other Member States in respect of the Brussels I Regulation and its implementing measures, be accorded the possibility to request the Court of Justice of the European Communities to give rulings on questions relating to the interpretation of this Agreement,

16. STRESSING that under Danish law the courts in Denmark should - when interpreting this Agreement including the provisions of the Brussels I Regulation and any implementing Community measures forming part of this Agreement - take due account of the rulings contained in the case law of the Court of Justice of the European Communities and of the courts of the Member States of the European Communities in respect of provisions of the Brussels Convention, the Brussels I Regulation and any implementing Community measures,

17. CONSIDERING that it should be possible to request the Court of Justice of the European Communities to rule on questions relating to compliance with obligations under this Agreement pursuant to the provisions of the Treaty establishing the European Community governing proceedings before the Court,

18. WHEREAS, by virtue of Article 300(7) of the Treaty establishing the European Community,

this Agreement binds Member States; it is therefore appropriate that Denmark, in the case of non-compliance by a Member State, should be able to seize the Commission as guardian of the Treaty,

HAVE AGREED AS FOLLOWS:

ARTICLE 1

Aim

1. The aim of this Agreement is to apply the provisions of Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Brussels I Regulation) and its implementing measures to the relations between the Community and Denmark, in accordance with Article 2(1).

2. It is the objective of the Contracting Parties to arrive at a uniform application and interpretation of the provisions of the Brussels I Regulation and its implementing measures in all Member States.

3. The provisions of Articles 3(1), 4(1) and 5(1) of this Agreement result from the Protocol on the position of Denmark.

ARTICLE 2

Jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

1. The provisions of the Brussels I Regulation, which is annexed to this Agreement and forms part thereof, together with its implementing measures adopted pursuant to Article 74(2) of the Regulation and - in respect of implementing measures adopted after the entry into force of this Agreement - implemented by Denmark as referred to in Article 4 of this Agreement, and the measures adopted pursuant to Article 74(1) of the Regulation, shall under international law apply to the relations between the Community and Denmark.

2. However, for the purposes of this Agreement, the application of the provisions of that Regulation shall be modified as follows:

8. Article 1(3) shall not apply.

9. Article 50 shall be supplemented by the following paragraph (as paragraph 2):2. However, an applicant who requests the enforcement of a decision given by an administrative authority in Denmark in respect of a maintenance order may, in the Member State addressed, claim the benefits referred to in the first paragraph if he presents a statement from the Danish Ministry of Justice to the effect that he fulfils the financial requirements to qualify for the grant of complete or partial legal aid or exemption from costs or expenses.

10. Article 62 shall be supplemented by the following paragraph (as paragraph 2):2. In matters relating to maintenance, the expression 'court' includes the Danish administrative authorities.

11. Article 64 shall apply to seagoing ships registered in Denmark as well as in Greece and Portugal.

12. The date of entry into force of this Agreement shall apply instead of the date of entry into force of the Regulation as referred to in Articles 70(2), 72 and 76 thereof.

13. The transitional provisions of this Agreement shall apply instead of Art. 66 of the Regulation.

14. In Annex I the following shall be added: in Denmark: Article 246(2) and (3) of the Administration

of Justice Act (lov om rettens pleje).

15. In Annex II the following shall be added: in Denmark, the byret '.

16. In Annex III the following shall be added: in Denmark, the landsret '.

17. In Annex IV the following shall be added: in Denmark, an appeal to the Højesteret ' with leave from the Procesbevillingsnævnet '.

ARTICLE 3

Amendments to the Brussels I Regulation

1. Denmark shall not take part in the adoption of amendments to the Brussels I Regulation and no such amendments shall be binding upon or applicable in Denmark.

2. Whenever amendments to the Regulation are adopted Denmark shall notify the Commission of its decision whether or not to implement the content of such amendments. Notification shall be given at the time of the adoption of the amendments or within 30 days hereafter.

3. If Denmark decides that it will implement the content of the amendments the notification shall indicate whether implementation can take place administratively or requires parliamentary approval.

4. If the notification indicates that implementation can take place administratively the notification shall, moreover, state that all necessary administrative measures enter into force on the date of entry into force of the amendments to the Regulation or have entered into force on the date of the notification, whichever date is the latest.

5. If the notification indicates that implementation requires parliamentary approval in Denmark the following rules shall apply:

18. Legislative measures in Denmark shall enter into force on the date of entry into force of the amendments to the Regulation or within 6 months after the notification, whichever date is the latest;

19. Denmark shall notify the Commission of the date upon which the implementing legislative measures enter into force.

6. A Danish notification that the content of the amendments has been implemented in Denmark, cf. paragraph 4 and 5, creates mutual obligations under international law between Denmark and the Community. The amendments to the Regulation shall then constitute amendments to this Agreement and shall be considered annexed hereto.

7. In case:

20. Denmark notifies its decision not to implement the content of the amendments; or

21. Denmark does not make a notification within the 30 days time limit set out in paragraph 2; or

22. Legislative measures in Denmark do not enter into force within the time limits set out in paragraph 5;

this Agreement shall be considered terminated unless the parties decide otherwise within 90 days or, in the situation referred to under c, legislative measures in Denmark enter into force within the same period. Termination shall take effect 3 months after the expiry of the 90 days period.

8. Legal proceedings instituted and documents formally drawn up or registered as authentic instruments before the date of termination of the Agreement as set out in paragraph 7 are not affected hereby.

ARTICLE 4

Implementing measures

1. Denmark shall not take part in the adoption of opinions by the Committee referred to in Article 75 of the Brussels I Regulation. Implementing measures adopted pursuant to Article 74(2) shall not be binding upon and shall not be applicable in Denmark.

2. Whenever implementing measures are adopted pursuant to Article 74(2) of the Regulation, the implementing measures shall be communicated to Denmark. Denmark shall notify the Commission of its decision whether or not to implement the content of the implementing measures. Notification shall be given upon receipt of the implementing measures or within 30 days hereafter.

3. The notification shall state that all necessary administrative measures in Denmark enter into force on the date of entry into force of the implementing measures or have entered into force on the date of the notification, whichever date is the latest.

4. A Danish notification that the content of the implementing measures has been implemented in Denmark creates mutual obligations under international law between Denmark and the Community. The implementing measures will then form part of this Agreement.

5. In case:

23. Denmark notifies its decision not to implement the implementing measures; or

24. Denmark does not make a notification within the 30 days time limit set out in paragraph 2;

this Agreement shall be considered terminated unless the parties decide otherwise within 90 days. Termination shall take effect 3 months after the expiry of the 90 days period.

6. Legal proceedings instituted and documents formally drawn up or registered as authentic instruments before the date of termination of the Agreement as set out in paragraph 5 are not affected hereby.

7. If in exceptional cases the implementation requires parliamentary approval in Denmark, the Danish notification under paragraph 2 shall indicate this and the provisions of Article 3(5)-(8) shall apply.

8. Denmark shall notify the Commission of texts amending the items set out in Article 2(2)(f)-(i) of this Agreement. The Commission shall adapt Article 2(2)(f)-(i) accordingly.

ARTICLE 5

International agreements which affect the Agreement

1. International agreements entered into by the Community based on the rules of the Brussels I Regulation shall not be binding upon and shall not be applicable in Denmark.

2. Denmark will abstain from entering into international agreements which may affect or alter the scope of the Brussels I Regulation as annexed to this Agreement unless it is done in agreement with the Community and satisfactory arrangements have been made with regard to the relationship between this Agreement and the international agreement in question.

3. When negotiating international agreements that may affect or alter the scope of the Brussels I Regulation as annexed to this Agreement , Denmark will co-ordinate its position with the Community and will abstain from any actions that would jeopardise the objectives of a Community position within its sphere of competence in such negotiations.

ARTICLE 6

Jurisdiction of the Court of Justice of the European Communities in relation to the interpretation of the Agreement

1. Where a question on the validity or interpretation of this Agreement is raised in a case pending before a Danish court or tribunal, that court or tribunal shall request the Court of Justice to give a ruling thereon whenever under the same circumstances a court or tribunal of another Member State of the European Union would be required to do so in respect of the Brussels I Regulation and its implementing measures referred to in Article 2(1).

2. Under Danish law, the courts in Denmark shall, when interpreting this Agreement, take due account of the rulings contained in the case law of the Court of Justice in respect of provisions of the Brussels Convention, the Brussels I Regulation and any implementing Community measures.

3. Denmark may, like the Council, the Commission and any Member State, request the Court of Justice to give a ruling on a question of interpretation of this Agreement. The ruling given by the Court of Justice in response to such a request shall not apply to judgments of courts or tribunals of the Member States which have become res judicata.

4. Denmark shall be entitled to submit observations to the Court of Justice in cases where a question has been referred to it by a court or tribunal of a Member State for a preliminary ruling concerning the interpretation of any provision referred to in Article 2(1).

5. The Protocol on the Statute of the Court of Justice of the European Communities and its Rules of Procedure shall apply.

6. If the provisions of the Treaty establishing the European Community regarding rulings by the Court of Justice are amended with consequences for rulings in respect of the Brussels I Regulation, Denmark may notify the Commission of its decision not to apply the amendments in respect of this Agreement. Notification shall be given at the time of the entry into force of the amendments or within 60 days hereafter.

In such a case this Agreement shall be considered terminated. Termination shall take effect 3 months after the notification.

7. Legal proceedings instituted and documents formally drawn up or registered as authentic instruments before the date of termination of the Agreement as set out in paragraph 6 are not affected hereby.

ARTICLE 7

Jurisdiction of the Court of Justice of the European Communities in relation to compliance with the Agreement

1. The Commission may bring before the Court of Justice cases against Denmark concerning non-compliance with any obligation under this Agreement.

2. Denmark may bring a complaint to the Commission as to the non-compliance by a Member State of its obligations by virtue of this Agreement.

3. The relevant provisions of the Treaty establishing the European Community governing proceedings before the Court of Justice as well as the Protocol on the Statute of the Court of Justice of the European Communities and its Rules of Procedure shall apply.

ARTICLE 8

Territorial application

1. This Agreement shall apply to the territories referred to in Article 299 of the Treaty establishing the European Community.

2. If the Community decides to extend the application of the Brussels I Regulation to territories currently governed by the Brussels Convention, the Community and Denmark shall cooperate in order to ensure that such an application also extends to Denmark.

ARTICLE 9

Transitional provisions

1. This Agreement shall apply only to legal proceedings instituted and to documents formally drawn up or registered as authentic instruments after the entry into force thereof.

2. However, if the proceedings in the Member State of origin were instituted before the entry into force of this Agreement, judgments given after that date shall be recognised and enforced in accordance with this Agreement,

25. if the proceedings in the Member State of origin were instituted after the entry into force of the Brussels or the Lugano Convention both in the Member State of origin and in the Member State addressed;

26. in all other cases, if jurisdiction was founded upon rules which accorded with those provided for either in this Agreement or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted.

ARTICLE 10

Relationship to the Brussels I Regulation

1. This Agreement shall not prejudice the application by the Member States of the Community other than Denmark of the Brussels I Regulation.

2. However, this Agreement shall in any event be applied:

27. in matters of jurisdiction, where the defendant is domiciled in Denmark, or where Article 22 or 23 of the Regulation, applicable to the relations between the Community and Denmark by virtue of Article 2 of this Agreement, confer jurisdiction on the courts of Denmark;

28. in relation to a lis pendens or to related actions as provided for in Articles 27 and 28 of

the Brussels I Regulation, applicable to the relations between the Community and Denmark by virtue of article 2 of this Agreement, when proceedings are instituted in a Member State other than Denmark and in Denmark;

29. in matters of recognition and enforcement, where Denmark is either the State of origin or the State addressed.

ARTICLE 11

Termination of the agreement

1. This Agreement shall terminate if Denmark informs the other Member States that it no longer wishes to avail itself of the provisions of Part I of the Protocol on the position of Denmark, cf. Article 7 of that Protocol.

2. This Agreement may be terminated by either Contracting Party giving notice to the other Contracting Party. Termination shall be effective six months after the date of such notice.

3. Legal proceedings instituted and documents formally drawn up or registered as authentic instruments before the date of termination of the Agreement as set out in paragraph 1 or 2 are not affected hereby.

ARTICLE 12

Entry into force

1. The Agreement shall be adopted by the Contracting Parties in accordance with their respective procedures.

2. The Agreement shall enter into force on the first day of the sixth month following the notification by the Contracting Parties of the completion of their respective procedures required for this purpose.

ARTICLE 13

Authenticity of texts

This Agreement is drawn up in duplicate in the Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovene, Slovak, Spanish and Swedish languages, each of these texts being equally authentic.

Annex

Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, as amended by Commission Regulation No. 1496/2002 of 21 August 2002 amending Annex I (the rules of jurisdiction referred to in Article 3(2) and Article 4(2)) and Annex II (the list of competent courts and authorities) to Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgements

in civil and commercial matters and by Commission Regulation (EC) No. 1937/2004 of 9 November 2004 amending Annexes I, II, III and IV to Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[1] OJ C , , p..

[2] OJ L 12, 16.1.2001,p1

[3] OJ C , , p..

[4] OJ C , , p..

[5] OJ L12,16.1.2001,p.1

[6] OJ L 299, 31.12.1972, p. 32. OJ L 304, 30.10.1978, p. 1. OJ L 388, 31.12.1982, p. 1. OJ L 285, 3.10.1989, p. 1. OJ C 15, 15.1.1997, p. 1. For a consolidated text, see OJ C 27, 26.1.1998, p. 1.

[7] OJ L 319, 25.11.1988, p. 9

[8] OJ L 12 , 16.1.2001, p. 1

[9] OJ L 204, 2.8.1975, p. 28, OJ L 304, 30.10.1978, p. 1, OJ L 388, 31.12.1982, p. 1, OJ L 285, 3.10.1989, p. 1, OJ C 15, 15.1.1997, p. 1. For a consolidated text see OJ C 27, 26.1.1998, p. 28.

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AUTHOR	European Commission
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DESPATCH	2005/04/15
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B14>**52005PC0145(01)**

Council Regulation (EC) No 1791/2006 of 20 November 2006 adapting certain Regulations and Decisions in the fields of free movement of goods, freedom of movement of persons, company law, competition policy, agriculture (including veterinary and phytosanitary legislation), transport policy, taxation, statistics, energy, environment, cooperation in the fields of justice and home affairs, customs union, external relations, common foreign and security policy and institutions, by reason of the accession of Bulgaria and Romania

Council Regulation (EC) No 1791/2006

of 20 November 2006

adapting certain Regulations and Decisions in the fields of free movement of goods, freedom of movement of persons, company law, competition policy, agriculture (including veterinary and phytosanitary legislation), transport policy, taxation, statistics, energy, environment, cooperation in the fields of justice and home affairs, customs union, external relations, common foreign and security policy and institutions, by reason of the accession of Bulgaria and Romania

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community,

Having regard to the Treaty of Accession of Bulgaria and Romania [1], and in particular Article 4(3) thereof,

Having regard to the Act of Accession of Bulgaria and Romania, and in particular Article 56 thereof,

Having regard to the proposal from the Commission,

Whereas:

(1) Pursuant to Article 56 of the Act of Accession, where acts of the institutions remain valid beyond 1 January 2007, and require adaptation by reason of accession, and the necessary adaptations have not been provided for in the Act of Accession or its Annexes, the necessary acts are to be adopted by the Council, unless the original act was adopted by the Commission.

(2) The Final Act of the Conference which drew up the Treaty of Accession indicated that the High Contracting Parties had reached political agreement on a set of adaptations to acts adopted by the institutions required by reason of accession and invited the Council and the Commission to adopt these adaptations before accession, completed and updated where necessary to take account of the evolution of the law of the Union.

(3) The following Regulations should therefore be amended accordingly:

- in the field of the free movement of goods: Regulations (EC) No 2003/2003 [2] and (EC) No 339/93 [3],

- in the field of the freedom of movement of persons: Regulations (EEC) No 1408/71 [4] and (EEC) No 574/72 [5],

- in the field of company law: Regulation (EC) No 2157/2001 [6],

- in the field of competition policy: Regulation (EC) No 659/1999 [7],

- in the field of agriculture (including veterinary legislation): Regulations: No 79/65 [8], (EEC) No 1784/77 [9], (EEC) No 2092/91 [10], (EEC) No 2137/92 [11], (EC) No 1493/1999 [12], (EC) No 1760/2000 [13], (EC) No 999/2001 [14], (EC) No 2160/2003 [15], (EC) No 21/2004 [16], (EC) No 853/2004 [17], (EC) No 854/2004 [18], (EC) No 882/2004 [19] and (EC) No 510/06 [20],

- in the field of transport policy: Regulations (EEC) No 1108/70 [21], (EEC) No 3821/85 [22],

(EEC) No 881/92 [23], (EEC) No 684/92 [24], (EEC) No 1192/69 [25] and (EEC) No 2408/92 [26],

- in the field of taxation: Regulation (EC) No 1798/2003 [27],

- in the field of statistics: Regulations (EEC) No 2782/75 [28], (EEC) No 357/79 [29], (EEC) No 837/90 [30], (EEC) No 959/93 [31], (EC) No 1172/98 [32], (EC) No 437/2003 [33] and (EC) No 1177/2003 [34],

- in the field of energy: Regulation (EC) No 1407/2002 [35],

- in the field of environment: Regulations (EC) No 761/2001 [36] and (EC) No 2037/2000 [37],

- in the field of cooperation in the fields of justice and home affairs: Regulations (EC) No 1346/2000 [38], (EC) No 44/2001 [39], (EC) No 1683/95 [40] and (EC) No 539/2001 [41],

- in the field of customs union: Regulation (EEC) No 2913/92 [42],

- in the field of external relations: Regulations (EEC) No 3030/93 [43], (EC) No 517/94 [44], (EC) No 152/2002 [45], (EC) No 2368/2002 [46] and (EC) No 1236/2005 [47],

- in the field of common foreign and security policy: Regulations (EC) No 2488/2000 [48], (EC) No 2580/2001 [49], (EC) No 881/2002 [50], (EC) No 1210/2003 [51], (EC) No 131/2004 [52], (EC) No 234/2004 [53], (EC) No 314/2004 [54], (EC) No 872/2004 [55], (EC) No 1763/2004 [56], (EC) No 174/2005 [57], (EC) No 560/2005 [58], (EC) No 889/2005 [59], (EC) No 1183/2005 [60], (EC) No 1184/2005 [61], (EC) No 1859/2005 [62], (EC) No 305/2006 [63], (EC) No 765/2006 [64] and(EC) No 817/2006 [65],

- in the field of institutions: Regulation (EEC) 1/58 [66].

(4) and the following Decisions should therefore be amended accordingly:

- in the field of the freedom of movement of persons: Decisions of the Administrative Commission of the European Communities on Social Security for Migrant Workers No 117 of 7 July 1982 [67], No 136 of 1 July 1987 [68], No 150 of 26 June 1992 [69] and No 192 of 29 October 2003 [70],

- in the field of agriculture (veterinary and phytosanitary legislation): Decisions 79/542/EEC [71], 82/735/EEC [72], 90/424/EEC [73], 2003/17/EC [74] and 2005/834/EC [75],

- in the field of transport policy: Decision No 1692/96/EC [76],

- in the field of energy: Decision 77/270/Euratom [77] and the Statutes of the Euratom Supply Agency [78],

- in the field of environment: Decisions 97/602/EC [79] and 2002/813/EC [80],

- in the field of cooperation in the fields of justice and home affairs: Decision of the Executive Committee of 28 April 1999 on the definitive version of the Common Consular Instructions [81] and Decision of the Executive Committee of 22 December 1994 on the certificate provided for in Article 75 to carry narcotic drugs and psychotropic substances [82].

HAS ADOPTED THIS REGULATION:

Article 1

1. The following Regulations shall be amended as set out in the Annex:

- in the field of the free movement of goods: Regulations (EC) No 2003/2003 and (EC) No 339/93,

- in the field of the freedom of movement of persons: Regulations (EEC) No 1408/71 and (EEC) No 574/72,

- in the field of company law: Regulation (EC) No 2157/2001,

- in the field of competition: Regulation (EC) No 659/1999,

- in the field of agriculture (including veterinary parts): Regulations: No 79/65, (EEC) No 1784/77, (EEC) No 2092/91, (EEC) No 2137/92, (EC) No 1493/1999, (EC) No 1760/2000, (EC) No 999/2001, (EC) No 2160/2003, (EC) No 21/2004, (EC) No 853/2004, (EC) No 854/2004, (EC) No 882/2004 and (EC) No 510/06,

- in the field of transport policy: Regulations (EEC) No 1108/70, (EEC) No 3821/85, (EEC) No 881/92, (EEC) No 684/92, (EEC) No 1192/69 and (EEC) No 2408/92,

- in the field of taxation: Regulation (EC) No 1798/2003,

- in the field of statistics: Regulations (EEC) No 2782/75, (EEC) No 357/79, (EEC) No 837/90, (EEC) No 959/93, (EC) No 1172/98, (EC) No 437/2003 and (EC) No 1177/2003,

- in the field of energy: Regulation (EC) No 1407/2002,

- in the field of environment: Regulations (EC) No 761/2001 and (EC) No 2037/2000,

- in the field of cooperation in the fields of justice and home affairs: Regulations (EC) No 1346/2000, (EC) No 44/2001, (EC) No 1683/95 and (EC) No 539/2001,

- in the field of customs union: Regulation (EEC) No 2913/92,

- in the field of external relations: Regulations (EEC) No 3030/93, (EC) No 517/94, (EC) No 152/2002, (EC) No 2368/2002 and (EC) No 1236/2005,

- in the field of common foreign and security policy: Regulations (EC) No 2488/2000, (EC) No 2580/2001, (EC) No 881/2002, (EC) No 1210/2003, (EC), No 131/2004, (EC) No 234/2004, (EC) No 314/2004, (EC) No 872/2004, (EC) No 1763/2004, (EC) No 174/2005, (EC) No 560/2005, (EC) No 889/2005, (EC) No 1183/2005, (EC) No 1184/2005, (EC) No 1859/2005, (EC) No 305/2006, (EC) No 765/2006 and(EC) No 817/2006,

- in the field of institutions: Regulation (EEC) 1/58.

2. The following Decisions shall be amended as set out in the Annex:

- in the field of the freedom of movement of persons: Decisions of the Administrative Commission of the European Communities on Social Security for Migrant Workers No 117 of 7 July 1982, No 136 of 1 July 1987, No 150 of 26 June 1992 and No 192 of 29 October 2003,

- in the field of agriculture (veterinary and phytosanitary legislation): Decisions 79/542/EEC, 82/735/EEC, 90/424/EEC, 2003/17/EC and 2005/834/EC,

- in the field of transport policy: Decision No 1692/96/EC,

- in the field of energy: Decision 77/270/Euratom and the Statutes of the Euratom Supply Agency,

- in the field of environment: Decisions 97/602/EC and 2002/813/EC,

- in the field of cooperation in the fields of justice and home affairs: Decision of the Executive Committee of 28 April 1999 on the definitive versions of the Common Consular Instructions and Decision of the Executive Committee of 22 December 1994 on the certificate provided for in Article 75 to carry narcotic drugs and psychotropic substances.

Article 2

This Regulation shall enter into force subject to and on the date of the entry into force of the Treaty of Accession of Bulgaria and Romania.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 20 November 2006

For the Council

The President

J. Korkeaoja

[1] OJ L 157, 21.6.2005, p.11.

[2] OJ L 304, 21.11.2003, p. 1.

[3] OJ L 40, 17.2.1993, p. 1.

[4] OJ L 149, 5.7.1971, p. 2.

[5] OJ L 74, 27.3.1972, p. 1.

[6] OJ L 294, 10.11.2001, p. 1.

[7] OJ L 83, 27.3.1999, p. 1.

[8] OJ 109, 23.6.1965, p. 1859.

[9] OJ L 200, 8.8.1977, p. 1.

[10] OJ L 198, 22.7.1991, p. 1.

[11] OJ L 214, 30.7.1992, p. 1.

[12] OJ L 179, 14.7.1999, p. 1.

[13] OJ L 204, 11.8.2000, p. 1.

[14] OJ L 147, 31.5.2001, p. 1.

[15] OJ L 325, 12.12.2003, p. 1.

[16] OJ L 5, 9.1.2004, p. 8.

[17] OJ L 139, 30.4.2004, p. 55.

[18] OJ L 139, 30.4.2004, p. 206.

[19] OJ L 165, 30.4.2004, p. 1.

[20] OJ L 93, 31.3.2006, p. 12.

[21] OJ L 130, 15.6.1970, p. 4.

[22] OJ L 370, 31.12.1985, p. 8.

[23] OJ L 95, 9.4.1992, p. 1.

[24] OJ L 74, 20.3.1992, p. 1.

[25] OJ L 156, 28.6.1969, p. 8.

[26] OJ L 240, 24.8.1992, p. 8.
[27] OJ L 264, 15.10.2003, p. 1.
[28] OJ L 282, 1.11.1975, p. 100.
[29] OJ L 54, 5.3.1979, p. 124.
[30] OJ L 88, 3.4.1990, p. 1.
[31] OJ L 98, 24.4.1993, p. 1.
[32] OJ L 163, 6.6.1998, p. 1.
[33] OJ L 66, 11.3.2003, p. 1
[34] OJ L 165, 3.7.2003, p. 1.
[35] OJ L 205, 2.8.2002, p. 1.
[36] OJ L 114, 24.4.2001, p. 1.
[37] OJ L 244, 29.9.2000, p. 1.
[38] OJ L 160, 30.6.2000, p. 1.
[39] OJ L 12, 16.1.2001, p. 1.
[40] OJ L 164, 14.7.1995, p.1.
[41] OJ L 81, 21.3.2001, p. 1.
[42] OJ L 302, 19.10.1992, p. 1.
[43] OJ L 275, 8.11.1993, p. 1.
[44] OJ L 67, 10.3.1994, p.1.
[45] OJ L 25, 29.1.2002, p. 1.
[46] OJ L 358, 31.12.2002, p. 28.
[47] OJ L 200, 30.7.2005, p. 1.
[48] OJ L 287, 14.11.2000, p. 19.
[49] OJ L 344, 28.12.2001, p. 70.
[50] OJ L 139, 29.5.2002, p. 9.
[51] OJ L 169, 8.7.2003, p.6.
[52] OJ L 21, 28.1.2004, p.1.
[53] OJ L 40, 12.2.2004, p.1.
[54] OJ L 55, 24.2.2004, p. 1.
[55] OJ L 162, 30.4.2004, p. 32.
[56] OJ L 315, 14.10.2004, p. 14.
[57] OJ L 29, 2.2.2005, p. 5.
[58] OJ L 95, 14.4.2005, p. 1.
[59] OJ L 152, 15.6.2005, p. 1.

[60] OJ L 193, 23.7.2005, p. 1.

[61] OJ L 193, 23.7.2005, p. 9.

[62] OJ L 299, 16.11.2005, p. 23.

[63] OJ L 51, 22.2.2006, p. 1.

[64] OJ L 134, 20.5.2006, p. 1.

[65] OJ L 148, 2.6.2006, p. 1.

[66] OJ 17, 6.10.1958, p. 385.

[67] OJ C 238, 7.9.1983, p. 3.

[68] OJ C 64, 9.3.1988, p. 7.

[69] OJ C 229, 25.8.1993, p. 5.

[70] OJ L 104, 8.4.2004, p. 114.

[71] OJ L 146, 14.6.1979, p. 15.

[72] OJ L 311, 8.11.1982, p. 16.

[73] OJ L 224, 18.8.1990, p.19.

[74] OJ L 8, 14.1.2003, p. 10.

[75] OJ L 312, 29.11.2005, p. 51.

[76] OJ L 228, 9.9.1996, p. 1.

[77] OJ L 88, 6.4.1977, p. 9.

[78] OJ 27, 6.12.1958, p. 534.

[79] OJ L 242, 4.9.1997, p. 64.

[80] OJ L 280, 18.10.2002, p. 62.

[81] OJ L 239, 22.9.2000, p. 317.

[82] OJ L 239, 22.9.2000, p. 463.

ANNEX

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p. 28);

- 32006 R 0029: Commission Regulation (EC) No 29/2006 of 10.1.2006 (OJ L 6, 11.1.2006, p. 27).

The table in Annex III is replaced by the following:

"ANNEX III

Total quantitative limits on producers and importers placing controlled substances on the market and using them for their own account in the Community

(1999-2003 - EU-15; 2004-2006 - EU-25; 2007-2015 - EU-27)

(calculated levels expressed in ODP tonnes) ¦

Substance For 12-month periods from 1 January to 31 December ¦ Group I ¦ Group II ¦ Group III ¦ Group IV ¦ Group V ¦ Group VI [1] For uses other than quarantine and pre-shipment applications ¦ Group VI [1] For quarantine and pre-shipment applications ¦ Group VII ¦ Group VIII ¦

1999 (EU-15) ¦ 0 ¦ 0 ¦ 0 ¦ 0 ¦ 0 ¦ 8665 ¦ ¦ 0 ¦ 8079 ¦

2000 (EU-15) ¦ ¦ ¦ ¦ ¦ ¦ ¦ 8665 ¦ ¦ ¦ 8079 ¦

2001 (EU-15) ¦ ¦ ¦ ¦ ¦ ¦ ¦ 4621 ¦ 607 ¦ ¦ 6678 ¦

2002 (EU-15) ¦ ¦ ¦ ¦ ¦ ¦ ¦ 4621 ¦ 607 ¦ ¦ 5676 ¦

2003 (EU15) ¦ ¦ ¦ ¦ ¦ ¦ ¦ 2888 ¦ 607 ¦ ¦ 3005 ¦

2004 (EU-25) ¦ ¦ ¦ ¦ ¦ ¦ ¦ 2945 ¦ 607 ¦ ¦ 2209 ¦

2005 (EU-25) ¦ ¦ ¦ ¦ ¦ ¦ ¦ 0 ¦ 607 ¦ ¦ 2209 ¦

2006 (EU-25) ¦ ¦ ¦ ¦ ¦ ¦ ¦ ¦ 607 ¦ ¦ 2209 ¦

2007 (EU-27) ¦ ¦ ¦ ¦ ¦ ¦ ¦ ¦ 607 ¦ ¦ 2250 ¦

2008 (EU-27) ¦ ¦ ¦ ¦ ¦ ¦ ¦ ¦ 607 ¦ ¦ 1874 ¦

2009 (EU-27) ¦ ¦ ¦ ¦ ¦ ¦ ¦ ¦ 607 ¦ ¦ 1874 ¦

2010 (EU-27) ¦ ¦ ¦ ¦ ¦ ¦ ¦ ¦ 607 ¦ ¦ 0 ¦

2011 (EU-27) ¦ ¦ ¦ ¦ ¦ ¦ ¦ ¦ 607 ¦ ¦ 0 ¦

2012 (EU-27) ¦ ¦ ¦ ¦ ¦ ¦ ¦ ¦ 607 ¦ ¦ 0 ¦

2013 (EU-27) ¦ ¦ ¦ ¦ ¦ ¦ ¦ ¦ 607 ¦ ¦ 0 ¦

2014 (EU-27) ¦ ¦ ¦ ¦ ¦ ¦ ¦ ¦ 607 ¦ ¦ 0 ¦

2015 (EU-27) ¦ ¦ ¦ ¦ ¦ ¦ ¦ ¦ 607 ¦ ¦ 0 ¦

11. COOPERATION IN THE FIELDS OF JUSTICE AND HOME AFFAIRS

A. JUDICIAL COOPERATION IN CIVIL AND COMMERCIAL MATTERS

1. 32000 R 1346: Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ L 160, 30.6.2000, p. 1), as amended by:

- 12003 T: Act concerning the conditions of accession and the adjustments to the Treaties-Accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic (OJ L 236, 23.9.2003, p. 33),

- 32005 R 0603: Council Regulation (EC) No 603/2005 of 12.4.2005 (OJ L 100, 20.4.2005, p. 1),

- 32006 R 0694: Council Regulation (EC) No 694/2006 of 27.4.2006 (OJ L 121, 6.5.2006, p. 1).

(a) The following is added to Article 44(1):

"(x) the Convention between Socialist Republic of Romania and the Hellenic Republic on legal assistance in civil and criminal matters and its Protocol, signed at Bucharest on 19 October 1972;

(y) the Convention between Socialist Republic of Romania and the French Republic on legal assistance in civil and commercial matters, signed at Paris on 5 November 1974;

(z) the Agreement between the People's Republic of Bulgaria and the Hellenic Republic on Legal Assistance in Civil and Criminal Matters, signed at Athens on 10 April 1976;

(aa) the Agreement between the People's Republic of Bulgaria and the Republic of Cyprus on Legal Assistance in Civil and Criminal Matters, signed at Nicosia on 29 April 1983;

(ab) the Agreement between the Government of the People's Republic of Bulgaria and the Government of the French Republic on Mutual Legal Assistance in Civil Matters, signed at Sofia on 18 January 1989;

(ac) the Treaty between Romania and the Czech Republic on judicial assistance in civil matters, signed at Bucharest on 11 July 1994;

(ad) the Treaty between Romania and Poland on legal assistance and legal relations in civil cases, signed at Bucharest on 15 May 1999"

(b) In Annex A, the following is inserted between the entries for Belgium and the Czech Republic:

"

- "

and, between the entries for Portugal and Slovenia:

"ROMANIA

- Procedura reorganizrii judiciare i a falimentului"

(c) In Annex B, the following is inserted between the entries for Belgium and the Czech Republic:

"

- "

and, between the entries for Portugal and Slovenia:

"ROMANIA

- Faliment"

(d) In Annex C, the following is inserted between the entries for Belgium and the Czech Republic:

"

-

-

- ()

- "

and, between the entries for Portugal and Slovenia:

"ROMANIA

- Administrator (judiciar)

- Lichidator (judiciar)"

2. 32001 R 0044: Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 12, 16.1.2001, p. 1), as amended by:

- 32002 R 1496: Commission Regulation (EC) No 1496/2002 of 21.8.2002 (OJ L 225, 22.8.2002, p. 13),

- 12003 T: Act concerning the conditions of accession and the adjustments to the Treaties-Accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic (OJ L 236, 23.9.2003, p. 33),

- 32004 R 1937: Commission Regulation (EC) No 1937/2004 of 9.11.2004 (OJ L 334, 10.11.2004, p. 3),

- 32004 R 2245: Commission Regulation (EC) No 2245/2004 of 27.12.2004 (OJ L 381, 28.12.2004, p. 10).

(a) The following is added to Article 69:

"- the Convention between Bulgaria and Belgium on certain Judicial Matters, signed at Sofia on 2 July 1930,

- the Agreement between the People's Republic of Bulgaria and the Federative People's Republic of Yugoslavia on Mutual Legal Assistance, signed at Sofia on 23 March 1956, still in force between Bulgaria and Slovenia,

- the Treaty between the People's Republic of Romania and the People's Republic of Hungary on Legal Assistance in Civil, Family and Criminal Matters, signed at Bucharest on 7 October 1958,

- the Treaty between the People's Republic of Romania and the Czechoslovak Republic on Legal Assistance in Civil, Family and Criminal Matters, signed at Prague on 25 October 1958, still in force between Romania and Slovakia,

- the Agreement between the People's Republic of Bulgaria and the Romanian People's Republic on Legal Assistance in Civil, Family and Criminal Matters, signed at Sofia on 3 December 1958,

- the Treaty between the People's Republic of Romania and the Federal People's Republic of Yugoslavia on Legal Assistance, signed at Belgrade on 18 October 1960 and its Protocol, still in force between Romania and Slovenia,

- the Agreement between the People's Republic of Bulgaria and the Polish People's Republic on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters, signed at Warsaw on 4 December 1961,

- the Convention between the Socialist Republic of Romania and the Republic of Austria on Legal Assistance in Civil and Family law and the Validity and Service of Documents and its annexed Protocol, signed at Vienna on 17 November 1965,

- the Agreement between the People's Republic of Bulgaria and the Hungarian People's Republic on Legal Assistance in Civil, Family and Criminal Matters, signed at Sofia on 16 May 1966,

- the Convention between the Socialist Republic of Romania and the Hellenic Republic on Legal Assistance in Civil and Criminal Matters and its Protocol, signed at Bucharest on 19 October 1972,

- the Convention between the Socialist Republic of Romania and the Italian Republic on Judicial Assistance in Civil and Criminal Matters, signed at Bucharest on 11 November 1972,

- the Convention between the Socialist Republic of Romania and the French Republic on Legal Assistance in Civil and Commercial Matters, signed at Paris on 5 November 1974,

- the Convention between the Socialist Republic of Romania and the Kingdom of Belgium on Legal Assistance in Civil and Commercial Matters, signed at Bucharest on 30 October 1975,

- the Agreement between the People's Republic of Bulgaria and the Hellenic Republic on Legal Assistance in Civil and Criminal Matters, signed at Athens on 10 April 1976,

- the Agreement between the People's Republic of Bulgaria and the Czechoslovak Socialist Republic on Legal Assistance and Settlement of Relations in Civil, Family and Criminal Matters, signed at Sofia on 25 November 1976,

- the Convention between the Socialist Republic of Romania and the United Kingdom of Great Britain and Northern Ireland on Legal Assistance in Civil and Commercial Matters, signed at London on 15 June 1978,

- the Additional Protocol to the Convention between the Socialist Republic of Romania and the Kingdom of Belgium on Legal Assistance Civil and Commercial Matters, signed at Bucharest on 30 October 1979,

- the Convention between the Socialist Republic of Romania and the Kingdom of Belgium on Recognition and Enforcement of Decisions in Alimony Obligations, signed at Bucharest on 30 October 1979,

- the Convention between the Socialist Republic of Romania and the Kingdom of Belgium on Recognition and Enforcement of Divorce Decisions, signed at Bucharest on 6 November 1980,

- the Agreement between the People's Republic of Bulgaria and the Republic of Cyprus on Legal Assistance in Civil and Criminal Matters, signed at Nicosia on 29 April 1983,

- the Agreement between the Government of the People's Republic of Bulgaria and the Government of the French Republic on Mutual Legal Assistance in Civil Matters, signed at Sofia on 18 January 1989,

- the Agreement between the People's Republic of Bulgaria and the Italian Republic on Legal Assistance and Enforcement of Decisions in Civil Matters, signed at Rome on 18 May 1990,

- the Agreement between the Republic of Bulgaria and the Kingdom of Spain on Mutual Legal Assistance in Civil Matters, signed at Sofia on 23 May 1993,

- the Treaty between Romania and the Czech Republic on Judicial Assistance in Civil Matters, signed at Bucharest on 11 July 1994,

- the Convention between Romania and the Kingdom of Spain on Jurisdiction, Recognition and Enforcement of Decisions in Civil and Commercial Matters, signed at Bucharest on 17 November 1997,

- the Convention between Romania and the Kingdom of Spain - complementary to the Hague Convention relating to civil procedure law (Hague, 1 March 1954), signed at Bucharest on 17 November 1997,

- the Treaty between Romania and the Republic of Poland on Legal Assistance and Legal Relations in Civil Cases, signed at Bucharest on 15 May 1999."

(b) In Annex I, the following is inserted between the entries for Belgium and the Czech Republic:

"- in Bulgaria: Article 4(1), of the International Private Law Code,"

and, between the entries for Portugal and Slovenia:

"- in Romania: Articles 148-157 of Law No. 105/1992 on Private International Law Relations,"

(c) In Annex II, the following is inserted between the entries for Belgium and the Czech Republic:

"- in Bulgaria, the " ""

and, between the entries for Portugal and Slovenia:

"- in Romania, the "Tribunal","

(d) In Annex III, the following is inserted between the entries for Belgium and the Czech Republic:

"- in Bulgaria, the " - ""

and, between the entries for Portugal and Slovenia:

"- in Romania, the "Curte de Apel"."

(e) In Annex IV, the following is inserted between the entries for Belgium and the Czech Republic:

"- in Bulgaria, " ""

and, between the entries for Portugal and Slovenia:

"- in Romania, a "contestatie in anulare" or a "revizuire"."

B. VISA POLICY

1. 31995 R 1683: Council Regulation (EC) No 1683/95 of 29 May 1995 laying down a uniform format for visas (OJ L 164, 14.7.1995, p. 1), as amended by:

- 32002 R 0334: Council Regulation (EC) No 334/2002 of 18.2.2002 (OJ L 53, 23.2.2002, p. 7),

- 12003 T: Act concerning the conditions of accession and the adjustments to the Treaties-Accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic (OJ L 236, 23.9.2003, p. 33).

In the Annex, point 3 is replaced by the following:

"3. The logo consisting of a letter or letters indicating the issuing Member State (or "BNL" in the case of the Benelux countries, namely Belgium, Luxembourg and the Netherlands) with a latent image effect shall appear in this space. This logo shall appear light when held flat and dark when turned by 90°. The following logos shall be used: A for Austria, BG for Bulgaria, BNL for Benelux, CY for Cyprus, CZE for the Czech Republic, D for Germany, DK for Denmark, E for Spain, EST for Estonia, F for France, FIN for Finland, GR for Greece, H for Hungary, I for Italy, IRL for Ireland, LT for Lithuania, LVA for Latvia, M for Malta, P for Portugal, PL for Poland, ROU for Romania, S for Sweden, SK for Slovakia, SVN for Slovenia, UK for the United Kingdom.".

2. 41999 D 0013: the definitive version of the Common Consular Instructions (SCH/Com-ex (99)) 13 (OJ L 239, 22.9.2000, p. 317), as adopted by Decision of the Executive Committee of 28 April 1999, have since been amended by the acts listed below. A revised version of the Common Consular Instructions containing those amendments and including other amendments made pursuant to the provisions of Council Regulation (EC) No 789/2001 of 24 April 2001 (OJ L 116, 26.4.2001, p. 2), has been published in OJ C 326, 22.12.2005, p. 1.

- 32001 D 0329: Council Decision 2001/329/EC of 24.4.2001 (OJ L 116, 26.4.2001, p. 32),

DOCNUM	32006R1791
AUTHOR	Council
FORM	Regulation
TREATY	European Community
PUBREF	OJ L 363, 20.12.2006, p. 1-80 (ES, CS, DA, DE, ET, EL, EN, FR, IT, LV, LT, HU, NL, PL, PT, SK, SL, FI, SV)
PUB	2006/12/20
DOC	2006/11/20
INFORCE	2007/01/01=EV
ENDVAL	2008/12/31
LEGBASE	12005S/TTE/04 12005SA056
MODIFIES	31958Q1101 Amendment Replacement Article 10.1 from 01/01/2007 31958Q1101 Amendment Replacement Article 10.2 from 01/01/2007 31958Q1101 Amendment Replacement Article 5.1 from 01/01/2007 31958Q1101 Amendment Replacement Article 5.2 from 01/01/2007 31958R0001 Amendment Replacement Article 1 from 01/01/2007 31958R0001 Amendment Replacement Article 4 from 01/01/2007 31958R0001 Amendment Replacement Article 5 from 01/01/2007 31965R0079 Amendment Completion Annex from 01/01/2007 31965R0079 Amendment Completion Article 5.1 from 01/01/2007 31969R1192 Amendment Completion Article 3.1 from 01/01/2007 31970R1108 Amendment Completion Annex 2 from 01/01/2007 31971R1408 Amendment Completion Annex 1 Paragraph 1 from 01/01/2007 31971R1408 Amendment Completion Annex 1 Paragraph 2 from 01/01/2007 31971R1408 Amendment Completion Annex 2 BI from 01/01/2007 31971R1408 Amendment Completion Annex 2 BIS from 01/01/2007 31971R1408 Amendment Completion Annex 2 Paragraph 1 from 01/01/2007 31971R1408 Amendment Completion Annex 2 Paragraph 2 from 01/01/2007 31971R1408 Amendment Completion Annex 2 Paragraph 3 from 01/01/2007 31971R1408 Amendment Completion Annex 2 Paragraph A) from 01/01/2007 31971R1408 Amendment Completion Annex 3 Paragraph A) from 01/01/2007 31971R1408 Amendment Completion Annex 3 Paragraph B) from 01/01/2007 31971R1408 Amendment Completion Annex 4 Paragraph A) from 01/01/2007 31971R1408 Amendment Completion Annex 4 Paragraph A) from 01/01/2007 31971R1408 Amendment Completion Annex 4 Paragraph B) from 01/01/2007 31971R1408 Amendment Completion Annex 4 Paragraph C) from 01/01/2007 31971R1408 Amendment Completion Annex 4 Paragraph C) from 01/01/2007 31971R1408 Amendment Completion Annex 6 from 01/01/2007 31971R1408 Amendment Replacement Annex 7 from 01/01/2007 31971R1408 Amendment Completion Annex 8 from 01/01/2007 31971R1408 Amendment Replacement Annex 8 from 01/01/2007

31971R1408 Amendment Amendment Article 82B. from 01/01/2007
31971R1408 Amendment Amendment Article 82 B) from 01/01/2007
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31972R0574 Amendment Completion Annex 10 from 01/01/2007
31972R0574 Amendment Completion Annex 2 from 01/01/2007
31972R0574 Amendment Completion Annex 3 from 01/01/2007
31972R0574 Amendment Amendment Annex 4 from 01/01/2007
31972R0574 Amendment Completion Annex 4 from 01/01/2007
31972R0574 Amendment Completion Annex 5 from 01/01/2007
31972R0574 Amendment Amendment Annex 5 from 01/01/2007
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31972R0574 Amendment Replacement Annex 8 from 01/01/2007
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31979R0357 Amendment Completion Annex from 01/01/2007
31979R0357 Amendment Amendment Article 4.3 from 01/01/2007
31982D0735 Amendment Repeal
31983Y0117 Amendment Replacement PT 2.2 from 01/01/2007
31985R3821 Amendment Amendment Annex 1 from 01/01/2007
31985R3821 Amendment Completion Annex 2 from 01/01/2007
31988Y0309(02) Amendment Completion Annex from 01/01/2007
31990D0424 Amendment Addition Article 23.13 from 01/01/2007
31990R0837 Amendment Completion Annex 3 from 01/01/2007
31991R2092 Amendment Completion Annex 5 Paragraph A) from 01/01/2007
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31991R2092 Amendment Completion Article 2 from 01/01/2007
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31992R0881 Amendment Completion Annex 1 from 01/01/2007
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31993R0339 Amendment Completion Article 6.2 from 01/01/2007
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31993R3030 Amendment Addition Article 2.10 from 01/01/2007
31993R3030 Amendment Completion Article 5 from 01/01/2007
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31994R0517 Amendment Completion Annex 3A. from 01/01/2007
41994D0028 Amendment Completion Annex 2 from 01/01/2007

31995R1683 Amendment Amendment Annex from 01/01/2007
31996D1692 Amendment Completion Annex 1 from 01/01/2007
31997D0602 Amendment Amendment Annex from 01/01/2007
31998R1172 Amendment Amendment Annex G. from 01/01/2007
31999R0339 Amendment Completion Article 6.1 from 01/01/2007
31999R0659 Amendment Amendment Article 1.B) from 01/01/2007
31999R1493 Amendment Amendment Annex 7 from 01/01/2007
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32005D0834 Amendment Completion Annex from 01/01/2007
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32006R0510 Amendment Completion Article 5.8 from 01/01/2007
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ACT

concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded

PART ONE

PRINCIPLES

Article 1

For the purposes of this Act:

— the expression 'original Treaties' means:

(a) the Treaty establishing the European Community ('EC Treaty') and the Treaty establishing the European Atomic Energy Community ('Euratom Treaty'), as supplemented or amended by treaties or other acts which entered into force before this accession,

(b) the Treaty on European Union ('EU Treaty'), as supplemented or amended by treaties or other acts which entered into force before this accession;

— the expression 'present Member States' means the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland;

— the expression 'the Union' means the European Union as established by the EU Treaty;

— the expression 'the Community' means one or both of the Communities referred to in the first indent, as the case may be;

— the expression 'new Member States' means the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic;

— the expression 'the institutions' means the institutions established by the original Treaties.

Article 2

From the date of accession, the provisions of the original Treaties and the acts adopted by the institutions and the European Central Bank before accession shall be binding on the new Member States and shall apply in those States under the conditions laid down in those Treaties and in this Act.

Article 3

1. The provisions of the Schengen acquis as integrated into the framework of the European Union by the Protocol annexed to the Treaty on European Union and to the Treaty establishing the European Community (hereinafter referred to as the 'Schengen Protocol'), and the acts building upon it or otherwise related to it, listed in Annex I to this Act, as well as any further such acts which may be adopted before the date of accession, shall be binding on and applicable in the new Member States from the date of accession.

2. Those provisions of the Schengen acquis as integrated into the framework of the European Union and the acts building upon it or otherwise related to it not referred to in paragraph 1, while binding on the new Member States from the date of accession, shall only apply in a new Member State pursuant to a Council decision to that effect after verification in accordance with the applicable Schengen evaluation procedures that the necessary conditions for the application of all parts of the acquis concerned have been met in that new Member State and after consulting the European Parliament.

The Council shall take its decision acting with the unanimity of its members representing the Governments of the Member States in respect of which the provisions referred to in the present paragraph have already been put into effect and of the representative of the Government of the Member State in respect of which those provisions are to be put into effect. The members of the Council representing the Governments of Ireland and of the United Kingdom of Great Britain and Northern Ireland shall take part in such a decision insofar as it relates to the provisions of the Schengen acquis and the acts building upon it or otherwise related to it in which these Member States participate.

3. The Agreements concluded by the Council under Article 6 of the Schengen Protocol shall be binding on the new Member States from the date of accession.

17. **CONSUMERS AND HEALTH PROTECTION**

32000 D 0323: Commission Decision 2000/323/EC of 4 May 2000 setting up a Consumer Committee (notified under document number C (2000) 408) (OJ L 111, 9.5.2000, p. 30).

In Article 3, in the first indent, '15' is replaced by '25'.

18. **COOPERATION IN THE FIELDS OF JUSTICE AND HOME AFFAIRS**

A. JUDICIAL COOPERATION IN CIVIL AND COMMERCIAL MATTERS

1. 32000 R 1346: Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ L 160, 30.6.2000, p. 1).

(a) The following is added to Article 44(1):

'(l) the Convention between the Federative People's Republic of Yugoslavia and the Kingdom of Greece on the Mutual Recognition and Enforcement of Judgments, signed at Athens on 18 June 1959;

(m) the Agreement between the Federative People's Republic of Yugoslavia and the Republic of Austria on the Mutual Recognition and Enforcement of Arbitral Awards and Arbitral Settlements in Commercial Matters, signed at Belgrade on 18 March 1960;

(n) the Convention between the Federative People's Republic of Yugoslavia and the Republic of Italy on Mutual Judicial Cooperation in Civil and Administrative Matters, signed at Rome on 3 December 1960;

(o) the Agreement between the Socialist Federative Republic of Yugoslavia and the Kingdom of Belgium on Judicial Cooperation in Civil and Commercial Matters, signed at Belgrade on 24 September 1971;

(p) the Convention between the Governments of Yugoslavia and France on the Recognition and Enforcement of Judgments in Civil and Commercial Matters, signed at Paris on 18 May 1971;

(q) the Agreement between the Czechoslovak Socialist Republic and the Hellenic Republic on Legal Aid in Civil and Criminal Matters, signed at Athens on 22 October 1980, still in force between the Czech Republic and Greece;

(r) the Agreement between the Czechoslovak Socialist Republic and the Republic of Cyprus on Legal Aid in Civil and Criminal Matters, signed at Nicosia on 23 April 1982, still in force between the Czech Republic and Cyprus;

(s) the Treaty between the Government of the Czechoslovak Socialist Republic and the Government of the Republic of France on Legal Aid and the Recognition and Enforcement of Judgments in Civil, Family and Commercial Matters, signed at Paris on 10 May 1984, still in force between the Czech Republic and France;

(t) the Treaty between the Czechoslovak Socialist Republic and the Italian Republic on Legal Aid in Civil and Criminal Matters, signed at Prague on 6 December 1985, still in force between the Czech Republic and Italy;

(u) the Agreement between the Republic of Latvia, the Republic of Estonia and the Republic of Lithuania on Legal Assistance and Legal Relationships, signed at Tallinn on 11 November 1992;

(v) the Agreement between Estonia and Poland on Granting Legal Aid and Legal Relations on Civil, Labour and Criminal Matters, signed at Tallinn on 27 November 1998;

(w) the Agreement between the Republic of Lithuania and the Republic of Poland on Legal Assistance and Legal Relations in Civil, Family, Labour and Criminal Matters, signed in Warsaw on 26 January 1993.';

(b) In Annex A, the following is inserted between the entries for Belgium and Germany:

'ČESKÁ REPUBLIKA

— Konkurs

— Nucené vyrovnání

— Vyrovnání'

and, between the entries for Germany and Greece:

'EESTI

— Pankrotimenetlus'.

and, between the entries for Italy and Luxembourg:

'ΚΥΠΡΟΣ

— Υποχρεωτική εκκαθάριση από το Δικαστήριο (Compulsory winding up by the court)

— Εκούσια εκκαθάριση από πιστωτές κατόπιν Δικαστικού Διατάγματος (Creditor's voluntary winding up by court order)

— Εκούσια εκκαθάριση από μέλη (Company's (members) voluntary winding up)

— Εκκαθάριση με την εποπτεία του Δικαστηρίου (Winding up subject to the supervision of the court)

— Πτώχευση κατόπιν Δικαστικού Διατάγματος (Bankruptcy by court order)

— Διαχείριση της περιουσίας προσώπων που απεβίωσαν αφερέγγυα (The administration of the estate of persons dying insolvent)

LATVIJA

— maksātnespēja

LIETUVA

— Bankroto byla

— Bankroto procedūra

— Likvidavimo procedūra'

and, between the entries for Luxembourg and the Netherlands:

'MAGYARORSZÁG

— Csődeljárás

— Felszámolási eljárás

MALTA

— Falliment

— Stralċ permezz tal-Qorti

— Stralċ volontarju tal-krediturí'

and, between the entries for Austria and Portugal:

'POLSKA

— Postępowanie upadłościowe,

— Postępowanie układowe'

and, between the entries for Portugal and Finland:

'SLOVENIJA

— Stečajni postopek

— Skrajšani stečajni postopek

— Postopek prisilne poravnave

— Prisilna poravnava v stečaju

— Likvidacija pravne osebe pred sodiščem

SLOVENSKO

— Konkurzné konanie

— Nútené vyrovnanie

— Vyrovnanie.';

(c) In Annex B, the following is inserted between the entries for Belgium and Germany:

'ČESKÁ REPUBLIKA

— Konkurs

— Nucené vyrovnání'

and, between the entries for Germany and Greece:

'EESTI

— Pankrotimenetlus'

and, between the entries for Italy and Luxembourg:

'ΚΥΠΡΟΣ

— Υποχρεωτική εκκαθάριση από το Δικαστήριο (Compulsory winding up by the court)

— Εκκαθάριση με την εποπτεία του Δικαστηρίου (Winding up subject to the supervision of the court)

— Εκούσια εκκαθάριση από πιστωτές (με την επικύρωση του Δικαστηρίου) (Creditor's voluntary winding up (with confirmation by the court))

— Πτώχευση (Bankruptcy)

— Διαχείριση της περιουσίας προσώπων που απεβίωσαν αφερέγγυα (The administration of the estate of persons dying insolvent)

LATVIJA

— bankrots

— likvidācija

— sanācija

LIETUVA

— Likvidavimo procedūra'

and, between the entries for Luxembourg and the Netherlands:

'MAGYARORSZÁG

— Csődeljárás

— Felszámolási eljárás

MALTA

— Falliment

— Stralċ permezz tal-Qorti

— Stralċ volontarju tal-krediturí'

and, between the entries for Austria and Portugal:

'POLSKA

— Postępowanie upadłościowe'

and, between the entries for Portugal and Finland:

'SLOVENIJA

— Stečajni postopek

— Skrajšani stečajni postopek

— Likvidacija pravne osebe pred sodiščem

SLOVENSKO

— Konkurzné konanie

— Nútené vyrovnanie

— Vyrovnanie';

(d) In Annex C, the following is inserted between the entries for Belgium and Germany:

'ČESKÁ REPUBLIKA

— Správce podstaty

— Předběžný správce

— Vyrovnací správce

— Zvláštní správce

— Zástupce správce'

and, between the entries for Germany and Greece:

'EESTI

— Pankrotihaldur

— Ajutine pankrotihaldur

— Usaldusisik'

and, between the entries for Italy and Luxembourg:

'ΚΥΠΡΟΣ

— Εκκαθαριστής και Προσωρινός Εκκαθαριστής (Liquidator and Provisional liquidator)

— Επίσημος Παραλήπτης (Official Receiver)

— Διαχειριστής της Πτώχευσης (Trustee in bankruptcy)

— Εξεταστής (Examiner)

LATVIJA

— administrators

— tiesu izpildītājs

— likvidators

LIETUVA

— Įmonės administratorius

— Įmonės likvidatorius'

and, between the entries for Luxembourg and the Netherlands:

'MAGYARORSZÁG

— Vagyonfelügyelő

— Felszámoló

MALTA

— Kuratur tal-fallut

— Likwidatur

— Riċevitur uffiċjali'

and, between the entries for Austria and Portugal:

'POLSKA

— Syndyk

— Nadzorca sądowy'

and, between the entries for Portugal and Finland:

'SLOVENIJA

— Poravnalni senat (senat treh sodnikov)

— Upravitelj prisilne poravnave

— Stečajni senat (senat treh sodnikov)

— Stečajni upravitelj

— Upniški odbor

— Likvidacijski senat (kot stečajni senat, če sodišče ne odloči drugače)

— Likvidacijski upravitelj (kot stečajni upravitelj, če sodišče ne odloči drugače)

SLOVENSKO

— Predbežný správca

— Konkurzný správca

— Vyrovnací správca

— Osobitný správca'.

2. 32000 R 1347: Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses (OJ L 160, 30.6.2000, p. 19), as amended by:

— 32002 R 1185: Commission Regulation (EC) No 1185/2002 of 1.7.2002 (OJ L 173, 3.7.2002, p. 3).

(a) The following is added to Article 40(3):

'(c) Agreement between the Holy See and Malta on the recognition of civil effects to canonical marriages and to decisions of ecclesiastical authorities and tribunals on those marriages of 3 February 1993, with the second Additional Protocol of 6 January 1995.';

(b) Article 40(4) is replaced by the following:

'(4) Recognition of the decisions provided for in paragraph 2 may, in Spain, Italy and Malta respectively, be subject to the same procedures and the same checks as are applicable to decisions of the ecclesiastical courts handed down in accordance with the international treaties concluded with the Holy See referred to in paragraph 3.';

(c) In Annex I, the following is inserted between the entries for Belgium and Germany:

'— in the Czech Republic, the "okresní soud" or "soudní exekutor",'

and, between the entries for Germany and Greece:

'— in Estonia, the "maakohus" or the "linnakohus",'

and, between the entries for Italy and Luxembourg:

'— in Cyprus, the "Οικογενειακό Δικαστήριο",

— in Latvia, the "bāriņtiesa" or "pagasttiesa",

— in Lithuania, the "Lietuvos apeliacinis teismas",'

and, between the entries for Luxembourg and the Netherlands:

'— in Hungary, the "megyei bíróság székhelyén működő helyi bíróság", and in Budapest, the "Budai Központi Kerületi Bíróság",

— in Malta, the "Prim' Awla tal-Qorti Ċivili" or "il-Qorti tal-Maġistrati ta' Għawdex fil-ġurisdizzjoni superjuri tagħha",'

and, between the entries for Austria and Portugal:

'— in Poland, the "Sąd Okręgowy",'

and, between the entries for Portugal and Finland:

'— in Slovenia, the "Okrajno sodišče",

— in Slovakia, the "okresný súd".';

(d) In Annex II, the following is inserted between the entries for Belgium and Germany:

'— in the Czech Republic, the "okresní soud",'

and, between the entries for Germany and Greece:

'— in Estonia, the "ringkonnakohus",'

and, between the entries for Italy and Luxembourg:

'— in Cyprus, the "Οικογενειακό Δικαστήριο",

— in Latvia, the "apgabaltiesa",

— in Lithuania, the "Lietuvos Aukščiausiasis Teismas",'

and, between the entries for Luxembourg and the Netherlands:

'— in Hungary, the "megyei bíróság", and in Budapest the "Fővárosi Bíróság",

— in Malta, the "Qorti tal-Appell" in accordance with the procedure laid down for appeals in the Kodiċi tal-Organizzazzjoni u Proċedura Ċivili – Kap. 12,'

and, between the entries for Austria and Portugal:

'— in Poland, the "Sąd Apelacyjny",'

and, between the entries for Portugal and Finland:

'— in Slovenia, the "Višje sodišče",

— in Slovakia, the "krajský súd".';

(e) In Annex III, the first indent is replaced by the following:

'— in Belgium, Greece, Spain, France, Italy, Latvia, Luxembourg and the Netherlands, by an appeal in cassation,';

(f) In the same Annex the following is inserted immediately before the entry for Germany:

'— in the Czech Republic, by a "dovolání" and a "žaloba pro zmatečnost",'

and, between the entries for Germany and Ireland:

'— in Estonia, by "kassatsioonkaebus",'

and, between the entries for Ireland and Austria:

'— in Cyprus, by an appeal to the Ανώτατο Δικαστήριο (Supreme Court),

— in Lithuania, by a retrial, only in cases prescribed by statute,

— in Hungary, "felülvizsgálati kérelem",'

and, between the entries for Austria and Portugal:

'— in Poland, by an appeal in cassation to the "Sąd Najwyższy",'

and, between the entries for Portugal and Finland:

'— in Slovenia, by a retrial, only in cases prescribed by statute.'.

3. 32001 R 0044: Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 12, 16.1.2001, p. 1), as amended by:

— 32002 R 1496: Commission Regulation (EC) No 1496/2002 of 21.8.2002 (OJ L 225, 22.8.2002, p. 13).

(a) Article 65 is replaced by the following:

'1. The jurisdiction specified in Article 6(2) and Article 11 in actions on a warranty of guarantee or in any other third party proceedings may not be resorted to Germany, Austria and Hungary. Any person domiciled in another Member State may be sued in the courts:

(a) of Germany, pursuant to Articles 68 and 72 to 74 of the Code of Civil Procedure (Zivilprozessordnung) concerning third-party notices;

(b) of Austria, pursuant to Article 21 of the Code of Civil Procedure (Zivilprozessordnung) concerning third-party notices;

(c) of Hungary, pursuant to Articles 58 to 60 of the Code of Civil Procedure (Polgári perrendtartás) concerning third-party notices.

(2) Judgments given in other Member States by virtue of Article 6(2), or Article 11 shall be recognised and enforced in Germany, Austria and Hungary in accordance with Chapter III. Any effects which judgments given in these States may have on third parties by application of the provisions in paragraph 1 shall also be recognised in the other Member States.';

(b) The following is added to Article 69:

'— the Convention between the Czechoslovak Republic and Portugal on the Recognition and Enforcement of Court Decisions, signed at Lisbon on 23 November 1927, still in force between the Czech Republic and Portugal,

— the Convention between the Federative People's Republic of Yugoslavia and the Republic of Austria on Mutual Judicial Cooperation, signed at Vienna on 16 December 1954,

— the Convention between the Polish People's Republic and the Hungarian People's Republic on the Legal Assistance in Civil, Family and Criminal Matters, signed at Budapest on 6 March 1959,

— the Convention between the Federative People's Republic of Yugoslavia and the Kingdom of Greece on the Mutual Recognition and Enforcement of Judgments, signed at Athens on 18 June 1959,

— the Convention between the Polish People's Republic and the Federative People's Republic of Yugoslavia on the Legal Assistance in Civil and Criminal Matters, signed at Warsaw on 6 February 1960, now in force between Poland and Slovenia,

— the Agreement between the Federative People's Republic of Yugoslavia and the Republic of Austria on the Mutual Recognition and Enforcement of Arbitral Awards and Arbitral Settlements in Commercial Matters, signed at Belgrade on 18 March 1960,

— the Agreement between the Federative People's Republic of Yugoslavia and the Republic of Austria on the Mutual Recognition and Enforcement of Decisions in Alimony Matters, signed at Vienna on 10 October 1961,

— the Convention between Poland and Austria on Mutual Relations in Civil Matters and on Documents, signed at Vienna on 11 December 1963,

— the Treaty between the Czechoslovak Socialist Republic and the Socialist Federative Republic of Yugoslavia on Settlement of Legal Relations in Civil, Family and Criminal Matters, signed at Belgrade on 20 January 1964, still in force between the Czech Republic, Slovakia and Slovenia,

— the Convention between Poland and France on Applicable Law, Jurisdiction and the Enforcement of Judgments in the Field of Personal and Family Law, concluded in Warsaw on 5 April 1967,

— the Convention between the Governments of Yugoslavia and France on the Recognition and Enforcement of Judgments in Civil and Commercial Matters, signed at Paris on 18 May 1971,

— the Convention between the Federative Socialist Republic of Yugoslavia and the Kingdom of Belgium on the Recognition and Enforcement of Court Decisions in Alimony Matters, signed at Belgrade on 12 December 1973,

— the Convention between Hungary and Greece on Legal Assistance in Civil and Criminal Matters, signed at Budapest on 8 October 1979,

— the Convention between Poland and Greece on Legal Assistance in Civil and Criminal Matters, signed at Athens on 24 October 1979,

— the Convention between Hungary and France on Legal Assistance in Civil and Family Law, on the Recognition and Enforcement of Decisions and on Legal Assistance in Criminal Matters and on Extradition, signed at Budapest on 31 July 1980,

— the Treaty between the Czechoslovak Socialist Republic and the Hellenic Republic on Legal Aid in Civil and Criminal Matters, signed at Athens on 22 October 1980, still in force between the Czech Republic, Slovakia and Greece,

— the Convention between the Republic of Cyprus and the Hungarian People's Republic on Legal Assistance in Civil and Criminal Matters, signed at Nicosia on 30 November 1981,

— the Treaty between the Czechoslovak Socialistic Republic and the Republic of Cyprus on Legal Aid in Civil and Criminal Matters, signed at Nicosia on 23 April 1982, still in force between the Czech Republic, Slovakia and Cyprus,

— the Agreement between the Republic of Cyprus and the Republic of Greece on Legal Cooperation in Matters of Civil, Family, Commercial and Criminal Law, signed at Nicosia on 5 March 1984,

— the Treaty between the Government of the Czechoslovak Socialist Republic and the Government of the Republic of France on Legal Aid and the Recognition and Enforcement of Judgments in Civil, Family and Commercial Matters, signed at Paris on 10 May 1984, still in force between the Czech Republic, Slovakia and France,

— the Agreement between the Republic of Cyprus and the Socialist Federal Republic of Yugoslavia on Legal Assistance in Civil and Criminal Matters, signed at Nicosia on 19 September 1984, now in force between Cyprus and Slovenia,

— the Treaty between the Czechoslovak Socialist Republic and the Italian Republic on Legal Aid in Civil and Criminal Matters, signed at Prague on 6 December 1985, still in force between the Czech Republic, Slovakia and Italy,

— the Treaty between the Czechoslovak Socialist Republic and the Kingdom of Spain on Legal Aid, Recognition and Enforcement of Court Decisions in Civil Matters, signed at Madrid on 4 May 1987, still in force between the Czech Republic, Slovakia and Spain,

— the Treaty between the Czechoslovak Socialist Republic and the Polish People's Republic on Legal Aid and Settlement of Legal Relations in Civil, Family, Labour and Criminal Matters, signed at Warsaw on 21 December 1987, still in force between the Czech Republic, Slovakia and Poland,

— the Treaty between the Czechoslovak Socialist Republic and the Hungarian People's Republic on Legal Aid and Settlement of Legal Relations in Civil, Family and Criminal Matters, signed at Bratislava on 28 March 1989, still in force between the Czech Republic, Slovakia and Hungary,

— the Convention between Poland and Italy on Judicial Assistance and the Recognition and Enforcement of Judgments in Civil Matters, signed at Warsaw on 28 April 1989,

— the Treaty between the Czech Republic and the Slovak Republic on Legal Aid provided by Judicial Bodies and on Settlements of Certain Legal Relations in Civil and Criminal Matters, signed at Prague on 29 October 1992,

— the Agreement between the Republic of Latvia, the Republic of Estonia and the Republic of Lithuania on Legal Assistance and Legal Relationships, signed at Tallinn on 11 November 1992,

— the Agreement between the Republic of Poland and the Republic of Lithuania on Legal Assistance and Legal Relations in Civil, Family, Labour and Criminal Matters, signed in Warsaw on 26 January 1993,

— the Agreement between the Republic of Latvia and the Republic of Poland on Legal Assistance and Legal Relationships in Civil, Family, Labour and Criminal Matters, signed at Riga on 23 February 1994,

— the Agreement between the Republic of Cyprus and the Republic of Poland on Legal Cooperation in Civil and Criminal Matters, signed at Nicosia on 14 November 1996,

— the Agreement between Estonia and Poland on Granting Legal Assistance and Legal Relations on Civil, Labour and Criminal Matters, signed at Tallinn on 27 November 1998.';

(c) In Annex I, the following is inserted between the entries for Belgium and Germany:

'— in the Czech Republic: Article 86 of Act No 99/1963 Coll., the Code of Civil Procedure (občanský soudní řád), as amended,'

and, between the entries for Germany and Greece:

'— in Estonia: Article 139, paragraph 2 of the Code of Civil Procedure (tsiviilkohtumenetluse seadustik),'

and, between the entries for Italy and Luxembourg:

'— in Cyprus: section 21(2) of the Courts of Justice Law No 14 of 1960, as amended,

— in Latvia: Articles 7 to 25 of the Civil Law (Civillikums),

— in Lithuania: Article 31 of the Code of Civil Procedure (Civilinio proceso kodeksas),'

and, between the entries for Luxembourg and the Netherlands:

'— in Hungary: Article 57 of Law Decree No. 13 of 1979 on International Private Law (a nemzetközi magánjogról szóló 1979. évi 13. törvényerejű rendelet),

— in Malta: Articles 742, 743 and 744 of the Code of Organisation and Civil Procedure – Cap. 12 (Kodiċi ta' Organizzazzjoni u Proċedura Ċivili – Kap. 12) and Article 549 of the Commercial Code – Cap. 13 (Kodiċi tal-kummerċ – Kap. 13),'

and, between the entries for Austria and Portugal:

'— in Poland: Articles 1103 and 1110 of the Code of Civil Procedure (Kodeks postępowania cywilnego),'

and, between the entries for Portugal and Finland:

'— in Slovenia: Articles 48(2) and 58 of the Private International Law and Procedure Act (Zakon o mednarodnem zasebnem pravu in postopku),

— in Slovakia: sections 37, 39 (only as regards maintenance) and 46 of Act No 97/1963 Zb. on Private International Law and Rules of Procedure relating thereto.';

(d) In Annex II, the following is inserted between the entries for Belgium and Germany:

'— in the Czech Republic, the "okresní soud" or "soudní exekutor",'

and, between the entries for Germany and Greece:

'— in Estonia, the "maakohus" or the "linnakohus",'

and, between the entries for Italy and Luxembourg:

'— in Cyprus, the "Επαρχιακό Δικαστήριο" or in the case of a maintenance judgment the "Οικογενειακό Δικαστήριο",

— in Latvia, the "rajona (pilsētas) tiesa",

— in Lithuania, the "Lietuvos apeliacinis teismas",'

and, between the entries for Luxembourg and the Netherlands:

'— in Hungary, the "megyei bíróság székhelyén működő helyi bíróság", and in Budapest the "Budai Központi Kerületi Bíróság",

— in Malta, the "Prim' Awla tal-Qorti Ċivili" or "Qorti tal-Maġistrati ta' Għawdex fil-ġurisdizzjoni superjuri tagħha", or, in the case of a maintenance judgment, the "Reġistratur tal-Qorti" on transmission by the "Ministru responsabbli għall-Ġustizzja",'

and, between the entries for Austria and Portugal:

'— in Poland, the "Sąd Okręgowy",'

and, between the entries for Portugal and Finland:

'— in Slovenia, the "Okrajno sodišče",

— in Slovakia, the "okresný súd" or "exekútor".';

(e) In Annex III, the following is inserted between the entries for Belgium and Germany:

'— in the Czech Republic, the "okresní soud",'

and, between the entries for Germany and Greece:

'— in Estonia, the "ringkonnakohus",'

and, between the entries for Italy and Luxembourg:

'— in Cyprus, the "Επαρχιακό Δικαστήριο" or in the case of a maintenance judgment the "Οικογενειακό Δικαστήριο",

— in Latvia, the "Apgabaltiesa",

— in Lithuania, the "Lietuvos Aukščiausiasis Teismas",'

and, between the entries for Luxembourg and the Netherlands:

'— in Hungary, the "megyei bíróság"; in Budapest, the "Fővárosi Bíróság",

— in Malta, the "Qorti ta' l-Appell" in accordance with the procedure laid down for appeals in the Kodiċi ta' Organizzazzjoni u Proċedura Ċivili – Kap.12 or in the case of a maintenance judgment by "ċitazzjoni" before the "Prim' Awla tal-Qorti ivili jew il-Qorti tal-Maġistrati ta' Għawdex fil-ġurisdizzjoni superjuri tagħha"',

and, between the entries for Austria and Portugal:

'— in Poland, the "Sąd Apelacyjny",'

and, between the entries for Portugal and Finland:

'— in Slovenia, the "Višje sodišče",

— in Slovakia, "odvolanie" to the "krajský súd" or "námietka" to the "okresný súd" in cases of execution ordered by the "exekútor".';

(f) In Annex IV, the following is inserted between the entries for Belgium and Germany:

'— in the Czech Republic, a "dovolání" and a "žaloba pro zmatečnost",'

and, between the entries for Germany and Greece:

'— in Estonia, a "kassatsioonkaebus",'

and, between the entries for Ireland and Austria:

'— in Cyprus, an appeal to the Supreme Court,

— in Latvia, an appeal to the "Augstākā tiesa",

— in Lithuania, by a retrial, only in cases prescribed by statute,

— in Hungary, "felülvizsgálati kérelem",

— in Malta, no further appeal lies to any other court; in the case of a maintenance judgment the "Qorti ta' l-Appell" in accordance with the procedure laid down for appeal in the "kodiċi ta' Organizzazzjoni u Procedura Ċivili – Kap. 12",'

and, between the entries for Austria and Portugal:

'— in Poland, by an appeal in cassation to the "Sąd Najwyższy",'

and, between the entries for Portugal and Finland:

'— in Slovenia, the "retrial, only in cases prescribed by statute",

— in Slovakia "odvolanie" in cases of execution ordered by the "exekútor" to the "Krajský súd".'.

B. VISA POLICY

1. 31995 R 1683: Council Regulation (EC) No 1683/95 of 29 May 1995 laying down a uniform format for visas (OJ L 164, 14.7.1995, p. 1), as amended by:

— 32002 R 0334: Council Regulation (EC) No 334/2002 of 18.2.2002 (OJ L 53, 23.2.2002, p. 7).

In the Annex, point 3 is replaced by the following:

'3. The logo consisting of a letter or letters indicating the issuing Member State (or "BNL" in the case of the Benelux countries, namely Belgium, Luxembourg and the Netherlands) with a latent image effect shall appear in this space. This logo shall appear light when held flat and dark when turned by 90°. The following logos shall be used: A for Austria, BNL for Benelux, CY for Cyprus, CZE for the Czech Republic, D for Germany, DK for Denmark, E for Spain, EST for Estonia, F for France, FIN for Finland, GR for Greece, H for Hungary, I for Italy, IRL for Ireland, LT for Lithuania, LVA for Latvia, M for Malta, P for Portugal, PL for Poland, S for Sweden, SK for Slovakia, SVN for Slovenia, UK for the United Kingdom.'.

2. 41999 D 0013: the definitive versions of the Common Manual and the Common Consular Instructions (SCH/Com-ex (99)) 13 (OJ L 239, 22.9.2000, p. 317), as adopted by Decision of the Executive Committee of 28 April 1999, have since been amended by the acts listed below. Revised versions of the Common Consular Instructions and Common Manual containing those amendments and including other amendments made pursuant to the provisions of Council Regulations (EC) Nos 789/2001 and 790/2001 of 24 April 2001 (OJ L 116, 26.4.2001, p. 2 and 5), have been published in OJ C 313, 16.12.2002, pp. 1 and 97.

— 32001 D 0329: Council Decision 2001/329/EC of 24.4.2001 (OJ L 116, 26.4.2001, p. 32),

— 32001 D 0420: Council Decision 2001/420/EC of 28.5.2001 (OJ L 150, 6.6.2001, p. 47),

— 32001 R 0539: Council Regulation (EC) No 539/2001 of 15.3.2001 (OJ L 81, 21.3.2001, p. 1),

— 32001 R 1091: Council Regulation (EC) No 1091/2001 of 28.5.2001 (OJ L 150, 6.6.2001, p. 4),

— 32001 R 2414: Council Regulation (EC) No 2414/2001 of 7.12.2001 (OJ L 327, 12.12.2001, p. 1),

— 32002 D 0044: Council Decision 2002/44/EC of 20.12.2001 (OJ L 20, 23.1.2002, p. 5),

— 32002 R 0334: Council Regulation (EC) No 334/2002 of 18.2.2002 (OJ L 53, 23.2.2002, p. 7),

— 32002 D 0352: Council Decision 2002/352/EC of 25.4.2002 (OJ L 123, 9.5.2002, p. 47),

— 32002 D 0354: Council Decision 2002/354/EC of 25.4.2002 (OJ L 123, 9.5.2002, p. 50),

— 32002 D 0585: Council Decision 2002/585/EC of 12.7.2002 (OJ L 187, 16.7.2002, p. 44),

— 32002 D 0586: Council Decision 2002/586/EC of 12.7.2002 (OJ L 187, 16.7.2002, p. 48),

— 32002 D 0587: Council Decision 2002/587/EC of 12.7.2002 (OJ L 187, 16.7.2002, p. 50).

The following adaptations are made to the Common Consular Instructions:

(a) In Annex 1, part II, the following entries are deleted:

'CYPRUS',

'CZECH REPUBLIC',

'ESTONIA',

'HUNGARY',

'LITHUANIA',

'LATVIA',

'MALTA',

'POLAND',

'SLOVENIA',

'SLOVAKIA'.

Commission Regulation (EC) No 2245/2004 of 27 December 2004 amending Annexes I, II, III and IV to Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

Commission Regulation (EC) No 2245/2004

of 27 December 2004

amending Annexes I, II, III and IV to Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [1], and in particular Article 74 thereof,

Whereas:

(1) Annex I to Regulation (EC) No 44/2001 lists the rules of national jurisdiction. Annex II contains the lists of courts or competent authorities that have jurisdiction in the Member States to deal with applications for a declaration of enforceability. Annex III lists the courts for appeals against such decisions, and Annex IV enumerates the redress procedures for such purpose.

(2) Annexes I, II, III and IV to Regulation (EC) No 44/2001 were amended by the 2003 Act of Accession so as to include the rules of national jurisdiction, the lists of courts or competent authorities and the redress procedures of the acceding States.

(3) France, Latvia, Lithuania, Slovenia and Slovakia have notified the Commission of amendments to the lists set out in Annexes I, II, III and IV.

(4) Regulation (EC) No 44/2001 should therefore be amended accordingly,

HAS ADOPTED THIS REGULATION:

Article 1

Regulation (EC) No 44/2001 is amended as follows:

1. Annex I is amended as follows:

(a) the indent relating to Latvia is replaced by the following:

"- in Latvia: section 27 and paragraphs 3, 5, 6 and 9 of section 28 of the Civil Procedure Law (Civilprocesa likums),";

(b) the indent relating to Slovenia is replaced by the following:

"- in Slovenia: Article 48(2) of the Private International Law and Procedure Act (Zakon o medarodnem zasebnem pravu in postopku) in relation to Article 47(2) of Civil Procedure Act (Zakon o pravdnem postopku) and Article 58(1) of the Private International Law and Procedure Act (Zakon o medarodnem zasebnem pravu in postopku) in relation to Article 57(1) and 47(2) of Civil Procedure Act (Zakon o pravdnem postopku),";

(c) the indent relating to Slovakia is replaced by the following:

"- in Slovakia: Articles 37 to 37e of Act No 97/1963 on Private International Law and the Rules of Procedure relating thereto.";

2. Annex II is amended as follows:

(a) the indent relating to France is replaced by the following:

"- in France:

(a) the "greffier en chef du tribunal de grande instance",

(b) the "président de la chambre départementale des notaires" in the case of application for a declaration of enforceability of a notarial authentic instrument.";

(b) the indent relating to Slovenia is replaced by the following:

"- in Slovenia, the "okrono sodie",";

(c) the indent relating to Slovakia is replaced by the following:

"- in Slovakia, the "okresnu sud".";

3. Annex III is amended as follows:

(a) the indent relating to France is replaced by the following:

"- in France:

(a) the "cour d'appel" on decisions allowing the application,

(b) the presiding judge of the "tribunal de grande instance", on decisions rejecting the application.";

(b) the indent relating to Lithuania is replaced by the following:

"- in Lithuania, the "Lietuvos apeliacinis teismas",";

(c) the indent relating to Slovenia is replaced by the following:

"- in Slovenia, the "okrono sodie",";

(d) the indent relating to Slovakia is replaced by the following:

"- in Slovakia, the "okresnu sud".";

4. Annex IV is amended as follows:

(a) the indent relating to Lithuania is replaced by the following:

"- in Lithuania, an appeal to the "Lietuvos Aukiausiasis Teismas",";

(b) the indent relating to Slovenia is replaced by the following:

"- in Slovenia, an appeal to the "Vrhovno sodie Republike Slovenije",";

(c) the indent relating to Slovakia is replaced by the following:

"- in Slovakia, the "dovolanie"."

Article 2

This Regulation shall enter into force on the seventh day following that of its publication in the Official Journal of the European Union.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 27 December 2004.

For the Commission

José Manuel Barroso

President

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[1] OJ L 12, 16.1.2001, p. 1. Regulation as last amended by the 2003 Act of Accession.

DOCNUM	32004R2245
AUTHOR	European Commission
FORM	Regulation
TREATY	European Community
PUBREF	OJ L 381, 28.12.2004, p. 10-11 (ES, CS, DA, DE, ET, EL, EN, FR, IT, LV, LT, HU, NL, PL, PT, SK, SL, FI, SV) OJ L 183M , 5.7.2006, p. 458-459 (MT)
PUB	2004/12/28
DOC	2004/12/27
INFORCE	2005/01/04=EV
ENDVAL	9999/99/99
LEGBASE	32001R0044
MODIFIES	32001R0044 Amendment Amendment Annex 1 from 04/01/2005 32001R0044 Amendment Amendment Annex 2 from 01/04/2005 32001R0044 Amendment Amendment Annex 3 from 04/01/2005 32001R0044 Amendment Amendment Annex 4 from 04/01/2005
SUB	Approximation of laws ; Justice and home affairs
REGISTER	19200000
DATES	of document: 27/12/2004 of effect: 04/01/2005; Entry into force Date pub. + 7 See Art 2 end of validity: 99/99/9999

Commission Regulation (EC) No 1937/2004 of 9 November 2004 amending Annexes I, II, III and IV to Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

Commission Regulation (EC) No 1937/2004

of 9 November 2004

amending Annexes I, II, III and IV to Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [1], and in particular Article 74 thereof,

Whereas:

(1) Annex I to Council Regulation (EC) No 44/2001 lists the rules of national jurisdiction. Annex II contains the lists of courts or competent authorities that have jurisdiction in the Member States to deal with applications for a declaration of enforceability. Annex III lists the courts for appeals against such decisions, and Annex IV enumerates the redress procedures for such purpose.

(2) Annexes I, II, III and IV to Council Regulation (EC) No 44/2001 were amended by the 2003 Act of Accession so as to include the rules of national jurisdiction, the lists of courts or competent authorities and the redress procedures of the acceding States.

(3) France, Latvia, Lithuania, Slovenia and Slovakia have notified the Commission of amendments to the lists set out in Annexes I, II, III and IV.

(4) Regulation (EC) No 44/2001 should therefore be amended accordingly.

HAS ADOPTED THIS REGULATION:

Article 1

Regulation (EC) No 44/2001 is amended as follows:

1. Annex I is amended as follows:

(a) the indent relating to Latvia is replaced by the following:

" in Latvia: Section 27 and Paragraphs 3, 5, 6 and 9 of Section 28 of the Civil Procedure Law (Civilprocesa likums),";

(b) the indent relating to Slovenia is replaced by the following:

" in Slovenia: Article 48(2) of the Private International Law and Procedure Act (Zakon o medarodnem zasebnem pravu in postopku) in relation to Article 47(2) of Civil Procedure Act (Zakon o pravdnem postopku) and Article 58(1) of the Private International Law and Procedure Act (Zakon o medarodnem zasebnem pravu in postopku) in relation to Article 57(1) and 47(2) of Civil Procedure Act (Zakon o pravdnem postopku),";

(c) the indent relating to Slovakia is replaced by the following:

" in Slovakia: Articles 37 to 37e of the Act No 97/1963 on Private International Law and the Rules of Procedure Relating Thereto."

2. Annex II is amended as follows:

(a) the indent relating to France is replaced by the following:

" in France:

(a) the "greffier en chef du tribunal de grande instance",

(b) the "président de la chambre départementale des notaires" in the case of application for a declaration of enforceability of a notarial authentic instrument.";

(b) the indent relating to Slovenia is replaced by the following:

" in Slovenia, the "okrono sodie",";

(c) the indent relating to Slovakia is replaced by the following:

" in Slovakia, the "okresnu sud",";

3. Annex III is amended as follows:

(a) the indent relating to France is replaced by the following:

" in France:

(a) the "cour d'appel" on decisions allowing the application,

(b) the presiding judge of the "tribunal de grande instance" on decisions rejecting the application.";

(b) the indent relating to Lithuania is replaced by the following:

" in Lithuania, the "Lietuvos apeliacinis teismas",";

(c) the indent relating to Slovenia is replaced by the following:

" in Slovenia, the "okrono sodie",";

(d) the indent relating to Slovakia is replaced by the following:

" in Slovakia, the "okresnu sud".";

4. Annex IV is amended as follows:

(a) the indent relating to Lithuania is replaced by the following:

" in Lithuania, an appeal to the "Lietuvos Aukiausiasis Teismas","

(b) the indent relating to Slovenia is replaced by the following:

" in Slovenia, an appeal to the "Vrhovno sodie Republike Slovenije","

(c) the indent relating to Slovakia is replaced by the following:

" in Slovakia, the "dovolanie"."

Article 2

This Regulation shall enter into force on the seventh day following that of its publication in

the Official Journal of the European Union.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 9 November 2004.

For the Commission

Antonio Vitorino

Member of the Commission

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[1] OJ L 12, 16.1.2001, p. 1. Regulation as last amended by the 2003 Act of Accession.

DOCNUM	32004R1937
AUTHOR	European Commission
FORM	Regulation
TREATY	European Community
PUBREF	OJ L 334, 10.11.2004, p. 3-4 (ES, CS, DA, DE, ET, EL, EN, FR, IT, LV, LT, HU, NL, PL, PT, SK, SL, FI, SV)
PUB	2004/11/10
DOC	2004/11/09
ENDVAL	2004/11/09
LEGBASE	32001R0044
MODIFIES	32001R0044 Amendment Amendment Annex 1 from 17/11/2004 32001R0044 Amendment Amendment Annex 2 from 17/11/2004 32001R0044 Amendment Amendment Annex 3 from 17/11/2004 32001R0044 Amendment Amendment Annex 4 from 17/11/2004
MODIFIED	Corrected by 32004R1937R(01)
SUB	Justice and home affairs
REGISTER	19200000
DATES	of document: 09/11/2004 end of validity: 09/11/2004; See 32004R1937R(01)

OC>

Corrigendum to Commission Regulation (EC) No 1937/2004

Corrigendum to Commission Regulation (EC) No 1937/2004Corrigendum to Commission Regulation (EC) No 1937/20042004 amending Annexes I, II, III and IV to Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 334, 10.11.2004)

Corrigendum to Commission Regulation (EC) No 1937/2004 of 9 November 2004 amending Annexes I, II, III and IV to Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

(Official Journal of the European Communities L 334 of 10 November 2004)

The publication of Regulation (EC) No 1937/2004 is considered null and void.

DOCNUM	32004R1937R(01)
AUTHOR	European Commission
FORM	Regulation
PUBREF	OJ L 50, 23.2.2005, p. 20-20 (ES, CS, DA, DE, ET, EL, EN, FR, IT, LV, LT, HU, NL, PL, PT, SK, SL, FI, SV)
PUB	2005/02/23
MODIFIES	32004R1937 Corrigendum

Commission Regulation (EC) No 1496/2002 of 21 August 2002 amending Annex I (the rules of jurisdiction referred to in Article 3(2) and Article 4(2)) and Annex II (the list of competent courts and authorities) to Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters

Commission Regulation (EC) No 1496/2002

of 21 August 2002

amending Annex I (the rules of jurisdiction referred to in Article 3(2) and Article 4(2)) and Annex II (the list of competent courts and authorities) to Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters(1), and in particular Articles 3(2), 4(2), 44 and 74 thereof,

Whereas:

(1) According to Article 3(1) of the Regulation (EC) No 44/2001, persons domiciled in a Member State may only be sued in the courts of another Member State by virtue of the rules set out in sections 2 to 7 of Chapter II on jurisdiction; according to Article 3(2), in particular the rules of jurisdiction set out in Annex I shall not be applicable as against them.

(2) Therefore, if a rule referred to in Annex I is abolished in a Member State, the content of the list should be modified accordingly.

(3) An application for a declaration of enforceability of a judgment given in a Member State and enforceable in that State, in another Member State, should be submitted to the competent authorities listed in Annex II to Regulation (EC) No 44/2001.

(4) Articles 38 et seq. and 57(4) of Regulation (EC) No 44/2001 allow that an application for a declaration of enforceability of an authentic instrument may be submitted to notaries as competent authorities.

(5) Article 74 of Regulation (EC) No 44/2001 provides that Member States should notify the Commission of texts amending the list of competent authorities set out in Annexes I to IV.

(6) The Netherlands has notified the Commission of an amendment to the rules of jurisdiction set in Annex I and to the list of competent courts and authorities set out in Annex II and Germany has notified the Commission of an amendment to the list of competent courts and authorities set out in Annex II; therefore, Regulation (EC) No 44/2001 should be amended accordingly,

HAS ADOPTED THIS REGULATION:

Article 1

In Annex I to Regulation (EC) No 44/2001, the eighth indent concerning the Netherlands, shall be deleted.

Article 2

In Annex II to Regulation (EC) No 44/2001, "in Germany the presiding Judge of a chamber of the 'Landgericht'" shall be replaced by the following:

"in Germany:

(a) the presiding Judge of a chamber of the 'Landgericht';

(b) a notary ('...') in a procedure of declaration of enforceability of an authentic instrument."

Article 3

In Annex II to Regulation (EC) No 44/2001, "in the Netherlands, the presiding Judge of the 'arrondissementsrechtbank'" shall be replaced by the following:"in the Netherlands, the 'voorzieningenrechter van de rechtbank'."

Article 4

This Regulation shall enter into force on the seventh day following its publication in the Official Journal of the European Communities.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 21 August 2002.

For the Commission

Antonio Vitorino

Member of the Commission

(1) OJ L 12, 16.1.2001, p. 1.

DOCNUM	32002R1496
AUTHOR	European Commission
FORM	Regulation
TREATY	European Community
TYPDOC	3 ; secondary legislation ; 2002 ; R
PUBREF	Official Journal L 225 , 22/08/2002 P. 0013 - 0013
DESCRIPT	civil law ; commercial law ; Community national ; jurisdiction of the courts

; mutual recognition principle ; EC countries

PUB 2002/08/22

DOC 2002/08/21

INFORCE 2002/08/29=EV

ENDVAL 9999/99/99

LEGBASE 32001R0044-A03P2.....
32001R0044-A04P2.....
32001R0044-A44.....
32001R0044-A74.....

MODIFIES 32001R0044..... Amendment..... Amendment ANN 1 from 29/08/2002
32001R0044..... Amendment..... Amendment ANN 2 from 29/08/2002

SUB Approximation of laws ; Justice and home affairs

REGISTER 19200000

DATES of document: 21/08/2002
of effect: 29/08/2002; Entry into force Date pub. + 7 See Art 4
end of validity: 99/99/9999

CONVENTION

on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

PREAMBLE

THE HIGH CONTRACTING PARTIES TO THIS CONVENTION,

DETERMINED to strengthen in their territories the legal protection of persons therein established,

CONSIDERING that it is necessary for this purpose to determine the international jurisdiction of the courts, to facilitate recognition, and to introduce an expeditious procedure for securing the enforcement of judgments, authentic instruments and court settlements,

AWARE of the links between them, which have been sanctioned in the economic field by the free trade agreements concluded between the European Community and certain States members of the European Free Trade Association,

TAKING INTO ACCOUNT:

— the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, as amended by the Accession Conventions under the successive enlargements of the European Union,

— the Lugano Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters, which extends the application of the rules of the 1968 Brussels Convention to certain States members of the European Free Trade Association,

— Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which has replaced the abovementioned Brussels Convention,

— the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed at Brussels on 19 October 2005,

PERSUADED that the extension of the principles laid down in Regulation (EC) No 44/2001 to the Contracting Parties to this instrument will strengthen legal and economic cooperation,

DESIRING to ensure as uniform an interpretation as possible of this instrument,

HAVE in this spirit DECIDED to conclude this Convention, and

HAVE AGREED AS FOLLOWS:

TITLE I

SCOPE

Article 1

1. This Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.

2. The Convention shall not apply to:

(a) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession;

(b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;

(c) social security;

(d) arbitration.

3. In this Convention, the term 'State bound by this Convention' shall mean any State that is a Contracting Party to this Convention or a Member State of the European Community. It may also mean the European Community.

TITLE II

JURISDICTION

SECTION 1

General provisions

Article 2

1. Subject to the provisions of this Convention, persons domiciled in a State bound by this Convention shall, whatever their nationality, be sued in the courts of that State.

2. Persons who are not nationals of the State bound by this Convention in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State.

Article 3

1. Persons domiciled in a State bound by this Convention may be sued in the courts of another State bound by this Convention only by virtue of the rules set out in Sections 2 to 7 of this Title.

2. In particular the rules of national jurisdiction set out in Annex I shall not be applicable as against them.

Article 4

1. If the defendant is not domiciled in a State bound by this Convention, the jurisdiction of the courts of each State bound by this Convention shall, subject to the provisions of Articles 22 and 23, be determined by the law of that State.

2. As against such a defendant, any person domiciled in a State bound by this Convention may, whatever his nationality, avail himself in that State of the rules of jurisdiction there in force, and in particular those specified in Annex I, in the same way as the nationals of that State.

SECTION 2

Special jurisdiction

Article 5

A person domiciled in a State bound by this Convention may, in another State bound by this Convention, be sued:

1. (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;

(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:

— in the case of the sale of goods, the place in a State bound by this Convention where, under the contract, the goods were delivered or should have been delivered;

— in the case of the provision of services, the place in a State bound by this Convention where, under the contract, the services were provided or should have been provided.

(c) if (b) does not apply then subparagraph (a) applies;

2. in matters relating to maintenance:

(a) in the courts for the place where the maintenance creditor is domiciled or habitually resident; or

(b) in the court which, according to its own law, has jurisdiction to entertain proceedings concerning the status of a person if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties; or

(c) in the court which, according to its own law, has jurisdiction to entertain proceedings concerning parental responsibility, if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties;

3. in matters relating to tort, *delict* or *quasi-delict*, in the courts for the place where the harmful event occurred or may occur;

4. as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the court seised of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings;

5. as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated;

6. as settlor, trustee or beneficiary of a trust created by the operation of a statute, or by a written instrument, or created orally and evidenced in writing, in the courts of the State bound by this Convention in which the trust is domiciled;

7. as regards a dispute concerning the payment of remuneration claimed in respect of the salvage of a cargo or freight, in the court under the authority of which the cargo or freight in question:

(a) has been arrested to secure such payment; or

(b) could have been so arrested, but bail or other security has been given;

provided that this provision shall apply only if it is claimed that the defendant has an interest in the cargo or freight or had such an interest at the time of salvage.

Article 6

A person domiciled in a State bound by this Convention may also be sued:

1. where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings;

2. as a third party in an action on a warranty or guarantee, or in any other third party proceedings, in the court seised of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case;

3. on a counter-claim arising from the same contract or facts on which the original claim was based, in the court in which the original claim is pending;

4. in matters relating to a contract, if the action may be combined with an action against the same defendant in matters relating to rights *in rem* in immovable property, in the court of the State bound by this Convention in which the property is situated.

Article 7

Where by virtue of this Convention a court of a State bound by this Convention has jurisdiction in actions relating to liability from the use or operation of a ship, that court, or any other court substituted for this purpose by the internal law of that State, shall also have jurisdiction over claims for limitation of such liability.

SECTION 3

Jurisdiction in matters relating to insurance

Article 8

In matters relating to insurance, jurisdiction shall be determined by this Section, without prejudice to Articles 4 and 5(5).

Article 9

1. An insurer domiciled in a State bound by this Convention may be sued:

(a) in the courts of the State where he is domiciled; or

(b) in another State bound by this Convention, in the case of actions brought by the policyholder, the insured or a beneficiary, in the courts for the place where the plaintiff is domiciled; or

(c) if he is a co-insurer, in the courts of a State bound by this Convention in which proceedings are brought against the leading insurer.

2. An insurer who is not domiciled in a State bound by this Convention but has a branch, agency or other establishment in one of the States bound by this Convention shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State.

Article 10

In respect of liability insurance or insurance of immovable property, the insurer may in addition be sued in the courts for the place where the harmful event occurred. The same applies if movable and immovable property are covered by the same insurance policy and both are adversely affected by the same contingency.

Article 11

1. In respect of liability insurance, the insurer may also, if the law of the court permits it, be joined in proceedings which the injured party has brought against the insured.

2. Articles 8, 9 and 10 shall apply to actions brought by the injured party directly against the insurer, where such direct actions are permitted.

3. If the law governing such direct actions provides that the policyholder or the insured may be joined as a party to the action, the same court shall have jurisdiction over them.

Article 12

1. Without prejudice to Article 11(3), an insurer may bring proceedings only in the courts of the State bound by this Convention in which the defendant is domiciled, irrespective of whether he is the policyholder, the insured or a beneficiary.

2. The provisions of this Section shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.

Article 13

The provisions of this Section may be departed from only by an agreement:

1. which is entered into after the dispute has arisen; or

2. which allows the policyholder, the insured or a beneficiary to bring proceedings in courts other than those indicated in this Section; or

3. which is concluded between a policyholder and an insurer, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same State bound by this Convention, and which has the effect of conferring jurisdiction on the courts of that State even if the harmful event were to occur abroad, provided that such an agreement is not contrary to the law of that State; or

4. which is concluded with a policyholder who is not domiciled in a State bound by this Convention, except insofar as the insurance is compulsory or relates to immovable property in a State bound by this Convention; or

5. which relates to a contract of insurance insofar as it covers one or more of the risks set out in Article 14.

Article 14

The following are the risks referred to in Article 13(5):

1. any loss of or damage to:

   (a) seagoing ships, installations situated offshore or on the high seas, or aircraft, arising from perils which relate to their use for commercial purposes;

   (b) goods in transit, other than passengers' baggage, where the transit consists of or includes carriage by such ships or aircraft;

2. any liability, other than for bodily injury to passengers or loss of or damage to their baggage:

   (a) arising out of the use or operation of ships, installations or aircraft as referred to in point 1(a) insofar as, in respect of the latter, the law of the State bound by this Convention in which such aircraft are registered does not prohibit agreements on jurisdiction regarding insurance of such risks;

   (b) for loss or damage caused by goods in transit as described in point 1(b);

3. any financial loss connected with the use or operation of ships, installations or aircraft as referred to in point 1(a), in particular loss of freight or charter-hire;

4. any risk or interest connected with any of those referred to in points 1 to 3;

5. notwithstanding points 1 to 4, all large risks.

SECTION 4

Jurisdiction over consumer contracts

Article 15

1. In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Articles 4 and 5(5), if:

(a) it is a contract for the sale of goods on instalment credit terms; or

(b) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or

(c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the State bound by this Convention of the consumer's domicile or, by any means, directs such activities to that State or to several States including that State, and the contract falls within the scope of such activities.

2. Where a consumer enters into a contract with a party who is not domiciled in the State bound by this Convention but has a branch, agency or other establishment in one of the States bound by this Convention, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State.

3. This section shall not apply to a contract of transport other than a contract which, for an inclusive price, provides for a combination of travel and accommodation.

Article 16

1. A consumer may bring proceedings against the other party to a contract either in the courts of the State bound by this Convention in which that party is domiciled or in the courts for the place where the consumer is domiciled.

2. Proceedings may be brought against a consumer by the other party to the contract only in the courts of the State bound by this Convention in which the consumer is domiciled.

3. This Article shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.

Article 17

The provisions of this Section may be departed from only by an agreement:

1. which is entered into after the dispute has arisen; or

2. which allows the consumer to bring proceedings in courts other than those indicated in this Section; or

3. which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same State bound by this Convention, and which confers jurisdiction on the courts of that State, provided that such an agreement is not contrary to the law of that State.

SECTION 5

Jurisdiction over individual contracts of employment

Article 18

1. In matters relating to individual contracts of employment, jurisdiction shall be determined by this Section, without prejudice to Articles 4 and 5(5).

2. Where an employee enters into an individual contract of employment with an employer who is not domiciled in a State bound by this Convention but has a branch, agency or other establishment in one of the States bound by this Convention, the employer shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State.

Article 19

An employer domiciled in a State bound by this Convention may be sued:

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

2. in another State bound by this Convention:

   (a) in the courts for the place where the employee habitually carries out his work or in the courts for the last place where he did so; or

   (b) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.

Article 20

1. An employer may bring proceedings only in the courts of the State bound by this Convention in which the employee is domiciled.

2. The provisions of this Section shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.

Article 21

The provisions of this Section may be departed from only by an agreement on jurisdiction:

1. which is entered into after the dispute has arisen; or

2. which allows the employee to bring proceedings in courts other than those indicated in this Section.

SECTION 6

Exclusive jurisdiction

Article 22

The following courts shall have exclusive jurisdiction, regardless of domicile:

1. in proceedings which have as their object rights *in rem* in immovable property or tenancies of immovable property, the courts of the State bound by this Convention in which the property is situated.

   However, in proceedings which have as their object tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months, the courts of the State bound by this Convention in which the defendant is domiciled shall also have jurisdiction, provided that the tenant is a natural person and that the landlord and the tenant are domiciled in the same State bound by this Convention;

2. in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or of the validity of the decisions of their organs, the courts of the State bound by this Convention in which the company, legal person or association has its seat. In order to determine that seat, the court shall apply its rules of private international law;

3. in proceedings which have as their object the validity of entries in public registers, the courts of the State bound by this Convention in which the register is kept;

4. in proceedings concerned with the registration or validity of patents, trade marks, designs, or other similar rights required to be deposited or registered, irrespective of whether the issue is raised by way of an action or as a defence, the courts of the State bound by this Convention in which the deposit or registration has been applied for, has taken place or is, under the terms of a Community instrument or an international convention, deemed to have taken place.

Without prejudice to the jurisdiction of the European Patent Office under the Convention on the grant of European patents, signed at Munich on 5 October 1973, the courts of each State bound by this Convention shall have exclusive jurisdiction, regardless of domicile, in proceedings concerned with the registration or validity of any European patent granted for that State irrespective of whether the issue is raised by way of an action or as a defence;

5. in proceedings concerned with the enforcement of judgments, the courts of the State bound by this Convention in which the judgment has been or is to be enforced.

SECTION 7

Prorogation of jurisdiction

Article 23

1. If the parties, one or more of whom is domiciled in a State bound by this Convention, have agreed that a court or the courts of a State bound by this Convention are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:

(a) in writing or evidenced in writing; or

(b) in a form which accords with practices which the parties have established between themselves; or

(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'.

3. Where such an agreement is concluded by parties, none of whom is domiciled in a State bound by this Convention, the courts of other States bound by this Convention shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction.

4. The court or courts of a State bound by this Convention on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between these persons or their rights or obligations under the trust are involved.

5. Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to the provisions of Articles 13, 17 or 21, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 22.

Article 24

Apart from jurisdiction derived from other provisions of this Convention, a court of a State bound by this Convention before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 22.

SECTION 8

Examination as to jurisdiction and admissibility

Article 25

Where a court of a State bound by this Convention is seised of a claim which is principally concerned with a matter over which the courts of another State bound by this Convention have exclusive jurisdiction by virtue of Article 22, it shall declare of its own motion that it has no jurisdiction.

Article 26

1. Where a defendant domiciled in one State bound by this Convention is sued in a court of another State bound by this Convention 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.

2. 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 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.

3. Instead of the provisions of paragraph 2, Article 15 of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial matters shall apply if the document instituting the proceedings or an equivalent document had to be transmitted pursuant to that Convention.

4. Member States of the European Community bound by Council Regulation (EC) No 1348/2000 of 29 May 2000 or by the Agreement between the European Community and the Kingdom of Denmark on the service of judicial and extrajudicial documents in civil or commercial matters, signed at Brussels on 19 October 2005, shall apply in their mutual relations the provision in Article 19 of that Regulation if the document instituting the proceedings or an equivalent document had to be transmitted pursuant to that Regulation or that Agreement.

SECTION 9

***Lis pendens* — related actions**

Article 27

1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different States bound by this Convention, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

Article 28

1. Where related actions are pending in the courts of different States bound by this Convention, any court other than the court first seised may stay its proceedings.

2. Where these actions are pending at first instance, any court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.

3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

Article 29

Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court.

Article 30

For the purposes of this Section, a court shall be deemed to be seised:

1. at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have service effected on the defendant; or

2. if the document has to be served before being lodged with the court at the time when it is received by the authority responsible for service, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have the document lodged with the court.

SECTION 10

Provisional, including protective, measures

Article 31

Application may be made to the courts of a State bound by this Convention for such provisional, including protective, measures as may be available under the law of that State, even if, under this Convention, the courts of another State bound by this Convention have jurisdiction as to the substance of the matter.

TITLE III

RECOGNITION AND ENFORCEMENT

Article 32

For the purposes of this Convention, 'judgment' means any judgment given by a court or tribunal of a State bound by this Convention, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court.

SECTION 1

Recognition

Article 33

1. A judgment given in a State bound by this Convention shall be recognised in the other States bound by this Convention without any special procedure being required.

2. Any interested party who raises the recognition of a judgment as the principal issue in a dispute may, in accordance with the procedures provided for in Sections 2 and 3 of this Title, apply for a decision that the judgment be recognised.

3. If the outcome of proceedings in a court of a State bound by this Convention depends on the determination of an incidental question of recognition that court shall have jurisdiction over that question.

Article 34

A judgment shall not be recognised:

1. if such recognition is manifestly contrary to public policy in the State in which recognition is sought;

2. where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;

3. if it is irreconcilable with a judgment given in a dispute between the same parties in the State in which recognition is sought;

4. if it is irreconcilable with an earlier judgment given in another State bound by this Convention or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the State addressed.

Article 35

1. Moreover, a judgment shall not be recognised if it conflicts with Sections 3, 4 or 6 of Title II, or in a case provided for in Article 68. A judgment may furthermore be refused recognition in any case provided for in Article 64(3) or 67(4).

2. In its examination of the grounds of jurisdiction referred to in the foregoing paragraph, the court or authority applied to shall be bound by the findings of fact on which the court of the State of origin based its jurisdiction.

3. Subject to the provisions of paragraph 1, the jurisdiction of the court of the State of origin may not be reviewed. The test of public policy referred to in Article 34(1) may not be applied to the rules relating to jurisdiction.

Article 36

Under no circumstances may a foreign judgment be reviewed as to its substance.

Article 37

1. A court of a State bound by this Convention in which recognition is sought of a judgment given in another State bound by this Convention may stay the proceedings if an ordinary appeal against the judgment has been lodged.

2. A court of a State bound by this Convention in which recognition is sought of a judgment given in Ireland or the United Kingdom may stay the proceedings if enforcement is suspended in the State of origin, by reason of an appeal.

SECTION 2

Enforcement

Article 38

1. A judgment given in a State bound by this Convention and enforceable in that State shall be enforced in another State bound by this Convention when, on the application of any interested party, it has been declared enforceable there.

2. However, in the United Kingdom, such a judgment shall be enforced in England and Wales, in Scotland, or in Northern Ireland when, on the application of any interested party, it has been registered for enforcement in that part of the United Kingdom.

Article 39

1. The application shall be submitted to the court or competent authority indicated in the list in Annex II.

2. The local jurisdiction shall be determined by reference to the place of domicile of the party against whom enforcement is sought, or to the place of enforcement.

Article 40

1. The procedure for making the application shall be governed by the law of the State in which enforcement is sought.

2. The applicant must give an address for service of process within the area of jurisdiction of the court applied to. However, if the law of the State in which enforcement is sought does not provide for the furnishing of such an address, the applicant shall appoint a representative *ad litem*.

3. The documents referred to in Article 53 shall be attached to the application.

Article 41

The judgment shall be declared enforceable immediately on completion of the formalities in Article 53 without any review under Articles 34 and 35. The party against whom enforcement is sought shall not at this stage of the proceedings be entitled to make any submissions on the application.

Article 42

1. The decision on the application for a declaration of enforceability shall forthwith be brought to the notice of the applicant in accordance with the procedure laid down by the law of the State in which enforcement is sought.

2. The declaration of enforceability shall be served on the party against whom enforcement is sought, accompanied by the judgment, if not already served on that party.

Article 43

1. The decision on the application for a declaration of enforceability may be appealed against by either party.

2. The appeal is to be lodged with the court indicated in the list in Annex III.

3. The appeal shall be dealt with in accordance with the rules governing procedure in contradictory matters.

4. If the party against whom enforcement is sought fails to appear before the appellate court in proceedings concerning an appeal brought by the applicant, Article 26(2) to (4) shall apply even where the party against whom enforcement is sought is not domiciled in any of the States bound by this Convention.

5. An appeal against the declaration of enforceability is to be lodged within one month of service thereof. If the party against whom enforcement is sought is domiciled in a State bound by this Convention other than that in which the declaration of enforceability was given, the time for appealing shall be two months and shall run from the date of service, either on him in person or at his residence. No extension of time may be granted on account of distance.

Article 44

The judgment given on the appeal may be contested only by the appeal referred to in Annex IV.

Article 45

1. The court with which an appeal is lodged under Article 43 or Article 44 shall refuse or revoke a declaration of enforceability only on one of the grounds specified in Articles 34 and 35. It shall give its decision without delay.

2. Under no circumstances may the foreign judgment be reviewed as to its substance.

Article 46

1. The court with which an appeal is lodged under Article 43 or Article 44 may, on the application of the party against whom enforcement is sought, stay the proceedings if an ordinary appeal has been lodged against the judgment in the State of origin or if the time for such an appeal has not yet expired; in the latter case, the court may specify the time within which such an appeal is to be lodged.

2. Where the judgment was given in Ireland or the United Kingdom, any form of appeal available in the State of origin shall be treated as an ordinary appeal for the purposes of paragraph 1.

3. The court may also make enforcement conditional on the provision of such security as it shall determine.

Article 47

1. When a judgment must be recognised in accordance with this Convention, nothing shall prevent the applicant from availing himself of provisional, including protective, measures in accordance with the law of the State requested without a declaration of enforceability under Article 41 being required.

2. The declaration of enforceability shall carry with it the power to proceed to any protective measures.

3. During the time specified for an appeal pursuant to Article 43(5) against the declaration of enforceability and until any such appeal has been determined, no measures of enforcement may be taken other than protective measures against the property of the party against whom enforcement is sought.

Article 48

1. Where a foreign judgment has been given in respect of several matters and the declaration of enforceability cannot be given for all of them, the court or competent authority shall give it for one or more of them.

2. An applicant may request a declaration of enforceability limited to parts of a judgment.

Article 49

A foreign judgment which orders a periodic payment by way of a penalty shall be enforceable in the State in which enforcement is sought only if the amount of the payment has been finally determined by the courts of the State of origin.

Article 50

1. An applicant who in the State of origin has benefited from complete or partial legal aid or exemption from costs or expenses shall be entitled, in the procedure provided for in this Section, to benefit from the most favourable legal aid or the most extensive exemption from costs or expenses provided for by the law of the State addressed.

2. However, an applicant who requests the enforcement of a decision given by an administrative authority in Denmark, in Iceland or in Norway in respect of maintenance may, in the State addressed, claim the benefits referred to in paragraph 1 if he presents a statement from the Danish, Icelandic, or Norwegian Ministry of Justice to the effect that he fulfils the economic requirements to qualify for the grant of complete or partial legal aid or exemption from costs or expenses.

Article 51

No security, bond or deposit, however described, shall be required of a party who in one State bound by this Convention, applies for enforcement of a judgment given in another State bound by this Convention on the ground that he is a foreign national or that he is not domiciled or resident in the State in which enforcement is sought.

Article 52

In proceedings for the issue of a declaration of enforceability, no charge, duty or fee calculated by reference to the value of the matter at issue may be levied in the State in which enforcement is sought.

SECTION 3

Common provisions

Article 53

1. A party seeking recognition or applying for a declaration of enforceability shall produce a copy of the judgment which satisfies the conditions necessary to establish its authenticity.

2. A party applying for a declaration of enforceability shall also produce the certificate referred to in Article 54, without prejudice to Article 55.

Article 54

The court or competent authority of a State bound by this Convention where a judgment was given shall issue, at the request of any interested party, a certificate using the standard form in Annex V to this Convention.

Article 55

1. If the certificate referred to in Article 54 is not produced, the court or competent authority may specify a time for its production or accept an equivalent document or, if it considers that it has sufficient information before it, dispense with its production.

2. If the court or competent authority so requires, a translation of the documents shall be produced. The translation shall be certified by a person qualified to do so in one of the States bound by this Convention.

Article 56

No legalisation or other similar formality shall be required in respect of the documents referred to in Article 53 or Article 55(2), or in respect of a document appointing a representative *ad litem*.

TITLE IV

AUTHENTIC INSTRUMENTS AND COURT SETTLEMENTS

Article 57

1. A document which has been formally drawn up or registered as an authentic instrument and is enforceable in one State bound by this Convention shall, in another State bound by this Convention, be declared enforceable there, on application made in accordance with the procedures provided for in Article 38, et seq. The court with which an appeal is lodged under Article 43 or Article 44 shall refuse or revoke a declaration of enforceability only if enforcement of the instrument is manifestly contrary to public policy in the State addressed.

2. Arrangements relating to maintenance obligations concluded with administrative authorities or authenticated by them shall also be regarded as authentic instruments within the meaning of paragraph 1.

3. The instrument produced must satisfy the conditions necessary to establish its authenticity in the State of origin.

4. Section 3 of Title III shall apply as appropriate. The competent authority of a State bound by this Convention where an authentic instrument was drawn up or registered shall issue, at the request of any interested party, a certificate using the standard form in Annex VI to this Convention.

Article 58

A settlement which has been approved by a court in the course of proceedings and is enforceable in the State bound by this Convention in which it was concluded shall be enforceable in the State addressed under the same conditions as authentic instruments. The court or competent authority of a State bound by this Convention where a court settlement was approved shall issue, at the request of any interested party, a certificate using the standard form in Annex V to this Convention.

TITLE V

GENERAL PROVISIONS

Article 59

1. In order to determine whether a party is domiciled in the State bound by this Convention whose courts are seised of a matter, the court shall apply its internal law.

2. If a party is not domiciled in the State whose courts are seised of the matter, then, in order to determine whether the party is domiciled in another State bound by this Convention, the court shall apply the law of that State.

Article 60

1. For the purposes of this Convention, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its:

(a) statutory seat; or

(b) central administration; or

(c) principal place of business.

2. For the purposes of the United Kingdom and Ireland 'statutory seat' means the registered office or, where there is no such office anywhere, the place of incorporation or, where there is no such place anywhere, the place under the law of which the formation took place.

3. In order to determine whether a trust is domiciled in the State bound by this Convention whose courts are seised of the matter, the court shall apply its rules of private international law.

Article 61

Without prejudice to any more favourable provisions of national laws, persons domiciled in a State bound by this Convention who are being prosecuted in the criminal courts of another State bound by this Convention of which they are not nationals for an offence which was not intentionally committed may be defended by persons qualified to do so, even if they do not appear in person. However, the court seised of the matter may order appearance in person; in the case of failure to appear, a judgment given in the civil action without the person concerned having had the opportunity to arrange for his defence need not be recognised or enforced in the other States bound by this Convention.

Article 62

For the purposes of this Convention, the expression 'court' shall include any authorities designated by a State bound by this Convention as having jurisdiction in the matters falling within the scope of this Convention.

TITLE VI

TRANSITIONAL PROVISIONS

Article 63

1. This Convention shall apply only to legal proceedings instituted and to documents formally drawn up or registered as authentic instruments after its entry into force in the State of origin and, where recognition or enforcement of a judgment or authentic instruments is sought, in the State addressed.

2. However, if the proceedings in the State of origin were instituted before the entry into force of this Convention, judgments given after that date shall be recognised and enforced in accordance with Title III:

(a) if the proceedings in the State of origin were instituted after the entry into force of the Lugano Convention of 16 September 1988 both in the State of origin and in the State addressed;

(b) in all other cases, if jurisdiction was founded upon rules which accorded with those provided for either in Title II or in a convention concluded between the State of origin and the State addressed which was in force when the proceedings were instituted.

TITLE VII

RELATIONSHIP TO COUNCIL REGULATION (EC) No 44/2001 AND OTHER INSTRUMENTS

Article 64

1. This Convention shall not prejudice the application by the Member States of the European Community of the Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, as well as any amendments thereof, of the Convention on Jurisdiction and the

Enforcement of Judgments in Civil and Commercial Matters, signed at Brussels on 27 September 1968, and of the Protocol on interpretation of that Convention by the Court of Justice of the European Communities, signed at Luxembourg on 3 June 1971, as amended by the Conventions of Accession to the said Convention and the said Protocol by the States acceding to the European Communities, as well as of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed at Brussels on 19 October 2005.

2. However, this Convention shall in any event be applied:

(a) in matters of jurisdiction, where the defendant is domiciled in the territory of a State where this Convention but not an instrument referred to in paragraph 1 of this Article applies, or where Articles 22 or 23 of this Convention confer jurisdiction on the courts of such a State;

(b) in relation to *lis pendens* or to related actions as provided for in Articles 27 and 28, when proceedings are instituted in a State where the Convention but not an instrument referred to in paragraph 1 of this Article applies and in a State where this Convention as well as an instrument referred to in paragraph 1 of this Article apply;

(c) in matters of recognition and enforcement, where either the State of origin or the State addressed is not applying an instrument referred to in paragraph 1 of this Article.

3. In addition to the grounds provided for in Title III, recognition or enforcement may be refused if the ground of jurisdiction on which the judgment has been based differs from that resulting from this Convention and recognition or enforcement is sought against a party who is domiciled in a State where this Convention but not an instrument referred to in paragraph 1 of this Article applies, unless the judgment may otherwise be recognised or enforced under any rule of law in the State addressed.

Article 65

Subject to the provisions of Articles 63(2), 66 and 67, this Convention shall, as between the States bound by this Convention, supersede the conventions concluded between two or more of them that cover the same matters as those to which this Convention applies. In particular, the conventions mentioned in Annex VII shall be superseded.

Article 66

1. The conventions referred to in Article 65 shall continue to have effect in relation to matters to which this Convention does not apply.

2. They shall continue to have effect in respect of judgments given and documents formally drawn up or registered as authentic instruments before the entry into force of this Convention.

Article 67

1. This Convention shall not affect any conventions by which the Contracting Parties and/or the States bound by this Convention are bound and which in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments. Without prejudice to obligations resulting from other agreements between certain Contracting Parties, this Convention shall not prevent Contracting Parties from entering into such conventions.

2. This Convention shall not prevent a court of a State bound by this Convention and by a convention on a particular matter from assuming jurisdiction in accordance with that convention, even where the defendant is domiciled in another State bound by this Convention which is not a party to that convention. The court hearing the action shall, in any event, apply Article 26 of this Convention.

3. Judgments given in a State bound by this Convention by a court in the exercise of jurisdiction provided for in a convention on a particular matter shall be recognised and enforced in the other States bound by this Convention in accordance with Title III of this Convention.

4. In addition to the grounds provided for in Title III, recognition or enforcement may be refused if the State addressed is not bound by the convention on a particular matter and the person against whom recognition or enforcement is sought is domiciled in that State, or, if the State addressed is a Member State of the European Community and in respect of conventions which would have to be concluded by the European Community, in any of its Member States, unless the judgment may otherwise be recognised or enforced under any rule of law in the State addressed.

5. Where a convention on a particular matter to which both the State of origin and the State addressed are parties lays down conditions for the recognition or enforcement of judgments, those conditions shall apply. In any event, the provisions of this Convention which concern the procedures for recognition and enforcement of judgments may be applied.

Article 68

1. This Convention shall not affect agreements by which States bound by this Convention undertook, prior to the entry into force of this Convention, not to recognise judgments given in other States bound by this Convention against defendants domiciled or habitually resident in a third State where, in cases provided for in Article 4, the judgment could only be founded on a ground of jurisdiction as specified in Article 3(2). Without prejudice to obligations resulting from other agreements between certain Contracting Parties, this Convention shall not prevent Contracting Parties from entering into such conventions.

2. However, a Contracting Party may not assume an obligation towards a third State not to recognise a judgment given in another State bound by this Convention by a court basing its jurisdiction on the presence within that State of property belonging to the defendant, or the seizure by the plaintiff of property situated there:

(a) if the action is brought to assert or declare proprietary or possessory rights in that property, seeks to obtain authority to dispose of it, or arises from another issue relating to such property; or

(b) if the property constitutes the security for a debt which is the subject-matter of the action.

TITLE VIII

FINAL PROVISIONS

Article 69

1. The Convention shall be open for signature by the European Community, Denmark, and States which, at the time of the opening for signature, are Members of the European Free Trade Association.

2. This Convention shall be subject to ratification by the Signatories. The instruments of ratification shall be deposited with the Swiss Federal Council, which shall act as Depositary of this Convention.

3. At the time of the ratification, the Contracting Parties may submit declarations in accordance with Articles I, II and III of Protocol 1.

4. The Convention shall enter into force on the first day of the sixth month following the date on which the European Community and a Member of the European Free Trade Association deposit their instruments of ratification.

5. The Convention shall enter into force in relation to any other Party on the first day of the third month following the deposit of its instrument of ratification.

6. Without prejudice to Article 3(3) of Protocol 2, this Convention shall replace the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters done at Lugano on 16 September 1988 as of the date of its entry into force in accordance with paragraphs 4 and 5 above. Any reference to the 1988 Lugano Convention in other instruments shall be understood as a reference to this Convention.

7. Insofar as the relations between the Member States of the European Community and the non-European territories referred to in Article 70(1)(b) are concerned, this Convention shall replace the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, signed at Brussels on 27 September 1968, and of the Protocol on interpretation of that Convention by the Court of Justice of the European Communities, signed at Luxembourg on 3 June 1971, as amended by the Conventions of Accession to the said Convention and the said Protocol by the States acceding to the European Communities, as of the date of the entry into force of this Convention with respect to these territories in accordance with Article 73(2).

Article 70

1. After entering into force this Convention shall be open for accession by:

(a) the States which, after the opening of this Convention for signature, become Members of the European Free Trade Association, under the conditions laid down in Article 71;

(b) Member States of the European Community acting on behalf of certain non-European territories that are part of the territory of that Member State or for whose external relations that Member State is responsible, under the conditions laid down in Article 71;

(c) any other State, under the conditions laid down in Article 72.

2. States referred to in paragraph 1, which wish to become a Contracting Party to this Convention, shall address their application to the Depositary. The application, including the information referred to in Articles 71 and 72 shall be accompanied by a translation into English and French.

Article 71

1. Any State referred to in Article 70(1)(a) and (b) wishing to become a Contracting Party to this Convention:

(a) shall communicate the information required for the application of this Convention;

(b) may submit declarations in accordance with Articles I and III of Protocol 1.

2. The Depositary shall transmit any information received pursuant to paragraph 1 to the other Contracting Parties prior to the deposit of the instrument of accession by the State concerned.

Article 72

1. Any State referred to in Article 70(1)(c) wishing to become a Contracting Party to this Convention:

(a) shall communicate the information required for the application of this Convention;

(b) may submit declarations in accordance with Articles I and III of Protocol 1; and

(c) shall provide the Depositary with information on, in particular:

(1) their judicial system, including information on the appointment and independence of judges;

(2) their internal law concerning civil procedure and enforcement of judgments; and

(3) their private international law relating to civil procedure.

2. The Depositary shall transmit any information received pursuant to paragraph 1 to the other Contracting Parties prior to inviting the State concerned to accede in accordance with paragraph 3 of this Article.

3. Without prejudice to paragraph 4, the Depositary shall invite the State concerned to accede only if it has obtained the unanimous agreement of the Contracting Parties. The Contracting Parties shall endeavour to give their consent at the latest within one year after the invitation by the Depositary.

4. The Convention shall enter into force only in relations between the acceding State and the Contracting Parties which have not made any objections to the accession before the first day of the third month following the deposit of the instrument of accession.

Article 73

1. The instruments of accession shall be deposited with the Depositary.

2. In respect of an acceding State referred to in Article 70, the Convention shall enter into force on the first day of the third month following the deposit of its instrument of accession. As of that moment, the acceding State shall be considered a Contracting Party to the Convention.

3. Any Contracting Party may submit to the Depositary a text of this Convention in the language or languages of the Contracting Party concerned, which shall be authentic if so agreed by the Contracting Parties in accordance with Article 4 of Protocol 2.

Article 74

1. This Convention is concluded for an unlimited period.

2. Any Contracting Party may, at any time, denounce the Convention by sending a notification to the Depositary.

3. The denunciation shall take effect at the end of the calendar year following the expiry of a period of six months from the date of receipt by the Depositary of the notification of denunciation.

Article 75

The following are annexed to this Convention:

— a Protocol 1, on certain questions of jurisdiction, procedure and enforcement,

— a Protocol 2, on the uniform interpretation of this Convention and on the Standing Committee,

— a Protocol 3, on the application of Article 67 of this Convention,

— Annexes I through IV and Annex VII, with information related to the application of this Convention,

— Annexes V and VI, containing the certificates referred to in Articles 54, 58 and 57 of this Convention,

— Annex VIII, containing the authentic languages referred to in Article 79 of this Convention, and

— Annex IX, concerning the application of Article II of Protocol 1.

These Protocols and Annexes shall form an integral part of this Convention.

Article 76

Without prejudice to Article 77, any Contracting Party may request the revision of this Convention. To that end, the Depositary shall convene the Standing Committee as laid down in Article 4 of Protocol 2.

Article 77

1. The Contracting Parties shall communicate to the Depositary the text of any provisions of the laws which amend the lists set out in Annexes I through IV as well as any deletions in or additions to the list set out in Annex VII and the date of their entry into force. Such communication shall be made within reasonable time before the entry into force and be accompanied by a translation into English and French. The Depositary shall adapt the Annexes concerned accordingly, after having consulted the Standing Committee in accordance with Article 4 of Protocol 2. For that purpose, the Contracting Parties shall provide a translation of the adaptations into their languages.

2. Any amendment of Annexes V through VI and VIII through IX to this Convention shall be adopted by the Standing Committee in accordance with Article 4 of Protocol 2.

Article 78

1. The Depositary shall notify the Contracting Parties of:

(a) the deposit of each instrument of ratification or accession;

(b) the dates of entry into force of this Convention in respect of the Contracting Parties;

(c) any declaration received pursuant to Articles I to IV of Protocol 1;

(d) any communication made pursuant to Article 74(2), Article 77(1) and paragraph 4 of Protocol 3.

2. The notifications will be accompanied by translations into English and French.

Article 79

This Convention, drawn up in a single original in the languages listed in Annex VIII, all texts being equally authentic, shall be deposited in the Swiss Federal Archives. The Swiss Federal Council shall transmit a certified copy to each Contracting Party.

IN WITNESS WHEREOF, the undersigned Plenipotentiaries, have signed this Convention.

Съставено в Лугано на тридесети октомври две хиляди и седма година.

Hecho en Lugano el treinta de octubre de dos mil siete.

V Luganu dne třicátého října dva tisíce sedm.

Udfærdiget i Lugano, den tredivte oktober to tusind og syv.

Geschehen zu Lugano am dreißigsten Oktober zweitausendsieben.

Lugano, kolmekümnes oktoober kaks tuhat seitse

Έγινε στο Λουγκάνο στις τριάντα Οκτωβρίου του έτους δύο χιλιάδες επτά.

Done at Lugano, on the thirtieth day of October in the year two thousand and seven.

Fait à Lugano, le trente octobre deux mille sept.

Arna dhéanamh in Lugano, an tríochadú lá de Dheireadh Fómhair sa bhliain dhá mhíle a seacht.

Fatto a Lugano, addì trenta ottobre duemilasette

Gerður í Lúganó þrítugasta dag október mánaðar árið tvö þúsund og sjö.

Lugâno, divi tûkstoði septîtâ gada trîsdesmitajâ oktobrî.

Priimta Lugane, du tûkstanèiai septintais metais spalio trisdeðimtà dienà.

Kelt Luganóban, a kétezer-hetedik év október havának harmincadik napján.

Magħmul f'Lugano, fit-tlettax-il jum ta' Ottubru fis-sena elfejn u seba'.

Gedaan te Lugano, op dertig oktober tweeduizend zeven.

Utferdiget i Lugano den trettiende oktober totusenogsyv.

Sporządzono w Lugano dnia trzydziestego października dwa tysiące siódmego roku

Feito em Lugano, aos trinta dias de Outubro do ano de dois mil e sete

Încheiatã la Lugano, la treizeci octombrie anul douã mii şapte.

V Lugane tridsiateho októbra dvetisícsedem.

Sestavljeno v Luganu, tridesetega oktobra leta dva tisoč sedem.

Tehty Luganossa kolmantenakymmenentenä päivänä lokakuuta vuonna kaksituhattaseitsemän.

Utfärdad i Lugano den trettionde oktober år tjugohundrasju.

За Европейската общност
Por la Comunidad Europea
Za Evropské společenstvi
For Det Europæiske Fællesskab
Für die Europäische Gemeinschaft
Euroopa Ühenduse nimel
Thar ceann an Chomhphobail Eorpaigh
Για την Ευρωπαϊκή Κοινότητα
For the European Community
Pour la Communauté européenne
Thar ceann an Chomhphobail Eorpaigh
Per la Comunità europea
Europos bendrijos vārdā
az Európai Közösség részéröl
Għall-Komunità Ewropea
Voor de Europese Gemeenschap
W imieniu Wspólnoty Europejskiej
Pela Comunidade Europeia
Pentru Comunitatea Europeană
Za Európske spoločenstvo
Za Evropsko skupnost
Euroopan yhteisön puolesta
På Europeiska gemenskapens vägnar

For Kongeriget Danmark

Fyrir hönd lýðveldisins Íslands

For Kongeriket Norge

Für die Schweizerische Eidgenossenschaft
Pour la Confédération suisse
Per la Confederazione svizzera

PROTOCOL 1

on certain questions of jurisdiction, procedure and enforcement

THE HIGH CONTRACTING PARTIES HAVE AGREED AS FOLLOWS:

Article I

1. Judicial and extrajudicial documents drawn up in one State bound by this Convention which have to be served on persons in another State bound by this Convention shall be transmitted in accordance with the procedures laid down in the conventions and agreements applicable between these States.

2. Unless the Contracting Party on whose territory service is to take place objects by declaration to the Depositary, such documents may also be sent by the appropriate public officers of the State in which the document has been drawn up directly to the appropriate public officers of the State in which the addressee is to be found. In this case the officer of the State of origin shall send a copy of the document to the officer of the State applied to who is competent to forward it to the addressee. The document shall be forwarded in the manner specified by the law of the State applied to. The forwarding shall be recorded by a certificate sent directly to the officer of the State of origin.

3. Member States of the European Community bound by Council Regulation (EC) No 1348/2000 of 29 May 2000 or by the Agreement between the European Community and the Kingdom of Denmark on the service of judicial and extrajudicial documents in civil or commercial matters, signed at Brussels on 19 October 2005, shall apply in their mutual relations that Regulation and that Agreement.

Article II

1. The jurisdiction specified in Articles 6(2) and 11 in actions on a warranty or guarantee or in any other third party proceedings may not be fully resorted to in the States bound by this Convention referred to in Annex IX. Any person domiciled in another State bound by this Convention may be sued in the courts of these States pursuant to the rules referred to in Annex IX.

2. At the time of ratification the European Community may declare that proceedings referred to in Articles 6 (2) and 11 may not be resorted to in some other Member States and provide information on the rules that shall apply.

3. Judgments given in the other States bound by this Convention by virtue of Article 6(2) or Article 11 shall be recognised and enforced in the States mentioned in paragraphs 1 and 2 in accordance with Title III. Any effects which judgments given in these States may have on third parties by application of the provisions in paragraphs 1 and 2 shall also be recognised in the other States bound by this Convention.

Article III

1. Switzerland reserves the right to declare upon ratification that it will not apply the following part of the provision in Article 34(2):

'unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so'.

If Switzerland makes such declaration, the other Contracting Parties shall apply the same reservation in respect of judgments rendered by the courts of Switzerland.

2. Contracting Parties may, in respect of judgments rendered in an acceding State referred to in Article 70(1)(c), by declaration reserve:

(a) the right mentioned in paragraph 1; and

(b) the right of an authority mentioned in Article 39, notwithstanding the provisions of Article 41, to examine of its own motion whether any of the grounds for refusal of recognition and enforcement of a judgment is present or not.

3. If a Contracting Party has made such a reservation towards an acceding State as referred to in paragraph 2, this acceding State may by declaration reserve the same right in respect of judgments rendered by the courts of that Contracting Party.

4. Except for the reservation mentioned in paragraph 1, the declarations are valid for periods of five years and are renewable at the end of such periods. The Contracting Party shall notify a renewal of a declaration referred to under paragraph 2 not later than six months prior to the end of such period. An acceding State may only renew its declaration made under paragraph 3 after renewal of the respective declaration under paragraph 2.

Article IV

The declarations referred to in this Protocol may be withdrawn at any time by notification to the Depositary. The notification shall be accompanied by a translation into English and French. The Contracting Parties provide for translations into their languages. Any such withdrawal shall take effect as of the first day of the third month following that notification.

PROTOCOL 2

on the uniform interpretation of the Convention and on the Standing Committee

PREAMBLE

THE HIGH CONTRACTING PARTIES,

HAVING REGARD to Article 75 of this Convention,

CONSIDERING the substantial link between this Convention, the 1988 Lugano Convention, and the instruments referred to in Article 64(1) of this Convention,

CONSIDERING that the Court of Justice of the European Communities has jurisdiction to give rulings on the interpretation of the provisions of the instruments referred to in Article 64(1) of this Convention,

CONSIDERING that this Convention becomes part of Community rules and that therefore the Court of Justice of the European Communities has jurisdiction to give rulings on the interpretation of the provisions of this Convention as regards the application by the courts of the Member States of the European Community,

BEING AWARE of the rulings delivered by the Court of Justice of the European Communities on the interpretation of the instruments referred to in Article 64(1) of this Convention up to the time of signature of this Convention, and of the rulings delivered by the courts of the Contracting Parties to the 1988 Lugano Convention on the latter Convention up to the time of signature of this Convention,

CONSIDERING that the parallel revision of both the 1988 Lugano and Brussels Conventions, which led to the conclusion of a revised text for these Conventions, was substantially based on the above mentioned rulings on the 1968 Brussels and the 1988 Lugano Conventions,

CONSIDERING that the revised text of the Brussels Convention has been incorporated, after the entry into force of the Amsterdam Treaty, into Regulation (EC) No 44/2001,

CONSIDERING that this revised text also constituted the basis for the text of this Convention,

DESIRING to prevent, in full deference to the independence of the courts, divergent interpretations and to arrive at an interpretation as uniform as possible of the provisions of this Convention and of those of the Regulation (EC) No 44/2001 which are substantially reproduced in this Convention and of other instruments referred to in Article 64(1) of this Convention,

HAVE AGREED AS FOLLOWS:

Article 1

1. Any court applying and interpreting this Convention shall pay due account to the principles laid down by any relevant decision concerning the provision(s) concerned or any similar provision(s) of the 1988 Lugano Convention and the instruments referred to in Article 64(1) of the Convention rendered by the courts of the States bound by this Convention and by the Court of Justice of the European Communities.

2. For the courts of Member States of the European Community, the obligation laid down in paragraph 1 shall apply without prejudice to their obligations in relation to the Court of Justice of the European Communities resulting from the Treaty establishing the European Community or from the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed at Brussels on 19 October 2005.

Article 2

Any State bound by this Convention and which is not a Member State of the European Community is entitled to submit statements of case or written observations, in accordance with Article 23 of the Protocol on the Statute of the Court of Justice of the European Communities, where a court or tribunal of a Member State of the European Community refers to the Court of Justice for a preliminary ruling a question on the interpretation of this Convention or of the instruments referred to in Article 64(1) of this Convention.

Article 3

1. The Commission of the European Communities shall set up a system of exchange of information concerning relevant judgments delivered pursuant to this Convention as well as relevant judgments under the 1988 Lugano Convention and the instruments referred to in Article 64(1) of this Convention. This system shall be accessible to the public and contain judgments delivered by the courts of last instance and of the Court of Justice of the European Communities as well as judgments of particular importance which have become final and have been delivered pursuant to this Convention, the 1988 Lugano Convention, and the instruments referred to in Article 64(1) of this Convention. The judgments shall be classified and provided with an abstract.

The system shall comprise the transmission to the Commission by the competent authorities of the States bound by this Convention of judgments as referred to above delivered by the courts of these States.

2. A selection of cases of particular interest for the proper functioning of the Convention will be made by the Registrar of the Court of Justice of the European Communities, who shall present the selected case law at the meeting of experts in accordance with Article 5 of this Protocol.

3. Until the European Communities have set up the system pursuant to paragraph 1, the Court of Justice of the European Communities shall maintain the system for the exchange of information established by Protocol 2 of the 1988 Lugano Convention for judgments delivered under this Convention and the 1988 Lugano Convention.

Article 4

1. A Standing Committee shall be set up, composed of the representatives of the Contracting Parties.

2. At the request of a Contracting Party, the Depositary of the Convention shall convene meetings of the Committee for the purpose of:

— a consultation on the relationship between this Convention and other international instruments,

— a consultation on the application of Article 67, including intended accessions to instruments on particular matters according to Article 67(1), and proposed legislation according to Protocol 3,

— the consideration of the accession of new States. In particular, the Committee may ask acceding States referred to in Article 70(1)(c) questions about their judicial systems and the implementation of the Convention. The Committee may also consider possible adaptations to the Convention necessary for its application in the acceding States,

— the acceptance of new authentic language versions pursuant to Article 73(3) of this Convention and the necessary amendments to Annex VIII,

— a consultation on a revision of the Convention pursuant to Article 76,

— a consultation on amendments to Annexes I through IV and Annex VII pursuant to Article 77(1),

— the adoption of amendments to Annexes V and VI pursuant to Article 77(2),

— a withdrawal of the reservations and declarations made by the Contracting Parties pursuant to Protocol 1 and necessary amendments to Annex IX.

3. The Committee shall establish the procedural rules concerning its functioning and decision-making. These rules shall provide for the possibility to consult and decide by written procedure.

Article 5

1. The Depositary may convene, whenever necessary, a meeting of experts to exchange views on the functioning of the Convention, in particular on the development of the case-law and new legislation that may influence the application of the Convention.

2. This meeting shall be composed of experts of the Contracting Parties, of the States bound by this Convention, of the Court of Justice of the European Communities, and of the European Free Trade Association. It shall be open to any other experts whose presence is deemed appropriate.

3. Any problems arising on the functioning of the Convention may be referred to the Standing Committee referred to in Article 4 of this Protocol for further action.

PROTOCOL 3

on the application of Article 67 of the Convention

THE HIGH CONTRACTING PARTIES HAVE AGREED AS FOLLOWS:

1. For the purposes of the Convention, provisions which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments and which are or will be contained in acts of the institutions of the European Communities shall be treated in the same way as the conventions referred to in Article 67(1).

2. If one of the Contracting Parties is of the opinion that a provision contained in a proposed act of the institutions of the European Communities is incompatible with the Convention, the Contracting Parties shall promptly consider amending the Convention pursuant to Article 76, without prejudice to the procedure established by Protocol 2.

3. Where a Contracting Party or several Parties together incorporate some or all of the provisions contained in acts of the institutions of the European Community referred to in paragraph 1 into national law, then these provisions of national law shall be treated in the same way as the conventions referred to in Article 67(1).

4. The Contracting Parties shall communicate to the Depositary the text of the provisions mentioned in paragraph 3. Such communication shall be accompanied by a translation into English and French.

ANNEX I

The rules of jurisdiction referred to in Article 3(2) and 4(2) of the Convention are the following:

— in Belgium: Articles 5 through 14 of the Law of 16 July 2004 on private international law,

— in Bulgaria: Article 4(1) of the International Private Law Code,

— in the Czech Republic: Article 86 of Act No 99/1963 Coll., the Code of Civil Procedure (občanský soudní řád), as amended,

— in Denmark: Article 246(2) and (3) of the Administration of Justice Act (Lov om rettens pleje),

— in Germany: Article 23 of the code of civil procedure (Zivilprozeßordnung),

— in Estonia: Paragraph 86 of the Code of Civil Procedure (tsiviilkohtumenetluse seadustik),

— in Greece: Article 40 of the code of civil procedure (Κώδικας Πολιτικής Δικονομίας),

— in France: Articles 14 and 15 of the civil code (Code civil),

— in Iceland: Article 32 paragraph 4 of the Civil Proceedings Act (Lög um meðferð einkamála nr. 91/1991),

— in Ireland: the rules which enable jurisdiction to be founded on the document instituting the proceedings having been served on the defendant during his temporary presence in Ireland,

— in Italy: Articles 3 and 4 of Act 218 of 31 May 1995,

— in Cyprus: section 21(2) of the Courts of Justice Law No 14 of 1960, as amended,

— in Latvia: section 27 and paragraphs 3, 5, 6 and 9 of section 28 of the Civil Procedure Law (Civilprocesa likums),

— in Lithuania: Article 31 of the Code of Civil Procedure (Civilinio proceso kodeksas),

— in Luxembourg: Articles 14 and 15 of the civil code (Code civil),

— in Hungary: Article 57 of Law Decree No 13 of 1979 on International Private Law (a nemzetközi magánjogról szóló 1979. évi 13. törvényerejű rendelet),

— in Malta: Articles 742, 743 and 744 of the Code of Organisation and Civil Procedure — Cap. 12 (Kodiċi ta' Organizzazzjoni u Proċedura Ċivili — Kap. 12) and Article 549 of the Commercial Code — Cap. 13 (Kodiċi tal-kummerċ — Kap. 13),

— in Norway: Section 4-3(2) second sentence of the Dispute Act (tvisteloven),

— in Austria: Article 99 of the Law on court Jurisdiction (Jurisdiktionsnorm),

— in Poland: Articles 1103 and 1110 of the Code of Civil Procedure (Kodeks postępowania cywilnego), insofar as they establish jurisdiction on the basis of the defendant's residence in Poland, the possession by the defendant of property in Poland or his entitlement to property rights in Poland, the fact that the object of the dispute is located in Poland and the fact that one of the parties is a Polish citizen,

— in Portugal: Article 65 and Article 65A of the code of civil procedure (Código de Processo Civil) and Article 11 of the code of labour procedure (Código de Processo de Trabalho),

— in Romania: Articles 148-157 of Law No 105/1992 on Private International Law Relations,

— in Slovenia: Article 48(2) of the Private International Law and Procedure Act (Zakon o mednarodnem zasebnem pravu in postopku) in relation to Article 47(2) of Civil Procedure Act (Zakon o pravdnem postopku) and Article 58 of the Private International Law and Procedure Act (Zakon o mednarodnem zasebnem pravu in postopku) in relation to Article 59 of Civil Procedure Act (Zakon o pravdnem postopku),

— in Slovakia: Articles 37 to 37e of Act No 97/1963 on Private International Law and the Rules of Procedure relating thereto,

— in Switzerland: le for du lieu du séquestre/Gerichtsstand des Arrestortes/foro del luogo del sequestro within the meaning of Article 4 of the loi fédérale sur le droit international privé/Bundesgesetz über das internationale Privatrecht/legge federale sul diritto internazionale privato,

— in Finland: the second, third and fourth sentences of the first paragraph of Section 1 of Chapter 10 of the Code of Judicial Procedure (oikeudenkäymiskaari/rättegångsbalken),

— in Sweden: the first sentence of the first paragraph of Section 3 of Chapter 10 of the Code of Judicial Procedure (rättegångsbalken),

— in the United Kingdom:
the rules which enable jurisdiction to be founded on:

(a) the document instituting the proceedings having been served on the defendant during his temporary presence in the United Kingdom; or

(b) the presence within the United Kingdom of property belonging to the defendant; or

(c) the seizure by the plaintiff of property situated in the United Kingdom.

ANNEX II

The courts or competent authorities to which the application referred to in Article 39 of the Convention may be submitted are the following:

— in Belgium: the 'tribunal de première instance' or 'rechtbank van eerste aanleg' or 'erstinstanzliches Gericht',

— in Bulgaria: the 'Софийски градски съд',

— in the Czech Republic: the 'okresní soud' or 'soudní exekutor',

— in Denmark: the 'byret',

— in Germany:

  (a) the presiding judge of a chamber of the 'Landgericht';

  (b) a notary in a procedure of declaration of enforceability of an authentic instrument,

— in Estonia: the 'maakohus' (county court),

— in Greece: the 'Μονομελές Πρωτοδικείο',

— in Spain: the 'Juzgado de Primera Instancia',

— in France:

  (a) the 'greffier en chef du tribunal de grande instance';

  (b) the 'président de la chambre départementale des notaires' in the case of application for a declaration of enforceability of a notarial authentic instrument,

— in Ireland: the High Court,

— in Iceland: the 'héraðsdómur',

— in Italy: the 'corte d'appello',

— in Cyprus: the 'Επαρχιακό Δικαστήριο' or in the case of a maintenance judgment the 'Οικογενειακό Δικαστήριο',

— in Latvia: the 'rajona (pilsētas) tiesa',

— in Lithuania: the 'Lietuvos apeliacinis teismas',

— in Luxembourg: the presiding judge of the 'tribunal d'arrondissement',

— in Hungary: the 'megyei bíróság székhelyén működő helyi bíróság', and in Budapest the 'Budai Központi Kerületi Bíróság',

— in Malta: the 'Prim' Awla tal-Qorti Ċivili' or 'Qorti tal-Maġistrati ta' Għawdex fil-ġurisdizzjoni superjuri tagħha', or, in the case of a maintenance judgment, the 'Reġistratur tal-Qorti' on transmission by the 'Ministru responsabbli għall-Ġustizzja',

— in the Netherlands: the 'voorzieningenrechter van de rechtbank',

— in Norway: the 'tingrett',

— in Austria: the 'Bezirksgericht',

— in Poland: the 'sąd okręgowy',

— in Portugal: the 'Tribunal de Comarca',

— in Romania: the 'Tribunal',

— in Slovenia: the 'okrožno sodišče',

— in Slovakia: the 'okresný súd',

— in Switzerland:

(a) in respect of judgments ordering the payment of a sum of money, the 'juge de la mainlevée'/'Rechtsöffnungsrichter'/'giudice competente a pronunciare sul rigetto dell'opposizione', within the framework of the procedure governed by Articles 80 and 81 of the loi fédérale sur la poursuite pour dettes et la faillite/Bundesgesetz über Schuldbetreibung und Konkurs/legge federale sulla esecuzione e sul fallimento;

(b) in respect of judgments ordering a performance other than the payment of a sum of money, the 'juge cantonal d'exequatur' compétent/zuständiger 'kantonaler Vollstreckungsrichter'/'giudice cantonale' competente a pronunciare l'exequatur,

— in Finland: the 'käräjäoikeus/tingsrätt',

— in Sweden: the 'Svea hovrätt',

— in the United Kingdom:

(a) in England and Wales, the High Court of Justice, or in the case of a maintenance judgment, the Magistrates' Court on transmission by the Secretary of State;

(b) in Scotland, the Court of Session, or in the case of a maintenance judgment, the Sheriff Court on transmission by the Secretary of State;

(c) in Northern Ireland, the High Court of Justice, or in the case of a maintenance judgment, the Magistrates' Court on transmission by the Secretary of State;

(d) in Gibraltar, the Supreme Court of Gibraltar, or in the case of a maintenance judgment, the Magistrates' Court on transmission by the Attorney General of Gibraltar.

ANNEX III

The courts with which appeals referred to in Article 43(2) of the Convention may be lodged are the following:

— in Belgium:

  (a) as regards appeal by the defendant, the 'tribunal de première instance' or 'rechtbank van eerste aanleg' or 'erstinstanzliche Gericht';

  (b) as regards appeal by the applicant: the 'cour d'appel' or 'hof van beroep',

— in Bulgaria: the 'Апелативен съд — София',

— in the Czech Republic: the court of appeal through the district court,

— in Denmark: the 'landsret',

— in the Federal Republic of Germany: the 'Oberlandesgericht',

— in Estonia: the 'ringkonnakohus',

— in Greece: the 'Εφετείο',

— in Spain: el 'Juzgado de Primera Instancia' que dictó la resolución recurrida para ser resuelto el recurso por la Audiencia Provincial,

— in France:

  (a) the 'cour d'appel' on decisions allowing the application;

  (b) the presiding judge of the 'tribunal de grande instance', on decisions rejecting the application,

— in Ireland: the High Court,

— in Iceland: the 'héraðsdómur',

— in Italy: the 'corte d'appello',

— in Cyprus: the 'Επαρχιακό Δικαστήριο' or in the case of a maintenance judgment the 'Οικογενειακό Δικαστήριο',

— in Latvia: the 'Apgabaltiesa' via the 'rajona (pilsētas) tiesa',

— in Lithuania: the 'Lietuvos apeliacinis teismas',

— in Luxembourg: the 'Cour supérieure de justice' sitting as a court of civil appeal,

— in Hungary: the local court situated at the seat of the county court (in Budapest, the Central District Court of Buda); the appeal is adjudicated by the county court (in Budapest, the Capital Court),

— in Malta: the 'Qorti ta' l-Appell' in accordance with the procedure laid down for appeals in the 'Kodiċi ta' Organizzazzjoni u Proċedura Ċivili — Kap.12' or in the case of a maintenance judgment by 'ċitazzjoni' before the 'Prim' Awla tal-Qorti ivili jew il-Qorti tal-Maġistrati ta' Għawdex fil-ġurisdizzjoni superjuri tagħha",

— in the Netherlands: the 'rechtbank',

— in Norway: the ‘lagmannsrett’,

— in Austria: the ‘Landesgericht’ via the ‘Bezirksgericht’,

— in Poland: the ‘sąd apelacyjny’ via the ‘sąd okręgowy’,

— in Portugal: the ‘Tribunal da Relação’ is the competent court. The appeals are launched, in accordance with the national law in force, by way of a request addressed to the court which issued the contested decision,

— in Romania: the ‘Curte de Apel’,

— in Slovenia: the ‘okrožno sodišče’,

— in Slovakia: the court of appeal through the district court whose decision is being appealed,

— in Switzerland: the ‘tribunal cantonal/Kantonsgericht/tribunale cantonale’,

— in Finland: the ‘hovioikeus/hovrätt’,

— in Sweden: the ‘Svea hovrätt’,

— in the United Kingdom:

(a) in England and Wales, the High Court of Justice, or in the case of a maintenance judgment, the Magistrates’ Court;

(b) in Scotland, the Court of Session, or in the case of a maintenance judgment, the Sheriff Court;

(c) in Northern Ireland, the High Court of Justice, or in the case of a maintenance judgment, the Magistrates’ Court;

(d) in Gibraltar, the Supreme Court of Gibraltar, or in the case of a maintenance judgment, the Magistrates’ Court.

ANNEX IV

The appeals which may be lodged pursuant to Article 44 of the Convention are the following:

— in Belgium: Greece, Spain, France, Italy, Luxembourg and in the Netherlands, an appeal in cassation,

— in Bulgaria: 'обжалване пред Върховния касационен съд',

— in the Czech Republic: a 'dovolání' and a 'žaloba pro zmatečnost',

— in Denmark: an appeal to the 'højesteret', with the leave of the 'Procesbevillingsnævnet',

— in the Federal Republic of Germany: a 'Rechtsbeschwerde',

— in Estonia: a 'kassatsioonkaebus',

— in Ireland: an appeal on a point of law to the Supreme Court,

— in Iceland: an appeal to the 'Hæstiréttur',

— in Cyprus: an appeal to the Supreme Court,

— in Latvia: an appeal to the 'Augstākās tiesas Senāts' via the 'Apgabaltiesa',

— in Lithuania: an appeal to the 'Lietuvos Aukščiausiasis Teismas',

— in Hungary: 'felülvizsgálati kérelem',

— in Malta: no further appeal lies to any other court; in the case of a maintenance judgment the 'Qorti ta' l-Appell' in accordance with the procedure laid down for appeal in the 'kodiċi ta' Organizzazzjoni u Procedura Ċivili — Kap. 12',

— in Norway: an appeal to the 'Høyesteretts Ankeutvalg' or 'Høyesterett',

— in Austria: a 'Revisionsrekurs',

— in Poland: 'skarga kasacyjna',

— in Portugal: an appeal on a point of law,

— in Romania: a 'contestație în anulare' or a 'revizuire',

— in Slovenia: an appeal to the 'Vrhovno sodišče Republike Slovenije',

— in Slovakia: the 'dovolanie',

— in Switzerland: a 'recours devant le Tribunal fédéral'/'Beschwerde beim Bundesgericht'/'ricorso davanti al Tribunale federale',

— in Finland: an appeal to the 'korkein oikeus/högsta domstolen',

— in Sweden: an appeal to the 'Högsta domstolen',

— in the United Kingdom: a single further appeal on a point of law.

ANNEX V

Certificate on judgments and court settlements referred to in Articles 54 and 58 of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

1. State of origin

2. Court or competent authority issuing the certificate

   2.1. Name

   2.2. Address

   2.3. Tel./fax/e-mail

3. Court which delivered the judgment/approved the court settlement (*)

   3.1. Type of court

   3.2. Place of court

4. Judgment/court settlement (*)

   4.1. Date

   4.2. Reference number

   4.3. The parties to the judgment/court settlement (*)

      4.3.1. Name(s) of plaintiff(s)

      4.3.2. Name(s) of defendant(s)

      4.3.3. Name(s) of other party(ies), if any

   4.4. Date of service of the document instituting the proceedings where judgment was given in default of appearance

   4.5. Text of the judgment/court settlement (*) as annexed to this certificate

5. Names of parties to whom legal aid has been granted

The judgment/court settlement (*) is enforceable in the State of origin (Article 38/58 of the Convention) against:

Name:

Done at …, date …

Signature and/or stamp

(*) Delete as appropriate.

ANNEX VI

Certificate on authentic instruments referred to in Article 57(4) of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

1. State of origin

2. Court or competent authority issuing the certificate

   2.1. Name

   2.2. Address

   2.3. Tel./fax/e-mail

3. Authority which has given authenticity to the instrument

   3.1. Authority involved in the drawing up of the authentic instrument (if applicable)

      3.1.1. Name and designation of authority

      3.1.2. Place of authority

   3.2. Authority which has registered the authentic instrument (if applicable)

      3.2.1. Type of authority

      3.2.2. Place of authority

4. Authentic instrument

   4.1. Description of the instrument

   4.2. Date

      4.2.1. On which the instrument was drawn up

      4.2.2. If different: on which the instrument was registered

   4.3. Reference number

   4.4. Parties to the instrument

      4.4.1. Name of the creditor

      4.4.2. Name of the debtor

5. Text of the enforceable obligation as annexed to this certificate.

The authentic instrument is enforceable against the debtor in the State of origin (Article 57(1) of the Convention).

Done at …, date …

Signature and/or stamp

ANNEX VII

The conventions superseded pursuant to Article 65 of the Convention are, in particular, the following:

— the Treaty between the Swiss Confederation and Spain on the mutual enforcement of judgments in civil or commercial matters, signed at Madrid on 19 November 1896,

— the Convention between the Czechoslovak Republic and the Swiss Confederation on the recognition and enforcement of judgments with additional protocol, signed at Bern on 21 December 1926,

— the Convention between the Swiss Confederation and the German Reich on the recognition and enforcement of judgments and arbitration awards, signed at Berne on 2 November 1929,

— the Convention between Denmark, Finland, Iceland, Norway and Sweden on the recognition and enforcement of judgments, signed at Copenhagen on 16 March 1932,

— the Convention between the Swiss Confederation and Italy on the recognition and enforcement of judgments, signed at Rome on 3 January 1933,

— the Convention between Sweden and the Swiss Confederation on the recognition and enforcement of judgments and arbitral awards signed at Stockholm on 15 January 1936,

— the Convention between the Swiss Confederation and Belgium on the recognition and enforcement of judgments and arbitration awards, signed at Berne on 29 April 1959,

— the Convention between Austria and the Swiss Confederation on the recognition and enforcement of judgments, signed at Berne on 16 December 1960,

— the Convention between Norway and the United Kingdom providing for the reciprocal recognition and enforcement of judgments in civil matters, signed at London on 12 June 1961,

— the Convention between Norway and the Federal Republic of Germany on the recognition and enforcement of judgments and enforceable documents, in civil and commercial matters, signed at Oslo on 17 June 1977,

— the Convention between Denmark, Finland, Iceland, Norway and Sweden on the recognition and enforcement of judgments in civil matters, signed at Copenhagen on 11 October 1977, and

— the Convention between Norway and Austria on the recognition and enforcement of judgments in civil matters, signed at Vienna on 21 May 1984.

ANNEX VIII

The languages referred to in Article 79 of the Convention are Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Icelandic, Irish, Italian, Latvian, Lithuanian, Maltese, Norwegian, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish.

ANNEX IX

The States and the rules referred to in Article II of Protocol 1 are the following:

— Germany: Articles 68, 72, 73 and 74 of the code of civil procedure (*Zivilprozeßordnung*) concerning third-party notices,

— Austria: Article 21 of the code of civil procedure (*Zivilprozeßordnung*) concerning third-party notices,

— Hungary: Articles 58 to 60 of the Code of Civil Procedure (*Polgári perrendtartás*) concerning third-party notices,

— Switzerland, with respect to those cantons whose applicable code of civil procedure does not provide for the jurisdiction referred to in Articles 6(2) and 11 of the Convention: the appropriate provisions concerning third-party notices (*litis denuntiatio*) of the applicable code of civil procedure.

II

(Acts adopted under the EC Treaty/Euratom Treaty whose publication is not obligatory)

DECISIONS

COUNCIL

COUNCIL DECISION

of 15 October 2007

on the signing, on behalf of the Community, of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

(2007/712/EC)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) thereof, in conjunction with the first subparagraph of Article 300(2) thereof,

Having regard to the proposal from the Commission,

Whereas:

(1) On 16 September 1988, the Member States of the European Communities signed an international agreement with the Republic of Iceland, the Kingdom of Norway and the Swiss Confederation on jurisdiction and the enforcement of judgments in civil and commercial matters ([1]) (the Lugano Convention), thereby extending to Iceland, Norway and Switzerland the application of the rules of the Convention of 27 September 1968 on the same subject matter ([2]) (the Brussels Convention).

(2) Negotiations on a revision of the Brussels Convention and the Lugano Convention were undertaken during the years 1998-1999 within the framework of an *ad hoc* Working Party enlarged with Switzerland, Norway and Iceland. These negotiations led to the adoption of a text of a draft convention prepared by the Working Party, which was confirmed by the Council at its meeting on 27 and 28 May 1999.

(3) Subsequent negotiations within the Council on the basis of this text led to the adoption of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ([3]), which modernised the rules of the Brussels Convention and made the system of recognition and enforcement swifter and more efficient.

(4) In the light of the parallelism between the Brussels and the Lugano Convention regimes on jurisdiction and on recognition and enforcement of judgments in civil and commercial matters, the rules of the Lugano Convention should be aligned with the rules of Regulation (EC) No 44/2001 in order to achieve the same level of circulation of judgments between the EU Member States and the EFTA States concerned.

(5) In accordance with the Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark does not take part in the application of measures pursuant to Title IV of the Treaty establishing the European Community. In order for the rules of the Lugano Convention to apply to Denmark, Denmark should therefore participate as a Contracting Party to a new convention covering the same subject matter.

([1]) Convention on jurisdiction and enforcement of judgments in civil and commercial matters (OJ L 319, 25.11.1988, p. 9).

([2]) Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ L 299, 31.12.1972, p. 32). (Consolidated version in OJ C 27, 26.1.1998, p. 1).

([3]) OJ L 12, 16.1.2001, p. 1. Regulation as last amended by Regulation (EC) No 1791/2006 (OJ L 363, 20.12.2006, p. 1).

(6) By Decision of 27 September 2002, the Council authorised the Commission to negotiate with a view to the adoption of a new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

(7) The Commission has negotiated such a convention, on behalf of the Community, with Iceland, Norway, Switzerland and Denmark.

(8) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and to the Treaty establishing the European Community, the United Kingdom and Ireland are taking part in the adoption and application of this Decision.

(9) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, Denmark does not take part in the adoption of this Decision and is not bound by it or subject to its application.

(10) The Convention, initialled at Brussels on 28 March 2007, should be signed,

HAS DECIDED AS FOLLOWS:

Article 1

The signing of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which will replace the Lugano Convention of 16 September 1988, is hereby approved on behalf of the Community, subject to the conclusion of the said Convention.

The text of the Convention is attached to this Decision.

Article 2

The President of the Council is hereby authorised to designate the person(s) empowered to sign, on behalf of the Community, the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Done at Luxembourg, 15 October 2007.

For the Council

The President

L. AMADO

Statement on Articles 15 and 73

1. The Council and the Commission are aware that the development of electronic commerce in the information society facilitates the economic growth of undertakings. Community law is an essential if citizens, economic operators and consumers are to benefit from the possibilites afforded by electronic commerce.

   They consider that the development of new distance marketing techniques based on the use of the Internet depends in part on the mutual confidence which may grow up between undertakings and consumers. One of the major elements in this confidence is the opportunity offered to consumers by Article 16 of the Regulation to bring possible disputes before the courts of the Member States in which they reside, where the contract concluded by the consumer is covered by Article 15 of the Regulation.

   The Council and the Commission point out in this connection that for Article 15(1)(c) to be applicable it is not sufficient for an undertaking to target its activities at the Member State of the consumer's residence, or at a number of Member States including that Member State; a contract must also be concluded within the framework of its activities. This provision relates to a number of marketing methods, including contracts concluded at a distance through the Internet.

   In this context, the Council and the Commission stress that the mere fact that an Internet site is accessible is not sufficient for Article 15 to be applicable, although a factor will be that this Internet site solicits the conclusion of distance contracts and that a contract has actually been concluded at a distance, by whatever means. In this respect, the language or currency which a website uses does not constitute a relevant factor.

2. The Council and the Commission take the view that in general it is in the interest of consumers and undertakings to try to settle their disputes amicably before resorting to the courts.

   The Council and the Commission stress in this connection that the purpose of the Regulation, and in particular of Articles 15 and 17 thereof, is not to prohibit the parties from making use of alternative methods of dispute settlement.

   The Council and the Commission accordingly wish to reiterate how important it is that work on alternative methods of dispute settlement in civil and commercial matters should continue at European Community level, in keeping with the Council's conclusions of 29 May 2000.

   They are aware of the great significance of this work and stress the useful complementary role represented by alternative methods of dispute settlement in civil and commercial matters, in particular with regard to electronic commerce.

3. Pursuant to Article 73 of the Regulation, the Commission is to submit a report on the application of the Regulation, accompanied, if need be, by proposals for adaptations, to the European Parliament, the Council and the Economic and Social Committee.

   The Council and the Commission consider that in preparing the report especial attention should be paid to the application of the provisions of the Regulation relating to consumers and small and medium-sized undertakings, in particular with respect to electronic commerce. For this purpose, the Commission will, where appropriate, propose amendments to the Regulation before the expiry of the period referred to in Article 73 of the Regulation.

Schweizerische Eidgenossenschaft
Confédération suisse
Confederazione Svizzera
Confederaziun svizra

Federal Department of Justice and Police

Federal Office of Justice

Revision of the Lugano Convention

Go to page «The Lugano Convention»

1. Status of the revision

At the end of April 1999, an EU-EFTA working group completed a draft of the substantive part of the revision of the Lugano and Brussels Conventions. Shortly afterwards, in May 1999, the Treaty of Amsterdam came into force for the EU member states. This treaty provides the basis for EC competence in civil justice cooperation. The re-vised text of the new agreement was consequently moulded into an EC regulation known as the Brussels I Regu-lation, without having any substantive effect on the outcome of the negotiations.

The second, formal part of the revision concerns essentially the transitional provisions, the relationship between the Lugano Convention and the Brussels Convention and other agreements, jurisdiction and appeals procedures, as well as ratification and membership procedures. The formal revision of the Convention was delayed for several reasons: firstly, there was a difference in interpretation of the paragraph on consumers by the Internet providers and consumers. This question had to be resolved before the Brussels I Regulation (Council Regulation (EC) No 44/2001) was passed on 22 December 2000 (entry into force 1 March 2002). The Lugano negotiations were fur-ther delayed because a separate instrument had to be negotiated with Denmark, which under the EC Treaty is not a party to the EC-driven integration of police and judicial affairs. Moreover, it was unclear for a long time whether the European Community had exclusive or shared competence to conclude the new Lugano Convention. The opinion of the European Court of Justice dated 7 February 2006 ruled that the conclusion of the new agreement fell entirely within the sphere of the Community's exclusive competence, which means that Switzerland, Norway and Iceland now only have to negotiate with one single contracting party — the European Community, acting through the EC Commission. The EU member states enjoy observer status.

The revised Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil an commercial matters was signed on 30 october 2007 in Lugano. The Convention still has to be ratified by the con-tracting parties.

The Convention will enter into force in respect of Switzerland earliest on 1st january 2010.

2. Revision Overview

The revision of the substantive part of the Convention focussed on the regulations on the court of jurisdiction and jurisdiction over consumer contracts. Other important changes were made in the following areas: special jurisdiction in company law, lis pendens and the consolidation of related actions, and in matters regarding exequatur proceedings. Other less significant changes were made in the areas: agreement conferring jurisdiction, employment contracts, jurisdiction relating to torts, the passive joinder of proceedings, action on a warranty or guarantee, action for breach of warranty, action in opposition to the execution of a judgement , insurance matters, exclusive jurisdiction regarding immovable property and intellectual property litigation, as well as defence on the substance of an action. The revised Lugano Convention largely assumes the numbering of the articles of the Brussels I Regulation.

Literary references on the substantive revision of the Convention: Monique Jametti

Greiner, Neues Lugano-Übereinkommen: Stand der Arbeiten, Internationales Zivil- und Verfahrensrecht 2, Zurich 2003, p. 113 ff.; Alexander Markus, Revidierte Übereinkommen von Brüssel und Lugano: Zu den Hauptpunkten, SZW 5/1999, p. 205 ff.; Ders., Neue Entwicklungen im internationalen Zuständigkeitsrecht (insb. LugÜ), Zum Gerichtsstand in Zivilsachen, Zurich 2002, p. 129 ff.; Ders., Die Konsumentenzuständigkeiten der EuGVO und des revidierten LugÜ, besonders im E-Commerce, ZZZ 2/2004, p. 181 ff.; Ders., Der Vertragsgerichtsstand gemäss Verordnung "Brüssel I" und im revidierten LugÜ nach der EuGH-Entscheidung Color Drack, ZSR 126(2007), S. 319 ff.; Rodrigo Rodriguez, Die Revision des Brüsseler und Lugano-Übereinkommens im Kontext der Europäisierung von IPR und IZPR, Jusletter 4 February 2002.

Lugano Convention of 30 october 2007 (279 Kb, pdf)

For more information

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Last modification: 04.08.2008

88/592/EEC: Convention on jurisdiction and the enforcement of judgments in civil and commercial matters - Done at Lugano on 16 September 1988

CONVENTION on jurisdiction and the enforcement of judgments in civil and commercial matters Done at Lugano on 16 September 1988 (88/592/EEC)

PREAMBLE

THE HIGH CONTRACTING PARTIES TO THIS CONVENTION,

ANXIOUS to strengthen in their territories the legal protection of persons therein established,

CONSIDERING that it is necessary for this purpose to determine the international jurisdiction of their courts, to facilitate recognition and to introduce an expeditious procedure for securing the enforcement of judgments, authentic instruments and court settlements,

AWARE of the links between them, which have been sanctioned in the economic field by the free trade agreements concluded between the European Economic Community and the States members of the European Free Trade Association,

TAKING INTO ACCOUNT the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, as amended by the Accession Conventions under the successive enlargements of the European Communities,

PERSUADED that the extension of the principles of that Convention to the States parties to this instrument will strengthen legal and economic cooperation in Europe,

DESIRING to ensure as uniform an interpretation as possible of this instrument,

HAVE in this spirit DECIDED to conclude this Convention and

HAVE AGREED AS FOLLOWS:

TITLE I

SCOPE

Article 1

This Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.

The Convention shall not apply to:

1. the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession;

2. bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositons and analogous pro-

ceedings;

3. social security;

4. arbitration.

TITLE II

JURISDICTION

Section 1

General provisions

Article 2

Subject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State.

Persons who are not nationals of the State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State.

Article 3

Persons domiciled in a Contracting State may be sued in the courts of another Contracting State only by virtue of the rules set out in Sections 2 to 6 of this Title.

In particular the following provisions shall not be applicable as against them:

- in Belgium: Article 15 of the civil code (Code civil - Burgerlijk Wetboek) and Article 638 of the judicial code (Code judiciaire - Gerechtelijk Wetboek),

- in Denmark: Article 246 (2) and (3) of the law on civil procedure (Lov om rettens pleje),

- in the Federal Republic of Germany: Article 23 of the code of civil procedure (Zivilprozeßordnung),

- in Greece: Article 40 of the code of civil procedure (E¦äéêao =ïeéôéê«o äéêïoïißao),

- in France: Articles 14 and 15 of the civil code (Code civil),

- in Ireland: the rules which enable jurisdiction to be founded on the document instituting the proceedings having been served on the defendant during his temporary presence in Ireland,

- in Iceland: Article 77 of the Civil Proceedings Act (lög um meäferä einkamala í héraäi),

- in Italy: Articles 2 and 4, Nos 1 and 2 of the code of civil procedure (Codice di procedura civile),

- in Luxembourg: Articles 14 and 15 of the civil code (Code civil),

- in the Netherlands: Articles 126 (3) and 127 of the

code of civil procedure (Wetboek van Burgerlijke Rechtsvordering),

- in Norway: Section 32 of the Civil Proceedings Act (tvistemålsloven),

- in Austria: Article 99 of the Law on Court Jurisdiction (Jurisdiktionsnorm)

- in Portugal: Articles 65 (1) (c), 65 (2) and 65A (c) of the code of civil procedure (Codigo de Processo Civil) and Article 11 of the code of labour procedure (Codigo de Processo de Trabalho),

- in Switzerland: le for du lieu du séquestre/Gerichtsstand des Arrestortes/foro del luogo del sequestro within the meaning of Article 4 of the loi fédérale sur le droit international privé/Bundesgesetz über das internationale Privatrecht/legge federale sul diritto internazionale privato,

- in Finland: the second, third and fourth sentences of Section 1 of Chapter 10 of the Code of Judicial Procedure (oikeudenkäymiskaari/rättegångsbalken),

- in Sweden: the first sentence of Section 3 of Chapter 10 of the Code of Judicial Procedure (Rättegångsbalken),

- in the United Kingdom: the rules which enable jurisdiction to be founded on:

(a) the document instituting the proceedings having been served on the defendant during his temporary presence in the United Kingdom; or

(b) the presence within the United Kingdom of property belonging to the defendant; or

(c) the seizure by the plaintiff of property situated in the United Kingdom.

Article 4

If the defendant is not domiciled in a Contracting State, the jurisdiction of the courts of each Contracting State shall, subject to the provisions of Article 16, be determined by the law of that State.

As against such a defendant, any person domiciled in a Contracting State may, whatever his nationality, avail himself in that State of the rules of jurisdiction there in force, and in particular those specified in the second paragraph of Article 3, in the same way as the nationals of that State.

Section 2

Special jurisdiction

Article 5

A person domiciled in a Contracting State may, in another Contracting State, be sued:

1. in matters relating to a contract, in the courts for the place of performance of the obligation in question; in matters relating to individual contracts of employment, this place is that where the employee habitually carries out his work, or if the employee does not habitually carry out his work in any one country, this place shall be the place of business through which he was engaged;

2. in matters relating to maintenance, in the courts for the place where the maintenance creditor is domiciled or habitually resident or, if the matter is ancillary to proceedings concerning the status of a person, in the court which, according to its own law, has juridiction to entertain those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties;

3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred;

4. as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the court seised of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings;

5. as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated;

6. in his capacity as settlor, trustee or beneficiary of a trust created by the operation of a statute, or by a written instrument, or created orally and evidenced in writing, in the courts of the Contracting State in which the trust is domiciled;

7. as regards a dispute concerning the payment of remuneration claimed in respect of the salvage of a cargo or freight, in the court under the authority of which the cargo or freight in question:

(a) has been arrested to secure such payment,

or

(b) could have been so arrested, but bail or other security has been given;

provided that this provision shall apply only if it is claimed that the defendant has an interest in the cargo or freight or had such an interest at the time of salvage.

Article 6

A person domiciled in a Contracting State may also be sued:

1. where he is one of a number of defendants, in the courts for the place where any one of them is domiciled;

2. as a third party in an action on a warranty or guarantee or in any other third party proceedings, in the court seised of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case;

3. on a counterclaim arising from the same contract or facts on which the original claim was based, in the court in which the original claim is pending;

4. in matters relating to a contract, if the action may be combined with an action against the same defendant in

matters relating to rights in rem in immovable property, in the court of the Contracting State in which the property is situated.

Article 6A

Where by virtue of this Convention a court of a Contracting State has jurisdiction in actions relating to liability arising from the use or operation of a ship, that court, or any other court substituted for this purpose by the internal law of that State, shall also have jurisdiction over claims for limitation of such liability.

Section 3

Jurisdiction in matters relating to insurance

Article 7

In matters relating to insurance, jurisdiction shall be determined by this Section, without prejudice to the provisions of Articles 4 and 5 (5).

Article 8

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 Contracting 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 State.

Article 9

In respect of liability insurance or insurance of immovable property, the insurer may in addition be sued in the courts for the place where the harmful event occurred. The same applies if movable and immovable property are covered by the same insurance policy and both are adversely affected by the same contingency.

Article 10

In respect of liability insurance, the insurer may also, if the law of the court permits it, be joined in proceedings which the injured party has brought against the insured.

The provisions of Articles 7, 8 and 9 shall apply to actions brought by the injured party directly against the insurer, where such direct actions are permitted.

If the law governing such direct actions provides that the policy-holder or the insured may be joined as a party to the action, the same court shall have jurisdiction over them.

Article 11

Without prejudice to the provisions of the third paragraph of Article 10, an insurer may bring proceedings only in the courts of the Contracting State in which the defendant is domiciled, irrespective of whether he is the policy-holder, the insured or a beneficiary.

The provisions of this Section shall not affect the right to bring a counterclaim in the court in which, in accordance with this Section, the original claim is pending.

Article 12

The provisions of this Section may be departed from only by an agreement on jurisdiction:

1. which is entered into after the dispute has arisen; or

2. which allows the policy-holder, the insured or a beneficiary to bring proceedings in courts

other than those indicated in this Section; or

3. which is concluded between a policy-holder and an insurer, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Contracting State, and which has the effect of conferring jurisdiction on the courts of that State even if the harmful event were to occur abroad, provided that such an agreement is not contrary to the law of the State; or

4. which is concluded with a policy-holder who is not domiciled in a Contracting State, except in so far as the insurance is compulsory or relates to immovable property in a Contracting State; or

5. which relates to a contract of insurance in so far as it covers one or more of the risks set out in Article 12A.

Article 12A

The following are the risks referred to in Article 12 (5):

1. any loss of or damage to:

(a) sea-going ships, installations situated off shore or on the high seas, or aircraft, arising from perils which relate to their use for commercial purposes;

(b) goods in transit other than passengers' baggage where the transit consists of or includes carriage by such ships or aircraft;

2. any liability, other than for bodily injury to passengers or loss of or damage to their baggage;

(a) arising out of the use or operation of ships, installations or aircraft as referred to in (1) (a) above in so far as the law of the Contracting State in which such aircraft are registered does not prohibit agreements on jurisdiction regarding insurance of such risks;

(b) for loss or damage caused by goods in transit as described in (1) (b) above;

3. any financial loss connected with the use or operation of ships, installations or aircraft as referred to in (1) (a) above, in particular loss of freight or charter-hire;

4. any risk or interest connected with any of those referred to in (1) to (3) above.

Section 4

Jurisdiction over consumer contracts

Article 13

In proceedings concerning a contract concluded by a person for a purpose which can be regarded as being outside his trade or profession, hereinafter called 'the consumer', jurisdiction shall be determined by this Section, without prejudice to the provisions of Articles 4 and 5 (5), if it is:

1. a contract for the sale of goods on instalment credit terms; or

2. a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or

3. any other contract for the supply of goods or a contract for the supply of services, and

(a) in the State of the consumer's domicile the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and

(b) the consumer took in that State the steps necessary for the conclusion of the contract.

Where a consumer enters into a contract with a party who is not domiciled in a Contracting State but has a branch, agency or other establishment in one of the Contracting States, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State.

This Section shall not apply to contracts of transport.

Article 14

A consumer may bring proceedings against the other party to a contract either in the courts of the Contracting State in which that party is domiciled or in the courts of the Contracting State in which he is himself domiciled.

Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Contracting State in which the consumer is domiciled.

These provisions shall not affect the right to bring a counterclaim in the court in which, in accordance with this Section, the original claim is pending.

Article 15

The provisions of this Section may be departed from only by an agreement:

1. which is entered into after the dispute has arisen; or

2. which allows the consumer to bring proceedings in courts other than those indicated in this Section; or

3. which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Contracting State, and which confers jurisdiction on the courts of that State, provided that such an agreement is not contrary to the law of that State.

Section 5

Exclusive jurisdiction

Article 16

The following courts shall have exclusive jurisdiction, regardless of domicile:

1. (a) in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, the courts of the Contracting State in which the property is situated;

(b) however, in proceedings which have as their object tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months, the courts of the Contracting State in which the defendant is domiciled shall also have jurisdiction, provided that the tenant is a natural person and neither party is domiciled in the Contracting State in which the property is situated;

2. in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or the decisions of their organs, the courts of the Contracting State in which the company, legal person or association has its seat;

3. in proceedings which have as their object the validity of entries in public registers, the courts of the Contracting State in which the register is kept;

4. in proceedings concerned with the registration or validity of patents, trade marks, designs, or other similar rights required to be deposited or registered, the courts of the Contracting State in which the deposit or registration has been applied for, has taken place or is under the terms of an international convention deemed to have taken place;

5. in proceedings concerned with the enforcement of judgments, the courts of the Contracting State in which the judgment has been or is to be enforced.

Section 6

Prorogation of jurisdiction

Article 17

1. If the parties, one or more of whom is domiciled in a Contracting State, have agreed that a court or the courts of a Contracting State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction. Such an agreement conferring jurisdiction shall be either:

(a) in writing or evidenced in writing, or

(b) in a form which accords with practices which the parties have established between themselves, or

(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

Where such an agreement is concluded by parties, none of whom is domiciled in a Contracting State, the courts of other Contracting States shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction.

2. The court or courts of a Contracting State on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between these persons or their rights or obligations under the trust are involved.

3. Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to the provisions of Article 12 or 15, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 16.

4. If an agreement conferring jurisdiction was concluded for the benefit of only one of the parties, that party shall retain the right to bring proceedings in any other court which has jurisdiction by virtue of this Convention.

5. In matters relating to individual contracts of employment an agreement conferring jurisdiction shall have legal force only if it is entered into after the dispute has arisen.

Article 18

Apart from jurisdiction derived from other provisions of this Convention, a court of a Contracting State before whom a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered solely to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 16.

Section 7

Examination as to jurisdiction and admissibility

Article 19

Where a court of a Contracting State is seised of a claim which is principally concerned with a matter over which the courts of another Contracting State have exclusive jurisdiction by virtue of Article 16, it shall declare of its own motion that it has no jurisdiction.

Article 20

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 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.

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.

Section 8

Lis Pendens related actions

Article 21

Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

Article 22

Where related actions are brought in the courts of different Contracting States, any court other than the court first seised may, while the actions are pending at first instance, stay its proceedings.

A court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the law of that court permits the consolidation of related actions and the court first seised has jurisdiction over both actions.

For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

Article 23

Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court.

Section 9

Provisional, including protective, measures

Article 24

Application may be made to the courts of a Contracting State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Convention, the courts of another Contracting State have jurisdiction as to the substance of the matter.

TITLE III

RECOGNITION AND ENFORCEMENT

Article 25

For the purposes of this Convention, 'judgment' means any judgment given by a court or tribunal of a Contracting State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court.

Section 1

Recognition

Article 26

A judgment given in a Contracting State shall be recognized in the other Contracting States without any special procedure being required.

Any interested party who raises the recognition of a judgment as the principal issue in a dispute may, in accordance with the procedures provided for in Section 2 and 3 of this Title, apply for a decision that the judgment be recognized.

If the outcome of proceedings in a court of a Contracting State depends on the determination of an incidental question of recognition that court shall have jurisdiction over that question.

Article 27

A judgment shall not be recognized:

1. if such recognition is contrary to public policy in the State in which recognition is sought;

2. where it was given in default of appearance, if the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defence;

3. if the judgment is irreconcilable with a judgment given in a dispute between the same parties in the State in which recognition is sought;

4. if the court of the State of origin, in order to arrive at

its judgment, has decided a preliminary question concerning the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills or succession in a way that conflicts with a rule of the private international law of the State in which the recognition is sought, unless the same result would have been reached by the application of the rules of private international law of that State;

5. if the judgment is irreconcilable with an earlier judgment given in a non-contracting State involving the same cause of action and between the same parties, provided that this latter judgment fulfils the conditions necessary for its recognition in the State addressed.

Article 28

Moreover, a judgment shall not be recognized if it conflicts with the provisions of Sections 3, 4 or 5 of Title II or in a case provided for in Article 59.

A judgment may furthermore be refused recognition in any case provided for in Article 54B (3) or 57 (4).

In its examination of the grounds of jurisdiction referred to in the foregoing paragraphs, the court or authority applied to shall be bound by the findings of fact on which the court of the State of origin based its jurisdiction.

Subject to the provisions of the first and second paragraphs, the jurisdiction of the court of the State of origin may not be reviewed; the test of public policy referred to in Article 27 (1) may not be applied to the rules relating to jurisdiction.

Article 29

Under no circumstances may a foreign judgment be reviewed as to its substance.

Article 30

A court of a Contracting State in which recognition is sought of a judgment given in another Contracting State may stay the proceedings if an ordinary appeal against the judgment has been lodged.

A court of a Contracting State in which recognition is sought of a judgment given in Ireland or the United Kingdom may stay the proceedings if enforcement is suspended in the State of origin by reason of an appeal.

Section 2

Enforcement

Article 31

A judgment given in a Contracting State and enforceable in that State shall be enforced in another Contracting State when, on the application of any interested party, it has been declared enforceable there.

However, in the United Kingdom, such a judgment shall be enforced in England and Wales, in Scotland, or in Northern Ireland when, on the application of any interested party, it has been registered for enforcement in that part of the United Kingdom.

Article 32

1. The application shall be submitted:

- in Belgium, to the tribunal de première instance or rechtbank van eerste aanleg,
- in Denmark, to the byret,
- in the Federal Republic of Germany, to the presiding judge of a chamber of the Landgericht,
- in Greece, to the ïïíïiåe¡o =ñùôïäéêåßï,
- in Spain, to the Juzgado de Primera Instancia,
- in France, to the presiding judge of the tribunal de grande instance,
- in Ireland, to the High Court,
- in Iceland, to the héraäsdomari,

- in Italy, to the corte d'appello,
- in Luxembourg, to the presiding judge of the tribunal d'arrondissement,
- in the Netherlands, to the presiding judge of the arrondissementsrechtbank,
- in Norway, to the herredsrett or byrett as namsrett,
- in Austria, to the Landesgericht or the Kreisgericht,
- in Portugal, to the Tribunal Judicial de Círculo,
- in Switzerland:

(a) in respect of judgments ordering the payment of a sum of money, to the juge de la mainlevée / Rechtsöffnungsrichter / giudice competente a pronunciare sul rigetto dell'opposizione, within the framework of the procedure governed by Articles 80 and 81 of the loi fédérale sur la poursuite pour dettes et la faillite / Bundesgesetz über Schuldbetreibung und Konkurs / legge federale sulla esecuzione e sul fallimento;

(b) in respect of judgments ordering a performance other than the payment of a sum of money, to the juge cantonal d'exequatur compétent / zuständiger kantonaler Vollstreckungsrichter / giudice cantonale competente a pronunciare l'exequatur,

- in Finland, to the ulosotonhaltija / överexekutor,
- in Sweden, to the Svea hovrätt,
- in the United Kingdom:

(a) in England and Wales, to the High Court of Justice, or in the case of a maintenance judgment to the Magistrates' Court on transmission by the Secretary of State;

(b) in Scotland, to the Court of Session, or in the case of a maintenance judgment to the Sheriff Court on transmission by the Secretary of State;

(c) in Northern Ireland, to the High Court of Justice, or in the case of a maintenance judgment to the Magistrates' Court on transmission by the Secretary of State.

2. The jurisdiction of local courts shall be determined by reference to the place of domicile of the party against whom enforcement is sought. If he is not domiciled in the State in which enforcement is sought, it shall be determined by reference to the place of enforcement.

Article 33

The procedure for making the application shall be governed by the law of the State in which enforcement is sought.

The applicant must give an address for service of process within the area of jurisdiction of the court applied to. However, if the law of the State in which enforcement is sought does not provide for the furnishing of such an address, the applicant shall appoint a representative ad litem.

The documents referred to in Articles 46 and 47 shall be attached to the application.

Article 34

The court applied to shall give its decision without delay; the party against whom enforcement is sought shall not at this stage of the proceedings be entitled to make any submissions on the application.

The application may be refused only for one of the reasons specified in Articles 27 and 28.

Under no circumstances may the foreign judgment be reviewed as to its substance.

Article 35

The appropriate officer of the court shall without delay bring the decision given on the application to the notice of the applicant in accordance with the procedure laid down by the law of the State in which enforcement is sought.

Article 36

If enforcement is authorized, the party against whom enforcement is sought may appeal against the decision within one month of service thereof.

If that party is domiciled in a Contracting State other than that in which the decision authorizing enforcement was given, the time for appealing shall be two months and shall run from the date of service, either on him in person or at his residence. N° extension of time may be granted on account of distance.

Article 37

1. An appeal against the decision authorizing enforcement shall be lodged in accordance with the rules governing procedure in contentious matters:

- in Belgium, with the tribunal de première instance or rechtsbank van eerste aanleg,
- in Denmark, with the landsret,
- in the Federal Republic of Germany, with the Oberlandesgericht,
- in Greece, with the åöåôåßï,
- in Spain, with the Audiencia Provincial,
- in France, with the cour d'appel,
- in Ireland, with the High Court,
- in Iceland, with the héraäsdomari,
- in Italy, with the corte d'appello,
- in Luxembourg, with the Cour supérieure de justice sitting as a court of civil appeal,
- in the Netherlands, with the arrondissements-

rechtsbank,

- in Norway, with the lagmannsrett,

- in Austria, with the Landesgericht or the Kreisgericht,

- in Portugal, with the Tribunal da Relaçao,

- in Switzerland, with the tribunal cantonal / Kantonsgericht / tribunale cantonale,

- in Finland, with the hovioikeus / hovrätt,

- in Sweden, with the Svea hovrätt,

- in the United Kingdom:

(a) in England and Wales, with the High Court of Justice, or in the case of a maintenance judgment with the Magistrates' Court;

(b) in Scotland, with the Court of Session, or in the case of a maintenance judgment with the Sheriff Court;

(c) in Northern Ireland, with the High Court of Justice, or in the case of a maintenance judgment with the Magistrates' Court.

2. The judgment given on the appeal may be contested only:

- in Belgium, Greece, Spain, France, Italy, Luxembourg and in the Netherlands, by an appeal in cassation,

- in Denmark, by an appeal to the højesteret, with the leave of the Minister of Justice,

- in the Federal Republic of Germany, by a Rechtsbeschwerde,

- in Ireland, by an appeal on a point of law to the Supreme Court,

- in Iceland, by an appeal to the Hæstiréttur,

- in Norway, by an appeal (kjæremål or anke) to the Hoyesteretts Kjæremålsutvalg or Hoyesterett,

- in Austria, in the case of an appeal, by a Revisionsrekurs and, in the case of opposition proceedings, by a Berufung with the possibility of a Revision,

- in Portugal, by an appeal on a point of law,

- in Switzerland, by a recours de droit public devant le tribunal fédéral / staatsrechtliche Beschwerde beim Bundesgericht / ricorso di diritto pubblico davanti al tribunale federale,

- in Finland, by an appeal to the korkein oikeus / högsta domstolen,

- in Sweden, by an appeal to the högsta domstolen,

- in the United Kingdom, by a single further appeal on a point of law.

Article 38

The court with which the appeal under Article 37 (1) is lodged may, on the application of the appellant, stay the proceedings if an ordinary appeal has been lodged against the judgment in the State of origin or if the time for such an appeal has not yet expired; in the latter case, the court may specify the time within which such an appeal is to be lodged.

Where the judgment was given in Ireland or the United Kingdom, any form of appeal available in the State of origin shall be treated as an ordinary appeal for the purposes of the first paragraph.

The court may also make enforcement conditional on the provision of such security as it shall determine.

Article 39

During the time specified for an appeal pursuant to Article 36 and until any such appeal has been determined, no measures of enforcement may be taken other than protective measures taken against the property of the party against whom enforcement is sought.

The decision authorizing enforcement shall carry with it the power to proceed to any such protective measures.

Article 40

1. If the application for enforcement is refused, the applicant may appeal:

- in Belgium, to the cour d'appel or hof van beroep,
- in Denmark, to the landsret,
- in the Federal Republic of Germany, to the Oberlandesgericht,
- in Greece, to the åöåôåßï,
- in Spain, to the Audiencia Provincial,
- in France, to the cour d'appel,
- in Ireland, to the High Court,
- in Iceland, to the héraäsdomari,
- in Italy, to the corte d'appello,
- in Luxembourg, to the Cour supérieure de justice sitting as a court of civil appeal,
- in the Netherlands, to the gerechtshof,
- in Norway, to the lagmannsrett,
- in Austria, to the Landesgericht or the Kreisgericht,
- in Portugal, to the Tribunal da Relaçao,
- in Switzerland, to the tribunal cantonal / Kantons-

gericht / tribunale cantonale,

- in Finland, to the hovioikeus / hovrätt,
- in Sweden, to the Svea hovrätt,
- in the United Kingdom:

(a) in England and Wales, to the High Court of Justice, or in the case of a maintenance judgment to the Magistrates' Court;

(b) in Scotland, to the Court of Session, or in the case of a maintenance judgment to the Sheriff Court;

(c) in Northern Ireland, to the High Court of Justice, or in the case of a maintenance judgment to the Magistrates' Court.

2. The party against whom enforcement is sought shall be summoned to appear before the appellate court. If he fails to appear, the provisions of the second and third paragraphs of Article 20 shall apply even where he is not domiciled in any of the Contracting States.

Article 41

A judgment given on an appeal provided for in Article 40 may be contested only:

- in Belgium, Greece, Spain, France, Italy, Luxembourg and in the Netherlands, by an appeal in cassation,

- in Denmark, by an appeal to the højesteret, with the leave of the Minister of Justice,

- in the Federal Republic of Germany, by a Rechtsbeschwerde,

- in Ireland, by an appeal on a point of law to the Supreme Court,

- in Iceland, by an appeal to the Hæstiréttur,

- in Norway, by an appeal (kjæremål or anke) to the Hoyesteretts kjæremålsutvalg or Hoyesterett,

- in Austria, by a Revisionsrekurs,

- in Portugal, by an appeal on a point of law,

- in Switzerland, by a recours de droit public devant le tribunal fédéral / staatsrechtliche Beschwerde beim Bundesgericht / ricorso di diritto pubblico davanti al tribunale federale,

- in Finland, by an appeal to the korkein oikeus / högsta domstolen,

- in Sweden, by an appeal to the högsta domstolen,

- in the United Kingdom, by a single further appeal on a point of law.

Article 42

Where a foreign judgment has been given in respect of several matters and enforcement cannot be authorized for all of them, the court shall authorize enforcement for one or more of them.

An applicant may request partial enforcement of a judgment.

Article 43

A foreign judgment which orders a periodic payment by way of a penalty shall be enforceable in the State in which enforcement is sought only if the amount of the payment has been finally determined by the courts of the State of origin.

Article 44

An applicant who, in the State of origin, has benefited from complete or partiyl legal aid or exemption

from costs or expenses, shall be entitled, in the procedures provided for in Articles 32 to 35, to benefit from the most favourable legal aids or the most extensive exemption from costs or expenses provided for by the law of the State addressed.

However, an applicant who requests the enforcement of a decision given by an administrative authority in Denmark or in Iceland in respect of a maintenance order may, in the State addressed, claim the benefits referred to in the first paragraph if he presents a statement from, respectively, the Danish Ministry of Justice or the Icelandic Ministry of Justice to the effect that he fulfils the economic requirements to qualify for the grant of complete or partial legal aid or exemption from costs or expenses.

Article 45

N° security, bond or deposit, however described, shall be required of a party who in one Contracting State applies for enforcement of a judgment given in another Contracting State on the ground that he is a foreign national or that he is not domiciled or resident in the State in which enforcement is sought.

Section 3

Common provisions

Article 46

A party seeking recognition or applying for enforcement of a judgment shall produce:

1. a copy of the judgment which satisfies the conditions necessary to establish its authenticity;

2. in the case of a judgment given in default, the original or a certified true copy of the document which establishes that the party in default was served with the document instituting the proceedings or with an equivalent document.

Article 47

A party applying for enforcement shall also produce:

1. documents which establish that, according to the law of the State of origin, the judgment is enforceable and has been served;

2. where appropriate, a document showing that the applicant is in receipt of legal aid in the State of origin.

Article 48

If the documents specified in Articles 46 (2) and 47 (2) are not produced, the court may specify a time for their production, accept equivalent documents or, if it considers that it has sufficient information before it, dispense with their production.

If the court so requires, a translation of the documents shall be produced; the translation shall be certified by a person qualified to do so in one of the Contracting States.

Article 49

N° legalization or other similar formality shall be required in respect of the documents referred to in Articles 46 or 47 or the second paragraph of Article 48, or in respect of a document appointing a representative ad litem.

TITLE IV

AUTHENTIC INSTRUMENTS AND COURT

SETTLEMENTS

Article 50

A document which has been formally drawn up or registered as an authentic instrument and is enforceable in one Contracting State shall, in another Contracting State, be declared enforceable there, on application made in accordance with the procedures provided for in Articles 31 et seq. The application may be refused only if enforcement of the instrument is contrary to public policy in the State addressed.

The instrument produced must satisfy the conditions necessary to establish its authenticity in the State of origin.

The provisions of Section 3 of Title III shall apply as appropriate.

Article 51

A settlement which has been approved by a court in the course of proceedings and is enforceable in the State in which it was concluded shall be enforceable in the State addressed under the same conditions as authentic instruments.

TITLE V

GENERAL PROVISIONS

Article 52

In order to determine whether a party is domiciled in the Contracting State whose courts are seised of a matter, the Court shall apply its internal law.

If a party is not domiciled in the State whose courts are seised of the matter, then, in order to determine whether the party is domiciled in another Contracting State, the court shall apply the law of that State.

Article 53

For the purposes of this Convention, the seat of a company or other legal person or association of natural or legal persons shall be treated as its domicile. However, in order to determine that seat, the court shall apply its rules of private international law.

In order to determine whether a trust is domiciled in the Contracting State whose courts are seised of the matter, the court shall apply its rules of private international law.

TITLE VI

TRANSITIONAL PROVISIONS

Article 54

The provisions of this Convention shall apply only to legal proceedings instituted and to documents formally drawn up or registered as authentic instruments after its entry into force in the State of origin and, where recognition or enforcement of a judgment or authentic instrument is sought, in the State addressed.

However, judgments given after the date of entry into force of this Convention between the State of origin and the State addressed in proceedings instituted before that date shall be recognized and enforced in accordance with the provisions of Title III if jurisdiction was founded upon rules which accorded with those provided for either in Title II of this Convention or in a convention concluded between the State of origin and the State addressed which was in force when the proceedings were instituted.

If the parties to a dispute concerning a contract had agreed in writing before the entry into force of this Convention that the contract was to be governed by the law of Ireland or of a part of the United Kingdom, the courts of Ireland or of that part of the United Kingdom shall retain the right to exercise jurisdiction in the dispute.

Article 54A

For a period of three years from the entry into force of this Convention for Denmark, Greece, Ireland, Iceland, Norway, Finland and Sweden, respectively, jurisdiction in maritime matters shall be determined in these States not only in accordance with the provisions of Title II, but also in accordance with the provisions of paragraphs 1 to 7 following. However, upon the entry into force of the International Convention relating to the arrest of sea-going ships, signed at Brussels on 10 May 1952, for one of these States, these provisions shall cease to have effect for that State.

1.

A person who is domiciled in a Contracting State may be sued in the courts of one of the States mentioned above in respect of a maritime claim if the ship to which the claim relates or any other ship owned by him has been arrested by judicial process within the territory of the latter State to secure the claim, or could have been so arrested there but bail or other security has been given, and either:

(a) the claimant is domiciled in the latter State; or

(b) the claim arose in the latter State; or

(c) the claim concerns the voyage during which the arrest was made or could have been made; or

(d) the claim arises out of a collision or out of damage caused by a ship to another ship or to goods or persons on board either ship, either by the execution or non-execution of a manoeuvre or by the non-observance of regulations; or

(e) the claim is for salvage; or

(f) the claim is in respect of a mortgage or hypothecation of the ship arrested.

2.

A claimant may arrest either the particular ship to which the maritime claim relates, or any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship. However, only the particular ship to which the maritime claim relates my be arrested in respect of the maritime claims set out under 5. (o), (p) or (q) of this Article.

3.

Ships shall be deemed to be in the same ownership when all the shares therein are owned by the same person or persons.

4.

When in the case of a charter by demise of a ship the charterer alone is liable in respect of a maritime claim relating to that ship, the claimant may arrest that ship or any other ship owned by the charterer, but no other ship owned by the owner may be arrested in respect of such claim. The same shall apply to any case in which a person other than the owner of a ship is liable in respect of a maritime claim relating to that ship.

5.

The expression 'maritime claim' means a claim arising out of one or more of the following:

(a) damage caused by any ship either in collision or otherwise;

(b) loss of life or personal injury caused by any ship or occurring in connection with the operation on any ship;

(c) salvage;

(d) agreement relating to the use or hire of any ship whether by charterparty or otherwise;

(e) agreement relating to the carriage of goods in any ship whether by charterparty or otherwise;

(f) loss of or damage to goods including baggage carried in any ship;

(g) general average;

(h) bottomry;

(i) towage;

(j) pilotage;

(k) goods or materials wherever supplied to a ship for her operation or maintenance;

(l) construction, repair or equipment of any ship or dock charges and dues;

(m) wages of masters, officers or crew;

(n) master's disbursements, including disbursements made by shippers, charterers or agents on behalf of a ship or her owner;

(o) dispute as to the title to or ownership of any ship;

(p) disputes between co-owners of any ship as to the ownership, possession, employment or earnings of that ship;

(q) the mortgage or hypothecation of any ship.

6.

In Denmark, the expression 'arrest' shall be deemed as regards the maritime claims referred to under 5. (o) and (p) of this Article, to include a 'forbud', where that is the only procedure allowed in respect of such a claim under Articles 646 to 653 of the law on civil procedure (lov om rettens pleje).

7.

In Iceland, the expression 'arrest' shall be deemed, as regards the maritime claims referred to under 5. (o) and (p) of this Article, to include a 'lögbann', where that is the only procedure allowed in respect of such a claim under Chapter III of the law on arrest and injunction (lög um kyrrsetningu og lögbann).

TITLE VII

RELATIONSHIP TO THE BRUSSELS CONVENTION AND TO OTHER CONVENTIONS

Article 54B

1. This Convention shall not prejudice the application by the Member States of the European Communities of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, signed at Brussels on 27 September 1968 and of the Protocol on interpretation of that Convention by the Court of Justice, signed at Luxembourg on 3 June 1971, as amended by the Conventions of Accession to the said Convention and the said Protocol by the States acceding to the European Communities, all of these Conventions and the Protocol being hereinafter referred to as the 'Brussels Convention'.

2. However, this Convention shall in any event be applied:

(a) in matters of jurisdiction, where the defendant is domiciled in the territory of a Contracting State which is not a member of the European Communities, or where Article 16 or 17 of this Convention confer a jurisdiction on the courts of such a Contracting State;

(b) in relation to a lis pendens or to related actions as provided for in Articles 21 and 22, when proceedings are instituted in a Contracting State which is not a member of the European Communities and in a Contracting State which is a member of the European Communities;

(c) in matters of recognition and enforcement, where either the State of origin or the State addressed is not a member of the European Communities.

3. In addition to the grounds provided for in Title III recognition or enforcement may be refused if the ground of jurisdiction on which the judgment has been based differs from that resulting from this Convention and recognition or

enforcement is sought against a party who is domiciled in a Contracting State which is not a member

of the European Communities, unless the judgment may otherwiese be recognized or enforced under any rule of law in the State addressed.

Article 55

Subject to the provisions of Articles 54 (2) and 56, this Convention shall, for the States which are parties to it, supersede the following conventions concluded between two or more of them:

- the Convention between the Swiss Confederation and France on jurisdiction and enforcement of judgments in civil matters, signed at Paris on 15 June 1869,

- the Treaty between the Swiss Confederation and Spain on the mutual enforcement of judgments in civil or commercial matters, signed at Madrid on 19 November 1896,

- the Convention between the Swiss Confederation and the German Reich on the recognition and enforcement of judgments and arbitration awards, signed at Berne on 2 November 1929,

- the Convention between Denmark, Finland, Iceland, Norway and Sweden on the recognition and enforcement of judgments, signed at Copenhagen on 16 March 1932,

- the Convention between the Swiss Confederation and Italy on the recognition and enforcement of judgments, signed at Rome on 3 January 1933,

- the Convention between Sweden and the Swiss Confederation on the recognition and enforcement of judgments and arbitral awards signed at Stockholm on 15 January 1936,

- the Convention between the Kingdom of Belgium and Austria on the reciprocal recognition and enforcement of judgments and authentic instruments relating to maintenance obligations, signed at Vienna on 25 October 1957,

- the Convention between the Swiss Confederation and Belgium on the recognition and enforcement of judgments and arbitration awards, signed at Berne on 29 April 1959,

- the Convention between the Federal Republic of Germany and Austria on the reciprocal recognition and enforcement of judgments, settlements and authentic instruments in civil and commercial matters, signed at Vienna on 6 June 1959,

- the Convention between the Kingdom of Belgium and Austria on the reciprocal recognition and enforcement of judgments, arbitral awards and authentic instruments

in civil and commercial matters, signed at Vienna on

16 June 1959,

- the Convention between Austria and the Swiss Confederation on the recognition and enforcement of judgments, signed at Berne on 16 December 1960,

- the Convention between Norway and the United Kingdom providing for the reciprocal recognition and enforcement of judgments in civil matters, signed at London on 12 June 1961,

- the Convention between the United Kingdom and Austria providing for the reciprocal recognition and enforcement of judgments in civil and commercial matters, signed at Vienna on 14 July 1961, with amending Protocol signed at London on 6 March 1970,

- the Convention between the Kingdom of the Nether-

lands and Austria on the reciprocal recognition and enforcement of judgments and authentic instruments

in civil and commercial matters, signed at The Hague on 6 February 1963,

- the Convention between France and Austria on the recognition and enforcement of judgments and authentic instruments in civil and commercial matters, signed at Vienna on 15 July 1966,

- the Convention between Luxembourg and Austria on

the recognition and enforcement of judgements and authentic instruments in civil and commercial matters, signed at Luxembourg on 29 July 1971,

- the Convention between Italy and Austria on the recognition and enforcement of judgments in civil and commercial matters, of judicial settlements and of authentic instruments, signed at Rome on 16 November 1971,

- the Convention between Norway and the Federal Republic of Germany on the recognition and enforcement of judgments and enforceable documents, in civil and commercial matters, signed at Oslo on 17 June 1977,

- the Convention between Denmark, Finland, Iceland, Norway and Sweden on the recognition and enforcement of judgments in civil matters, signed at Copenhagen on 11 October 1977,

- the Convention between Austria and Sweden on the recognition and enforcement of judgments in civil matters, signed at Stockholm on 16 September 1982,

- the Convention between Austria and Spain on the recognition and enforcement of judgments, settlements and enforceable authentic instruments in civil and commercial matters, signed at Vienna on 17 February 1984,

- the Convention between Norway and Austria on the recognition and enforcement of judgments in civil matters, signed at Vienna on 21 May 1984, and

- the Convention between Finland and Austria on the recognition and enforcement of judgments in civil matters, signed at Vienna on 17 November 1986.

Article 56

The Treaty and the conventions referred to in Article 55 shall continue to have effect in relation to matters to which this Convention does not apply.

They shall continue to have effect in respect of judgments given and documents formally drawn up or registered as authentic instruments before the entry into force of this Convention.

Article 57

1. This Convention shall not affect any conventions to which the Contracting States are or will be parties and which in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments.

2. This Convention shall not prevent a court of a Contracting State which is party to a convention referred to in the first paragraph from assuming jurisdiction in accordance with that convention, even where the defendant is domiciled in a Contracting State which is not a party to that convention. The court hearing the action shall, in any event, apply Article 20 of this Convention.

3. Judgments given in a Contracting State by a court in the exercise of jurisdiction provided

for in a convention referred to in the first paragraph shall be recognized and enforced in the other Contracting States in accordance with Title III of this Convention.

4. In addition to the grounds provided for in Title III, recognition or enforcement may be refused if the State addressed is not a contracting party to a convention referred to in the first paragraph and the person against whom recognition or enforcement is sought is domiciled in that State, unless the judgment may otherwise be recognized or enforced under any rule of law in the State addressed.

5. Where a convention referred to in the first paragraph to which both the State of origin and the State addressed are parties lays down conditions for the recognition or enforcement of judgments, those conditions shall apply. In any event, the provisions of this Convention which concern the procedures for recognition and enforcement of judgments may be applied.

Article 58

(None)

Article 59

This Convention shall not prevent a Contracting State from assuming, in a convention on the recognition and enforcement of judgments, an obligation towards a third State not to recognize judgments given in other Contracting States against defendants domiciled or habitually resident in the third State where, in cases provided for in Article 4, the judgment could only be founded on a ground of jurisdiction specified in the second paragraph of Article 3.

However, a Contracting State may not assume an obligation towards a third State not to recognize a judgment given in another Contracting State by a court basing its jurisdiction on the presence within that State of property belonging to the defendant, or the seizure by the plaintiff of property situated there:

1. if the action is brought to assert or declare proprietary or possessory rights in that property, seeks to obtain authority to dispose of it, or arises from another issue relating to such property, or

2. if the property constitutes the security for a debt which is the subject-matter of the action.

TITLE VIII

FINAL PROVISIONS

Article 60

The following may be parties to this Convention:

(a) States which, at the time of the opening of this Convention for signature, are members of the European Communities or of the European Free Trade Association;

(b) States which, after the opening of this Convention for signature, become members of the European Communities or of the European Free Trade Association;

(c) States invited to accede in accordance with Article 62

(1) (b).

Article 61

1. This Convention shall be opened for signature by the States members of the European Communities or of the European Free Trade Association.

2. The Convention shall be submitted for ratification by the signatory States. The instruments of ratification shall be deposited with the Swiss Federal Council.

3. The Convention shall enter into force on the first day of the third month following the date on which two States, of which one is a member of the European Communities and the

other a member of the European Free Trade Association, deposit their instruments of ratification.

4. The Convention shall take effect in relation to any other signatory State on the first day of the third month following the deposit of its instrument of ratification.

Article 62

1. After entering into force this Convention shall be open to accession by:

(a) the States referred to in Article 60 (b);

(b) other States which have been invited to accede upon a request made by one of the Contracting States to the depositary State. The depositary State shall invite the State concerned to accede only if, after having communicated the contents of the communications that this State intends to make in accordance with Article 63, it has obtained the unanimous agreement of the signatory States and the Contracting States referred to in Article 60 (a) and (b).

2. If an acceding State wishes to furnish details for the purposes of Protocol 1, negotiations shall be entered into to that end. A negotiating conference shall be convened by the Swiss Federal Council.

3. In respect of an acceding State, the Convention shall take effect on the first day of the third month following the deposit of its instrument of accession.

4. However, in respect of an acceding State referred to in paragraph 1 (a) or (b), the Convention shall take effect only in relations between the acceding State and the Contracting States which have not made any objections to the accession before the first day of the third month following the deposit of the instrument of accession.

Article 63

Each acceding State shall, when depositing its instrument of accession, communicate the information required for the application of Articles 3, 32, 37, 40, 41 and 55 of this Convention and furnish, if need be, the details prescribed during the negotiations for the purposes of Protocol 1.

Article 64

1. This Convention is concluded for an initial period of five years from the date of its entry into force in accordance with Article 61 (3), even in the case of States which ratify it or accede to it after that date.

2. At the end of the initial five-year period, the Convention shall be automatically renewed from year to year.

3. Upon the expiry of the initial five-year period, any contracting State may, at any time, denounce the Convention by sending a notification to the Swiss Federal Council.

4. The denunciation shall take effect at the end of the calendar year following the expiry of a period of six months from the date of receipt by the Swiss Federal Council of the notification of denunciation.

Article 65

The following are annexed to this Convention:

- a Protocol 1, on certain questions of jurisdiction, procedure and enforcement,

- a Protocol 2, on the uniform interpretation of the Convention,

- a Protocol 3, on the application of Article 57.

These Protocols shall form an integral part of the Convention.

Article 66

Any Contracting State may request the revision of this Convention. To that end, the Swiss Federal Council shall issue invitations to a revision conference within a period of six months from the date of the request for revision.

Article 67

The Swiss Federal Council shall notify the States represented at the Diplomatic Conference of Lugano and the States who have later acceded to the Convention of:

(a) the deposit of each instrument of ratification or accession;

(b) the dates of entry into force of this Convention in respect of the Contracting States;

(c) any denunciation received pursuant to Article 64;

(d) any declaration received pursuant to Article Ia of Protocol 1;

(e) any declaration received pursuant to Article Ib of Protocol 1;

(f) any declaration received pursuant to Article IV of Protocol 1;

(g) any communication made pursuant to Article VI of Protocol 1.

Article 68

This Convention, drawn up in a single original in the Danish, Dutch, English, Finnish, French, German, Greek, Icelandic, Irish, Italian, Norwegian, Portuguese, Spanish and Swedish languages, all fourteen texts being equally authentic, shall be deposited in the archives of the Swiss Federal Council. The Swiss Federal Council shall transmit a certified copy to the Government of each State represented at the Diplomatic Conference of Lugano and to the Government of each acceding State.

En fe de lo cual, los plenipotenciarios abajo firmantes suscriben el presente Convenio.Til bekræftelse heraf har undertegnede befuldmægtigede underskrevet denne konvention.Zu Urkund dessen haben die unterzeichneten Bevollmächtigten ihre Unterschrift unter dieses Übereinkommen gesetzt.Oå =ßoôùoç ôùí aíùô¡ñù, ïé o=ïañÜöïíôåo =eçñåiïuoéïé ¡èåoaí ôçí o=ïañaö« ôïoo êÜôù a=ü ôçí =añïuoa ouiâaoç.In witness whereof, the undersigned Plenipotentiaries have signed this Convention.En foi de quoi, les plénipotentiaires soussignés ont apposé leurs signatures au bas de la présente convention.Da fhianu sin, chuir na Lanchumhachtaigh thíos-sínithe de lamh leis an gCoinbhinsiun seo.Pessu til staäfestu hafa undirritaäir fulltruar sem til pess hafa fullt umboä undirritaä samning pennan.In fede di che, i plenipotenziari sottoscritti hanno apposto le loro firme in calce alla presente convenzione.Ten blijke waarvan de ondergetekende gevolmachtigden hun handtekening onder dit Verdrag hebben gesteld.Til bekreftelse har de undertegnete befullmektigte underskrevet Konvensjonen her.Em fé do que os plenipotenciarios abaixo-assinados apuseram as suas assinaturas no final da presente convençao.Tämän vakuudeksi ovat allekirjoittaneet, asianmukaisesti siihen valtuutettuina, allekirjoittaneet tämän yleissopimuksen.Till bekräftelse härav har undertecknade befullmäktigade ombud undertecknat denna konvention.

Hecho en Lugano, a dieciséis de septiembre de mil novecientos ochenta y ocho.Udfærdiget i Lugano, den sekstende september nitten hundrede og otteogfirs.Geschehen zu Lugano am sechzehnten September neunzehnhundertachtundachtzig.ßÅaéíå oôï EïoaêÜíï, oôéo ä¡êa ¡ié Oå=ôåiâñßïo eéa åíïéaêüoéa ïaäüíôa ïêô¦.Done at Lugano on the sixteenth day of September in the year one thousand nine hundred and eighty-eight.Fait à Lugano, le seize septembre mil neuf cent quatre-vingt-huit.Arna dhéanamh i Lugano, an séu la déag de Mhéan Fomhair sa bhliain míle naoi gcéad ochto a hocht.Gjört í Lugano hinn sextanda dag septembermanaäar nítjan hundruä attatíu og atta.Fatto a Lugano, addi sedici settembre millenovecentottantotto.Gedaan te Lugano, de zestiende september negentienhonderd achtentachtig.

Feito em Lugano, em dezasseis de Setembro de mil novecentos e oitenta e oito.

Tehty Luganossa kuudentenatoista päivänä syyskuuta vuonna tuhat yhdeksänsataa kahdeksankymmentäkahdeksan.

Som skedde i Lugano den sextonde september nittonhundraåttioåtta.

Pour Sa Majesté le roi des Belges

Voor Zijne Majesteit de Koning der Belgen

! REFERENCE TO A FILM!

For Hendes Majestæt Danmarks Dronning

! REFERENCE TO A FILM!

Für den Präsidenten der Bundesrepublik Deutschland

Aéa ôïí áñüääñï ôçο Åeeçíéê«o Æçïïêñaôßao

! REFERENCE TO A FILM!

Por Su Majestad el Rey de España

Pour le président de la République française

Thar ceann Uachtaran na hEireann

Fyrir forseta l`yäveldisins Islands

! REFERENCE TO A FILM!

Per il Presidente della Repubblica italiana

! REFERENCE TO A FILM!

Pour Son Altesse Royale le grand-duc de Luxembourg

! REFERENCE TO A FILM!

Voor Hare Majesteit de Koningin der Nederlanden

For Hans Majestet Norges Konge

! REFERENCE TO A FILM!

Für den Bundespräsidenten der Republik Osterreich

Pelo Presidente da Republica Portuguesa

! REFERENCE TO A FILM!

Für den Schweizerischen Bundesrat

Pour le Conseil fédéral suisse

Per il Consiglio federale svizzero

! REFERENCE TO A FILM!

Suomen tasavallan presidentin puolesta

För Konungariket Sveriges regering

! REFERENCE TO A FILM!

For Her Majesty the Queen of the United Kingdom of Great Britain and Northern Ireland

PROTOCOL 1 on certain questions of jurisdiction, procedure and enforcement

THE HIGH CONTRACTING PARTIES HAVE AGREED UPON THE FOLLOWING PROVISIONS, WHICH SHALL BE ANNEXED TO THE CONVENTION:

Article I

Any person domiciled in Luxembourg who is sued in a court of another Contracting State pursuant to Article 5 (1) may refuse to submit to the jurisdiction of that court. If the defendant does not enter an appearance the court shall declare of its own motion that it has no jurisdiction.

An agreement conferring jurisdiction, within the meaning of Article 17, shall be valid with respect to a person domiciled in Luxembourg only if that person has expressly and specifically so agreed.

Article Ia1. Switzerland reserves the right to declare, at the time of depositing its instrument

of ratification, that a judgment given in another Contracting State shall be neither recognized nor enforced in Switzerland if the following conditions are met:

(a) the jurisdiction of the court which has given the judgment is based only on Article 5 (1) of this Convention; and

(b) the defendant was domiciled in Switzerland at the time of the introduction of the proceedings; for the purposes of this Article, a company or other legal person is considered to be domiciled in Switzerland if it has its registered seat and the effective centre of activities in Switzerland; and

(c) the defendant raises an objection to the recognition or enforcement of the judgment in Switzerland, provided that he has not waived the benefit of the declaration foreseen under this paragraph.

2. This reservation shall not apply to the extent that at the time recognition or enforcement is sought a derogation has been granted from Article 59 of the Swiss Federal Constitution. The Swiss Government shall communicate such derogations to the signatory States and the acceding States.

3. This reservation shall cease to have effect on 31 December 1999. It may be withdrawn at any time.

Article IbAny Contracting State may, by declaration made at the time of signing or of deposit of its instrument of ratification or of

accession, reserve the right, notwithstanding the provisions of Article 28, not to recognize and enforce judgments given in the other Contracting States if the jurisdiction of the court of the State of origin is based, pursuant to Article 16 (1) (b), exclusively on the domicile of the defendant in the State of origin, and the property is situated in the territory of the State which entered the reservation.

Article II

Without prejudice to any more favourable provisions of national laws, persons domiciled in a Contracting State who are being prosecuted in the criminal courts of another Contracting State of which they are not nationals for an offence which was not intentionally committed may be defended by persons qualified to do so, even if they do not appear in person.

However, the court seised of the matter may order appearance in person; in the case of failure to appear, a judgment given in the civil action without the person concerned having had the opportunity to arrange for his defence need not be recognized or enforced in the other Contracting States.

Article III

In proceedings for the issue of an order for enforcement, no charge, duty or fee calculated by reference to the value of the matter in issue may be levied in the State in which enforcement is sought.

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.

Unless the State in which service is to take place objects by declaration to the Swiss Federal Council, such documents may also be sent by the appropriate public officers of the State in which the document has been drawn up directly to the appropriate public officers of the State in which the addressee is to be found. In this case the officer of the State of origin shall send a copy of the document to the officer of the State applied to who is competent to forward it to the addressee. The document shall be forwarded in the manner specified by the law of the State applied to. The forwarding

shall be recorded by a certificate sent directly to the officer of the State of origin.

Article V

The jurisdiction specified in Articles 6 (2) and 10 in actions on a warranty or guarantee or in any other third party proceedings may not be resorted to in the Federal Republic of Germany, in Spain, in Austria and in Switzerland. Any person domiciled in another Contracting State may be sued in the courts:

- of the Federal Republic of Germany, pursuant to Articles 68, 72, 73 and 74 of the code of civil procedure (Zivilprozeßordnung) concerning third-party notices,

- of Spain, pursuant to Article 1482 of the civil code,

- of Austria, pursuant to Article 21 of the code of civil procedure (Zivilprozeßordnung) concerning third-party notices,

- of Switzerland, pursuant to the appropriate provisions concerning third-party notices of the cantonal codes of civil procedure.

Judgments given in the other Contracting States by virtue of Article 6 (2) or 10 shall be recognized and enforced in the Federal Republic of Germany, in Spain, in Austria and in Switzerland in accordance with Title III. Any effects which judgments given in these States may have on third parties by application of the provisions in the preceding paragraph shall also be recognized in the other Contracting States.

Article VaIn matters relating to maintenance, the expression 'court' includes the Danish, Icelandic and Norwegian administrative authorities.

In civil and commercial matters, the expression 'court' includes the Finnish ulosotonhaltija / överexekutor.

Article VbIn proceedings involving a dispute between the master and a member of the crew of a sea-going ship registered in Denmark, in Greece, in Ireland, in Iceland, in Norway, in Portugal or in Sweden concerning remuneration or other conditions of service, a court in a Contracting State shall establish whether the diplomatic or consular officer responsible for the ship has been notified of the dispute. It shall stay the proceedings so long as he has not been notified. It shall of its own motion decline jurisdiction if the officer, having been duly notified, has exercised the powers accorded to him in the matter by a consular convention, or in the absence of such a convention has, within the time allowed, raised any objection to the exercise of such jurisdiction.

Article Vc(None)

Article VdWithout prejudice to the jurisdiction of the European Patent Office under the Convention on the grant of European patents, signed at Munich on 5 October 1973, the courts of each Contracting State shall have exclusive jurisdiction, regardless of domicile, in proceedings concerned with the registration or validity of any European patent granted for that State which is not a Community patent by virtue of the provision of Article 86 of the Convention for the European patent for the common market, signed at Luxembourg on 15 December 1975.

Article VI

The Contracting States shall communicate to the Swiss Federal Council the text of any provisions of their laws which amend either those provisions of their laws mentioned in the Convention or the lists of courts specified in Section 2 of

Title III.

PROTOCOL 2 on the uniform interpretation of the Convention

PREAMBLE

THE HIGH CONTRACTING PARTIES,

HAVING REGARD to Article 65 of this Convention,

CONSIDERING the substantial link between this Convention and the Brussels Convention,

CONSIDERING that the Court of Justice of the European Communities by virtue of the Protocol of 3 June 1971 has jurisdiction to give rulings on the interpretation of the provisions of the Brussels Convention,

BEING AWARE of the rulings delivered by the Court of Justice of the European Communities on the interpretation of the Brussels Convention up to the time of signature of this Convention,

CONSIDERING that the negotiations which led to the conclusion of the Convention were based on the Brussels Convention in the light of these rulings,

DESIRING to prevent, in full deference to the independence of the courts, divergent interpretations and to arrive at as uniform an interpretation as possible of the provisions of the Convention, and of these provisions and those of the Brussels Convention which are substantially reproduced in this Convention,

HAVE AGREED AS FOLLOWS:

Article 1

The courts of each Contracting State shall, when applying and interpreting the provisions of the Convention, pay due account to the principles laid down by any relevant decision delivered by courts of the other Contracting States concerning provisions of this Convention.

Article 2

1. The Contracting Parties agree to set up a system of exchange of information concerning judgments

delivered pursuant to this Convention as well as relevant judgments under the Brussels Convention. This system shall comprise:

- transmission to a central body by the competent authorities of judgments delivered by courts of last instance and the Court of Justice of the European Communities as well as judgments of particular importance which have become final and have been delivered pursuant to this Convention or the Brussels Convention,

- classification of these judgments by the central body including, as far as necessary, the drawing-up and publication of translations and abstracts,

- communication by the central body of the relevant documents to the competent national authorities of all signatories and acceding States to the Convention and to the Commission of the European Communities.

2. The central body is the Registrar of the Court of Justice of the European Communities.

Article 3

1. A Standing Committee shall be set up for the purposes of this Protocol.

2. The Committee shall be composed of representatives appointed by each signatory and acceding State.

3. The European Communities (Commission, Court of Justice and General Secretariat of the Council) and the

European Free Trade Association may attend the meetings as observers.

Article 4

1. At the request of a Contracting Party, the depositary of the Convention shall convene meetings of the Committee for the purpose of exchanging views on the functioning of the Convention and in particular on:

- the development of the case-law as communicated under the first indent of Article 2 (1),

- the application of Article 57 of the Convention.

2. The Committee, in the light of these exchanges,

may also examine the appropriateness of starting on

particular topics a revision of the Convention and make recommendations.

PROTOCOL 3 on the application of Article 57

THE HIGH CONTRACTING PARTIES HAVE AGREED AS FOLLOWS:

1. For the purposes of the Convention, provisions which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments and which are, or will be contained in acts of the institutions of the European Communities shall be treated in the same way as the conventions referred to in Article 57 (1).

2. If one Contracting State is of the opinion that a provision contained in an act of the institutions

of the European Communities is incompatible with the Convention, the Contracting States shall promptly consider amending the Convention pursuant to Article 66, without prejudice to the procedure established by Protocol 2.

DECLARATION by the representatives of the Governments of the States signatories to the Lugano Convention which are members of the European Communities on Protocol 3 on the application of Article 57 of the Convention

Upon signature of the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters done at Lugano on 16 September 1988,

THE REPRESENTATIVES OF THE GOVERNMENTS OF THE MEMBER STATES OF THE EUROPEAN COMMUNITIES,

taking into account the undertakings entered into vis-à-vis the member states of the European Free Trade Association,

anxious not to prejudice the unity of the legal system set up by the Convention,

declare that they will take all measures in their power to ensure, when Community acts referred to in paragraph 1 of Protocol 3 on the application of Article 57 are being drawn up, respect for the rules of jurisdiction and recognition and enforcement of judgments established by the Convention.

En fe de lo cual, los abajo firmantes suscriben la presente Declaracion.

Til bekræftelse heraf har undertegnede underskrevet denne erklæring.

Zu Urkund dessen haben die Unterzeichneten ihre Unterschrift unter diese Erklärung gesetzt.

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In witness whereof the undersigned have signed this Declaration.

En foi de quoi, les soussignés ont signé la présente déclaration.

Da fhianu sin, chuir na daione thíos-sínithe a lamh leis an Dearbhu seo.

Pessu til staäfestu hafa undirritaäir undirritaä yfirlysingu pessa.

In fede di che, i sottoscritti hanno firmato la presente dichiarazione.

Ten blijke waarvan de ondergetekenden deze verklaring hebben ondertekend.

De undertegnete har undertegnet erklæringen til vitterlighet.

Em fé do que os abaixo-assinados firmaram a presente declaraçao.

Tämän vakuudeksi ovat allekirjoittaneet, asianmukaisesti siihen valtuutettuina, allekirjoittaneet tämän yleissopimuksen.

Till bekräftelse härav har undertecknade undertecknat denna deklaration.

Hecho en Lugano, a dieciséis de septiembre de mil novecientos ochenta y ocho.

Udfærdiget i Lugano, den sekstende september nitten hundrede og otteogfirs.

Geschehen zu Lugano am sechzehnten September neunzehnhundertachtundachtzig.

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Done at Lugano on the sixteenth day of September in the year one thousand nine hundred and eighty-eight.

Fait à Lugano, le seize septembre mil neuf cent quatre-vingt-huit.

Arna dhéanamh i Lugano, an séu la déag de Mhéan Fomhair sa bhliain míle naoi gcéad ochto a hocht.

Gjört í Lugano hinn sextanda dag septembermanaäar nítjan hundruä attatíu og atta.

Fatto a Lugano, addi sedici settembre millenovecentottantotto.

Gedaan te Lugano, de zestiende september negentienhonderd achtentachtig.

Utferdiget i Lugano, den sekstende september nitten hundre og åttiåtte.

Feito em Lugano, em dezasseis de Setembro de mil novecentos e oitenta e oito.

Tehty Luganossa kuudentenatoista päivänä syyskuuta vuonna tuhat yhdeksänsataa kahdeksankymmentäkahdeksan.

Som skedde i Lugano den sextonde september nittonhundraåttioåtta.

Pour le gouvernement du royaume de Belgique

Voor de Regering van het Koninkrijk Belgie

! REFERENCE TO A FILM!

For regeringen for Kongeriget Danmark

! REFERENCE TO A FILM!

Für die Regierung der Bundesrepublik Deutschland

Aéa ôçí êoâ¡ñíçoç ôço Åeeçíéê«o Æçiïêñaôßao

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Por el Gobierno del Reino de España

Pour le gouvernement de la République française

Thar ceann Rialtas na hEireann

Per il governo della Repubblica italiana

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Pour le gouvernement du grand-duché de Luxembourg

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Voor de Regering van het Koninkrijk der Nederlanden

Pelo Governo da Republica Portuguesa

! REFERENCE TO A FILM!

For the Government of the United Kingdom of Great Britain and Northern Ireland

DECLARATION by the Representatives of the Governments of the States signatories to the Lugano Convention which are members of the European Communities

Upon signature of the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters done at Lugano on 16 September 1988,

THE REPRESENTATIVES OF THE GOVERNMENTS OF THE MEMBER STATES OF THE EUROPEAN COMMUNITIES

declare that they consider as appropriate that the Court of Justice of the European Communities, when interpreting the Brussels Convention, pay due account to the rulings contained in the case-law of the Lugano Convention.

En fe de lo cual, los abajo firmantes suscriben la presente Declaracion.

Til bekræftelse heraf har undertegnede underskrevet denne erklæring.

Zu Urkund dessen haben die Unterzeichneten ihre Unterschrift unter diese Erklärung gesetzt.

Oå =ßoôùoç ôùí aíùô¡ñù, ïé o=ïañÜöïíôåo =eçñåiïuoéïé ¡èåoaí ôçí o=ïañaö« ôïoo êÜôù a=ü ôçí =añïuoa ä«eùoç.

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In fede di che, i sottoscritti hanno firmato la presente dichiarazione.

Ten blijke waarvan de ondergetekenden deze verklaring hebben ondertekend.

De undertegnete har undertegnet erklæringen til vitterlighet.

Em fé do que os abaixo-assinados firmaram a presente declaraçao.

Tämän vakuudeksi ovat allekirjoittaneet, asianmukaisesti siihen valtuutettuina, allekirjoittaneet tämän yleissopimuksen.

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For the Government of the United Kingdom of Great Britain and Northern Ireland

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DECLARATION by the Representatives of the Governments of the States signatories to the Lugano Convention which are members of the European Free Trade Association

Upon signature of the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters done at Lugano on 16 September 1988,

THE REPRESENTATIVES OF THE GOVERNMENTS OF THE MEMBER STATES OF THE EUROPEAN FREE TRADE ASSOCIATION

declare that they consider as appropriate that their courts, when interpreting the Lugano Convention, pay due account to the rulings contained in the case law of the Court of Justice of the European Communities and of courts of the Member States of the European Communities in respect of provisions of the Brussels Convention which are substantially reproduced in the Lugano Convention.

En fe de lo cual, los abajo firmantes suscriben la presente Declaracion.

Til bekræftelse heraf har undertegnede underskrevet denne erklæring.

Zu Urkund dessen haben die Unterzeichneten ihre Unterschrift unter diese Erklärung gesetzt.

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Fatto a Lugano, addi sedici settembre millenovecentottantotto.

Gedaan te Lugano, de zestiende september negentienhonderd achtentachtig.

Utferdiget i Lugano, den sekstende september nitten hundre og åttiåtte.

Feito em Lugano, em dezasseis de Setembro de mil novecentos e oitenta e oito.

Tehty Luganossa kuudentenatoista päivänä syyskuuta vuonna tuhat yhdeksänsataa kahdeksankymmentäkahdeksan.

Som skedde i Lugano den sextonde september nittonhundraåttioåtta.

Fyrir ríkisstjorn l`yäveldisins Islands

! REFERENCE TO A FILM!

For Kongeriket Norges Regjering

! REFERENCE TO A FILM!

Für die Regierung der Republik Osterreich

Für die Regierung der Schweizerischen Eidgenossenschaft

Pour le gouvernement de la Confédération suisse

Per il governo della Confederazione svizzera

! REFERENCE TO A FILM!

Suomen tassavallen hallituksen puolesta

För Konungariket Sveriges regering

! REFERENCE TO A FILM!

FINAL ACT

The Representatives of:

THE GOVERNMENT OF THE KINGDOM OF BELGIUM,

THE GOVERNMENT OF THE KINGDOM OF DENMARK,

THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY,

THE GOVERNMENT OF THE HELLENIC REPUBLIC,

THE GOVERNMENT OF THE KINGDOM OF SPAIN,

THE GOVERNMENT OF THE FRENCH REPUBLIC,

THE GOVERNMENT OF IRELAND,

THE GOVERNMENT OF THE REPUBLIC OF ICELAND,

THE GOVERNMENT OF THE ITALIAN REPUBLIC,

THE GOVERNMENT OF THE GRAND DUCHY OF LUXEMBOURG,

THE GOVERNMENT OF THE KINGDOM OF THE NETHERLANDS,

THE GOVERNMENT OF THE KINGDOM OF NORWAY,

THE GOVERNMENT OF THE REPUBLIC OF AUSTRIA,

THE GOVERNMENT OF THE PORTUGUESE REPUBLIC,

THE GOVERNMENT OF THE KINGDOM OF SWEDEN,

THE GOVERNMENT OF THE SWISS CONFEDERATION,

THE GOVERNMENT OF THE REPUBLIC OF FINLAND,

THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND,

Assembled at Lugano on the sixteenth day of September in the year one thousand nine hundred and eighty-eight on the occasion of the Diplomatic Conference on jurisdiction in civil matters, have placed on record the fact that the following texts have been drawn up and adopted within the Conference:

I. the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters;

II. the following Protocols, which form an integral part of the Convention:

- 1, on certain questions of jurisdiction, procedure and enforcement,

- 2, on the uniform interpretation of the Convention,

- 3, on the application of Article 57;

III. the following Declarations:

- Declaration by the Representatives of the Governments of the States signatories to the Lugano Convention which are members of the European Communities on Protocol 3 on the application of Article 57 of the Convention,

- Declaration by the Representatives of the Governments of the States signatories to the Lugano Convention which are members of the European Communities,

- Declaration by the Representatives of the Governments of the States signatories to the Lugano Convention which are members of the European Free Trade Association.

En fe de lo cual, los abajo firmantes suscriben la presente Acta final.

Til bekræftelse heraf har undertegnede underskrevet denne slutakt.

Zu Urkund dessen haben die Unterzeichneten ihre Unterschrift unter diese Schlußakte gesetzt.

Oå =ßoôùoç ôùí aíùô¡ñù, ïé o=ïañÜöïíôåo =eçñåiïuoéïé ¡èåoaí ôçí o=ïañaö« ôïoo êÜôù a=ü ôçí =añïuoa ôåeéê« =ñÜiç.

In witness whereof, the undersigned have signed this Final Act.

En foi de quoi, les soussignés ont apposé leurs signatures au bas du présent acte final.

Da fhianu sin, chuir na daoine thíos-sínithe a lamh leis an Ionstraim Chríochnaitheach seo.

Pessu til staäfestu hafa undirritaäir undirritaä lokagerä pessa.

In fede di che, i sottoscritti hanno apposto le loro firme in calce al presente atto finale.

Ten blijke waarvan de ondergetekenden hun handtekening onder deze Slotakte hebben gesteld.

Til bekreftelse har de undertegnete underskrevet denne Sluttakt.

Em fé do que os abaixo-assinados apuseram as suas assinaturas no final do presente Acto Final.

Tämän vakuudeksi allekirjoittaneet ovat, allekirjoittaneet tämän Päättöpöytäkirjan.

Till bekräftelse härav har undertecknade undertecknat denna Slutakt.

Hecho en Lugano, a dieciséis de septiembre de mil novecientos ochenta y ocho.

Udfærdiget i Lugano, den sekstende september nitten hundrede og otteogfirs.

Geschehen zu Lugano am sechzehnten September neunzehnhundertachtundachtzig.

éÅaéíå oôï EïoaêÜíï, oôéo ä¡êa ¡ié Oå=ôåiâñßïo eéa åííéaêüoéa ïaäüíôa ïêô¦.

Done at Lugano on the sixteenth day of September in the year one thousand nine hundred and eighty-eight.

Fait à Lugano, le seize septembre mil neuf cent quatre-vingt-huit.

Arna dhéanamh i Lugano, an séu la déag de Mhéan Fomhair sa bhliain míle naoi gcéad ochto a hocht.

Gjört í Lugano hinn sextanda dag septembermanaäar nítjan hundruä attatíu og atta.

Fatto a Lugano, addi sedici settembre millenovecentottantotto.

Gedaan te Lugano, de zestiende september negentienhonderd achtentachtig.

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Tehty Luganossa kuudentenatoista päivänä syyskuuta vuonna tuhat yhdeksänsataa kahdeksankymmentäkahdeksan.

Som skedde i Lugano den sextonde september nittonhundraåttioåtta.

Pour le gouvernement du royaume de Belgique

Voor de Regering van het Koninkrijk Belgie

! REFERENCE TO A FILM!

For regeringen for Kongeriget Danmark

! REFERENCE TO A FILM!

Für die Regierung der Bundesrepublik Deutschland

! REFERENCE TO A FILM!

Aéa ôçí êoâ¡ñíçoç ôço Åeeçíéê«o Æçiïêñaôßao

! REFERENCE TO A FILM!

Por el Gobierno del Reino de España

! REFERENCE TO A FILM!

Pour le gouvernement de la République française

! REFERENCE TO A FILM!

Thar ceann Rialtas na hEireann

! REFERENCE TO A FILM!

Fyrir ríkisstjorn l`yäveldisins Islands

! REFERENCE TO A FILM!

Per il governo della Repubblica italiana

! REFERENCE TO A FILM!

Pour le gouvernement du grand-duché de Luxembourg

! REFERENCE TO A FILM!

Voor de Regering van het Koninkrijk der Nederlanden

! REFERENCE TO A FILM!

For Kongeriket Norges Regjering

! REFERENCE TO A FILM!

Für die Regierung der Republik Osterreich

! REFERENCE TO A FILM!

Pelo Governo da Republica Portuguesa

! REFERENCE TO A FILM!

Für die Regierung der Schweizerischen Eidgenossenschaft

Pour le gouvernement de la Confédération suisse

Per il governo della Confederazione svizzera

! REFERENCE TO A FILM!

Suomen tassavallen hallituksen puolesta

! REFERENCE TO A FILM!

För Konungariket Sveriges regering

! REFERENCE TO A FILM!

For the Government of the United Kingdom of Great Britain and Northern Ireland

! REFERENCE TO A FILM!

DOCNUM 41988A0592

AUTHOR Austria ; Iceland ; Norway ; Sweden ; Switzerland ; Finland ; France ; Belgium ; Luxembourg ; Spain ; Greece ; Italy ; Portugal ; Federal Republic of Germany ; Netherlands ; Denmark ; Ireland ; United Kingdom

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CORRIGENDUM TO:
88/592/EEC: Convention on jurisdiction and the enforcement of judgements in civil and commercial matters, done at Lugano on 16 September 1988

/* A corrigendum bearing these publication references has been published for the following language(s): GERMAN

Refer to the Celex version(s) or the page of the EC OJ indicated in the language(s) in question.

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MODIFIES	41988A0592.....CORRIGENDUM...

COUNCIL CONVENTION
on jurisdiction and the enforcement of judgments in civil and commercial matters done at Lugano on 16 September 1988
Official Journal No. C 189, 1990, Item 7
(1990/C 189/07)
REPORT

by Mr P. JENARD
Honorary Director of Administration at the Belgian Ministry of Foreign Affairs.
and Mr. G. MOLLER
President of the Court of First Instance in Toijala

In addition to the draft Convention and the other instruments drawn up by the government experts, the draft explanatory report was submitted to the Governments of the Member States of the European Communities and of the European Free Trade Association before the Diplomatic Conference held in Lugano from 12 to 16 September 1988. This report takes account of the comments made by certain Governments and of the amendments made by the Diplomatic Conference to the drafts before it. It takes the form of a commentary on the Convention signed in Lugano on 16 September 1988.

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CHAPTER 1 GENERAL CONSIDERATIONS

1. INTRODUCTORY REMARKS

1. The Lugano Convention, opened for signature on 16 September 1988, is concluded between the Member States of the European Communities and the Member States of the European Free Trade Association (EFTA). It will be referred to in this report as the 'Lugano Convention' although during the preparatory proceedings it was known as the 'Parallel Convention'. It was given that name because it corresponds very closely to the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, which was concluded between the six original Community Member States [FN 1] and adopted consequent upon the accession of new Member States to the Communities [FN 2]. For convenience, that Convention, in its adopted form, will be referred to as the 'Brussels Convention'. Although the Lugano Convention takes not only its structure but also numerous provisions from the Brussels Convention, it is nevertheless a separate instrument.

2. This report does not contain a detailed commentary on all the provisions of the Lugano Convention. Where provisions are identical to those of the Brussels Convention, the reader should refer to the existing reports by Mr P. Jenard on the 1968 Convention, by Mr P. Schlosser on the 1978 Convention on the accession of Denmark, Ireland and the United Kingdom and by Messrs Evrigenis and Kerameus on the 1982 Convention on the accession of Greece [FN 3]. The provisions in force in each of the EFTA Member States on the recognition and enforcement of foreign

judgments and an account of the relevant conventions concluded by those States with one another or with Member States of the Communities are not included in the body of this report but are given in Annexes I and II. This different layout from previous reports has been adopted so as not to complicate the text.

2. JUSTIFICATION FOR AND BACKGROUND TO THE LUGANO CONVENTION

3. The European Communities and EFTA are at present made up of a great many European countries who share very similar conceptions of constitutional (separation of powers between the legislature, the executive and the judiciary), legal (primacy of the rule of law and the rights of the individual) and economic matters (market economy). The two organizations differ however with regard to their objectives and institutions. That is why we felt it useful to give a brief outline.

A. THE EUROPEAN COMMUNITIES

4. The European Communities differ substantially from the other international or European organizations on account of their particular aims and the originality of their institutional machinery. They pursue the specific objectives assigned to them by the three Treaties establishing them (ECSC, EEC and Euratom) but their ultimate objective is to establish a real European union. The economic dimension of this union in the making is complemented by a political discussion which is expressed through the medium of European Political Cooperation, by means of which the Twelve endeavour to harmonize their foreign policies. The construction of Europe initiated by the six founding States (Belgium, the Federal Republic of Germany, France, Italy, the Grand Duchy of Luxembourg and the Netherlands) took a step forward with the signing first of all of the Treaty of Paris (18 April 1951) which established the European Coal and Steel Community (ECSC) and subsequently (on 25 March 1957) of the two Treaties of Rome which laid the foundations of the European Economic Community (EEC) and the European Atomic Energy Community (Euratom). Denmark, Ireland and the United Kingdom acceded to those three Treaties on 1 January 1973 (the Nine), Greece on 1 January 1981 (the Ten), Spain and Portugal on 1 January 1986 (the Twelve). The European Communities therefore currently comprise twelve European countries which are bound together by jointly undertaken commitments.

5. With the Single European Act, which entered into force on 1 July 1987, a new stage was reached on the path towards a European union. This new Community legal instrument aims in particular at the progressive establishment, over a period expiring on 31 December 1992, of a real internal market providing for the free movement of goods, persons, services and capital. It also aims at promoting significant progress in both the monetary field and new policy sectors (in particular the environment and new technologies). It makes Community decision-making machinery more flexible in a number of fields and, by means of treaty provisions, institutionalizes European political Cooperation.

6. The institutional architecture of the Communities rests on four pillars:

1. The Council of Ministers The Council consists of the representatives of the Member States and each Government delegates one of its members to it, depending on the field of competence and the nature of the subjects under discussion. The Ministers of Foreign Affairs coordinate general

Community policy. The Council of Ministers is the Communities' decision-making body. It participates in legislative power and as such is empowered to take binding measures in the form of Regulations or Directives which are directly binding on the Member States and/or their nationals. The Regulations are directly applicable in the Member States, whereas Directives have to be incorporated into national legislation. The Council's decisions are prepared by the Permanent Representatives Committee (Coreper), composed of the Permanent Representatives of the Member States to the European Communities. The Council's decisions are taken unanimously, by a simple majority or by a qualified majority, depending on the legal provisions on which they are based. The Single Act aims at multiplying the cases in which a majority vote becomes standard practice, so as to expedite the proceedings of an enlarged Community. Twice a year the European Council brings together the Heads of State or of Government of the Member States. This body, set up at the highest level on a political basis in 1975, was given Treaty recognition following the adoption of the Single Act. Its main task is to work out guidelines and give the necessary impetus to the development of the Community process.

2. The Commission

The Commission currently consists of 17 members chosen by common agreement by the Governments. The Commission is the most original institution in the Community's institutional machinery. It cannot be likened to a secretariat because the authors of the Treaties chose to make it the prime mover of European integration. It participates actively in the preparation and formulation of the acts of the Council by virtue of its power of initiative.

3. The Court of Justice The role of the Court of Justice is to ensure that Community law is obeyed in the implementation of the three Treaties establishing the European Communities. Its powers are manifold and it has inter alia the power to give rulings in the form of judgments on the validity of the acts of Community authorities and on the interpretation of the Treaties and Community acts. In its decisions, the Court has affirmed the precedence of Community law over Member States' constitutional and legislative provisions. Under the Luxembourg Protocol of 3 June 1971, the Member States of the Communities conferred jurisdiction upon the Court of Justice for giving judgment on the interpretation of the 1968 Brussels Convention, which is of particular concern to us.

4. The European Parliament Since 1979 the Members of the European Parliament have been elected by direct universal suffrage for a five-year term of office. Although the European Parliament has quite extensive powers of political supervision in respect of the action of the Council and the Commission and in the budgetary field, it does not however have legislative powers similar to those of national Parliaments. The Single Act contains new cooperation arrangements designed to involve the Parliament more closely in the exercise of the legislative power conferred jointly upon the Council and the Commission.

7. In conclusion, in the field under review, it should be noted that:

1. the Lugano Convention is linked to the 1968 Brussels Convention which is based on Article 220 of the Treaty establishing the European Economic Community;

2. with regard to Community acts, legislative power is mainly conferred upon the Council;

3. the European Communities have created a very dense network of relations with the outside world which are embodied in agreements of various kinds, either with States or with organizations.

B. EFTA

8. The European Free Trade Association is a group of six European countries which share with the European Communities the aim of creating a dynamic, homogeneous European economic area embracing the Member States of the EEC and EFTA. That aim was laid down in the Luxembourg Declaration adopted on 9 April 1984 by the Ministers of all EEC and EFTA Member States. EFTA's goal is the removal of import duties, quotas and other obstacles to trade in Western Europe and the upholding of liberal, non-discriminatory practices in international trade. Set up in 1960, the Association now has six member countries: Austria, Finland, Iceland, Norway, Sweden and Switzerland. EFTA's establishment and evolution form part of the story of economic integration in Western Europe. Its founder members, which included Denmark, Portugal and the United Kingdom, adopted as their first objective the introduction of free trade between themselves in industrial goods. This objective was realized three years ahead of schedule at the end of 1966.

9. The trade between the EFTA countries accounts for only 13 to 14 % of their overall trade. Much more important is their trade with the EEC which is the source of more than half of their imports and the destination of more than half of their exports. The EFTA countries are also important trading partners for the EEC, providing markets for between a fifth and a quarter of EEC exports (excluding trade between the EEC countries). The closeness of the commercial links between the EFTA and the EEC countries was one of the reasons for the attempt in the 1950s to negotiate a free trade area embracing the original six-nation EEC and the other Western European countries. The attempt failed. But when seven of these countries resolved to strengthen their own links by founding EFTA they saw the Association as, among other things, a means of preparing the way for the eventual fulfilment of their hopes of a single European market. Thus EFTA was born with the ambition of bringing about a larger market including all the countries of Western Europe. This was the second objective of EFTA's founder members. This second goal was in effect achieved in the 1970s through negotiations which brought each of the present EFTA countries into a new relationship with the EEC, and at the same time the EEC was enlarged by the entry of two former EFTA countries, Denmark and the United Kingdom, and of Ireland. Free trade agreements came into force between the enlarged EEC and Austria, Portugal, Sweden and Switzerland on 1 January 1973, and the EEC and Iceland on 1 April 1973. Similar agreements came into force between Norway and the EEC on 1 July 1973 and between Finland and the EEC on 1 January 1974. Under these agreements the import duties on almost all industrial products were abolished from July 1977. These free trade agreements also apply to trade between the EFTA countries and three countries which joined the EEC at later dates: Greece from 1 January 1981, Portugal and Spain from 1 January 1986. As mentioned above, the extension and intensification of EEC-EFTA cooperation have given rise since 1984 to talks between the two groups of States in many areas connected, directly or indirectly, with the EEC's ambitious programme for

the creation of a genuine internal market in 1992. They concern matters such as technical barriers to trade, competition rules, intellectual property rights, product liability, etc. The negotiations for the Lugano Convention came within that context.

C. JUSTIFICATION FOR THE CONVENTION

10. According to a report produced by Mr Johnsen for the Parliamentary Assembly of the Council of Europe (document 5774 of 9 September 1987 FDO C5774), 'the Member States of EFTA and the EEC now make up a vast market of 350 million European consumers. With a few exceptions, industrial products circulate within this area without being subject to custom duties or quantitative restrictions. It is the largest market in the world, surpassing the United States market (240 million) and the Japanese market (120 million).' It thus became apparent that this economic cooperation between the two groupings of European States ought to be strengthened through a convention on jurisdiction and the recognition and enforcement of judgments. In this connection, the Brussels Convention was considered to embody a number of principles which could serve to strengthen judicial and economic cooperation between the States involved. The aim of the Brussels Convention is to simplify the formalities needed for mutual recognition and enforcement of court decisions. For this reason the Convention begins by specifying the rules of jurisdiction regarding the courts before which proceedings are to be brought in civil and commercial matters relating to property. The Convention goes on to lay down a procedure for the enforcement of judgments given in another Member State which is simpler than traditional arrangements and swift because the initial stages are non-adversarial. The Brussels Convention and the 1971 Protocol on its interpretation by the Court of Justice have both assumed considerable practical importance: hundreds of decisions based on the Convention have been given in the Member States and there is a series of interpretative judgments of the Court (see Chapter VI). Because of the magnitude of trade between the EEC Member States and EFTA, it was to be expected that the need would arise for a judgment given in a Community Member State to be enforced in an EFTA country, or for a judgment given in an EFTA member country to be enforced in a Member State of the European Communities. D. BACKGROUND TO THE CONVENTION

11. In 1973, when discussions over the accession of Denmark, Ireland and the United Kingdom to the Brussels Convention were under way, the Swedish Government indicated its interest in the creation of contractual links between the Community Member States on the one hand, and Sweden plus other countries which might be interested on the other hand, with a view to facilitating the recognition and enforcement of judgments in civil and commercial matters. In 1981, the Swiss Mission to the European Communities took up the Swedish Government's initiative and inquired of the competent authorities of the Commission whether and on what terms the recognition and enforcement of judgments in civil and commercial matters between the Member States of the Communities and Switzerland could be facilitated along the lines of the Brussels Convention of 27 September 1968. The inquiry was renewed in April 1982 to Mr Thorn, President of the Commission, by Mr Furgler, Member of the Swiss Federal Council. In January 1985, acting on the instructions of the Council of the European Communities, an ad hoc working party met to examine, on the basis of a paper submitted by the Commission, the possibility of organizing negotiations with the EFTA countries with a view to extending the Brussels Convention. With the assistance of the Council Secretariat and the Commission departments, preliminary talks were entered into with the

Member States of EFTA in order to establish whether an extension of the Brussels Convention could be envisaged. It emerged that Norway, Sweden, Switzerland, Finland, and subsequently Iceland, were in favour of opening negotiations on the drafting of a parallel Convention to the Brussels Convention. At the end of this exploratory stage, the representatives of the Governments of the EEC Member States, meeting in the permanent Representatives Committee in May 1985, noted that all the conditions obtained for negotiations to be initiated. They therefore agreed to issue an invitation to the EFTA Member States to take part in such negotiations. A working party made up of governmental experts from the Member States of the European Communities and experts appointed by the EFTA Member States was set up to this end. The working party met for the first time on 8 and 9 October 1985 under the alternating chairmanship of Mr Voyame, Director at the Ministry of Justice of the Swiss Confederation, and Mr Saggio, Counsellor at the Italian Court of Appeal. A delegation sent by the Austrian Government attended the negotiations in an observer capacity, as did representatives of The Hague Conference. The working party also appointed two rapporteurs, Mr P. Jenard, at the time Director of Administration at the Belgian Ministry of Foreign Affairs, for the Member States of the European Communities and Mr Moller, at that time Counsellor on Legislation to the Finnish Ministry of Justice and now President of the Court of First Instance in Toijala, for the EFTA Member States. The working party's discussions lasted two years, during which a preliminary draft Convention was prepared for use as the basic document for a diplomatic conference. An overall assessment of the results achieved by the working party can be nothing if not positive, since wide consensus was reached with regard to the draft Convention, to the Protocols which supplement it and are an integral part thereof, and to three Declarations. At all events, the conclusion of a multilateral Convention between a number of States offers better prospects of legal certainty and practical convenience than a series of bilateral, and inescapably divergent, agreements. The Convention also opens the way towards implementation of a common system of interpretation, a point which is specifically mentioned in Protocol 2. Another possibility might have been for the EFTA Member States to accede to the Brussels Convention. This possibility was not followed up because, being based on Article 220 of the Treaty of Rome and being the subject of the Protocol of 3 June 1971 which entrusted the Court of Justice of the European Communities with the power to interpret the Convention, the Brussels Convention is a Community instrument and it would have been difficult to ask non-Member States to become signatories.

12. The draft Convention and the other instruments drawn up by the working party were submitted to a diplomatic conference held, at the invitation of the Swiss Federal Government, in Lugano from 12 to 16 September 1988. All the Member States of the European Communities and of the European Free Trade Association were represented at this conference. Certain amendments were made to the drafts prepared by the working party. In accordance with the Final Act of the conference (see Annex III), the representatives of all the States concerned adopted the final texts of the Convention, the three Protocols and the three Declarations. On 16 September 1988, the date of opening for signature, the required signatures were appended by the representatives of 10 States, that is, for the Member States of the European Communities, Belgium, Denmark, Greece, Italy, Luxembourg and Portugal, and for the Member States of EFTA, Iceland, Norway, Sweden and Switzerland. The Convention was signed by Finland on 30 November 1988 and by the Netherlands on 7 February 1989.

3. IDENTITY OF STRUCTURE BETWEEN THE BRUSSELS CONVENTION AND THE LUGANO CONVENTION - FUNDAMENTAL PRINCIPLES

13. The two Conventions are based on identical fundamental principles which can be summarized as follows: First principle: The scope of the two Conventions as determined ratione materiae is confined to civil and commercial matters relating to property. The two Conventions have the same Article 1. Second principle: Both Conventions fall into the 'double treaty' category, that is to say they contain rules of direct jurisdiction. These rules are applicable in the State in which the initial proceedings are brought and serve to determine the court vested with jurisdiction, whereas 'simple treaties' merely contain rules of indirect jurisdiction which do not apply until the stage of recognition and enforcement has been reached. Third principle: A defendant's domicile is the point on which the rules on jurisdiction hinge. For the purposes of the 1978 Accession Convention, the United Kingdom and Ireland adjusted their legislation to align their concept of domicile on that of many continental countries [FN 4]. Proceedings against any person domiciled in the territory of a Contracting State must, save where the Conventions provide otherwise, be brought before the courts of that State. Under no circumstances may rules of exorbitant jurisdiction be invoked as arguments (Articles 2 and 3). However, where a defendant is not domiciled in the territory of a Contracting State jurisdiction continues to be determined in each State by the law of that State. Furthermore, persons domiciled in the territory of a Contracting State may, regardless of their nationality, avail themselves of the rules of jurisdiction which apply in that State, including exorbitant jurisdiction (Article 4), in the same way as nationals of that State. Fourth principle: Both Conventions contain precise and detailed rules of jurisdiction specifying the instances in which a person domiciled in a Contracting State may be sued in the courts of another Contracting State. In this respect, the structures of the two Conventions are again identical, these rules being contained in the following sections. (a) Additional rules of jurisdiction Title II, Section 2 (Articles 5 and 6) contains additional rules of jurisdiction in that the courts therein specified are not mentioned in Article 2. The section relates to proceedings which can be considered as having a particularly close link with the court before which proceedings are brought. The rules of jurisdiction set out in this section are special because, in general, both Conventions directly specify which court has jurisdiction. As will be seen below, there are certain differences between the Brussels Convention and the Lugano Convention with regard to the provisions contained in this section (see Article 5 (1) and Article 6 (4), points 36 to 44, 46 and 47). (b) Mandatory rules Both Conventions contain mandatory rules on jurisdiction in matters relating to insurance (Section 3) and consumer contracts (Section 4), the primary objective of which is to protect the weaker party. The rules are mandatory in that the parties are not permitted to depart from them before a dispute has arisen. These sections are the same in both Conventions. (c) Exclusive jurisdiction Both Conventions contain rules of exclusive jurisdiction (Section 5, Article l6): (a) in some cases, disputes must be brought before the courts of a given State (rights in rem in, or tenancies of, immovable property; validity, nullity or dissolution of companies; validity of entries in public registers; registration or validity of patents, trade marks and designs; proceedings concerned with the enforcement of judgments); (b) the parties are not permitted to waive the jurisdiction of the competent courts, either by an agreement conferring jurisdiction even if entered into after a dispute has arisen (Article 17), or by submission to the jurisdiction (Article

18); (c) a court of a State other than the State whose courts have exclusive jurisdiction must declare, of its own motion, that it has no jurisdiction (Article 19); (d) breach of the rules constitutes grounds for refusing recognition and enforcement (Articles 28 and 34); (e) the rules apply whether or not the defendant is domiciled in a Contracting State. The only difference between the two Conventions relates to tenancies of immovable property (see points 49 to 54). (d) Prorogation of jurisdiction The two Conventions also contain rules of prorogation of jurisdiction by agreement or tacitly (Title II, Section 6, Articles 17 and 18). The Conventions differ in the case of Article 17 (prorogation by agreement see points 55 to 61) but not in the case of Article 18 (submission to jurisdiction). (e) Lis pendens and related actions Both Conventions contain provisions on the case of a lis pendens (Article 21) and related actions (Article 22) in Section 8, the aim of which is to avoid conflicting judgments. The wordings differ slightly here with regard to a lis pendens (see point 62). Fifth principle: The defendant's rights must have been respected in the State of origin. Both Conventions provide in the first paragraph of Article 20, the importance of which should be emphasized, that if a defendant does not enter an appearance the court must declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from the provisions of the Convention. The second and third paragraphs of Article 20 cover the problem of notification of legal documents to the defendant, the court being obliged to stay its proceedings so long as it has not been shown that the defendant was able to receive the document instituting the proceedings in sufficient time to enable him to arrange for his defence. This Article has not been amended. Sixth principle: Grounds for refusing recognition and enforcement are limited. Pursuant to the first paragraph of Article 26 of both Conventions, judgments given in a Contracting State must be recognized in the other Contracting States without any special procedure being required. In other words, judgments are entitled to automatic recognition: the Conventions establish the presumption in favour of recognition and the only grounds for refusal are those listed in Articles 27 and 28. There are two conditions which agreements such as this usually contain but which these two Conventions omit: recognition does not require that the foreign judgment should have become res judicata, and the jurisdiction of the court in the State of origin is no longer examined by the court of the State in which enforcement is being sought. In this respect there are some differences between the two Conventions with regard to Article 28 (see points 16 and 82). Seventh principle: The enforcement procedure is unified and simplified. It is unified in that, in every Contracting State, the procedure is initiated by submission of an application. It is simplified in particular with reference to the appeals procedure. The Lugano Convention makes a number of technical adjustments as against the 1968 Convention (see points 68 to 70). Eighth principle: The Conventions govern relations with other international Conventions. On this point, and with regard to Conventions concluded on particular matters, there are a few differences between the two Conventions (see points 79 to 82). Ninth principle: Steps are taken to ensure that interpretation of the two Conventions is uniform. Interpretation of the 1968 Convention is entrusted to the Court of Justice by the Luxembourg Protocol of 3 June 1971. Interpretation of the Lugano Convention is governed by Protocol 2 to that Convention (see points 110 to 119). CHAPTER II RESPECTIVE SCOPE OF THE BRUSSELS CONVENTION AND THE LUGANO CONVENTION (Article 54b)

14. As shown above, although the structure of the two Conventions is identical and they contain a great number of comparable provisions, they

remain separate Conventions.

15. The respective application of the two Conventions is governed by Article 54b. The first point to note is that this Article primarily concerns the courts of member countries of the European Communities, these being the only courts which may be required to deliver judgments pursuant to either Convention. Courts in EFTA Member States are not bound by the Brussels Convention since the EFTA States are not parties to that Convention. However, Article 54b is relevant for the courts of EFTA countries since it was felt advantageous that Article 54b should, for reasons of clarity, contain details relating to the case of a lis pendens, related actions and recognition and enforcement of judgments. The philosophy of Article 54b is as follows: According to paragraph 1, the Brussels Convention continues to apply in relations between Member States of the European Communities. This applies in particular where: (a) a person, of whatever nationality, domiciled in one Community State, e.g. France, is summoned to appear before a court in another such State, e.g. Italy. The plaintiffs nationality and domicile are immaterial; (b) a judgment has been delivered in one European Community Member State, e.g. France, and must be recognized or enforced in another such State, e.g. Italy. The Brussels Convention also applies where a person domiciled outside the territory of a European Community Member State and outside the territory of any other State party to the Lugano Convention, e.g. in the United States, is summoned to appear before a court in a European Community Member State (Article 4 of the Brussels Convention). In each of these three instances, the Court of Justice of the European Communities has jurisdiction under the 1971 Protocol to rule on problems which may arise with regard to the interpretation of the Brussels Convention.

16. However, under paragraph 2, the court of a European Community Member State must apply the Lugano Convention where: (1) a defendant is domiciled in the territory of a State which is party to the Lugano Convention and an EFTA member or is deemed to be so domiciled under Articles 8 or 13 of the Convention. For instance, if a person domiciled in Norway is summoned before a French court, jurisdiction will be vested in that court only in the cases for which the Lugano Convention provides. In particular the rules of exorbitant jurisdiction provided for in Article 4 of the Brussels Convention may not be relied on as against that person; (2) the courts of an EFTA Member State possess exclusive jurisdiction (Article 16) or jurisdiction by prorogation (Article 17). The courts of Member States of the European Communities may not, for instance, be seised of a dispute relating to rights in rem in immovable property situated in the territory of a State party to the Lugano Convention and an EFTA Member State, notwithstanding Article 16 (1) of the Brussels Convention, which will apply only if the immovable property is situated in the territory of a State party to the 1968 Convention; (3) recognition or enforcement of a judgment delivered in a State party to the Lugano Convention and an EFTA Member State is being sought in a Community Member State (paragraph 2 (c)). Paragraph 2 also provides that the Lugano Convention applies where a judgment delivered in a Community Member State is to be enforced in an EFTA Member State party to the Lugano Convention. This does not resolve potential conflicts between the two Conventions, but it does define their respective scope. Obviously if a judgment has been delivered in a State party to the Lugano Convention and an EFTA Member State and is to be enforced either in a Community Member State or in an EFTA Member State, the Brussels Convention does not apply; (4) Article 54b also contains provisions relating to a lis pendens (Article 21) and related actions (Article 22). Under Article 54b (2) (b)

a court in a Community Member State must apply these Articles of the Lugano Convention if a court in an EFTA Member State is seised of the same dispute or a related claim. Apart from the greater clarity which they bring, these provisions serve a double purpose: to remove all uncertainty, and to ensure that judgments delivered in the different States concerned do not conflict; (5) Article 54b (3) provides that a court in an EFTA Member State may refuse recognition or enforcement of a judgment delivered by a court in a Community Member State if the grounds on which the latter court has based its jurisdiction are not provided for in the Lugano Convention and if recognition or enforcement is being sought against a party who is domiciled in any EFTA Contracting State. These grounds for refusal are additional to those provided for in Article 28, and arise essentially from a guarantee sought by the EFTA Member States. The cases involved can be expected to arise relatively seldom, since the Conventions are so similar in respect of their rules of jurisdiction. The possibility nevertheless remains. The case would arise in the event of a judgment on a contract of employment delivered by a court in a Community Member State which had erroneously based its jurisdiction with regard to a person domiciled in an EFTA Member State either on Article 4 or Article 5 (1) of the Brussels Convention, i.e. in a manner inconsistent with Article 5 (1) of the Lugano Convention, which includes a specific provision on contracts of employment, or on an agreement conferring jurisdiction which predated the origin of the dispute (Article 17). However, in the interests of freedom of movement of judgments, the judgment will be recognized and enforced provided that this can be done in accordance with the rules of common law of the State addressed, in particular its common law rules on the jurisdiction of foreign courts; (6) for convenience, we have used the term 'EFTA Member States' in the above examples. Obviously, the same arrangements would apply to States which are not members of either the EEC or EFTA but accede to the Lugano Convention (see Article 62 (1) (b)).

17. The question remained unresolved as to how the Lugano Convention would apply between Community Member States one of which was not a party to the Brussels Convention such as, for instance, Spain or Portugal, while both were parties to the Lugano Convention. The issue would, for example, arise should both Belgium and Spain become parties to the Lugano Convention before the Treaty on the accession of Spain to the Brussels Convention has been concluded or has entered into force and should enforcement of a judgment delivered in one of these States be requested in the other. In the rapporteurs opinion, the Lugano Convention would, as a source of law, apply in the case in point pending entry into force between Belgium and Spain of the Treaty on the accession of Spain to the Brussels Convention.

CHAPTER III PROVISIONS WHICH DISTINGUISH THE LUGANO CONVENTION FROM THE BRUSSELS CONVENTION 1. SUMMARY OF THESE PROVISIONS

18. The amendments are not numerous. Before considering them in detail it might be helpful to list the Articles in the Lugano Convention which differ from the corresponding Articles in the Brussels Convention. Article 3 This Article adds the rules of exorbitant jurisdiction current in the EFTA Member States and in Portugal. It should be noted that no such rules exist in Spain. Article 5 (1) A special provision has been inserted covering matters relating to contracts of employment. Article 6 A new paragraph 4 relates to the combination of proceedings in rem with proceedings in personam. Article 16 Matters relating to tenancies in immovable property are the subject of a new provision (paragraph 1 (b))

and of a reservation (Protocol No 1, Article 1b). Article 17 This Article has been amended with regard to the reference to commercial practices and contracts of employment. Article 21 The reference in this Article to lis pendens has been somewhat amended. Article 28 This Article now contains further grounds for refusing recognition and enforcement. Articles 31 to 41 Technical modifications have been made to some of these Articles with regard to procedure for enforcement and modes of appeal. Article 50 The wording of this Article, which concerns authentic instruments, has been slightly altered. Article 54 This Article has been clarified with regard to the transitional provisions. Article 54A This Article is based on Article 36 of the 1978 Accession Convention and contains additions. Article 54B This is a new Article governing the respective scope of the Brussels Convention and the Lugano Convention. Article 55 This Article concerns relations with other conventions and refers only to conventions to which EFTA Member States are party. Article 57 This Article governs implementation of conventions concluded with regard to particular matters and differs appreciably from Article 57 of the Brussels Convention. Articles 60 to 68 (Final provisions) These Articles have been amended.

19. Protocol 1 Article 1a This new Article contains a reservation requested by the Swiss delegation. Article 1b This new Article contains a reservation resulting from the amendment of Article 16 (1) relating to tenancies in immovable property. Article V This Article covers actions on a warranty or guarantee and contains additions covering current legislation in several States. Article Va The Article covers maintenance matters in particular and contains additions to take account of the situation in several States. Article Vb This Article covers disputes between the master and a member of the crew of a vessel and again contains additions to take account of the laws in a number of States.

20. Protocol 2 This Protocol has been added in order to ensure that, as far as possible, the Lugano Convention and the provisions therein which are identical to the Brussels Convention are interpreted uniformly.

21. Protocol 3 This Protocol deals with the problem of Community acts.

22. Declarations First Declaration: supplementary to Protocol 3. Second and Third Declarations: supplementary to Protocol 2 on the uniform interpretation of the Lugano Convention. 2. DETAILED EXAMINATION TITLE I SCOPE OF THE LUGANO CONVENTION (Article 1)

23. Since this differs in no respect from the Brussels Convention, the reader is referred to the Jenard and Schlosser reports. TITLE II JURISDICTION (Articles 2 to 24) Section 1 General provisions (Articles 2 to 4)

(a) Introductory remarks

24. The proposed adaptations to Articles 2 to 4 are confined to mentioning, in the second paragraph of Article 3, certain exorbitant jurisdictions in the legal systems of the EFTA Member States and of Portugal. A brief explanation of the proposed additional provisions (see point 1) precedes, as in the Schlosser report, two more general remarks on the relevance of these provisions to the whole structure of the Lugano Convention.

(b) Exorbitant jurisdictional bases in force in the EFTA Member States and Portugal

1. Austria

25. Article 99 of the Law on Court Jurisdiction (Jurisdiktionsnorm) provides that any person neither domiciled nor ordinarily resident in Austria may, in matters relating to property, be sued in the court for any place where he has assets or where the disputed property is located. The value of the assets located in Austria may, however, not be considerably lower than the value of the matter in dispute. Foreign establishments, foundations, companies, cooperatives and associations may, according to the abovementioned Article (paragraph 3), also be sued in the court for the place where they have their permanent representation for Austria or an agency.

2. Finland

26. The second sentence of Article 1 of Chapter 10 of the Finnish Code of Judicial Procedure provides that a person who has no habitual residence in Finland may be sued in the court of the place where the documents instituting the proceeding were served on him or in the court of the place where he has assets. The third sentence of the same Article provides that a Finnish national who is staying abroad may also be sued in the court for the place where he had his last residence in Finland. The fourth sentence of the same Article provides that a foreign national, having neither domicile nor residence in Finland may, unless there is a special provision to the contrary as to nationals of a particular State, be sued in the court for the place where the documents instituting the proceedings were served on him or in the court for the place where he has assets.

3. Iceland

27. Article 77 of the Icelandic Civil Proceedings Act provides that in matters relating to property obligations to Icelandic citizens, firms etc. any person not domiciled in that country may be sued in the court for the place where the person was when the documents instituting the proceedings were served on him or where he has assets.

4. Norway

28. Article 32 of the Norwegian Civil Proceedings Act provides that any person not domiciled in Norway may be sued, in matters relating to property, in the court for the place where he has assets or where the disputed property is located at the time when the documents instituting the proceedings were served on him.

5. Sweden

29. The first sentence of Section 3 of Chapter 10 of the Swedish Code of Judicial Procedure provides that anyone without a known domicile in Sweden may be sued, in matters concerning payment of a debt, in the court for the place where he has assets.

6. Switzerland

30. Article 40 of the Federal Law on Private International Law states that if there is no other provision on jurisdiction in Swiss law an action concerning sequestration may be brought before the court for the

place where the goods were attached in Switzerland.

7. Portugal

31. Article 65 of Chapter II of the Code of Civil Procedure provides that a foreign national may be sued in a Portuguese court where: - (paragraph 1 (c)) the plaintiff is Portuguese and, if the situation were reversed, he could be sued in the courts of the State of which the defendant is a national,

- (paragraph 2) under Portuguese law, the court with jurisdiction would be that of the defendant's domicile, if the latter is a foreigner who has been resident in Portugal for more than six months or who is fortuitously on Portuguese territory provided that, in the latter case, the obligation which is the subject of the dispute was entered into in Portugal. Article 65a (c) of the Code of Civil Procedure confers exclusive jurisdiction on Portuguese courts for actions relating to employment relationships if any of the parties is of Portuguese nationality. Article 11 of the Code of Labour Procedure gives jurisdiction to Portuguese labour courts for disputes concerning a Portuguese worker where the contract was concluded in Portugal.

(c) The relevance of the second paragraph of Article 3 to the whole structure of the Lugano Convention

1. Scope of the second paragraph of Article 3

32. The rejection as exorbitant of jurisdictional bases hitherto considered to be important in the various States should not, any more than the second paragraph of Article 3 of the 1968 Brussels Convention, mislead anyone as regards the scope of the first paragraph of Article 3. Only particularly extravagant claims to international jurisdiction for the courts of a Contracting State are expressly underlined. Other rules founding jurisdiction in the national laws of the Contracting States also remain compatible with the Lugano Convention only to the extent that they do not offend against Article 2 and Articles 4 to 18. Thus, for example, the jurisdiction of Swedish courts in respect of persons domiciled in a Contracting State can no longer be based, in contractual matters, on the fact that the contract was entered into in Sweden.

2. Impossibility of founding jurisdiction on the location of property

33. With regard to Austria, Denmark, Finland, Germany, Iceland, Norway, Sweden and the United Kingdom, the list in the second paragraph of Article 3 contains provisions rejecting jurisdiction derived solely from the existence of property in the territory of the State in which the court is situated. Such jurisdiction cannot be invoked even if the proceedings concern a dispute over rights of ownership, or possession or the capacity to dispose of the specific property in question.

34. With regard to Switzerland, the list in the second paragraph contains a provision rejecting jurisdiction derived solely from an attachment of property located in Switzerland. There is, however, no obstacle for Swiss courts pursuant to Article 24, to grant such provisional, including protective, measures as may be available under the law of Switzerland, even if, under the Convention, the courts of another Contracting State have jurisdiction as to the substance of the matter.

35. As regards persons who are domiciled outside the Contracting States, the provisions which hitherto governed the jurisdiction of courts in the Contracting States remain unaffected. Even the rules on jurisdiction mentioned in the second paragraph of Article 3 may continue to apply to such persons. Judgments delivered by courts which thus have jurisdiction must also be recognized and enforced in other Contracting States unless one of the exceptions in paragraph 5 of Article 27 or in Article 59 of the Convention applies. The latter provision is the only one concerning which the list in Article 3 second paragraph is not only of illustrative significance, but has direct and restrictive importance.

Section 2 Special jurisdiction (Articles 5 and 6)

(a) Article 5 (1) - Contract of employment

36. The domicile of the defendant constitutes the basic rule of both the Brussels Convention and the Lugano Convention. However, Section 2 (Articles 5 and 6) of Title II on jurisdiction contains a number of supplementary provisions. Under these provisions, the plaintiff may choose to bring the action in the court specified in Section 2, or in the courts of the State in which the defendant is domiciled (Article 2). Article 5 (1) of the Brussels Convention provides that the defendant may be sued in 'matters relating to a contract, in the courts for the place of performance of the obligation in question'.

37. This paragraph is applicable with regard to a contract of employment (see Jenard report, p. 24 and Chapter VI: judgment of the Court of Justice of 13 November 1979 in Sanicentral v. Collin, according to which employment legislation comes within the Convention's scope). When asked to give a ruling on this matter, the Court of Justice ruled that the obligation to be taken into account in the case of claims based on different obligations arising under a contract of employment as a representative binding a worker to an undertaking was the obligation which characterized the contract, i.e. that of the place where the work was carried out (judgment of the Court of 26 May 1982 in Ivenel v. Schwab, see Chapter VI). This ruling was based, amongst other things, on Article 6 of the Rome Convention on the law applicable to contractual obligations (OJ No L 266, 1980, p. 1), which provides that in matters relating to an employment contract, the contract 'is to be governed, in the absence of choice of the applicable law, by the law of the country in which the employee habitually carries out his work in performance of the contract, unless it appears that the contract is more closely connected with another country'. In the above judgment, the Court commented that the aim of this provision was to secure adequate protection for the party who from the socioeconomic point of view was to be regarded as the weaker in the contractual relationship (see also Giuliano-Lagarde report, OJ No C 282, 1982, p. 25). In another ruling, the Court of Justice observed that contracts of employment, like other contracts for work other than on a self-employed basis, differed from other contracts - even those for the provision of services - by virtue of certain particularities: they created a lasting bond which brought the worker to some extent within the organizational framework of the business of the undertaking or employer, and they were linked to the place where the activities were pursued, which determined the application of mandatory rules and collective agreements (judgment of 15 January 1987 in Shenavai v. Kreischer, see Chapter VI). During negotiation of the Lugano Convention the EFTA Member States requested that, in respect of Article 5 and Article 17 (for this last Article, see point 60), matters relating to employment contracts

should be the subject of a separate provision. This request was granted.

38. Under the new Article 5 (1) on matters relating to contracts of employment, the place of performance of the obligation in question is deemed to be that where the employee habitually carries out his work. If he does not habitually carry out his work in any one country, the place is that in which is situated the place of business through which he was engaged. It should be noted that such an issue is currently before the Court of Justice (see Chapter VI, Six Constructions v. Humbert case). As we have seen, this provision is in line with the previous judgments of the Court of Justice corresponding quite closely to Article 6 of the Rome Convention [FN 5].

39. The stipulation in Article 5 (1) gives rise to the following comments: According to the general structure of the Lugano Convention, the following have jurisdiction where there are disputes between employers and employees: - the courts of the State in which the defendant is domiciled (Article 2), - the courts specified in Article 5 (1). If an employee habitually carries out his work in the same country, but not in any particular place, the internal law of that country will determine the court which has jurisdiction, - courts on which jurisdiction has been conferred by an agreement entered into after the dispute has arisen (see Article 17 (5)), - courts whose jurisdiction is implied by submission (Article 18). However, these rules do not apply unless the dispute contains an extraneous element. The Conventions only lay down rules of international jurisdiction (see preamble). They have no effect if the contract (domicile of the employer, domicile of the employee and place of work) is actually situated in a single country. In this connection, the employee's nationality must not be taken into account, as the employee must be treated in the same way as other employees. On the other hand, if the defendant is domiciled outside the territory of one of the Contracting States, Article 4 is applicable.

40. Where the defendant does not habitually carry out his work in any one country, the courts of the place in which the place of business through which he was engaged is situated will have jurisdiction. This system is in keeping with that laid down by Article 6 (2) (b) of the Rome Convention on the law applicable to contractual obligations. The purpose of the provision is to avoid increasing the number of courts with jurisdiction in disputes between employers and employees where the employee is required to carry out his work in several countries. In addition, for States parties to the Rome Convention and the Lugano Convention, jurisdiction will be congruent with the applicable law. The same applies in some States which are not parties to the Rome Convention.

41. The question whether a contract of employment exists is not settled by the Convention. If the judge to whom the matter has been referred gives an affirmative reply to this question, he will have to apply the second part of Article 5 (1), which constitutes a specific provision. Although there is as yet no independent concept of what constitutes a contract of employment, it may be considered that it presupposes a relationship of subordination of the employee to the employer (see Chapter VI, judgments in Shenavai v. Kreischer, cited earlier, and in Arcado v. Haviland of 8 March 1988).

42. Article 5 (1) refers only to individual employment relationships, and not to collective agreements between employers and workers' representatives.

43. The term 'place of business' is to be understood in the broad sense; in particular, it covers any entity such as a branch or an agency with no legal personality.

44. In conclusion, it may be considered that although the texts of the Brussels Convention and the Lugano Convention are not identical, they do converge, particularly by reason of the interpretation by the Court of Justice of Article 5 (1) of the Brussels Convention.

(b) Article 6 (1) - Co-defendants

45. No change has been made to the text of the Brussels Convention which provides that 'a person domiciled in a Contracting State may be sued, where he is one of a number of defendants, in the courts for the place where any one of them is domiciled'. However, this provision was taken over verbatim only in the light of the comments made in the Jenard report on the 1968 Convention (OJ No C 59/79, p. 26) to the effect that 'in order for this rule to be applicable there must be a connection between the claims made against each of the defendants, as for example in the case of joint debtors. It follows that action cannot be brought solely with the object of ousting the jurisdiction of the courts of the State in which the defendant is domiciled.' A few days after the diplomatic conference ended, the Court of Justice delivered a judgment along these lines (judgment of 27 September 1988 in Kalfelis v. Schroder, see Chapter VI, OJ No C 281, 4. 11. 1988, p. 18).

(c) Article 6 (4) - Combination of actions in rem and in personam

46. When a person has a mortgage on immovable property the owner of that property is quite often also personally liable for the secured debt. Therefore it has been made possible in some States to combine an action concerning the personal liability of the owner with an action for the enforced sale of the immovable property. This presupposes of course that the court for the place where the immovable property is situated also has jurisdiction as to actions concerning the personal liability of the owner. It was agreed that it was practical that an action concerning the personal liability of the owner of an immovable property could be combined with an action for the enforced sale of the immovable property in those States where such a combination of actions was possible. Therefore it was deemed appropriate to include in the Convention a provision according to which a person domiciled in a Contracting State also may be sued in matters relating to a contract, if the action may be combined with an action against the same defendant in matters relating to rights in rem in immovable property, in the court of the Contracting State in which the property is situated. To illustrate, let us assume that a person domiciled in France is the owner of an immovable property situated in Norway. This person has raised a loan which is secured through a mortgage on his immovable property in Norway. In the eventuality of the loan not being repaid when due, if the creditor wishes to bring an action for the enforced sale of the immovable property, the Norwegian court has exclusive jurisdiction under Article 16 (1). However, under the present provision, this court also has jurisdiction as to an action against the owner of the property concerning his personal liability for the debt, if the creditor wishes to combine the latter action with an action for the enforced sale of the property.

47. It is evident that this jurisdictional basis cannot exist by itself.

It must necessarily be supplemented by legal criteria which determine on which conditions such a combination is possible. Thus the provisions already existing in or which in the future may be introduced into the legal systems of the Contracting States with reference to the combining of the abovementioned actions remain unaffected by the Lugano Convention. It goes without saying however that the combination of the two actions which this paragraph deals with have to be instituted by the 'same claimant'. The same claimant includes of course also a person to whom another person has transferred his rights or his successor. Sections 3 and 4 Jurisdiction in matters relating to insurance (Articles 7 to 12a) and over consumer contracts (Articles 13 to 15)

48. Since no amendments have been made to these sections, reference should be made to the Jenard and Schlosser reports.

Section 5
Exclusive jurisdiction

Article 16 (1) - Tenancies

49. Under Article 16 (1) of the Brussels Convention, only courts of the Contracting State in which the immovable property is situated have jurisdiction concerning rights in rem in, or tenancies of, immovable property. Thus the wording covers not only all disputes concerning rights in rem in immovable property, but also those relating to tenancies of such property. According to the Jenard report (p. 35), the Committee which drafted the Brussels Convention intended to cover disputes between landlord and tenant over the existence or interpretation of tenancy agreements, compensation for damage caused by the tenant, eviction, etc. The rule was, according to the same report, not intended by the Committee to apply to proceedings concerned only with the recovery of rent, since such proceedings can be considered to relate to a subject-matter which is quite distinct from the rented property itself. The working party which drafted the Convention on the accession of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Brussels Convention and to the Protocol on its interpretation by the Court of Justice was, however, according to the Schlosser report (paragraph 164), unable to agree whether actions concerned only with rent, i.e. dealing simply with recovery of a debt, are excluded from the scope of Article 16 (1). As stated in the Jenard report, the reference to tenancies in Article 16 (1) of the Brussels Convention includes tenancies of dwellings and of premises for professional or commercial use, and agricultural holdings. According to the Schlosser report, the underlying principle of the provision quite clearly does not require its application to short-term agreements for use and occupation such as, for example, holiday accommodation [sic].

50. The Court of Justice of the European Communities has ruled that Article 16 (1) does not cover disputes relating to transfer of an usufructuary right in immovable property (judgment of 14 December 1977 in Sanders v. Van der Putte, see Chapter VI). The Court held that Article 16 (1) must not be interpreted as including an agreement to rent under a usufructuary lease a retail business carried on in immovable property rented from a third person by the lessor. However, departing from the intentions of the authors of the 1968 Convention, the Court of Justice recently ruled that the exclusive jurisdiction provided for in Article 16 (1) also applies to proceedings in respect of the payment of rent, and that this includes short-term lettings of holiday homes (judgment of 18

January 1985 in Rosler v. Rottwinkel, see Chapter VI). The Court held that this exclusive jurisdiction applies to all lettings of immovable property, even for short term and even where they relate only to the use and occupation of a holiday home and that this jurisdiction covers all disputes concerning the obligations of the landlord or the tenant under a tenancy, in particular those concerning the existence of tenancies or the interpretation of the terms thereof, their duration, the giving up of possession to the landlord, the repairing of damage caused by the tenant or the recovery of rent and of incidental charges for the consumption of water, gas and electricity. This decision seems at least partially to be in contradiction with what, according to the Jenard and Schlosser reports, was the intention of those who drafted the Brussels Convention.

51. Having regard especially to the ruling given by the Court of Justice in the case of Rosler v. Rottwinkel, the EFTA Member States insisted on the inclusion of a special provision concerning short-term tenancies of immovable property in the Lugano Convention. As an alternative, these States put forward the idea of excluding tenancies totally from the scope of the Convention or particularly from Article 16. The working party agreed that it was inappropriate to exclude tenancies altogether from the scope of the Convention, in view of the importance of this matter. As to the proposal for excluding tenancies from Article 16 especially, the delegations of the Community Member States found such a solution totally unacceptable as the normal jurisdiction rules of the Convention would have been applicable to tenancies of immovable property, which was alien to the whole philosophy existing in this respect at least in the Community States. Thus the working party decided to include in Article 16 (1) a new subparagraph

(b) containing a special provision concerning short-term tenancies.

52. The result of this change is that, where tenancies are concerned, there will be two exclusive jurisdictions, which might be described as alternative exclusive jurisdictions. Under subparagraph (a), the courts of the Contracting State in which the immovable property is situated will always have jurisdiction without restriction. However, under subparagraph (b), in proceedings which have as their object tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months - which covers particularly holiday lettings - the plaintiff may also apply to the courts of the Contracting State in which the defendant is domiciled. This option is open to him only if the tenant (and not the owner) is a natural person and if, in addition, neither party is domiciled in the Contracting State in which the property is situated. Legal persons holding tenancies were excluded since they are generally engaged in commercial transactions. Furthermore, where one of the parties is domiciled in the Contracting State in which the property is situated, it was considered appropriate to retain the rule in Article 16 (1) which lays down the principle of the jurisdiction of the courts of that State.

53. Article 16 (1) (b) did, however, create serious political difficulties for certain Community Member States. In order to overcome these difficulties, the working party agreed that this provision be accompanied by the possibility of a reservation. By means of this, any Contracting State may declare that it will neither recognize nor enforce a judgment in respect of a case concerning tenancies of immovable property, if the immovable property concerned is situated on its territory even if the tenancy is such as referred to in Article 6

paragraph 1 and the jurisdiction of the court which has given the judgment has been based on the domicile of the defendant. This reservation is given in Article Ib of Protocol No 1. This possibility of a reservation only concerns such cases in which the immovable property is situated in the State where recognition and enforcement are sought. If, thus, for instance, Spain makes use of this possibility, that does not mean that Spain is entitled to refuse the recognition or enforcement of a judgment given in proceedings which had as their object a tenancy referred to in Article 16 (1) (b) if the immovable property is situated in another State e.g. Italy, and the judgment is given by a court in a third State, where the defendant has his domicile, e.g. Sweden. Whether the State where the immovable property is situated has made use of the reservation is in this case completely irrelevant. It was however understood that any State which wishes to use this reservation may make a narrower reservation than that provided for. Thus a State may, for instance, declare that the reservation is limited to the case where the landlord is a legal person.

54. Article 16 (1) applies only if the property is situated in the territory of a Contracting State. The text is sufficiently explicit on this point. If the property is situated in the territory of a third State, the other provisions of the Convention apply, e.g. Article 2 if the defendant is domiciled in the territory of a Contracting State, and Article 4 if he is domiciled in the territory of a third State, etc.

Section 6
Prorogation of jurisdiction (Articles 17 and 18)

(a) Article 17 - Prorogation by an agreement

55. 1. Paragraph 1 of this Article essentially concerns the formal requirements for agreements conferring jurisdiction. The question of whether an agreement on jurisdiction has been validly entered into (e.g. lack of due consent) is to be regulated by the applicable law (judgment of the Court of Justice of 11 November 1986 in Iveco Fiat v. Van Hool, see Chapter VI). As to whether such an agreement can be validly entered into in specific matters it should be pointed out that the Court of Justice (judgment of 13 November 1979 in Sanicentral v. Collin, see Chapter VI) ruled that in matters governed by the Convention national procedural law was set aside in favour of the Convention's provisions.

56. According to the original version of Article 17 of the Brussels Convention, an agreement conferring jurisdiction must be in writing or evidenced in writing. In the light of the interpretation of the Court of Justice of the European Communities in some of its first judgments concerning Article 17 of the Brussels Convention (see Chapter VI), the working party preparing the 1978 Convention on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Brussels Convention and to the Protocol of 3 June 1971 on its interpretation by the Court of Justice was of the opinion that these formal requirements did not cater adequately for the customs and needs of international trade. Therefore a relaxation of these formal requirements as far as agreements on jurisdiction in international trade or commerce are concerned was felt necessary. According to Article 17 of the Brussels Convention as amended by the 1978 Accession Convention, an agreement conferring jurisdiction may in international trade or commerce be in a form which accords with practices in that trade or commerce of which the parties are or ought to have been aware.

57. During the negotiations on the Lugano Convention, the EFTA Member States, however, felt that this provision was too vague and might create legal uncertainty. Those States feared that Article 17 (1), as far as agreements on jurisdiction in international commerce or trade are concerned, might make it possible to consider an agreement established by the mere fact that no protest has been launched against a jurisdiction clause in certain unilateral statements by one party, for instance in an invoice or in terms of trade presented as a confirmation of the contract. Therefore the EFTA Member States proposed the following amendment of the second sentence of Article 17 (1): Such an agreement conferring jurisdiction shall be either (a) in writing (or clearly evidenced in writing) including an exchange of letters, telegrams and telexes (or other modern means of technical communications), or (b) included or incorporated by reference in a bill of lading or a similar transport document.' The representatives of the Community Member States found however that this proposal would not only lead to an excessive amount of rigidity but would also be in contradiction with the rulings of the Court of Justice of the European Communities, according to which it should be possible to take into account particular practices (judgment of 14 December 1976 in Segoura v. Bonakdarian, see Chapter VI).

58. Article 17 (1) (a) of the Lugano Convention is based on Article 9 paragraph 2 of the 1980 United Nations Convention on Contracts for the International Sale of Goods (the so-called Vienna Convention). Since the Member States of the EEC and the EFTA States may become parties to that Convention, the working party found it desirable to align in this respect the text of Article 17 on the text of Article 9 paragraph 2 of the Vienna Convention. The provision can be seen as a compromise between the two groups of States. First, according to Article 17 (1) (b) of the Lugano Convention, an agreement conferring jurisdiction fulfils the formal requirements if it is in a form that accords with practices which the parties have established between themselves. This is not provided for in the wording of Article 17 of the Brussels Convention. In the light of the case law of the Court of Justice of the European Communities (see Chapter VI), this seems, however, to be the understanding of Article 17 of the Brussels Convention. The working party was of the opinion that this understanding should be explicitly reflected in the text of the Lugano Convention. Secondly, in international trade or commerce an agreement conferring jurisdiction fulfills the formal requirements if it is in a form that accords with a usage of which the parties are or ought to have been aware and which in such trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned. Thus, even in international trade or commerce, it is not sufficient that an agreement conferring jurisdiction be in a form which accords with practices (or a usage) in such trade or commerce of which the parties are or ought to have been aware. It is moreover required that the usage shall be, on the one hand, widely known in international trade or commerce and, on the other, regularly observed by parties to contracts of the type involved in the particular trade or commerce concerned. In particular, having regard to the words 'internationale Handelsbrauche' and 'usages' which are used in the German and French versions of Article 17 of the Brussels Convention, it seems that there are at least no major differences in substance between the provisions concerned in the two Conventions. In order to ensure a uniform interpretation it was, however, felt by the EFTA States that the present wording of paragraph 1 (c) was necessary in the Lugano Convention.

59. Article 17 of the Brussels Convention has given rise to a considerable number of judgments by the Court of Justice of the European Communities. In this connection, readers are referred to Chapter VI.2, point 12 'Article 17', paragraphs 1 to 12. However, it should be mentioned in this context that the Court of Justice has ruled that an agreement between the parties with regard to the place of performance, which constitutes a ground of jurisdiction pursuant to Article 5 (1), is sufficient to confer jurisdiction without being subject to the formal requirements laid down in Article 17 for prorogation of jurisdiction (judgment of 17 January 1980 in Zelger v. Salinitri, see Chapter VI).

60. 2. Article 17 (5) was proposed by the EFTA Member States. It provides that in matters relating to contracts of employment an agreement conferring jurisdiction within the meaning of the first paragraph shall have legal force only if it is entered into after the dispute has arisen. The background of this provision is the same as that for Article 5 (1), i.e. the protection of the employee, who from the socioeconomic point of view is regarded as the weaker in the contractual relationship. It seemed desirable that it should not be possible for the protection intended to be given to employees by virtue of Article 5 (1) to be taken away by prorogation agreements entered into before the dispute arose. As in the case of Article 5 (1) this provision applies only to individual employment relationships and not to collective agreements concluded between employers and employees' representatives.

61. During the Diplomatic Conference, stress was laid on the difference between the Brussels and Lugano Conventions as regards agreements conferring jurisdiction with respect to contracts of employment, and a number of problems were highlighted. The example given was that of an agreement conferring jurisdiction which, at the time, was concluded between parties domiciled in the territory of two States which had ratified the Brussels Convention. Under that Convention, prorogation of jurisdiction by agreement may, as regards a contract of employment, be effected before the dispute arises. What happens if, at a later stage, one of the parties transfers his domicile to an EFTA Member State? What would be the attitude either of the court in a Community Member State to which a dispute is referred on the basis of that agreement conferring jurisdiction, or of a court in an EFTA Member State to which a dispute is referred despite the agreement? The question was left open and, although the solutions adopted by the Brussels and the Lugano Conventions are not without their merits, might possibly be resolved in the Convention on the accession of Spain and Portugal to the Brussels Convention by aligning the Brussels Convention on the Lugano Convention. (b) Article 18 - Submission to jurisdiction

62. Discrepancies have been noted between the various versions of the Brussels Convention. A number of versions, for example the English and the German ones, provide that the rule whereby the court of the Contracting State has jurisdiction does not apply where appearance was entered 'solely' to contest the jurisdiction, which restriction is not included in the French text. However, no amendment was made to the various texts in view of a judgment given by the Court of Justice to the effect that Article 18 applies under certain conditions where the defendant contests the court's jurisdiction and also makes submissions on the substance of the action (judgment of 24 June 1981 in Elefanten Schuh v. Jacqmain, see Chapter VI).

Section 7

Examination as to jurisdiction and admissibility (Articles 19 and 20)

63. Although these Articles correspond to Articles 19 and 20 of the Brussels Convention, Article 20 requires some comment, given that it is a particularly important provision where the defendant fails to enter an appearance (see Jenard report, page 39). A judge required to apply the Lugano Convention must declare of his own motion that he has no jurisdiction unless his jurisdiction is derived from the provisions of Sections 2 to 6 of Title II of that Convention. For example, a French judge before whom a person domiciled in Norway is required to appear on the basis of Article 14 of the Code Civil (jurisdiction derived from the French nationality of the applicant) must declare of his own motion that he has no jurisdiction if the defendant fails to enter an appearance. Likewise, the judge must declare of his own motion that he has no jurisdiction unless his jurisdiction is derived from the provisions of an international convention governing jurisdiction in particular matters, as stipulated in Article 57 (2). In this connection reference should be made to the comments on Article 57. It should be noted that almost all the Community and EFTA Member States are currently parties to the Hague Convention of 15 November 1965 on the service abroad of judicial and extra-judicial documents in civil or commercial matters since, at June 1988, the sole exceptions are Austria, Ireland, Iceland and Switzerland.

Section 8
Lis pendens - related actions (Articles 21 to 23)

64. Article 21 Only this Article has been amended in Section 8. Article 21 of the Brussels Convention provides that in case of a lis alibi pendens, any court other than the court first seised must of its own motion decline jurisdiction in favour of that court and may stay its proceedings if the jurisdiction of the other court is contested. The representatives of the EFTA Member States thought this solution was too radical. They observed that an action often had to be brought in order to comply with a time limit or stop further time from running, and that opinions differed as to whether a time limit had been complied with where an action had been brought before a court lacking jurisdiction internationally. Thus, in their view, if an action was brought before a judge who would have had jurisdiction, but was not the first to be seised, that judge would of his own motion have to decline jurisdiction in favour of the court first seised. However, that court might perhaps decide that it did not have jurisdiction. In that case, both actions would have been dismissed with the result that the time limits might have run out and the action be time barred. These remarks have been taken into consideration. Article 21 has been amended so that the court other than the court first seised will of its own motion stay its proceedings until the jurisdiction of the other court has been established. A court other than the one first seised will not decline jurisdiction in favour of the court first seised until the jurisdiction of the latter has been established (see Schlosser report, paragraph 176). The Court of Justice has ruled that the term lis pendens used in Article 21 covers a case where a party brings an action before a court in a Contracting State for a declaration that an international sales contract is inoperative or for the termination thereof whilst an action by the other party to secure performance of the said contract is pending before a court in another Contracting State (judgment of 8 December 1987 in Gubisch v. Palumbo).
Section 9

65. Article 24 - Provisional, including protective. measures As this

provision has not been amended, reference should be made to the Jenard report, page 42 and the Schlosser report, paragraph 183.

TITLE III
RECOGNITION AND ENFORCEMENT
(Articles 25 to 49)
Section 1
Recognition (Articles 26 to 30)

(a) Article 27 (5)

66. Article 27 (5) refers only to cases where the judgment recognition of which is requested is irreconcilable in the State addressed with an earlier judgment given in a non-Contracting State and recognizable in the State addressed. The case of a judgment given in a Contracting State which is irreconcilable with an earlier judgment given in another Contracting State and recognizable in the State addressed is not specifically dealt with, nor is it covered in the Brussels Convention. It was felt that such cases would be extremely exceptional given the mechanisms provided for in Title II and in particular Articles 21 and 22 with a view to avoiding contradictory decisions. Should such a case, however, arise it would be for the court in the State addressed to apply its rules of procedure and the general principles arising out of the Convention and to refuse to recognize and enforce the judgment given after the first judgment had been recognized. It might, indeed, be argued that, since it has already been recognized in the State addressed, the first judgment should produce the same effects there as a judgment given by the courts in that State, the situation covered by Article 27 (3).

(b) Article 28

67. Two grounds for refusal have been added. They concern the cases provided in Articles 54B and 57; reference should be made to the comments on those Articles. Section 2

Enforcement (Articles 31 to 45)

(a) Article 31

68. Under the first paragraph of this Article in the Brussels Convention, 'A judgment given in a Contracting State and enforceable in that State shall be enforced in another Contracting State when, on the application of any interested party, the order for its enforcement has been issued there'. Since United Kingdom law does not have the exequatur system for foreign judgments, paragraph 2 of this Article provides that such a judgment shall be enforced in England and Wales, in Scotland, or in Northern Ireland where, on the application of any interested party, it has been registered for enforcement in that part of the United Kingdom (see Schlosser report, paragraphs 208 et seq.).

69. In Switzerland, a distinction must be drawn between judgments ordering the payment of a sum of money and those ordering performance other than the payment of money. The enforcement of judgments ordering he payment of a sum of money is governed by Articles 69 et seq. of the federal law on suit for bankruptcy debts (LP). Articles 80 and 81 LP require, for the purposes of enforcement, the production of an enforceable judgment in a civil case. In the case of foreign judgments, involving an order for payment of money, an order for its enforcement is

necessary only if the judgment was given in a State which has not concluded a treaty on recognition and enforcement with Switzerland. If such a treaty exists, a foreign judgment involving an order for payment of money is enforceable in the same way as a Swiss judgment. The only objections which can be raised are those provided for in the convention in question (third paragraph of Article 81 LP). A foreign judgment ordering performance other than the payment of money is enforced under cantonal law, even if there is a treaty with the State concerned. In general, the cantonal rules governing orders for enforcement are then applicable. With the convention in mind, Switzerland declared that it intends to continue to grant the preferential treatment it gives to judgments involving an order for payment of money. The working party agreed that the wording of Article 31 (1) of the Brussels Convention had been chosen to comply with the legal system of the original six Member States of the European Communities and acknowledged that this wording could create problems for States with different enforcement procedures than those existing in these six States. Therefore and in order to take account, in particular, of the Swiss position the words the order for its enforcement has been issued' in the first paragraph of Article 31 of the Brussels Convention have been replaced in the Lugano Convention by the words it has been declared enforceable'.

(b) Articles 32 to 45

70. The formal adjustments to Articles 32 to 45 relate exclusively to the courts having jurisdiction and possible types of appeal against their decisions. For applications for a declaration of enforceability of judgments only one court has been given jurisdiction in Iceland and in Sweden. In Sweden, this is due to the practice according to which the 'Svea hovratt' is competent to declare enforceable foreign judgments and arbitral awards. If the judgment debtor wishes to argue against the authorization of enforcement, he must lodge his application to set the enforcement order aside not with the higher court, as in most other Contracting States, but as in Austria, Belgium, Ireland, Italy, the Netherlands and the United Kingdom, with the same court as declared the judgment enforceable. The proceedings will take the form of an ordinary contentious civil action. This applies also regarding the appeal which the applicant may lodge if his application is refused.

Section 3
Common provisions (Articles 46 to 48)

71. Since no amendments have been made to the provisions of this section, reference should be made to the Jenard report (pp. 54 to 56) and the Schlosser report (paragraph 225).

TITLE IV
AUTHENTIC INSTRUMENTS AND COURT SETTLEMENTS
(Articles 50 and 51)

Article 50 - Authentic instruments

72. The representatives of the EFTA Member States were able to agree to the text of Article 50, although the concept of an authentic instrument is contained only in Austria's legislation. However, they did request that the report should specify the conditions which had to be fulfilled by an authentic instrument in order to be regarded as authentic within the meaning of Article

50 (see Schlosser report, paragraph 226).
The conditions are as follows:

- the authenticity of the instrument should have been established by a public authority,

- this authenticity should relate to the content of the instrument and not only, for example, the signature,

- the instrument has to be enforceable in itself in the State in which it originates. Thus, for example, settlements occurring outside courts which are known in Danish law and enforceable under that law (udenretlig forlig) do not fall under Article 50. Likewise, commercial bills and cheques are not covered by Article 50. As in Article 31 (see point 69), the phrase 'have an order for its enforcement issued there' has been replaced by the words 'be declared enforceable'. It should be noted that the application of Article 50 of the

Brussels Convention appears to be relatively uncommon.

TITLE V
GENERAL PROVISIONS
Article 52 - Domicile

73. The third paragraph of Article 52 of the Brussels Convention relates to persons whose domicile depends on that of another person or on the seat of an authority. It adopts a common rule of conflicts based on the personal status of the person making the application, in the case in point, the national law of the person. The EFTA Member States challenged this rule, particularly in view of the developments regarding the domicile of married women that have taken place since the 1968 Convention was drawn up. It was decided to delete the third paragraph. It follows that in order to determine whether the defendant is a minor or legally incapacitated, the judge will apply the law specified by the conflicts rules applied in his country. In the affirmative case, either the first paragraph or the second paragraph of Article 52, depending on the case, will be applied to determine the legal domicile. Thus, to determine whether a minor is domiciled in the territory of the State whose courts are seised of a matter, the judge will apply his internal law. When the minor is domiciled in the territory of the State whose courts are seised of the matter, the judge will, in order to determine whether the minor is domiciled in another Contracting State, apply the law of that State.

TITLE VI
TRANSITIONAL PROVISIONS
(Articles 54 and 54a)

(a) Article 54 - Temporal application

74. The adjustments made to this Article are only technical ones, given that the procedures for entry into force of the two Conventions are not identical, but that no substantive changes have been made (see Jenard report, pp. 57 and 58 and Schlosser report, paragraphs 228 to 235).

(b) Article 54a (Maritime claims)

75. Article 54a corresponds to Article 36 of the 1978 Accession

Convention (see Schlosser report, paragraphs 121 et seq.). Paragraph 5 of this Article defines the expression 'maritime claim'. A maritime claim, according to this definition, is inter alia a claim arising out of dock charges and dues (point (1)). The German version of this Convention as well as of the Brussels Convention uses the word 'Hafenabgaben' for dock charges and dues. This should however not mislead anybody into thinking that port charges, dues or tolls or similar public fees are regarded as dock charges or dues for the purposes of this Article.

TITLE VII
RELATlONSHIP TO THE BRUSSELS CONVENTION AND OTHER CONVENTIONS

(a) Article 54b (Relationship to the Brussels Convention)

76. Reference should be made to the comments in Chapter II. (b) Articles 55 and 56 (Conventions concerning the EFTA Member States)

77. Article 55 lists conventions concluded between the EFTA Member States and conventions concluded between EFTA Member States and Community Member States (see Annex II). Conventions between Community Member States have not been included since they are already covered by Article 55 of the Brussels Convention and, where Spain and Portugal are concerned, will be covered by the Conventions on Accession to the Brussels Convention.

78. Article 56 has not been amended.

(c) Article 57 (Conventions in relation to particular matters)

79. It may be said that the problem of conflicts of law, together with the problem of conflicts of jurisdiction, are the chief concern of private international law. However, the problem of conflicts of convention also requires attention, since nowadays, with so many international organizations drawing up international conventions, the number which deal directly or indirectly with the same subject is considerable. As for solving the problem, several systems could perfectly well be contemplated under international law. Some are based on the principle specialia generalibus derogant, others on the rule of antecedence. Lastly, yet others advocate taking the effectiveness criterion into consideration. For example, where a judgment is to be recognized and enforced, the conventions which exist might be considered and the one selected which, translating the aim sought by the authors of the conventions, gives the party to whom judgment has been delivered in one country the best possibility of getting it recognized and enforced in another. As noted by Professor Schlosser in his report (paragraphs 238 to 246), this question was dealt with at length during the negotiations on the 1978 Accession Convention. The solution was enshrined in Article 25 of that Convention.

80. The problem was taken up again during negotiation of the Lugano Convention. The same basic principle has been adopted in both Conventions: namely, that the Convention will not affect any conventions to which the Contracting States are or will be parties and which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments [FN 6]. The arrangements adopted are set out in Article 57. They may be examined on two levels: firstly, the level of jurisdiction, and secondly, that of recognition and enforcement.

81. Regarding jurisdiction, the two Conventions, i.e. the 1968 Convention

as amended by the 1978 Convention, and the Lugano Convention, both contain similar provisions. Article 57 (2) of the Lugano Convention, like Article 25 (2) of the 1978 Accession Convention, provides that the Convention will not prevent a court of a Contracting State which is party to a convention relating to a particular matter from assuming jurisdiction in accordance with that convention, even where the defendant is domiciled in a State party to the Lugano Convention, but not to, the convention on the particular matter. In this respect, Article 57 provides another exception to Article 2, which lays down the principle that the defendant must be sued in the courts of his domicile. Take the following example: The International Convention for the unification of certain rules relating to international carriage by air, signed at Warsaw on 12 October 1929, has not been ratified by Luxembourg. The carrier is domiciled in Luxembourg, but the Warsaw Convention provides that the court with jurisdiction is that of the place of 'destination' (a court not adopted as such by the Lugano Convention, nor, for that matter, by the Brussels Convention). Article 57 enables the applicant to sue the Luxembourg carrier in the court of a State party to the Lugano Convention and to the Warsaw Convention, since that court is allowed under that Convention. Exactly the same arrangement is adopted in the Brussels Convention. It is the special convention which prevails, in the interests, as stated by Professor Schlosser in his report on the 1978 Convention (paragraph 240 (b)), of 'simplicity and clarity of the legal position' and, let us add, so as not to fail to recognize the rights that nationals of third States might hold under the special convention. However, the court seised will have to apply Article 20 of the Lugano Convention in order to ensure respect for the rights of the defence. In the case in point, if the defendant fails to enter an appearance, the judge must of his own motion examine whether he does indeed have jurisdiction under the special convention and whether the defendant has been sued properly, and in sufficient time to enable him to arrange his defence.

82. Regarding recognition and enforcement, the arrangements in the Brussels Convention (as adjusted on this point by the 1978 Convention) and the Lugano Convention are not the same. Unlike the Brussels Convention, the Lugano Convention provides that recognition or enforcement may be refused if the State addressed is not a contracting party to the special convention and if the person against whom recognition or enforcement is sought is domiciled in that State. The reason for this difference is that the Brussels Convention applies between Member States of the same Community, while the Lugano Convention is not based on a similar principle. The EFTA Member States therefore requested that the courts of the State addressed should be able to refuse recognition or enforcement if the person against whom they were sought was domiciled in that State, on the grounds that such a guarantee should be granted the defendant, particularly for fear that the special convention might contain grounds for jurisdiction considered as exorbitant by the State addressed in accordance with the law of that State. It must be emphasized that this ground for refusal is an exception, given that paragraph 3 establishes the principle of recognition and enforcement. It does not therefore apply automatically, but is left to the discretion of the judge in the State addressed under the law of that State. It goes without saying that a judgment delivered in an EFTA Member State on the basis of a rule of jurisdiction provided for in a special convention might be refused recognition or enforcement, under the same terms, in a Community Member State.

83. In the opinion of the rapporteurs, although the question is not expressly dealt with in the text of Article 57, if a court in a Contracting State having jurisdiction under a special convention is seised first, the rules on lis pendens and related actions in Articles 21 and 22 are applicable. Hence, for instance, in the case of lis pendens, the courts of another Contracting State would, even though that State was not party to the special convention, have to stay their proceedings of their own motion if seised subsequently. The jurisdiction of the court first seised is recognized by the Lugano Convention through the conjunction of Articles 21 and 57, with the latter recognizing the jurisdiction of the court first seised on the basis of a special convention.

84. For the purposes of the Lugano Convention, Community acts are to be treated in the same way as special conventions. Reference should be made here to the comments on Protocol 3.

TITLE VIII
FINAL PROVISIONS
(Articles 60 to 68)

(a) introductory remarks

85. Although final provisions are usually fairly standard, those in the present Convention are somewhat different and therefore require quite detailed comment. This is a Convention which first and foremost requires the Contracting States to have extremely similar thinking on constitutional and economic matters (see Chapter I.2, point 3). Moreover, the Convention was negotiated between States all of which belong to European organizations, either the European Communities or EFTA. The drafters of the Convention had to deal with several questions. The first was the general one of deciding which States could become parties to the Convention. Other more specific questions were: What was the position of those States which, after the opening of the Convention for signature, became members either of the European Communities or EFTA? What was the position of third States, i.e. countries which did not belong to either of these two organizations but wished to become parties to the Convention? What was the territorial application of the Convention? What, finally, was the position if one of the territories for whose international relations a Contracting State was responsible were to become independent? Each of these questions was examined in detail and a series of solutions was found [FN 7].

(b) Article 60 - States which may become parties to the Convention

86. Article 60 deals with this question, while Articles 61 and 62 define the relevant procedures involving either signature and ratification (Article 61) or accession (Article 62). The following may in any case become parties to the Convention:

1. States which, at the date of the opening of the Convention for signature, are members either of the European Communities or of EFTA;

2. States which, after that date, become members of one or other of the two organizations. In view of the origins of the Convention, this solution was virtually self-evident since neither of the two organizations could remain fixed in time;

3. third States. This was undoubtedly the most delicate question. There are, in addition to Member States of the two organizations, States which share the same fundamental conceptions even though they are not European. As we shall see in the comments on Article 62, provision has been made for fairly strict conditions for the accession of such States to the Convention. In brief, although the Convention reflects a desire for openess, its approach is clearly a cautious one.

(c) Article 61 - Signature, ratification and entry into force

87. According to Article 61, the Lugano Convention shall be opened for signature by those States which were members of one or other of the two organizations on the date - 16 September 1988 - on which it was opened for signature. This was agreed because it was at the diplomatic conference that the final text was drawn up and adopted by the persons empowered to do so by their States. On that date, the Convention was signed by 10 States: for the Community Member States: Belgium, Denmark, Greece, Italy, Luxembourg and Portugal, and for the EFTA Member States: Iceland, Norway, Sweden and Switzerland. The Convention was subsequently signed by Finland on 30 November 1988 and by the Netherlands on 7 February 1989. The Convention may be signed at any subsequent time by the other six States (Federal Republic of Germany, Spain, France, Ireland and the United Kingdom on the one hand and Austria on the other).

88. Pursuant to Article 61 (3), the Convention shall enter into force when it has been ratified by one Community Member State and one Member State of EFTA. Since this is a multilateral Convention, such a method of entry into force might seem somewhat surprising. The intention was deliberately to speed up entry into force of the Lugano Convention. For persons domiciled in a Member State of EFTA, the Convention offers a number of guarantees when they are sued in the courts of a Community Member State. Thus, for example, Article 4 of the Brussels Convention will cease to apply to such persons. Moreover, persons domiciled in a Community Member State will not be able to be sued in the courts of a Member State of EFTA on the basis of exorbitant rules of jurisdiction. Furthermore, ratification procedures can be quite slow and this would delay the entry into force of a multilateral Convention where a certain number of ratifications are required. Examples of this are the 1968 Convention, which only entered into force in 1973, and the 1978 Accession Convention, which only entered into force between the six original Member States and Denmark on 1 October 1986, the United Kingdom on 1 January 1987 and Ireland on 1 June 1988. The Convention on the accession of Greece of 25 October 1982 entered into force on 1 April 1989 with regard to Belgium, Denmark, the Federal Republic of Germany, Greece, France, Ireland, Italy, Luxembourg and the Netherlands and on 1 October 1989 with regard to the United Kingdom. In brief, it is sufficient therefore for one Community Member State and one EFTA Member State to ratify the Lugano Convention in order to bring it into force between those two States as from the first day of the third month following the deposit of the second instrument of ratification.

(d) Articles 62 and 63 - Accession

1. New Member States

89. Those States which, after the opening of the Convention for signature, become members of either the Communities or EFTA may accede to the Convention. Under Article 62 (4), a Contracting State may, however,

consider that it is not bound by such an accession. This clause was adopted in view of the fact that a Member State of one of the two organizations has no say in the accession of new States to the other organization and, for reasons of its own, might feel it cannot have ties with that new State which are as close as those created by the Lugano Convention. This is a safeguard clause which also applies to third States.

2. Third States

90. A cautious attitude to such States is reflected in specific conditions. Firstly, their wish to accede to the Lugano Convention must be 'sponsored' by a Contracting State, i.e. a State which has either ratified the Convention or acceded to it, which will inform the depositary State of the third State's intention. Secondly, the third State will have to inform the depositary State of the contents of any declarations it intends to make in order to apply the Convention and of any details it would like to furnish in order to apply Protocol No 1, and the depositary State will then communicate that information to the other signatory States and States which have acceded. Negotiations may be held on this subject: they may not, in any circumstances, call into question the provisions of the Lugano Convention itself. The device envisaged therefore differs from that in Article 63 of the Brussels Convention, which stipulates that a new Member State of the European Economic Community may ask for 'necessary adjustments' to be the subject of a special convention. This procedure, which was followed notably when drawing up the 1978 Accession Convention, is not therefore applicable in the present case. Thirdly, the States referred to in Article 60 (a) and (b) must, when they have thus been informed of the declarations and details envisaged by the State applying for accession, decide unanimously whether that State should be invited to accede. The States referred to in Article 60 (a) and (b) are either those States which were members of one or other of the two organizations on the date on which the Convention was opened for signature, i.e. 16 September 1988, or States which became members of one or other of the two organizations after that date. The agreement of any third States which have acceded to the Convention is not therefore required. This was agreed because the Convention is essentially a Convention between Community and EFTA Member States and consequently it did not seem advisable to give a third State which has become a party to the Convention the right to veto the accession of another third State. Fourthly, once the decision has been taken to look at the application of a third State, negotiations can be started, either at that State's request or at the request of other States concerned, regarding the details it intends to furnish for the purposes of Protocol No 1. Finally, it should be noted that a last safeguard clause allows any Contracting State (pursuant to paragraph 4) to refuse application of the Convention in its relations with a third State which has acceded to the Convention. This system, which is based on various Conventions drawn up pursuant to The Hague Conference on Private International Law, takes account of the (possibly political) problems which might arise between a Contracting State and a third State.

(e) Territorial application

91. Article 60 of the 1968 Convention and Article 27 of the 1978 Convention deal with the territorial application of those Conventions, limiting it to the European territory of the Contracting States, subject to clearly defined exceptions.

92. In the negotiations leading up to the Lugano Convention it was found that application of the Convention to non-European territories forming an integral part of the national territory of Contracting States or for whose international relations the latter assume responsibility needed to be envisaged on a broader basis. A number of these territories are frequently important financial centres having close relations with Contracting States. Given the speed with which means of communication are developing, assets could be transferred to such territories, and if the Convention could not be applied to them, this would create a situation which would defeat the desired aim, since judgments given in a State which was party to the Convention could not be enforced in such territories under these provisions.

93. It was agreed at the diplomatic conference that it would be better if, like many other international conventions, the Convention contained no provision on territorial application. The limitation to European territories laid gown in principle in the 1968 and 1978 Conventions is thus not included in the Lugano Convention.

94. However, it was clear from the negotiations that in the absence of any specific clause the Lugano Convention applies automatically to: - the entire territory of the Kingdom of Spain, - the entire territory of the Portuguese Republic, - in the case of France: all territories which are an integral part of the French Republic (see Article 71 et seq. of the Constitution), including therefore the French Overseas Departments (Guadeloupe, Martinique, Guiana, Reunion), the Overseas Territories (Polynesia, New Caledonia, Southern and Antartic Territories) and the individual territorial collectivities (Saint Pierre and Miquelon, Mayotte).

95. The situation is slightly different where Denmark and the Netherlands are concerned. Denmark: With a view to ratification of the Lugano Convention, Denmark made known its wish to reserve the right to extend the scope of the Convention at a later stage to the Faroe Islands and Greenland which are part of the Kingdom of Denmark but enjoy autonomy in their internal affairs (Law No 137 of 23 March 1948 for the Faroe Islands and No 577 of 29 November 1978 for Greenland) and which must be consulted on draft laws affecting their territories. In the light of the outcome of such consultations, Denmark will be able to state, in a declaration to be addressed at any time to the depositary State, what the situation is with respect to the application of the Convention to these territories. The Netherlands: Since 1 January 1986, the Kingdom of the Netherlands consists of three countries, namely: the Netherlands, the Netherlands Antilles (the islands of Bonaire, Curacao, Sint Marten (Netherlands part of the island), Sint Eustatius and Saba) and Aruba. Following the necessary consultations, the Netherlands, just like Denmark in the case of the Faroe Islands and Greenland, will be able to state in a declaration which may be addressed at any time to the depositary State, what the situation is with respect to the application of the Convention to the Netherlands Antilles and to Aruba.

96. On the other hand, other Contracting States (the United Kingdom and Portugal in the case of Macao and Timor-Leste) comprise entities which are separate from the metropolitan territory. International agreements cannot be concluded on behalf of these entities other than by the United Kingdom and Portugal. United Kingdom: During the negotiations, the United Kingdom, like the other States, provided a full list of non-European

territories for whose international relations it is responsible [FN 8]. For the European territories, see Schlosser report, paragraph 252. This list of non-European territories is included in the acts of the diplomatic conference. The United Kingdom also gave an indication of the territories to which it might consider making the Convention actually apply. It was agreed that provision of such information did not imply any binding obligation that other extensions could not be made, but the information provided was intended to assist the other States in assessing the practical consequences for them of an extension of the application of the Convention. For this purpose, the United Kingdom indicated that, of its non-European territories, Anguilla, Bermuda, British Virgin Islands, Montserrat, Turks and Caicos Islands and Hong Kong were ones to which there might be a real prospect of the Convention being extended. Portugal: The question of extending the Convention to Macao and Timor-Leste has not yet been settled.

(f) Territories which become independent

97. The question of what would happen regarding application of the Lugano Convention to territories gaining independence was also considered. The Convention contains no provisions on this subject. Such a clause is not usual in international Conventions. On the other hand, this is a familiar problem in public international law and it is generally accepted that, if a country gains independence, any Contracting State is free to decide whether or not it is bound by the Convention in question in respect of the new State and vice versa (on this point, see Schlosser report, paragraph 254). In any event, a State which has become independent may, if it wishes to become a party to the Lugano Convention, make use of the accession procedure provided for third States in Article 62 of the Lugano Convention (see point 90).

CHAPTER IV
PROTOCOLS

98. Under Article 65, the three supplementary Protocols form an integral part of the Convention.

PROTOCOL 1 ON CERTAIN QUESTIONS OF JURISDICTION, PROCEDURE AND ENFORCEMENT

1. Introductory remarks

99. This Protocol corresponds to the Protocol annexed to the Brussels Convention. The provisions contained in Articles I, II, III and Vd of that Protocol are reproduced unmodified in Protocol 1 to the Lugano Convention. The provisions contained in Article Vc of the Protocol annexed to the Brussels Convention are not reproduced in this Protocol. Those provisions were inserted into the Protocol annexed to the Brussels Convention only to make it clear that the concept of 'residence' in the English text of the Convention for the European patent for the common market, signed at Luxembourg on 15 December 1975, should be deemed to have the same scope as the concept of 'domicile' in the Brussels Convention. Such provisions were, however, redundant in the Lugano Convention. The other provisions of the Protocol annexed to the Brussels Convention are reproduced in this Protocol with minor amendments most of which are due to the law in force in various EFTA Member States. Furthermore, the Protocol contains two Articles (Ia and Ib) which have no

equivalent in the Protocol annexed to the Brussels Convention.

2. Article Ia - Swiss reservation

100. This Article contains a reservation asked for by Switzerland. It provides that Switzerland may declare, at the time of depositing its instrument of ratification, that a judgment given in another Contracting State shall neither be recognized nor enforced in Switzerland if the jurisdiction of the court which has given the judgment is based only on Article 5 (1) (place of performance of contract) of the Lugano Convention and if certain other conditions are met. As this head of jurisdiction is regarded by many States as the most commercially significant of all the special bases of jurisdiction in the Lugano Convention, the terms of this part of Protocol No 1 were the subject of close discussion. For Switzerland the need for a reservation arose from the provisions of Article 59 of the Swiss Federal Constitution [FN 9] which reserves the right for a person of Swiss domicile, whatever his nationality, to be sued over a contract in the courts of his domicile. Whilst some exceptions existed to this general principle, it became clear that a provision such as Article 5 (1) of the Convention could involve a conflict with the constitutional rule in Switzerland and make Swiss participation in the Convention impossible. The compromise reached limits the effect of the reservation to the minimum necessary.

101. In the first place, any reservation will only apply if the defendant was domiciled in Switzerland at the time of the introduction of the proceedings. In the application of the reservation the question of domicile will be determined and acknowledged in accordance with the general principles and rules of the Convention. However, a company or other legal person is considered to be domiciled in Switzerland only if it has its registered seat and the effective centre of activities in Switzerland. The reservation will thus not apply if the effective centre of activities of a company or other legal person is outside Switzerland even if the company or other legal person has its registered seat in Switzerland. Furthermore, the reservation will never apply unless the company or legal person concerned has its registered seat in Switzerland. Secondly, recognition and enforcement may only be refused under the reservation if the jurisdiction of the court which has given the judgment was based solely on Article 5 (1). If, for example, a defendant domiciled in Switzerland were to submit to the jurisdiction in the other Contracting State the reservation would not apply, because in that event jurisdiction would not have been based solely on Article 5 (1), but also on Article 18. Equally, the reservation will not apply if the jurisdiction of the original court is based on an agreement to confer jurisdiction over contractual disputes, since in that case jurisdiction would have been derived from Article 17. Thirdly, the reservation will not apply unless the defendant raises an objection to the recognition and enforcement of the judgment in Switzerland. The objection must be raised in good faith. It was explained by the Swiss delegation that it was entirely possible under Swiss law for the defendant to waive the protection available under Article 59 of the Constitution and that this waiver could validly be made at any time. Thus this waiver can be made even before Switzerland has made any declaration. This is reflected in the text of the Article by the words 'the declaration foreseen under this paragraph'. It will therefore be possible for persons contracting with persons enjoying Swiss domicile to stipulate a waiver of the protection provided for in Article 59 of the Swiss Federal Constitution which would otherwise be available. An agreement between the parties on the waiver of

such protection could be made orally or in writing as long as there is sufficient proof that the waiver has been made. In the event that such an agreement has been made, or if the Swiss court is otherwise satisfied as a matter of fact that the defendant has waived his rights, then recognition and enforcement will not be refused in Switzerland even if a reservation has been made. Fourthly, the reservation will not apply to contracts in respect of which, at the time recognition and enforcement is sought, a derogation has been granted from Article 59 of the Swiss Federal Constitution. The Swiss Government is obliged to communicate such derogations to the signatory States and the acceding States. Fifthly, the Swiss delegation has declared that a reservation envisaged in this Article will not apply to contracts of employment. Thus Switzerland will in no event refuse the recognition or enforcement of a judgment given in a matter relating to an individual contract of employment on the ground that the jurisdiction of the court which has given the judgment is based only on the second part of Article 5 (1) of the Convention. Finally, any declaration made by Switzerland under this Article is to expire on a fixed date, i.e. on 31 December 1999. If, by that time, the Swiss Federal Constitution has ot been amended so as to remove the constitutional difficulty, one possibility would be for Switzerland to consider denouncing the Convention, and become a party to it again when the constitutional difficulty has been removed.

102. If Switzerland makes the reservation provided for in this Article it will be open to other Contracting States to reciprocate the effect of that reservation by refusing to enforce judgments originating in Switzerland if the jurisdiction of the Swiss court is based solely on Article 5 (1) of the Convention and if conditions corresponding to those mentioned in Article Ia of the Protocol are fulfilled. By reason of the difference in constitutional systems, a reciprocity clause was not inserted in the Protocol. The result is that the matter of reciprocity will be left to the normal rules of public international law. In view of the fact that such rules may be incorporated differently into national law, solutions to the question of reciprocity may vary from country to country. In countries applying the 'dualist' system the question of reciprocity will be dealt with at a legislative level, thus settling the question of reciprocity in a general manner. In those countries where the 'monist' system exists it is for the courts or other authorities to decide on the question of reciprocity. For instance in France, where the 'monist' system exists, a treaty, according to the French constitution, has a higher level than law provided that the treaty is applied in a reciprocal manner. If the question of whether a treaty is applied in a reciprocal manner is raised before a court and the answer is not clear, the judge will submit the question to the Ministry of Foreign Affairs which is competent for the interpretation of treaties. As far as the aspect of application of Article 7 of the Treaty establishing the European Economic Community is concerned (non-discrimination on grounds of nationality), the judge in a Community Member State can, if the question arises before him, submit it to the Court of Justice of the European Communities for a preliminary ruling under Article 177 of the EEC Treaty. From the discussions it is apparent that certain States will not reciprocate. 3. Article Ib - Reservation on tenancies

103. This Article provides that any Contracting State may, by a declaration made at the time of signing or deposit of its instrument of ratification or accession, reserve the right not to recognize and enforce judgments given in other Contracting States if the jurisdiction of the court of origin is based, pursuant to Article 16 (1) (b), exclusively on

the domicile of the defendant in the State of origin. This provision has been commented on above (see point 53). 4. Article IV - Judicial and extra-judicial documents

104. This Article reproduces Article IV of the Protocol annexed to the Brussels Convention. The declaration referred to in paragraph 2 of this Article will, however, not be made to the Secretary-General of the Council of the European Communities but to the depositary of the Lugano Convention. 5. Article V - Actions on a warranty or guarantee

105. Under Austrian, Spanish and Swiss law, as under German law, the function performed by an action on a warranty or guarantee or any other third party proceedings is fulfilled by means of third-party notices. A rule analogous to that contained in Article V of the Protocol annexed to the Brussels Convention (see Jenard report, page 27, comments on Article 6 (2)) has accordingly been applied to Austria, Spain and Switzerland in this Article. Unlike the case of Austria, the Federal Republic of Germany and Spain, it has not been possible to refer to a single legislative source in Swiss law. Provisions on third-party notices are to be found both in the federal law of civil procedure and in the 26 cantonal codes of civil procedure. Third party intervention in proceedings is not governed by explicit rules in the Spanish legal system and the want of proper procedures is the source of procedural uncertainty. This legal hiatus has been severely citicized in the works of legal experts, who have recommended that it be remedied in the near future. However, this has not prevented acceptance of third party proceedings in some fields of jurisprudence or in civil laws governing certain specific cases, e.g. Article 124 (3) of Law No 11 of 20 March 1986 on patents and Article 1482 [FN 10] of the Civil Code, regarding eviction. Generally speaking, it is the latter rule which is applicable in cases of non-voluntary third party proceedings; in the negotiations between the Member States of the European Communities and those of the European Free Trade Association, it was therefore judged advisable to include it in Article V of Protocol No 1. Article 1482 is referred to, albeit indirectly, in Article 638 (gift), 1145 (joint and several obligations), 1529 (assignment of claims), 1540 (exchange), 1553 (tenancy), 1681 (obligations of partners), 1830 (surety), 1831 (co-surety), etc. of the Civil Code. 6. Article Va - Jurisdiction of administrative authorities

106. In Iceland and Norway administrative authorities are, as in Denmark, competent in matters relating to maintenance. Thus Iceland and Norway have been included in this Article in addition to Denmark.

107. In Finland, for historical reasons the 'ulosotonhaltija/overexekutor' (regional chief enforcement authority) is competent for protective measures referred to in Article 24 of the Lugano Convention. Furthermore, a documentary procedure for collecting debts based on a promissory note or a similar document, as well as some other summary proceedings e.g. eviction, take place before that authority. These proceedings are an optional alternative to court proceedings. The 'ulosotonhaitija/overexekutor' is clearly not a court but an administrative authority, which in the aforementioned cases plays a judicial role. The abolition of the ulosotonhaltija/overexekutor' is envisaged and its functions as far as civil and commercial matters are concerned will be transferred to the courts. In order to avoid any imbalance a second paragraph has been inserted in this Article according to which the expression 'court' in civil and commercial matters includes the Finnish 'ulosotonhaltija/overexekutor'. 7. Article Vb - Dispute

between the master and a member of a ship's crew

108. Following specific requests from the Icelandic, Norwegian, Portuguese and Swedish delegations, Iceland, Norway, Portugal and Sweden have been included in this Article. 8. Article VI - Amendment of national legislation

109. This Article reproduces Article VI of the Protocol annexed to the Brussels Convention. The communication provided for in this Article will, however, not be made to the Secretary-General of the Council of the European Communities but to the depositary of the Lugano Convention.

PROTOCOL 2 ON THE UNIFORM INTERPRETATION OF THE CONVENTION

1. Introductory remarks

110. Without uniform interpretation, the unifying force of the Lugano Convention would be considerably reduced. In addition, a considerable number, if not the majority, of its provisions are reproduced from the Brussels Convention, which posed a further problem. As we know, in order to avoid such differences of interpretation, the Community Member States concluded a Protocol on 3 June 1971 giving jurisdiction to the Court of Justice of the European Communities to rule on the interpretation of the Brussels Convention. When applying that Convention, the courts of the Community Member States must comply with the interpretation given by the Court of Justice. However, the Court of Justice could not be assigned jurisdiction to interpret the Lugano Convention which is not a source of Community law. Furthermore, the EFTA Member States could not have accepted a solution according to which an institution of the Communities would, as a court of last resort, rule on the Lugano Convention. Nor was it conceivable to assign such jurisdiction to any other international court or to create a new court since, inter alia, the Court of Justice of the European Communities already had jurisdiction under the 1971 Protocol to rule on the interpretation of the Brussels Convention and conflicts of jurisdiction between international courts had at all events to be avoided.

111. The solution adopted to resolve this somewhat complex situation (i.e. ensuring uniform interpretation of the Lugano Convention while taking account of the powers of the Court of Justice of the European Communities as regards the interpretation of the Brussels Convention, many of the provisions of which were reproduced in the Lugano Convention) is based on the principle of consultation and not on judicial hierarchy. It was thus agreed that judgments delivered pursuant to the Lugano Convention or the Brussels Convention are to be communicated through a central body to each signatory State and acceding State and that meetings of representatives appointed by each such State are to be convened to exchange views on the functioning of the Convention. As regards legal technique, it was decided that the provisions aiming at uniform interpretation should be included in a Protocol annexed to the Convention, the provisions of which would form an integral part thereof. It was furthermore agreed that two Declarations would be annexed to the Protocol. One of these Declarations was to be signed by the representatives of the Governments of the States signatories to the Lugano Convention which were members of the European Communities and the other by the representatives of the Governments of the States signatories to the Lugano Convention which were members of EFTA.

2. Preamble

112. The first recital in the preamble makes reference to Article 65 of the Lugano Convention. According to this Article, a Protocol 2 on the uniform interpretation of the Convention by the courts will form an integral part of the Convention. The second recital refers to the substantial link between the Lugano Convention and the Brussels Convention. As has already been mentioned, the Court of Justice of the European Communities has, under the Protocol of 3 June 1971, been entrusted with jurisdiction to give rulings on the interpretation of the provisions of the Brussels Convention. A starting point for the negotiations for the conclusion of the Lugano Convention was that those provisions of the Brussels Convention which were to be substantially reproduced in the Lugano Convention should be understood in the light of these rulings given up to the date of opening for signature of the latter Convention. The working party which drafted the Convention was aware of all those rulings delivered up to that date. The intention was to arrive at as uniform as possible an interpretation where the provisions in question were identical in the two Conventions. On the other hand, insofar as a provision of the Brussels Convention as interpreted by the Court of Justice of the European Communities, e.g. Article 16 (1), was found not to be acceptable, it was not reproduced unmodified in the Convention (for judgments of the Court of Justice, see Chapter VI). The third, fourth and fifth recitals were included in the Preamble in order to stress the relevance of the rulings on the interpretation of the Brussels Convention given by the Court of Justice of the European Communities up to the time of the signature of the Lugano Convention. The sixth recital confirms the wish of the Contracting States to prevent, in full deference to the independence of the courts, divergent interpretations. 3. Article 1

113. This Article relates only to decisions concerning provisions of the Lugano Convention. It provides that the courts of each Contracting Party shall, when applying and interpreting that Convention, pay due account to the principles laid down by any relevant decision delivered by courts of the other Contracting Parties concerning provisions of the Lugano Convention. The expression 'any relevant decision' means in this Article those decisions delivered by courts of the Contracting Parties which according to Article 2 (1), first indent, have been transmitted to a central body, i.e. judgments delivered by courts of last instance and other judgments of particular importance which have become final.

114. This Article does not explicitly refer to decisions concerning the application and interpretation of those provisions of the Brussels Convention which are substantially reproduced in the Lugano Convention. It must be remembered that the courts of the Community Member States are the only courts required to apply the Brussels Convention and that when they interpret provisions of that Convention, they must respect the judgments of the Court of Justice. The Community Member States were, however, not in a position to commit the Court of Justice, a separate institution, to pay due regard to judgments of national courts in EFTA Member States. For their part, the representatives of the EFTA Member States thought that it would not be entirely fair to include a provision in the Protocol which expressly stipulated that the courts of these States had to take account not only of the decisions given by the courts of the other Contracting States but also of the judgments of the Court of Justice of the European Communities, while the latter would not be subject to any undertaking as regards the interpretation of the

provisions of the Brussels Convention which were reproduced in the Lugano Convention.

115. It was, however, recognized that the courts of the Community Member States, when interpreting provisions of the Lugano Convention which are reproduced from the Brussels Convention, would understand those provisions in the same way as the identical provisions of the Brussels Convention and in accordance with the interpretations given in the rulings of the Court of Justice of the European Communities. It was therefore essential, in order to ensure as uniform an interpretation as possible of the Lugano Convention, that the courts of he EFTA Member States apply it in the same way as the courts of the Community Member States. But it was equally necessary for the Court of Justice, when interpreting provisions of the Brussels Convention which were reproduced in the Lugano Convention to pay due account in particular to the case law of the courts of the EFTA Member States.

116. In order to achieve this twofold objective two Declarations accompany the Convention. In one of them the representatives of the Governments of the States signatories to the Lugano Convention which are members of the Communities declare that they consider as appropriate that the Court of Justice, when interpreting the Brussels Convention, pay due account to the rulings contained in the case law of the Lugano Convention. In the other, the representatives of the EFTA States declare that they consider as appropriate that their courts, when interpreting the Lugano Convention, pay due account to the rulings contained in the case law of the Court of Justice of the European Communities and of the courts of the Member States of the European Communities in respect of provisions of the Brussels Convention which are substantially reproduced in the Lugano Convention. At the request of the representatives of the EFTA States, a list and the contents of the judgments delivered by the Court of Justice when interpreting the 1968 Convention is given in this report (see Chapter VI).

4. Article 2

117. As we have already said, it was agreed that a uniform interpretation of the common provisions of the Lugano and Brussels Conventions would be achieved by means of information and consultation. According to the first paragraph of this Article the Contracting States agree to set up a system of exchange of information concerning judgments delivered pursuant to the Lugano Convention as well as relevant judgments under the Brussels Convention. The expression 'relevant judgments' means, in this context, those judgments delivered pursuant to the Brussels Convention which are relevant for the interpretation of the Lugano Convention as well. This system of exchange of information comprises:

- transmission to a central body by the competent national authorities of judgments delivered pursuant to the Lugano Convention or the Brussels Convention,

- classification of these judgments by the central body including, as far as necessary, the drawing up and publication of translations and abstracts, - communication by the central body of the relevant documents to the competent national authorities of all signatories and acceding States to the Lugano Convention and to the Commission of the European Communities. The abovementioned central body will, according to paragraph 2 of this Article, be the Registrar of the Court of Justice of the

European Communities. The Registrar has signified his agreement to this, provided that the detailed arrangements for the system of exchange of information, and in particular the question of the translation of judgments not drawn up in an official language of the Communities, are worked out with the Court after the Diplomatic Conference and that the department of the Court receive the necessary aid and budgetary support. The competent national authorities referred to in the first and third indent of paragraph 1 of this Article are to be designated by each Member State concerned. This system of exchange of information will, however, not include every judgment delivered by a national court pursuant to the Lugano Convention or every relevant judgment delivered pursuant to the Brussels Convention. For the purposes of the objective which the Protocol is aiming at it will suffice that judgments delivered by courts of last instance and the Court of Justice as well as judgments of other courts which are of particular importance and have become final are transmitted to the central body referred to in this Article (paragraph 1 first indent). Only those judgments will thus be classified by the central body and communicated pursuant to the third indent of paragraph 1 of this Article. To the extent that the communication of documentation implies publication of translations and abstracts by the central body, it was agreed that such publication, in the interests of economy, could take a simplified form.

5. Article 3

118. In order to ensure a uniform interpretation of the common provisions of the Lugano and Brussels Conventions, it was deemed necessary that representatives appointed by each signatory or acceding State meet to exchange views on the functioning of the Lugano Convention. To this end Article 3 provides that a Standing Committee composed of representatives appointed by each signatory or acceding State shall be set up. This Standing Committee is not intended to be a bureaucratic body but rather a forum where national experts could exchange their views on the functioning of the Convention and in particular on the case law as it develops in the various Contracting States, with the aim of fostering in that manner, as far as possible, uniformity in the interpretation of the Convention. No regular meetings of the Committee are provided for in the Protocol. Meetings of the Committee will, according to Article 4 (1) of the Protocol, be convened only at the request of a Contracting Party. In this context it deserves to be emphasized that not only States which have already become parties to the Convention (either by ratifying it or by acceding to it), but also States which have signed the Convention but not yet become parties to it may appoint their representatives as members of the Standing Committee. This solution was adopted since a distinction between signatory and Contracting States would suggest that certain States might sign the Lugano Convention without any intention of ratifying it. Divergent views were expressed as to whether the Standing Committee should be composed of judges or civil servants. It was decided that it would be for each State to appoint its representatives on the Committee. Thus, it may well be that certain States will appoint judges whereas other States may appoint civil servants or others. It goes without saying that each State is free to decide how and for which period of time anyone is appointed to represent it on the Committee. Because of the links between the Lugano Convention and the Brussels Convention, paragraph 3 of this Article provides that representatives of the European Communities (i.e. of the Commission, the Court of Justice and the General Secretariat of the Council) and of EFTA may attend the meetings of the Committee as observers. If necessary, it will be for the Committee to

establish its own rules of procedure.

6. Article 4

119. The provisions of paragraph 1 of this Article concern the convocation and the tasks of the Standing Committee. As already mentioned, the meetings of the Committee will be convened at the request of a Contracting Party for the purpose of exchanging views on the functioning of the Convention. In this context it deserves to be emphasized that a meeting of the Committee cannot be convened at the request of a State which has only signed the Convention but not yet become a party to it, even though the Committee, according to Article 3 (2), will be composed of representatives appointed by each signatory State or acceding State. The task of convening the Committee has been entrusted to the depositary of the Convention. There are no limitations as to the questions relating to the functioning of the Convention which oblige the depositary to convene meetings of the Committee at the request of a Contracting Party. In view of the purpose of the Protocol, Article 4 provides that meetings of the Committee will be convened for the purpose of exchanging views in particular on the development of the case law as communicated under the first indent of Article 2 (1). The purpose of this provision is not, however, to invest the Committee with the role of a higher body which would assess the judgments given by national courts. It is rather a body, which, by examining such judgments, would identify divergences of interpretation and, as far as possible, foster uniformity in the interpretation of the Convention. Article 57 (1) of the Convention provides that it will not affect any conventions to which the Contracting States are or will be parties and which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments. According to Protocol No 3, provisions which govern jurisdiction or the recognition or enforcement of judgments and which are or will be contained in acts of the institutions of the European Communities will be treated in the same way as conventions referred to in Article 57 (1). Provisions which in relation to particular matters govern jurisdiction may, irrespective of whether such provisions are contained in a convention or in a Community act, amount to a change of the rules of jurisdiction contained in the Convention without the agreement of all the Contracting Parties. Therefore paragraph 1 of this Article further provides that meetings of the Committee will be convened for exchanging views on the application of Article 57 of the Convention. Paragraph 2 of Protocol No 3 on Community acts makes provision for a similar procedure. Thus the Committee will provide a forum where views can be exchanged inter alia on the provisions governing jurisdiction in particular matters adopted or envisaged in Community acts. In the light of these exchanges of views it may appear that an amendment of the Convention would be appropriate. This may be the case if the Committee, when examining the case law communicated under Article 2, were to identify divergences of interpretation arising from a lack of clarity in one or more of the provisions of the Convention. Therefore, paragraph 2 of the Article provides that the Committee may also examine the appropriateness of starting on particular topics a revision of the Convention and make recommendations. This power of the Committee should not be confused with the right for any Contracting State under Article 66 of the Convention to request the revision of the Convention. The powers and procedures in that Article differ radically from those provided for in Article 4 (2) of the Protocol. A recommendation made by the Committee is thus not to be assimilated with a request by a Contracting State under Article 67 of the Convention for a revision conference. Only a Contracting State but not

the Committee may request the depositary of the Convention to convene a revision conference. Neither is a recommendation of the Committee a prerequisite for the right of a Contracting State to request the revision of the Convention.

PROTOCOL 3 ON THE APPLICATION OF ARTICLE 57

120. This Protocol is in response to the problems which might arise from any provisions on jurisdiction and the recognition and enforcement of judgments appearing in Community acts.

1. Concern of the States party to the Lugano Convention 121. The entirely justified concern of both Community and EFTA Member States has been vigorously expressed in regard to Community acts. Why is this?

(a) For the Community Member States, it is because they have, in a manner of speaking, a dual personality. They are sovereign States. But they are also members of the Communities and are thus bound, by virtue of this latter point, to comply with the obligations to which they have subscribed under the Treaties establishing the European Communities (ECSC, EEC and Euratom). Under those Treaties, it is the Council which is competent to adopt Regulations and Directives which in specific matters may possibly concern jurisdiction and the recognition and enforcement of judgments, according to the requirements of those Communities [FN 11]. The concern of these States was threefold:
- the need to comply with the obligations they have entered into by becoming party to the Treaties establishing the Communities,

- the need to avoid hampering any development taking place in the context of the Treaties and relating to the powers of the Community institutions,

- the need to respect the commitments entered into by the Lugano Convention vis-a-vis the EFTA Member States.

(b) For the EFTA Member States, because they feared that the guarantees offered them by the Lugano Convention regarding jurisdiction and the recognition and enforcement of judgments could, in certain areas, be practically wiped out by a Community act. In particular, the representatives of the EFTA Member States voiced the fear that the protection guaranteed by the Lugano Convention, particularly by Article 3, to defendants domiciled in an EFTA Member State might be undermined by a Community act. Such defendants might thus be treated differently from defendants domiciled in a Community Member State, or even be put in the same situation as defendants domiciled in third States. For example, for the representatives of these States it was inconceivable to accept that it should be possible for a person domiciled in the territory of an EFTA Member State (e.g. Norway) to be required to appear before the courts of a Member State of the Communities (such as France) on the basis of a Community act which they had played no part in drawing up and on the basis of a criterion of jurisdiction not provided for in the Lugano Convention. In any event, for these States, it was unacceptable that it should be possible for a judgment delivered on the basis of such a rule of jurisdiction to be recognized and enforced in their territory under the Lugano Convention. These fears would seem to be as well-founded as those of the Member States of the Communities. In short, for the EFTA Member States, the inclusion of rules of jurisdiction and of recognition and enforcement of judgments in Community acts could, in the absence of

any correcting mechanism, be regarded as empowering the Community Member States to amend the Lugano Convention unilaterally. 2. Response to this concern

122. The question for the authors of the Convention was how to respond to these various concerns, all equally justified, and to work out a solution that could be accepted by all the Contracting Parties. We shall try and answer two questions, the problem having been resolved: Why was it possible to solve the problem? How was it solved? It was possible to respond to this concern because there existed on both sides a conviction or, one might prefer to say, a deep awareness that despite its difficulties the problem posed could and had to be resolved, in accordance with the principles of public international law, because of the fundamental objectives of the Lugano Convention, i.e. the granting of guarantees to a defendant domiciled in the territory of a Contracting State and the free movement of judgments. In addition, it emerged during the discussions that despite its theoretical aspect the problem had only a very relative impact in practice; thus the Member States of the Communities stressed the fact that in 30 years no Community act containing provisions on jurisdiction had been adopted. It should however be noted that a draft Regulation on the Community trade mark containing such jurisdiction rules is currently in preparation. Also, some Community Member States made it clear that for practical reasons they were not in favour of Community acts including provisions relating to jurisdiction and to the recognition and enforcement of judgments. For these States, the issue had to be settled by the Brussels Convention, even if that meant its being revised, amended or supplemented, since for the practitioner (lawyers, judges, and others) this Convention constituted a Community code which was becoming well known. If these provisions were scattered throughout numerous Community instruments it would weaken the scope of this code and make it more difficult to apply. These States were well aware of the importance that Community acts might have in this matter and they considered that any resort to these instruments, in the areas in question, should continue to be entirely exceptional.

3. Solution adopted

123. How was the problem resolved? The solution is to be found in Protocol 3 and in the Declaration by the Member States of the Communities which supplements it. What is involved in this solution that has given satisfaction to both sides? Protocol 3 and the Declaration supplementing it form a whole.

(a) Protocol 3

124. In paragraph 1, for the purposes of the Lugano Convention, Protocol No 3 treats Community acts in the same way as the conventions which have been concluded on particular matters and whose effect on the Lugano Convention is determined by Article 57 of the Convention (see points 79 to 83). In the view of the representatives of the Community Member States, there is no difference, except as regards the way they were drawn up, between these two types of instrument. They pointed out that if the EFTA Member States were willing to entertain the possibility for the States party to the Lugano Convention of the rules of that Convention being amended by conventions concluded in particular areas (transport, etc.) they could also agree to the Community amending the Convention by means of Community acts. These representatives also stressed that to be approved a Community act required in principle the agreement of the 12

Member States, whereas a convention on a particular matter, whose rules could depart from those of the Lugano Convention, could be concluded between two States only. In their view, there was accordingly no substantive difference between the two types of instrument: conventions on particular matters and Community acts. The representatives of the EFTA Member States were able to accept this view only for the purposes of this Convention and in conjunction with paragraph 2 of Protocol 3 and the Declaration supplementing it (see point 127 below). They also said that their States had no wish to obstruct the Communities' proper and specific demands that they preserve a certain freedom to develop Community law.

125. What are the consequences of paragraph 1 of Protocol 3 which, for the purposes of this Convention, treats Community acts in the same way as conventions concluded on particular matters? It will be possible for a person domiciled in the territory of a Contracting State (such as Switzerland) to be summoned to appear in the territory of another Contracting State belonging to the European Communities (such as Belgium) on the basis of a rule of jurisdiction which is not laid down in the Lugano Convention but results from a Community act (just like a convention on a particular matter). A judgment handed down by a court in a Community Member State - which has jurisdiction by virtue of the Community act which derogates, as regards jurisdiction, from the Lugano Convention - will be recognized and enforced in the other Community Member States. However, recognition and enforcement may be refused under the conditions laid down in Article 57 (4), i.e. in an EFTA Member State where the person against whom recognition or enforcement of the decision is being sought is domiciled, unless such recognition and enforcement are permitted under the law of the State. It should be noted that paragraph 1 of the Protocol refers only to Community acts and not to the legislation of the Community Member States where this has been harmonized pursuant to those acts, in this case by Directives. The assimilation of Community acts to conventions concluded on particular matters can only refer to an act which is equivalent to such a convention and cannot therefore extend to national legislation. Moreover, if a national legislation, departing from a Directive, were to introduce rules of jurisdiction derogating from the Lugano Convention, the situation would be different, i.e. it would be a question of the responsibility of the State which had taken such measures. As explained above, the representatives of the EFTA Member States were able to agree to Community acts being treated in the same way as conventions concluded on particular matters only subject to a Declaration by the Community Member States that they will comply with the rules on jurisdiction and recognition and enforcement of judgments established by the Lugano Convention (for comments on that Declaration, see point 127 below).

126. Paragraph 2 of Protocol 3 refers to the case where, notwithstanding the precautions taken, in the view of one of the Contracting Parties, a provision of a Community act is not compatible with the Lugano Convention. For example, this is the situation that might arise if the Community act provided for the jurisdiction of the court of the plaintiff's domicile vis-a-vis a defendant who was domiciled outside the Community and therefore in an EFTA Member State. Paragraph 2 has the effect of a pactum de negotiando. If one of the Contracting Parties considers there is incompatibility between the Community act and the Lugano Convention, negotiations will be initiated to amend, if necessary, the Lugano Convention. To this end the review procedure provided for in Article 66 of the Lugano Convention will apply without prejudice to the possibility of a meeting of the Standing Committee set up by Article 3 of

Protocol 2 being convened to hear this request in accordance with Article 4 of that Protocol. Negotiations will have to begin immediately to establish rapidly whether or not there is any need to amend the Lugano Convention. Paragraph 2 contains only an undertaking to contemplate an amendment rather than actually to amend the Convention. Moreover, paragraph 2 of protocol 3 does not contain any undertaking, nor could it, to contemplate an amendment to a Community act. Such negotiations would lie outside relations between the States party to the Convention and should be undertaken with the Community institutions, as Community acts fall within the competence of the latter. It should be noted that the procedure laid down in paragraph 2 could be instigated equally well by a Community Member State or by an EFTA Member State. An EFTA Member State will be able in particular to request the amendment of the Lugano Convention to avoid derogating measures being taken through a Community act in respect of persons domiciled in its territory. On the other hand, a Community Member State could have an interest in adapting the Lugano Convention so that judgments delivered in its territory can be recognized and executed in all EFTA Member States, to which Article 57 (4) might prove an obstacle. (b) The Declaration by the Governments of the Member States of the Communities

127. Protocol 3 is accompanied by an important Declaration by the Community Member States. This unilateral Declaration represents an essential element of the solution adopted, the other two being the placing of Community acts on the same footing as conventions on particular matters and the undertaking to negotiate if there is any divergence between a Community act and the Lugano Convention. As we have explained, the Community Member States are caught between two stools. On the one hand, they have to respect the institutional machinery laid down by the Treaties establishing the Communities while on the other they must respect the undertakings they entered into under the Lugano Convention in respect of the EFTA Member States. The Declaration is important because the Community Member States, without forgetting that they belong to the Communities and with due respect for its institutions: (a) take into consideration the undertakings which they have entered into with regard to the EFTA Member States. For those States the Lugano Convention is therefore an instrument to be complied with. On their side there is therefore what was regarded as a 'best efforts' clause aimed at avoiding as far as possible any divergence between the provisions of Community acts and those of the Lugano Convention; (b) indicate their concern not to jeopardize the unity of the legal system established by the Lugano Convention. This is an obvious concern if we consider that the Lugano Convention, through rules based firmly on the Brussels Convention, is intended to guarantee the free movement of judgments among the great majority of West European States, i.e. including judgments delivered by the courts of the Member States of the Communities; (c) the Community Member States consequently undertake, when drafting Community acts, to take all the steps in their power to ensure that the rules contained in the Lugano Convention are complied with, particularly as regards the protection which the Convention gives a defendant domiciled in a Contracting State. The result is that when a Community act is discussed in the Council of the Communities, particular attention will have to be paid by each of the Member States to the rules of the Lugano Convention. To sum up, the Declaration represents a moral and political undertaking, made in good faith by the Community Member States, to keep intact the efforts towards unification which are being made by the Lugano Convention. 4. Conclusion

128. The questions raised by Community acts were amongst the most difficult with which the drafters of the Lugano Convention had to deal. A solution was reached thanks to the constructive will of the representatives of all the States concerned. This compromise solution appears to us to allay the concern shown on both sides. To summarize, it may be said to be a three-storey edifice: (a) it places Community acts on the same footing as conventions on particular matters, which corresponds to the wishes of the Community Member States; (b) the Community Member States have given a unilateral undertaking to make every effort to ensure that the unity of the legal system established by the Lugano Convention is not put in jeopardy, which satisfies the EFTA Member States; (c) as a corrective, there is the undertaking to seek a negotiated solution in the case of a divergence between a Community act and the Lugano Convention. As we have stated, this satisfies both sides. The compromise thus appears to be perfectly balanced.

CHAPTER V DECLARATIONS ANNEXED TO THE CONVENTION

129. The Lugano Convention is supplemented by three Declarations. The first concerns Protocol 3 which relates to Community acts (see points 120 to 128) and the two others Protocol 2 on the uniform interpretation of the Convention (see points 110 to 119).

CHAPTER VI JUDGMENTS OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES CONCERNING THE INTERPRETATION OF THE BRUSSELS CONVENTION OF 27 SEPTEMBER 1968

1. General

130. The Protocol of 3 June l971 confers on the Court of Justice of the European Communities jurisdiction to rule on the interpretation of the Brussels Convention. Article 30 of the Accession Convention of 9 October 1978 (Denmark, Ireland, United Kingdom) provides that the Court of Justice also has jurisdiction to rule on the interpretation of that Convention. Article 10 of the Convention of 25 October 1982 on the accession of Greece contains a similar provision. As at 1 June 1988 the six original Member States of the Communities together with Denmark, Ireland and the United Kingdom are parties to the Protocol. On the scope of the Protocol, reference should be made to the Jenard report (pp. 66 to 70) and the Schlosser report (paragraphs 255 and 256). It should be noted, however, that the Protocol makes provision for two forms of reference: reference for a preliminary ruling and reference in the interests of the law. The latter possibility has not so far been used. Reference for a preliminary ruling means that a national court required to rule on a question of interpretation of the Convention or the Protocol refers the matter to the Court of Justice and stays its proceedings, pending the latter's decision. Since the Protocol came into force on 1 September 1975, nearly 60 judgments have been handed down by the Court (see point 3 below) and a number of cases are currently pending (see point 4 below). As stated in the comments on Protocol 2 (see points 112 and 116), in the negotiations on the Lugano Convention it was agreed that the provisions of the Brussels Convention should be construed as interpreted by the Court of Justice and that the report would mention the various judgments handed down by the Court. This Chapter meets the latter stipulation. The judgments are given not in chronological order but by reference to those Articles of the Brussels Convention, the Protocol annexed thereto and the 1971 Protocol which have been interpreted, since this seems a more convenient arrangement. This Chapter gives only the

operative part of the decision and not, barring exceptions, the grounds. For it is not the purpose of this report to study the judgments of the Court of Justice but merely to indicate how it has interpreted a number of Articles. 2. Content of the judgments [FN 12]

131. (1) Application of the Convention National procedural laws are set aside in the matters governed by the Convention in favour of the provisions thereof (judgment of 13 November 1979 in Case 25/79 Sanicentral v. Collin (1979) ECR 3423-3431).

(2) Article 1, first paragraph: Civil and commercial matters 1. The Court held that the concept of civil and commercial matters must be regarded as autonomous. It ruled that a judgment given in an action between a public authority and a person governed by private law, in which the public authority has acted in the exercise of its powers', is excluded from the area of application of the Convention (judgment of 14 October 1976 in Case 29/76 LTU v. Eurocontrol (1976) ECR 1541-1552). 2. It confirmed its decision in its judgment of 16 December 1980 in Case 814/79 Netherlands State v. Ruffer to the effect that the concept of civil and commercial matters does not include the recovery of the costs incurred by the agent responsible for administering public waterways, in this instance the Netherlands State, in the removal of a wreck pursuant to an international Convention ((1980) ECR 3807-3822). 3. Contracts of employment come within the scope of the Convention (judgment of 13 November 1979 in Case 25/79 Sanicentral v. Collin (1979) ECR 3423-3431).

(3) Article 1, second paragraph (1) (a) Status of persons 1. Judicial decisions authorizing provisional measures in the course of proceedings for divorce do not fall within the scope of the Convention 'if those measures concern or are closely connected with either questions of the status of the persons involved in the divorce proceedings or proprietory legal relations resulting directly from the matrimonial relationship or the dissolution thereof, (judgment of 27 March 1979 in Case 143/78 J. De Cavel v. L. De Cavel (1979) ECR 1055-1068). 2. However, the Convention is applicable, on the one hand, to the enforcement of an interlocutory order made by a French court in divorce proceedings whereby one of the parties to the proceedings is awarded a monthly maintenance allowance and, on the other hand, to an interim compensation payment, payable monthly, awarded to one of the parties by a French divorce judgment pursuant to Article 270 et seq. of the French Civil Code. The Court held that the scope of the Convention extends to maintenance obligations and that the treatment of an ancillary claim is not necessarily linked to that of the principal claim. Ancillary claims come within the scope of the Convention according to the subject matter with which they are concerned and not according to the subject matter involved in the principal claim (judgment of 6 March 1980 in Case 120/79 L. De Cavel v. J. De Cavel (1980) ECR 731). (b) Matrimonial relationships 1. The term 'rights in property arising out of a matrimonial relationship' includes not only property arrangements specifically and exclusively envisaged by certain national legal systems in the case of marriage but also any proprietory relationships resulting directly from the matrimonial relationship or the dissolution thereof (judgment of 27 March 1979 in Case 143/78 J. De Cavel v. L. De Cavel (1979) ECR 1055-1068). 2. An application for provisional measures to secure the delivery up of a document in order to prevent it from being used as evidence in an action concerning a husband's management of his wife's property does not fall within the scope of the Convention if such management is closely connected with the proprietary relationship resulting directly from the marriage bond (judgment of 31 March 1982 in

Case 25/81 C. H. W. v. G. J. H. (1982) ECR 1189-1205). (2) Bankruptcy A decision such as that of a French civil court based on Article 99 of the French Law of 13 July 1967, ordering the de facto manager of a legal person to pay a certain sum into the assets of a company must be considered as given in the context of bankruptcy or analogous proceedings (judgment of 22 February 1979 in Case 133/78 Gourdain v. Nadler (1979) ECR 733-746).

(4) Article 5 (1): Contractual matters 1. The place of performance of the obligation in question is to be determined in accordance with the law which governs the obligations in question according to the rules of conflict of laws of the court before which the matter is brought (judgment of 6 October 1978 in Case 12/76 Tessili v. Dunlop (1976) ECR 1473-1487). 2 If the place of performance of a contractual obligation has been specified by the parties in a clause which is valid according to the national law applicable to the contract, the court for that place has jurisdiction to take cognizance of disputes relating to that obligation under Article 5 (1), irrespective of whether the formal conditions provided for under Article 17 have been observed (judgment of 17 January 1980 in Case 56/79 Zelger v. Salinitri (1980) ECR 89-98). 3. The word 'obligation' contained in Article 5 (1) refers to the contractual obligation forming the basis of the legal proceedings, namely the obligation of the grantor in the case of an exclusive sales contract (judgment of 6 October 1976 in Case 14/76 De Bloos v. Bouyer). 4. The plaintiff may invoke the jurisdiction of the courts of the place of performance in accordance with Article 5 (1) of the Convention even when the existence of the contract is in dispute between the parties (judgment of 4 March 1982 in Case 38/81 Effer v. Kantner (1982) ECR 825-836). 5. The obligation to be taken into account for the purposes of the application of Article 5 (1) of the Convention in the case of claims based on different obligations arising under a contract of employment as a representative binding a worker to an undertaking is the obligation which characterizes the contract, i.e. that of the place where the work is carried out (judgment of 26 May 1982 in Case 133/82 Ivenel v. Schwab (1982) ECR 1891-1902). 6. The concept of matters relating to a contract is an autonomous concept. Obligations in regard to the payment of a sum of money which have their basis in the relationship existing between an association and its members by virtue of membership are 'matters relating to a contract', whether the obligations in question arise simply from the act of becoming a member or from decisions made by organs of the association (judgment of 22 March 1983 in Case 34/82 Peters v. Znav (1983) ECR 987-1004). 7. For the purpose of determining the place of performance within the meaning of Article 5 (1), the obligation to be taken into consideration in an action for the recovery of fees, commenced by an architect commissioned to prepare plans for the building of houses, is the contractual obligation actually forming the basis of the legal proceedings. In the case in point that obligation consists of a debt for a sum of money payable at the defendant's permanent address. The place of payment is determined by the law applicable to the contract (judgment of 15 January 1987 in Case 266/85 Shenavai v. Kreischer, OJ No C 39, 17. 2. 1987, p. 3). 8. (a) On the question of whether a claim for compensation for sudden and premature termination of an agreement was a matter relating to a contract or to quasi-delict, the Court of Justice replied that 'proceedings relating to the wrongful repudiation of an independent commercial agency agreement and the payment of commission due under such an agreement are proceedings in matters relating to a contract within the meaning of Article 5 of the Brussels Convention'. (b) It repeated that matters relating to a contract should be regarded as an 'autonomous'

concept (judgment of 22 March 1983 in Case 34/82 Peters v. Znav). (c) Compensation for wrongful repudiation of an agreement is based on failure to comply with a contractual obligation. (d) Lastly, the Court referred to the Rome Convention of 19 June 1980 on the law applicable to contractual obligations, which includes (Article 10) within the field of the law applicable to a contract the consequences of total or partial non-performance of the obligations arising from it and hence the contractual liability of he party responsible for non-performance (judgment of 8 March 1988 in Case 9/87 Arcado v. Haviland, OJ No C 89, 6. 4. 1988, p. 9).

(5) Article 5 (2): Maintenance The subject of maintenance obligations falls within the scope of the Convention even if the claim in question is ancillary to divorce proceedings (judgment of 6 March 1980 in Case 120/79 L. De Cavel v. J. De Cavel (1980) ECR 731).

(6) Article 5 (3): Tort or delict 1. The expression 'place where the harmful event occurred' must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it. The result is that the defendant may be sued, at the option of the plaintiff, either in the courts for the place where the damage occurred or in the courts for the place of the event which gives rise to and is at the origin of that damage (judgment of 30 November 1976 in Case 21/76 Bier, Reinwater v. Mines de potasse d'Alsace (1976) ECR 1735-1748). 2. (a) The term 'tort, delict or quasi-delict' in Article 5 (3) of the Convention must be regarded as an autonomous concept covering all actions which seek to establish the liability of a defendant and which are not related to a 'contract' within the meaning of Articles (1). (b) A court which has jurisdiction under Article 5 (3) to entertain an action with regard to tortious matters does not have jurisdiction to entertain that action with regard to other matters not based on tort (judgment of 27 September 1988 in Case 189/87 Kalfelis v. Schroder, OJ No C 281, 4. 11. l988, p. 18).

(7) Article 5 (5): Branch, agency or other establishment 1. When the grantee of an exclusive sales concession is not subject either to the control or to the direction of the grantor, he cannot be regarded as being at the head of a branch, agency or other establishment of the grantor within the meaning of Article 5 (5) (judgment of 6 October 1976 in Case 14/76 De Bloos v. Bouyer (1976) ECR 1497-1511).

2. The Court has given an autonomous interpretation to the concepts of 'operations of a branch, agency or other establishment':

(a) the concept of branch, agency or other establishment implies a place of business which has the appearance of permanency, such as the extension of a parent body, has a management and is materially equipped to negotiate business with third parties so that the latter, although knowing that there will if necessary be a legal link with the parent body, the head office of which is abroad, do not have to deal directly with such parent body but may transact business at the place of business constituting the extension;

(b) the concept of 'operations' comprises:

(1) actions relating to rights and contractual or non-contractual obligations concerning the management properly so-called of the agency, branch or other establishment itself such as those concerning the

situation of the building where such entity is established or the local engagement of staff to work there,

(2) actions relating to undertakings which have been entered into at the abovementioned place of business in the name of the parent body and which must be performed in the Contracting State where the place of business is established,

(3) actions concerning non-contractual obligations arising from the activities in which the branch, agency or other establishment has engaged at the place in which it is established on behalf of the parent body (judgment of 22 November 1978 in Case 33/78 Somafer v. Ferngas (1978) ECR 2183-2195).

3. An 'independent commercial agent', inasmuch as he is free to arrange his own work and the undertaking which he represents may not prevent him from representing several firms at the same time and he merely transmits orders to the parent undertaking without being involved in either their terms or their execution, does not have the character of a branch (judgment of 18 March 1981 in Case 139/80 Blanckaert that provision does not however make it possible, in an application to oppose enforcement made to the courts of the Contracting State in which enforcement is to take place, to plead a set-off between the right whose enforcement is being sought and a claim over which the courts of that State would have no jurisdiction if it were raised independently. The Court held that this amounts to a clear abuse of the process on the part of the plaintiff for the purpose of obtaining indirectly from the German courts a decision regarding a claim over which those courts have no jurisdiction under the Convention (judgment of 4 July 1985 in Case 220/84 AS-Autoteile v. Malhe (1985) ECR 2267-2279).

(12) Article 17: Agreements conferring jurisdiction

1. (a) Where a clause conferring jurisdiction is included among the general conditions of sale of one of the parties, printed on the back of a contract, the requirement of a writing under the first paragraph of Article 17 is fulfilled only if the contract signed by both parties contains an express reference to those general conditions and

(b) in the case of a contract concluded by reference to earlier offers, which were themselves made with reference to the general conditions of one of the parties including a clause conferring jurisdiction, the requirement of a writing under the first paragraph of Article 17 is satisfied only if the reference is express and can therefore be checked by a party exercising reasonable care (judgment of 14 December 1976 in Case 24/76 Colzani v. Ruwa (1976) ECR 1831-1843).

2. (a) In the case of an orally concluded contract, the requirements of the first paragraph of Article 17 as to form are satisfied only if the vendor's confirmation in writing accompanied by notification of the general conditions of sale has been accepted in writing by the purchaser

(b) and the fact that the purchaser does not raise any objections against a confirmation issued unilaterally by the other party does not amount to acceptance on his part of the clause conferring jurisdiction unless the oral agreement comes within the framework of a continuing trading relationship between the parties which is based on the general conditions of one of them, and those conditions contain a clause conferring

jurisdiction (judgment of 14 December 1976 in Case 25/76 Segoura v. Bonakdarian (1976) ECR 1851-1863).

3. (a) The first paragraph of Article 17 cannot be interpreted as prohibiting an agreement under which the two parties to a contract for sale, who are domiciled in different States, can be sued only in the courts of their respective States and

(b) in the above case the Article cannot be interpreted as prohibiting the court before which a dispute has been brought in pursuance of such a clause from taking into account a set-off connected with the legal relationship in dispute (judgment of 9 November 1978 in Case 23/78 Meeth v. Glacetal (1978) ECR 2133-2144).

4. (a) National procedural laws are set aside in the matters governed by the Convention in favour of the provisions thereof and

(b) in judicial proceedings instituted after the coming into force of the Convention, clauses conferring jurisdiction included in contracts of employment concluded prior to that date must be considered valid even in cases in which they would have been regarded as void under the national law in force at the time when the contract was entered into (judgment of 13 November 1979 in Case 25/79 Sanicentral v. Collin (1979) ECR 3423-3431).

5. If the place of performance of a contractual obligation has been specified by the parties in a clause which is valid according to the national law applicable to the contract, the court for that place has jurisdiction to take cognizance of disputes relating to that obligation under Article 5 (1) of the Convention, irrespective of whether the formal conditions provided for under Article 17 have been observed (judgment of 17 January 1980 in Case 56/79 Zelger v. Salinitri (1980) ECR 89-98).

6. Article 17 must be interpreted as meaning that the legislation of a Contracting State may not allow the validity of an agreement conferring jurisdiction to be called in question solely on the ground that the language used is not that prescribed by that legislation (judgment of 24 June 1981 in Case 150/81 Elefanten Schuh v. Jacqmain (1981) ECR 1671-1690).

7. Article 17 must be interpreted as meaning that where a contract of insurance, entered into between an insurer and a policy-holder and stipulated by the latter to be for his benefit and to enure for the benefit for third parties, contains a clause conferring jurisdiction relating to proceedings which might be brought by such third parties, the latter, even if they have not expressly signed the said clause, may rely upon it (judgment of 14 July 1983 in Case 201/82 Gerling v. Amministrazione del tesoro dello Stato (1983) ECR 2503-2518).

8. On bills of lading, the Court handed down a judgment to the effect that: (a) the bill of lading issued by the carrier to the shipper may be regarded as an 'agreement' 'evidenced in writing' between the parties, within the meaning of Article 17. The jurisdiction clause applies if the parties have signed the bill of lading. If the clause conferring jurisdiction appears in the general conditions, the shipper must have expressly accepted it in writing. The wording of the bill of lading signed by both parties must expressly refer to the general conditions. However, if the carrier and the shipper have a continuing business

relationship, which is governed as a whole by the carrier's general conditions, the clause conferring jurisdiction applies even without acceptance in writing; (b) the bill of lading issued by the carrier to the shipper may be regarded as an 'agreement' 'evidenced in writing', within the meaning of Article 17, vis-a-vis a third party holding the bill only if that third party is bound by an agreement with the carrier under the relevant national law and if the bill of lading, as 'evidence in writing' of the 'agreement', satisfies the formal conditions in Article 17 (judgment of 19 June 1984 in Case 71/83 Russ v. Nova, Goeminne (1984) ECR 2417-2436).

9. The court of a Contracting State before which the applicant, without raising any objection as to the court's jurisdiction, enters an appearance in proceedings relating to a claim for a set-off which is not based on the same contract or subject-matter as the claims in his application and in respect of which there is a valid agreement conferring exclusive jurisdiction on the courts of another Contracting State within the meaning of Article 17 has jurisdiction by virtue of Article 18 (judgment of 7 March 1985 in Case 48/84 Spitzley v. Sommer (1985) ECR 787-800).

10. The first paragraph of Article 17 must be interpreted as meaning that the formal requirements therein laid down are satisfied if it is established that jurisdiction was conferred by express oral agreement, that written confirmation of that agreement by one of the parties was received by the other and that the latter raised no objection (judgment of 11 July 1985 in Case 221/84 Berghoefer v. ASA (1985) ECR 2699-2710).

11. An agreement conferring jurisdiction is not to be regarded as having been concluded for the benefit of only one of the parties, within the meaning of the third paragraph of Article 17 of the Convention, where all that is established is that the parties have agreed that a court or the courts of the Contracting State in which that party is domiciled are to have jurisdiction. The Court held that clauses which expressly state the name of the party for whose benefit they were agreed and those which, whilst specifying the courts in which either party may sue the other, give one of them a wider choice of courts must be regarded as clauses whose wording shows that they were agreed for the exclusive benefit of one of the parties (judgment of 24 June 1986 in Case 22/85 Anterist v. Credit Lyonnais, OJ No C 196, 5. 8. 1986).

12. Article 17 must be interpreted as meaning that where a written agreement containing a jurisdiction clause and stipulating that the agreement can be renewed only in writing has expired but has continued to serve as the legal basis for the contractual relations between the parties, the jurisdiction clause satisfies the formal requirements in Article 17 if, under the law applicable, the parties could validly renew the original contract otherwise than in writing, or if, conversely, either party has confirmed in writing either the jurisdiction clause or the group of clauses which have been tacitly renewed and of which the jurisdiction clause forms part, without any objection on the part of the other party to whom such confirmation has been notified (judgment of 11 November 1986 in Case 313/85 Iveco Fiat v. Van Hool, OJ No C 308, 2. 12. 1986, p. 4).

(13) Article 18: Submission to the jurisdiction 1.

(a) Article 18 applies even where the parties have by agreement

designated a court in another State since Article 17 is not one of the exceptions laid down in Article 18 and

(b) Article 18 is applicable where the defendant not only contests the court's jurisdiction but also makes submissions on the substance of the action, provided that, if the challenge to jurisdiction is not preliminary to any defence as to the substance, it does not occur after the making of the submissions which under national procedural law are considered to be the first defence addressed to the court seised (judgment of 24 June 1981 in Case 150/81 Elefanten Schuh v. Jacqmain (1981) ECR 1671-1690). (See also the judgments of 22 October 1981 in Case 27/81 Rohr v. Ossberger, 31 March 1982 in Case 25/81 C. H. W. v. G. J. H and 14 July 1983 in Case 201/82 Gerling v. Amministrazione del tesoro dello Stato.)

2. The court of a Contracting State before which the applicant, without raising any objection as to the court's jurisdiction, enters an appearance in proceedings relating to a claim for a set-off which is not based on the same contract or subject matter as the claims in his application and in respect of which there is a valid agreement conferring exclusive jurisdiction on the courts of another Contracting State within the meaning of Article 17 of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters has jurisdiction by virtue of Article 18 of that Convention (judgment of 7 March 1985 in Case 48/84 Spitzley v. Sommer (1985) ECR 787-800).

(14) Article 19: Examination of jurisdiction

Article 19 requires the national court to declare of its own motion that it has no jurisdiction whenever it finds that a court of another Contracting State has exclusive jurisdiction under Article 16 of the Convention, even in an appeal in cassation where the national rules of procedure limit the court's review to the grounds raised by the parties (judgment of 15 November 1983 in Case 288/82 Duijnstee v. Goderbauer (1983) ECR 3663-3679).

(15) Article 21: Lis pendens

1. See the judgment of 7 June 1984 in Case 29/83 Zelger v. Salinitri.

2. The term lis pendens used in Article 21 covers a case where a party brings an action before a court in a Contracting State for a declaration that an international sales contract is inoperative or for the termination thereof whilst an action by the other party to secure performance of the said contract is pending before a court in another Contracting State. The Court also ruled that the terms used in Article 21 to determine a situation of lis pendens are to be regarded as autonomous concepts (judgment of 8 December 1987 in Case 144/86 Gubisch v. Palumbo, OJ No C 8, 13. 1. 1988, p. 3).

(16) Article 22: Related actions

Article 22 does not confer jurisdiction. It applies only where related actions are brought before courts of two or more Contracting States (judgment of 24 June 1981 in Case 150/81 Elefanten Schuh v. Jacqmain (1981) ECR 1671-1690).

(17) Article 24: Provisional, including protective, measures

1. The inclusion of provisional measures in the scope of the Convention is determined not by their own nature but by the nature of the rights which they serve to protect (judgment of 27 March 1979 in Case 143/78 J. De Cavel v. L. De Cavel (1979) ECR 1055-1068).

2. On the enforcement of judicial decisions authorizing provisional and protective measures, see Article 27 below (judgment of 21 May 1980 in Case 125/79 Denilauler v. Couchet (1980) ECR 1553).

3. Article 24 may not be relied on to bring within the scope of the Convention provisional measures relating to matters which are excluded from it (judgment of 31 March 1982 in Case 25/81 C. H. W. v. G. J. H. (1982) ECR 1189-1205).

(18) Article 26: Recognition A foreign judgment recognized by virtue of Article 26 must in principle have the same effects in the State in which enforcement is sought as it does in the State in which the judgment was given. Subject, however, it should be added, to the grounds for non-recognition laid down in the Convention (judgment of 4 February 1988 in Case 145/86 Hoffmann v. Krieg. See also in the same case the Court's interpretation of Articles 27 (1) and (3), 31 and 36, OJ No C 63, 8.3. 1988, p. 6).

(19) Article 27 (1): Public policy Recourse to the public policy clause, which is to be had only in exceptional cases, ...is in any event not possible where the problem is one of compatibility of a foreign judgment with a domestic judgment. That problem must be resolved on the basis of Article 27 (3), which covers the case of a foreign judgment irreconcilable with a judgment given between the same parties in the State in which enforcement is sought (judgment of 4 February 1988 in Case 145/86 Hoffmann v. Krieg, OJ No C 63, 8. 3. 1988, p. 6).

(20) Article 27 (2): Rights of the defence

1. Judicial decisions authorizing provisional or protective measures, which are delivered without the party against which they are directed having been summoned to appear and which are intended to be enforced without prior service do not come within the system of recognition and enforcement provided for by Title III of the Convention (judgment of 21 May 1980 in Case 125/79 Denilauler v. Couchet (1980) ECR 1553).

2. Article 27 (2) must be interpreted as follows:

(a) the words 'the document which instituted the proceedings' cover any document, such as the order for payment (Zahlungsbefehl) in German law;

(b) a decision such as the enforcement order (Vollstreckungsbefehl) in German law is not covered by the words 'the document which instituted the proceedings';

(c) in order to determine whether the defendant has been enabled to arrange for his defence as required by Article 27 (2) the court in which enforcement is sought must take account only of the time, such as that allowed under German law for submitting an objection (Widerspruch), available to the defendant for the purposes of preventing the issue of a judgment in default which is enforceable under the Convention;

(d) Article 27 (2) remains applicable where the defendant has lodged an objection against the decision given in default and a court of the State in which the judgment was given has held the objection to be inadmissible on the ground that the time for lodging an objection has expired; (e) even if a court of the State in which the judgment was given has held, in separate adversary proceedings, that service was duly effecte, Article 27 (2) still requires the court in which enforcement is sought to examine whether service was effected in sufficient time to enable the defendant to arrange for his defence; (f) the court in which enforcement is sought may as a general rule confine itself to examining whether the period, reckoned from the date on which service was duly effected, allowed the defendant sufficient time for his defence; it must, however, consider whether, in a particular case, there are exceptional circumstances such as the fact that, although service was duly effected, it was inadequate for the purposes of causing that time to begin to run; (g) Article 52 of the Convention and the fact that the court of the State in which enforcement is sought concluded that under the law of that State the defendant was habitually resident within its territory at the date of service of the document which instituted the proceedings do not affect the replies given above (judgment of 16 June 1981 in Case 166/80 Klomps v. Michel (1981) ECR 1593-1612).

3. The court of the State in which enforcement is sought may, if it considers that the conditions laid down by Article 27 (2) are fulfilled, refuse to grant recognition and enforcement of a judgment, even though the court of the State in which the judgment was given regarded it as proven, in accordance with the third paragraph of Article 20 of that Convention in conjunction with Article 15 of the Hague Convention of 15 November 1965, that the defendant, who failed to enter an appearance, had an opportunity to receive service of the document instituting the proceedings in sufficient time to enable him to make arrangements for his defence (judgment of 15 July 1982 in Case 288/81 Pendy Plastic Products v. Pluspunkt (1982) ECR 2723-2737).

4. (a) Article 27 (2) is also applicable, in respect of its requirement that service of the document which instituted the proceedings should have been effected in sufficient time, where service was effected within a period prescribed by the court of the State in which the judgment was given or where the defendant resided, exclusively or otherwise, within the jurisdiction of that court or in the same country as that court.

(b) In examining whether service was effected in sufficient time, the court in which enforcement is sought may take account of exceptional circumstances which arose after service was duly effected.

(c) The fact that the plaintiff was apprised of the defendant's new address, after service was effected, and the fact that the defendant was responsible for the failure of the duly served document to reach him are matters which the court in which enforcement is sought may take into account in assessing whether service was effected in sufficient time (judgment of 11 June 1985 in Case 49/84 Debaecker and Plouvier v. Bouwman (1985) ECR 1779-1803).

(21) Article 27 (3): Irreconcilable judgments A foreign judgment ordering a person to make maintenance payments to his spouse by virtue of his obligations, arising out of the marriage, to support her is irreconcilable for the purposes of Article 27 (3) with a national

judgment which has decreed the divorce of the spouses in question (judgment of 4 February 1988 in Case 145/86 Hoffmann v. Krieg, OJ No C 63, 8. 3. 1988, p. 6).

(22) Articles 30 and 38: Ordinary appeal The Court ruled in favour of an autonomous concept of ordinary appeal. An 'ordinary appeal' is constituted by any appeal: (a) which is such that it may result in the annulment or the amendment of the judgment which is the subject matter of the procedure for recognition or enforcement and (b) the lodging of which is bound, in the State in which the judgment was given, to a period which is laid down by the law and starts to run by virtue of that same judgment (judgment of 22 November 1977 in Case 43/77 Industrial Diamond v. Riva (1977) ECR 2175-2191).

(23) Article 31: Enforcement 1. The provisions of the Convention prevent a party who has obtained a judgment in his favour in a Contracting State, being a judgment for which an order for enforcement under Article 31 may issue in another Contracting State, from making an application to a court in that other State for a judgment against the other party in the same terms as the judgment delivered in the first State (judgment in Case 42/76 De Wolf v. Cox). 2. A foreign judgment the enforcement of which has been ordered in a Contracting State pursuant to Article 31, and which remains enforceable in the State in which it was given, need not remain enforceable in the State in which enforcement is sought when, under the legislation of the latter State, it ceases to be enforceable for reasons which lie outside the scope of the Convention. In the case in point a foreign judgment ordering a person to make maintenance payments to his spouse by virtue of his obligations, arising out of the marriage, to support her is irreconcilable with a national judgment which has decreed the divorce of the spouses in question (judgment of 4 February 1988 in Case 145/86 Hoffman v. Krieg, OJ No C 63, 8. 3. 1988, p. 6).

(24) Article 33: Address for service 1. (a) The second paragraph of Article 33 must be interpreted as meaning that the requirement to give an address for service laid down in that provision must be complied with in accordance with the rules laid down by the law of the State in which enforcement is sought or, if those rules do not specify when that requirement must be complied with, no later than the date on which the enforcement order is served. (b) The consequences of an infringement of the rules concerning the choice of an address for service are, by virtue of Article 33 of the Convention, governed by the law of the State in which enforcement is sought, provided that the aims of the Convention are respected, i.e. the law of the latter State remains subject to the aims of the Convention; the penalty cannot therefore call into question the validity of the judgment granting enforcement or allow the rights of the party against whom enforcement is sought to be prejudiced (judgment of 10 July 1986 in Case 198/85 Carron v. FRG, OJ No C 209, 20. 8. 1986, p. 5).

(25) Article 36: Enforcement procedure 1. (a) Article 36 of the Convention excludes any procedure whereby interested third parties may challenge an enforcement order, even where such a procedure is available to third parties under the domestic law of the State in which the enforcement order is granted. (b) The Court held that the Convention has established an enforcement procedure which constitutes an autonomous and complete system, including the matter of appeals. It follows that Article 36 of the Convention excludes procedures whereby interested third parties may challenge an enforcement order under domestic law. (c) The Convention merely regulates the procedure for obtaining an order for the enforcement

of foreign enforceable instruments and does not deal with execution itself, which continues to be governed by the domestic law of the court in which execution is sought, so that interested third parties may contest execution by means of the procedures available to them under the law of the State in which execution is levied (judgment of 2 July 1985 in Case 148/84 Deutsche Genos-senschaftsbank v. Brasserie du Pecheur (1985) ECR 1981-1993). 2. The Article must be interpreted as meaning that the party who has failed to appeal against the enforcement order referred to in Article 31 (in the case in point within one month of service of the enforcement order) is thereafter precluded, at the stage at which the judgment is enforced, from relying upon a valid reason which he could have invoked in such appeal. That rule is to be applied ex officio by the courts of the State in which enforcement is sought. However, that rule does not apply when it has the effect of obliging the national court to make the effects of a national judgment lying outside the scope of the Convention (divorce) conditional on that judgment being recognized in the State in which the foreign judgment whose enforcement is at issue was given (judgment of 4 February 1988 in Case 145/86 Hoffman v. Krieg, OJ No C 63, 8. 3. 1988, p. 6).

(26) Article 37: Enforcement procedure 1. (a) The second paragraph of Article 37 must be interpreted as meaning that an appeal in cassation and, in the Federal Republic of Germany, a 'Rechtsbeschwerde' may be lodged only against the judgment given on the appeal. (b) That provision cannot be extended so as to enable an appeal to be lodged against a judgment other than that given on the appeal, for instance against a preliminary or interlocutory order requiring preliminary inquiries to be made (judgment of 27 November 1984 in Case 258/83 Brennero v. Wendel (1984) ECR 3971-3984).

(27) Article 38: Enforcement procedure 1. See (20) above on 'ordinary appeal'. 2. The second paragraph of Article 38 of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters must be interpreted as meaning that a court with which an appeal has been lodged against a decision authorizing enforcement, given pursuant to the Convention, may make enforcement conditional on the provision of security only when it gives judgment on the appeal (judgment of 27 November 1984 in Case 258/83 Brennero v. Wendel (1984) ECR 3971-3984).

(28) Article 39: Enforcement procedure 1.

(a) By virtue of Article 9 of the Convention, a party who has applied for and obtained authorization for enforcement may, within the period mentioned in that Article, proceed directly with protective measures against the property of the party against whom enforcement is sought and is under no obligation to obtain specific authorization.

(b) A party who has obtained authorization for enforcement may proceed with the protective measures referred to in Article 39 until the expiry of the period prescribed in Article 36 for lodging an appeal and, if such an appeal is lodged, until a decision is given thereon.

(c) A party who has proceeded with the protective measures referred to in Article 39 of the Convention is under no obligation to obtain, in respect of those measures, any confirmatory judgment required by the national law of the court in question (judgment of 3 October 1985 in Case 119/84 Capelloni v. Pelkmans (1985) ECR 3147-3164).

(29) Article 40: Enforcement procedure The court hearing an appeal by a party seeking enforcement is required to hear the party against whom enforcement is sought, pursuant to the first sentence of the second paragraph of Article 40 of the Convention, even though the application for an enforcement order was dismissed in the lower court simply because documents were not produced at the appropriate time. This is because the Convention formally requires that both parties should be given a hearing at the appellate level, without regard to the scope of the decision in the lower court (judgment of 12 July 1984 in Case 178/83 P. v. K. (1984) ECR 3033-3043).

(30) Article 54: Temporal application The effect of Article 54 is that the only essential for the rules of the Convention to be applicable to litigation relating to legal relationships created before the date of the coming into force of the Convention is that the judicial proceedings should have been instituted subsequently to that date. This is true even if an agreement conferring jurisdiction was concluded before the Convention came into force and could be regarded as void under the law applicable to it; the case in point concerns a contract of employment between a French employee and a German firm, to which French law was applicable (judgment of 13 November 1979 in Case 25/79 Sanicentral v. Collin (1979) ECR 3423-3431).

(31) Articles 55 and 56: Bilateral Conventions As the first paragraph of Article 56 of the Convention states that the bilateral Conventions listed in Article 55 continue to have effect in relation to matters to which the Convention does not apply, the court of the State in which enforcement is sought may apply them to decisions which, without coming under the second paragraph of Article 1, are excluded from the Convention's scope. This is the case as regards application of the German-Belgian Convention of 1958, which may continue to have effect in 'civil and commercial matters', irrespective of the autonomous construction placed upon that concept by the Court for the purposes of interpretation of the 1968 Convention (judgment of 14 July 1977 in joined Cases 9/77 and 10/77 Bavaria and Germanair v. Eurocontrol (1977) ECR 1517-1527).

(32) Article I, second paragraph, of the Protocol annexed to the Convention (Luxembourg) A clause conferring jurisdiction is not binding upon a person domiciled in Luxembourg unless that clause is mentioned in a provision:

(a) specially and exclusively meant for this purpose;

(b) specifically signed by that party; in this respect the signing of the contract as a whole does not suffice. It is not necessary for that clause to be mentioned in a separate document (judgment of 6 May 1980 in Case 784/79 Porta-Leasing v. Prestige International (1980) ECR 1517).

(33) Article II of the Protocol annexed to the Convention

1. The expression 'an offence which was not intentionally committed' should be understood as meaning any offence the legal definition of which does not require the existence of intent, and

2. Article II of the Protocol applies in all criminal proceedings concerning offences which were not intentionally committed, 'in which the accused's liability at civil law, arising from the elements of the

offence for which he is being prosecuted, is in question or on which such liability might subsequently be based' (judgment of 26 May 1981 in Case 157/80 Rinkau (1981) ECR 1391-1484).

(34) Article 2 of the Protocol of 3 June 1971 Lower courts not sitting in an appellate capacity are not empowered to seek a preliminary ruling from the Court of Justice on a question of interpretation of the Convention. See the Court of Justice's order of 9 November 1983 in Case 80/83 Habourdin v. Italocremona (1983) ECR 3639-3641) and order of 28 March 1984 in Case 56/84 Von Gallera v. Maitre ((1984) ECR 1769-1772).

132. 3. List of judgments of the Court of Justice (from 6 October 1976 to 27 September 1988)

*** Table Omitted ***

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REPORT

on the national case-law relating to the Lugano Convention

drawn up in performance of the task entrusted to the Spanish, Greek and Swiss delegations at the 5th session of the Lugano Convention's Standing Committee (Interlaken, 18.9.1998)

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Introduction

The original impetus to draw up the present report was given at the last meeting of the Lugano Convention's Standing Committee during discussions aimed at exploring "the possibilities to improve its system" (point 4 of the agenda). The idea was triggered off by some remarks of the Italian delegation; these led the Committee to examine whether it was sufficient, as up till now, to simply take cognizance of the case-law materials communicated by the services of the Court of justice in application of Protocol No. 2 or whether it should go a step further and start analysing it. This would in particular also entail analysing the case-law relating to the Brussels Convention and "underlining the current divergencies of interpretation as well as those which may occur in the future" (minutes of the 5th meeting of the Standing Committee, point II.4, fifth paragraph). Questions having been raised as to the appropriateness of such an undertaking as well as to its consistency with the provisions of Protocol No. 2, the Committee decided to postpone its final decision until a "model report" on national case-law had been drawn up (above-mentioned minutes, point II.4, sixth paragraph). Indeed, in the light of such a report, which is as yet experimental, the Committee would be in a better position to take a final decision concerning the proposals as to the use of the case-law materials relating to the Lugano Convention. This is precisely the purpose of the present report and its authors hope it will lay the foundations for an "in-depth discussion" on the matter (above-mentioned minutes, *ibid*).

In accordance with the general feeling expressed at the meeting, the drafters of the present report agreed to base it above all on the case-law communicated by the services of the Court of Justice in application of Protocol No. 2 of the Lugano Convention and, in principle, to concentrate their research on one single provision of the Convention. Insofar however as this first experimental report was to lay the foundations for a discussion aiming not only at ensuring the conformity of the system envisaged with Protocol No. 2, but also its appropriateness and its practical and actual interest, the authors took the liberty of also trying to give a brief overview of the case-law relating to the Lugano Convention. Moreover, they agreed to focus this report on art. 5.1, which, apart from the interest it offers in itself, is the most often quoted provision in the case-law materials under survey.

I. PRELIMINARY OBSERVATIONS

In application of Protocol No. 2 of the Lugano Convention, the competent service of the Court of Justice (i.e. the Division Library, Research and Documentation) has currently brought out seven (7) fascicles relating to case-law. The first one was communicated to the Contracting States in 1992 and the latest one in July 1998. The first three fascicles have moreover been published by the Swiss Institute of comparative Law (Collection of jurisprudence of the European Court of Justice and of the highest courts of the States Parties concerning the Lugano Convention, Schulthess Polygraphischer Verlag, vol. I/1992, vol. II/1993 and vol. III/1994, Zurich 1996, 1997 and 1998).

The seven above-mentioned fascicles contain all the judgments which the Court of Justice gave since 1992 on the interpretation of the Brussels Convention as well as a large selection of national case-law materials; the latter concern both Brussels and Lugano and currently total over two hundred (200) national decisions including those relating to requests for preliminary rulings. With a few exceptions, which mostly concern the first fascicles (or the preliminary procedure), the judgments were all delivered by the Supreme Courts of the Contracting States.

There are twenty-five (25) of them relating to the Lugano Convention, some of which also concern the Brussels Convention.

Some of those twenty-five decisions declare the Lugano Convention to be inapplicable *ratione temporis,* but mention it all the same*,* either to simply recall a legal instrument destined to enter into force in the near future and which might sanction different solutions (*Norwegian Høyesterett*, 20 January 1993, *Information No. 1993/43*, art. 6/1 – see also German *Bundesgerichtshof*, 21 November 1996, *Information No. 1997/43*, art. 18, which also concerns the Brussels Convention), or in order to corroborate the interpretation envisaged under national law (*Norwegian Høyesterett*, 31 May 1994, *Information No. 1995/20*, art. 5.3, Austrian *Oberster Gerichtshof*, 8 April 1997, *Information No. 1998/12*, art. V of Protocol No. 1).

As for the other decisions, i.e. those which actually interpret and apply the Lugano Convention, one should note from the outset that they offer elements of interpretation of nearly every provision of the Convention which offers more than a merely average interest (art.1, 5.1, 5.3, 6.1, 16, 17, 21, 24, 27-28, 31, 54) and that, as a general rule, they follow the case-law developed in application of the Brussels Convention faithfully.

It also seems to us to be useful to point out that the currently available case-law materials relating to the Lugano Convention are considerable and that the twenty-five above-mentioned decisions, which serve as a basis for the present report, were chosen by the services of the Registrar of the Court of Justice in application of Protocol No. 2 of the Convention. Let us add here that, whilst the services of the Registrar of the Court of Justice (which is the central body entrusted with implementing the system of exchange of information set up by the above-mentioned Protocol No. 2) necessarily possess the most complete collection of decisions

relating to the Lugano Convention, such decisions are published more and more often in numerous law periodicals; apart from the publications which are of purely national interest (as, for instance, the commentary on Swiss case-law by Volken in the *Schweizerische Zeitschrift für Internationales und europäisches Recht*), the *International Litigation Procedure* (hereafter *ILP*) is especially worthy of mention as it regularly publishes decisions of all the Contracting States in English or translated into English.

May we also specify that all through this report the term "judgment" will be used in an overall sense, so as to extend to any judgment given by a court or tribunal of a Contracting State, whatever it may be called, including a decree, order, decision or writ of execution (see in the same sense art. 25 of the Convention), as well as judgments given within the framework of *exequatur* proceedings.

II. OVERVIEW OF THE CASE-LAW

If one leaves aside the judgments relating to art. 5.1, which will be analysed more in detail in chapter III hereafter, as well as certain judgments declaring the Convention to be inapplicable *ratione temporis,* one can present the following overview of the case-law, according to the subject-matter of each decision:

A. With respect to the material scope of application of the Convention, one should mention two judgments, which both declare the Convention to be inapplicable: one case concerned a request for protective measures of the conjugal union including maintenance claims (Swiss *Bundesgericht*, 27 May 1993, *Information No. 1994/12*) and the other, which concerned the compulsory winding-up of a State-owned enterprise and the companies controlled by it as well as a prohibition to pay the debts, was qualified by the national court as "proceedings analogous" to bankruptcy within the meaning of art. 1.2.2 (Norwegian *Høyesterett*, 18 January 1996, *Information No. 1996/28*).

B. One single judgment (Swedish *Högsta Domstolen*, 23 February 1994, *Information No. 1996/12*) concerns exclusive jurisdiction. It related to proceedings concerned with the registration or validity of patents and the national court held that the rule of art.16.4 does not extend to a dispute between an employee for whose invention a patent has been applied for and his employer, where the dispute regards their respective rights in that patent.

C. There are two judgments relating to prorogation of jurisdiction. The first concerned the definition of a stipulation in favour of one party only, in a case where one also had to pay account to art. I a of Protocol No. 1 (*Tribunale d'appello del Canton Ticino*, in Switzerland, 2nd November 1993, *Information No. 1994/17*). The second concerned the formal requirements in the light of the case-law of the Court of Justice pertaining to the Brussels Convention (Norwegian *Høyesterett*, 17 December 1993, *Information No. 1994/19*).

D. As for the alternative criteria of jurisdiction, if one leaves aside the judgments falling within the ambit of art. 5.1, which will be dealt with in the following chapter, one can, strangely enough, only find two single judgments, which were both delivered by the Supreme Court of Norway (Norwegian *Hoyesterett*, 31 May 1994, *Information No. 1995/20,* above-mentioned in chapter I, and 6 June 1996, *Information No. 1997/36)*[*]. They concern matters relating to tort, which are governed by art. 5.3; however the Court decided the cases in application of national law, because the Lugano Convention was inapplicable *ratione temporis.* One should nevertheless note that both decisions concern disputes relating to cross-frontier defamation and that the most recent one expressly mentions the ECJ judgment of 7.3.1995 in the C-68/93 Shevill/Press Alliance case.

E. With respect to the special jurisdiction foreseen in art. 6, the only judgments which will be mentioned are those relating to point 1 and concerning a plurality of defendants. There are three of them, two of which in particular stand out. One is an English judgment which refuses to apply the forum non conveniens theory with respect to the co-defendant domiciled in another Contracting State (*High Court*, 26 March 1992, *Information No. 1993/42)* and the other is a Norwegian decision. In the latter case the court had to examine whether the fact that the dispute between the plaintiff and the other co-defendant had later been settled out of court, without that circumstance having led the Norwegian court to renounce exercising its jurisdiction, could arouse the suspicion that art. 6.1 had merely been invoked in order to prevent the foreign defendant from being sued before the courts of his domicile (*Høyesteretts kjaeremålsutvalg*, 23 February 1996, *Information No. 1997/21*). The third judgment, given by the same Norwegian court, does not seem to be of great interest (*Høyesteretts kjaeremålsutvalg,* 17 August 1995, *Information No. 1996/26).* One may also recall that amongst the judgments declaring the Convention to be inapplicable *ratione temporis* one again comes across a Norwegian decision concerning a plurality of defendants (*Høyesterett*, 20 January 1993, *Information No. 1993/43*, mentioned previously in chapter I).

F. There are two judgments on the interpretation of article 21 relating to lis pendens; both concern the determination of the court "first seised" and in that matter they seem to follow the case-law of the Community (English *High Court,* 14 October 1993, *Information No. 1995/15*, and Swiss *Bundesgericht*, 26 September 1997, *Information No. 1998/13*).

G. Two judgments relate to provisional measures. Of those two, one is English and concerns the jurisdiction of the courts of a Contracting State to order the defendant, who is domiciled in that State, but is sued in another, to refrain from disposing of his assets and to disclose their localisation in the whole world (*Court of Appeal,* 11 June 1997, *Information No. 1998/34*). The other concerns the enforcement of a judicial sequestration order in another contracting State (Swedish *Högsta Domstolen*, 12 September 1995, *Information No*. *1996/27*).

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[*] The authors thank Ms Løvold of the Norwegian delegation for her comments on these decisions.

H. Of the three judgments concerning the grounds for refusing recognition and enforcement, two relate to cases in which the defendant was in default of appearance in the country of origin. However, only the first, which related to a payment order, directly concerned the refusal ground *ad hoc*, i.e. art. 27.2, which is moreover the provision of art. 27 most often invoked in practice (Swiss *Bundesgericht,* 12 June 1997, *Information No. 1998/15*). In the other, which concerned an order to pay costs issued to a person who was unaware of the proceedings, the ground invoked was that of public policy foreseen in art. 27.1 (Norwegian *Høyesteretts* kjaeremålsutvalg, 29 March 1996, *Information No. 1997/28*). The third does not seem to be of any particular interest (Norwegian *Høyesteretts* k*jaeremålsutvalg*, 7 March 1996, *Information No. 1997/26*.).

I. In matters relating to the enforcement procedure (art. 31 et seq. of the Convention) one can find one single judgment. It refers to the effects of the judgment in the State in which enforcement is sought and thereby takes into account the limitations resulting from the application of the law of the State of execution proper (Swedish *Högsta Domstolen*, 12 September 1995, *Information No. 1996/2*, mentioned previously under G).

K. The still recent entry into force of the Convention gave rise to two – previously mentioned - judgments on the application of the transitional provisions of art. 54.2. The judgment of the *Tribunale d'appello del Canton Ticino (*2 November 1993*, Information No. 1994/17*, previously mentioned under C) ruled that enforcement was to be authorized in accordance with the Convention once the jurisdiction of the court of the State of origin had been examined. In the other case, the Swiss *Bundesgericht* (12 June 1997, *Information No. 1998/15*, previously mentioned under H), after having held that the court of the State where enforcement was sought was bound by the findings of fact on which the court in the State of origin had based its jurisdiction, refused to recognize or enforce the foreign judgment on the ground that it neither contained any findings of fact nor stated the grounds on which it rests.

III. **CASE-LAW RELATING IN PARTICULAR TO ART. 5.1**

The fascicles brought out by the services of the Court of Justice contain five judgments concerning art. 5.1, i.e., in chronological order:

- Swiss *Bundesgericht*, 18 January 1996, *Information No. 1997/18*
- Swiss *Bundesgericht*, 21 February 1996, *Information No. 1998/14*
- Norwegian *Høyesteretts kjaeremålsutvalg*, 10 May 1996, *Information No. 1997/33*

- Swedish *Högsta Domstolen*, 13 June 1997, *Information No. 1997/45*

- English *Court of Appeal*, 13 July 1997, *Information No. 1998/33*

However, so as to allow the national delegations to get a broader overview of the case-law relating to art. 5.1, we thought that it would be appropriate to extend our analysis to other judgments of Supreme courts given during the same period as the five above-mentioned judgments, i.e. during the judicial years 1995/1996 and 1996/1997; there are two (2) of them:

- Swiss *Bundesgericht,* 23 August 1996
- Norwegian *Høyesterett,* 15 May 1997.

The most recent judgments, in particular the Austrian ones which were published in the *Zeitschrift für Rechtsvergleichung, Internationales Privatrecht und Europarecht* (*Oberster Gerichtshof,* 9.9.1997, 1998.163, 10.9.1998, 1999.23 [sum.], 1999.23 [sum.] and 1999.24 [sum.], 28.10.1997, 1998.167 and 1999.35 [sum.], 27.1.1998, 1997.157, 25.2.1998, *Juristische Blätter* 1998.518, 12.8.1998, 1999.22 – see also Norwegian *Høyesterett*, 27.1.1998, *ILP* 1998.550 [sum.], and Swiss *Bundesgericht*, 9.3.1998, *Coll*., vol.124 III, p. 188) can be included in the next report, assuming, of course, that the Standing Committee decides to pursue its examination of national case-law by drawing up reports.

Thus the present report only mentions the seven (7) above-mentioned judgments, which were given during the judicial years 1995/1996 and 1996/1997.

We will successively examine the contents of each of those judments and its conformity with the case-law concerning the Brussels Convention (for the judgment under [b] we will add some subtitles because it presents certain special features).

(a) Swiss *Bundesgericht*, 18 January 1996, *Information No. 1997/18, T/C* [ILP 1998.77]

The corporation S., with its registered office in Switzerland, sold to the Italian company T. an exhaust gas cleaning unit which it installed on the spot. Afterwards the company T. claimed that the system was deficient and rescinded the contract. The corporation S. brought an action in Zurich against the Italian company T. for payment of the purchase price; the company T. raised the plea of lack of international jurisdiction. The parties disagreed on the question whether an agreement conferring jurisdiction incorporated in their contract was valid. However, the Federal Court first examined whether the courts of Zurich had jurisdiction within the meaning of art. 5.1, a question to which it gave an affirmative answer. It then found that, whereas one should resort to an autonomous interpretation of the concept of "matters relating to a contract", the place of performance should be governed by the law applicable to the contract or the obligation. In the case of entirely bilateral contracts it further held that

according to the rule of jurisdiction foreseen by art. 5.1 there was a different place of performance for each obligation, the object of the dispute being in the present instance the claim relating to the purchase price. The Federal Court applies the substantive rules of the Vienna Convention on contracts for the international sale of goods "as the applicable law". By interpreting art. 57 and 58 of that Convention, it comes to the conclusion that in the present case one is not dealing with a transaction where each obligation is conditional on the counter-performance, because at no time of the performance of the contract did the partial obligation of one of the parties have to be performed at the same time as that of the other. It follows that it is not letter [b] but letter [a] of article 57.1 of the Vienna Convention, which is applicable and that according to that last provision the purchase price should be paid at the place where the seller and plaintiff is established, which means that Zurich would have jurisdiction.

In its judgment of 4.3.1982 in the Peters/ZNAV case (34/82) the Court of Justice (hereafter ECJ in this chapter III) had already ruled that the concept of "matters relating to a contract" should be interpreted autonomously, an interpretation which it for instance confirmed in its judgment of 8.3.1988 in the Arcado/Haviland case (9/87) and in that of 17.6.1992 in the Handte/TMCS case (C-26/91). But it was in its judgment of 6.10.1976 in the Tessili/Dunlop case (12/76) that the ECJ ruled that the place of performance was to be determined by the law applicable to the contract or the obligation. Furthermore, in its judgment of 6.10.1976 in the De Bloss/Bouyer case (14/76) the ECJ held that, within the framework of a bilateral contract, there can be a different jurisdiction for the disputes relating to the main obligation of each party. Finally, in its judgment of 29.6.1994 in the Custom Made/Stawa Metallbau case (C-288/92), the ECJ decided that the place of performance can also be determined by the *lex causae*, even if the latter is a uniform law, as for instance the Hague Convention on the law applicable to the international sale of goods in the case adjudged by the ECJ and the Vienna Convention on contracts for the international sale of goods, which replaced the Hague Convention, in the case adjudged by the Federal Court.

One can therefore state that in the present judgment the Federal Court resorted to the same concept of jurisdiction in contractual matters as that which was held applicable in the case-law of the ECJ.

b) Swiss *Bundesgericht*, 21 February 1996, *Information No. 1998/14*, B/K

1.The judgment

In 1993, Ms K. sued Mr B (domiciled in Rome or London) in Zurich. She brought an action against the defendant for the repayment of two loans. The defendant contested both the existence of the loans and the territorial jurisdiction of the court in Zurich. The question was whether, within the meaning of art. 5.1 of the Lugano Convention, the place of performance was in Zurich.

The Federal Court was of the opinion that the place of performance of the obligation to repay the loans may also be determined by an agreement between the parties provided that such an agreement is valid under the applicable *lex causae*. In such a

case, in principle, the agreement need not be entered into in one of the forms required by art. 17. However, the agreement must relate to the actual place of performance; this requirement aims at avoiding that the rules of form contained in art. 17 be circumvented.

On the other hand, with respect to the application of art. 5.1 and the procedure aiming at identifying the place of performance in dispute between the parties, the Federal Court distinguishes according to whether or not the factual allegations of the plaintiff also have a bearing on the judgment as to substance.

In the former situation, an hypothesis which was not that of the case adjudged by the Federal Court, the court would be empowered to determine its jurisdiction merely by relying on the contents of the claim and to postpone examining any contrary allegations of the defendant till the case was examined on the merits. That principle, which – let us repeat it – is only applicable if the contested claim is relevant both with respect to the examination as to jurisdiction under the Lugano Convention and as to the substance of the claim, aims at protecting the defendant: since the latter must reply to decisive allegations both with respect to jurisdiction and to the substance of the claim, he must afterwards be in a position to oppose a second claim which would be substantively identical to the first by raising the plea of *res judicata*.

If, on the other hand, the existence of an agreement concerning the place of performance – claimed by the plaintiff, but contested by the opposite party – is only relevant with respect to the determination of jurisdiction but has no bearing on the claim as to its substance, the court cannot simply leave it to the allegations of the plaintiff on that point, should the defendant contest them; the plaintiff must, on the contrary, if necessary, submit evidence on that point. In the present case, the claim for repayment of the loans in dispute could be adjudged on the merits without it being necessary to decide whether the place of performance of the obligation was in Zurich or not. Thus the case was remanded to the cantonal court so that the latter require the submission of proofs on the agreement relating to the place of performance according to art. 5.1 of the Lugano Convention.

2. Observance of the case-law relating to the Brussels Convention

In its judgment of 17.1.1980 in the Zelger/Salinitri case (56/79), the ECJ is of the opinion that jurisdiction within the meaning of art. 5.1 can be based on an agreement determining the place of performance, even if no particular form was chosen, it being understood that the form requirements foreseen in art. 17 need in principle not be observed. The ECJ based its interpretation on the difference between the teleological and the systematic conception of art. 5.1 and that of art. 17: whereas the forum foreseen in art. 17 is based on an agreement between the parties relating directly to jurisdiction, it is the proximity of the forum to the object of the dispute which is considered decisive in the case of art. 5.1. That is sound and coherent reasoning even if Advocate general Capotorti (and later on various authors) perceived the danger that art. 17 could thus be circumvented. By denying that a purely fictive agreement on the place of performance may have any power to confer jurisdiction within the meaning of art. 5.1 the Federal Court not only takes into consideration that

preoccupation, but it also in a way anticipates the judgment that the ECJ was to deliver one year later in the MSG/Gravières Rhénanes case (21.2.1997, C – 106/95). Indeed, according to that judgment an "agreement on the place of performance, which is designed….solely to establish that the courts for a particular place have jurisdiction" (tenor, point 2), cannot confer jurisdiction.

3. New development of the case-law relating to the Conventions

The opinion according to which "one need not proceed to a formal initial analysis" of the allegations of the plaintiff, such as described in the fourth above-mentioned paragraph of our presentation of the Bundesgericht's judgment, is shared by some German and Swiss authors (see Kropholler, Europäisches Zivilprozessrecht, Heidelberg 1998,6th ed., art. 19, note 5).

In its above-mentioned judgment in the Peters/ZNAV case, the ECJ simply found that the national courts could determine their own jurisdiction in accordance with art. 5.1. without being obliged to examine the case as to its merits (point 17). The above judgment of the Federal Court seems to tackle this problem in a more sophisticated manner, insofar as it distinguishes according to the consequences that the allegations relating to jurisdiction could have on the merits. Such an approach could be generalized and its scope could perhaps be extended beyond the case foreseen in art. 5.1.

One may however note that the rules of the Convention concerning "examination as to jurisdiction and admissibility" (see in particular art. 19) seem to be interpreted in the sense that, if the allegations of the plaintiff are only relevant with respect to the determination of jurisdiction, the court seised cannot be obliged to rely solely on them. Furthermore, the conventions do not allow one to draw the conclusion that there is a real duty to ordain the submission of proofs, where the facts generating jurisdiction are contested, such a duty resulting - possibly, as in the present case - from national law.

c) Norwegian *Høyesterettskjaeremålsutvalg, 10 May 1996, Information No. 1997/33 Deutsche Bank*
[ILP 1997.8, sum.]

The analysis of this judgment is based on the English summary prepared by the Norwegian authority entrusted with the exchange of information, as well as on an officious French translation kindly communicated by the services of the Committee, the Norwegian language not being known to the authors of the present report.

The case concerned an action brought in Norway by virtue of art. 5.1, the application of the said provision having in this instance been contested by the defendant on the ground that the claim in dispute was not of a contractual, but of a delictual nature. The Norwegian court seised with the claim seems to have held, that in order to declare itself competent, it should be in possession of sufficiently clear indications

("relatively clear indications" according to the terms of the summary drawn up by the national authority) of a contractual relationship and that, besides, it was for the plaintiff to give these indications. Such an interpretative approach of art. 5.1 seems to us to harmonize perfectly with the case-law of the ECJ relating to Effer/Kantner (4.3.1982, 38/81), to which the national judgment moreover refers.

d) Swiss *Bundesgericht*, 13 August 1996, K/Ms P and F

Ms P. and F., domiciled in Geneva, brought an action against K. domiciled in London, for the payment of a sum of money due for a brokerage commission. The defendant argued that the cantonal court had transgressed art. 5.1 of the Lugano Convention by not examining sufficiently whether the case in dispute fell within the concept of "matters relating to a contract " or not, especially as the existence, respectively the validity of the contract were in dispute. Such an examination, it was contended, would have led to the conclusion that the said provision was not applicable.

The Federal Court was of the opinion that the concept of "matters relating to a contract" is an autonomous notion which is not to be interpreted by reference to the national law of a State. It includes disputes relating to the existence or validity of a contract, failing which the defendant would have only to claim that the contract does not exist or is not valid, in order to evade the jurisdiction established by art. 5.1. The Federal Court adds that the obligation to be taken into consideration is neither any one of the obligations resulting from the contract, nor the characteristic obligation, but the obligation on which the action is based. Furthermore, the place where the obligation has been or must be performed should be determined according to the law governing the obligation in dispute according to the conflict rules of the forum. The special jurisdiction would then derive from the place of performance designated by that law. The Court concludes that the defendant could be sued in Switzerland, because, according to the applicable Swiss law, the payment must be made at the place where the creditor is domiciled at the time of the payment, unless otherwise stipulated. The Court also adds an argument based on art. 18, since the defendant had never contested the jurisdiction of the Genevese authorities.

In this judgment, the Federal Court also follows the above-mentioned case-law of the ECJ (see under judgment of the Swiss Bundesgericht of 18.I.1996, point III. a above): a special forum for each principal obligation in the case of entirely bilateral contracts and determination of the place of performance according to the law applicable to the contract, respectively to the obligation. Moreover, as results from the equally above-mentioned judgment of the ECJ in the Effer/Kanter case, the concept of "matters relating to a contract " also includes the case where the very formation of the contract is litigious.

e) Norwegian Høyesterett, 15 May 1997, Annie Haug
[*ILP* 1998.804]

The heirs of the recipient of a loan repayed it to the creditor and then turned against the guarantors. The latter were domiciled in Spain, but the action was brought in Norway, place were the loan was repayed. The defendants objected that the Norwegian courts lacked jurisdiction, on the ground that the dispute was not of a contractual nature and that, in any case, art. 5.1 was only applicable in commercial matters. The court of first instance accepted the plea of lack of jurisdiction, but the Court of Appeal reversed the judgment and the Supreme Court confirmed the appeal judgment.

As for the objection that the dispute was not of a contractual nature, the Supreme Court held itself to be bound by the findings of the Court of Appeal, the latter having concluded that the dispute was of a contractual nature, and, therefore, that art. 5.1 was applicable. In consequence, the Supreme Court directly expressed an opinion only on the other aspect relating to lack of jurisdiction, i.e. the inapplicability of art. 5.1 to disputes of a non-commercial nature, an objection which it refutes, by stating that such a limitation by no means results from the text of art. 5.1.

As to that last point, the judgment of the Supreme Court seems to be in harmony with the case-law of the ECJ, which never limited the applicability of art. 5.1 to disputes of a commercial nature (see the above-mentioned judgment in the Peters/ZNAV case, as well as the judgment of 15.1.1987 in the Shenavai/Kreischer case 266/85); the same applies in regard to academic teaching (Jenard Report, p. 23; Donzallaz, La Convention de Lugano, Berne, Staempfli, III/1998, No. 4442-4443) and, to our knowledge, to national case-law (Italian Corte di Cassazione, 1.10.1980, Rep. I-5.1.2-B32).

However, with respect to the contractual nature of the dispute, one can reasonably wonder whether and to what extent the interpretation given in the present instance is in accordance with the above-mentioned Handte/TMCS case of the ECJ. Of course, the *Høyesterett* did not directly examine whether the litigious obligation was contractual or not, as it considered itself to be bound, under national law, by the findings of the Court of Appeal, whose reasoning is not known to us. But it seems to us, that, as in the Handte/TMCS case, there was in this instance "no obligation which had been freely assumed by one party towards the other" (point 15 of the Handte/TMCS case).

(f) Swedish *Högsta Domstolen,* 13 June 1997, Information No. 1998/45, Probo Ab[*]

Like the judgment analysed under (c), the language of the judgment delivered on 13 June 1997 in the Probo Ab case by the Supreme Swedish Court is unknown to the drafters of the present report. In addition, no summary was established by the national authority entrusted with the exchange of information, the short analysis which follows having been rendered possible thanks to the help of the services of the European Commission in the form of an officious French translation of the relevant

[*] The authors thank Ms Renfors of the Swedish delegation for her comments on this decision.

judgment (let us also note that a very brief summary of that judgment appeared in English in the *Praxis des internationalen Privat- und Verfahrensrechts,* 1999, 54).

The proceedings opposed a creditor to a person who provided a guarantee for his debtor, the proceedings having been brought before the Swedish courts on the ground that the place of performance of the obligation resulting from the guarantee was to be performed in Sweden.

The first question which arose was whether such an action, based on a guarantee contract, fell within the scope of art. 5.1 or not. The national courts, which from the outset recall the principle of the autonomous interpretation of the concept of "matters relating to a contract", answer the above-mentioned question in the affirmative; this seems to us to be in accordance with the case-law and academic teaching relating to the Brussels Convention, even if we are not able to support our position by an *ad hoc* quotation, other than that of a judgment of the French Court of cassation of 3 March 1992 (*Information No. 1992/12*).

Moreover, with respect to the determination of the competent jurisdiction under art. 5.1, the Högsta Domstolen faithfully follows the interpretation consisting in taking into consideration the "litigious" obligation and determining its place of performance in accordance with the *lex causae*, identified by the conflict rules of the *forum*, even if it did not have to choose between Swedish and English law (the only two laws which could come into consideration), as in both cases the disputed obligation was to be performed at the domicile of the plaintiff, i.e. in Stockholm.

(g) English *Court of Appeal*, 13 July 1997, *Information No. 1998/33, Agnew* [*]

The judgment dealt with a claim for annulment/rescission of a contract on the ground that the behaviour of the other party during the negotiations was in breach of good faith. It was a contract of reinsurance and the behaviour in bad faith consisted in "misrepresentation and non-disclosure of material facts".

The question was whether the dispute fell within the scope of art. 5.1 and, if so, which would be the competent court according to that provision.

Both the Court of first instance and the Court of Appeal answered the first part of the question in the affirmative and then held the English courts to have jurisdiction as the negotiations had taken place in England.

With respect to the applicability of art. 5.1, the Court of Appeal, whilst recognizing that the obligation to act in good faith has its origin in *equity* and that it has not, as such, a contractual character, based its conclusion on the observation that in any case the above-mentioned obligation would only have a practical meaning in relation to a particular contract. Moreover the fact that the action aimed at the annulment/rescission of the contract does not seem to have shed any doubt on the applicability of art. 5.1; insofar as the action was of a contractual nature, the Court of

[*] The authors thank Mr Van der Velden of the Dutch delegation for his comments on this decision.

Appeal does not distinguish according to whether it aims at the performance of the contract or its validity/annulment.

On the other hand, with respect to the determination of the competent jurisdiction pursuant to art. 5.1, the reasoning of the Court of Appeal is essentially based on pragmatic considerations leading to the conclusion that, insofar as the action is based on an alleged breach of the principle of good faith during the negotiations, the court best placed to hear the case can only be the one of the place where the negotiations were held.

On the whole, this interpretation seems to us to be in accordance with the Brussels Convention, even if we are not in a position to support this allegation by precedents relating to national case-law or that of the Community. Only the second aspect of the question relating to the applicability of art. 5.1 seems to have been examined in the case-law of the Community, in particular, in the above-mentioned Effer/Kantner case; in that instance however the fact that the contract was void was only invoked incidentally, in a plea relating to lack of jurisdiction and not as the main issue in proceedings on the merits, as is the case here.

We can however make the following observations:

The decision of the Court of Appeal adopts the well-known principle of the Brussels Convention according to which art. 5 should be interpreted by reference to the objectives of the Convention and not to the concepts of the national laws, and is based, to a great extent, on the judgments of the ECJ relating to art. 5 (above-mentioned judgments Bloos, Shenavai and Custom Made/Stawa Metallbau, as well as the judgment of 27.9.1988 in the Kalfelis/Schröder case). In other words, the Court of Appeal acts as if it had to interpret the Brussels Convention.

The interpretation given by the Court of Appeal on the applicability of art. 5.1 corresponds to that already advocated by the the prevailing academic opinion with regard to the Brussels Convention (Gaudemet-Tallon, Les Conventions de Bruxelles et de Lugano, Paris L.G.D.J., 1996, 2nd ed., p. 112, note 22), as well as to national case-law (Italian *Corte di Cassazione*, 17.2.1981, Cahiers de droit européen 1985.469, *Cour de cassation* française, 25.1.1983, *Revue critique de droit international privé* 1983.516). The same applies with respect to the *culpa in contrahendo* in particular (Donzallaz, op. cit., No. 4531-4534).

It can also be said of the obligation foreseen in view of applying art. 5.1, i.e. the obligation to act in good faith during the negotiations. The above-mentioned judgment of the French Cour de cassation is not sufficiently conclusive and could perhaps lend itself to two different interpretations, but the Italian judgment is much less ambiguous and closer to that of the English Court of Appeal. It concerned a contract that had been entered into orally in Italy but was to be formalized later on in Paris, which never happened; even if several obligations were to be performed in Italy, the Corte di Cassazione held the French courts to have jurisdiction, on the ground that for the purpose of applying art. 5.1, one had to take into account the obligation which had been transgressed and which justified the rescission of the contract (in the same sense Donzallaz, Nos 4611 and 4612, who quotes the above-mentioned Italian judgment as well as Schlosser Kommentar, no. 9, ad art. 5).

Last but not least, the judgment commented on expressly mentions the need for a uniform interpretation of the Brussels and the Lugano Conventions in accordance with Protocol No. 2 of the Lugano Convention.

In conclusion, the judgment of the Court of Appeal seems to proceed on the assumption that both conventions are to be interpreted uniformly and offers new elements of interpretation of a question in relation to which the case-law concerning the Brussels Convention does not yet seem quite set.

IV. FINAL CONSIDERATIONS

The foregoing analysis seems to point to the fact that the case-law on the Lugano Convention is developing in a similar manner to that relating to the Brussels Convention, whilst sometimes allowing greater clarification and a more in-depth research into the subject, as results for instance from the judgment of the Swiss *Bundesgericht* of 21 February 1996 and of the English *Court of Appeal* of 13 July 1997. Besides, even if a given decision should diverge somewhat from the case-law concerning the Brussels Convention, as appears to have happened in the case of the Norwegian *Høyesterett* of 15 May 1997, we are under the impression that those divergencies are not due to the specific nature of the Lugano Convention, but that they could well appear within the framework of the Brussels Convention itself.

However, these conclusions are only provisional and stated with some diffidence, insofar as our detailed analysis of the case-law refers solely to art. 5.1, the judgments concerning the other provisions of the Convention having only been examined in the "overview" of chapter II above. We therefore suggested to the Standing Committee to extend the analysis of the case-law undertaken in this report with respect to art. 5.1 alone to all the provisions of the Lugano Convention which have given rise to case-law. In this way, one will on the one hand be able to verify to what extent our conclusions relating to art. 5.1 have a general impact, and, on the other hand, case-law materials collected in application of Protocol No. 2 would have additional value, because they would be easier to use.

In our opinion the most appropriate method would be to draw up in a first stage a consolidated version of the report which would cover all the case-law materials currently available, i.e. from the 1st to the 8th fascicle, and afterwards to foresee annual updatings, whenever new fascicles are published. To judge from our experience, we take the liberty of adding that such work would be very much facilitated by material support, aiming mainly at covering the expenses occasioned by some translations and/or secretarial work.

Furthermore, the authors of the report draw your attention to the fact that several judgments appearing in fascicles written in "unusual" languages are later translated in particular into English in order to be published, in their entirety or in a summarized form, in law reviews. The fascicles mention these translations if they are available at the time each fascicle is prepared, but several translations are only published later on. In our report, we were careful to mention these "new" translations, i.e. those

which did not yet exist at the time each fascicle was prepared and which are not mentioned on the endpaper of each judgment included in the fascicles, and we think that it would be useful if the future reports (as well as the publications of the Swiss Institute of comparative law) would do the same.

In conclusion, the authors would like to thank the services of the Committee for the assistance they gave in securing the French translation of judgments (c) and (f) of chapter III and they furthermore acknowledge that their task has been greatly facilitated by the preliminary analysis of the case-law which the competent services of the Court of justice communicated in application of Protocol No. 2. They would also like to thank the members of the Standing Committee for the trust they placed in them by giving them the task of drawing up this first experimental report and express the wish that this report will indeed enable a useful discussion on the methods used to follow up of the case-law collected by the services of the Court of justice in application of Protocol No. 2.

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DEUXIÈME RAPPORT SUR LA JURISPRUDENCE DES TRIBUNAUX NATIONAUX ERELATIVE Á LA CONVENTION DE LUGANO

établi par H. Bull, G. Musger, F. Pocar

I. Introduction

Lors de sa réunion des 13 et 14 septembre 1999, le Comité permanent de la Convention de Lugano a reçu un rapport sur la jurisprudence des tribunaux nationaux relative à la convention, qui avait été établi à partir des décisions transmises à la Cour de justice des Communautés européennes (CJCE) par les États signataires et adhérents, conformément au Protocole n° 2 annexé à la convention. Ce rapport portait sur les décisions contenues dans les sept premiers fascicules publiés par la Cour (par sa direction « Bibliothèque, recherche et documentation »). Le Comité permanent a décidé que les délégations autrichienne, italienne et norvégienne établiraient pour la réunion suivante un deuxième rapport analogue portant sur les décisions contenues dans le 8ème fascicule, diffusé en juillet 1999. Le 8ème fascicule contient 71 décisions relatives soit à la convention de Lugano, soit à la convention de Bruxelles, qui ont été prononcées par les juridictions suivantes :

***Convention de Lugano*:**
Oberster Gerichtshof (Autriche): 22 décisions
Tribunal fédéral / Bundesgericht (Suisse): 7 décisions
Bundesgerichtshof (Allemagne): 1 décision
Corte di Cassazione (Italie): 4 décisions
Norges Høyesterett (Norvège): 1 décision
Korkein oikeus / Högsta domstolen (Finlande): 2 décisions[*]

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***Convention de Bruxelles* :**
Cour de justice des CE: 6 décisions
Bundesgerichtshof (Allemagne): 3 décisions
Tribunal Supremo (Espagne): 3 décisions
Cour de Cassation (France): 11 décisions
House of Lords (Royaume-Uni) : 2 décisions
Corte di Cassazione (Italie): 6 décisions
Supreme Court (Irlande): 1 décision

Décisions de renvoi à la Cour de justice des CE afin qu'elle statue à titre préjudiciel :
Hoge Raad (Pays-Bas) 1 décision (Affaire C-387/98 de la CJCE)
Cour d'appel de Versailles (France): 1 décision (Affaire C-412/98 de la CJCE)

Comme dans le premier rapport, seules les décisions portant sur la Convention de Lugano (37 décisions) seront présentées dans le présent rapport. Parmi ces 37 décisions, celle de la *Norges Høyesterett* (arrêt nº 69 du 8ème fascicule – décision du 15 mai 1997, 1.nº 286 K/1997, *Annie Haug*), figurait déjà dans le premier rapport. Nous renvoyons au résumé de la décision et aux commentaires que ce premier rapport faisait à son sujet.
Nous rappelons que la CJCE est tributaire des informations que lui fournissent les autorités des différents États sur la jurisprudence nationale. Les décisions nationales relatives aux Conventions de Bruxelles et de Lugano que la CJCE a été en mesure de diffuser ne constituent pas nécessairement une compilation complète des décisions relatives à ces conventions rendues par les juridictions nationales jugeant en dernier ressort. Il convient d'en tenir compte en lisant le rapport.
Les décisions portent sur une large éventail de questions, mais l'article 5, point 1, sur le *forum solutionis* est manifestement la disposition ayant fait l'objet du plus grand nombre de décisions : 26 sur 71, dont 16 concernent la Convention de Lugano. Vient ensuite, pour le nombre de litiges, l'article 17 sur les conventions attributives de juridiction (13 sur un total de 71 décisions, dont 6 relatives à la Convention de Lugano). Deux points du rapport, les points III et IV, sont par conséquent consacrés respectivement à l'article 5, point 1, et à l'article 17, les autres décisions étant présentées au point II.

II. Relevé de la jurisprudence

Mis à part les arrêts relatifs à l'article 5, point 1, et à l'article 17, qui feront l'objet d'une analyse plus détaillée aux points III et IV, ainsi que quelques arrêts d'intérêt mineur, nous pouvons présenter le relevé ci-après de la jurisprudence :

1. Le Tribunal fédéral suisse a explicitement décidé le 20 août 1998 (arrêt nº 35), de s'aligner sur la jurisprudence de la CJCE relative à la Convention de Bruxelles pour l'interprétation de la notion de « matières civile et commerciale » figurant à **l'article 1er** (affaire nº 814/79, *Rüffer*), soulignant par là l'importance que revêt d'une manière générale une interprétation uniforme des Conventions de Bruxelles et de Lugano. La décision contenait cependant quelques considérations sur les circonstances dans lesquelles une interprétation divergente des conventions serait justifiée. Cela pourrait être le cas, note le Tribunal fédéral, si l'interprétation d'une disposition de la Convention de Bruxelles était influencée par l'application d'une disposition de droit communautaire, par exemple par l'application du principe de non-discrimination à raison de la nationalité.
L'arrêt est sur le fond parfaitement conforme à la jurisprudence de la Cour européenne relative à l'article 1er. Le simple fait que l'une des parties soit une autorité publique n'exclut pas la matière du champ d'application de la convention. La question déterminante est celle de savoir si l'autorité en question a agi dans l'exercice de ses prérogatives de puissance publique (*jure imperii*) ou non (*jure gestionis*). En l'espèce, le défendeur, une entité publique italienne, avait agi dans le domaine de l'assurance-crédit, sans user de prérogatives de puissance publique. L'application de la convention a donc été admise.

2. Un arrêt (*Oberster Gerichtshof* autrichienne, 28 août 1997, arrêt nº 10) concerne l'interprétation de l'**article 5, point 2** (obligations alimentaires). La demanderesse, une jeune femme domiciliée en Autriche, voulait intenter une action contre son père, domicilié en Suisse, pour le paiement d'une dot. Ignorant apparemment l'existence de l'article 5, point 2, elle demanda à la Cour suprême de désigner une juridiction compétente devant laquelle porter son action. Sa demande était fondée sur l'article 28 de la Jurisdiktionsnorm (loi autrichienne sur la procédure civile et l'organisation judiciaire). Cette disposition autorise la Cour suprême, si certaines conditions sont réunies, à désigner une juridiction compétente pour connaître d'une action pour laquelle les autres règles de droit national ou international ne désignent pas de juridiction territorialement compétente. La Cour a rejeté la demande, au motif que lorsque le droit autrichien est la lex causae, le paiement d'une dot relève de l'article 5, point 2. Cette disposition prévoyant que la compétence appartient au tribunal du domicile de demandeur, la Cour ne voyait pas de raison de désigner un tribunal compétent.

La question de savoir si le paiement d'une dot relève ou non de l'article 5, point 2, n'a été traitée que dans le cadre d'une question préjudicielle soumise à la Cour suprême. Néanmoins, on sait maintenant que cette obligation doit être qualifiée d'obligation alimentaire au sens de l'article 5, point 2. Compte tenu de la particularité des règles autrichiennes en matière de dot, il semble que cela soit conforme à la jurisprudence de la Cour de justice relative à cette disposition. Le droit autrichien considère la dot comme l'ultime effet de l'obligation alimentaire des parents. Ils doivent aider leurs enfants à démarrer dans la vie matrimoniale. La dot doit aller à l'enfant lui-même et non au conjoint. C'est pourquoi la Cour suprême a estimé que, lorsque le droit autrichien est la lex causae, la dot relève d'un concept autonome d'obligations alimentaires au sens de l'article 5, point 2.

3. Trois décisions portent, au moins en partie, sur l'**article 5, point 3**.

La première (*Oberster Gerichtshof* autrichienne, 27 janvier 1998, nº 18) concerne une action en restitution du prix dans une affaire dans laquelle la validité d'un contrat était contestée pour défaut de consentement. Le demandeur fondait la compétence des tribunaux autrichiens sur l'article 5, point 1, ou sur l'article 5, point 3. Le Cour suprême a accepté l'applicabilité de l'article 5, point 1, (voir ci-après point III, paragraphe 4), mais a refusé l'application de l'article 5, point 3. Elle a estimé que la notion de « matière délictuelle ou quasi délictuelle » devait être considérée comme une notion autonome – ainsi qu'en avait décidé la CJCE dans l'affaire *Kalfelis/Schröder* (affaire nº 189/87) – et qu'elle ne s'appliquait pas à une action fondée sur l'enrichissement sans cause après résolution du contrat.

Dans un autre arrêt relatif à l'article 5, point 3, (*Oberster Gerichtshof* autrichienne, 24 février 1998, nº 21) la Cour a eu à juger de la localisation de pertes purement économiques. Le demandeur, domicilié en Autriche, avait livré des marchandises à une société allemande sur la base d'un contrat de crédit assorti d'une clause de réserve de propriété. Mais la société allemande a tout de même vendu les marchandises et les acheteurs en ont acquis la propriété en vertu des règles allemandes de l'acquisition de bonne foi. Avant la date à laquelle le paiement devait avoir lieu, la société est devenue insolvable en raison de malversations de son directeur général, et les factures du demandeur sont restées impayées.

Le demandeur a cherché à obtenir une indemnisation en intentant contre le directeur général une action en responsabilité extracontractuelle. Le directeur étant domicilié en Allemagne, la compétence des tribunaux autrichiens ne pouvait être fondée que sur l'article 5, point 3. La Cour suprême a invoqué la jurisprudence de la CJCE (*Bier/Mines de potasse*, affaire 21/76 ; *Dumez France SA*, affaire 220/88 ; *Shevill*, affaire 68/93), aux termes de laquelle le demandeur peut choisir d'intenter son action soit devant le tribunal du lieu où l'événement causal s'est produit, soit devant celui du lieu où le préjudice est survenu.

Étant donné que le défendeur avait commis ses malversations en Allemagne, seule la deuxième possibilité entrait en pratique en ligne de compte. Invoquant deux décisions italiennes relatives à l'article 5, point 3, de la Convention de Bruxelles (qui vont plus ou moins dans le sens de la décision nº 60 citée ci-après), la Cour a considéré que la diminution du patrimoine du demandeur avait eu lieu à son domicile et que, étant la conséquence première et directe des malversations commises par le défendeur, le tribunal du domicile du demandeur était compétent aux termes de l'article 5, point 3.

Dans ses conclusions, le défendeur avait invoqué l'affaire *Marinari* jugée par la CJCE (affaire 364/93) pour montrer qu'une perte purement économique de patrimoine subie par le demandeur ne suffisait pas à établir la compétence en vertu de l'article 5, point 3. La Cour suprême a rejeté cet argument. Dans l'affaire *Marinari*, le CJCE avait estimé que les conséquences ultérieures d'un préjudice survenues dans un État différent de celui où est survenu le préjudice initial n'entraient pas en ligne de compte pour l'application de l'article 5, point 3. La Cour suprême a considéré en l'espèce que la perte initiale avait été subie au domicile du demandeur. Vu que la vente des marchandises par le défendeur, qui avait eu lieu en Allemagne, avait eu pour conséquence directe la perte de ses biens par le demandeur, on peut se demander si la Cour suprême a appliqué correctement la jurisprudence *Marinari*. On pourrait faire valoir que la perte des biens a été le préjudice initial subi par le demandeur, auquel cas, une réduction de son patrimoine situé en Autriche pourrait être qualifiée de conséquence n'entrant pas en ligne de compte pour l'application de l'article 5, point 3.

Le troisième arrêt relatif à l'article 5, point 3, (*Corte di Cassazione* italienne, 22 mai 1998, nº 60) concerne la détermination du lieu où le fait dommageable s'est produit. Le demandeur avait subi une opération chirurgicale en Suisse et s'était plaint, deux années plus tard, que son état de santé avait empiré en Italie, où il avait son domicile. Il a poursuivi le chirurgien en Italie en fondant la compétence des tribunaux italiens sur le droit du demandeur de choisir entre le lieu de l'événement causal et le lieu où le fait dommageable s'est produit, droit établi par la CJCE dans sa jurisprudence, et en soutenant que le fait dommageable s'était produit en Italie. La Cour suprême s'est livrée à une analyse détaillée de la jurisprudence de la CJCE pour parvenir à sa conclusion, favorable au demandeur. Elle a tout d'abord exclu, en se fondant sur les faits, que le demandeur ait invoqué l'article 5, point 1, ou l'article 5, point 3, comme chefs de compétence ; ensuite, elle a écarté l'argument avancé par le défendeur, selon lequel le for contractuel devait prévaloir conformément à l'arrêt *Kalfelis/Schröder* rendu par la CJCE dans l'affaire 189/87.

Sur la question principale, la Cour a passé en revue toutes les décisions de la CJCE, depuis l'arrêt *Bier/Mines de potasse* (affaire 21/76) jusqu'à l'arrêt *Marinari* (affaire 364/93), pour arriver à la conclusion que le fait dommageable invoqué par le demandeur pour fonder la compétence, à savoir l'aggravation de son état de santé, devait être considéré comme la conséquence directe du comportement du défendeur ayant causé le préjudice, et non comme un préjudice accessoire qui ne relèverait pas de l'article 5, point 3. Il semble que la Cour ait appliqué dans sa décision les principes affirmés par le CJCE dans l'affaire *Marinari*, dans la mesure où elle y admet qu'un préjudice accessoire consistant uniquement en une perte patrimoniale n'aurait pas été un critère de compétence justifié au titre de la convention.

4. Deux arrêts de la Cour suprême autrichienne concernent l'**article 6**.
Dans le premier (*Oberster Gerichtshof* , 24 février 1998, nº 20), la Cour suprême a appliqué correctement l'article 6, point 3 (demande reconventionnelle). Á la différence de la disposition correspondante du droit autrichien de la procédure (l'article 96 de la Jurisdiktionsnorm), l'article 6, point 3, exige qu'il existe un lien entre la demande et la demande reconventionnelle. Ce lien n'existant pas dans l'espèce considérée, la Cour n'a pas admis la compétence pour la demande reconventionnelle.
Le deuxième arrêt (*Oberster Gerichtshof*, 24 novembre 1997, nº 14) ne concernait pas la Convention de Lugano à proprement parler, mais y faisait référence pour l'interprétation du droit procédural interne. Le droit autrichien ne connaît pas les demandes en garantie et en intervention visées à l'article 6, point 2, de la Convention de Lugano, mais les tiers peuvent être invités à comparaître devant un tribunal selon les règles de la litis denuntiatio. Il avait été jugé lors de décisions antérieures qu'à la suite d'une telle procédure l'arrêt rendu sur la demande originaire produisait des effets à l'égard du tiers, qu'il ait ou non comparu dans le cadre de cette procédure. Toutefois, pour obtenir une décision exécutoire contre le tiers, il faut intenter des actions distinctes - et c'est là que réside en fait la différence entre les systèmes allemand et autrichien de litis denuntiatio, d'une part, et les demandes en garantie et en intervention visées à l'article 6, point 2, d'autre part -, mais, selon la tradition jurisprudentielle, le tiers était forclos à faire valoir que la décision originaire était erronée. Vu l'absence, dans le Code de procédure civile, de règles concernant cet effet contraignant, cette jurisprudence a été sévèrement critiquée par la doctrine. Devant ces critiques, la Cour suprême a décidé de revoir sa position et elle a fait référence, dans une affaire de portée purement nationale, à l'article V du protocole n° 1 annexé à la Convention de Lugano.

Cette disposition tient compte des différents systèmes permettant de faire intervenir des tiers dans une procédure judiciaire. Elle porte non seulement sur les questions de compétence – l'article 6, point 2, et l'article 11 concernant les demandes en garantie et en intervention sont remplacés par la possibilité d'une litis denuntiatio - , mais aussi sur la reconnaissance des décisions. L'article V dit explicitement que les effets produits à l'égard des tiers par des jugements rendus en Autriche ou en Allemagne en application des dispositions relatives à la litis denuntiatio sont également reconnus dans les autres États contractants.
La Cour suprême considère que cette disposition n'aurait aucun sens si les litis denuntiatio ne produisaient pas d'effet à l'égard des tiers. Les autorités législatives autrichiennes ont donc accepté, en ratifiant la Convention de Lugano, que les litis denuntiatio produisent des effets au moins dans les affaires transfrontalières. La Cour ne voyant pas de raison de faire une distinction entre les affaires nationales et internationales, la jurisprudence traditionnelle relative aux effets contraignants de la litis denuntiatio a été confirmée.
Cette décision est un exemple très instructif des effets que peut avoir la Convention de Lugano sur l'interprétation et l'application du droit interne, mais elle n'est pas le seul exemple : plusieurs décisions de la Cour suprême autrichienne ont fait référence à la jurisprudence de la CJCE relative à l'article 21 de la Convention de Bruxelles lorsqu'il s'est agi de résoudre des questions touchant à la litispendance, à la force de la chose jugée et à l'estoppel (*Oberster Gerichtshof*, 15 décembre 1997, *Sammlung zivilrechtlicher Entscheidungen*, vol. 70 nº 261, 14 juillet 1999 et 13 octobre 1999, non encore publiées).

5. Dans un arrêt déjà mentionné à propos de l'article 2 (Tribunal fédéral suisse, 20 août 1998, nº 35), le Tribunal fédéral suisse a jugé que le tribunal du domicile du preneur d'assurance (**article 8, point 1**) pouvait aussi être compétent pour connaître d'actions intentées contre l'assureur par l'assuré ou le bénéficiaire.

6. L'**article 14, premier alinéa**, prévoit que l'action intentée par un consommateur contre l'autre partie au contrat peut être portée soit devant les tribunaux de l'État sur le territoire duquel est domicilié le consommateur soit devant ceux de l'État sur le territoire duquel est domiciliée l'autre partie. Cette disposition ne concerne que la compétence internationale ; la question de la juridiction territorialement compétente est réglée par la *lex fori*. Des problèmes se posent lorsque le droit procédural interne ne connaît pas de concept analogue de protection des consommateurs dans les affaires sans implications transfrontières et qu'il n'existe donc pas de tribunal (territorialement) compétent au domicile du consommateur (comme c'est le cas en Allemagne et en Autriche). En pareils cas, l'article 14, premier alinéa, peut offrir une compétence internationale, mais il n'existe pas de tribunal qui soit réellement compétent.

Le droit procédural autrichien prévoit ce type de situations à l'article 28 de la Jurisdiktionsnorm, que l'on a déjà cité à propos de l'article 5, point 2. Si les tribunaux autrichiens ont une compétence internationale en vertu d'un traité international, mais que le droit procédural interne ne permet pas de trouver un tribunal compétent, la Cour suprême doit désigner un tribunal qui deviendra ainsi territorialement compétent. Une décision de la Cour suprême contenue dans le dossier (*Oberster Gerichtshof,* 15 octobre 1998, nº 9) illustre parfaitement cette procédure particulière, qui est assez fréquente. Dans les procédures non contradictoires, la Cour suprême vérifie –en se fondant uniquement sur les conclusions du demandeur – s'il existe ou non une compétence internationale. Si celle-ci est admise et si un tribunal de première instance est désigné, sa compétence territoriale ne peut être contestée par le défendeur dans la suite de la procédure.
Nous ne pouvons mentionner ici qu'un seul des problèmes que cette procédure est susceptible de poser : étant donné que le défendeur n'est pas entendu devant la Cour suprême, on peut se demander s'il lui est possible de contester la compétence internationale des tribunaux autrichiens dès le début de la procédure devant le tribunal désigné. Compte tenu de l'article 20 de la Convention de Lugano et de l'article 6 de la Convention européenne des droits de l'homme, cela devrait être possible.

7. Trois décisions autrichiennes doivent être citées s'agissant de l'**article 16** (compétences exclusives), dont deux concernent le point 1, et une le point 5.
Dans les arrêts relatifs à l'**article 16, point 1**, (*Oberster Gerichtshof,* 15 octobre 1998, nº 17, et *Oberster Gerichtshof,* 25 juin 1998, nº 25), la Cour suprême autrichienne a explicitement suivi la jurisprudence de la CJCE sur la Convention de Bruxelles. Elle a souligné dans les deux affaires l'importance d'une interprétation autonome des notions utilisées dans la convention et a considéré que la qualification des actions selon la lex fori ou la lex causae n'était pas pertinente.
Dans l'arrêt nº 17, la Cour suprême était saisie d'une action intentée par un créancier contre des actes du débiteur concernant un droit réel sur des biens immobiliers (action paulienne). En droit interne, ce type d'actions relèvent de l'article 81 de la Jurisdiktionsnorm, disposition qui correspond à l'article 16, point 1, de la Convention. En dépit de cette qualification par la lex fori, la Cour suprême a suivi l'arrêt rendu par la CJCE dans l'affaire *Reichert/Dresdner Bank* (affaire nº 115/88), dans lequel celle-ci excluait l'action paulienne du champ d'application de l'article 16, point 1.

Dans la décision nº 25, la Cour suprême a eu à statuer sur la situation suivante : le demandeur était propriétaire d'un bien immobilier situé en Autriche. Il avait loué ce bien à bail à une personne domiciliée en Allemagne. Les parties n'ayant pas demandé pour ce contrat l'autorisation prescrite par la loi réglementant la vente et l'affermage des terres (Grundverkehrsrecht), le contrat était nul *ab initio*. Comme le défendeur avait utilisé le terrain pendant quelques mois, le requérant a demandé une compensation pour la jouissance du bien en question. Il s'est appuyé sur l'article 16, point 1, pour invoquer la compétence des tribunaux autrichiens. La Cour suprême a rejeté cette conclusion. S'appuyant sur l'arrêt CJCE *Liber/Göbel* (affaire C 292/93), elle a considéré que l'usage d'un bien immobilier dans le cadre d'un contrat frappé de nullité *ab initio* ne relevait pas de l'article 16, point 1, et que le type du contrat frappé de nullité (vente de terrain dans l'affaire *Liber/Göbel*, location à bail d'un terrain dans l'espèce considérée) ne devait pas entrer en ligne de compte.

Dans un arrêt relatif à l'**article 16, point 5**, la Cour suprême autrichienne a souligné l'importance d'une interprétation restrictive de cette disposition (*Oberster Gerichtshof,* 5 janvier 1998, nº 15). Un débiteur condamné, domicilié en Autriche, avait intenté une action contre le créancier en vue d'obtenir une décision déclarant qu'il s'était acquitté de son obligation. Comme ce dernier était domicilié en Allemagne, le demandeur a voulu fonder la compétence des tribunaux autrichiens sur l'article 16, point 5, au motif que le créancier avait menacé d'entamer une procédure d'exécution. Comme cette procédure n'était pas engagée, la Cour suprême a refusé d'appliquer cette disposition.

8. Il arrive assez souvent que les jugements aient entre autres à régler la question de savoir si un tribunal est rendu compétent par la comparution du défendeur (**article 18**). Vu que la plupart des décisions en la matière sont conformes à la jurisprudence de la CJCE (*Elefanten Schuh/Jacqmain*, affaire 150/80), il nous a semblé qu'une seule décision méritait d'être mentionnée (*Oberster Gerichtshof,* 25 février 1998, nº 22). Le cas soumis à la Cour était assez classique : la procédure autrichienne d'injonction de payer (Mahnverfahren) prévoit que le tribunal délivre une ordonnance en ce sens, uniquement sur la base des conclusions du créancier. En l'absence d'opposition (Einspruch) de la part du débiteur dans les deux semaines, l'ordonnance est exécutoire. Dans le cas contraire, une procédure civile normale est ouverte. L'opposition n'a pas besoin d'être motivée, le débiteur doit simplement déclarer qu'il n'est pas d'accord sur l'ordonnance. Toutefois, les oppositions contiennent souvent des conclusions sur le fond de l'affaire, notamment lorsqu'elles sont rédigées par un avocat.

C’est ce qui s’était produit dans l’affaire dont la Cour suprême avait à connaître. Dans son opposition écrite, le défendeur avait contesté l’action sur le fond. Lors de la première audition, il avait en outre excipé de l’incompétence des tribunaux autrichiens. Le requérant avait rétorqué que l’opposition devait être qualifiée de comparution conférant compétence au sens de l’article 18.
La Cour suprême a déclaré que la question de savoir quelles sont les conclusions qui valent comparution devait être tranchée selon la lex fori. Le droit autrichien de la procédure permettant de soulever la question de la compétence lors de la première audition, même si celle-ci n’a pas été contestée dans l’opposition, la Cour a refusé d’appliquer l’article 18.
Cette décision, qui a été suivie de plusieurs autres allant dans le même sens, résisterait-elle à une analyse approfondie effectuée sur la base de la jurisprudence de la CJCE ? Il est exact que la jurisprudence *Elefanten Schuh/Jacqmain* renvoie à la lex fori en affirmant que la compétence doit être contestée avant les conclusions considérées, *par le droit procédural national*, comme la première défense adressée au juge saisi. On pourrait cependant se demander si l’application de l’article 18 doit réellement dépendre du type particulier de conclusions (comme par exemple l’opposition à une ordonnance enjoignant le paiement) censées conférer une compétence au regard du droit national. Comment ce critère pourrait-il fonctionner dans un État contractant où la notion de comparution conférant compétence n’existe tout simplement pas ? Il s’agit ici de savoir si l’opposition doit être considérée, selon la lex fori, comme une *défense* contre l’action intentée par le demandeur. Étant donné qu’en l’absence d’opposition dans les deux semaines, l’ordonnance enjoignant de payer devient exécutoire sans aucun recours possible, cette hypothèse paraît incontestable. Il n’est donc pas étonnant que la décision de la Cour suprême ait été sévèrement critiquée par la doctrine. En outre, dans une opinion incidente récente (*Oberster Gerichtshof,* 24 novembre 1999, non encore publiée), une autre chambre de la Cour suprême s'est demandé si le simple critère de la lex fori était valable. On peut s’attendre à ce que tôt ou tard la CJCE soit saisie de cette question (dans le cadre de la Convention de Bruxelles).

9. Trois décisions figurant dans le fascicule de 1999 sur la Convention de Lugano concernent l’**article 21**, toutes les trois en liaison avec l’article 54.2. Une seule décision avait pour objet principal l’interprétation de l’article 21 et sera traitée ci-après. Les deux autres seront examinées plus loin (cf. point II, paragraphe 12).

Dans l'affaire dont il s'agit ici (*Corte di Cassazione* italienne, 13 février 1998, nº 61), l'action avait été intentée devant les tribunaux suisses et italiens, avant l'entrée en vigueur de la convention, par A contre B à Bâle et contre C à Rome. Après l'entrée en vigueur de la convention, C était intervenu dans l'action pendante à Bâle contre B et avait appelé B à comparaître dans l'action pendante à Rome. Il était demandé à la Cour d'examiner si la question de la litispendance devait être tranchée sur la base de la demande originaire, auquel cas la convention ne serait pas applicable, ou sur la base de l'action intentée après l'entrée en vigueur de la convention. La Cour a invoqué la notion de « demande formée » figurant à l'article 21 et a très justement fait observer que l'identité des parties à la suite d'une jonction facultative et d'une jonction obligatoire d'actions devait être appréciée au moment de la jonction et non au moment où les demandes originaires ont été formées. Elle a donc appliqué en l'espèce l'article 21. La décision de la Cour suprême italienne peut être considérée comme une application des principes affirmées par la CJCE dans l'affaire *Tatry/Maciej Rataj* (affaire nº C-406/92).

10. La Cour suprême autrichienne avait été saisie de plusieurs questions relatives à la **compétence en matière de mesures provisoires** (*Oberster Gerichtshof*, 13 janvier 1998, nº 16). La Fédération internationale de ski (FIS), qui a son siège en Suisse, avait, en vertu de ses statuts, refusé à un skieur professionnel autrichien l'autorisation de participer à des compétitions de la coupe du monde sans posséder la licence de la fédération autrichienne de ski. Le skieur a demandé des mesures provisoires ordonnant à la FIS d'accepter une licence délivrée par un fédération caraïbe de ski.

La Cour suprême a anticipé dans un attendu la jurisprudence *Van Uden* de la CJCE (affaire C 391/95) en jugeant que pour les mesures provisoires la compétence internationale pouvait être fondée *soit*, en application de l'article 24, sur le droit national, *soit* sur les règles de compétence de la convention. Contrairement au point de vue défendu par le demandeur, la Cour a estimé que l'article 24 prévoyait simplement l'application du droit national, et que les États contractants n'étaient nullement tenus de prévoir des tribunaux spécialement compétents pour ordonner des mesures provisoires dans le contexte de la Convention de Lugano (ou de Bruxelles).

La Cour a aussi examiné rapidement s'il était possible d'appliquer les dispositions en matière de compétence de la convention elle-même pour la mesure provisoire considérée. Le demandeur avait invoqué l'article 5, point 3 et – pour une action intentée contre la Fédération autrichienne de ski – l'article 6, point 1. Les deux chefs de compétence ont été refusés.

Concernant l'article 6, point 1, le demandeur n'avait pas démontré l'existence d'un lien suffisamment étroit entre l'action dirigée contre la Fédération autrichienne de ski et la mesure provisoire qu'il avait demandée contre celle-ci. Cet argument incontestable suffisait à lui seul à exclure l'application de cette disposition, mais la Cour suprême a ajouté une opinion incidente intéressante : vu que le droit autrichien ne permet pas de rendre une décision jointe portant à la fois sur une demande au fond et sur une demande de mesure provisoire, elle a estimé que le recours à l'article 6, point 1, était impossible en pareil cas pour les mesures provisoires.

Á première vue, cela semble aller trop loin. Dans l'arrêt *Van Uden*, la CJCE a simplement fait référence aux dispositions de la convention sur la compétence en tant que telles sans subordonner la compétence à d'autres conditions. En cas d'actions jointes au sens propre du terme, l'article 6, point 1, ne précise pas si une décision jointe sur les actions est possible, voire requise par le droit procédural interne, ou non. C'est pourquoi l'article 6, point 1, devrait a priori être applicable même si le droit national ne connaît pas la notion de décision jointe ou d'actions connexes. Tel étant le cas, il n'y a a priori aucune raison de traiter différemment les demandes de mesures provisoires.

Il pourrait cependant être intéressant d'examiner l'affaire de plus près en tenant compte du véritable objet de l'article 6, point 1. Selon la jurisprudence *Kalfelis/Schröder* de la CJCE (affaire 189/87), cette disposition a pour objet d'éviter les jugements inconciliables. On pourrait se demander s'il ne faut pas pour cela au moins des procédures jointes pour toutes les actions connexes (au besoin avec des décisions distinctes). Si le droit national ne le permet pas – comme c'est le cas en Autriche pour les demandes au fond et les demandes de mesures provisoires –l'objet principal de l'article 6, point 1, semble être mis en échec. On serait tenté d'en conclure que l'opinion incidente de la Cour suprême pourrait se justifier.

La Cour a également refusé d'application l'article 5, point 3, au motif que la mesure provisoire demandée « n'avait pas pour objet de préserver un droit établi du demandeur ». On peut regretter que la Cour n'ait pas précisé davantage ce qu'elle entendait pas là. Le demandeur était un skieur professionnel et le risque d'une perte financière était donc évident. Compte tenu de l'interprétation assez large que fait la Cour suprême de l'article 5, point 3 (cf. ci-dessus, point II, paragraphe 3, décision nº 21), la compétence aurait pu être fondée sur le simple fait que le patrimoine du demandeur se trouvaient en Autriche. Et même si cet argument n'avait pas été accepté, au moins certaines des compétitions dont le demandeur était exclu avaient lieu en Autriche. L'attitude de la FIS avait donc des conséquences dommageables immédiates dans l'État du for.

Mais la véritable question n'est pas là (elle a été explicitement laissée de côté par la Cour suprême). Est-il possible de recourir à l'article 5, point 3, pour les actions préventives, ou le for que cette disposition désigne est-il limité aux cas où le fait dommageable s'est déjà produit ? La doctrine privilégie, semble-t-il, une interprétation plus large de cette disposition. On peut cependant regretter qu'une question préjudicielle de la *Bundesgerichtshof* allemande portant sur cette question ait été retirée avant que le CJCE n'ait eu l'occasion de se prononcer. La Cour suprême autrichienne vient de nouveau de saisir la CJCE de ce point (*Oberster Gerichtshof,* 6 Ob 50/00x, concernant l'action préventive d'une association de consommateurs contre des dispositions inéquitables figurant sur des formulaires types du défendeur).

11. Dans une décision du 17 juin 1998 (nº 70) sur l'exécution d'un jugement français en Finlande, la *Korkein oikeus* finlandaise a rejeté l'argument par lequel le défendeur condamné faisait valoir que l'exécution devait être refusée au motif que l'acte introductif d'instance devant le tribunal français ne lui avait pas été notifié en temps utile pour qu'il puisse se défendre, cf. **article 27, point 2** de la convention. Le jugement français avait été rendu par défaut après remise au parquet de l'acte en France et après une tentative des autorités finlandaises pour le notifier au défendeur dans sa version originale française. D'après les autorités finlandaises, le défendeur connaissait le français, mais il avait refusé d'accepter le document en français. Le ministère finlandais de la justice avait dû le renvoyer en France en demandant sa traduction pour qu'il soit de nouveau notifié. La *Korkein oikeus* a estimé que le document avait été dûment notifié au défendeur selon la loi française. Elle a également considéré que, vu la tentative faite pour lui notifier le document dans sa version française, qui avait eu lieu quatre mois avant le prononcé du jugement, l'affaire avait été portée à sa connaissance et il avait eu suffisamment de temps pour préparer sa défense.

12. Ainsi qu'on l'a indiqué plus haut, trois décisions concernent la disposition transitoire de l'article 54, deuxième alinéa, en liaison avec la question de la litispendance faisant l'objet de l'article 21. L'une d'entre elles a été examinée sous l'angle de cette dernière disposition, mais les deux autres portent principalement sur le champ d'application et l'effet de l'article 54, deuxième alinéa. Dans la première affaire (Tribunal fédéral suisse, 9 septembre 1998, nº 36), le Tribunal devait décider si, aux fins de l'application de l'article 54, deuxième alinéa, la disposition sur la litispendance faisait partie des dispositions sur la compétence à prendre en considération pour la reconnaissance et l'exécution d'une décision rendue après la date d'entrée en vigueur de la convention dans une action intentée avant cette date.

Le Tribunal fédéral a estimé que pour l'application de l'article 54, deuxième alinéa, seules les règles prévoyant une compétence directe devaient être prises en considération et que seules les dispositions des articles 2 à 18 de la convention répondaient à ce critère, la disposition sur la litispendance ayant, quant à elle, pour seul objet d'indiquer au juge comment il doit agir dans une situation particulière, à savoir celle dans laquelle une autre juridiction est saisie de la même affaire. Par conséquent, la violation de cette disposition par la juridiction de l'État d'origine ne saurait justifier un refus de reconnaissance, lorsque le tribunal étranger a fondé sa compétence sur un critère prévu dans la convention. Tout autre point de vue serait aussi incompatible avec la considération selon laquelle une violation de l'article 21 ne pourrait en soi entraîner la non-reconnaissance en vertu des règles générales d'exécution applicables en dehors du régime transitoire.

La Corte di Cassazione italienne (28 mai 1998, nº 67) ne paraît pas partager le point de vue du Tribunal fédéral suisse. Dans une affaire similaire, la Cour de cassation a en effet reconnu que l'article 54, deuxième alinéa, n'avait pas pour objet de réglementer la question de la compétence directe pour les actions pendantes à la date d'entrée en vigueur de la convention, mais elle a exclu qu'une décision rendue dans un État contractant après cette date puisse affecter une action pendante dans un État où la reconnaissance de ladite décision est demandée, si cette dernière action répond aux critères de litispendance prévus à l'article 21 ou de connexité prévus à l'article 22 de la convention. C'est pourquoi, en cas de demande formée par les mêmes parties en Suisse et en Italie avant la date d'entrée en vigueur de la convention, la décision rendue par le tribunal suisse après cette date et établissant la compétence du tribunal suisse ne devrait pas être reconnue en Italie, en application de l'article 54, deuxième alinéa. La Cour suprême italienne a fait observer qu'il ne serait pas raisonnable de supposer que dans la disposition transitoire le principe général d'antériorité établi dans la Convention pour la décision relative à la compétence ait été abandonné au profit du principe opposé de priorité de la décision rendue en premier lieu comme critère de compétence. Il ne serait possible de s'écarter ainsi du principe général qu'en présence d'une disposition excluant clairement toute autre interprétation, ce qui n'est pas le cas de l'article 54, deuxième alinéa, dont le texte est compatible avec le principe général.

Les points de vue divergents exprimés par les deux Cours suprêmes dans les affaires mentionnées ci-dessus montrent que le régime transitoire peut générer une insécurité et que la question doit être approfondie. En effet, même s'il s'agit d'un problème à caractère transitoire dont l'importance dans les relations futures entre les États contractants d'origine est limitée, il pourra encore jouer un rôle en ce qui concerne les nouveaux États adhérents.

Une autre décision concerne l'article 54, deuxième alinéa, en liaison avec la prorogation de compétence (Tribunal fédéral suisse, 19 août 1998, nº 34) : il s'agit d'une convention attributive de juridiction conclue avant l'entrée en vigueur de la convention, qui est invoquée dans un action intentée après cette date. Constatant que la clause attributive de juridiction, bien que valide au moment de sa conclusion, ne répondait pas aux conditions prévues à l'article 12 de la convention, le Tribunal a décidé que, compte tenu de l'article 54, deuxième alinéa, la convention devait être appliquée et que la clause était, de ce fait, invalide. Il semble que cette décision fasse une application correcte de la disposition transitoire, conforme à ce que suggérait la CJCE dans l'affaire *Sanicentral/Collin* (affaire nº 25/79).

III. Compétence en matière contractuelle (article 5, point 1)

Comme on l'a déjà indiqué (voir point I), sur les 37 jugements relatifs à la Convention de Lugano repris dans le 8ème fascicule de 1999, pas moins de 16 concernent – au moins partiellement - la première partie de l'article 5, point 1, ce qui prouve non seulement l'importance pratique mais le caractère problématique de cette disposition.

A l'exception peut-être de quatre décisions autrichiennes portant sur la restitution du prix à la suite de l'annulation d'un contrat et sur la question de savoir si le lieu de livraison des marchandises peut être qualifié de lieu d'exécution au sens de l'article 5, point 1 (cf. point III, paragraphes 3 et 4), la plupart de ces jugements sont conformes à la jurisprudence de la CJCE relative à l'article 5, point 1, de la Convention de Bruxelles. Elles admettent en principe aussi bien le fonctionnement des obligations contractuelles au sens de la jurisprudence *De Bloos/Bouyer* (affaire 14/76) que la notion de lex causae de la jurisprudence *Tessili/Dunlop* (affaire 12/76).

Dans une décision (Tribunal fédéral suisse, 9 mars 1998, nº 33), le Tribunal fédéral suisse a expressément mentionné les critiques sévères de la doctrine contre les deux interprétations. Le Tribunal a néanmoins décidé de s'aligner sur la jurisprudence de la CJCE relative à la Convention de Bruxelles, affirmant qu'une interprétation qui s'en écarterait entraînerait une insécurité juridique que les États contractants ont essayé d'éviter par l'adoption des dispositions du protocole nº 2 et les déclarations qu'ils ont faites au moment de la signature de la convention.

1. Actions en paiement

La première série de jugements citée concerne le paiement de sommes d'argent en tant qu'obligation contractuelle principale (*Oberster Gerichtshof autrichienne*, 28 octobre 1997, nº 12 ; 28 octobre 1997, nº 13 ; 25 février 1998, nº 22 ; 28 juillet 1998, nº 26 ; 12 novembre 1998, nº 30 ; Tribunal fédéral suisse, 23 août 1996, nº 31 ; *Høyesterett* norvégienne, 15 mai 1997, nº 69 ; *Korkein oikeus* finlandaise, 12 novembre 1998, nº 71). Aucun d'eux ne tente de trouver un lieu d'exécution uniforme pour toutes les obligations contractuelles par une interprétation autonome de l'article 5, point 1. Les Cours se sont au contraire alignées sur la jurisprudence de la CJCE et ont cherché à déterminer le lieu d'exécution de l'obligation de paiement en tant qu'obligation servant de base à la demande. Elles ont appliqué la règle de la lex causae de la jurisprudence *Tessili/Dunlop* (affaire nº 12/76).

On constate une fois de plus que les différences existant entre les systèmes juridiques européens sur la question du lieu d'exécution de l'obligation de paiement – domicile du créancier ou du débiteur – ont conduit à des résultats purement fortuits.

En Autriche et en Allemagne, les obligations pécuniaires doivent en principe être exécutées au lieu où le débiteur avait son domicile au moment de la conclusion du contrat. L'utilité pratique de l'article 5, point 1, est alors limitée aux cas où le débiteur a changé de domicile après la conclusion du contrat (décision nº 26). En dehors de ces cas, la compétence déterminée en application de l'article 5, point 1, ne s'écarte pas de la règle générale de l'article 2 (décisions nº 22 et 30). Il peut néanmoins arriver que la lex causae s'écarte, elle, quelque peu du principe du domicile du débiteur. Il en est ainsi, selon la Cour suprême autrichienne, dans le cas des contrats d'hébergement en droit autrichien (décision nº 12). L'usage étant de payer les notes d'hôtel au moment du départ, la Cour suprême a estimé que, compte tenu de la nature du contrat, les obligations des deux parties devaient être exécutées au lieu de l'hébergement. Cette décision a été rendue en application de la loi autrichienne en tant que lex causae, elle n'est donc pas en contradiction avec la règle de la jurisprudence *de Bloos*, qui prévoit d'appliquer un traitement distinct à chaque obligation contractuelle concernée. La Cour n'en a pas moins refusé d'étendre cette solution à d'autres types de contrats. Dans le cas d'un contrat entre un avocat autrichien et son client allemand, la règle du domicile du débiteur a été appliquée, sans que la possibilité de s'en écarter pour tenir compte du caractère spécifique du contrat ait été évoquée (arrêt nº 26).

La situation est différente lorsque la lex causae prévoit que l'obligation de paiement doit être exécutée au domicile du créancier. Dans une affaire portée devant le Tribunal fédéral suisse (nº 9), les parties avaient conclu un contrat de courtage. Le demandeur, domicilié en Suisse, a intenté une action contre le défendeur, domicilié en Angleterre, pour obtenir le paiement de la commission. Se fondant sur le droit suisse, applicable en vertu du droit international privé suisse, le Tribunal a déclaré que cette obligation devait être exécutée au lieu du domicile du créancier. L'application de l'article 5, point 1, a donc conduit à la compétence du tribunal du domicile du demandeur (forum actoris).

Quant à la question de savoir si l'article 5, point 1, couvre les sûretés, la *Korkein oikeus* finlandaise y a répondu par l'affirmative dans une décision du 12 novembre 1998 (nº 71). Le tribunal finlandais de première instance avait estimé que cette disposition n'était pas applicable à la sûreté, puisqu'il s'agit d'une offre unilatérale de celui qui se porte caution de payer au cas où le premier débiteur n'a pas payé à l'échéance, et non d'un accord mutuel établissant des droits et des obligations pour les deux parties. La *Korkein oikeus* finlandaise a considéré que la sûreté, bien qu'étant une offre unilatérale de celui qui se porte caution, n'en est pas moins un contrat au sens de l'article 5, point 1. La *Högsta Domstolen* suédoise est parvenue à la même conclusion dans une décision du 13 juin 1997, parue dans les *Nytt Jurisdiskt Arkiv* de 1997 : 76 (non reprise dans le 8ème fascicule).

La CJCE a jugé (*Zelger/Salinitri*, affaire 56/79 ; mais voir aussi *MSG/Les Gravières rhénanes*, affaire nº C 106/95) qu'un accord sur le lieu d'exécution qui était valide en application de la lex causae, l'était aussi aux fins de l'article 5, point 1, sans qu'il soit besoin de remplir les conditions de forme prévues à l'article 17 (arrêts nº 13 et 22). La charge de la preuve a été attribuée au demandeur (nº 22).

2. Actions en exécution d'autres obligations contractuelles

Dans une affaire portée devant la Cour suprême autrichienne (O*berster Gerichtshof*, 9 septembre 1997, nº 11), une banque autrichienne avait émis une garantie bancaire au bénéfice du défendeur. Celui-ci avait ensuite transféré cette garantie au demandeur, tout en s'opposant à ce que la banque la lui paye. Le demandeur a donc cherché à obtenir une décision judiciaire ordonnant au défendeur de consentir au paiement.

Le demandeur et le défendeur étaient tous deux domiciliés en Allemagne, ce qui n'a pas empêché le demandeur de porter l'action devant le tribunal du siège de la banque en Autriche. Invoquant l'article 5, point 1, il a fait valoir que l'obligation servant de base à la demande était l'obligation de la banque de payer la garantie.

La Cour suprême autrichienne a rejeté cet argument, jugeant l'idée abstruse. L'obligation servant de base à la demande était manifestement l'obligation du défendeur d'adresser à la banque une déclaration par laquelle il consentait au paiement de la garantie et la Cour devait donc examiner où cette obligation devait être exécutée selon le droit applicable. Comme le droit allemand et le droit autrichien, qui étaient les *leges causae* potentielles, connaissent tous deux la règle du domicile du débiteur, le défendeur devait faire sa déclaration en Allemagne. La Cour autrichienne a aussi refusé l'idée qu'il existait une obligation contractuelle implicite pour le défendeur de se rendre au siège de la banque pour faire la déclaration.

Le véritable problème que posait cette décision n'était pas l'application de l'article 5, point 1, en tant que tel, mais la détermination du droit applicable. Se fondant sur le droit international privé autrichien de l'époque (c'est-à-dire avant l'entrée en vigueur de la Convention de Rome), la Cour a opté pour l'application du droit autrichien. Cependant, comme l'application du droit autrichien et du droit allemand aboutissait au même résultat, la Cour a pu ne pas trancher la question.

3. Actions en réparation pour cause de rupture de contrat

Dans plusieurs décisions, le demandeur cherchait à obtenir réparation de la violation d'obligations contractuelles (*Oberster Gerichtshof autrichienne*, 10 septembre 1998, nº 27 ; 10 septembre 1998, nº 28 ; 10 septembre 1998, nº 29 ; Tribunal fédéral suisse, 9 mars 1998, nº 33, déjà citée plus haut). Toutes ces décisions sont, d'un point de vue formel au moins, conformes à la jurisprudence de la CJCE sur la détermination de « l'obligation qui sert de base à la demande » (*de Bloos/Bouyer*, affaire nº 14/76) : si une action en réparation ou en dissolution d'un contrat est fondée sur la non-exécution d'une obligation contractuelle, c'est le lieu d'exécution de cette obligation qui entre en ligne de compte.

Deux de ces décisions (nº 27 et nº 29) concernaient une situation assez courante. Dans un contrat de vente internationale, les parties étaient convenues, explicitement dans la décision nº 27 et en insérant la clause « livraison au domicile de l'acheteur » dans la décision n° 29, que le vendeur devait livrer les marchandises en un certain lieu. La Convention des Nations Unies sur les contrats de vente internationale de marchandises était applicable dans les deux cas. Comme les marchandises étaient défectueuses, l'acheteur a intenté une action en réparation. Il a fait valoir, aux fins de l'article 5, point 1, que le lieu de la livraison devait être considéré comme le lieu d'exécution de l'obligation servant de base à la demande.

Dans les deux cas, la Cour suprême autrichienne a rejeté cet argument. Citant la doctrine relative à l'article 31, de la convention sur les contrats de vente, elle a considéré que la désignation d'un lieu de livraison ne concernait généralement que les modalités de livraison ainsi que les risques et les frais de transport. Il était dès lors impensable que les parties aient eu aussi l'intention, en convenant d'un lieu de livraison, d'établir un lieu d'exécution au sens de l'article 5, point 1. Elle en a conclu que la compétence ne pouvait être fondée sur cette disposition.

D'un point de vue formel, les deux décisions sont conformes à la jurisprudence de la CJCE. La Cour suprême autrichienne n'a pas présupposé une interprétation autonome des termes « lieu de l'exécution » figurant à l'article 5, point 1 ; elle a fondé tous ses arguments sur l'application de la Convention sur les contrats de vente internationale en tant que lex causae. Elle semble néanmoins supposer que cette convention comporte des règles implicites sur le lieu de l'exécution pour les questions de compétence, du moins dans la mesure où un accord sur le lieu de livraison n'a aucune conséquence en matière de compétence. C'est également la conclusion que l'on peut tirer d'une opinion incidente accompagnant la décision nº 27 : aux termes de l'article 31, point a), de la convention sur les contrats de vente, en l'absence d'accord sur le lieu de livraison et si le contrat implique le transport des marchandises, l'obligation du vendeur consiste à remettre les marchandises au premier transporteur. On pourrait penser que le lieu de remise serait aussi le lieu de l'exécution au sens de l'article 5, point 1. Or la Cour a dit pour droit – sans s'appuyer sur le texte de la convention – qu'en pareil cas, le lieu de l'exécution serait le lieu où le vendeur a son établissement.

Si l'on considère que la convention sur les contrats de vente internationale ne traite pas du tout de la compétence, la solution à laquelle est arrivée la Cour suprême autrichienne est loin d'être évidente. En se fondant sur ses arguments, on pourrait aussi affirmer que l'article 57 de la convention sur les ventes – l'obligation pour l'acheteur de payer le prix au lieu où le vendeur a son établissement – ne concerne que les coûts et les risques du transfert d'argent et n'a donc aucune conséquence sur le plan de la compétence. Mais cela serait bien sûr contraire à la décision de la CJCE dans l'affaire *Custom Made Commercial/Stawa Metallbau* (affaire nº C-288/92).

En examinant les décisions nº 27 et nº 29 en liaison avec la décision nº 12 (voir ci-dessus point III, paragraphe 1), on peut déceler, dans le contexte de l'article 5, point 1, une légère tendance de la Cour suprême autrichienne à opter pour des « solutions lex causae » : dans l'interprétation de la loi applicable, la Cour admet certains des arguments avancés par la doctrine contre la jurisprudence de la CJCE relative à la Convention de Bruxelles sans s'en écarter officiellement. Les résultats que donne cette approche étant valables dans l'ensemble, on devrait se garder de la critiquer avec trop de véhémence.

Les deux autres jugements (nº 28 et nº 33) ne présentent pas d'intérêt particulier. Dans l'affaire nº 28, les parties avaient conclu un contrat de service de traiteur pour un soirée après-ski à Kitzbühel. Le défendeur, une société allemande, a annulé sa commande ; le traiteur, domicilié en Autriche, l'a poursuivi pour le manque à gagner qu'il avait subi, en considérant que Kitzbühel était le lieu d'exécution au sens de l'article 5, point 1. La Cour suprême autrichienne a rejeté cette idée, estimant que l'obligation servant de base à la demande était celle du défendeur de payer le prix du service de traiteur. La loi autrichienne étant applicable, cette obligation devait, en application de la règle générale visée plus haut (point III, paragraphe 1), être exécutée là où le débiteur avait son établissement.

Le jugement nº 33 concerne un contrat de vente exclusive. Le défendeur, une société danoise, avait enfreint ses obligations à l'égard du demandeur, domicilié en suisse, en livrant des marchandises à une autre société suisse. Le Tribunal fédéral suisse a fait une distinction entre deux obligations du vendeur, l'une concernant la distribution des marchandises et l'autre leur livraison proprement dite. Au regard de l'article 5, point 1, ces obligations devaient être traitées séparément. Les juridictions inférieures ayant établi que le demandeur avait fondé son action uniquement sur le non-respect de l'obligation relative à la distribution, le Tribunal fédéral, qui était lié par cette constatation, s'est borné à l'examen de cette obligation. D'après le droit suisse des obligations, qui était applicable en vertu du droit international privé suisse, cette obligation devait être exécutée au domicile du débiteur. La Cour a donc considéré que les tribunaux suisses n'étaient pas compétents.

4. Actions en restitution du prix après l'annulation d'un contrat

Dans deux décisions (27 janvier 1998, nº 18 et 10 mars 1998, nº 23), la Cour suprême autrichienne (*Oberster Gerichtshof*) a estimé que les demandes en restitution de sommes d'argent déjà payées en vertu d'un contrat dont, dans le premier cas, le demandeur affirmait qu'il était nul et non avenu ou qui, dans le second cas, avait été annulé par consentement mutuel entre les parties, entrent dans le champ d'application de l'article 5, point 1. Cela signifie aussi que, pour la Cour suprême autrichienne, l'article 5, point 1, s'applique à une obligation qui n'est pas l'une des obligations principales du contrat, ni une obligation accessoire découlant du non-respect de ces obligations, mais une obligation reposant sur le principe de l'enrichissement sans cause.

Il s'agissait, dans le premier cas, d'un contrat ayant pour objet le transfert à des personnes domiciliées en Autriche du droit de propriété d'une GmbH (une discothèque) appartenant à des personnes domiciliées en Allemagne. Après avoir pris possession de l'affaire, les nouveaux propriétaires se sont rendus compte que, contrairement à ce que les vendeurs avaient voulu, selon eux, leur faire croire, la discothèque n'avait pas les autorisations publiques requises.

Ils ont intenté devant les tribunaux autrichiens une action en recouvrement de la somme d'argent qu'ils avaient déjà payée aux vendeurs, à qui ils rendraient en échange leurs parts dans la GmbH, au motif que le contrat était nul et non avenu. Se réclamant de la doctrine (Kropholler), la Cour suprême a considéré que l'article 5, point 1, couvrait aussi les litiges relatifs à la conclusion en tant que telle du contrat. Elle est également parvenue à la conclusion que, puisque « l'obligation servant de base à la demande » n'était pas l'une des obligations principales du contrat (à savoir l'obligation des vendeurs de transférer la propriété des parts de la GmbH ou l'obligation de l'acheteur de payer), elle serait l'obligation des vendeurs de restituer l'argent qu'ils avaient reçu, si le contrat était déclaré nul et non avenu. La Cour suprême a toutefois estimé que le lieu de l'exécution de cette obligation était le domicile des vendeurs en Allemagne, puisque, en vertu du droit applicable, le lieu de l'exécution d'une obligation pécuniaire était le domicile du débiteur.

Dans le deuxième cas, le contrat était valide au départ, mais les parties y ont mis fin par consentement mutuel avant son exécution, ce qui signifiait que l'acompte versé par l'acheteur (domicilié en Autriche) devait être rendu, mais le vendeur (domicilié en Suisse) l'a fait en compensant la créance de l'acheteur par une créance que le vendeur affirmait avoir sur l'acheteur au titre d'un contrat antérieur. L'acheteur n'a pas accepté la compensation, et a donc intenté une action. La Cour suprême autrichienne a invoqué l'affaire précédente et fait observer que dans les deux cas il s'agissait de demandes en restitution reposant sur le principe de l'enrichissement sans cause (« bereicherungsrechtlicher Rückforderungsanspruch »). Le fait que la demande de restitution soit en l'espèce fondée sur un contrat valide, auquel il avait été mis fin d'un commun accord, alors que dans l'affaire précédente il s'agissait d'une demande en restitution fondée sur l'invalidité (contestée) du contrat, ne changeait, selon elle, rien au résultat. La demande en restitution avait en l'espèce pour origine le versement d'un acompte par l'acheteur, et cet acompte était une obligation prévue dans le contrat auquel il avait été mis fin. Le lieu d'exécution de l'obligation de restituer l'acompte devait cependant être vu comme distinct de lieu d'exécution de l'obligation de l'acheteur de payer le vendeur, qui était prévue dans le contrat. Alors qu'il aurait dû être statué sur cette dernière obligation selon l'article 57 de la Convention des Nations Unies sur les contrats de vente, applicable tant en Autriche qu'en Suisse, la Cour suprême autrichienne a estimé que cet article ne s'appliquait pas à la demande en restitution. La décision devait être fondée sur le principe général du droit suisse, selon lequel le lieu d'exécution des créances pécuniaires est le domicile (ou le siège social) du créancier, situé en l'occurrence en Autriche.

Les deux décisions autrichiennes sont difficiles à concilier avec une décision de la *House of Lords* anglaise rendue le 30 octobre 1997 (nº 56 du 8ème fascicule), qui découlait d'une décision précédente dans laquelle cette Cour avait estimé que certains accords swap conclus par plusieurs collectivités locales du Royaume-Uni étaient nuls *ab initio* car leur conclusion dépassait les compétences d'une collectivité locale. Une banque a ainsi été amenée à intenter contre le Conseil municipal (City Council) de la ville de Glasgow une action, devant des tribunaux du Royaume-Uni, en restitution d'une somme d'argent qu'elle avait versée audit Conseil municipal dans le cadre de sept accords swap. L'action était fondée en droit anglais sur le principe de l'enrichissement sans cause et a été considérée comme relevant de la loi sur la restitution et non du droit des contrats. L'affaire concernait l'application au Royaume-Uni des règles de la Convention de Bruxelles sur l'attribution de compétence, c'est pourquoi la CJCE avait refusé de se prononcer à titre préjudiciel. Dans une décision rendue à la majorité (3-2), la House of Lords a conclu que l'article 5, point 1, n'était pas applicable. Bien que cette affaire soit différente des affaires autrichiennes, puisqu'il ne s'agissait plus de l'invalidité *ab initio* des contrats concernés, il semble, à en juger par les motifs invoqués par la majorité des membres de la chambre, que le fait que l'invalidité soit déjà établie n'ait pas été un point déterminant à leurs yeux. La majorité a admis que l'on devait interpréter de manière autonome la notion de « contrat », mais a estimé qu'une demande en restitution fondée sur le principe de l'enrichissement sans cause et formée en vertu d'un contrat qui n'a jamais existé en droit n'entrait pas dans le champ d'application de l'article 5, point 1, qui, constituant une exception à l'article 2, devait faire l'objet d'une interprétation restrictive. La minorité a admis le principe de l'interprétation restrictive, de l'article 5, point 1, tout en maintenant que, pour des raisons pratiques, les demandes en restitution résultant du fait qu'un contrat s'est avéré invalide devaient relever de cette disposition.

Il faut reconnaître que la CJCE n'a pas, jusqu'ici, statué clairement sur la question de savoir si l'article 5, point 1, doit s'appliquer aux situations dont la Cour suprême autrichienne et la Chambre des Lords ont eu à connaître.

Dans l'affaire 38/81, *Effer/Kantner*, Rec. 1982, p. 825, la CJCE a jugé que l'article 5, point 1, était applicable, « même si la formation du contrat qui est à l'origine du recours est litigieuse entre les parties ». Dans cette affaire, cependant, c'était le défendeur qui affirmait qu'il n'y avait pas de relations contractuelle entre les parties, mais qu'en réalité le contrat avait été conclu entre le demandeur et un tiers. En outre, l'arrêt laisse entendre que, si la juridiction saisie conclut à l'absence de contrat, elle devrait décliner sa compétence.

C'est ainsi que la *Høyesterett* norvégienne a compris cette décision, à en juger par les affaires 1.nº 267 K/1996, *Deutsche Bank/Den norske Bank*, et 1.nº 45 K/1998 *Terje Karlung/Svänska Vägguide Comertex*, décisions du 10 mai 1996 et du 27 janvier 1998, publiées dans *Norsk Retstidende* de 1996, p. 822, et de 1998, p. 136, respectivement (aucune des deux ne figure dans le 8ème fascicule). Dans les deux cas le demandeur soutenait que sa demande concernait l'obligation du défendeur de payer au titre d'un contrat qui existait (toujours) entre les parties, mais dans la première affaire, le défendeur affirmait qu'il n'y avait jamais eu de contrat couvrant l'action du demandeur et que la demande relevait donc au mieux de la législation en matière délictuelle ou quasi délictuelle. Dans la deuxième affaire, le défendeur soutenait que la demande portait sur une commission relative à une chose que le défendeur avait faite après que le demandeur eut lui-même mis fin à un contrat de représentation et pour laquelle le demandeur n'avait donc pas le droit de réclamer de commission. Aucune de ces deux affaires n'est directement comparable aux affaires autrichiennes et britannique, dans lesquelles la demande résultait, même en la considérant du point de vue du défendeur, d'un contrat qui avait existé un jour, ou du moins devait exister un jour, entre les parties.

Dans l'affaire C-51/97, *Réunion européenne contre Spliethoff's Bevrachtingskantoor*, Rec. 1998, p. I-6511, (nº 1 du 8ème fascicule, l'arrêt a été rendu après les arrêts autrichiens et britannique), la CJCE a déclaré que l'article 5, point 1, « ne saurait être compris comme visant une situation dans laquelle il n'existe aucun engagement librement assumé d'une partie envers une autre » . Elle s'est toutefois servi de cette assertion pour rejeter l'idée que l'article 5, point 1, puisse s'appliquer à une demande portant sur la réparation d'un préjudice dû à un dommage causé à des marchandises pendant leur transport, lorsque la demande est fondée sur un connaissement et que l'action n'a pas été intentée contre la personne qui l'avait délivré, mais contre celle que le demandeur tient pour le transporteur maritime réel des marchandises. On pourrait par conséquent faire valoir que cette assertion avait pour objet d'exclure du champ d'application de l'article 5, point 1, les actions dirigées contre des défendeurs avec qui le demandeur (où la personne subrogée dans ses droits) n'a même jamais essayé de nouer une relation contractuelle.

Sans doute convient-il dans cette affaire de ne pas attacher trop d'importance à l'usage du présent (« situation dans laquelle il n'y *a* pas d'obligation »). On pourrait alors considérer que la décision de la CJCE n'exclurait pas l'application de l'article 5, point 1, à « des situations » qui, de l'avis tant du demandeur que de défendeur, concernent les conséquences entre les parties de la cessation ou de l'invalidité d'un contrat qui a un jour existé, ou qui devait un jour exister, entre elles.

IV. Clauses attributives de juridiction (article 17)

Cinq décisions rendues au cours de la période considérée concernent l'article 17. Comme on l'a indiqué ci-dessus, l'une d'elles concerne des clauses attributives de juridiction en liaison avec la disposition transitoire de l'article 54, deuxième alinéa, et a déjà été examinée (cf. point II, paragraphe 12) ; les autres concernent les conditions exigées pour que la clause et ses effets soient valides.

1. Dans la première affaire (*Oberster Gerichtshof autrichienne*, 23 février 1998, nº 19), il s'agissait d'une clause attribuant la compétence à une juridiction autrichienne, qui avait été conclue entre une société domiciliée en Autriche et une société domiciliée en Turquie. La Cour suprême autrichienne était saisie de la question de savoir si, pour l'application de l'article 17, il faut en pareil cas que l'une des parties soit domiciliée dans un autre État contractant. Elle a analysé la doctrine en la matière ainsi que la jurisprudence d'autres États contractants, notamment de l'Allemagne et de l'Italie, pour arriver à la conclusion qu'en l'absence de lien additionnel avec un autre État contractant, l'application de l'article 17 ne serait pas justifiée. La Cour suprême autrichienne a estimé que cette disposition ne serait applicable que si, de l'avis du juge autrichien, ni le domicile d'une partie, ni le for convenu, n'est situé en Autriche. Il s'agit là d'une question délicate sur laquelle des points de vue divers ont été et peuvent être exprimés, même si le texte de l'article 17 ne semble pas exclure la validité de la clause lorsque le for choisi et le domicile de la seule partie domiciliée dans un État contractant coïncident. Il convient de noter que la Cour suprême autrichienne a ajouté que la condition additionnelle prévue par l'article 17 serait également nécessaire pour l'application de l'article 18.

2. La deuxième affaire (Tribunal fédéral suisse, 15 janvier 1998, nº 32) concerne les conditions qui doivent être réunies pour qu'une clause attributive de juridiction conclue en vertu de l'article 17 soit valide, compte tenu des conditions fixées par le droit national régissant le contrat dans lequel la clause a été insérée. Dans l'affaire relative à un contrat de cautionnement comportant une prorogation de compétence en faveur d'un tribunal suisse, conclu par le maire d'une municipalité française et une société financière suisse, le Tribunal fédéral devait décider si la validité de la clause devait être examinée au regard du droit administratif français ou du droit suisse. Le Tribunal a retenu la deuxième solution, en expliquant que l'article 17 ne fait pas obstacle à cette solution, puisqu'il ne traite pas de la validité quant au fond de la clause attributive de juridiction ; toute décision en la matière appartient donc à la juridiction saisie. Il semble que la solution retenue suive à juste titre le raisonnement suivant : vu que la convention n'affecte pas le droit matériel, elle ne devrait pas affecter la manière dont les juridictions nationales abordent cette question, même si leur approche peut aboutir à des conclusions qui diffèrent d'un État contractant à l'autre (cf. O'Malley-Layton, *European Civil Practice*, 1989, p. 569).

3. Les deux affaires restantes (*Bundesgerichtshof* allemande, 23 juillet 1998, nº 39 et *Corte di Cassazione* italienne, 1er février 1999, nº 66) portent sur des clauses attributives de juridiction en faveur d'une seule des parties. Dans la première décision, la Cour suprême allemande a soutenu que, pour établir si une clause n'a été stipulée qu'en faveur de l'une des parties, il faut se référer non seulement au libellé de la clause, mais aussi au contexte général du contrat et aux circonstances dans lesquelles il a été conclu. Dans la mesure où la décision se fonde sur l'interprétation du contrat dans chaque cas d'espèce, elle est conforme à la jurisprudence de la CJCE dans l'affaire *Anterist/Crédit Lyonnais* (affaire 22/85). Il en va de même de l'autre décision, dans laquelle la Cour suprême italienne a soutenu qu'une clause ne peut être considérée comme stipulée en faveur d'une des parties que lorsque l'intention des parties ressort clairement des termes de la clause attributive de juridiction ; elle a ajouté que la désignation d'une juridiction de l'État contractant sur le territoire duquel l'une des parties est domiciliée ne permet pas en elle-même de conclure que l'intention commune des parties était de conférer un avantage à cette partie. Le texte de la décision suit à la lettre l'arrêt de la CJCE que l'on a cité.

V. Conclusions

Il convient de tirer quelques brèves conclusions de cette revue de la jurisprudence des tribunaux nationaux relative à la Convention de Lugano.

1. Les juridictions nationales ont clairement tendance à s'aligner sur la jurisprudence de la CJCE. Cette tendance ressort non seulement des solutions adoptées dans diverses décisions, mais aussi des références fréquentes faites dans le texte des décisions aux arrêts de la CJCE.

2. Toutefois, les affaire portées devant les juridictions nationales ne coïncident pas toujours entièrement avec celles qu'examine la CJCE. Les tribunaux nationaux ont alors tendance à donner leur propre interprétation des arrêts de la CJCE, tirant ainsi des principes affirmés dans ces arrêts des conclusions que la CJCE n'aurait peut-être pas admises.

3. Les juridictions nationales ont parfois à traiter d'affaires et de problèmes dont la CJCE n'a encore jamais été saisie. Lorsqu'elles statuent sur ces affaires, elles ont tendance à trouver des solutions qui parfois sont conformes à la jurisprudence de la CJCE, et parfois ne le sont pas.

4. Certaines juridictions ont une bonne connaissance de la jurisprudence des autres tribunaux nationaux et ont l'esprit d'en tenir compte. Certaines considèrent aussi qu'une juridiction ne doit s'écarter du point de vue déjà adopté par une autre juridiction nationale que s'il y a de bonnes raisons de la faire (cf., par exemple, l'affaire nº 19).

5. Les efforts visant à harmoniser la jurisprudence pourraient notamment consister à encourager les autorités nationales à signaler aux juridictions nationales l'existence du site internet de la CJCE sur la jurisprudence relative aux Conventions de Bruxelles et de Lugano. On pourrait aussi encourager les autorités nationales à envoyer le texte intégral des décisions nationales sous forme électronique à la CJCE, en y annexant, autant que possible, des résumés des décisions dans d'autres langues (accessibles).

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LIMITE

THIRD REPORT ON NATIONAL CASE LAW ON THE LUGANO CONVENTION

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I. Introduction

At its meeting on 13 – 14 September 1999 the Standing Committee of the Lugano Convention was presented with a report on national case law pertaining to the Convention, based on decisions communicated to the EC Court of Justice by signatory and acceding States in application of Protocol 2 to the Convention. That report written by the Greek, Swiss and Spanish delegations[1] covered the decisions contained in the first seven fascicles brought out by the Court of Justice (through its Library, Research and Documentation Centre). A second report by the Austrian, Italian and Norwegian delegations[2] covered the decisions contained in the 8th fascicle. In September 2000 the Standing Committee decided that the third report, covering the decisions in the 9th fascicle[3], should be drawn up by the Netherlands, German and Swedish delegations for the meeting of the Standing Committee in September 2001. The 9th fascicle contains 50 decisions pertaining either to the Lugano or the Brussels Convention, handed down by the following courts:

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[*] Our kind thanks go to Mrs Caren Reibold for her assistance in editing the report.

[1] IPRax 2001, 262.

[2] IPRax #.

[3] Information pursuant to Protocol 2 to the Lugano Convention, Package No. 9, July 2000 (quoted as Information No. 2000/...); the decisions are also published on the homepage of the ECJ under http://www.curia.eu.int/common/recdoc/ convention/en/tableau/2000.htm.

Lugano Convention:

Oberster Gerichtshof (Austria): 3 decisions

Tribunal fédéral/Bundesgericht (Switzerland): 3 decisions

Oberlandesgericht München (Germany): 1 decision

Cour de Cassation (France): 2 decisions

House of Lords (United Kingdom): 1 decision

Norges Høyesterett (Norway): 1 decision

Högsta domstolen (Sweden): 1 decision

Brussels Convention:

EC Court of Justice: 6 decisions

Cour d'appel de Bruxelles (Belgium): 2 decisions

Hoge Rat/Gerechtshof Amsterdam (Netherlands): 3 decisions

Bundesgerichtshof/Oberlandesgericht Karlsruhe (Germany): 2 decisions

Oberster Gerichtshof (Austria): 3 decisions

Court of Appeal (United Kingdom): 6 decisions

Cour de Cassation/Cour d'appel de Colmar/Cour administrative d'appel de Nantes/Cour d'appel de Paris (France): 11 decisions

Efeteio Thessalonikis/Areios Pagos (Greece): 2 decisions

Corte di Cassazione (Italy): 3 decisions

It should be pointed out that the EC Court of Justice (ECJ) is dependent on information on national case law provided by national authorities. Thus, the national decisions pertaining to the Lugano and Brussels Conventions that the Court has been able to disseminate do not necessarily constitute a complete compilation of such decisions by national courts of last instance. This should be borne in mind when reading this report.

Although the decisions cover a wide variety of questions, Article 5 (1) is the provision that is most frequently dealt with. The provisions disputed more than once are Article 1, 2nd para., Article 16 (1a) and Article 24. As was the case with the first and second reports, this report, too, will concentrate on the decisions on the Lugano Convention proper (12 decisions)[4].

II. Overview of the case law

1) Title I - Scope

Article 1, 2nd para. (1)

In a judgment by the Austrian Supreme Court *(E. v. O.)*[5] the main issue was whether the matter to be decided fell within the material scope of the Convention. The parties had agreed as part of a divorce settlement that the ex-wife (the defendant) should be the principal debtor and the ex-husband (the plaintiff) the deficiency guarantor for a bank loan. When the defendant failed to discharge her obligations to the bank, the bank claimed payment from the plaintiff. The plaintiff then claimed "right of recourse" against the defendant.

[4] Courts in the contracting States to the Lugano Convention have different traditions as to the disclosure of the considerations which led to their decision. A fair comparison of cases is thereby complicated.

[5] Austrian *Obergerichtshof*, 21 October 1999, http://www.curia.eu.int/common/recdoc/convention/en/2000/17-2000.htm, Information No. 2000/17.

In its brief remarks on the material scope of the Convention the Austrian Supreme Court based its decision on two ECJ rulings (*De Cavel v. De Cavel*[6] and *W. v. H.*[7]). These older decisions on the Brussels Convention were held to constitute an authentic interpretation of the identical provisions found in the Lugano Convention: corresponding to that case law, the term "rights in property arising out of a matrimonial relationship" (Article 1, 2nd para. (1)) was said not to refer solely to the property regimes specifically and exclusively envisaged by certain national legal systems in the case of marriage. Any proprietary relationships resulting directly from the matrimonial relationship or the dissolution thereof were also said to be excluded, in this exception, from the scope of the Convention. The plaintiff's claim, so the Supreme Court held, was based on a settlement reached by the spouses on the dissolution of their marriage[8]. The subject-matter of the case was therefore held to have correlations with property law resulting from the dissolution of the marriage and, as such, were not covered by the Convention.

Article 1, 2nd para. (4)

Article 1, 2nd para. (4) rules that arbitration is outside the scope of the Lugano Convention. Views differ as regards the meaning of this provision, which is identical to Article 1, 2nd para. (4) of the Brussels Convention. As already indicated in the Jenard Report[9], many, but not all disputes over arbitration clauses are excluded. The Schlosser Report[10] on the Convention relating to the accession of Denmark, Ireland and the United Kingdom to the Brussels Convention discusses the different interpretations of this provision and states that court proceedings only fall within arbitration proceedings when they are ancillary to those

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6 Slg. 1979 p. 1055 (143/78).

7 Slg. 1982 p. 1189 (25/81).

8 Austrian family law provides that in the case of divorce, the matrimonial property and all debts connected with such property have to be distributed amongst husband and wife in an equitable way. In principle, the distribution of the debts has only effects *inter partes* and does not affect the position of the creditor. A divorce by mutual consent is not possible if the parties do not reach an agreement on that point.

9 OJ 1979, C 59/1 p.13.

10 OJ 1979, C 59/71 p. 92.

arbitration proceedings. The ECJ accepted this interpretation in the *Rich v. Impianti* case[11]. In this case, the ECJ decided that the exclusion provided for in Article 1, 2nd para. (4) extends to litigation pending before a national court concerning the appointment of an arbitrator, even if the existence or validity of an arbitration agreement is a preliminary issue in that litigation. In a decision of 4 May 1999 the French *Cour de cassation (Piquet v. Sacinter)*[12] had to consider whether an arbitration clause in an individual contract of employment excluded the applicability of the Lugano Convention. A Belgian engineer had entered into an individual contract of employment with a Swiss company, the work to be carried out in France. The contract provided that in case of dispute it would be subject to arbitration in *Lausanne* and governed by the "concordat suisse sur l'arbitrage". The engineer was dismissed. He then sued the Swiss company for payment of damages, based on unjustified dismissal in the Labour Court at the place where he carried out his work. The Labour Court declared that it did not have jurisdiction. On appeal the Court of Appeal confirmed the Labour Court's decision. It based its decision on two grounds:

A. according to its Article 1, 2nd para. (4) the Lugano Convention is not applicable to arbitration, and B. being a valid arbitration clause according to Swiss law, which is applicable to the contract, this clause excludes the application of French labour protection provisions.

The French *Cour de cassation* held that the Lugano Convention was applicable[13]. In a concise judgment it stated that the arbitration clause could not be raised against an employee who in conformity with the applicable law has taken his former employer to the French competent courts and that by applying Article 5 (1) of this Convention the French courts had jurisdiction to decide on the matter. The *Cour de cassation* did not deal with Article 1, 2nd para. (4)

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11 Slg. 1991 p. I-3855 (190/89).

12 French *Cour de cassation*, 4 May 1999, Revue de l'arbitrage 1999, p. 292; La semaine juridique-édition générale 1999 p. 1010, 1999 IV 2132, 2000 II 10337, http://www.curia.eu.int/common/recdoc/convention/en/2000/28-2000.htm, Information No. 2000/28.

13 As concerns Article 54 of the Lugano Convention see p. 19.

specifically and did not explain why it referred the case to another Court of Appeal to decide on the merits. However, by referring directly to Article 5 (1) and referring the case to another Court of Appeal to decide on the merits it is unclear whether the *Cour de cassation* meant to refer to that court any decision on the validity or enforceability of the arbitration clause.

2) Title II - Jurisdiction

In its decision on 26 October 1999 the Swedish Supreme Court *(Thessalian Paper Industry Svensaka AB:s i likvidation konkursbo v. P.F. and L.O.)*[14] came to the conclusion that it is left to national law to decide whether circumstances to support the application of a specific ground of jurisdiction in the Convention has to be invoked by the parties or if a court can apply the provisions in Title II in the Convention *ex officio*.

In this case, a Swedish company brought proceedings against several defendants, inter alia against a person domiciled in Finland, defendant Y, claiming liability for a deficiency of repayments in accordance with Swedish company law. The plaintiff claimed that Swedish courts – in this particular case, the *Stockholm* District Court – had jurisdiction regarding defendant Y under Article 16 (2) of the Convention. The *Stockholm* District Court held that the proceedings did not involve matters on the constitution of legal persons or any other matter mentioned in Article 16 (2), and dismissed the application.

The view that Article 16 (2) was not applicable was upheld by all instances. The *Svea* Court of Appeal, however, came to the conclusion that the *Stockholm* District Court had jurisdiction over defendant Y under Article 6 (1), since the court had jurisdiction regarding the co-defendant under Article 2. It was undisputed that the actions against the co-defendants were connected as required by ECJ case-law (*Kalfelis v. Schröder*[15]).

Defendant Y appealed against the decision of the *Svea* Court of Appeal, arguing that Article 6 could not be applied by the Court of Appeal since it was not invoked by the plaintiff when the proceedings were brought.

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14 Swedish *Högsta domstolen*, 26. October 1999; Nytt Juridiskt Arkiv 1999 I p. 660, http://www.curia.eu.int/common/ recdoc/convention/en/2000/50-2000.htm, Information No. 2000/50.

15 lg. 1988 p. 5565 (189/87).

The Supreme Court rejected this argument. The Court found that the provisions in Title II are meant to be applied whether invoked by the parties or not. Any obligation for courts to take into account circumstances that have not been invoked by the parties, was however found to be left to national law, with the exception of the situations dealt with by Articles 19 and 20. These provisions compel courts to consider certain issues *ex officio*. Outside the scope of those provisions the Supreme Court held that the Convention did not lay down any obligations.

Article 5 (1) clause 1

In a final judgment by the Higher Regional Court in *München*[16], the plaintiff, the trustee in bankruptcy of a private limited company with its registered office in Germany (hereinafter referred to as the company) sued the defendant for damages. The defendant had formerly been the company's managing director and was domiciled in Switzerland. The decision focused on the managing director's internal liability to the company, especially pursuant to certain provisions of German law on public limited companies. In particular, the plaintiff claimed that the defendant had misrepresented the company's nominal capital and "stripped" the company's assets.

Without first going into the prior question of whether the dispute related to a contract of employment pursuant to clauses 2 and 3 of Article 5 (1), the court classified the special legal relationship between the German private limited company and its managing director as its organ as a "contract" within the meaning of the first clause of Article 5 (1). It acknowledged that the appointment of a managing director by a company was an act under corporate law. The court found that since the position of a managing director within a company involved wide-ranging obligations towards the company, such an appointment had, however, to be accepted by the managing director. There was all the more reason, so the court held, to apply

[16] Munich *Oberlandesgericht*, 25 June 1999, Zeitschrift für Wirtschaftsrecht 1999 p. 1558, Der Betrieb 1999 p. 1847, http://www.curia.eu.int/common/recdoc/convention/en/2000/22-2000.htm, Information No. 2000/22.

Article 5 (1) as there was usually a contract of employment between the company and its managing director, specifying that legal obligations stemming from his position as company executive should also to be complied with. The ECJ was also stated to have ruled that obligations to pay money arising from the relationship between an association and its members were to be regarded as "matters relating to a contract" within the meaning of Article 5 (1) of the Brussels Convention, which had exactly the same wording. Membership of an association created, between the members, links as close as those created between parties to a contract. Furthermore, the court drew attention to the ECJ's qualification of the links between the shareholders of a company as being of a contractual nature.

In conclusion, the court declared itself to have international jurisdiction under the first clause of Article 5 (1), if not already under Article 5 (3) so far as the action could be classified as tortious. The court held that the place of performance of the disputed contract, which was to be determined by reference to the principles of private international law, was Germany (registered office of the company).

In a decision of the British *House of Lords* of 17 February 2000 *(Agnew and others v. Lansförsäkringsbolagens AB)*[17], one of the issues at hand was the interpretation of Article 5 (1)[18]. The plaintiffs brought proceedings in England against an insurance company domiciled in Sweden, seeking a declaration that they were entitled to set aside a reinsurance contract on the grounds of misrepresentation and non-disclosure. The background to the proceedings is the following. The plaintiffs carried on reinsurance business in the London market and provided reinsurance for a risk entered into by the Swedish company, who had issued suppliers' and manufacturers' guarantee insurance in respect of obligations arising under a contract to supply a Norwegian company with underwater valves for use in oil fields. The claimants argued that they were induced to enter into the contracts by material misrepresentation and that the defendant, through its brokers, was guilty of material non-disclosure during the negotiation and the presentation of the risk, in London.

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17 British *House of Lords*, 17 February 2000, The All England Law Reports 2000 Vol. 1 p. 737, http://www.curia.eu.int/common/recdoc/convention/en/2000/40-2000.htm, Information No. 2000/40.

18 The issue whether the dispute fell under Articles 7 to 12 on jurisdiction in matters relating to insurance contracts is dealt with in a following section in this report.

In bringing the proceedings, the plaintiffs relied on Article 5 (1) of the Lugano Convention. The defendant argued that the proceedings fell outside the scope of Article 5 (1), contending that the ”obligation in question” had to be an obligation *under* a contract and that an obligation of disclosure in pre-contractual negotiations was not such an obligation.

The *High Court* and the *Court of Appeal* accepted jurisdiction under Article 5 (1). Also the *House of Lords* found that English courts had jurisdiction under Article 5 (1). Firstly, the *House of Lords* held that an obligation to disclose in pre-contract negotiations could constitute the obligation in question for the purposes of Article 5 (1). This conclusion was held to be consistent with the ordinary meaning of the language used in the provision. Furthermore, the policy and principle underpinning the provision was found to support that interpretation. Secondly, the *House of Lords* held that an obligation which, if not fulfilled, provided a right to set aside the contract was to be regarded as a contractual obligation. In this context it was pointed out that a distinction has to be made in relation to cases where an apparent contract was void *ab initio*.

The reasoning in the decision by the *House of Lords* takes as its starting point the language of Article 5 (1). In the opinion of Lord Woolf, this standpoint is examined in relation not only to the policy behind the Convention, but also in relation to case-law of the ECJ. Referring to i.a. *de Bloos v. Bouyer*[19] and the *Effer v. Kantner*[20] , Lord Woolf concludes that ECJ case-law does not take a stand on the issue whether pre-contractual obligations are within Article 5 (1). Neither should, according to this opinion, the *de Bloos* case and the use of the words ”…the obligation referred to in Article 5 (1) is still that which arises under the contract.” be interpreted as limiting Article 5 (1) to obligations arising under express terms of a contract.

[19] Slg. 1976 p. 1497 (14/769).
[20] Slg. 1982 p. 825 (38/81).

In dissenting opinions of Lord Hope and Lord Millett, conclusions to the contrary are made with regard to pre-contractual obligations. Lord Hope finds the references in ECJ judgment in *Groupe Concorde v. Suhadiwarno*[21] to "the intention of the parties" and to the place which has a real connection with the "true substance of the contract" to support the conclusion that when the court uses the words "contractual obligation" it has in mind obligations created by or arising under the contract. Lord Millett argued that an obligation relevant to the application of Article 5 (1) must be a contractual obligation, voluntarily undertaken by the party to the contract and contained in the contract itself. A breach of the duty to act in utmost good faith when the reinsurance contract was entered into could not be regarded to be a performance or a non-performance of an obligation created by the contract.

Article 5 (1) clauses 1 and 2

In a decision of 20 January 1999 the Austrian Supreme Court[22] considered whether a self-employed commercial agent could sue his principal at the place of jurisdiction for the contract of employment (second clause of Article 5 (1)) in an action in which he claimed payment of commission, compensation for termination of an agreement, submission of a statement of accounts and preparation of an abstract of accounts. The court found that the ECJ was not directly entitled to interpret the Lugano Convention. Pursuant to Protocol No 2 to that Convention, ECJ decisions handed down prior to 16 September 1988 (= date the Lugano Convention was signed) were to be regarded as authentic interpretations. The court went on to say that the case law of the other Contracting States was also to be taken into account. Lastly, in interpreting the Convention, due account was to be taken of the principles deriving from ECJ case law on parallel provisions of the Brussels Convention. The methodological principles applicable to interpretation of the Brussels Convention could also, so the court held, be drawn upon for the interpretation of the Lugano Convention.

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21 Slg. 1999 p. I-6307 (440/97).

22 Austrian *Oberster Gerichtshof*, 20. January 1999, Juristische Blätter 1999 p. 745, http://www.curia.eu.int/common/ recdoc/convention/en/2000/14-2000.htm, Information No. 2000/14.

The court held that exceptions from the basic rule in Article 2 were to be interpreted narrowly. Pursuant to the second clause of Article 5 (1), actions arising out of employment contracts could be also brought at the place where the work was habitually carried out. The term "contract of employment" was said generally to be given an autonomous interpretation. The interpretation of Article 6 of the 1980 Rome Convention on the law applicable to contractual obligations was also to be taken into account. Contracts of employment were held to be agreements between the employer and the employee covering a dependent, subordinate activity. As stated by the ECJ in the *Mulox v. Geels*[23] case, the contract of employment created a lasting bond which integrated the employee into the organisational framework of the employer's business in a specific way. According to the lower court's findings this did not apply to the plaintiff's situation. His dependence on the defendant was not such, either in personal or commercial terms, as to amount to personal dependence. There was therefore no dependent, subordinate relationship, so that the action could not be based on the second clause of Article 5 (1).

By way of supplementation, the Austrian Supreme Court looked at the question whether the action could be based on the place of performance for other contractual disputes (first clause of Article 5 (1)). According to ECJ case law, the place of performance was to be determined by the law applicable to the contract. However, this did not mean that a separate place of performance had to be determined for each separate claim. If a claimant based his action on several obligations arising under the same contract, the court had to be guided by the maxim *accessorium sequitur principale*. The court said that in order to avoid a multiplicity of fora, in cases where various obligations were at issue, it would be the principal obligation which would determine its jurisdiction. In the case in point, the principal obligation was held to be the obligation in regard to the payment of a sum of money (and not the claim for submission of a statement of accounts or for preparation of an abstract of accounts).

Since the defendant was domiciled in Finland and the place of performance was also in Finland, the Austrian court declined international jurisdiction.

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[23] Slg. 1993 p. I-4075 (125/92).

Article 5 (3)

In a decision of 2 August 1999 the Swiss Federal Court *(P.H. v. B.T.)*[24] was seized of a case where the plaintiff was seeking a court declaration negating the existence of a certain claim. The plaintiff, the director of a bank in an advisory capacity, had been in correspondence with the *Zürich* regional prosecutor's office and made a witness statement to it. The defendant alleged that it had been harmed by this action, which it considered to be tortious and claimed damages from the plaintiff. The plaintiff sought a declaration that he was not liable to the defendant, or at least not through any tortious act.

The court took as its starting point the ECJ decision in the case *Tatry v. Rataj*[25]. According to that decision, an action seeking a declaration that the plaintiff is not liable for causing loss had the same cause of action as proceedings brought by the opposing party seeking to have the plaintiff declared liable for loss; therefore where a tort claim was in dispute the proceedings for a declaration that the plaintiff is not liable were to be brought in the same place as the disputed claim would have to be brought.

The court conceded that problems might arise if no single place of commission could be identified, e.g. if the event giving rise to the injury occurred in one place but the injury occurred elsewhere. The court thought it might be problematic that under these circumstances, it would be the plaintiff (the presumed wrongdoer), rather than the victim, who would have the option allowed by Article 5 (3) of suing either in the place where the injury occurred ("Handlungsort") or in the place where the event giving rise to the injury occurred ("Erfolgsort"). At any rate, there was in the court's opinion no problem in the case in point, because the court seized thereof was particularly close to the source of the evidence and facts of the case.[26]

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24 Swiss *Bundesgericht*, 2. August 1999; Entscheidungen des Schweizerischen Bundesgerichts Bd. 125 III p. 346, http://www.curia.eu.int/common/recdoc/convention/en/2000/19-2000.htm, Information No. 2000/19.

25 Slg. 1994 p. I-5439 (406/92).

26 The court also concluded that the wrongdoer as the plaintiff does not have to provide evidence supporting jurisdiction as he is the one who denies the factual basis of the victim's claim. In such cases the averments of the alleged victim suffice to create jurisdiction.

As regards Article 5 (3) Lugano Convention, views differ as to whether the court is required to examine whether a tortious act was actually committed in a case where the defendant denies commission. To the extent that such examination is demanded, this is designed to avoid jurisdiction being procured on the basis of arbitrary allegations made by the plaintiff. But where a supposed tortfeasor has brought an action seeking a court declaration negating the existence of a cause of action, this will not be necessary in the opinion of the Swiss Federal Court, for, if that were not the case, a supposed tortfeasor denying commission of a tort would not be able to benefit from the jurisdiction envisaged in Article 5 (3).

Finally, the court also dealt with the question of where the event giving rise to the injury, i.e. the plaintiff's alleged tortious statements, occurred. It ruled that this was the place where statements were made orally to third parties or where written statements were dispatched.

I. Articles 7 and 11

In the above mentioned decision of the *House of Lords* of 17 February 2000 *(Agnew and others v. Lansförsäkringsbolagens AB)*[27] the interpretation of "matters relating to insurance" was dealt with in addition to the questions regarding Article 5 (1). The issue was whether a reinsurance contract is covered by the protective provisions in Title II, Section 3 of the Convention.

One of the objections to English courts having jurisdiction put forward by the defendant was that the case was a matter related to insurance under Article 7. Thus, the insurer could according to Article 11 only bring proceedings in the courts of the Contracting State where the defendant was domiciled.

[27] British *House of Lords*, 17 February 2000; The All England Law Reports 2000 Vol. 1 p. 737, http://www.curia.eu.int/ common/recdoc/convention/en/2000/40-2000.htm, Information No. 2000/40. The background to the dispute is described on p. 7.

The *House of Lords* was unanimous in rejecting this defence and held that the provisions in Section 3 of the Convention had as the primary objective to protect the weaker party in a insurance contract. The reinsured could not conventionally be regarded as a weaker party and did not, according to the *House of Lords*, need social protection against reinsurers. Moreover, insurance and reinsurance were considered to be conceptually different and serving different purposes. This outcome is consistent with the standpoints made in the Schlosser Report[28] on the 1978 Accession Convention, which has been confirmed by ECJ in *Group Josi v. UGIC*[29].

Article 8, 1st para. (1, 2)

In a decision of the French *Cour de cassation (Consorts Bonello v. Crèdit Commercial de France Suisse et autre)*[30] the interpretation of Article 8,1st para. (2) was at stake. In this case a testator had been granted a loan by a Swiss bank which was guaranteed by a life insurance policy with a Swiss insurance company. When the testator died, the heirs, with residence in France, summoned both companies before the *Nice* District Court stating that the bank's claim to repayment of the loan was not justified and that the insurance company had no right to refuse its guarantee. The heirs were of the opinion that they could go to the court where they were domiciled on the ground of Article 8, 1st para. (2) of the Lugano Convention. The *Nice* Court and the *Aix-en-Provence* Court of Appeal both declined jurisdiction on the basis of Article 8 of the Brussels Convention.

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28 OJ 1979, C 59/71 p. 117.

29 Slg. 2000 p. I-5925 (412/98).

30 French *Cour de Cassation*, 22 February 2000, Bulletin des arrêts, Chambres civiles, 2000 I No. 55, http://www.curia.eu.int/common/recdoc/convention/en/2000/34-2000.htm, Information No. 2000/34.

The *French Cour de cassation* held that the appeal could not be based on the ground that the courts had applied Article 8 of the Brussels Convention although Article 8 of the Lugano Convention was applicable with regard to the domicile of the Swiss insurer, as the terminology of these provisions is identical. The question decided here has probably never been raised before in Brussels and Lugano Convention cases but may become of particular interest in the near future. Without explicitly saying so the *Cour de cassation* decided that the mere fact that a court had applied the wrong international instrument may not give rise to an appeal, if the correct ground of jurisdiction has been applied. Before long, the European Commmunity and Lugano States will be confronted with four or even five different international instruments on jurisdiction and enforcement. From 1 March 2002 the Brussels Convention will be replaced by the Brussels Regulation on jurisdiction and enforcement[31], which will be binding from that date upon fourteen EU Member States. Denmark - which has a special position under the EU Amsterdam Treaty - will not be subject to this Regulation and will remain under the Brussels Convention until a new Convention between Denmark and the EU/other member states of the EU, revised along the lines of the Brussels Regulation, will come into force. In the meantime, the Lugano Convention, too, will be revised in the same way. Until such time as every actual Lugano Convention State will have ratified the new Lugano Convention, the jumble will remain in place especially since the drafting of clear disconnection clauses almost seems impossible in legal terms and wholly impossible in political terms.

The *Cour de cassation* rejected the appeal, stating that on the basis of Article 8, 1st para. (2), courts have jurisdiction at the place where the policy-holder is domiciled only for the benefit of the person who has contracted with the insurer. Heirs may exercise claims formerly owned by the testator but they are not policy-holders as referred to in the mentioned provision.

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31 OJ 2001, L 12/1.

This point of the decision discusses the meaning of Article 8, 1st para. (2) of the Lugano Convention. This part of Article 8 is identical to the same part of Article 8 of the Brussels Convention, which, until now, has not given rise to any question of interpretation. The Jenard Report [32]only commented that the policy-holder is the person who has contracted with the insurance company, and that this forum actoris jurisdiction lies with the courts for the place of the policy-holder's domicile at the time of instigating the case. The decision of the *Cour de cassation* determined the right of the policy-holder to summon the insurer before the courts of the place where he is domiciled, a right which is not open to universal heirs. Whether this opinion is acceptable to all European Union States and all Lugano States, is not certain.

Article 16 (1)

There was interpretation of Article 16 (1) in a ruling given by the Austrian Supreme Court *(H. v. K.)*[33]. The plaintiff sued the defendant in respect of a contract which both parties described as a "lease agreement". The object of the contract was the lease of exhibition space outside Austria. In addition, the contract settled how electricity, heating and ancillary costs such as telephone units were to be charged. The plaintiff also promised assistance from her PR department and offered to publish the defendant's brochures in-house. The plaintiff provided the defendant with addresses from her customer files for an envisaged mail-shot.

The Austrian court based its ruling on the ECJ's decision in the *Rösler v. Rottwinkel*[34] case. Having due regard to the circumstances of the individual case - so the court held - the crucial point in a mixed contract was whether the contract was at least primarily a lease/tenancy agreement. The court held that the lower instance had been right not to accord any particular importance to services provided by the plaintiff (advertising, mail-shot) over and above the payment of rent.

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32 OJ 1979, C 59/1 p. 31.

33 Austrian *Oberster Gerichtshof*, 29 September 1999, http://www.curia.eu.int/common/recdoc/convention/en/2000/16-2000.htm, Information No. 2000/16.

34 Slg. 1985 p. 99 (241/83).

In conclusion the Austrian Court qualified the agreement between the parties as a tenancy within the meaning of Article 16. Since the immovable property was situated outside of Austria the court declined jurisdiction.

Article 24

A Swiss commercial court made an interim injunction ordering the defendant to deliver certain goods to the plaintiff on the basis of a contractual agreement. The plaintiff was ordered to pay a security. The defendant appealed, claiming that Article 24 had been infringed. The Swiss Federal Court *(SodaStream Ltd. v. Urs Jäger AG)*[35], which ultimately rejected the appeal, dealt first with the parties' agreement on jurisdiction. According to the wording of that agreement, the English courts were to have jurisdiction in any proceedings arising out of the contract. An agreement conferring jurisdiction within the meaning of Article 17 was said to have the effect of derogating from the rules of the Convention; the Federal Court concluded that this extended to provisional measures, so that the Swiss court did not have jurisdiction to impose the interim injunction under the Lugano Convention.[36]

The Federal Court then stated that under Article 24 provisional measures could also be based on national jurisdiction rules. The question whether, and under what circumstances, a jurisdiction agreement between parties could also derogate from national jurisdiction rules, was, in the Federal Court's opinion, to be governed by national law. This ruled out any derogation if the court applied to was the only one able to order immediately enforceable interim measures in time. This was held to be the case.

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[35] Swiss *Tribunal Fédéral,* 17 September 1999, Arrêts du Tribunal Fédéral Suisse Vol. 125 III p. 451, http://www.curia.eu.int/common/recdoc/convention/en/2000/20-2000.htm, Information No. 2000/20.

[36] Kropholler, Europäisches Zivilprozeßrecht,1998, 6th ed., Art. 17 foot-note No. 109.

The court then raised the question whether, and under what circumstances, provisional measures under Article 24 could be granted if they were not designed solely to safeguard rights that might be at risk, but to provide temporary satisfaction. The court emphasised first of all that ECJ case law on parallel provisions in the Brussels Convention should be taken into account when interpreting the Lugano Convention. Since Article 24 referred to provisional, including protective, measures, the court found that the provision could not be held to refer solely to protective measures.

Referring to the ECJ's decisions in *Reichert v. Dresdner Bank*[37], *van Uden v. Deco-Line*[38] and *Mietz v. Intership Yachting*[39] the court then pointed to the risk that ordering interim performance might, by its very nature, prejudice the decision on the merits. The court held that an order for interim performance could not be regarded as a provisional measure within the meaning of Article 24 unless two conditions were met. First, the court with jurisdiction on the merits was not (to put it briefly) to be in the position of ordering interim measures in time. Secondly, the defendant had to be guaranteed repayment of the sum awarded if the plaintiff was unsuccessful as regards the merits of his action. The court held that both these conditions were met in the case at issue.

Articles 24 and 31

Article 24 remains an interesting and difficult provision of the Brussels and Lugano Convention, as can also be seen in the case decided by the Swiss Federal Court *(S. v. X. en liquidation)*[40]. The Civil Court of *Oslo* had ordered S. to pay to X. a sum of money in point 1) and 2) of the operating part of the judgment. Point 3) stated that a delay of two weeks was granted for the performance of the obligations under 1) and 2), this delay running from the day of the pronouncement of the judgment. The defendant S. appealed against this decision.[41]

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37 Slg. 1992 p. I-2149 (261/90).

38 Slg. 1988 p. I-7091 (391/95).

39 Slg. 1999 p. I-2277 (99/96).

40 Swiss *Tribunal Fédéral*, 8 February 2000, Arrêts du Tribunal Fédéral Suisse Vol. 126 III p. 156, http://www.curia.eu.int/common/recdoc/convention/en/2000/18-2000.htm, Information No. 2000/18.

41 The law report in which the decision is published does not mention the domicile of S. and X. The decision implicitly indicates that both parties did not have a residence in Switzerland.

A year after, X., then in liquidation, requested the President of the *Geneva* District Court to authorise sequestration to the detriment of S., referring to the Oslo judgment. The President gave authorisation on the same day, but after opposition by S., he revised his decision one month later. On appeal the *Geneva* Cantonal Court decided in favour of X. and reconfirmed the authorisation of sequestration. S. submitted the case to the Swiss Federal Court, which annulled the contested decision of the Appellate Court.

The decision of the Federal Court can only be understood after studying Article 271, 1st para. (4) of the Swiss Act on Payment Collection and Bankruptcy. The first paragraph of this Article enumerates the grounds for the seizure of property, sub 4 of this paragraph provides a right of seizure for debts of a foreign domiciled debtor. In such a case seizure may be granted if (1) the claim has a *sufficient link* with Switzerland, or (2) if it is based on an *enforceable judgment*, or (3) on an *acknowledgement of debt* by the debtor.[42]

The Federal Court firstly stated that X.'s claim was not based on an acknowledgement of debt by S. and did not have a sufficient link with Switzerland, which lead to the question whether the claim resulted from a decision which is enforceable as referred to in Article 271, 1st para. (4) of the mentioned Swiss Act. According to some authors, the Federal Court continued, this condition of enforceability is fulfilled if the decision is enforceable in the State where it was delivered, even if according to Swiss law or an international convention like the Lugano Convention that decision is not open to an exequatur. Most authorities on the Convention are of a different opinion, to which the *Geneva* Cantonal Court implicitly associated itself when it examined whether the Norwegian judgment is enforceable as regards Article 31, 1st para. of the Lugano Convention.

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[42] The wording of Article 271 of the Swiss Act on Payment Collection and Bankruptcy:
„(1) Der Gläubiger kann für eine fällige Forderung, soweit diese nicht durch ein Pfand gedeckt ist, Vermögensstücke des Schuldners mit Arrest belegen lassen:
1. ...
2. ...
3. ...
4. wenn der Schuldner nicht in der Schweiz wohnt, kein anderer Arrestgrund gegeben ist, die Forderung aber einen genügenden Bezug zur Schweiz aufweist oder auf einem vollstreckbaren gerichtlichen Urteil oder auf einer Schuldanerkennung im Sinne von Artikel 82 Absatz 1 beruht;
5. ...
(2)..."

Expert reports make it clear that even according to the law of the State of origin, the Norwegian judgment is not enforceable. It is not even comparable with a judgment enforceable in anticipation or a provisional decree, while it has not been declared provisionally enforceable pending an appeal, nor does it contain a provisional order for money preliminary to the proceedings on the merits. The Swiss first and second instance courts did not study any of these qualifications. They considered that the requesting party had made it sufficiently clear that part 3) of the Norwegian judgment gave the possibility of provisional seizure upon the expiry of the period of time provided for in the judgment, now that it had transpired that the defendant did not appeal on that point and that appeal as such did not ex lege suspend the execution. Norwegian authorities are of the opinion that, according to Norwegian law, the Oslo judgment, even without having "force exécutoire", may be used to guarantee the claim by allowing the winning claimant to request provisional seizure or a sequestration over all the defendant's goods in Norway and in any other State which private international law or conventions allow this to be done. Basing its decision on these reports the Geneva Cantonal Court seems to have accepted that the *Oslo* judgment, although not executory on the merits, nevertheless entitles X. to ask for a provisional seizure of S.' property even if it is located in another State.

The Swiss Federal Court nevertheless rejected this decision and accepted S.' argument. It considered that although Article 25 of the Lugano Convention does not exclude the recognition and enforcement of provisional measures which could justify a sequestration order under Article 271, 1st para. (4), of the said Swiss Act, importance has to be given to the fact that the Norwegian courts had not ordered any freezing of property as a consequence of the *Oslo* judgment. The Cantonal Court wrongly gave executory power to point 3) of the *Oslo* judgment, which clearly does not mean that the judgment would be provisionally enforceable on the merits, but only that it allows the winning party to request provisional measures within two weeks after the pronouncement of the judgment. As the *Oslo* Court did not deliver a decision which can be enforced, and did not order a provisional seizure, the request for sequestration could only be rejected.

This rather complex case deals with the problem under which circumstances an application for a provisional measure may be made to a court which does not have jurisdiction over the substance of the matter. Article 24 of the Lugano Convention entitles Swiss courts to grant provisional measures provided for under Swiss law, like sequestration, even if under that Convention the courts of another Contracting State have jurisdiction to decide on the merits. However, in the case of Article 24, the conditions, the content and the effects of such measures are determined by the national law (in this case the Swiss Act on Payment Collection and Bankruptcy). But do these national requirements need to be in line with the requirements of the ECJ? In applying Article 271, 1st para. (4) of the Swiss Act on Payment Collection and Bankruptcy, the Federal Court dealt with two aspects:

a) As concerns the recognition and enforcement of foreign judgments, Article 31 of the Lugano Convention requires that if a foreign judgment is enforceable under the Convention, then it must be - provisionally or definitively - enforceable in the State in which it has been rendered. The Norwegian judgment here discussed did not include any decision as to its enforceability, nor was it considered by any other courts of that State to be enforceable or provisionally enforceable.

b) Secondly the Federal Court dealt with the Article 271-requirement of a sufficient link with Switzerland, now that the requirements of an enforceable judgment and of an acknowledgement of debt were missing. The judgment of the Federal Court to deny X. the right of a provisional measure such as the appointment of a sequestrator, because the claim had no sufficient link with Switzerland, in principle falls into line with the ECJ decision in the *Van Uden v. Deco-line* case[43]. In the *Van Uden* case it was decided in the fourth paragraph of its operative part that Article 24, in general, requires a real connecting link between the subject-matter of the measures sought and the territorial jurisdiction of the Contracting State of the court before which those measures are sought. The Federal Court`s decision that it is *only* the national law of the state where the court is situated, which determines the conditions for an interim or provisional measure is certainly not in line with the *Van Uden* case.

[43] Slg. 1998 p. I-7091 (391/95).

It would have been desirable if in its decision the Federal Court had gone into detail with regard to the question whether the specific requirements of the Swiss law concerning the real connecting link correspond to the requirements of the ECJ case law.

3) Title III - Recognition and Enforcement
Article 28 (1) in conjunction with Article 16 (1a)

In a decision by the Norwegian Supreme Court *(Dansommer AS v. Bardsen)*[44] regarding enforcement of a Danish judgment in Norway, the question of the scope of application of provisions on exclusive jurisdiction for proceedings which have as their object tenancies of immovable property, was raised. The parties had concluded an agreement whereby the plaintiff should grant leases over a house, belonging to the defendant, to foreign tourists. The contract gave the right of entire disposal of the house to the plaintiff during a set period of time for a specified sum of money. The defendant had no right to use the house during this period. The plaintiff's rights under the contract would remain unchanged even if the house was sold.

The judgment was handed down by a court in Aarhus, Denmark, ordering the defendant to pay a sum of money to the plaintiff, in accordance with conditions specified in the contract, due to the defendants failure to comply with the agreement. The court assumed jurisdiction relying on an explicit provision in the contract stating that the court in Aarhus had jurisdiction over all disputes that might arise from the contract. The judgment debtor – the defendant in the original proceedings – objected to the judgment being declared enforceable and claimed that the contract was a tenancy of immovable property. Under Article 16 (1a) of the Convention, such proceedings can only be brought before the courts of the Contracting State in which the property is situated, notwithstanding an agreement to the contrary. Enforcement should thus be refused according to Article 28. The plaintiff argued that the agreement was not a tenancy, but an agreement obliging the plaintiff to grant leases over the house.

[44] Norwegian *Hoyesterett*, 6 August 1999, Norsk retstidende 1999 p. 1206, http://www.curia.eu.int/common/recdoc/ convention/en/2000/47-2000.htm, Information No. 2000/47.

The Norwegian Supreme Court came to the contrary conclusion, and found the dispute to fall within the scope of Article 16 (1a). The agreement was concluded with the owner and arose out of the owners obligations under the contract. The fact that the plaintiff never intended to live in the property, but to lease it to others, did not change the status of the agreement. A reference was made to two cases from the ECJ, *Hacker v. Euro-Relais*[45] and *Rösler v. Rottwinkel*[46]. Regarding the first-mentioned case, in which Article 16 (1) was found not to be applicable, the Norwegian Supreme Court underlined that the agreement in that case was a mixed agreement, and included obligations unrelated to the lease of immovable property. The situation was thus different compared to the present case.

Article 54

In the above mentioned[47] decision of 4 May 1999 the French *Cour de cassation* also had to decide on Article 54 of the Lugano Convention. The individual contract of employment under discussion was concluded in 1986. On appeal it was decided that the Lugano Convention did not apply since it became binding between France and Switzerland only after February 1992. However, the *Cour de cassation* ruled that the Lugano Convention was applicable in view of Article 54, since the Convention has been in force from the first of January 1992, while the Labour Court was seized in July 1995. This *Cour de cassation* decision is in line with the *Sanicentral* decision[48], in which interpretation was given of Article 54 of the Brussels Convention which is identical to Article 54 of the Lugano Convention. In this decision the ECJ held that "by its nature a clause in writing conferring jurisdiction and occurring in a contract of employment is a choice of jurisdiction; such a choice has no legal effect for so long as no judicial proceedings have been commenced and only becomes of consequence at the date when judicial proceedings are set in motion. … The effect of Article 54 is that the only essential factor for the rules of the Convention to be applicable to litigation relating to legal relationships created before the date of coming into force of the Convention is that the judicial procedure should have been instituted subsequently to that date, …"

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45 Slg. 1992 p. I-1111 (280/90).
46 Slg 1985 p. 99 (241/83).
47 See foot-note No. 12.
48 Slg. 1979 p. 3423 (25/79).

The French *Cour de cassation* did not deal with the fact that the *Sanicentral* case concerned an employment contract prorogation clause, while the ECJ's decision discussed here concerned an employment contract arbitration clause. *However,* with regard to Article 54 this question is not of importance.

III. Final considerations

The review of the case law of national courts on the Lugano Convention requires some brief concluding remarks:

National courts tend to follow the case law of the ECJ on parallel provisions of the Brussels Convention. This tendency is revealed not only by the solutions adopted in various decisions, but also by frequent reference in the text of decisions to judgments of the ECJ.

In its decision of 20 January 1999 the Austrian Supreme Court makes specific reference to Protocol No 2 of the Lugano Convention.

National courts are sometimes confronted with cases and problems that have never been dealt with by the ECJ. In deciding such cases, national courts tend to seek solutions which are in line with the case law of the ECJ.

Some courts also draw on the case law of other national courts and on domestic and foreign legal commentaries in their deliberations.[49]

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[49] See e.g. the decision of the Swiss Federal Court, cited in foot-note No. 40.

FORTH REPORT ON NATIONAL CASE LAW ON THE LUGANO CONVENTION

by Oliver Parker, Gustav Moeller and Jeannine Dennewald

I Introduction

At its meeting on 13-14 September 1999 the Standing Committee of the Lugano Convention was presented with a report on national case law pertaining to the Convention, based on decisions communicated to the EC Court of Justice by signatory and acceding States in application of Protocol 2 to the Convention. That report which was written by the Greek, Swiss and Spanish delegations[1] covered the decisions contained in the first seven fascicles brought out by the Court of Justice (through its Library, Research and Documentation Centre).

A second report by the Austrian, Italian and Norwegian delegations[2] covered the decisions contained in the 8th fascicle. A third report by the Netherlands, German and Swedish delegations[3] covered the decisions contained in the 9th fascicle. In September 2001 the Standing Committee decided that the fourth report, covering decisions in the 10th fascicle[4], should be drawn up by the United Kingdom, Luxembourg and Finnish delegations for the meeting of the Standing Committee in September 2002. The 10th fascicle[5] contains decisions pertaining to the Lugano and Brussels Conventions, handed down by the following courts:

Lugano Convention

Oberster Gerichtshof (Austria) : 4 decisions
Tribunal federal/Bundesgericht (Switzerland) : 4 decisions
Arbeitsgericht Wiesbaden (Germany) : 1 decision
Bundesgerichtshof (Germany) : 1 decision
House of Lords (United Kingdom) : 1 decision
Norges Hoyesterett (Norway) : 1 decision
Hogsta Domstolen (Sweden) : 1 decision.

Brussels Convention

EC Court of Justice : 2 decisions
Court of Appeal (United Kingdom) : 2 decisions
High Court of Justice (United Kingdom) : 2 decisions
Oberlandesgericht, Dusseldorf (Germany) : 1 decision
Oberlandesgericht, Munchen (Germany) : 1 decision
Landesarbeitsgericht, Munchen (Germany) : 1 decision
Oberlandesgericht, Koblenz (Germany) : 1 decision
Oberlandesgericht, Frankfurt (Germany) : 1 decision
Landgericht, Frankfurt (Germany) : 1 decision
Supreme Court (Ireland) : 3 decisions
Hof van Beroep, Antwerpen (Belgium) : 2 decisions

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[1] 1P Rax 2001, 262.
[2] 1P Rax
[3] 1P Rax
[4] 1P Rax
[5] Information pursuant to Protocol 2 to the Lugano Convention, Package No 10, September 2001 (quoted as Information No 2001/….); the decisions are also published on the home page of the ECJ under http://www.curia.eu.int/common/recdoc/convention/en/tableau/2000.htm.

Tribunal de 1 ere instance, Bruxelles (Belgium) : 1 decision
Corte di Cassazione (Italy) : 3 decisions
Oberster Gerichtshof (Austria) : 2 decisions
Hoge Raad (Netherlands) : 3 decisions
Gerechtshof's Gravenhage : 1 decision
Hojesteret (Denmark) : 1 decision
Cour d'appel d'Orleans (France) : 1 decision
Cour d'appel de Versailles (France) : 1 decision
Cour d'appel de Rouen (France) : 1 decision
Cour de cassation (France) : 1 decision
Cour d'appel de Luxembourg (Luxembourg) : 5 decisions.

It should be pointed out that the EC Court of Justice (ECJ) is dependent on information on national case law provided by national authorities. Thus, the national decisions pertaining to the Lugano and Brussels Conventions that the Court has been able to disseminate do not necessarily constitute a complete compilation of such decisions by national courts. This should be borne in mind when reading this report.

As was the case with the first, second and third reports, this report will also concentrate on the decisions on the Lugano Convention (13 decisions)[6].

II Overview of the case law

Articles 1(2) and 6(4)

1. In its decision of 25 April 2002 the Norwegian Supreme Court had to consider whether the expression "wills and succession" for the purposes of Article 1, para 2 (1) of the Lugano Convention only covers disputes concerning succession rights or in other words only disputes which could not have arisen independently of succession. The question arose in a dispute between one heir and another heir and his wife concerning the effects of a settlement, including ownership of immovable property, between the administrator of a bankrupt estate of a deceased person and one of the two heirs. The other heir alleged that her rights as an heir of the deceased person had been violated by the settlement. The Court held that the exception in Article 1, para 2(1) of the Convention only applied to disputes concerning purely succession rights and that the Lugano Convention thus was applicable in the matter.

2. In the same decision the Court further held that Article 16(1)(a) of the Convention applied to a dispute concerning ownership of immovable property.

3. Finally the Court had to consider whether it was under Article 6 (4) of the Convention possible for the heir - who alleged that her rights as an heir had been violated by the settlement - to combine her action for repayment of rent relating to that property with her action concerning ownership of the immovable property. The defendants alleged that the dispute was not a matter relating to a contract, since the claimant had denied that there was a valid transfer of ownership of the immovable property from the deceased person to the heir. The Court held that an allegation that the transfer of the immovable property was invalid could not in a case like this render Article 6 (4) of the Convention inapplicable. If that was the case and the claims could not be combined, the consequence would be that the claims had to be brought in two

[6] Courts in the Contracting State to the Lugano Convention have different traditions as to the disclosure of the considerations which led to their decisions. A fair comparison of cases is thereby complicated.

different proceedings even though all claims had arisen out of the same contract. Thus Article 6 (4) was in any case applicable as far as the action was brought against the other heir.

4. As far as the action also was brought against the other heir's wife the Court observed that there was no contract between her and the deceased person. The immovable property had been transferred to her without compensation by her housebound. The latter had acquired the immovable property by a contract from the deceased person In a case like this, where the courts of the Contracting State, in which the immovable property is situated have exclusive jurisdiction as to the dispute concerning immovable property, it would having regard to so-called procedural economy be inappropriate not to allow the claimant to combine his claims concerning ownership and repayment of rents relating to that property.

5. Under Article 6 (4) of the Convention the law applicable to the question whether the actions may be combined was in this case Norwegian law. Since combination of the actions was allowed under Norwegian law, the Norwegian courts had jurisdiction as to all claims in the case.

Article 2

6. In a final judgment dated 12 October 2000 the British House of Lords (*Canada Trust Co and others v Stolzenberg and others* (No 2[7])) considered the date on which a person is "sued" for the purposes of the Convention's main rule of jurisdiction in Article 2, and the rule on multiple defendants in Article 6(1).

7. In this case the plaintiff wished to bring proceedings in England against multiple defendants, only one of whom, defendant S, was domiciled in England when the writ was issued. The writ was then served on all the defendants, except defendant S, who was served three months later by which time he had left England in an attempt to evade service and it was possible that at that moment he was no longer domiciled in England. Subsequently several of the defendants applied to the English courts to have the service on them set aside on the ground that the English courts had no jurisdiction over them. In respect of the defendants domiciled in Switzerland the plaintiff relied on Articles 2 and 6 on the basis that defendant S was domiciled in England at the time the writ was issued against him. These defendants argued that a person was "sued" for the purposes of these provisions on the day when the writ was served on him, and not on the day when it was issued. This contention was rejected at first instance and in the Court of Appeal, and these defendants then appealed to the House of Lords.

8. The House of Lords held that for the purposes of Articles 2 and 6 the word "sued" referred to the initiation of proceedings and accordingly the English courts took jurisdiction over a defendant, for these purposes, on the date that the writ was issued. The court gave the following reasons for this conclusion. First, such a conclusion was supported by the language of the Convention which used the expressions "sued", "bring proceedings" and "instituted proceedings" interchangeably. Secondly, it protected one of the major aims of the Convention, namely the achievement of predictability and certainty at all stages for all the parties involved. The time of lodging of the legal process with the court would be a matter of record in all national legal systems, whereas proof of valid service depended on evidence. Even if there were differences between legal systems as to how proceedings were initiated, the date of their initiation appeared to be a readily available point of reference. And thirdly, if the date of service was to be used as the operative date for the purposes of Articles 2 and 6, some defendants, like defendant S in this case, would be able to evade the service of process when

[7] 12 October 2000, the All England Law Reports [2000] vol 4, p 481.

they became aware of the incipient proceedings. That risk was particularly significant in a claim against a multiplicity of defendants.

9. Another issue decided by this case concerns the standard of proof to be applied by the English courts in considering whether a court's jurisdiction has been established for the purposes of the Convention. In Shevill v Presse Alliance[8] the Court of Justice held that it is for the national court to determine this standard of proof, provided that this does not impair the effectiveness of the Convention. The House of Lords, upholding the decision of the Court of Appeal, held that the plaintiff need only demonstrate a good arguable case that the jurisdictional facts on which he relies are present. This test is applied generally by the English courts to jurisdictional issues outside the context of the Convention.

10. This conclusion has been criticised[9] on the basis that it may impair the practical effect of the Convention. For example an English court may consider that the necessary jurisdictional basis is probably absent perhaps on the ground that there may well be a valid choice of court agreement in favour of the courts of another Contracting State; however the court will continue with the proceedings, provided there is still a good arguable case that the validity of that agreement could be successfully questioned. It may subsequently decide that it has in fact no jurisdiction under the Convention because the agreement is valid, but it will still neveretheless give a judgment on the merits. The problem is that English law appears to preclude any further ruling on the issue of jurisdiction, once an initial finding on that issue has been made. It has been suggested in the light of this that a higher standard of proof should be applied to the determination of such issues, for example the balance of probabilities. In the Canada Trust Co case the House of Lords rejected such a test on the basis that its adoption would sometimes require the trial of the issue or at least the cross-examination of deponents to affidavits and that this would cause significant extra expense and delay for the parties to the litigation.

Article 5(1)

11. In a judgment of 28 June 2000, the Oberster Gerichtshof[10] in Austria, ruled that, for the purposes of applying and interpreting the provisions of the Lugano Convention, it is necessary to apply the case law of the Court of Justice of the European Communities and of the national courts of the Member States on matters concerning the Brussels Convention, so as to obtain uniform application of the Lugano and Brussels Conventions throughout the whole of the territorial area to which those two conventions apply.

12. It was decided that Article 5 (1) of the Lugano Convention, interpreted in accordance with the case law of the Court of Justice, does not apply to an action brought by the purchaser of a defective product against the manufacturer, when the latter was not the vendor from whom the purchaser had bought the product.

13. It was decided that purely financial loss is not covered by product liability. Apart from in the case of product liability, the purchaser cannot rely on Article 5 (3) of the Lugano Convention to sue the manufacturer of goods which are merely defective and which the purchaser has bought from another vendor.

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[8] Case C-68/93[1995] ECR1-415.

[9] Civil Jurisdiction and Judgments Briggs and Rees (3rd edition 2002 at p215).

[10] Published in: Österreichisches Recht der Wirtschaft 2001, pp. 21-22; Juristische Blätter 2001, pp. 185-188; Zeitschrift für Rechtsvergleichung, internationales Privatrecht und Europarecht 2001, p. 32 (summary).

Article 6(1)

14. The British House of Lords (in *Canada Trust Co and others v Stolzenberg and Others* (No 2[11])) decided that for the purpose of the rule in Article 6(1) on multiple defendants (and also in relation to Article 2) a person is "sued" on the date a writ is issued, rather than the date on which it is served on him by the plaintiff[12]. The court also rejected the argument that a plaintiff could only rely on this article, if the "anchor defendant", that is the defendant who was domiciled in the jurisdiction in which the proceedings have been brought, had already been served before the other defendants. This conclusion reflected the fact that when a court is considering whether Article 6(1) should be applied, it does so on an *inter partes* basis. In the light of this the court held that the defendant's interests are protected because he has an opportunity to contest those proceedings and the order in which defendants have been served or whether one was served before the issue of proceedings against another is irrelevant.

Article 8(1)

15. In its decision of 3 January 2000 the Swedish Supreme Court[13] had to consider whether the court for the place where the policyholder is domiciled must exercise its jurisdiction under Article 8, para 1 (2) of the Lugano Convention in a dispute concerning the liability of an insurance association as underwriter of a marine insurance agreement because of damage to the rudder of the tanker M/T Barbro. Article 9 of Chapter 17 of the Swedish Maritime Code (sjölagen) provides that such a dispute shall be tried and decided by an average adjuster (particular average).

16. The Swedish Supreme Court held that the above mentioned provision of the Lugano Convention gives the shipowners the right to sue the insurance association in the court for the place where the shipowners have their seat. The provision meant an advantage for the shipowners who are usually regarded as the weaker party. The Court held further that Article 8 para 1 (2) of the Lugano Convention requires that a party shall have a possibility to institute court proceedings in order to get a judgment, which is entitled to enforcement in the other Contracting States. Since the Lugano Convention prevailed over Swedish national law the shipowners had the right to sue the insurance association in the court for the place where the shipowners had their seat, even though no particular average had been rendered in the dispute

Article 17

17. In two cases before the German and Austrian courts judgments were given on the basis of Article 17 of the Lugano Convention.

18. In the first case, the applicant, domiciled in Austria, brought an action, before the Austrian courts, for compensation for a loss resulting from a delivery which did not conform to the terms of an exclusive distribution contract. The defendant claimed that the original contract did not include a jurisdiction clause, and that the jurisdiction clause had been added, by the applicant, without his knowledge or consent.

[11] 12 October 2000, the All England Law Reports [2000] vol 4, p 481.
[12] This issue has been dealt with in more detail in an earlier section in this report: see paragraphs 6 to 10 above.
[13] Swedish Högsta domstolen, 3 January 2000, Nytt Juridiskt Arkiv, 2000 1p. 3. Information No 2001/55

19. The court of first instance ruled (and this ruling was confirmed by the Oberster Gerichtshof[14] in Austria, on 29 August 2000) that the concept of jurisdiction is an autonomous concept within the Lugano Convention. In order for a valid jurisdiction clause to exist, it is necessary for the wills of the parties to be in agreement on the principle and content of that clause, and that meeting of wills must be clearly and unequivocally manifest. It is for the courts to examine the question of whether such a meeting of wills exists, and they do so in accordance with the procedural rules of the Lugano Convention and not in accordance with national rules.

20. The Oberster Gerichtshof, finding that the jurisdiction clause relied on by the applicant was not included in the original contract and that it was impossible in point of fact to determine the moment when the said jurisdiction clause was added and thus to determine whether or not there was consent between the parties, made the applicant bear the consequences of this lack of proof by dismissing his action.

21. The other case concerns the procedural conditions of a jurisdiction clause contained in a pro forma, drawn up in advance by the bank and bearing only the bank's stamp.

22. In the case in question, the bank granted a loan to a German company which had its registered place of business in Germany but whose manager was a person domiciled in Switzerland. The wife of the manager of the company, who was acting as guarantor in respect of the said loan, received by post the guarantee form, drawn up in advance and bearing only the stamp of the bank. She signed it and returned it to the bank.

23. When the company became insolvent, the bank claimed payment of the guarantee before the courts specified in accordance with the jurisdiction clause. In order to avoid paying the guarantee, the guarantor claimed that the court seised of the matter did not have jurisdiction because the said clause was invalid. Under the terms of the jurisdiction clause and pursuant to Article 17 (2) of the Lugano Convention, the court of first instance declared that it had jurisdiction.

24, The Oberlandesgericht confirmed the first judgment and ruled that the jurisdiction clause was valid. It held that since the only thing that mattered was that an agreement between the parties determining jurisdiction should exist in writing, in whatever form, the fact that there was no signature by the responsible individual in the bank was regarded as irrelevant.

25. Reviewing the decision by the Oberlandesgericht, the Bundesgerichtshof[15] in Germany, ruled on 22 February 2001 that the disputed jurisdiction clause did not comply with the procedural conditions set by the Lugano Convention. It held that since Article 17 of the Lugano Convention and Article 17 of the Brussels Convention were identical, it was necessary to refer to previous judgments by the Court of Justice of the European Communities. That Court's strict interpretation requires that each party should give its consent in writing and that that consent must be shown clearly in the text, the author of which must be identifiable from that text.

[14] Reference: 1 Ob 149/00v.

[15] Published in: Betriebs-Berater 2001, pp. 959,060; Wertpapier-Mitteilungen 2001, pp. 768-769.

Article 27(1)

26. In this case, the question before the Swiss Federal Court (BGE 126 III 534) was whether a judgment emanating from the English High Court of Justice, awarding the plaintiff in excess of £700,000.- on the basis of a gambling debt, could be refused recognition under Article 27 No. 1 of the Convention. The issue arose for two reasons. First, in March of 1920, the Swiss Constitution was amended to prohibit the operation of any casinos on Swiss territory. Second, Article 513 of the Swiss Code of Obligations provides that gambling debts will not be enforced in the Swiss courts. As a result, in two decisions dating from 1935, the Federal Court had found that the non-enforcement of gambling debts represented a strong public policy in Switzerland, such that even when Swiss conflicts law required the application of foreign law on the gambling contract, that law would not be applied to the extent it allowed for the enforcement of a gambling debt.

27. These decisions remained good law for quite some time. However, during the 1990s, the constitutional prohibition of casinos was abolished and the Code of Obligations amended so as to allow the enforcement of those gambling debts that have been incurred in one of the new federally licensed casinos. As a result, the Federal Court found that the non-enforcement of a gambling debt can no longer be considered a violation of Swiss public policy today. Thus, the judgment of the English High Court could not be refused recognition and enforcement under Article 27 1.

Articles 27(2)

28. Article 27(2) of the Lugano Convention and certain related issues have been the subject of two Austrian decisions.

29. In the first case, on 15 February 1999 the Austrian court of first instance (Bezirksgericht, Villach) dismissed an action seeking a court order enforcing a German executory judgment dating from 1996, on the grounds that the procedures for the serving of the document instituting proceedings required under the Austro-German Convention had not been complied with.

30. On 1 July 1999 the appeal court (Landesgericht, Klagenfurt) confirmed the first decision. Finding that it was not the bilateral convention but rather the Lugano Convention, which had just come into force between Germany and Austria, which was applicable to the case in question, the appeal court ruled that, in accordance with Article 46 the document instituting proceedings had been served, but that no evidence had been produced to prove that the document had been served in accordance with the provisions of Article 27 of the Convention. Because of this, and because of the fact that this problem had not yet been the subject of a judgment by the Oberster Gerichtshof, Austria, the court ruled that it was possible to bring an action.

31. On 12 July 2000 the Oberster Gerichtshof[16] decided that the payment order (Mahnbescheid) constituted a document instituting proceedings and the enforcement order

[16] Published in: Jus-Extra 2000 No 191, p. 51 (summary); Österreichisches Recht der Wirtschaft 2001, p. 154 (summary).

(Vollstreckungsbescheid) constituted a judgment in default of appearance within the meaning of Article 27 (2) of the Lugano Convention. In the absence of any document initiating proceedings which establishes the specific circumstances, under Article 48 (1) of the Convention it is sufficient if there is a certificate indicating that the document has been duly served and giving the date of service.

32. The second case concerns an action before the Austrian courts seeking the enforcement of a German court decision fixing the amount of debts.

33. The Austrian court of first instance (Bezirksgericht, Villach) dismissed this action on 24 January 2000. Taking the view that the Lugano Convention was applicable, it decided that serving the document initiating proceedings by posting it on the court notice board did not meet the conditions for being 'duly served'.

34. On 13 April 2000 the appeal court (Landesgericht, Klagenfurt) overturned the first decision and ruled that the action for review before the Oberster Gerichtshof was admissible on the grounds that, although evidence had been produced to prove that the document instituting proceedings had been served, a judgment given in default of appearance should in any case be regarded as equivalent to a writ of execution.

35. In its judgment of 20 September 2000, the Oberster Gerichtshof[17] in,Austria, ruled that the possibility of bringing a claim, in a State, against a judgment given in default of appearance, did not meet the requirement, set out in Article 27 (2) of the Brussels Convention, that the defendant must be given sufficient time to arrange for his defence before such a judgment is given. Although the posting of the document instituting proceedings on the court notice board may meet the 'duly served' criterion, it does not meet the 'in sufficient time' criterion, unless, owing to special circumstances, the debtor himself is responsible for the fact that the document was unable to reach him. Moreover, an action seeking the fixing of an advocate's fees after the adjournment of the proceedings in which the advocate has represented the debtor party constitutes a document instituting proceedings.

Articles 28 and 54

36. This case before the Swiss Federal Court (BGE 127 III 186) concerned the recognizeability of a judgment given by the English High Court of Justice, which had been rendered by default. Since the parties' contract had included an arbitration clause, the question arose whether recognition of the judgment could be refused for violating a valid arbitration clause. Siding with one opinion represented in the scholarly literature, the Federal Court found that this was not a ground for non-recognition under Article 28 of the Convention. However, the Court nevertheless found the English judgment to be unrecognizeable. The reason for this is no less interesting than the Court's dictum on the issue of recognition of a judgment violating an arbitration clause: in the Court's view, the application of Article 54b(3) requires that there be some way to ascertain the head of jurisdiction on which the rendering court based its authority to adjudicate. This, of course, was not possible since the English court's decision was a judgment by default. Interestingly, however, the judgment creditor, on appeal from the decision not to recognize the English judgment, had produced a certification by a Master of the Supreme Court of England and Wales, to the effect that the English court had based its jurisdiction on Article 17 of the Convention and that service had been properly made.

[17] Published in: Jus-Extra 2000 No 191, p. 51 (summary); Österreichisches Recht der Wirtschaft 2001, p. 154 (summary).

Nevertheless, the Swiss Federal Court was of opinion that this certification did not suffice for the purposes of recognition because it did not fulfill the requirements of a judgment under Article 25; the reason for this was that the defendant could not have participated in the proceedings leading up to the Master's certification.

Article 57 and Protocol No 3

37. A dispute before a German employment tribunal concerned a German association with its own legal personality which had negotiated collective agreements under Norwegian law with a construction company employing employees seconded from Norway to German shipyards.

38. The association asked the employer to apply certain provisions of the collective agreements to seconded employees in Germany.

39. In its judgment of 15 April 1998, the German employment tribunal (Arbeitsgericht Wiesbaden)[18] declared that it had jurisdiction. The tribunal found, first of all, that the Lugano Convention was applicable in Germany and Norway, and that the defendant was domiciled in a Contracting State. It decided that only the jurisdiction rules of the Lugano Convention were applicable, and not the national rules.

40. The tribunal also found that, under Article 57 and Protocol No 3 (1) on the application of Article 57, the Lugano Convention does not generally affect the legal acts of Member States, and in particular Council Directive 96/71/EC of 16 December 1996 on the secondment of employees.

41. Consequently, the jurisdiction rule referred to in Article 6 of that Directive takes precedence over the provisions of Article 6 of the Lugano Convention, by virtue of which the courts of the State to whose territory the employee is or was seconded have jurisdiction.

Article 1a of Protocol 1

42. In a case concerning an application for an order for the enforcement in Switzerland of a German final judgment of 1 August 1997, the Swiss Federal Court[19], on 19 October 2000, gave a ruling on the scope of the Swiss reservation contained in Article 1 a of Protocol 1 of the Lugano Convention. It decided that the reservation ceased to be effective on 31 December 1999 and therefore no longer prevented the recognition and enforcement of judgments given before that date.

43. It confirmed the judgment of the Swiss Obergericht of 18 August 2000 and interpreted Article 1 a as meaning that the grounds for refusing enforcement were valid for the whole of the period of validity of the Swiss reservation, but only for that period, with the consequence that since the expiry of the Swiss reservation any foreign judgment, even if given before 31 December 1999, can be enforced in Switzerland.

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[18] Published in: Die deutsche Rechtssprechung auf dem Gebiete des Internationales Privatrechts im Jahre 1998 No 143.

[19] Entscheidung des Schweizerischen Bundesgerichts B D, 126 111, pages 540 to 543

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FIFTH REPORT ON NATIONAL CASE LAW ON THE LUGANO CONVENTION

By Jean-Pierre Bedin, Peter Arnt Nielson, Jens Røn and Regina Terry

I Introduction

At its meeting on 13 -14 September 1999 the Standing Committee of the Lugano Convention was presented with a report on national case law pertaining to the Convention, based on decisions communicated to the EC Court of Justice by signatory and acceding States in application of Protocol 2 to the Convention. That report which was written by the Greek, Swiss and Spanish delegations[1] covered the decisions contained in the first seven fascicles brought out by the Court of Justice (through its Library, Research and Documentation Centre).

A second report by the Austrian, Italian and Norwegian delegations[2] covered the decisions contained in the 8th fascicle. A third report by the Netherlands, German and Swedish delegations[3] covered the decisions contained in the 9th fascicle and a fourth report by the United Kingdom, Finnish and Luxembourg delegations covered the decisions contained in the 10th fascicle[4]. In September 2002 the Standing Committee decided that the fifth report, covering decisions in the 11th fascicle[5], should be drawn up by the Belgian, Danish and Irish delegations for the meeting of the Standing Committee in September 2003. The 11th fascicle[6] contains decisions pertaining to the Lugano and Brussels Conventions, handed down by the following courts:

Lugano Convention

Oberster Gerichtshof (Austria) : 1 decision
Bundesgericht (Switzerland) : 1 decision
Bundesgerichtshof (Germany) : 1 decision
Conseil d'Etat/Cour d'appel de Versailles (France): 2 decisions
Court of Appeal/High Court of Justice (United Kingdom) : 2 decisions
Høyesterett (Norway) : 6 decisions
S d Najwyószy (Poland) : 2 decisions

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1 1P Rax 2001, 262.

2 1P Rax

3 1P Rax

4 1P Rax

5 1P Rax

6 Information pursuant to Protocol 2 to the Lugano Convention, Package No 11, September 2002 (quoted as Information No 2002/….); the decisions are also published on the home page of the ECJ under http://www.curia.eu.int/common/recdoc/convention/en/tableau/2002.htm.

Brussels Convention

EC Court of Justice : 6 decisions
Court of Appeal (United Kingdom): 3 decisions
House of Lords (United Kingdom): 1 decision
High Court of Justice (United Kingdom: 1 decision
Bundesgerichtshof (Germany): 2 decisions
Oberlandesgericht Nürnberg, (Germany) : 1 decision
Oberlandesgericht, Köln (Germany) : 1 decision
Landgericht, Düsseldorf (Germany) : 1 decision
Oberster Gerichtshof (Austria) : 6 decisions
Oberlandesgericht Innsbruck (Austria): 2 decisions
Arbejdsretten (Denmark) : 1 decision
Højesteret anke-og kaeremalsudvalg (Denmark): 1 decision
Højesteret (Denmark): 1 decision
Sø- og Handelsretten: (Denmark): 1 decision
Corte suprema di Cassazione (Italy) : 1 decision
Corte di Cassazione (Italy) : 1 decision
Hof van Beroep, Brussel (Belgium) : 1 decision
Tribunal Supremo (Spain): 1 decision
Cour d'appel de Paris (France) : 1 decision
Cour d'appel de Rouen (France) : 1 decision
Cour de cassation (France) : 3 decisions
Cour d'appel de Luxembourg (Luxembourg) : 3 decisions
Arrondissementsrechtbank Rotterdam (Netherlands): 1 decision
Hoge Raad (Netherlands) : 1 decision

As pointed out in previous reports, it should be noted that the EC Court of Justice (ECJ) is dependent on information on national case law provided by national authorities. Thus, the national decisions pertaining to the Lugano and Brussels Conventions that the Court has been able to disseminate do not necessarily constitute a complete compilation of such decisions by national courts. This should be borne in mind when reading this report.

As was the case with the reports drawn up in the last four years, this report will also concentrate on the decisions on the Lugano Convention (15 decisions).

II Overview of the case law

Article 1(1)

Le conseil municipal d'une commune de France[7] a décidé d'accorder la garantie de la commune à une société française X pour le remboursement d'un emprunt contracté par celle-ci auprès d'une autre société française Y.

A cette société Y, s'est substituée une société luxembourgeoise Z.

Le même conseil municipal a autorisé le maire de la commune à intervenir au nom de la commune pour souscrire à l'emprunt garanti et l'a chargé d'établir et de signer la convention fixant, dans les relations entre la commune et l'emprunteur, les conditions de mise en œuvre de la garantie et la mise en œuvre des sûretés offertes.

[7] Information No 2002/33

La convention signée par le maire prévoit que l'emprunt garanti est contracté directement auprès d'une société suisse. Par ailleurs, il s'avère que les conditions de l'emprunt pour lesquelles le maire a engagé la commune, ne sont pas conformes à la délibération du conseil municipal.

La juridiction suisse a décidé de surseoir à statuer jusqu'à ce qu'une décision portant sur la validité de l'engagement de la commune par le maire soit prise par une juridiction française, demandant en quelque sorte que soit posée une question préjudicielle aux juridictions françaises.

La société luxembourgeoise Z demande alors à un tribunal administratif français qu'il soit dit pour droit que le maire n'avait pas outrepassé les pouvoirs que le conseil municipal lui avait conférés.

Le tribunal administratif français a rejeté cette demande.

Le Conseil d'Etat français est, à son tour, saisi du litige et confirme la décision du tribunal administratif en considérant qu'en l'absence de dispositions contraires de la Convention de Lugano, la juridiction administrative française peut se prononcer sur la validité d'un acte de garantie souscrit en faveur d'une société de droit suisse au non d'une commune française.

Bien qu'il soit difficile, à la lecture de l'arrêt, d'appréhender la totalité des faits et du raisonnement tenu par la juridiction suisse, on peut supposer que la commune a invoqué la nullité de la convention pour refuser d'exécuter l'une ou l'autre de ses obligations et que le demander a saisi la juridiction suisse sur la base de l'article l'article 5.1. de la Convention de Lugano. La juridiction suisse a dû constater que pour trancher le litige qui lui était soumis, elle devait se prononcer sur la validité d'un acte posé par un élu local français. Cette question devait être tranchée en appliquant le droit administratif français. Or, la juridiction suisse a dû constater que les règles de droit international public ne lui permettaient pas de faire application d'un droit administratif étranger. Elle n'avait par conséquent, pas d'autre solution que celle de surseoir à statuer aussi longtemps que cette question n'aurait pas été tranchée par la juridiction française compétente. La juridiction française a rendu une décision en indiquant, à juste titre, que la l'appréciation de la validité de sa compétence ne devait en aucune manière être faite à la lumière des dispositions de la Convention de Lugano.

On peut d'ailleurs souligner que l'article 1er, alinéa 1er, de la Convention exclut de son champ d'application les matières administratives.

Articles 1 and 2

Le demandeur, qui est domicilié en France[8], réclame au défendeur, son frère, qui est domicilié en Suisse, sa quote-part dans les pénalités de retard infligées aux héritiers du fait du paiement tardif de droits de succession et que le demandeur a supporté seul.

La juridiction française initialement saisie s'est déclarée incompétente par application de La juridiction française initialement saisie s'est déclarée incompétente par application de l'article 2 de la Convention de Lugano qui dispose, en substance, que les personnes domiciliées sur le territoire d'un Etat contractant, sont attraites, quelle que soit leur nationalité devant les juridictions de cet Etat.

[8] Information No 2002/38

Le demandeur porte le litige devant la Cour d'appel et soutient que c'est à tort que la juridiction initialement saisie s'est déclarée incompétente parce qu'il n'y avait pas lieu à l'application de la Convention de Lugano dont le champ d'application exclut les matières fiscales et les successions.

La Cour d'appel considère que la demande formée est de nature purement civile parce que l'action du demandeur n'est ni de nature fiscale, ni de nature successorale en ce qu'il se borne à réclamer le paiement d'une somme qui lui est due.

Par conséquent, la Cour confirme la décision de la juridiction initialement saisie.

A cet égard, il y a lieu de rappeler que la Cour de Justice des Communautés européennes a précisé que la notion de "matières civiles et commerciales" doit être appréciée d'une manière autonome et non par référence à un système national (arrêt Eurocontrol du 14 octobre 1976, aff. 29/76).

En l'occurrence, la décision de la Cour doit être approuvée puisque la demande n'avait pour autre objet que celui de récupérer une créance auprès d'un débiteur. L'origine de cette créance ne permet pas de considérer que le litige est d'ordre fiscal ou successoral au sens de la Convention de Lugano.

Articles 2 and 18

In a case heard before the English Court of Appeal, and decided upon in February 2001[9], a key issue for determination was whether the power to stay proceedings on the ground of forum non conveniens was consistent with the Lugano Convention. The claimant's case was for a declaration of non-liability under a contract of reinsurance made with the first defendant, an insurance company domiciled in Switzerland. (The second defendant was a New York company to which the first defendant, as part of a restructuring move, had assigned all rights and liabilities under the relevant reinsurance contract.) It was common cause that the first defendant had submitted to the jurisdiction of the English courts albeit with a reservation which permitted it to argue the point regarding forum non conveniens. Both defendants had been successful at first instance in obtaining a stay of proceedings on the ground of forum non conveniens in favour of proceedings which had already commenced in Texas. The original insured was a Texan company and the reinsurance contract had contained a service of suit clause whereby the underwriters had indicated a willingness to submit to a court of competent jurisdiction in the US.

In reaching its determination, the Court of Appeal considered itself to be bound by previous authority (concerning the Brussels Convention) to say that the staying of proceedings against the first defendant would not be inconsistent with the Lugano Convention. It had particular regard to the case of In Re Harrods (Buenos Aires)[10] which answered in the affirmative the question as to whether or not an English court could stay, strike out or dismiss proceedings on the ground of forum non conveniens, where the defendant in the English proceedings was domiciled in England but the conflict of jurisdiction was between the jurisdiction of the English court and the jurisdiction of the courts of a state which was not a Contracting State, no other Contracting State being involved. That case had also endorsed an argument which, in essence, put forward the view that the Brussels Convention does not apply so as to

[9]The Times Law Reports 2001. p 155. Information No 2002/41

[10][1992] Ch 72, [1992] I. L. Pr. 453

regulate jurisdiction issues between the courts of a Contracting State and the courts of a non-Contracting State. The Court of Appeal did not accept that the present case could be distinguished from the Harrods case because the defendant was domiciled not in England but in another Contracting State. Having affirmed the basic principle regarding forum non conveniens, the Court, in application of those principles, proceeded to dismiss the appeal against the stay of proceedings. (A request for a preliminary ruling on a case involving similar legal issues is at present pending before the European Court of Justice C - 281/02).

Article 5(1)

Two cases concerning the interpretation of Article 5(1) of the Lugano Convention have been before the Norwegian Supreme Court.

a) In the first decision of 28 November 2001 the Norwegian Supreme Court had to consider where the place of performance for a payment obligation was under a commercial agency contract entered into between a Norwegian firm and a Danish company concerning marketing and sales in Norway of tools[11]. The Norwegian agent instituted proceedings in Norway under Article 5(1) of the Lugano Convention against the Danish company claiming payment for commission. The defendant argued that the Norwegian court lacked jurisdiction, since Article 5(1) would lead to forum shopping if applicable on all payment obligations under the contract. The defendant also argued that the place of performance of the payment claim for commission was in Denmark and that Norwegian domestic law was inapplicable to an international contract.

   The Norwegian Supreme Court held that the law applicable to the contract was Norwegian law and that the place of performance of payment obligations under Norwegian law is at the creditor's domicile. The Court added that the decisive obligation providing for jurisdiction under Article 5(1) is the obligation that forms the basis of the plaintiff's claim. Consequently, the Norwegian courts had jurisdiction under Article 5(1) to decide the agent's claim for commission.

   The Norwegian Supreme Court delivered its second judgment concerning Article 5(1) of the Lugano Convention on 18 February 2002.[12] A Norwegian company instituted proceedings under Article 5 (1) in Norway against the bankruptcy estates of two Swedish companies. The plaintiff asked the court for a declaration of the non-existence of debts relied on by the defendants. The parties agreed that the place of performance of the obligation in question should be determined in accordance with Norwegian law. The Norwegian company argued that the place of performance of the alleged debts to be discharged was in Norway according to the Norwegian Statute on Financial Contracts (the debtor's domicile), whereas the defendants argued that that place was in Sweden under the Norwegian general rules on place of payment (the creditor's domicile).

   The Norwegian Supreme Court held after examination of the explanatory report of the Norwegian Statute on Financial Contracts and the Community Directive 97/5 on cross-border credit transfers that the statute provided for payment at the creditor's bank. The defendants' bank had its seat in Sweden. Thus, the Supreme Court concluded that the Norwegian courts lacked jurisdiction under Article 5(1) of the Lugano Convention.

[11] Published in Norsk retstidende 2001, p. 1567-1569. Information No. 2002/49

[12] Published in Norsk retstidende 2002, p. 199-203. Information No. 2002/53

b) La Cour d'appel d'Innsbruck[13] a été saisie d'un litige relatif à une convention de time-sharing.

Le demandeur réclame au défendeur qui se trouve être une société dont le siège est en Allemagne, des dommages et intérêts pour défaut d'exécution de ses obligations concernant un bien situé en Autriche.

La compétence du tribunal initialement saisi a été fondée sur les articles 16.1, 13.3, 14 et 5.1. de la Convention de Lugano.

Pour rappel:

l'article 16.1.a. vise, notamment et en substance, les droits réels immobiliers et les baux d'immeubles qui fondent la compétence exclusive de la juridiction du lieu de l'Etat où le bien est situé.

l'article 13.3. vise, notamment et en substance, les contrats ayant pour objet la fourniture de services à des consommateurs. Par application de l'article 14, l'action intentée par le consommateur peut être intentée soit devant les tribunaux de l'Etat contractant sur le territoire duquel il est domicilii l'autre partie, soit devant les tribunaux de l'Etat contractant sur le territoire duquel est domicilié le consommateur.

l'article 5.1. dispose notamment que le défendeur domicilié sur le territoire d'un Etat contractant peut être attrait dans un autre Etat contractant, en matière contractuelle, devant le tribunal du lieu où l'obligation qui sert de base à la demande a été ou doit être exécutée.

Les arguments avancés de part et d'autre étaient les suivants:

le contrat de "time-sharing" ne confère aucun droit réel immobilier;

Le contrat de “time-sharing en cause n'est pas un contrat de louage d'immeuble parce que le bien immobilier appartient à un tiers et que la partie défenderesse s'est "bornée" à s'engager à le mettre à disposition du demandeur;

pour le motif que les services prévus au contrat doivent être fournis par un tiers et non par la partie défenderesse, on ne peut non plus parler de convention de fourniture de services entre les deux parties au litige;

il n'existe pas de relation contractuelle entre la demanderesse et la défenderesse de sorte que l'article 5.1. de la Convention ne peut trouver à s'appliquer.

La juridiction initialement saisie du litige a constaté qu'après avoir acquis le droit d'utilisation d'un bien immeuble, l'acquéreur a également acquis le droit de mettre à la disposition d'un tiers son droit d'utilisation en échange d'un autre droit d'utilisation. La même juridiction a également constaté que ce droit d'utilisation avait été cédé.

[13] Information No 2002/18

Par conséquent, conclut cette juridiction, la première caractéristique du contrat en question est le transfert d'un droit d'utilisation d'un immeuble contre rémunération. Il en découle, selon la juridiction, que l'article 16.1.a. de la Convention de Lugano est applicable en l'espèce.

La Cour d'appel saisie du litige commence par rappeler que par application de la Convention de Lugano, il appartient à la juridiction de vérifier d'office si elle compétente et, partant, qu'elle n'est pas liée par les arguments développés par les parties.

La Cour relève ensuite que le tribunal initialement saisi du litige a fait une analyse correcte du contrat et a pu en déduire que les éléments de celui-ci étaient visés par l'article 16.1.a. de la Convention de Lugano.

La Cour observe cependant que cette dernière constatation ne doit pas mener à la conclusion selon laquelle la compétence de la juridiction saisie peut se fonder sur l'article 16.1.a., précité.

En effet, il résulte des affirmations de la demanderesse que sa demande repose sur la non-exécution par la défenderesse, non pas de la convention de time-sharing proprement dite mais de la non-exécution d'un engagement aux termes duquel les droits de temps partagés (bail) des anciens clients seraient repris un tiers. La relation en cause n'est donc pas un louage de bien immeuble, mais un engagement aux termes duquel un tel droit serait attribué par un tiers.

Il n'est pas possible de faire rentrer une telle obligation dans le champ de l'article 16.1.a., mais il y a lieu de faire application de l'article 5.1. qui fonde la compétence internationale de la même juridiction. La notion de "matière contractuelle" doit être entendue dans un sens large et l'indemnisation réclamée par le demander entre dans le champ de cette disposition.

En ce qui concerne la détermination du lieu de l'exécution de l'obligation, il y a lieu de faire application du droit international privé autrichien. Selon ce droit, le lieu de l'exécution est déterminé par l'accord des parties et, à défaut d'accord, par la nature et l'objet de l'engagement. En l'occurrence, le lieu d'exécution est le lieu où le droit d'utilisation de l'immeuble devrait être exercé (Autriche) et le tribunal initialement saisi était donc bien compétent, bien qu'il ait fondé sa compétence d'une manière erronée.

En matière de convention de "time sharing", la question du for et du droit applicable lorsque des personnes acquièrent des droits d'utilisation à temps partiel sur un immeuble situé à l'étranger est complexe. Les avis divergent sur ce point quant à l'interprétation de la Convention de Lugano du 16 septembre 1988 concernant la compétence judiciaire et l'exécution des décisions en matière civile et commerciale. A cet égard, la qualification de ces droits d'utilisation est déterminante. L'une des thèses plaide en faveur de l'application de la protection générale des consommateurs lors de la conclusion d'un contrat. Ainsi, le consommateur peut poursuivre en justice l'autre partie au contrat non seulement à son domicile ou à son siège, mais aussi à son propre domicile. L'autre thèse déclare que les droits d'utilisation à temps partiel relèvent des droits réels immobiliers. Il en résulte que le juge compétent est celui de l'Etat contractant du lieu de situation de l'immeuble en cause. Dans le cas d'espèce rapporté, la juridiction a détaché l'obligation litigieuse du contrat pour conclure que ce qui était, en réalité, en cause dans le litige soumis était non pas l'exécution d'une convention de time-sharing dont il convenait de déterminer la qualification juridique ainsi que l'avait fait la juridiction initialement première saisie, mais bien une obligation contractuelle "banale" tombant, pour la détermination de la compétence internationale, dans le champ d'application de l'article 5.1.

On peut également observer, en ce qui concerne, la notion de relation contractuelle, que la Cour de Justice des Communautés européennes a toujours affirmé le caractère autonome de la notion de "matière contractuelle" en lui attribuant un contenu "large" (Arrêt Peters, du 22 mars 1983, aff. 34/82).

Enfin, il peut être observé que la décision rapportée s'inscrit dans la ligne de la jurisprudence de la Cour de Justice des Communautés européennes et, en particulier, de l'arrêt Lieber, du 9 juin 1994, Aff. C-294/92, dans lequel la Cour a dit pour droit qu'il est évident qu'une demande d'indemnisation pour la perte de jouissance d'un immeuble ne peut être invoquée qu'à l'égard du débiteur et qu'elle constitue dès lors un droit personnel.

Article 5(2) (also Article 54)
In a decision dated 5 January 2001, the Polish Supreme Court[14] dealt with a claim brought by a Polish citizen against an Italian citizen for the costs of maintenance during the three-month period close to the time of childbirth and for costs relating to pregnancy and childbirth. While the Court ruled that the jurisdiction rules of the Lugano Convention could not be applied in this case as the proceedings had been instituted in February 1998, the case is of interest for the fact that the Court confirmed that the jurisdiction rules applicable when pursuing ordinary maintenance claims were also capable of being applied to the types of claim at issue given that they were close to maintenance claims in nature. Thus, the claims in question fell within the scope of the relevant provisions of the Lugano Convention. The parallel claim being pursued for the re-imbursement of the relevant pregnancy/childbirth costs also fell within the scope of the Convention but, being a pecuniary claim, would not attract the preferential rules which apply in maintenance cases. (This particular case was referred back to a lower court for reconsideration, particularly in the light of the provisions of relevant international Conventions).

Article 5 (3)
In its decision of 17 October 2001 the Norwegian Supreme Court decided a case concerning certain aspects of Article 5(3) of the Lugano Convention.[15] The case concerned a Swedish broadcasting company that had broadcasted a documentary concerning the seal industry in Norway and the reporter who made the documentary. The programme was received by television viewers in Sweden and Norway. A number of Norwegian seal catchers instituted proceedings in Norway against the broadcasting company and the reporter claiming damages for defamation. The seal catchers relied on Article 5(3) of the Lugano Convention by arguing that the courts of the Contracting State where damage is sustained have jurisdiction and that the plaintiff may choose between instituting proceedings in that State and the State where the event giving rise to the damage occurred. The defendants argued that such an interpretation of Article 5(3) would lead to forum shopping and that Article 5(3) should not be applicable to broadcasting. The defendants finally argued that a Norwegian judgment holding the reporter liable would not be recognized and enforced in Sweden due to public policy (freedom of speech).

The Norwegian Supreme Court relying on ECJ Case 21/76 (Bier) and ECJ Case C-68/93 (Fiona Shevill) found that the Norwegian courts did have jurisdiction. The Court added that the question whether the Norwegian judgment would be against public policy in Sweden had no importance in relation to the question of jurisdiction.

[14] Information No 2002/56

[15] Published in Norsk retstidende, 2001, p. 1322-1331. Information No 2002/48.

Article 6.1
Le demandeur[16], domicilié en Allemagne, poursuit le défendeur n° 2, domicilié en Suisse en vue d'obtenir le remboursement d'un montant payé à celui-ci en sa qualité d'administrateur d'une société d'investissement.
Les motifs de la demande sont les suivants:

Le demandeur a participé à un fonds d'investissements exploité par une société allemande, dont le gérant est le défendeur n° 1, domicilié en Allemagne. Le défendeur n° 2 avait la qualité d'administrateur de cette société. Le demandeur a versé le montant d'une souscription sur un compte indiqué par la société allemande. Ultérieurement, le demandeur a retiré son dépôt mais n'a obtenu aucun paiement de la société qui, entre-temps, avait été radiée du registre du commerce. Il a donc attrait devant une juridiction allemande, le défendeur n° 1 (gérant de la société) et le défendeur n° 2 (administrateur de cette même société).

En première instance, le demandeur a obtenu gain de cause.

Le défendeur n° 2 a introduit un recours en révision fondé sur la contestation de la compétence de la juridiction allemande au regard de l'interprétation à donner à l'article 6.1. de la Convention de Lugano.

Pour rappel, cet article dispose, en substance que le défendeur domicilié sur le territoire d'un Etat contractant, peut, s'il y a plusieurs défendeurs, être attrait devant le tribunal du domicile de l'un d'entre eux.

La Cour fédérale allemande expose ainsi son raisonnement:

La question de la compétence internationale de la juridiction concernant une demande formulée contre le défendeur n° 2 domicilié en Suisse doit être appréciée au regard de l'article 6.1. de la Convention de Lugano.

[16]Information No 2002/28

La jurisprudence de la Cour de Justice relative à l'application de la Convention de Bruxelles, doit être prise en considération, par application du Protocole n° 2 sur l'interprétation uniforme de la Convention de Lugano.

Il ressort de la jurisprudence de la Cour de Justice que l'application de l'article 6.1., de la Convention de Bruxelles, requiert une connexité des différentes demandes d'un demandeur à l'égard de plusieurs défendeurs afin d'éviter des décisions judiciaires contradictoires.

En ce qui concerne les conditions requises pour qu'une telle connexité soit présente, la Cour de Justice a dit pour droit que la connexité requise n'existe pas lorsque deux conclusions déposées dans le cadre d'une même demande visant à obtenir des dommages et intérêts contre plusieurs défendeurs sont fondées, respectivement sur une base contractuelle pour l'une et sur une base délictuelle pour l'autre.

Or, dans le cas d'espèce, cette condition de la connexité n'est pas présente et, par conséquent, la compétence des juridictions allemandes ne peut être retenue.

A propos de la condition de connexité, on peut relever que l'arrêt Kalfelis de la Cour de Justice des Communautés européennes du 27 septembre 1988 a mis en en exergue cette condition qui ne résulte pas directement des termes de l'article 6.1. mais se déduit de son esprit qui tend à éviter que le demander utilise cette disposition pour soustraire à son juge naturel le co-défendeur qui n'a pas son domicile dans l'Etat du for saisi.

Article 10

The decision of 8 February 2002 delivered by the Norwegian Supreme Court concerned a Cypriot ship that was lost in the North Sea and caused pollution of the Norwegian coast.[17] The ship was insured by an English company. The Norwegian State claimed compensation for expenses covering the clean-up and instituted proceedings in Norway against the shipping company which accepted the jurisdiction of the Norwegian courts, and the insurer under Article 10(2) and Article 9 of the Lugano Convention. Both Norwegian and English law provided for direct actions. However, the insurer contested the jurisdiction of the Norwegian courts arguing that English law did not provide for direct action against the insurer taking the circumstances of the facts into consideration.

The Norwegian Supreme Court found that the question whether direct actions are permitted shall be determined by the lex causae in accordance with the choice of law rules of the forum. The Norwegian choice of law rules led to application of Norwegian law.

Articles 13 (1), 14 and 52

The Norwegian Supreme Court took in its decision of 21 January 2002 a stand on a consumer contract.[18] A Norwegian credit card company instituted proceedings against a consumer in Norway under Article 14 of the Lugano Convention. The consumer contested the jurisdiction pointing out that he was no longer domiciled in Norway.

The Norwegian Supreme Court found that the question of whether the defendant was still domiciled in Norway should be determined by Norwegian law in accordance with Article 52 of the Lugano Convention. The Court added while referring to Article 13(1) of the Lugano Convention that a credit card contract in general is not covered by the scope of application of

[17] Published in Norsk retstidende, 2002, p. 180-187. Information No 2002/52.

[18] Published in Norsk retstidende 2002, p. 82-84. Information No 2002/51.

the rules on consumer contracts. Consequently, the issue of jurisdiction should be decided on the basis of Article 2.

Article 17, para 1

a) In a judgment given in July 2000[19], the English High Court of Justice had to determine the scope of a jurisdiction clause in a power of attorney where that power contained a Swiss choice of law clause and a jurisdiction clause in favour of the canton of Zurich. The claimant in question was the beneficiary of a Swiss bank account who had executed a power of attorney in respect of dealings with the bank in favour of his father who, in turn, had executed a substitute power of attorney in favour of the defendant. Alleging misappropriation of funds, he initiated proceedings in the United Kingdom against the defendant, who was domiciled there at the time, against a background where the primary claim was for breach of trust or breach of fiduciary duty. In applying to have the case struck out, the defendant argued that the English courts lacked jurisdiction and that, in accordance with Article 17 of the Lugano Convention, any case must be brought in Switzerland.
During the hearing, evidence was tendered to the effect that the concept of beneficial ownership does not exist under Swiss law which recognises only one type of title which is legal title. The argument was also made that the sole relationship between the claimant and the defendant, in relation to the bank account, was the contractual one of the donor and donee of a power of attorney onto which English concepts of fiduciary duty and trusts assets could not be engrafted. The matter being contractual in nature, the effect of the jurisdiction clause was that disputes arising out of or in connection with the power of attorney must be brought before the relevant Swiss court. On the basis of the evidence presented and the surrounding factual matters, the judge in the case concluded that the claimant's case concerning the jurisdiction of the English court was likely to fail and discharged an ex parte freezing order which had been granted previously.

In its decision of 29 November 2001 the Norwegian Supreme Court examined a jurisdiction clause in a contract between a Norwegian and an Austrian company.[20] According to the clause the plaintiff had the right to choose the competent court. The choice was not limited to the courts of the seat/domicile of the parties. Consequently, the plaintiff could even choose a court in a non-Contracting State. The Norwegian plaintiff instituted proceedings in Norway relying on the jurisdiction clause. However, the defendant contested the jurisdiction by arguing that the clause was invalid under Article 17(1) of the Lugano Convention since the clause did not explicitly provide for jurisdiction for courts in a Contracting State.

The Norwegian Supreme Court held the clause invalid, since the jurisdiction clause did not refer to the courts of a Contracting State. The Court pointed out that the clause gave jurisdiction to an unlimited number of courts whether situated in a Contracting State or a non-Contracting States and that it therefore was not sufficiently predictable to be upheld.

b) En août 1998, A et B, domiciliés dans la Principauté de Monaco[21], d'une part et C et D agissant pour compte d'une société de droit autrichien, X, établie en Autriche, ont signé une convention par laquelle X désigne A en qualité de mandataire intérimaire et B en qualité de "sous-mandataire", moyennant paiement d'honoraires.

[19] [2001] I. L. Pr. 396. Information No 2002/40

[20] Published in Norsk retstidende 2001, p. 1570-1574. Information No 2002/50.

[21] Information No 2002/24

La convention précise qu'elle est soumise au droit matériel suisse et que les juridictions de Zurich sont seules compétentes.

Les honoraires convenus ont cessé d'être payées par X, ce qui a conduit A à citer X devant le tribunal de Zurich en vue d'obtenir le paiement des sommes dues et des intérêts.

Le tribunal initialement saisi s'est déclaré incompétent, pour le motif que X n'est pas valablement représenté par C et D et, partant, que la clause d'élection de for, contenue dans la convention ne peut trouver à s'appliquer.

La juridiction d'appel a réformé le jugement pour le motif suivant : De l'avis de la juridiction d'appel, la défenderesse, X, était bien valablement représentée par C et D, agissant en qualité d'organe de X, de sorte que la clause d'élection de for était bien valable et partant, que les juridictions de Zurich étaient bien compétentes.

Le défendeur porte le litige devant le tribunal fédéral en vue d'obtenir l'annulation de la décision de la juridiction supérieure.

Le raisonnement du tribunal fédéral est ainsi développé:

Dans la décision attaquée de la juridiction supérieure, la compétence est fondée sur la clause d'élection de for de la convention intervenue entre les parties et l'article 17 de la Convention de Lugano.

Pour rappel, cet article dispose, en substance et notamment, que les clauses d'élection de for sont, en principe valables lorsqu'une au moins des parties a son domicile sur le territoire d'un Etat partie à la Convention de Lugano et que la convention d'élection de for est conclue par écrit.

Le défendeur reproche à la juridiction d'appel d'avoir méconnu que, par application du droit autrichien, la décision d'une société concernant la désignation d'un gérant est soumise à une obligation d'inscription qui, en l'occurrence, est défaillante. En d'autres termes, la juridiction d'appel aurait fait une mauvaise application du droit autrichien.

Le tribunal fédéral constate que l'article 17 de la Convention de Lugano ne règle pas la capacité de contracter des parties, ni la question de la validité de la représentation de celles-ci.

Puisque la Convention de Lugano ne règle pas cette question, il y a lieu de faire application du droit national. Par application du droit international privé suisse, les sociétés sont régies par le droit de l'Etat dans lequel elles sont organisées. En l'occurrence, c'est le droit autrichien qu'il y a lieu d'appliquer.

Selon le droit autrichien tel qu'il a été considéré par la juridiction de première instance et qui ne peut plus être reconsidéré par le tribunal fédéral, la désignation d'un gérant d'une société GMBH est faite par la décision des associés. Lorsque, comme en l'espèce, il y a un associé unique, sa volonté coïncide avec la volonté des organes habilités à représenter la société.

Le grief du défendeur qui l'amène à contester les constatations de la juridiction d'appel n'est pas recevable.

La décision attaquée est, par conséquent, confirmée.

Toute la philosophie de l'article 17, dont il a été fait une exacte application en l'espèce, est résumée en une phrase qu'on trouve dans l'arrêt Benicasa de la Cour de Justice des Communautés européennes, du 3 juillet 1997, aff. C-269/95, selon laquelle l'article 17 a pour objectif de désigner d'une manière claire et précise une juridiction d'un Etat contractant qui soit exclusivement compétente conformément à l'accord de volonté des parties, exprimé selon les conditions de forme strictes y énoncées.

Reste que comme il est dit dans la décision, la Convention de Lugano ne règle pas la détermination de la loi applicable à l'appréciation de la clause d'élection de for au fond. Dans le silence du texte, l'opinion développée par l'avocat général Slynn dans l'affaire Elefanten Schuh,du 29 juin 1981, aff. 150/80, en faveur de la loi du tribunal désigné paraît satisfaisante.

Article 24

In a decision dated 6 April 2001, the Polish Supreme Court[22] considered an application to appoint a court to which a German company could submit an application for a preliminary ruling in order to secure claims lodged against a number of other companies in relation to a disputed share transaction. Some of these companies were based in Germany, others were based in Poland and the substantive action was being tried before a court in Cologne. The Polish Supreme Court confirmed that Article 24 was applicable and that the Polish Courts had jurisdiction to entertain an application to implement provisional measures, including preliminary measures, even where the main action was taking place elsewhere. However, the Court declined to appoint a court to which the application might be submitted. Jurisdiction in this instance was to be determined by reference to the relevant provisions of the Code of Civil Procedure and, as interpreted by the Court, those provisions pointed to the fact that the competent court (both from a geographical and substantive point of view) was the court in whose jurisdiction the adjudication of an action in the first instance would fall if such action were to be instigated before a Polish court. The combined effect of both the Code and the Lugano Convention was such as to enable the appropriate court to be identified and further intervention by the Supreme Court would, therefore, not be warranted.

[22] Information No 2002/57

SIXTH REPORT ON NATIONAL CASE LAW ON THE LUGANO CONVENTION

I Introduction

In September 2003, the Standing Committee decided that the subsequent, i.e. the sixth report, covering the decisions contained in the twelfth fascicle issued by the Court of Justice (through its Library, Research and Documentation Centre) should be drawn up by the Icelandic, Polish and Portuguese delegations. The twelfth fascicle[1] contains decisions pertaining to the Lugano and the Brussels Convention, handed down by the following courts:

Lugano Convention:

Oberster Gerichtshof (Austria): 1 decision
Tribunal fédéral/Bundesgericht (Switzerland): 2 decisions
Oberlandesgericht Düsseldorf (Germany): 1 decision
House of Lords (United Kingdom): 1 decision
Cour d'appel (Luxembourg): 1 decision
Høyesterett (Norway): 1 decision
Hoge Raad (Netherlands): 1 decision
Korkein oikeus (Finland): 1 decision

Brussels Convention:

EC Court of Justice: 6 decisions
Court of Appeal (England and Wales, United Kingdom): 2 decisions
Court of Session (Scotland, United Kingdom): 2 decisions
Oberlandesgericht, Köln (Germany): 1 decision
Oberlandesgericht, Frankfurt/Main (Germany): 1 decision
Bayeriches Oberstes Landesgericht (Germany): 1 decision
Oberlandesgericht, Karlsruhe (Germany): 1 decision
Bundesgerichtshof (Germany): 3 decisions
Hof van beroep, Gent (Belgium): 2 decisions
Corte di Cassazione (Italy): 1 decision
Corte d'Appello di Torino (Italy*):* 1decision
Oberster Gerichtshof (Austria): 3 decisions
Gerechtshof's Gravenhage (Netherlands): 1 decision
Hoge Raad (Netherlands*):* 2 decisions
Vestre Landsret (Denmark): 1 decision
Cour de cassation (France): 1 decision
Cour d'appel (Luxembourg): 1 decision
Audiencia Provincial de Madrid (Spain*)*: 1 decision
Supremo Tribunal de Justiça (Portugal): 1 decision
Efeteio Thessalonikis (Greece) 1 decision

[1] The decisions have also been published on the homepage of the EC Court of Justice under http://www.curia.eu.int/common/recdoc/convention/en/tableau/2003.htm

Efereio Peiraios (Greece) 1 decision

As in the previous reports, it should be stressed that as regards national case law, the European Court of Justice is dependent on information provided by national authorities. Therefore, national decisions pertaining to the Lugano Convention and the Brussels Convention that the Court has been able to disseminate do not necessarily constitute a complete compilation of such decisions passed by national courts. This should be borne in mind when reading this report.

II Overview of the case law

Article 5(1) of the Convention

In the decision dated 11 April 2002, the Norwegian Supreme Court *(Høyesterett, case no 2003/42)* expressed its opinion on the question of interpretation of Article 5(1) of the Lugano Convention, in matters relating to individual contracts of employment.
The facts of the case were as follows:
On 2 December 1997, Martin Openshaw, a British national residing in Scotland, was employed as a drilling master in a Swiss company Saipem AG, which later changed its name to Saipem Services AG, for work on board floating drilling platforms operated by the Italian company Saipem SpA. Saipem Services AG is a subsidiary wholly owned by Saipem SpA. The companies maintain a common branch office in Stavanger, Norway.

Openshaw was engaged as a drilling master on board drilling platform "Scarabeo 6" which was operated on the British continental shelf until the beginning of 1998. According to the employment contract, Openshaw's wages and employment terms were those applicable to the company's employees on the British continental shelf. At the beginning of 1998 the drilling platform was moved to the Norwegian continental shelf and a new contract was concluded on wages and employment terms, conforming to the terms customary for similar work on the Norwegian continental shelf. The contract contained a provision on obligatory transfer, and on 16 March 2001 Openshaw was notified that he was to be transferred to work outside Norway, and would cease to receive wages according to the Norwegian employment contract on 21 March 2001. A contract, which was submitted to

him, concerning the work on the Nigerian continental shelf, contained different provisions on wages and employment terms.

Openshaw refused to accept the terms of that contract. He only accepted the transfer for work outside Norway on the condition that he would retain his wages and employment terms. Openshaw was subsequently laid off.

Openshaw began an action in the Stavanger City Court against the Norwegian division of Saipem Services AG. In his action, the plaintiff claimed that he was entitled to continue his employment, as well as to compensation for undue and unlawful termination of his employment.

Saipem Services AG requested the dismissal of the case on the grounds that the court did not have jurisdiction.

On 3 August 2001 the Stavanger City Court dismissed the action.

Openshaw appealed against the decision of the Stavanger City Court to the Gulating Court of Appeals, which on 14 January 2002 held that the Stavanger City Court had jurisdiction.

Saipem Services AG appealed the decision of the Court of Appeals to the Supreme Court. The company claimed the following:

The employment contracts concluded between the company and Openshaw were so-called international contracts, containing provisions on the employee's obligatory transfer. The contracts also contained provisions specifying that Swiss law was to be applied as regards any dispute, and that the court in Zurich was to have jurisdiction. However, the dispute in question concerns the employee's obligatory transfer, not the internal matters regarding employment terms on the Norwegian continental shelf. The case should consequently be dismissed from the courts of Norway. Openshaw was engaged for employment in Britain and commenced his work on the British continental shelf. When a duty of transfer is imposed, it cannot be maintained that he performs his work in a particular country, cf. Article 5 (1) of the Lugano Convention. It is therefore possible that he could take legal action against Saipem Services AG in Britain, cf. the final sentence of Article 5 (1) of the Lugano Convention, but not in Norway, since the Norwegian courts do not have jurisdiction.

Openshaw claimed the following:

Openshaw was employed by Saipem Services AG for work on board the drilling platform Scarabeo 6, which was, and still is, operated for Norsk Hydro on the Norwegian continental shelf. He is willing to work in Nigeria, but only on the same terms as on the Norwegian

continental shelf. Transfer involving significantly inferior terms is regarded equal to termination of employment.

There can hardly be any doubt that according to Article 5 (1) of the Lugano Convention, the courts in Norway have jurisdiction. It follows from paragraph 1.4 of the employment contract that the place of work is the drilling platform Scarabeo on the Norwegian continental shelf, and the work was actually performed there until the dispute arose. There are no provisions in the employment contract to the effect that Openshaw is to perform his work in different places.

The Supreme Court noted that in that case a British national residing in Scotland has brought legal action against a company with head office in Switzerland, the issue of jurisdiction is to be considered pursuant to the provisions of the Lugano Convention.

The Supreme Court agreed with the conclusion of the Gulating Court of Appeals that the provisions of the employment contract concerning the choice of court are not applicable, because the contract was concluded before the dispute arose (Art. 17 (5) of the Lugano Convention).

The Supreme Court assessed further whether the Court of Appeals based its decision on a correct interpretation of Article 5 (1) of the Lugano Convention.

The basic principle of that provision is that in cases involving a contractual relationship, a person domiciled in a Contracting State may be sued in the courts for the place of performance of the obligation in question. It also provides that "in matters relating to individual contracts of employment, this place is that where the employee habitually carries out his work, or if the employee does not habitually carry out his work in any one country, this place shall be the place of business through which he was engaged."

The Court of Appeals has concluded that the place of performance was in Norway, as the employee worked habitually on the Norwegian continental shelf. The duty of movement, provided for in the employment contract, made the employer entitled, subject to conditions provided for in further detail, to transfer the employee to another work location, including a country where the Convention does not apply. During the period of employment, effectuation of the duty of movement will therefore have the effect that the employee performs his work in different countries. It does not, however, prevent an employee from referring his claim to the court having the competence pursuant to the place where the work was performed in cases of individual employment contracts. The Court of Appeals held that the place where the employee "habitually carries out his work" is the Norwegian continental

shelf, and that the Stavanger City Court is his proper venue for litigation against the employer.

The Court of Appeals furthermore pointed to the provision 1.4 of the contract, which reads as follows: "The designated work location is aboard the vessel "Scarabeo 6" in the Norwegian Continental Shelf. Depending on operation requirements, the Company reserves the rights to transfer the employee to another work location during the employment period". The work location is thus defined as the drilling platform "Scarabeo 6" on the Norwegian continental shelf. The employment contract does not specify any time limitations, and it is not limited to any particular project. If the employer does not exercise his option of transfer, Openshaw would have his fixed work location on board "Scarabeo 6" on the Norwegian continental shelf. It was also to be noted that in this particular case the employee actually worked on the Norwegian continental shelf for a relatively long period, under terms adapted to Norwegian conditions and Norwegian legislation.

The Supreme Court agreed with this interpretation of Article 5 (1) of the Convention. It noted, in particular, that the above-presented interpretation seems to be well in accordance with the judgment of the European Court of Justice of 27.02.2002 *(case C-37/00 Herbert Weber/Universal Ogden Services Ltd., ECR 2002, I-2013)* relating to the corresponding provision of Article 5 (1) of the Brussels Convention.

In the judgment referred to by the Norwegian Supreme Court, the European Court of Justice made a thorough interpretation of Article 5(1) of the Brussels Convention and set out detailed criteria for the establishment of the place of the habitual performance of work, within the meaning of Article 5(1) of the Brussels Convention. That position of the European Court of Justice in fact makes a summary of the previous ECJ's rulings concerning the interpretation of the notion of the place of performance of work as grounds for the establishment of jurisdiction of courts to hear employment disputes. In the ruling the ECJ maintained its position that the place of performance of the obligation upon which the claim is based, as referred to in Article 5(1) of the Brussels Convention, must be determined not by reference to the applicable national law, but by reference to uniform criteria. Article 5(1) of the Brussels Convention must be interpreted as meaning that where an employee performs the obligations arising under his contract of employment in several Contracting States the place where he habitually works, within the meaning of that provision, is the place where, or from which, taking account of all the circumstances of the case, he in fact performs the essential part of his duties *vis-a-vis* his employer. In the case of a contract of

employment under which an employee performs for his employer the same activities in more than one Contracting State, it is necessary, in principle, to take account of the whole of the duration of the employment relationship in order to identify the place where the employee habitually works, within the meaning of Article 5(1). Failing other criteria, that will be the place where the employee has worked the longest. It will only be otherwise if, in light of the facts of the case, the subject-matter of the dispute is more closely connected with a different place of work, which would, in that case, be the relevant place for the purposes of applying Article 5(1) of the Convention.

Article 6(1) of the Convention

The case where the jurisdiction was considered on the basis of Article 6(1) of the Lugano Convention was heard before a German courts and it was finally decided before the Highest Court of Germany (*Oberlandesgericht Düsseldorf - judgment dated 25 January 2001, no 2003/23 overruled by Bundesgerichtshof - judgment dated 23 October 2001*[2]*).*

The following facts were established in connection with that case:
Mr Düllberg, the plaintiff, pursued forward stock exchange transactions and on that account he participated in a German fund up to the amount of DM 26250. Forward transactions as such were realised by a German limited liability company, which was administered by defendant 1 in the case, domiciled in Düsseldorf. Defendant 2 was a trustee of a German company domiciled in Zurich, which managed the realisation of forward transactions. The plaintiff transferred the amount of DM 26250 to the trustee's account indicated in the subscription agreement.

By way of legal action, the plaintiff claimed the repayment of his deposit with interest. He argued that he was not capable of carrying out forward stock exchange transactions, and moreover that no such transactions were carried out. He also claimed that no information or clarifications concerning the risk of carrying out forward transactions were provided in the subscription prospectus to persons making deposits. Defendant 2 was also familiar with these issues. The plaintiff assumed that both defendants were jointly and severally liable, both in terms of contractual liability and liability in tort. Moreover, he

[2] *this decision is not contained in the twelfth fascicle*

claimed that they were obliged to repay the appropriated amount resulting from unjustified enrichment.

The National Court in Düsseldorf *(Landgericht)* admitted the action. In the part of the reasons, which referred to its jurisdiction, the court pointed to Article 6(1) of the Lugano Convention as the basis of its jurisdiction. At the same time, it confirmed that the actions are closely connected within the meaning of Article 22(3) of the Lugano Convention. As far as the "basis" for the claim is concerned, the court stated that the duty of payment by the defendant 1 was based on liability in tort (§ 826 Bürgerliches Gesetzbuch). As to defendant 2, the court held that he was obliged to reimburse the sum paid by the plaintiff on the grounds of unjustified enrichment according to § 812 I 1 of the German Civil Code (Bürgerliches Gesetzbuch).

The Defendant 2 lodged an appeal against the judgment. He once again questioned the jurisdiction of the Düsseldorf court. He made a reference to the judgments of the European Court of Justice and argued that in the case at issue there was no close connection of actions, which would justify that jurisdiction.

The Higher National Court in Düsseldorf *(Oberlandesgericht)*, which examined the appeal, confirmed the jurisdiction of the lower instance court. The appellate court based its considerations on Article 6(1) of the Lugano Convention, which stipulates that a person domiciled in a Contracting State may also be sued, where he is one of a number of defendants, in the courts for the place where any one of them is domiciled. It concluded that the grounds necessary to establish the jurisdiction of the National Court in Düsseldorf, resulting from Article 6(1) of the Lugano Convention, had been complied with. One of the defendants was domiciled within the jurisdiction of the court in Düsseldorf and there was also the necessary close connection between the actions addressing the two defendants within the meaning of Article 22, regardless of the fact that the plaintiff employed different claims as the basis of his actions. The Higher National Court in Düsseldorf expressed the opinion that in order to assume the existence of that connection it is sufficient if homogenous facts are the subject of a legal examination. There is always a risk involved that in the case of different jurisdictions, in spite of homogenous facts, irreconcilable judgments are passed. These judgments do not always have to concern the same issues drawn from the facts of the case, pursuant to the national (in that case, German) understanding of the established facts of the case. Even the mere possibility of having different answers to questions concerning preliminary issues (e.g. those referring to the validity of statements of

will deposed according to the applicable law or to the effects of particular ways of behaving) justifies the jurisdiction pursuant to Article 6(1) of the Lugano Convention.

The Higher National Court in Düsseldorf also confirmed the considerations of the court of the first instance in respect of the unjustified enrichment. The appellate court in Düsseldorf held that the conditions of § 812 I 1 of the German Civil Code (Bürgerliches Gesetzbuch) were in the present case fulfilled and that the defendant 2 was obliged to reimburse the sum paid by the plaintiff.

The Higher National Court in Düsseldorf, towards the end of its considerations, admitted the possibility of lodging an extraordinary appeal against the judgment passed in that case, however only in a limited scope. He stated that on account of the paramount importance of the issue connected with the scope of application of Article 6(1) of the Brussels Convention and the Lugano Convention in the case of different grounds for the liability the possibility of carrying out an extraordinary appeal could be admitted.

The extraordinary appeal was lodged. The Highest Court of Germany (Bundesgerichtshof) in its decision dated 23 October 2001 did not agree with the position of courts of the first and the second instance.

By reference to the text of Article 1 of Protocol 2 on the uniform interpretation of the Lugano Convention Bundesgerichtshof emphasised that in this case the case law of the European Court of Justice, as shaped under the Brussels Convention, should be taken into account. It stated that the appellate court did not sufficiently take into account the case law of the European Court of Justice.

Bundesgerichtshof, which heard the extraordinary appeal, agreed with the view that jurisdiction of German courts in the case against the defendant 2), domiciled in Switzerland, should be assessed pursuant to Article 6 (1) of the Lugano Convention, which is in force between Germany and Switzerland.

For article 6(1) to apply, there has to be a connection between different actions, which allows a court to make a single judgment in order to avoid the risk of irreconcilable judgments resulting from separate proceedings.

Basically, the Convention grants jurisdiction to courts of the State where the defendant is domiciled, and special jurisdiction provided for in Article 6 (1) is an exception that should be interpreted in a way which does not challenge the principle from Article 2. The plaintiff must not lodge an action against several defendants only for the purpose of avoiding jurisdiction of courts of the state where one of the defendants is domiciled. These principles

arise from the case law of the European Court of Justice with regard to the Brussels Convention *(judgment of 27 September 1988 in the case Kalfelis/Schröder, no 189/87, ECR 1988, 5565 and judgment of 27 October 1998 in the case Reunion europeenne, nr C-51/97 ERC 1998 I, 6511, 6548)* and are also applicable to Article 6 (1) of the Lugano Convention, which has exactly the same wording as Article 6 (1) of the Brussels Convention.

The European Court of Justice – and that fact was overlooked by the appellate court – expressed the opinion that there was no sufficient connection for the application of Article 6 (1) of the Brussels Convention if under one action for compensation against two defendants, one of the claims is based on contractual liability, while the other one on liability in tort.

That legal view should be taken into account while interpreting Article 6 (1) of the Lugano Convention. That view is even more important for the examined case where one action lodged against different defendants comprises the claim based on liability in tort and the claim based on unjustified enrichment. The diversity of legal bases for the claim is here even more important than in the case of contractual and tort-related claims for compensation.

Thus, contrary to the opinion of appellate court, Bundesgerichtshof assumed that in the case in question, the existence of a close connection between actions against two defendants cannot be assumed, and consequently, German courts did not have jurisdiction to examine the claim against the defendant ad 2).

Article 16(5) of the Convention

The interpretation of Article 16(5) of the Lugano Convention was considered by the House of Lords in its decision of 12 June 2003, in the case of *Kuwait Oil Tanker Company S.A.K. v. Qabazard* (*House of Lords, case 2002/36)*. In that judgment, the House of Lords stated that an English court has no jurisdiction to decide on the making of an order of garnishing a debt due to the judgment debtor if that order would lead to the enforcement of the judgment not in the territory of The United Kingdom, but in the territory of another state.

That conclusion was formulated pursuant to the following facts of the case:

The English court allowed the claims of the creditor (Kuwait Oil Tanker Company S.A.K.), who demanded the payment of the amount of USD 130 mln from the debtor (Mr Qabazard), and ordered the payment of that amount by the debtor. The appeal against that

judgment lodged by the debtor was dismissed. The execution against the debtor's property located in the territory of Great Britain made it possible for the creditor to regain some small part of the amount indicated in the judgment. The creditor found out that the debtor held an account in a branch of a Swiss bank and thus he applied to the English court to deliver an order to garnish the debt resulting from the fact of the debtor's holding an account in that Swiss bank. The application was dismissed on the grounds that money garnishment effected on the debtor's account held in a branch of the Swiss bank operating in Switzerland would actually make an enforcement of the judgment in Switzerland, and thus it is the Swiss courts that should take that decision.

In order to justify this position, the House of Lords referred to the report by Mr Jenard who, in respect of Article 16(5) of the Brussels Convention (which is in the same terms in the Lugano Convention), stated that "Article 16(5) provides that the courts of the State in which a judgment has been or is to be enforced have exclusive jurisdiction in proceedings concerned with the enforcement of that judgment. [...] The expression 'proceedings concerned with the enforcement of judgments' [...] means those proceedings which can arise from 'recourse to force, constraint or distraint on movable or immovable property in order to ensure the effective implementation of judgments and authentic instruments. Problems arising out of such proceedings come within the exclusive jurisdiction of the courts for the place of enforcement. [...]."

The question of application of Article 16(5) of the Brussels Convention, which is worded identically to Article 16(5) of the Lugano Convention, was subjected to the interpretation of the European Court of Justice in case 220/84, *AS/Autoteile Service GmbH v. Malhé (case 220/84 ECR 1985, 2267*) and in case *Reichert/Dresdner Bank (case 261/90 ECR 1992, I –2149).* Those ECJ's decisions were referred to by the House of Lords in their judgment.

In order to justify the position that only a court in a state where a judgment is to be enforced is competent to apply the measures aimed at the enforcement of a judgment, the House of Lords referred to the ECJ's judgment dated 21.05.1980, passed in the case *Denilauler/Snc Couchet Fréres (case 125/79, ECR 1980, 1553*). Though that judgment was not directed to the interpretation of Article 16(5) of the Convention, the observations it contained, according to the House of Lords, would apply with added force to execution. In that judgment, the European Court of Justice stated that "the courts of the place or, in any event, of the Contracting State, where the assets subject to the measures sought are located, are

those best able to assess the circumstances which may lead to the grant or refusal of the measures sought or to the laying down of procedures and conditions which the plaintiff must observe in order to guarantee the provisional and protective character of the measures ordered."

The judgment by the House of Lords does not change the hitherto prevailing direction in the interpretation of Article 16(5) of the Convention. The similar attitude was expressed in the ECJ's judgment dated 26 March 1992, in case *Reichert/Dresdner Bank (case 261/90 ECR 1992, I –2149).* In that judgment the European Court of Justice stated that Article 16(5) grants an exclusive jurisdiction to judicial authorities of the state in which the judgment has been or is to be enforced, for the purpose of carrying out proceedings under which the recourse to force, constraint or distraint on movable or immovable property, in order to ensure the effective implementation of a judgment may take place.

Article 17 of the Convention

In the case heard before Austrian *Oberster Gerichtshof (judgment of 29 January 2002, no 2003/16)* the question at dispute was the effectiveness of the agreement which granted jurisdiction to the Austrian court. The agreement was concluded between a company seated in Austria and a natural person domiciled in Uzbekistan. The consequence of the assumed absence of effectiveness of the jurisdiction agreement was the absence of jurisdiction of Austrian courts to examine the dispute.

The Austrian Supreme Court considered the effectiveness of the jurisdiction agreement, i.e. whether there were sufficient conditions for the application to of Article 17 of the Convention where at least one party was domiciled in a Contracting State and a suitable form was applied, or whether it was necessary to satisfy other grounds, which do not result directly from a literal wording of Article 17.
In order to deliver a decision, the Austrian court analysed the existing national decisions of Austrian courts, as well as the German and the Italian case law.

According to the opinion of the Supreme Court of Austria, in order to establish the jurisdiction of a court under Article 17 of the Lugano Convention it is not sufficient that the party domiciled (seated) in one of the Contracting States agrees with the party domiciled in a non-Contracting State to the Lugano Convention that the court competent to hear disputes

will be the court for the place where the first party is domiciled. Moreover, Article 17 of the Lugano Convention can only be applied to such situations, if either the domicile of one of the parties, or the agreed territorial jurisdiction of the court, from the point of view of an Austrian judge, is in the territory of another Contracting State. It means that the parties to the prorogation agreement cannot establish the territorial jurisdiction of the court in the Contracting State where they are domiciled or seated.

The Austrian Supreme Court admitted that although such a position makes a very limited interpretation of Article 17 of the Convention, it corresponds to the opinions of the German Supreme Court and the Italian Supreme Court (*Corte di Cassazione*).

Therefore, in the light of the opinion expressed by the Austrian Supreme Court, Article 17 of the Lugano Convention should only be applied if, from the point of view of an Austrian judge, either the domicile (seat) of one of the parties, or the agreed territorial jurisdiction of the court are not in Austria but in the territory of another Contracting State.

The interpretation of Article 17 of the Convention was also considered by the Swiss Supreme Court in its judgment dated 7 August 2001 *(Bundesgericht judgment of 7.08.2000, no 2003/21)*.

The Swiss Supreme Court based its considerations upon the following facts of the case:

The plaintiff (and defendant in the appeal proceedings) was a Swiss railway joint-stock company „TransRail". The defendant (and plaintiff lodging the appeal) in that case was a German limited liability company dealing with forwarding and navigation.

The plaintiff is a forwarding agent of the former Soviet Union's railway. In 1998 it concluded a co-operation agreement with the defendant, which contained, *inter alia*, the provision saying that:" Disputes arising out of this agreement have to be amicably settled. Otherwise the arbitration rules applied in the defendant's country have to be observed by both parties".

In 1999 the parties concluded an agreement concerning the further development of their co-operation, where some of the provisions of the 1998 co-operation agreement were changed. It introduced, *inter alia*, the provision worded as follows: "Commercial contacts between the two companies shall be subject to the Swiss law. The court which shall have territorial jurisdiction in respect of both parties is the Swiss Court in St. Gallen CH-9000."

Since the German navigation company failed to comply with the obligation, the plaintiff began an action in the Circuit Court in St. Gallen, in which it demanded the payment. The Circuit Court in St. Gallen referred the case to the Commercial Court of the St. Gallen Canton, which limited the hearing of that case to the question of jurisdiction only. The Commercial Court dismissed the plea of the absence of its jurisdiction, raised by the defendant in first instance-the German company, and accepted the action in order to hear it. The proceedings resulted in delivering the decision that was unfavourable to the defendant, who appealed against it by raising, *inter alia*, that the Commercial Court in St. Gallen was not competent to hear that case.

The Supreme Court of Switzerland, which examined the appeal, stated that the jurisdiction of the Commercial Court of St. Gallen was based on the agreement concluded in 1999 between the plaintiff and the defendant (which amended the 1998 co-operation agreement). According to that agreement the court competent in respect of both parties of that agreement was a court seated in St. Gallen – i.e. only judicial courts seated in the Canton of St. Gallen. The defendant, however, claims that such a statement is contrary to the law, which is in force in Switzerland, and that the court competent to hear that case is an arbitration court (which would result from the original co-operation agreement of 1998). According to the Supreme Court, if the parties of the proceedings are domiciled in different Contracting States to the Lugano Convention and they identify the courts of one of the Contracting States as competent to hear disputes, which might result from a particular legal relationship, then the agreements concluded between the parties with regard to the jurisdiction of the court should, as a principle, be examined pursuant to Article 17 of the Lugano Convention.

Prior to the examination of the jurisdiction of a particular court, however, it should be decided according to which law this jurisdiction should be interpreted.

However, although in the Swiss academic writing it has been pointed out that the Lugano Convention regulates not only the form but also the contractual element of an agreement of the parties concerning international and territorial jurisdiction, and as such it prevails over the application of the national law, the Swiss lower instance court, by way of

the application of *lex fori*, pointed to the Swiss law as the law relevant for the purpose of examining that issue.

However, what was most important for the court, was not the question of form, nor the very agreement concluded between the parties, but the dispute over the interpretation of parties' agreements.

In 1999 the parties chose the Swiss law as the law relevant for the purpose of carrying out a substantial examination of disputes. Therefore, according to the Supreme Court, the interpretation of the provisions concerning jurisdiction, contained in the agreement, carried out pursuant to autonomous principles should be rejected; Article 17 of the Lugano Convention does not contain interpretation principles. Thus, the disputed agreement concerning the jurisdiction of a court should be interpreted pursuant to the *lex causae* principle, that is, according to the Swiss law.

The Supreme Court focused on the examination of a concerted will of the parties of the agreement, which should be assessed pursuant to the wording and the purpose of the agreement, taking all the attendant circumstances into account. Pursuant to the decisions of the Swiss Supreme Court, in case of an objective interpretation of contradicting contractual rules for jurisdiction relating to the same legal relationships, the starting point should be, as a principle, the assumption that later agreements (in that case the 1999 agreement) take precedence over, or even abate, the former ones. According to the Court, this solution is applied only if the circumstances of the case do not suggest that it should be assessed according to differing presumed wills expressed by the parties, which also was subject to the Court's assessment in the present case.

In conclusion, the Supreme Court decided that there were no circumstances, if the objective interpretation was applied, that would allow establishing that the agreement concerning jurisdiction, which the parties concluded in 1999, is not absolute. It should be assumed that the conclusion of that agreement gives the possibility of withdrawing from the former arbitration clause. After the parties agreed upon the territorial jurisdiction of the St. Gallen court – while the agreement they concluded does not mention the jurisdiction of the arbitration court as well – it should be assumed that judicial courts seated in St. Gallen will be competent to hear disputes.

Protocol 1 Article I paragraph 2 in connection with Article 17 of the Convention

In a judgment dated 25 April 2002, "la Cour d'Appel" of Luxembourg (*Cour d'appel no 2003/40)* applied paragraph 2 of article I of Protocol n. 1 of the Lugano Convention. To our knowledge, this is the first time that a decision applying this provision has been reported under protocol n. 2 of the Lugano Convention.

In this case the plaintiff (M), whose registered office was in the Grand Duchy of Luxembourg, brought proceedings in Luxembourg against a company (E), whose registered office was in Austria. Later, the plaintiff asked for the intervention in the proceedings of another firm (Z) with registered office in Belgium. The court of first instance declared itself competent but considered both requests non admissible; the first on the basis of its obscurity and the second for lack of object.

M was suing E for damages related to a defective performance of a contract of sale of goods because this company (E) had allegedly delivered old material that was not functioning.

In the appeal proceedings, E pleaded the existence of a choice of court agreement in favour of an Austrian court, and, consequently, the lack of jurisdiction of the court that had decided the case. The alleged choice of court agreement was, in fact, a statement in the invoices that E sent to M and to which M did not oppose.

The court decided that paragraph 2 of article I of Protocol n.1 of the Lugano Convention was applicable and interpreted it as "requiring a provision dealing exclusively with conferral of jurisdiction and specifically signed by the party residing in Luxembourg". The court concluded that those requirements were not fulfilled in the case *sub judice* and considered that the court had jurisdiction under paragraph 1 of article 5 of the Lugano Convention because the parties had agreed that the merchandise was to be delivered in Luxembourg.

In this case, the Lugano Convention had to be applied instead of the Brussels Convention because proceedings were initiated in June 1998, when the Convention on the Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the Brussels Convention was not yet in force.

The decision makes no reference to previous case law; however, the Court of Justice in the case Porta-LeasingGmbh/Prestige International, SA (Case 784/79, ECR 1980, 1517) had already interpreted the similar provision of the Protocol annexed to the Brussels Convention. In paragraph 9 of that case the ECJ decided that "a clause conferring

jurisdiction within the meaning of that provision may not be considered to have been expressly and specifically agreed to by a person domiciled in Luxembourg unless that clause, besides being in writing as required by article 17 of the Convention, is mentioned in a provision specially and exclusively meant for this purpose and specifically signed by the party domiciled in Luxembourg; in this respect the signing of the contract as a whole does not in itself suffice".

The two interpretations are in line and coincide with the comments in Jenard's report[3]. Apparently, this provision was inspired by the Benelux Treaty and derives from the fact that a large number of contracts entered into by residents in Luxembourg are, in fact, international.

Although the Appeal Court's (la Cour d'Appel) decision mentions "commercial relations between the parties during a reasonably long period of time and relating to repetitive purchase orders"[4], the possibility of the existence of a usage between the parties or an international trade usage, under b) or c) of paragraph 1, Article 17.º (1) of the Lugano Convention, was not analysed. It would have been interesting to analyse the relation between paragraph 2 of article I of the Protocol n.1 to the Lugano Convention and the existence of a usage in compliance with article 17. When the Protocol annexed to the Brussels Convention was negotiated the Convention only made reference to agreements in writing or evidenced in writing. The international trade usage was introduced with the Convention on the Accession of the Kingdom of Denmark, of Ireland and the United Kingdom of Great Britain and Northern Ireland, and the usage between the parties in the Lugano negotiations. However, paragraph 2 of article I of the Protocol annexed to the Brussels Convention remained the same in the Protocol n.1 to the Lugano Convention and the report[5] to that Convention makes no reference to any discussion on the subject.

This issue, however, is no longer relevant within the scope of application of Regulation (EC) 44/2001, as that provision was not maintained. It is certainly an issue that will be taken into account in the negotiations for the revision of the Lugano Convention.

Article 24 of the Convention

[3] OJ [1990] C 189, p. 177.
[4] Case n. 2003/40, p. 7.
[5] OJ [1990] C 189, p. 86.

Jurisdiction to adjudicate on the application of provisional and protective measures was referred to by the Supreme Court of the Netherlands, in its judgment of 21 June 2002 *(Hoge Raad, judgment of 21.06.2002, no 2002/45)*. In the judgment, the Court has definitely supported the necessity to preserve the uniform character of decisions passed under the Lugano Convention and the Brussels Convention and emphasised that, according to the undertakings given by the signatories to the Lugano Convention the courts of those States, whether they fall within the EC or the EFTA, must take account when applying the provisions of the Lugano Convention which also feature in the Brussels Convention, of the case-law of the European Court of Justice and of the courts of the Member States concerning those provisions. Consequently, the Supreme Court of the Netherlands, while examining the submitted case, has taken into account the decisions of the European Court of Justice.

By reference to the hitherto existing decisions of the European Court of Justice, the Supreme Court of the Netherlands stated that as regards an application for provisional measures, brought before the Netherlands court seeking payment of a sum in that court while the main proceedings are pending before a court in Norway, the Netherlands court is entitled to grant such a measure solely under Article 24 of the Lugano Convention only where there is a real connection between the subject-matter of that measure and its territorial jurisdiction.

The judgment has been delivered pursuant to the following circumstances:
The plaintiff seated in Amsterdam has lodged an action against 7 defendants domiciled or seated in the territory of Norway. The plaintiff has applied to the President of the Circuit Court in Amsterdam (*President van de Rechtbank te Amsterdam*) to issue an interim order consisting in the payment of a demanded amount for the plaintiff, or, in event the application was rejected, consisting in the provision of a security for the payment of the amount of 300 mln Norwegian crowns.

The President of the Circuit Court in Amsterdam decided that the court had no jurisdiction to examine the application for provisional measures.

The applicant appealed against that judgment and the appellate court reversed the judgment of the President of the Circuit Court in Amsterdam. It decided that the President of the Circuit Court in Amsterdam had jurisdiction to examine the application.

One of the defendants applied for the appeal of the judgment of the second instance court.

Having examined the appeal, the Supreme Court in the Netherlands stated that as regards that case, it is necessary to decide whether under the Lugano Convention, which is applicable to that case, the President of the Circuit Court in Amsterdam is competent to deliver an interim order consisting in the payment of the disputed amount in the situation where in the main case there is a pending judicial proceeding before a competent Norwegian court.

The issue of jurisdiction to decide on the provisional or protective measures pursuant to Article 24 of the Brussels Convention, which is worded identically as Article 24 of the Lugano Convention, has been considered in the ECJ's rulings.

The Supreme Court of the Netherlands reversed the decision of the appellate court . It has referred to the ECJ's judgment of 17 November 1998, delivered in the case *Van Uden Maritime BV/Deco-Line (case C-391/95, ECR 1998, I-7091).* In that judgment, the European Court of Justice stated that in the situation where the subject-matter of the case in connection with which the issuing of provisional measures is requested falls within the objective scope of the Convention, the court having jurisdiction to decide on the merits of the case pursuant to Article 2 and Articles 5 to 18 of the Convention also has jurisdiction to decide on provisional or protective measures and that jurisdiction is not dependent on any further conditions. However, if a court requested to decide on provisional or protective measures has no jurisdiction to decide on the merits of the case, then jurisdiction to decide on provisional and protective measures may be conferred on it pursuant to Article 24 of the Brussels Convention, even though it is possible that the proceedings concerning the merits of the dispute have been already, or may be, instituted before another court or are already pending before an arbitration court. In that judgment, the European Court of Justice also emphasised that the application of provisional or protective measures pursuant to Article 24 of the Brussels Convention of 27 August 1968 is conditional on, *inter alia*, the existence of a real connecting link between the subject-matter of the measures sought and the territorial jurisdiction of the Contracting State of the court before which those measures are sought. In that judgment, the ECJ examined, with regard to the above factor, the measure consisting in an immediate payment of a contractual consideration.

The European Court of Justice decided that provisional or protective measures relating to matters excluded from the scope of the Convention are also excluded from the scope of Article 24 of the Convention, because there is no legal basis for arguing for a different scope

between provisional measures and definitive measures (also in the case *De Cavel/De Cavel judgment of 27.03.1979, ECR 1979, 1055*).

In its earlier judgment, dated 21.05.1980, issued in the case Denilauler/Snc Couchet Fréres (case 125/79, ECR 1980, 1553), the European Court of Justice stated that the courts of the place – or, in any event, of the Contracting State – where the assets subject to the measures sought are located are those best able to assess the circumstances which may lead to the grant or refusal of the measures sought or to laying down of procedures and conditions which the plaintiff must observe in order to guarantee the provisional and protective character of the measures authorised. It follows that the granting of provisional or protective measures on the basis of Article 24 is conditional on, inter alia, the existence of a real connecting link between the subject-matter of the measures sought and the territorial jurisdiction of the contracting State of the court before which those measures are sought. That court should take up the measures in order to ensure the provisional or protective character of the adjudicated measures. In that judgment, the ECJ stated that the application of such measures requires particular care and knowledge and that the court must have a possibility of imposing a time limit with regard to the judgment or of limiting it to certain assets and objects, or else, of demanding bank guarantees or the designation of a depository in order to ensure the provisional or protective character of the adjudicated measure. It also stated that the most competent court to assess these circumstances is the court of the place where the assets subject to the measures sought are located. Article 24 of the Convention does not prohibit recognising and declaring the enforceability of provisional measures ordered in another state in litigious proceedings, pursuant to the conditions set out in Articles 25 to 29 of the Convention. On the other hand, the conditions set out in Title III are not complied with in the case of provisional and protective measures, which have been adjudicated or approved by the court in the absence of a party they concern, as well as in the case of the measures to be enforced without prior notification on that party. Measures, which do not comply with these conditions, are not subject to simplified enforcement procedure specified in Title III of the Convention.

Article 27(1) of the Convention

The case dated 5 July 2001 *(Tribunal Fédéral, case no 2003/23)*, refers to an opposition to the execution of a judgment of the High Court of Justice of London in

Switzerland, on the basis of violation of public policy. Party X pleaded that in the proceedings in London the court had not considered the legal opinion submitted by that party as an affidavit, while considering as such the legal opinion submitted by the other party.

However, after analysing the case, the Federal Court decided that there was no violation of public policy as the legal opinion in question did not satisfy the requirements of English law on taking of evidence, while the other did. Moreover, the court concluded from the analysis of the facts, that the procedural rights were granted to both parties and that for procedural public policy purposes, it is not relevant if the party did, in fact, make use or not of those rights, as long as they were available.

Article 27(2) of the Convention

In the decision dated 10 May 2002, the Finnish Supreme Court (Korkein oikeus, no 2003/47) expressed its opinion on the question of interpretation of Article 27(2) of the Lugano Convention. The case concerned a default judgment, the enforcement of which was applied for in Finland and the question whether a summons had been served on the defendant in the manner provided for in Article 27 (2) of the Lugano Convention.
The French Societé Chantiers et Ateliers de la Perriere (hereinafter referred to as CAP) applied for the enforcement of a judgment rendered by the Court of Appeals in Rennes (France) against Hollming Ltd (hereinafter referred to as Hollming). On 6 February1998 the Rauma District Court (Finland) decided that the judgment of the French court was to be enforced in accordance with Articles 31, 34 and 36 of the Lugano Convention.

Hollming lodged an appeal to the District Court's decision on the grounds that Hollming had not received a summons and had not been properly represented during the proceedings in France; consequently the judgment of the Court of Appeals in Rennes could not be enforced in Finland.

The Finnish Court of Appeals found the case chiefly to involve the question whether Hollming had been properly represented, which concerned the fair trial requirement during the proceedings in the first instance in France, i.e. the Commercial Court in Lorient, and the related question whether Hollming had been served with a summons to appear before the

commercial court or whether it had any other reliable information other than that contained in the summons concerning its status as a defendant.

The Finnish Court of Appeals referred to the judgment of the Lorient Commercial Court, according to which the barrister Possoz represented Hollming. The Court held that the entry of this point into the record was not necessarily true to fact, as the barrister was only obliged to produce a power of attorney if a request was made to that effect.

According to the wording of the judgment of the Lorient Commercial Court, Hollming had been summoned to appear. Nevertheless, the case file does not make it clear whether a summons concerning Hollming existed. At any rate, Hollming's assertion that the company itself had not been summoned, and that instead Hollming's commercial agent in France, Sofaret had received a summons at that company's address, was considered reliable. The Court of Appeals concluded that no summons could be found that had been served on Hollming. A summons served at the premises of Sofaret could not replace a summons served on Hollming directly, and was not binding upon Hollming. Thus, Hollming had not been summoned to appear before the commercial court. The relationship on the grounds of which Sofaret was acting as a commercial agent to Hollming did not render Sofaret competent to defend Hollming in court, whether in the Commercial Court or in the Court of Appeals. There was no indication that Hollming had granted a power of representation in the case to Sofaret, the defendant, or to Sofaret's barrister, Possoz.

According to Article 27 of the Lugano Convention, a judgment will not be recognised if its recognition is contrary to public policy in the State in which recognition is sought. According to Article 29 of the Convention, no facts relating to the resolution of a case in a foreign judgment shall be reviewed under any circumstances. Matters concerning the representation and the service of summons have no relation to the subject matter of a judgment. Hollming itself did not receive a summons. Actually, Hollming did not possess information to the effect that the case had been filed in the Commercial Court or on its status as a defendant there. Nor had CAP asserted that Sofaret or the barrister Possoz possessed a mandate of legal representation from Hollming. It was found that Hollming, not having been summoned, was absent from the proceedings of the commercial court. Consequently the proceedings could not be said to constitute a fair trial of the absent party. The fact that the proceedings may have been fair in other respects was not relevant. Recognition of the judgments of the Lorient Commercial Court of 17 December 1993 and the Rennes Court of Appeals of 13 March 1996 was contrary to the basic principles of Finnish procedural law.

The Court of Appeals therefore denied CAP's application.

CAP was entitled to lodge an appeal.

In its appeal, the CAP requested a reversal of the judgment of the Court of Appeals, and granting its application for recognition of the decision of the Court of Appeals in Rennes, making the judgment enforceable.

In its decision issued on 10 May 2002, the Supreme Court, which examined the appeal, stated that according to Article 34 (2) of the Lugano Convention, a court handling an application for a decision on enforcement may only refuse such application for one of the reasons specified in Articles 27 and 28 of the Convention. According to Art. 27 (2), a judgment shall not be recognised if it was given in default of appearance, and the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defence. Thus, Article 27 (2) of the Convention relates only to judgments rendered in default of appearance. It can be noticed in the case Hendrikman and Feyen/Magenta Druck&Veerlak GmbH *(case C-78/95, judgment of 10 October 1996; OJ 1996 p. 1-4943)* the Court of Justice stated that where proceedings are initiated against a person without his knowledge and a lawyer appears before the court first seised on his behalf but without his authority, such a person is quite powerless to defend himself and must be regarded as a defendant in default of appearance, within the meaning of Article 27(2) of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, even if the proceedings before the court first seised became, in point of form, proceedings inter partes.

Article 27(2) of the Convention therefore applies to judgments given against a defendant who was not duly served with, or notified of, the document instituting proceedings in sufficient time and who was not validly represented during those proceedings, albeit the judgments given were not given in default of appearance because someone purporting to represent the defendant appeared before the court first seised.

According to the judgment of the Lorient Commercial Court of 17 December 1993, two barristers were registered as representatives of the defendant Hollming. Thus, the judgment was not rendered in the defendant's absence. The first question to be resolved was whether Hollming had been duly represented in the Lorient Commercial Court. Against Hollming's denial it was not established that Hollming provided the said barristers with a power of representation before that court. Nor has it been established that the company Sofaret, which acted as Hollming's commercial agent in France, was by virtue of that

function or for some other reason empowered to represent Hollming in the course of the litigation.

Thus, the Supreme Court holds that, within the meaning of Article 27 (2), the judgment was given in default of appearance on the part of Hollming.

A judgment given in default of appearance can only be enforced in the absence of the faults referred to in Article 27 (2). The provision requires that a document instituting the proceedings be served on the defendant in sufficient time to enable him to arrange for his defence. Its purpose is to ensure that a judgment is not enforced on the basis of the Lugano Convention if the defendant did not have an opportunity to defend himself during the proceedings.

According to a submitted exposition, a summons for appearance before the Lorient Commercial Court was served on the company Sofaret ("Ste Hollming SA co Sofaret"). It was not explained that Sofaret was, on the basis of an agreement between that company and Hollming, empowered to receive a summons or an equivalent document on Hollming's behalf, or that Sofaret was otherwise in possession of such a mandate. As a summons was not served on Hollming at all, it follows that such a document was not served on Hollming in sufficient time to arrange for its defence.

On this basis, the Supreme Court denied CAP´s application for the enforcement of the judgment of the Rennes Court of Appeals.

III.Final considerations

The review of the national decisions on the Lugano Convention contained in the twelfth fascicle issued by the Court of Justice confirms the tendency of national courts to follow the case law of the ECJ pertaining the Brussels Convention.

Numerous references to the case law of the European Court of Justice, made by national courts in their judgments, seem to prove that the ECJ's decisions are in general well known. The fact that national courts, while deciding on the issues pertaining to the Lugano Convention, analyse the decisions of the European Court of Justice and make in their judgments direct references to the case law worked out by the ECJ, proves that they take a proper care to have homogenous decisions passed with regard to both Conventions, i.e. the Lugano Convention and the Brussels Convention.

On the other hand none of the decisions of the European Court of Justice contained in the twelfth fascicle can be cited as an example of the ECJ paying due account to the rulings contained in the case-law of the Lugano Convention according to the Declaration of the Representatives of the Governments of the States signatories to the Lugano Convention which are members of the European Communities.

It is worthy of appreciation that national courts make references to the case laws of other Contracting States. Due to the fact that judgments passed by national courts are most frequently published in their original language versions, it is worth noting the effort of the courts of some countries in establishing a uniform interpretation of the Lugano Convention.

The fact that national decisions are published in national language versions may limit the general knowledge of the content of these decisions. Therefore, these Reports may be a valuable auxiliary to national courts, especially if translated into all national languages and widely disseminated.

SEPTIÈME RAPPORT
SUR LA JURISPRUDENCE NATIONALE
DE LA CONVENTION DE LUGANO

I. Introduction

Lors de sa 11ème Session, tenue à Neuchâtel (Suisse), les 6-7 septembre 2004, le Comité Permanent de la Convention de Lugano a chargé les délégués de l'Espagne, l'Italie et la Suisse de préparer le septième rapport sur la jurisprudence nationale de la Convention de Lugano sur le 13ème envoi (septembre 2004) issue par la Cour de Justice des Communautés européennes au titre du Protocole nº 2 annexé à la Convention de Lugano.

Des 38 décisions contenues dans cet envoi, seules neuf se réfèrent à la Convention de Lugano. Il s'agit des décisions suivantes :

- Arrêt du *Tribunal fédéral* suisse du 21 février 2003 (n° 2004/16)
- Arrêt du *Tribunal fédéral* suisse du 6 juin 2003 (nº 2004/17)
- Arrêt du *Tribunal fédéral* suisse du 23 juin 2003 (nº 2004/18)
- Arrêt du *Tribunal fédéral* suisse du 30 juillet 2003 (nº 2004/19)
- Arrêt du *Oberlandesgericht München* (Allemagne) du 15 mai 2003 (nº 2004/21)
- Arrêt du *Tribunal Supremo* (Espagne) du 9 octobre 2003 (nº 2004/25)
- Arrêt du *Hoyeserett* (Norvège) du 20 décembre 2003 (nº 2004/33)
- Arrêt du *Hoyeserett* (Norvège) du 5 février 2003 (nº 2004/34)
- Arrêt du *Sad Najwyzszy* (Pologne) du 19 décembre 2003 (nº 2004/38).

Quelques remarques à caractère préalable peuvent être faites.

D'abord, les auteurs ont eu connaissance d'une autre décision relative à la Convention de Lugano rendue dans la période considérée, l'arrêt du *Tribunal fédéral* suisse du 23 décembre 2003, qui est commenté dans le présent rapport. L'arrêt a été communiqué à la Cour de Justice qui s'est déclarée prête à l'inclure dans l'information officielle.

Ensuite, la délégation norvégienne a fait parvenir aux rapporteurs une traduction en anglais d'un arrêt de la Cour Suprême norvégienne du 14 juin 2004, pour laquelle les rapporteurs la remercient. Ils ont considéré cependant que l'arrêt appartiendra au 14ème envoi (septembre 2005), et par conséquent, cette décision sera commentée dans le huitième rapport. Comme les rapporteurs n'ont pas eu à disposition des traductions des autres décisions norvégiennes, ils se sont bornés à une brève référence à ces arrêts, sur la base du résumé qui se trouve dans le 13ème envoi.

II. Aperçu sur la jurisprudence

1. Art. 1 al. 2 Convention de Lugano

Dans l'arrêt du *Tribunal fédéral* suisse du 6 juin 2003 *(ATF 129 III 683)*, une décision d'un tribunal autrichien devait être reconnue et exécutée en Suisse. Le jugement concernait une action révocatoire (*actio pauliana*) dans une faillite introduite en Autriche.

Le Tribunal fédéral rappelle sa jurisprudence selon laquelle les procédures qui trouvent leur origine dans le droit des poursuites et de la faillite et qui, selon toute

vraisemblance, n'auraient pas été conduites sans l'existence d'une procédure spéciale prévue par ce droit, sont exclues du champ d'application matériel de la Convention de Lugano. Comme sa fonction est de faire grossir la masse de la faillite, une action paulienne révocatoire comme en l'espèce est une procédure dans le sens décrit.

La question de la compatibilité de cette jurisprudence avec celle de la CJCE développée en relation avec les affaires *AS Autoteile* (n° C-220/84, datée du 4 juillet 1985) ainsi que *Reichert I* (n° C-115/88, datée du 10 janvier 1990) et *Reichert II* (n° 261/90, datée du 26 mars 1992) peut se poser. Dans les affaires mentionnées, il s'agissait d'apprécier diverses actions pauliennes (du droit français dans les deux derniers cas) au regard des fors de la Convention de Bruxelles. La Cour trouva dans ces trois cas que les actions pauliennes tombaient dans le champ d'application de la Convention de Bruxelles; elle rejeta en outre explicitement la subordination de l'action paulienne à l'art. 16 para. 5 en tant qu'action en exécution (*Reichert II*). Il apparaît toutefois essentiel que les actions pauliennes mentionnées n'aient pas été en relation avec une procédure d'exécution générale (faillite), mais bien en rapport avec une procédure d'exécution spéciale (saisie). L'exception de l'art. 1 al. 2 para. 2 CB et CL ne se référant pas aux procédures d'exécution individuelles, le jugement en l'espèce concernant une action révocatoire dans le cadre d'une exécution collective est compatible avec la jurisprudence de la CJCE. Une exclusion pure et simple des procédures ayant leur origine dans le droit des poursuites et de la faillite du champ d'application de la Convention de Lugano serait, par contre, incompatible avec cette jurisprudence.

2. Art. 1, al. 4 Convention de Lugano

L'arrêt du *Tribunal Supremo* (Espagne) du 9 octobre 2003 applique correctement l'art. 1, al. 4 de la Convention de Lugano en rejetant l'application de la Convention pour l'exequatur d'une sentence arbitrale. Mais cette exclusion de l'arbitrage du domaine d'application de la Convention de Lugano, ainsi que de la Convention de Bruxelles pose des questions (à cet égard, arrêt de la Cour de Justice du 25 juillet 1991, affaire C 190/89, *Marc Rich,* et conclussions de l'Avocat générale Darmon, points 50-76 ; parmi les nombreux commentaires, M. Amores-J. Serra dans *Revista de la Corte Española de Arbitraje,* 1991, pp. 85-93 ; A. Borrás, dans *Revista Jurídica de Catalunya,* 1992, pp. 571-574 ; G. Gaja, dans *Rivista de l'arbitrato,* 1992, pp. 116-121 ; T. Hartley, dans *European Law Review,* 1991, pp. 529-533 ; A. Huet, dans *Journal de Droit interntional,* 1992, pp. 488-493 ; R. Monaco, dans *Etudes de Droit international en l'honneur de Pierre Lalive,* Bâle, 1993, pp. 587-594 ; H. Tagaras, dans *Cahiers de Droit Européen,* 1992, pp. 668-671 ; P. Volken, dans *Schweizerische Zeitschrift für internationales und europäisches Recht,* 1992, pp. 239-240). Mais, dans le cas d'espèce, seules les questions relatives à l'exequatur sont pertinentes.

Les faits sont les suivants : La société espagnole *Unión Naval de Levante S.A.* (ci-après : *Unión Naval.)* et la société de Panama *Bisca Comercial Inc* (ci-après : *Bisca*) ont soumis leur différend à l' arbitrage. La sentence arbitrale était rendue à Genève le 28 février 1997 par un Tribunal désigné par la Cour d'Arbitrage de la Chambre internationale de Commerce condamnant à *Unión Naval* à payer une certaine somme d'argent à *Bisca.* Contre cette sentence arbitrale, un recours a été interjeté auprès du *Tribunal Fédéral suisse*, lequel, par arrêt du 16 octobre, a refusé les deux recours d'annulation interposés par les parties.

Sur requête de *Bisba,* le *Juzgado de Primera Instancia* nº 3 de Madrid, a prononcé l'exequatur ; cette décision a été confirmée par la *Audiencia Provincial* de Madrid. Ainsi, la

voie prévue par les articles 32 et 37 de la Convention de Lugano doit être suivie. *Union Naval* a formé un pourvoi en cassation, invoquant la violation de l'art. 1, al. 4, de la Convention de Lugano, des articles I et III de la Convention de New York, de l'art. 1 de la Convention entre l'Espagne et la Suisse du 19 novembre 1896 pour la reconnaissance et exécution des décisions en matière civile et commerciale par rapport à l'art. 55 de la Convention de Lugano, de l'art. 3 de ladite Convention, ainsi que de l'art. 24 de la Constitution espagnole relatif au droit à un procès contradictoire et aux droits de la défense.

Le *Tribunal Supremo* a fait une distinction claire entre l'exequatur de l'arrêt du *Tribunal fédéral* et l'exequatur de la sentence arbitrale.

Selon le *Tribunal Supremo,* s'agissant de l'arrêt du *Tribunal fédéral,* la Convention de Lugano devrait s'appliquer, à l'exclusion de la Convention bilatérale entre l'Espagne et la Suisse, en conformité avec la dérogation expresse faite à l'art. 55, deuxième tiret, de la Convention de Lugano. Cette décision prend partie dans le débat entre ce que dit le Rapport Schlosser (Point 65 du Rapport relatif à la Convention d'adhésion du Danemark, de l'Irlande et du Royaume Uni à la Convention de Bruxelles, et, dans le même sens, point 35 du Rapport Evrigenis et Kerameus à la Convention relative à l'adhésion de la Grèce à la Convention de Bruxelles) en ce que les décisions des tribunaux étatiques annulant la sentence, ou encore accordant ou refusant l'exequatur à cette sentence échappent aussi au champ d'application de la Convention et l'opinion du même Schlosser (dans son article « The 1968 Brussels Convention and Arbitration », *Rivista di diritto internazionale privato e processuale,* 1989, p. 545), lequel, contrairement à l'opinion exprimée dans son rapport, estime que la Convention de Bruxelles doit s'appliquer à toutes les instances judiciaires étatiques ayant trait à une question d'arbitrage. C'est un point dont il faut tenir en compte, bien que dans le cas d'espèce cette question ne soit pas importante parce que l'arrêt du *Tribunal fédéral* suisse n'a pas annulé la sentence arbitrale.

S'agissant de la sentence arbitrale, le *Tribunal Supremo* a clairement jugé que la Convention de Lugano n'est pas applicable, en raison du fait que l'arbitrage est exclu de son champ d'application en vertu de l'art. 1, al. 4. En conséquence, l'exequatur de la sentence arbitrale doit suivre la procédure établie aux articles I et III de la Convention de New York sur la reconnaissance et l'exécution des sentences arbitrales étrangères. L'arrêt du *Tribunal Supremo* espagnol mentionne aussi, sans nécessité, l'éventuelle violation des articles 1 et 3 de la Convention entre la Suisse et l'Espagne, pour le cas où la Convention de New York ne serait pas applicable.

Il faut rappeler qu'au moment où l'arrêt a été rendu, la requête d'exequatur devait dans tous les cas être présentée, en conformité avec l'art. 955 de la Loi espagnole de procédure civile de 1881, devant le *Tribunal Supremo.* Toutefois, en vertu des Conventions internationales, telles que la Convention de Bruxelles, la Convention de Lugano ou toute autre Convention bilatérale, il était possible de présenter la requête devant le *Juzgado de Primera Instancia.* La décision sur l'exequatur de la sentence arbitrale était de la compétence du *Tribunal Supremo* parce que, en vertu de l'art. III de la Convention de New York, la procédure d'exequatur est régie par les règles de procédure en vigueur dans l'Etat où l'exequatur est demandé. On peut ajouter que, par Loi 62/2003, de 30 décembre XXX(ANNEE ???), l'art. 955 a été modifié et le *Juzgado de Primera instancia* est compétent

en matière d'exequatur de manière générale et aux conditions établies par ledit article pour la détermination de la compétence territoriale.

3. Art 5, al. 1 Convention de Lugano

Aux termes de l'arrêt du *Hoyeserett* (Norvège) du 20 décembre 2003, un acheteur de marchandises domicilié sur le territoire d'un Etat contractant peut être attrait, en application de l'art. 5, point 1, de la convention de Lugano, dans un autre Etat contractant, devant le tribunal du lieu où l'obligation de payer le prix de vente doit être exécutée, bien que ce lieu ne soit pas déterminé par le contrat de vente, mais par la loi du for et la Convention des Nations Unies de 11 avril 1980 sur les contrats de vente internationale de marchandises à laquelle deux Etats contractants ont adhéré et dont l'art. 57 prévoit que le lieu d'exécution de l'obligation de payer le prix de vente est le domicile commercial du vendeur.

4. Art. 2 et 5 ss Convention de Lugano

L'arrêt du *Tribunal fédéral* suisse du 23 décembre 2003 (ATF 130 III 285) concerne un litige entre A., domicilié à Genève, et la banque X., sise à Lyon. L'application correcte de l'action en libération de dette (*Aberkennungsklage*) selon la Convention de Lugano se trouve au cœur de ce litige. L'action en libération de dette est une particularité du droit suisse d'exécution brièvement expliquée ci-après afin de permettre une meilleure compréhension de l'arrêt.

La procédure suisse d'exécution forcée applicable aux créances se déroule en deux phases: la procédure d'introduction et la procédure d'exécution forcée proprement dite. La procédure d'introduction prépare l'exécution forcée proprement dite: Tout d'abord, dans le cadre de la procédure d'introduction, un commandement officiel de payer sera adressé au débiteur. Cette procédure offre ensuite le cadre et l'occasion de clarifier – par diverses procédures– la légitimité du créancier à exiger l'exécution forcée.

Dans la première phase, l'Office des poursuites – donnant suite à la demande du créancier – notifie au débiteur un commandement de payer sans procéder à un examen de l'existence et de l'exigibilité de la créance alléguée. Cet acte ordonne au débiteur soit de payer la créance dans les 20 jours, soit de faire opposition au commandement de payer dans les 10 jours. Dans le cas où le débiteur n'a ni payé ni fait opposition dans le délai imparti, la procédure de poursuite entre dans la seconde phase, celle de l'exécution forcée proprement dite. Une opposition au commandement de payer, qui, soit dit en passant, ne doit pas être nécessairement motivée, suspend la poursuite dans tous les cas.

Dans le cas où aucun jugement n'a été prononcé en faveur du créancier, celui-ci doit initier une procédure civile ordinaire dans laquelle il conclura, en plus des conclusions au fond, à la levée définitive de l'opposition ("mainlevée définitive"). Si, par contre, il produit une reconnaissance (écrite) de dette, il peut, basé sur ce moyen de preuve, requérir la levée provisoire de l'opposition dans une procédure sommaire ("mainlevée provisoire"). La partie adverse peut opposer toute exception à condition qu'elle la rende immédiatement vraisemblable.

Lorsque la mainlevée provisoire a été accordée, le débiteur peut intenter une action dite en libération de dette au for de la poursuite dans les 20 jours à compter de la mainlevée. Cette action est une action négatoire de droit matériel visant la constatation de l'inexistence ou de l'inexigibilité de la créance invoquée. Lors de cette procédure – comme lors de procès

civils ordinaires – la cognition du juge n'est limitée dans aucune mesure. Si le débiteur n'use pas de son droit d'intenter une action en libération de dette ou s'il est débouté de celle-ci, la mainlevée provisoire ainsi que, le cas échéant, la saisie provisoire deviennent définitives et le créancier peut demander l'exécution forcée.

Dans le cas présent, la banque X., sise à Lyon, avait fait notifier à A., par l'Office des poursuites de Genève, un commandement de payer auquel A a fait opposition. La banque X. a requis et obtenu la mainlevée provisoire. Par la suite, A. a intenté une action en libération de dette auprès de la même juridiction – le tribunal genevois. La banque X. a alors contesté la compétence de ce tribunal et soutenu que, selon l'art. 2 CL, l'action en libération de dette devait être intentée au for de son siège à Lyon.

Se basant sur le principe de la primauté de la Convention de Lugano en tant que traité international sur toute disposition contraire de la loi nationale, le Tribunal fédéral a examiné si, à la lumière de cette Convention, le tribunal genevois était compétent pour statuer sur l'action en libération de dette exercée devant celui-ci, c'est-à-dire au for de la poursuite.

S'appuyant sur le principe général *actor sequitur forum rei* posé à l'art. 2 CL, le Tribunal fédéral a d'abord constaté que si la banque X. avait intenté une action en paiement contre A., le tribunal genevois aurait été compétent. La banque X. a néanmoins préféré faire d'abord notifier à A. un commandement de payer à son lieu de domicile à Genève. Le commandement de payer ne peut vraisemblablement pas être qualifié d'acte juridictionnel au sens de la Convention de Lugano puisqu'il est émis par une autorité administrative. Le Tribunal fédéral a cependant laissé la question de la soumission du commandement de payer à la Convention ouverte puisque l'autorité émettrice au domicile de A. aurait été compétente en vertu de l'art. 2 CL. Comme le for du lieu de la poursuite auquel a été aussi déposée l'action en mainlevée provisoire de l'opposition correspond au domicile du débiteur poursuivi, le Tribunal fédéral laissa également ouverte la question de savoir si la décision de mainlevée provisoire correspond à un procès au fond au sens de l'art. 2 et ss CL.

Le Tribunal fédéral a toutefois constaté que l'action en libération de dette est un procès au fond et que par conséquent les dispositions des arts 2 ss. CL s'appliquent. Il observe que l'action en libération de dette est une action négatoire de droit matériel, mais explique le renversement du rôle procédural des parties par le fait que la procédure est intégrée dans la phase introductive de la procédure de poursuite. Le fardeau de la preuve reste ainsi le même que lors d'une action en reconnaissance de dette. Comme l'art. 2 CL ne mentionne pas expressément le défendeur mais fait référence à la personne attraite devant les juridictions de l'Etat contractant de son domicile, il apparaît que le rôle formel des parties n'est pas nécessairement décisif.

Selon la doctrine dominante concernant les Conventions de Bruxelles et de Lugano, les actions négatoires de droit matériel doivent également être initiées au for du défendeur (sur le plan formel). Dans son jugement, le Tribunal fédéral s'appuie sur l'arrêt, AS-Autoteile de la CJCE (n° 220/84, daté du 4.7.1985). La Cour avait alors décidé que les actions en opposition à exécution prévues par l'art. 767 du code allemand de procédure civile peuvent en principe tomber dans le champ d'application des arts 2 et ss CB. AS-Autoteile, partie défenderesse dans la procédure de poursuite, avait intenté une action en opposition à exécution en Allemagne et invoqué une créance compensatoire contre le demandeur. En relation avec cette créance, la Cour négligea la position des parties sur le plan formel et retint uniquement des considérations matérielles. Elle admit finalement la compétence des tribunaux qui auraient été compétents pour statuer si la créance avait fait l'objet d'une action autonome.

Dans son argumentation concernant le cas présent, le Tribunal fédéral se réfère expressément à l'art. 2 CL en tant que principe fondamental; malgré tout, il convient d'admettre que les fors alternatifs pour le procès au fond sont également examinés. Lorsque

leurs conditions spéciales sont remplies, le demandeur a le choix entre les fors spéciaux de la CL et le for général de l'art. 2 CL.

Plusieurs autres raisons pourraient être citées pour la prise en compte de considérations matérielles lors de l'évaluation d'une action négatoire de droit matériel en relation avec une procédure d'exécution. La situation qui nous occupe est ainsi comparable à celle d'une demande reconventionnelle au sens de l'art. 6 para. 3 CL. Leur point commun est que le demandeur sur le plan formel se trouve dans une situation de défense sur le plan matériel. Une comparaison avec le cas de figure de la comparution au sens de l'art. 18 CL paraît également possible: Dans le cas d'espèce, la demanderesse sur le plan formel avait fait notifier le commandement de payer et initié la procédure de mainlevée à Genève, il convient donc d'admettre que l'action en libération de dette doit également pouvoir être déposée à ce même for par le débiteur poursuivi.

Le Tribunal fédéral fait allusion à ces considérations sans toutefois entrer dans les détails. Nous retenons en l'espèce que le Tribunal fédéral a suivi la jurisprudence de la CJCE du cas AS-Autoteile et qu'il l'a appliquée de façon analogue aux particularités de la procédure suisse d'initiation de poursuite. Ceci lui donne la possibilité de développer ultérieurement sa jurisprudence de manière conséquente et de qualifier expressément de procédure au sens des arts 2 et ss CL la procédure de mainlevée provisoire. Une décision du Oberlandesgericht Düsseldorf du 16 mars 2004 (I-3 W 373/03) s'exprime d'ailleurs aussi en faveur d'une telle qualification. Ce tribunal a statué qu'une décision de mainlevée provisoire suisse est une décision au sens de l'art. 25 CL et peut être déclarée exécutoire en Allemagne selon la CL.

5. Art. 16 para. 4, Convention de Lugano

A) Dans le cas de l'arrêt du *Tribunal fédéral* suisse du 21 février 2003 *(ATF 129 III 295)*, le demandeur, une société italienne, avait fait établir par le tribunal cantonal des Grisons qu'il ne violait pas les droits découlant d'un brevet européen appartenant au défendeur, une société anonyme domiciliée en Suisse, dans les six Etats européens en cause.

Le Tribunal fédéral constatait que le cas considéré n'entrait pas dans le champ d'application de l'art. 16 para. 4 de la Convention de Lugano, il entrait donc en matière. Cette interprétation de l'art. 16 para. 4 CL semble en ligne avec celle de la CJCE. En effet, bien que la CJCE n'ait pas encore décidé ce genre de cas précisément, il est possible de se baser sur la décision Duijnstee (n° 288/82, datée du 15 novembre 1983). La CJCE distinguait un litige portant sur les droits respectifs d'un employé, auteur d'une invention pour laquelle un brevet a été demandé ou obtenu, et de son employeur – litige découlant de leur relation de travail – de ceux concernant l'inscription ou la validité du brevet et tombant dans le champ d'application de l'art. 16 para. 4 CB. Pour ce faire, la Cour se basait sur la distinction retenue tant par la Convention de Munich du 5 octobre 1973 sur le brevet européen que par la Convention de Luxembourg du 15 décembre 1975 sur le brevet communautaire entre la compétence pour les litiges concernant le droit au brevet et la compétence pour les litiges en matière d'inscription et de validité d'un brevet. La CJCE déclarait également dans cet arrêt que "si […] le litige ne porte pas lui-même sur la validité du brevet ou l'existence du dépôt ou de l'enregistrement, il faut estimer qu'aucune raison particulière ne plaide pour l'attribution d'une compétence exclusive aux juridictions de l'Etat contractant ou le brevet a été demandé ou délivré et que, par conséquent, un tel litige ne relève pas de l'art. 16 para. 4 [CB]" ; la Cour appliquera donc "les règles générales de la Convention" à ces "autres actions".

De plus, l'avocat général L.A. Geelhoed reprend dans ses conclusions concernant l'affaire pendante *Gesellschaft für Antriebstechnik* (n° C-4/03) l'argumentation de la CJCE

dans le cas Duijnstee qui justifie l'art. 16 para. 4 CB aussi par le fait que "les juridictions [nationales] sont les mieux placées pour connaître des cas dans lesquels le litige porte lui-même sur la validité du brevet ou l'existence du dépôt ou de l'enregistrement". L'avocat général donne finalement le cas d'un litige concernant la violation d'un brevet comme exemple type d'une "autre action" pour laquelle l'art. 16 para. 4 CB n'est pas applicable.

B) Parmi les jugements qui traitent de l'art. 16 para. 4 de la Convention de Lugano s'inscrit également l'arrêt de l'*Oberlandesgericht München* (Allemagne) du 15 mai 2003 (*MarkenR*, 2003, 397-401), qui présente une raison supplémentaire (???) d'intérêt parce qu'il interprète et applique à la fois cette disposition et la disposition correspondante de la Convention de Bruxelles.

Il s'agissait en effet dans l'espèce d'une demande introduite par les demanderesses devant le *Landgericht München* simultanément à l'encontre d'un défendeur domicilié en Suisse et d'un défendeur domicilié en Autriche. L'action visait à constater l'inefficacité sur le territoire allemand d'une marque de fabrique internationale enregistrée en Suisse, auprès de l'Organisation mondiale de la propriété intellectuelle (OMPI), par le premier défendeur (D1), lequel agissait en tant que fiduciaire du deuxième défendeur (D2), qui était le seul bénéficiaire des droits de propriété découlant de l'inscription de la marque, suite à son dépôt prioritaire en Autriche. Le *Landgericht München* a rejeté la demande en statuant que tant en vertu de l'art. 16 para. 4 de la Convention de Lugano qu'en vertu de la disposition correspondante de la Convention de Bruxelles les tribunaux suisses étaient seuls compétents, au détriment des tribunaux allemands.

L'*Oberlandesgericht* s'est prononcé de la manière contraire, et a affirmé l'existence de la juridiction des tribunaux allemands à l'encontre des défendeurs. D'abord, il a remarqué que les dispositions de la Convention de Lugano, notamment celles de la section prévoyant des compétences exclusives, doivent être appliquées d'office, alors même que le demandeur ne les a pas invoquées expressément en instance. Pour ce qui est du défendeur D1, domicilié en Suisse, il a observé que l'art. 16 para. 4 de la Convention de Lugano donne la compétence en la matière, sans considération de domicile, aux juridictions de l'Etat contractant sur le territoire duquel le dépôt ou l'enregistrement a été demandé, a été effectué ou est réputé avoir été effectué aux termes d'une convention internationale. L'enregistrement ayant été effectué aux termes de l'Arrangement de La Haye concernant le dépôt international des dessins ou modèles industriels, il a ensuite observé que c'est à ce dernier qu'il faut se référer pour déterminer le territoire visé par la fiction contenue dans l'art. 16 para. 4 de la Convention de Lugano. D'après l'art. 7 al. 1 let. a de l'Arrangement de La Haye tout dépôt au Bureau international produit, dans chacun des Etats contractants désignés par le déposant dans sa demande, les mêmes effets que si toutes les formalités et touts les actes administratifs prévus par la loi nationale pour obtenir la protection avaient été respectés et accomplis par le déposant. A son tour, l'art. 7 al. 1 let. b prévoit que la protection des dessins ou modèles enregistrés auprès du Bureau international est régie dans chacun des Etats contractants par les dispositions de la loi nationale qui s'applique dans ledit Etat aux dessins ou modèles dont la protection est revendiquée par la voie du dépôt national et pour lesquels toutes les formalités ont été remplies et tous les actes administratifs ont été accomplis. Il en résulte, selon l'*Oberlandesgericht* , qu'en cas de litige portant sur l'efficacité ou l'inefficacité, sur le territoire de la République fédérale d'Allemagne, d'une marque de fabrique internationale, ce sont les tribunaux allemands qui sont compétents, sans considération du domicile du défendeur.

Des considérations analogues ont conduit le tribunal, dans la décision examinée, à affirmer la compétence des tribunaux allemands pour connaître de l'action en constatation de

droit intentée par les demanderesses à l'encontre du défendeur D2, domicilié en Autriche, en vertu de l'art. 16 para. 4 de la Convention de Bruxelles. Le texte des dispositions concernées dans les deux conventions étant le même, la cour en donne la même interprétation.

Il faut encore remarquer que l'*Oberlandesgericht* s'est prononcé en faveur de la recevabilité de l'action en constatation de la non-existence d'un rapport de droit, en considérant qu'il y avait un intérêt juridique pour les demanderesses à intenter l'action. Leur situation juridique était menacée par un danger actuel du fait que D2 avait intenté une action à leur encontre pour violation de la marque internationale en question devant le tribunal NF, et que le procès était pendant au moment du jugement. L'action en constatation de droit a été considérée par la cour allemande comme une mesure visant à clarifier le rapport de droit, dans la mesure où l'action pendant devant le tribunal NF repose sur une violation de la marque de fabrique. Quant à D1, l'intérêt juridique réside dans sa qualité de détenteur inscrit auprès de l'OMPI de la marque de fabrique en question. En faveur de la recevabilité de l'action milite enfin, selon la cour, le fait que les demanderesses n'avaient pas d'autres voies de recours à leur disposition.

6. Arts 25 et 31 Convention de Lugano

Cet arrêt du *Tribunal fédéral* suisse du 30 juillet 2003 *(ATF 129 III 626)* concerne une mesure provisionnelle conservatoire prononcée par la Haute Cour de Justice de Londres (en l'occurrence une "*Freezing Injunction*") à l'encontre d'un débiteur résidant en Turquie, demandant le blocage d'une partie de ses avoirs en Suisse. Le tribunal cantonal de Zurich avait accordé la reconnaissance et l'exécution de cette "*Freezing Injunction*" et le débiteur avait déposé un recours de droit public auprès du Tribunal fédéral contre cette décision. Il faisait valoir que son droit d'être entendu n'avait pas été respecté et que la compétence territoriale de la Haute Cour de Justice de Londres n'avait aucun lien réel avec les avoirs situés en Suisse entraînant, selon la jurisprudence de la CJCE, l'incompétence de la Cour en la matière.

Le Tribunal fédéral constatait dans un premier temps que la "*Freezing Injunction*" du droit anglais pourrait être une décision au sens de l'art. 25 CL. Il appliquait la règle développée par la CJCE dans l'affaire *Denilauler* (n° 125/79, datée du 21 mai 1980) selon laquelle une mesure provisionnelle conservatoire ne peut être reconnue que si la partie concernée par cette mesure a été entendue dans la procédure aboutissant à celle-ci. Dans le cas d'espèce, le défendeur n'avait été entendu qu'après que la Cour avait décidé une extension de l'exécutabilité de l'injonction initiale au territoire étranger. Le Tribunal fédéral constatait ensuite que la jurisprudence restrictive de la Cour concernant l'application de l'art. 25 CL au mesures «ex parte» était controversée dans la doctrine, mais décidait néanmoins de s'y conformer au regard de l'art. 1 du protocole II. De plus, le Tribunal fédéral observait que le débiteur avait été entendu dans la procédure initiale à Londres ordonnant la "*Freezing Injunction*" qui prévoyait déjà en principe la possibilité d'une extension de l'exécutabilité à l'étranger. En outre, le défendeur avait la possibilité de se défendre contre cette extension après la décision. Le Tribunal fédéral arrivait donc à la conclusion que la partie en question avait eu suffisamment d'opportunités pour faire valoir ses objections. Ce résultat correspond également à la jurisprudence de la CJCE dans les affaires *Klomps* (n° 166/80, datée du 16.06.1981) et *Brennero* (n° 258/83, datée du 27.11.1984).

Le Tribunal fédéral a ensuite examiné la deuxième objection du débiteur à la lumière de la jurisprudence de la CJCE. Dans l'affaire *Van Uden* (n° C-391/95, datée du 17 novembre 1998), la CJCE considérait que l'art. 24 CB devait être interprété en ce sens que son

application était subordonnée, notamment, à la condition de l'existence d'un "lien de rattachement réel" entre l'objet de cette mesure et la compétence territoriale de l'Etat contractant du juge saisi. La Cour s'était alors référée à sa propre jurisprudence développée dans l'arrêt Denilauler précité qui établissait que "c'est certainement le juge du lieu ou en tout cas de l'Etat contractant où sont situés les avoirs qui feront l'objet des mesures sollicitées qui est le mieux à même d'apprécier les circonstances qui peuvent amener à octroyer ou à refuser les mesures sollicitées […]".

Le Tribunal fédéral observe cependant que, dans l'affaire *Mietz* (n° C-99/96, datée du 27 avril 1999), la CJCE avait requis un lien réel entre la compétence territoriale du tribunal prononçant la mesure provisionnelle et les avoirs concernés uniquement dans les cas où les mesures provisionnelles conservatoires avaient été prononcées par un tribunal virtuellement incompétent sur le fond. Le Tribunal fédéral décidait donc que comme dans le cas d'espèce la Haute Cour de Londres s'était déclarée compétente pour connaître du fond de l'affaire, un lien réel entre la compétence territoriale du tribunal anglais et les avoirs concernés n'était pas nécessaire pour fonder la compétence dudit tribunal. Il rejetait ainsi la deuxième objection du débiteur et confirmait la décision du tribunal cantonal.

7. Arts. 26, 27.1 et 54, 2 Convention de Lugano

Decision of the Court of *Sad Najwyzszy* (Supreme Court of Poland) of December 19, 2003: A Swedish national logded with the Circuit Court of Kraków an application for recognition of a judgment of a Swedish District Court decision dating from October 31, 2000 and **of** a judgment of the Court of Appeal of Stockholm of November 17, 2000 confirming the District Court decision. The Swedish decision dealt with a maintenace case between the party seeking recognition, a father domiciled in Sweden, and his child. It condemned the Poland-based mother to the procedural costs awarded to the father after the child had withdrawn its action. For reasons of incompatibility with substantive Polish public policy the Circuit Court in Kraków rejected the request for recognition. In the following proceedings before the Court of Appeal of Kraków the rejection by the Circuit Court was quashed, and it was ruled that the major part of the Swedish judgment could be recognized.

The Supreme Court of Poland decided that the question of recognition was governed by the Lugano Convention. It held that, according to Article 25, the Convention applied to the recognition of the allocation of costs if the principal issue of the proceedings fell within the scope *ratione materiae* of the Convention. This was the case as the Swedish proceedings were on child maintenance.

As to the application of the Convention *ratione temporis* the Supreme Court came to the following conclusions.

The Swedish judgments had both been rendered after the entry into force of the Lugano Convention between Sweden and Poland on February 1, 2000. However, the files led the Supreme Court to the assumption that the Swedish proceedings had been instituted before that date. Based on Article 54 of the Lugano Convention the Supreme Court examined whether the Swedish court had indirect jurisdiction pursuant to the rules of the Lugano Convention or any other Convention concluded between the State of origin and the State addressed which was in force when the proceedings were instituted. Although the judgment itself contained nothing on that issue the Supreme Court, in the spirit *of favour recognitionis*, was able to conclude from the files that the party seeking recognition who was the defendant in the maintenance proceedings had its domicile in Sweden at the time of the institution of the

proceedings and that the indirect jurisdiction of the Swedish court was therefore in accordance with Article 2 of the Lugano Convention.

This ruling could be regarded as taking a direction that is developing further an existing case law as to the duties of the court addressed to establish the factual basis of indirect competence. In a proceeding based on Article 54 (2) concerning recognition and enforcement of a German default decision, the Swiss Federal Tribunal (decision of June 12, 1997; BGE 123 III 374; N° 1998/15) found itself unable to verify the indirect competence on the basis of the German decision because, on one hand, according to Article 28 (3) of the Lugano Convention, the recognizing court would have been bound to the findings of fact on which the first court based its jurisdiction, but, on the other hand, the German decision contained neither a summary of the facts nor the grounds it was based on. Since the indirect jurisdiction of the German court was contested and its jurisdiction was not obvious from the files, the judgment was denied enforceability (see also denial of enforceability in BGE 127 III 186 E.4.b, but in the different context of Article 54 b (3)).

The Polish court of appeal pointed out that, on top of the fact that the Swedish court's jurisdiction was in accordance with the Lugano Convention, a treaty dealing exclusively with recognition and enforcement was in force between the States involved at the time of the institution of the proceedings: the Hague Maintenance Convention of 1973, in force between Poland and Sweden since July 1, 1996. The indirect jurisdiction of the Swedish court could be founded on that convention. For the purposes of Article 54 paragraph 2 of the Lugano Convention, according to the Polish Supreme Court, it already would be sufficient to establish the jurisdiction of the State of origin, based on an international Convention dealing with indirect jurisdiction only, and not with direct competence.

Independently from these findings, the Supreme Court came to the conclusion that the Hague Maintenance Convention of 1973 didn’t apply to the recognition of the Swedish judgment as the latter dealt with the payment of procedural costs by the mother as the statutory representative of the child rather than by the child itself.

In addition to the Maintenance Convention, the Supreme Court examined the application of the Hague Convention of 1980 on Access to Justice, also in force between the two countries. However, the court didn’t apply this Convention as it found the case did not fall under its Articles 14 and 15.

The court then went on to examine whether the public policy exception of Article 27 (1) applied. First it recognized that the public exception of Polish national law was considerably broader than Article 27 (1) of the Lugano Convention. It stressed the exceptional character of the public policy clause which could only be applied in particularly flagrant cases of departure from crucial and fundamental principles of the national legal order. The mere fact of divergence between legal provisions applied by the State of origin and the rules which the recognizing State would have applied if it had had the case in hand was not sufficient for the application of Article 27 (1). This seems to be in line with the Report *Jenard* (ad Article 26) and a rich case law by the Court of Justice and national Supreme Courts on the narrow interpretation and exceptional nature of the public policy exception.

In this connection, it was found that Polish law only excluded the imposition of court fees on the child, but did not prevent the court from awarding the opposing party its procedural costs against the child. The difference to Swedish law lay in the fact that the latter prevented the courts from awarding procedural costs of the opposing party against the child, but instead allowed the imposition of these costs on its statutory representative. Thus the only difference beween the two regimes lay in the fact that from a formalistic point of view the procedural costs of the opposing party were awarded against different persons. From an

economic point of view, the costs were borne by the same person, the statutory representative of the minor. Thus the Polish Supreme Court held that Art. 27 para. 1 was not violated .

Finally, the court turned to the fact that the applicant had requested recognition of the Swedish judgment without asking for its enforcement. The Supreme Court held that, pursuant to Article 26 of the Lugano Convention, each judgment, regardless of the fact whether it was enforceable according to Articles 31 ff. or or not, could be recognized in other Contracting States. Although the conditions for recognition and declaration of enforceability were mostly convergent, the two proceedings were regulated separately in the Lugano Convention as well as in Polish national procedural law. Thus the Swedish judgment of October 31, 2000 was not declared enforceable but only recognized as containing the decision on the costs of the proceedings. Indeed, with respect to the treatment of a request as a mere request for recognition where enforcement of the decision could be directly sought there seems to be no relevant case law asking for a special interest for a decision on recognition according to Article 26 (2) of the Lugano Convention.

8. Art. 29 Convention de Lugano

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> The decision of the Hoyeserett (Norway) of February 5, 2003, concerned
the question of enforcement in Norway of a Dutch
> court decision regarding compensation. After the Dutch decision became
> enforceable in the Netherlands, the Norwegian defendant redeemed part
> of the judgment. The Dutch plaintiff then sought recognition and
> enforcement of the outstanding amount in Norway. The Norwegian
> defendant objected on the grounds that the Dutch judgment no longer
> was fully enforceable. The Appeals Committee of the Supreme Court
> regarded the objection as a matter of substance, which could not be
> reviewed by Norwegian courts according to the Lugano Convention
> article 29. This objection should instead be raised during the
> enforcement procedure, which is governed by national law.
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9. Arts 37 et 38 Convention de Lugano

L'arrêt du *Tribunal fédéral* suisse du 23 juin 2003 *(ATF 129 III 574)* traitait de la reconnaissance et de l'exécution en Suisse d'un jugement conditionnel (*Vorbehaltsurteil*) rendu par le *Landgericht* Düsseldorf en application du droit de procédure civile allemand. Le Tribunal fédéral suisse avait rejeté le recours introduit contre la décision du juge suisse de l'exécution (tribunal cantonal de Zurich) d'octroyer la reconnaissance et l'exécution en Suisse. Le recourant demandait la suspension de la procédure d'exequatur en application de l'art. 38(1) CL et faisait valoir la violation des arts 30 et 38 CL.

Se basant sur la définition du "recours ordinaire" au sens des arts 30 et 38 de la Convention de Bruxelles donnée par la CJCE dans l'affaire *Diamond Supplies* (n° 43/77, datée du 22 novembre 1977), le Tribunal fédéral avait tout d'abord constaté que la procédure subséquente (*Nachverfahren*), constituant selon le droit allemand la condition résolutoire du jugement conditionnel, ne peut être assimilée à un "recours ordinaire" au sens des arts 30 et 38 CL. En effet, la définition donnée par la CJCE de l'expression "recours ordinaire" englobe "tout recours qui est de nature à pouvoir entraîner l'annulation ou la modification de la décision faisant l'objet de la procédure de reconnaissance ou d'exécution selon la Convention [de Bruxelles] et dont l'introduction est liée, dans l'Etat d'origine, à un délai déterminé par la

loi prenant cours en vertu de cette décision même". Il convient de noter que la notion de "recours ordinaire" est une notion autonome dont la détermination se fait dans le seul cadre de la Convention de Bruxelles, resp. de Lugano. Or, comme le droit allemand (§600 ZPO) ne prévoie aucun délai pour engager la procédure subséquente, celle-ci ne peut être qualifiée de "recours ordinaire" au sens des arts 30 et 38 CL. Ces dispositions ne pouvant donc pas s'appliquer à ce genre de procédure, elles ne peuvent être violées par le refus du tribunal cantonal de surseoir à statuer.

Le Tribunal fédéral note ensuite que, selon §599(3) ZPO, le jugement conditionnel est exécutoire en Allemagne. A ce stade, il serait intéressant de remarquer qu'une exécution dans un autre Etat contractant sur la base de l'art. 31 CB et CL pourrait, dans certaines situations, entrer en conflit avec certains buts des conventions de Bruxelles et Lugano: Dans l'affaire Diamond Supplies précitée, la CJCE rappelle d'abord que le but général des conventions est d'"assurer l'exécution rapide des décisions avec un minimum de formalités, dès lors que celles-ci ont un caractère exécutoire dans l'Etat d'origine" ; elle décrit ensuite le but des arts 30 et 38 comme étant celui d'"empêcher que des décisions soient obligatoirement reconnues et exécutées dans d'autres Etats contractants à un moment où subsiste la possibilité qu'elles soient mises à néant ou modifiées dans l'Etat d'origine". Dans le cas qui nous occupe, le Tribunal fédéral s'est cependant limité à l'examen de la violation alléguée des arts 30 et 38 CL et ne s'est donc pas référé à cette jurisprudence. Le Tribunal fédéral avait également constaté que le recourant n'avait engagé la procédure subséquente en Allemagne que plus de cinq ans après le jugement conditionnel, afin de pouvoir invoquer l'art. 38(1) CL et demander la suspension de la procédure d'exequatur. Le Tribunal fédéral finit enfin par faire remarquer que les arts 30 et 38 CL n'établissent qu'une simple possibilité – et non pas une obligation – de surseoir à statuer notamment lorsqu'un recours a été intenté dans l'Etat d'origine contre la décision étrangère; il appartient ainsi au juge de l'exécution d'exercer librement son pouvoir d'appréciation.

III. Considérations finales

Une année de plus, on peut constater une tendance des cours des Etats parties à la Convention de Lugano à prendre en considération la jurisprudence de la Cour de Justice des Communautés Européennes relative à l'interprétation de la Convention de Bruxelles. Ce qui montre, sans doute, une intention d'appliquer dans le même sens la Convention de Bruxelles et la Convention de Lugano. Les mentions de la jurisprudence de la Cour européenne sont fréquentes. Cela montre une bonne connaissance de cette jurisprudence aussi bien par les juges des Etats membres de la Communauté européenne que les juges des autres Etats parties à la Convention de Lugano, ou, au moins, une bonne connaissance de cette jurisprudence par les conseils qui assistent les parties dans les affaires pouvant mettre en cause cette jurisprudence ou se prévaloir de celle-ci.

On peut signaler, par contre, que les jugements rendus dans d'autres Etats parties à la Convention sont rarement mentionnés dans les arrêts. Un résultat normal pour deux raisons. En premier lieu, parce que les juges internes ne sont pas habitués à citer la jurisprudence étrangère. En deuxième lieu, en raison des difficultés linguistiques.

De manière plus générale, il y a lieu de remarquer qu'à côté des décisions qui ne font que reprendre de solutions déjà consolidées dans la jurisprudence de la Cour de justice, d'autres ont trait à des espèces qui présentent des éléments juridiques et de fait nouveaux sur

lesquels les juges se penchent pour la première fois. La recherche de solutions qui s'insèrent dans la ligne de la jurisprudence de la Cour, ou qui sont au moins compatibles avec celle-ci, constitue une contribution importante dont la Cour elle-même est appelée à tenir compte lorsqu'elle aborde des espèces analogues. De ce point de vue, la richesse de la jurisprudence sur la Convention de Lugano confirme encore un fois le rôle essentiel joué par la convention parallèle dans le cadre de l'harmonisation du droit de la coopération judiciaire en Europe.

Alegría Borrás (Espagne)

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15.9.05 Fausto Pocar (Italie)

8th Report on National Case Law
Relating to the Lugano Convention

I. Introduction

At its 12th meeting, which took place in September 2005 in Zurich, the Standing Committee of the Lugano Convention appointed the delegates from Norway, the Czech Republic, and Germany to draft the 8th Report on National Case Law Relating to the Lugano Convention. This Report is based on the fourteenth fascicle of court judgments presented by the Court of Justice of the European Communities in September 2005 in accordance with Protocol No. 2 to the Lugano Convention.

Of the 50 judgments contained in the fascicle, 15 relate to the Lugano Convention. They will be referred to as follows:

- Judgment of the Supreme Court of Austria (*Oberster Gerichtshof*) of 28 April 2004 (No. 2005/19)
- Judgment of the Federal Supreme Court of Switzerland (*Tribunal fédéral*) of 23 December 2003 (No. 2005/21)
- Judgment of the Federal Supreme Court of Switzerland (*Tribunal fédéral*) of 9 June 2004 (No. 2005/22)
- Judgment of the Federal Supreme Court of Switzerland (*Tribunal fédéral*) of 15 December 2004 (No. 2005/23)
- Judgment of the Federal Labour Court of Germany (*Bundesarbeitsgericht*) of 20 August 2003 (No. 2005/25)
- Judgment of the Düsseldorf Higher Regional Court (*Oberlandesgericht*) (Germany) of 2 March 2004 (No. 2005/26)
- Judgment of the Supreme Court of France (*Cour de Cassation*) of 30 March 2004 (No. 2005/32)
- Judgment of the Court of Appeal (United Kingdom) of 3 February 2003 (No. 2005/37)
- Judgment of the Court of Appeal (United Kingdom) of 12 November 2004 (No. 2005/38)
- Judgment of the Supreme Court of Norway (*Høyesterett*) of 14 June 2004 (No. 2005/42)
- Judgment of the Supreme Court of Norway (*Høyesterett*) of 13 October 2004 (No. 2005/43)

- Judgment of the Supreme Court of the Netherlands (*Hoge Raad*) of 19 March 2004 (No. 2005/45)

- Judgment of the Poznań Court of Appeal (*Sąd Apelacyjny w Poznaniu*) (Poland) of 16 February 2004 (No. 2005/47)

- Judgment of the Supreme Court of Poland (*Sąd Najwyzszy*) of 14 July 2004 (No. 2005/48)

- Judgment of the Court of Appeal (*Svea hovrätt*) (Sweden) of 27 May 2004 (No. 2005/49).

The 15 judgments are briefly described and discussed below.

II. Notes on National Case Law

1. Area of Applicability of the Lugano Convention

In its judgment of 15 December 2004 (No. 2005/23) the Federal Supreme Court of Switzerland (*Tribunal fédéral*) addresses the question of the application of the Lugano Convention to revocatory actions under bankruptcy law. The judgment also discusses the question of the extent to which Swiss courts must take account of the case law of the Court of Justice of the European Communities (hereinafter: ECJ) on the parallel Brussels Convention.

The judgment is based upon the following set of facts:

Company A, headquartered in Geneva, entered into bankruptcy in 2000. It was a creditor of Company X, headquartered in Warsaw (Poland), to which it had granted a remission of debt two times prior to the opening of the bankruptcy proceedings. The bankruptcy trustee filed a revocatory action ("Paulian action") against Company X in Geneva as the place of the bankruptcy proceedings pursuant to Articles 285 et seq. of the Federal Law on Debt Recovery and Bankruptcy (Loi fédérale sur la poursuite pour dettes et la faillite, hereinafter: LP) with the goal of rescinding the remission of debt. The defendant Company X unsuccessfully argued at each instance of the proceedings against the international jurisdiction of the Swiss courts. In the defendant's opinion the proceedings were required to be conducted at its headquarters in Warsaw in accordance with the Lugano Convention.

The Federal Supreme Court decided that the Lugano Convention was not applicable to revocatory actions under bankruptcy law pursuant to Articles 285 et seq. LP because the latter fulfill the exclusion provision of Article 1(2)(2) of the Lugano Convention. If a revocatory action is filed after the insolvency proceeding is opened, its legal basis is the opening of the insolvency proceeding and results directly from this proceeding. Thus, there is a direct connection between the two proceedings.

In the bases for its judgment the Federal Supreme Court referred to the principles on the interpretation of the Lugano Convention developed by it in previous judgments. In this context it expressly emphasized the requirement to take into account the case law of both the ECJ and the courts of the EU Member States on the provisions of the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (hereinafter: Brussels Convention) and Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter: Brussels I Regulation) in reaching judgment.

The Swiss Federal Supreme Court supported its opinion with the principles of the judgment of the ECJ in the matter of *Gourdain v. Nadler* of 22 February 1979 (C-133/78). In that judgment, “en comblement de passif social” (for the payment of company debts), a lawsuit specially regulated in French bankruptcy law, is part of bankruptcy and bankruptcy-like proceedings within the meaning of Article 1(2)(2) of the Brussels Convention.

However, the Federal Supreme Court expressly made clear that there are limits to the interpretation of the Lugano Convention oriented toward the case law of the ECJ on the Brussels Convention and the Brussels I Regulation. If the interpretation of the above-named “parallel provisions” are determinatively influenced by the Treaty on the European Communities or by secondary legal acts, the contracting states to the Lugano Convention are not required to take these into account.

The Federal Supreme Court held that the particularly narrow interpretation of the exception provision in bankruptcy matters, which is currently under discussion within the context of Article 1(2)(b) of the Brussels I Regulation

(Geimer/Schütze, *Europäisches Zivilverfahrensrecht*, 2nd Ed., Munich 2004, margin notes 130 et seq. on Article 1) was not applicable to the situation of a Non-EU Member State. In accordance therewith, complementary interpretation of this legal act and Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (Regulation on Insolvency) must take place. Under this view both regulations must be seen as a unit because they attempt comprehensive rules on international jurisdiction for individual and collective proceedings. If an individual proceeding such as a revocatory action could not be subsumed under the Regulation on Insolvency, in any event it would have to be encompassed within the area of applicability of the Brussels I Regulation. Contrary to the view of the Federal Supreme Court, the exclusion provision as to insolvency matters would not apply under this view.

2. International Jurisdiction

a) General Jurisdiction

Article 2(1) of the Lugano Convention

In its judgment of 23 December 2003 (2005/21) the Federal Supreme Court of Switzerland (*Tribunal fédéral*) addresses the special problem of the action for release from the debt within the context of Swiss debt collection proceedings, which are governed by the Federal Law on Debt Recovery and Bankruptcy (Loi fédérale sur la poursuite pour dettes et la faillite, hereinafter: LP). This was the first opinion by the Federal Supreme Court regarding jurisdiction over an action for release from the debt within the area of applicability of the Lugano Convention, which is an extremely disputed question in Switzerland.

The legal situation is briefly described as follows:

Enforcement conducted as part of collection proceedings based upon a monetary claim begins with a debt collection request (Art. 67 LP). The competent debt collection office issues a summons for payment to the debtor without substantive assessment of the creditor's request (Art. 69 et seq. LP). The debtor can file a formal complaint against this debt collection request. This results in a suspension of the debt collection proceedings (Art. 78 LP).

If the claim relates to an enforceable judgment or to a title placed on equal footing pursuant to Art. 80 subsec. 2 LP, the creditor can then request a final dismissal of objection (cf. Art. 80 LP). The debtor is limited to the objections set forth in Art. 81 of repayment, deferral of payment, or the tolling of the statute of limitations since the judgment was issued. This proceeding is generally viewed as an enforcement proceeding and allocated within the area of applicability of Art. 16(5) of the Lugano Convention.

The situation is different in regard to provisional dismissal of objection proceedings pursuant to Art. 82 et seq., set forth below.

If the claim relates to a debt established by a public document or an acknowledgment of debt confirmed by signature, the creditor can (only) request a provisional dismissal of objection (Art. 82 LP). A provisional asset seizure of the objects against which enforcement is intended to take place, thus, becomes possible. The debtor can lodge an action for release from the debt within 20 days of the dismissal of objection (Art. 83 subsec. 2 LP). If he misses the deadline, the provisional dismissal of objection becomes final (Art. 83 subsec. (3) LP).

The provisional dismissal of objection proceedings also begins without substantive assessment of the claim, however, in the proceedings on the action for release from the debt the debtor can raise substantive law objections against the claim. The court decides on the existence of the claim in a “regular proceeding” (cf. Art. 83 subsec. (2) LP). The action for release from the debt thus contains an action for a negative declaratory judgment to deny the substantive law claim. As a result, the choice of provisional dismissal of objection proceedings offers the creditor the advantage of a quick and low-cost proceeding placing on the debtor the burden of initiating a court decision regarding the existence of the claim while avoiding the filing of an action for specific performance.

The judgment of the Federal Supreme Court was based upon the following set of facts:

A bank headquartered in France had loaned money to a French company. A, headquartered in Switzerland, provided a guarantee for the repayment of the

loan claim. The French company did not meet its repayment obligation. Therefore the bank claimed against A as to its guarantee for repayment of the remaining amount of the loan. It instituted debt collection proceedings against it before the Swiss courts and obtained a summons for payment. After A lodged a formal objection against this, the bank applied for a provisional dismissal of objection, which also was granted. Subsequent thereto debtor A filed an action for release from the debt in Switzerland (*action en libération de dette*) pursuant to Article 83 subsec. (2) LP. The bank objected to the international jurisdiction of the Swiss courts involved. Pursuant to Article 2 (1) of the Lugano Convention, it contended, it must be sued at its headquarters in France. There is no special jurisdiction pursuant to the Lugano Convention.

The Federal Supreme Court confirmed the judgments of the lower courts. It also affirmed the international jurisdiction of the Swiss courts at the location of debt collection proceedings pursuant to Article 2 (1) of the Lugano Convention for the provisional dismissal of objection as well.

The Federal Supreme Court presented the bases of its judgment as follows:

In the determination of the court with international jurisdiction within the context of Article 83 LP, pursuant to Article 30a LP the provisions of the Lugano Convention must also be taken into consideration. Article 2 (1) of the Lugano Convention, which is applicable on its own, enables the debtor to file an action for release from the debt at the place of the debt collection proceedings and, thus, usually at his domicile. The wording of the provision is not contrary to this, because the reference here is not formally to a plaintiff or defendant, but rather, only that “persons domiciled in a Contracting State shall (…) be sued in the courts of that State.” The purpose of the provision relates to persons that are materially in the position of a defendant and not to those who formally assume the role of a defendant in the proceedings. The particular design of Swiss law on debt collection proceedings – other than enforcement law in other legal systems – accords the material role of defendant to the debtor. The proceedings for release from the debt replace the normal proceedings for the creditor in other states. If the creditor itself had taken legal action it would have been required to claim against defendant A before the Swiss courts. The creditor should not benefit from the fact that it made use of a different option for realizing its claim made available by Swiss law. Jurisdiction pursuant to Ar-

ticle 2 (1) of the Lugano Convention also is not displaced by the exclusive jurisdiction pursuant to Article 16(5) of the Lugano Convention. The proceedings on release from the debt are not merely enforcement proceedings within the meaning of the provision, but rather, are an *actio negatoria* under substantive law. They are aimed at establishing that the claim does not exist or is not enforceable.

In reaching its judgment, the Federal Supreme Court found a parallel to the case decided by the ECJ *SAS-Autoteileservice Gmbh v. Pierre Malhé* (ECJ of 4 July 1985, C-220/1984). It sees it as the underlying idea of the judgment that persons that must defend themselves at a substantive law level, in principle can defend themselves at their place of domicile

b) Special Jurisdiction

Article 5(1) of the Lugano Convention

aa) In its judgment of 20 August 2003 (*No. 2005/25*) the Federal Labour Court (*Bundesarbeitsgericht*, Germany) addressed the question of when an employment relationship exists within the meaning of Article 5(1) 2nd half sentence of the Lugano Convention. The result was a rejection of the international jurisdiction of the German labour courts.

The judgment was based on the following set of facts:

The plaintiff, domiciled in Germany, is a pilot and also an attorney. The defendant operates an alliance of European airlines headquartered in Switzerland. The plaintiff and defendant concluded a framework agreement whereby the plaintiff was to work for one company of the defendant's as pilot and for another company of the defendant's as managing director. Details regarding the scope and conduct of duties were to be contractually agreed with each company. The plaintiff initially worked as managing director and pilot, but then was not employed further.

He filed a lawsuit against the defendant with the German labour courts for a determination that the contractual employment relationship continued to exist, for payment of the agreed compensation, and for contractual damage com-

pensation by the defendant for breaches of obligation. The German labour courts, finding that they lacked international jurisdiction, rejected the lawsuit as inadmissible.

The Federal Labour Court, with reference to the definitions and principles of interpretation developed by the ECJ regarding the Brussels Convention, argued as follows:

International jurisdiction of German labour courts does not arise from Article 5 (1) 2nd half sentence of the Lugano Convention, because an employment agreement was not concluded between the parties. Pursuant to the case law of the ECJ, a fundamental characteristic of an employment relationship is that a person provides services for another in accordance with their instructions during a particular time and for which they receive compensation in return. It is a requirement that the claims made by the employee are directly aimed at the employer. These prerequisites were not fulfilled because the plaintiff did not owe the main services agreed upon to the defendant, but rather, to each subsidiary and, thus, third parties.

With these arguments the Federal Labour Court adhered to the case law of the ECJ on Article 5(1) 2nd half sentence of the Brussels Convention in the matter of *Rutten v. Cross* (ECJ of 9 January 1997, C-383/95).

The Federal Labour Court consistently subsequently examines the jurisdiction of German courts in accordance with general jurisdiction of the place of performance arising from Article 5(1) 1st half-sentence of the Lugano Convention. It was rejected for the reason that the determinative place of performance was not located in Germany. The place of performance is not autonomous, but rather, to be determined in accordance with the law that is determinative for the disputed obligation (*lex causae*). In this regard it also depends on the place of performance of the principle contractual obligation if secondary claims, which could be caused by a breach of a collateral duty, are concurrently a subject matter of the legal dispute. From the principle that in the context of the determination of jurisdiction in relation to numerous concurrently asserted obligations arising from one contract collateral matters follow the main matter, the court derives priority of the claims for payment asserted by the plaintiff over the claim for determination. Because the plaintiff at the time

of the conclusion of the contract had his usual place of residence in Germany, German law is applicable in the case at issue. Pursuant to section 269 subsec. (1) of the German Civil Code (*Bürgerliches Gesetzbuch*), the place of performance of the determinative claims for payment is the place where the debtor has his domicile at the time the debt arose, which in this case is the defendant's headquarters in Switzerland.

In this respect the Federal Labour Court also expressly adhered to the case law of the European Court of Justice, in this case to Article 5(1) 1st half-sentence of the Brussels Convention.

bb) In its judgment of 14 June 2004 (No. 2005/42) the Supreme Court of Norway (*Høyesterett*) addressed the question of which jurisdiction is available under the Lugano Convention when claims for damage compensation are brought based on a breach of an exclusive marketing agreement that relates to the entire territory of a contracting state.

The judgment is based on the following set of facts:

A Finnish company concluded an exclusive marketing agreement with a Norwegian company. In accordance therewith the Norwegian company had the exclusive right to market agricultural machinery of the Finnish company in Norway. In the agreement the Finnish company obligated itself not to make any sales to other Norwegian traders. In breach of this obligation, the Finnish company apparently also sold agricultural machinery where the Norwegian company was located.

Thereafter the Norwegian company filed a lawsuit for damage compensation based upon breach of the exclusive marketing agreement at the court where its headquarters are located.

The Norwegian Supreme Court rejected the applicability of Article 5(1) 1st half sentence of the Lugano Convention. In its judgment the court took account not only of the case law of the ECJ, in particular here the judgment of 19 February 2002 in the matter of *Besicks v. WABAG*, but also referred to – at the suggestion of the plaintiff – the case law of EU Member States, in this case

one from the Netherlands (*Nederlandse Jurisprudentie* 1991, No. 676) and a Danish judgment (*UfR* 1991, p. 244).

The Norwegian Supreme Court presented the bases of its judgment as follows:

The obligation that is determinative regarding the place of performance is the obligation to refrain from action arising from the exclusive marketing agreement. This obligation to refrain from action relates to the entire Norwegian market and, thus, does not exist in just one location. However, the wording of Article 5(1) 1st half sentence of the Lugano Convention requires the determination of a specific place (of performance). The provision does not generally reference the courts of a state, but rather the court in one location. The provision, thus, also requires connection to a specific court location because it not only governs international jurisdiction, but also venue.

Article 5(1) 1st half sentence of the Lugano Convention also cannot be extensively interpreted as an exception provision to Article 2. Otherwise the principle in the Convention that the defendant is to be sued before the courts of his domicile could be undermined.

In the bases for its judgment the Norwegian Supreme Court expressly relied upon the case law of the ECJ on Article 5(1) of the Brussels Convention. The ECJ found the provision inapplicable when the place of performance of the obligation that is the object of the proceedings cannot be determined because the disputed contractual obligation is a geographically unlimited prohibition of competition to be performed or that would be performed at numerous locations. In such a case jurisdiction can only be determined pursuant to Article 2 (1) of the Lugano Convention (cf. ECJ of 19 February 2002, *Besicks v. WA-BAG*).

It must be noted that the facts at the basis of the ECJ judgment last mentioned differ from those at issue here in that there the obligation to refrain from action extended to a number of Member States, while the obligation to refrain from action here only related to one Member State, although to numerous possible locations within this Member State. Currently, a more comparable case is before the ECJ for interpretation. The object of the proceedings, however, is not

an obligation to refrain from action but supply obligations. The Supreme Court of Austria (*Oberster Gerichtshof*) presented the following question for interpretation to the Court of Justice in matter C-386/05:

"Is Article 5(1) (b) of Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Official Journal 2001, L 12, p. 1) to be interpreted that a seller of movable goods who has his headquarters in the territory of a Member State and agrees to supply goods to a variety of locations in this other Member State to the purchaser who has his headquarters in the territory of a different Member State can be sued by the purchaser in regard to a contract claim relating to all partial deliveries at the sole discretion of the plaintiff before the court of this place (of performance)?"

Article 5(1) and (3) of the Lugano Convention

In its judgment of 30 March 2004 (No. 2005/32), the French Supreme Court (*Cour de Cassation*) addressed the scope of Article 5(1) and (3) of the Lugano Convention in regard to claims arising from the dissolution of a commercial partnership between the parties.

The Plaintiff, a company headquartered in France, and the defendant, a company headquartered in Austria, worked together in international transportation on a contractual basis. The contract regarding the commercial partnership contained an agreement for a three month termination notice period, which was guaranteed by a contractual penalty. The Austrian company terminated the cooperation without adherence to this notice period. The French company thereafter sued in the French courts for payment of the contractual penalty and for payment of damage compensation based on unfair competition. The Tribunal de Commerce accepted international jurisdiction based on Article 5(3) of the Lugano Convention. The Supreme Court upheld this only in regard to the lawsuit for damages based on unfair competition. Regarding this, it presented the following arguments:

When claims based on contract are brought in addition to claims based on tort (claim for payment of the agreed contractual penalty), the petitioned court can only decide the matter in international jurisdiction if the prerequisites of Article

5(1) of the Lugano Convention are fulfilled. However, there is a lack of conclusive argumentation by the plaintiff for this.

The Supreme Court (France) applies ECJ case law on the relationship of Article 5(1) and (3) of the Brussels Convention to the Lugano Convention (*Kalfehlis v. Schröder*), however, without express reference thereto.

Article 5(5) of the Lugano Convention

aa) In decision dated 3 February 2003, the Court of Appeal, London, delivered a judgment on the question of interpretation of Article 5(5) of the Lugano Convention.

As to the facts: A Norwegian bank has a branch situated in London. That branch, hereafter referred to as the defendants, is morgagee of a vessel. Due to default to pay the underlying loan, the vessel was arrested in Panama upon instructions of the branch in London. This arrest caused damage to goods transported by the vessel, and the buyers, hereafter referred to as claimants, wants to sue the defendants.

The claimants argued that the arrest arose out of a London branch loan. Further it was pointed to the fact that it was the London branch that had taken the decision to arrest the vessel and also ordered the arrest, which nevertheless was performed by Panamanian lawyers.

The defendants alleged that according to article 5(5), it was not enough to establish a link with the branch in question; it was also necessary to establish a link between the dispute and the English court. In defending this position it was referred to two decisions by the ECJ, first Somafer v Saar Fern Gas AG [1978] ECR 2183 and secondly Lloyd's Register of Shipping v Society Campenon Bernard [1995] ECR I-961.

The court stated that the legal question was whether article 5(5) conferred jurisdiction to the English court.

As to the interpretation of article 5(5), the court first turned to the commentary to the Brussels Convention by Jenard specifying, "adoption of the special rule

on jurisdiction is justified by the fact that there must be a close connecting factor between the dispute and the court with jurisdiction to resolve it". Furthermore the court referred to observations by the ECJ, which echoed that proposition.

The court also briefly mentioned the rejection by the lower court of the argument by the claimants that jurisdiction could be established under article 5(3) on the ground that England was the place where the harmful event occurred. The lower court admitted that there is a connection between the decision to order arrest and the interference with the contracts of carriage that ultimately led to the damage. However, it is not a "particular close connecting factor", which is the relevant applicable criterion in order to uphold the restrictive approach to the application of article 5. This part of the judgment by the lower court is not appealed.

Regarding the two judgments by ECJ that the defendants referred to, the court stated that they were to be given their natural effect. When it comes to the Lloyd's Register case, it demonstrates that there must be a link between the branch and the dispute so as to render it natural to describe the dispute as one arising out of the activities of the branch. When the claim is in tort, the events that give rise to liability can vary widely. However, instead of going into a specific analysis of this issue, the court turned to some general observations of article 5. This article addresses specific causes of action except for paragraph 5, which is of general application.

The court then expressed its support for the conclusions of the Advocate General in the Lloyd's Register case. There the purpose of article 5(5) is seen as approximating the place where a branch carries on with business with third parties to the point of departure of the first paragraph of article 2 – regardless of where the underlying activity takes place. Subsequently, the court pointed out that the correct comparison was the connection between the dispute and London, with the connection between the dispute and Norway. That analysis led to the conclusion that the dispute arose out of the activities of the defendants' London branch. The agreement was negotiated in London, the decision to enforce the security over the vessel was taken in London and finally it was also the London branch that gave instructions to enforce the security and the power of the attorney to enable it to be done.

bb) In decision dated 2. March 2004, the Court of Appeal (Oberlandesgericht Düsseldorf) in Germany, delivered a judgment on the question of interpretation of Article 5(5) of the Lugano Convention.

As to the facts: A German company gave a loan to a Polish company. The purpose was to establish a branch in Germany. Later the loan was defaulted. Consequently the German company sued the Polish company in Germany on the ground that the Polish company had a branch in Germany.

The claimant – the German company – argued that the court had jurisdiction with respect of the Polish company. The Polish company had a branch in Germany and the loan should finance the establishment of that branch.

The defendant – the Polish company – opposed this, arguing that the German court did not have jurisdiction.

The court stated that the legal question was whether article 5(5) conferred jurisdiction to the German court.

With reference to the ECJ decision in Somafer v Saar Fern Gas AG [1978] ECR 2183, the court found that the branch of the Polish company met the criteria decided on by that judgment. The court pointed out that the Polish company had decided upon the establishment of a German branch which was subordinated the Polish board of directors. The branch had also entered into contracts with German companies. That the application for registration of the branch had been withdrawn did not change that conclusion, as the business did not seize to exist in Germany. The branch was only being moved to a neighbouring city.

<u>Article 6(1) of the Lugano Convention</u>

In decision dated 9 June 2004, the Swiss Supreme Court (Bundesgericht), delivered a judgment on the question of the interpretation of Article 6(1) of the Lugano Convention.

As to the facts: The customers to a Swiss tailor paid by transferring money to an invoice company owned by the tailor's wife. The couple divorced and the tailor moved to Austria. The invoice company thereafter sued the tailor as well as one customer. The lower Swiss court (Bezirksgericht Bischofszell) dismissed the claim against the customer. As regards the claim against the ex-husband, the court found that it did not have jurisdiction. The appeal court (Obergericht des Kanton Thurgau) upheld that judgment. The case was then brought before the Swiss Supreme Court (Bundesgericht).

The claimant – the invoice company – argued that the court had jurisdiction with respect of both defendants, cf. article 6(1) "more than one defendant".

The defendants – the ex-husband and one customer – argued that the Swiss court did not have jurisdiction.

The court upheld the decision to dismiss the claim against the customer. In situations where there is a dispute regarding a cession agreement between a cessionary and a cedent, it cannot under any circumstances involve the debtor.

As regards the ex-husband, the legal question is whether article 6(1) confer jurisdiction to the Swiss court. As a point of departure the court states that, as this is an exception to the basic principle of domicile in article 2, it is necessary to apply a restrictive interpretation of article 6(1). According to the court, one condition when applying article 6(1) is that there is such a connection between the claims that a joint decision is necessary in order to avoid conflicting judgments. The court further stated that it is up to the national courts to examine whether this requirement is fulfilled.

The court cannot find that such connection exists between the defendants. The claim against the customer cannot be upheld for reasons described above. Consequently, conflicting judgments against the customer and the ex-husband, cannot occur either.

It is true that this result is based on an assessment of the underlying claim against the customer. Is must nevertheless be acceptable in this case as it is

obvious that that claim cannot succeed. Due to the costs of legal procedure, it is justifiable to dismiss the claims.

c) Jurisdiction over Consumer Contracts

Article 13(3) of the Lugano Convention

In decision dated 13 October 2004, the Appeal Committee of the Supreme Court (Høyesteretts kjæremålsutvalg) in Norway, delivered a judgment on the question of interpretation of Article 13(3) – consumer contracts – of the Lugano Convention.

As to the facts: A consumer domiciled in Oslo, Norway, participated in a reality show on TV about cosmetic surgery. The advertisement for participation in this TV programme was done in Norway. Except for the invitation to undergo cosmetic surgery, the ad mentioned neither the doctor nor the clinic. Prior to participation she signed two contracts, one in Oslo with the television company, and one in Malmö, Sweden with the doctor and the clinic. After the operation she filed a suit against both the doctor who performed the operation and the clinic he is working at, both seated in Malmö.

The claimant – the consumer – argue that the Norwegian court has jurisdiction with respect of the Swedish doctor and clinic.

The defendants – the doctor and the clinic – opposed this, arguing that the Norwegian court did not have jurisdiction.

The court stated that the legal question was whether article 13(3) conferred jurisdiction to the Norwegian court. Both the conditions in article 13 (3) letter a and b must be met in order to deviate from the general provision in article 2.

According to article 13(3) letter a, conclusion of the contract with the consumer must have been “preceded by a specific invitation addressed to him or by advertising” in the state of the consumer’s domicile.

The court found that the connection between the advertisement in Norway and the agreement with the Swedish clinic concerning performance of the surgery,

was so closely interrelated that the conditions in article 13(3) letter a was met. Even though the advertisement did not refer to the Swedish clinic, it was obvious that surgery was to be performed. Further, the clinic had a clear interest in this advertisement as it generated new assignments for them. The applicability of this provision is not conditional upon the defendant's own advertising.

Furthermore, it is a requirement according to article 13 (3) letter b that the consumer, in his state of domicile, has taken the steps necessary for the conclusion of the contract.

The court also found that this requirement was met. It was in Oslo that the consumer was introduced to the television program where participation also included cosmetic surgery. The contract, signed in Oslo with the television company included cosmetic surgery performed by the Swedish clinic, and the consumer committed herself to undergo this treatment. The owner of the clinic was also present in Oslo at the time of conclusion of the contract between the consumer and the broadcasting company. He examined her and informed her about the clinic. Due to his arrangement with the broadcasting company, he could offer her a discount.

The clinic argued that the owner was in Oslo only due to the contract with the broadcasting company. The owner solely performed a general assessment of the possible candidates. However, the court found that even if he weren't representing the clinic, the consumer had good reason to assume that. That a more thorough examination was needed prior to the surgery (took place in Malmö) and that the definite contract between the consumer and the clinic also was signed there did not alter the stand of the court. Neither did the fact that the examination in Oslo was only preliminary and that the consumer at that point could have withdrawn from the project if she had wanted to.

The court commented on the wording "steps necessary". Even though it primarily refers to mail orders, the wording nevertheless also covers situations like these. This interpretation was also found to be in line with the general principle of a restrictive approach to the application of provisions on special jurisdiction.

As far as the doctor is concerned, the court's assessment of the suit against the clinic, applies accordingly to the suit against him. Even if the clinic is party to the contract entered into in Sweden, the contract mentions the name of the doctor in question in the title. So, he is regarded as a party to the contract as well. Consequently, his participation in this programme, including the publicity, is such as he may be sued in Oslo on the same grounds as the clinic.

d) Exclusive Jurisdiction and Lis pendens - Related Actions

Article 16(2) and article 21 of the Lugano Convention

In decision dated 12 November 2004, the England and Wales Court of Appeal, London, delivered a judgment on the question of interpretation of Article 16(2) – exclusive jurisdiction in proceedings regarding companies – of the Lugano Convention. Further, the court also decided upon the relationship between article 16 and article 21 on lis pendens.

As to the facts:
"FOH" is seated in the UK. It is owned by SLEC which is a holding company seated in Jersey. SLEC is owned by two holding companies "Speed" and "Bambino", which are both seated in Jersey. Speed, Bambino FOH and others are all parties to an agreement called the SLEC Shareholders agreement. By clause 30, the parties submit to "the exclusive jurisdiction of the courts of Geneva Switzerland". However, it is common ground that this may be displaced, if they apply, by the exclusive jurisdiction provisions of the Judgments Regulation or the Lugano Convention.

The parties to the dispute is on one side Speed and SLEC, and on the other hand Bambino and two individuals domiciled in Switzerland (the Argands), who by Bambino were appointed to the board of directors of FOH. The dispute concerns the legality of that appointment.

The claimants – Speed and SLEC – argue that the court of England and Wales has jurisdiction according to article 16(2) of the Lugano Convention.
The defendants – Bambino and the Argands – oppose this, arguing that the court of Geneva, Switzerland has jurisdiction. Further, The Argands also ar-

gue that the Swiss court were first seized and that the English court shall stay its proceedings according to article 21 (lis pendens) of the Lugano-convention.

The appeal court agreed with the court of first instance.

The court of first instance found that the case concerned the composition of the board of directors and consequently fell clearly within article 16(2). That solution also accorded with “practical convenience, and with the reasonable expectations of those involved”. That interpretation involved some expansions of the language of the Article, since it did not strictly concern the “validity” of the constitution or, of any actual board decisions. However, the court found that determining the composition of the Board is “clearly essential for the validity of future decisions”. Further, that interpretation was found to be in line with the objective of assimilation the jurisdiction under the Convention rules to choice-of-law principles of private international law. Finally, support for that interpretation was found in Professor Jenard’s authoritative report concerning article 16(2) where he says: “It is important, in the interests of legal certainty, to avoid conflicting judgments being given as regards the existence of a company or association or as regards the validity of the decisions of its organs.” The defendants however argued in vain that the article should be given a “restrictive” interpretation.

The appeal court supported the view that the real subject matter of the dispute is the composition of the Board of directors. It is not changed by the fact the answer may require one to look beyond the strict limits of the company’s constitution, technically speaking.

As to the *stay* issue, the Argands showed that Bambino commenced proceedings in Geneva confirming the validity of their appointment, a few days before the proceedings in the UK were served on the Argands. They alleged that since the Swiss court was first seized, the UK court “shall of its own motion stay its proceedings”, according to article 21 in the Lugano convention.

The court found that article 21 on lis pendens did not apply when the second seized court had exclusive jurisdiction. The court first referred to two judgments by the European Court of Justice: Overseas Union Insurance v New Hampshire [1992] and Eric Gasser v MISAT [2004]. However, the first judgment left the question open and the second one only decided upon the rela-

tionship between article 21 and article 17 on choice of forum agreements. Nevertheless, in judicial theory this issue had been discussed, and support had been given for the view that article 21 was inapplicable in the second seized court and the latter need not therefore decline to adjudicate. Reference was given to the spirit and policy of the Convention as well as to the fact that the first seized court's judgment would not be entitled to recognition in other Contracting states. Consequently, recognition would not be required to be given to two possibly conflicting judgments. Finally, the court thought that any other solution in fact would not serve any purpose but to increase delay and expenses.

e) Prorogation of Jurisdiction

Article 17(1) of the Lugano Convention

In decision dated 16 February 2004, the Court of Appeal, Poznan, delivered a judgement on the question of interpretation of Article 17(1) of the Lugano Convention.

As to the facts: The company Exact Software Poland Sp. z o.o. in Poznan made (as a licensor) a written offer to the company Prestige S.S. in Poznan (a licensee) for the conclusion of a set of agreements in the area of using computer software. The offer contained, in addition to other terms, the following provision: "The Licensee hereby confirms that it has been acquainted with the General Terms and Conditions and undertakes to act in compliance with the aforementioned rules, unless agreed otherwise." This offer was signed by a person authorised to represent the company Exact Software Poland Sp. z o.o. and the signature was attached below the text quoted above. One of the provisions of the General Terms and Conditions to which the offer refers stipulates that "Any and all disputes arising from or in connection with the agreements shall be heard and resolved by the competent court in the Netherlands. However, if the software was acquired outside the territory of the Netherlands and the above provision is invalid pursuant to the domestic laws, any and all disputes arising from or in connection with the agreements shall be heard and resolved by the competent court of the capital city of the state where the software was acquired."

The claimant (licensee) requested in its petition that the court declare the legal relationship invalid. The defendant (licensor) objected that the case does not fall within the jurisdiction of courts in Poland. The defendant based its objection on Article 17 of the Lugano Convention and Article 1105 (5) of the Polish Civil Procedure Code and requested that the District Court in Poznan dismiss the petition. However, the District Court in Poznan did not satisfy the defendant's request and did not dismiss the petition. It stated in its judgement that the case did not contain a foreign element and, therefore, the defendant's arguments were not relevant.

The defendant filed a complaint to the Court of Appeal, Poznan, against the judgement of the District Court in Poznan on 4 September 2003 under file no. IX GC 290/03. The Court of Appeal rejected the defendant's complaint by its judgement of 16 February 2004, file no. I Acz 2601/03.

In its judgement, the Court of Appeal stated that the contents of Article 17 of the Lugano Convention did not indicate that the conclusion of an agreement on exclusion of Polish courts jurisdiction would be conditional upon the existence of the so-called foreign (international) element in the dispute. Article 17 of the Lugano Convention stipulates that if the parties of which at least one resides in the territory of a contracting state agree that a dispute arising from a certain legal relationship be resolved by a court or courts of a contracting state, then the courts of such Contracting State shall have exclusive jurisdiction. The court jurisdiction clause must be concluded in writing or in verbal form (which must be confirmed) or in another form corresponding to the customs established between both parties. Pursuant to the provisions of Article 1105 (1) of the Polish Civil Procedure Code, the parties may, within the scope of their contractual obligations, agree on writing on excluding the jurisdiction of Polish courts in favour of another country's courts, if permissible pursuant to the laws of such a country. The above provisions of the Lugano Convention and the Polish laws really do not indicate their applicability only to disputes with an international element. For this reason, the statement of the District Court in Poznan that the parties cannot refer to these provisions is incorrect.
The Court of Appeal in its judgement further stated that the agreement between the claimant and the defendant was undoubtedly concluded on the basis of an offer, but only with respect to the offer subject (provision of software,

including licence). However, an agreement containing a court jurisdiction clause in a manner stipulated in Article 17 (1) of the Lugano Convention or Article 1105 (1) of the Polish Civil Procedure Code was not concluded. The defendant proved neither the conclusion of such an agreement, nor signing by the claimant of the offer acceptance, including the General Terms and Conditions to which the offer refers. Besides, the General Terms and Conditions were formulated in a way linking the court jurisdiction to the software origin. The defendant did not prove in which state the software was acquired and whether the change of jurisdiction was effective pursuant to the laws of such state.

Finally, it must therefore be stated that the Court of Appeal, Poznan, rejected the defendant's complaint primarily because the defendant could not bear the burden of proof that the application of the provisions of Article 17 (1) of the Lugano Convention or Article 1105 (1) of the Polish Civil Procedure Code was adequate in the given dispute.

f) Lis pendens - Related Actions

Article 21 of the Lugano Convention

The Supreme Court of Austria decided by its judgement dated 28 April 2004 with respect to the issue regulated in the provisions of Article 21 of the Lugano Convention.

As to the facts: Grazyna J. (the defendant) holds execution against Mag. Stefan C. (the claimant) on the basis of the Regional Court of the City of Warsaw, Poland, dated 21 October 1997, file no. Zl XRC 463/96, with the aim to recovering receivables arising from a failure to pay the alimonies to his wife. The above judgement of the Polish court was declared enforceable in Austria on 29 January 1999.

On 10 January 2000, the claimant filed a petition with the competent Polish court for determination that the obligation to pay alimonies to his ex-wife (the defendant) stipulated by judgement dated 21 October 1997 was already extinct. The claimant further filed an opposition petition on 5 December 2002 with the District Court in Baden, requesting that the claims of his ex-wife set

forth in the aforementioned judgement of the Polish court be declared fully extinct. In the opposition petition, the claimant stated that the financial situation of the defendant had significantly improved, while the claimant's income had significantly fallen.

The defendant filed an objection of the lack of jurisdiction pursuant to Article 21 of the Lugano Convention as to the opposition petition. The first instance court satisfied the defendant's objection, declared itself incompetent to decide the case and rejected the opposition petition. It stated that the parties in both proceedings were identical and both disputes related to the same issue (determination of the ex-wife's claims as extinct). The first instance court stated that the petition with it was filed later, which was why it declared itself incompetent in favour of the Polish court to which the petition was delivered already on 10 January 2000.

The Court of Appeal confirmed the judgement of the first instance court. It based its decision on the fact that both Poland and Austria are contracting states to the Lugano Convention and stated that the objective of the petition and the reasons of the claimant's claims were identical in both proceedings and both petitions had the same objective – cancellation of the execution title. The claimant filed a protest against the judgement of the Court of Appeal dated 22 May 2003, file no. 16 R 132/03f-9, requesting a review.
The Supreme Court decided to dismiss the protest requesting a review. In its judgement, the court stated that there were no doubts regarding the need to apply the Lugano Convention in this case, which prevails over the Austrian laws. The sense of Article 21 of the Lugano Convention is to eliminate the existence of several proceedings on the same claim before courts of various Contracting States to the Convention, thus eliminating the danger of incompatible judgements that could not be consequently recognised pursuant to Article 27 (3) of the Convention.

The term "identical claim" must be interpreted independently within the context of the Lugano Convention, not pursuant to the application of domestic laws. The identity of the subject of dispute is specified if both petitions have the same basis and relate to the same issue. The claim basis includes the situation and legal regulations on which the petition is based. The Supreme Court stated in the reasoning of its judgement that the first instance court and the

Court of Appeal correctly concluded that the termination of execution against the claimant in Austria was only a consequence of the judgement proposed by the claimant in the opposition petition. However, the main objective of the opposition petition was, same as in the case of the petition filed by the claimant with the Polish court on 10 January 2000, the extinction of the claim for alimonies.

As for the reason on which the claimant based his protest, i.e. that the Supreme Court did not provide its opinion on the interpretation of the term "identical claim" in Article 21 of the Lugano Convention, the Supreme Court concluded that this was not a substantial legal issue that needs to be assessed in the given case pursuant to Austrian laws. The only decisive aspect is the independent interpretation of the subject of dispute within the context of the Convention (see above), which was why the claimant's protest against the judgement of the appeal court was dismissed.

3. Provisional, including protective, measures

Article 24 of the Lugano Convention

In decision dated 19 March 2004, the Supreme Court in the Netherlands delivered the judgement on the question of interpretation of Article 24 of the Lugano Convention.

As to the facts: The company Koninklijke Philips Electronics N.V. (hereinafter "Philips") is the holder of rights pertaining to specific European patents relating to information carriers in the form of a compact disc. These discs are also known as "recordable CDs" or CD-R. The companies Postech, Princo Tai-wan, and Princo Switzerland manufacture and trade CD-Rs. The companies Postech and Princo Tai-wan have their registered office in Tai-wan, the company Princo Switzerland has its registered office in Switzerland. Philips was of the opinion that the above foreign companies breach the European patents of which it is a holder. Based on an applicable EU Regulation on piracy, it applied with the Dutch customs authorities to inform it of the occurrence of CD-R shipments sent from Tai-wan by the companies Postech c.s. and Princo Tai-wan. The Dutch customs authorities identified in total six such shipments and informed of them the company Philips that restrained them upon a court order.

Subsequently, Philips invited Postech and 7 other companies to participate in summary proceedings before the Court in s'Gravenhage. It requested that Postech be prohibited from violating the patent rights of Philips and that the court order Postech to withdraw its CD-Rs and ensure their liquidation. In its judgement dated 11 January 2001, the Court in s'Gravenhage confirmed the requested measures against Postech.

Postech filed an appeal against the judgement in which it objected in particular the lack of the international jurisdiction of the Dutch court. The Court of Appeal in s'Gravenhage cancelled the disputed first instance judgement and resolved the case following complex evidence proceedings by prohibiting the company Postech and each of its members individually from violating the rights of Philips in the Netherlands subject to financial sanctions only.

Philips filed a protest (cassation) against this judgement, as the judgement did not grant it a sufficient protection of its intellectual property.

The Supreme Court in its judgement dated 19 March 2004, file no. C02/110 HR, cancelled the judgment of the Court of Appeal in s'Gravenhage of 1 October 2001 and returned the case to this court for new hearing and resolution. The Supreme Court concluded that the Court of Appeal in s'Gravenhage incorrectly assessed its jurisdiction with respect to foreign companies. If a Dutch judge is entitled, pursuant to any rules of the international law, to review a request relating to violation of intellectual property rights in another country, the judge may, if necessary, prohibit unlawful activities carried out abroad. There is no reason for adopting a restriction specified in the judgement of the EC Court of Justice dated 21 May 1980 in the case of Denilauer/ Couchet Fréres in the cases falling outside the formal area of applicability of the EEX or EVEX Treaty. The objective of the Regulation on piracy in EU with respect to Article 8 (1) and point 11 of the Preamble is to enable that the goods violating the intellectual property rights be liquidated without any damage compensation.

4. Recognition and Enforcement

Article 27 (3) of the Lugano Convention

In decision dated 27 May 2004, the Svea Court of Appeal (Svea hovrätt) delivered the judgement on the question of interpretation of Article 27 (3) of the Lugano Convention.

As to the facts: L.N. and C.N. entered into marriage in 1965. On 5 April 1993 a French court decided on their separation. This judgement approved a final agreement between the spouses that stated, among other things, that L.N. undertook to pay alimonies to C.N. amounting to FRF 10,000 to be indexed pursuant to a certain index. The judgement further states that the spouses were instructed of the fact that the judgement may only be transformed from separation to divorce on the basis of their joint proposal. The spouses undertook that this joint proposal would be submitted for decision pursuant to the French laws, unless they agree otherwise.

In 1997, L.N. filed a proposal for the marriage divorce with the District Court in Stockholm. This court passed a partial judgement on the marriage divorce on 9 January 1998. In the proceedings before this court C.N. requested that the District Court in Stockholm confirm the part of the above mentioned French judgement regarding the alimonies since 8 September 1998 and that L.N. be obliged to pay her alimonies amounting to FRF 10,000 as of this date. The District Court in Stockholm dismissed the requests of C.N. in its final judgement dated 13 November 2002. In the reasoning of its judgement it stated that pursuant to the Lugano Convention, the recognition of a French court judgement in Sweden was conditional upon its review by the Court of Appeal. If it is found possible to recognise the French judgement in Sweden in its part relating to the alimonies, there will be an obstacle of a decided case (res iudicata).
The Court of Appeal (as the first instance body) declared in its judgement dated 7 July 2003, on the proposal of C.N., that the above mentioned French judgement in its part relating to the alimonies was exercisable in Sweden. L.N. filed an appeal against this judgement. In the appeal, he stated that the proposal of C.N. should be dismissed pursuant to Article 34 (2) and Article 27 (3) of the Lugano Convention. He performed his alimental obligation towards C.N. until the effectiveness of the Swedish judgement on the divorce. The proposal for declaration of the French judgement on alimonies of 1993 was filed by C.N. only after the issuance of the Swedish court judgement on the divorce. In the opinion of L.N., both judgements were incompatible, because the French

judgement was based on a situation when the marriage is not divorced, i.e. its legal existence continues.

C.N. stated with respect to the appeal filed by L.N. that she insisted on the declaration of the French judgement on alimonies of 1993. She considers the judgement compatible with the judgement of the Swedish court on the divorce. Separation of husband and wife pursuant to French laws means that their common life is terminated once for all, which allows for the decision of alimonies. The Swedish laws also grant the wife the right to alimonies, which means that both judgements are not incompatible, but supplementary to each other.

The Svea Court of Appeal decided by the judgement of its appeal body of 27 May 2004, file no. Ö 6034-03, on dismissing the proposal of C.N. for the declaration of the French judgement as exercisable. It explained its judgement by stating that the Court of Appeal (its first instance body) cannot be reviewed pursuant to Article 34 of the Lugano Convention. The proposal for its recognition may only be dismissed for one of the reasons set forth in Article 27 and 28. For this reason, the Court of Appeal dismissed the proposal of L.N. for rejecting the declaration of the French judgement on alimonies as exercisable in Sweden.

At the same time, the Court of Appeal (its appeal body) decided in its judgement dated 27 May 2004 to change the judgement on its first instance body so that the proposal of C.N. for declaration of the French judgement on alimonies be dismissed. In the reasoning of its judgement, it pointed out the incompatibility of both decisions. The French judgement presumed continued existence of the marriage of C.N. and L.N., the husband and wife were released from the obligation to live together, but their obligation to take care of each other still existed (Bell m. fl. Principles of French Law, Oxford University Press, 1998, page 266). The Swedish judgement is incompatible with the French judgement, because it divorces the marriage of C.N. and L.N., which means the marriage termination. When evaluating both judgements with respect to their compatibility or incompatibility, the Court of Appeal (its appeal body) took into consideration a similar judgement of the EC Court dated 4 February 1988, file no. 145/86, in the case of Hofmann / Krieg. In this case, the EC Court decided that the German judgement on alimonies for the separated wife was in-

compatible with the Dutch judgement on divorce. It is obvious that the proceedings on the proposal of C.N: before the Court of Appeal met the criteria for the rejection of its non-recognition pursuant to Article 27 (3) of the Lugano Convention.

Article 40 of the Lugano Convention

In decision dated 14 July 2004, the Supreme Court in Poland delivered the judgement on the question of interpretation of Article 40 of the Lugano Convention.

As to the facts: The creditor ERMEWA S.A. in Geneva filed a proposal with the Regional Court in Białymstok for the eenforcement of a judgement *in contumatiam* issued on 1 February 2002 by the first instance Court of the republic and canton of Geneva, under which the debtor Mirosław S. was to pay financial amounts in EUR at the amounts set forth in articles 1 – 28 of the judgement.

The Regional Court in Białymstok found out that the Court in Geneva summoned the parties for the hearing to be held on 17 January 2002. The summons were to be delivered to the defendant, Mirosław S., through the chairperson of the District Court in Białymstok on 2 November 2000, pursuant to Article 5 a) of the Hague Convention. The defendant did not accept the summons letter within the prescribed period after its deposition on the post office. The judgement *in contiumatiam* issued by the Court in Geneva was delivered to the defendant, Mirosław S., in the same manner, the letter with the judgement not collected at the post office was filed as delivered.

The Regional Court in Białymstok concluded that the first notice delivery was incorrect, because the notice should have been delivered to the defendant in person. The substitute delivery, i.e. the notice deposition with the effect of delivery, is only permissible in the case of further notices and after the addressee has been informed of procedural consequences of such a delivery. Due to the first incorrect delivery of the notice to Mirosław S., the Regional Court in Białymstok dismissed the proposal of the creditor ERMEWA S.A. for the enforcement of the judgement *in contiumatiam.*

By its decision of 9 June 2003, Court of Appeal in Białymstok changed the judgement of the Regional Court in Białymstok and permitted the enforcement of the judgement against the debtor, Mirosław S. It disagreed with the legal opinion of the District Court and referred to the provisions of Article 139 of the Polish Civil Procedure Code that allows delivery of notices by means of their depositing at a post office or a municipal authority. A notice of such delivery must be inserted into the addressee's mailbox or posted on the door. The debtor filed a protest against the judgement of the Court of Appeal and objected against a breach of specific provisions of the Polish Civil Procedure Code, as well as a breach of Articles 40 (2), Article 34 (2) and 27 (2) of the Lugano Convention.

The Supreme Court cancelled the above mentioned judgement of the Regional Court by its judgement dated 14 June 2004, file no. IV CK 495/03. It stated that it undoubtedly possible to apply the provisions of the Lugano Convention to this case, as both Poland and Switzerland were parties to the Convention. It pointed out that Article 40 of the Lugano Convention did not stipulate a time period for filing an appeal against a judgement on dismissal of the creditor's proposal for the judgement execution. This time period must be determined in compliance with the domestic laws of the country in which the judgement execution is being requested. The appeal must be filed with a court set out in Article 40 of the Lugano Convention, i.e. with a court that will decide on the appeal.

In the given case, the appeal should have been filed within one week of delivery of the judgement of the Regional Court in Białymstok to the creditor and the debtor. The appeal should have been filed with the court that decides on it pursuant to Article 40 of the Lugano Convention, i.e. the Appeal Court. The creditor filed the appeal after the expiry of the one-week period set forth in Article 394 (2) of the Polish Civil Procedure Code with the Regional Court in Białymstok, not with the Appeal Court in Białymstok. For this reason, the Supreme Court cancelled the decision of the Appeal Court challenged by the protest (cassation). At the same time, it stated that the creditor's appeal against the judgement of the Regional Court in Białymstok dated 28 March 2003 was dismissed for the same reasons.

III. Final considerations

The rulings of national courts on the Lugano Convention during the reporting period confirm a tendency already observed in the past several years: The national courts are not only well aware of the case law of the European Court of Justice regarding the parallel provisions of the Brussels Convention and the Brussels I Regulation; indeed, they expressly take it into consideration with the goal of ensuring the uniform interpretation of the provisions of the two parallel conventions.

This is shown not only by the numerous references to ECJ decisions in solving already-familiar problems. The national courts also use the statements of the ECJ, and to some extent those of the parties as well, in the search for solutions to new problems (cf. Court of Appeal, United Kingdom, No. 2005/37). Continuing the ECJ's approach, they seek answers to legal questions that have thus far not been submitted for decision to the ECJ.

In contrast, only in isolated cases were the rulings of the courts of the EU Member States considered as well, consistent with Protocol no. 2 to the Lugano Convention (cf. HØyesterett, Norway, no. 2005/42). In that case as well, this occurred only on the initiative of one of the parties to the proceedings.

Finally, it should be emphasised that the limits of the binding nature of ECJ case law on the courts with regard to the Brussels parallel convention in the scope of the Lugano Convention are being increasingly addressed and placed in more precise terms (cf. Federal Court, Switzerland, no. 2005/23).

[Final Act of the Twentieth Session]

CONVENTION ON CHOICE OF COURT AGREEMENTS
(Concluded 30 June 2005)

The States Parties to the present Convention,
Desiring to promote international trade and investment through enhanced judicial co-operation,
Believing that such co-operation can be enhanced by uniform rules on jurisdiction and on recognition and enforcement of foreign judgments in civil or commercial matters,
Believing that such enhanced co-operation requires in particular an international legal regime that provides certainty and ensures the effectiveness of exclusive choice of court agreements between parties to commercial transactions and that governs the recognition and enforcement of judgments resulting from proceedings based on such agreements,
Have resolved to conclude this Convention and have agreed upon the following provisions -

CHAPTER I – SCOPE AND DEFINITIONS

Article 1 Scope
1. This Convention shall apply in international cases to exclusive choice of court agreements concluded in civil or commercial matters.
2. For the purposes of Chapter II, a case is international unless the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State.
3. For the purposes of Chapter III, a case is international where recognition or enforcement of a foreign judgment is sought.

Article 2 Exclusions from scope
1. This Convention shall not apply to exclusive choice of court agreements -

a) to which a natural person acting primarily for personal, family or household purposes (a consumer) is a party;
b) relating to contracts of employment, including collective agreements.
2. This Convention shall not apply to the following matters -

a) the status and legal capacity of natural persons;
b) maintenance obligations;
c) other family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships;
d) wills and succession;
e) insolvency, composition and analogous matters;
f) the carriage of passengers and goods;
g) marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage;
h) anti-trust (competition) matters;
i) liability for nuclear damage;
j) claims for personal injury brought by or on behalf of natural persons;

k) tort or delict claims for damage to tangible property that do not arise from a contractual relationship;
l) rights in rem in immovable property, and tenancies of immovable property;
m) the validity, nullity, or dissolution of legal persons, and the validity of decisions of their organs;
n) the validity of intellectual property rights other than copyright and related rights;
o) infringement of intellectual property rights other than copyright and related rights, except where infringement proceedings are brought for breach of a contract between the parties relating to such rights, or could have been brought for breach of that contract;
p) the validity of entries in public registers.
3. Notwithstanding paragraph 2, proceedings are not excluded from the scope of this Convention where a matter excluded under that paragraph arises merely as a preliminary question and not as an object of the proceedings. In particular, the mere fact that a matter excluded under paragraph 2 arises by way of defence does not exclude proceedings from the Convention, if that matter is not an object of the proceedings.
4. This Convention shall not apply to arbitration and related proceedings.
5. Proceedings are not excluded from the scope of this Convention by the mere fact that a State, including a government, a governmental agency or any person acting for a State, is a party thereto.
6. Nothing in this Convention shall affect privileges and immunities of States or of international organisations, in respect of themselves and of their property.

Article 3 Exclusive choice of court agreements
For the purposes of this Convention -

a) "exclusive choice of court agreement" means an agreement concluded by two or more parties that meets the requirements of paragraph c) and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts;
b) a choice of court agreement which designates the courts of one Contracting State or one or more specific courts of one Contracting State shall be deemed to be exclusive unless the parties have expressly provided otherwise;
c) an exclusive choice of court agreement must be concluded or documented -

i) in writing; or
ii) by any other means of communication which renders information accessible so as to be usable for subsequent reference;
d) an exclusive choice of court agreement that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. The validity of the exclusive choice of court agreement cannot be contested solely on the ground that the contract is not valid.

Article 4 Other definitions
1. In this Convention, "judgment" means any decision on the merits given by a court, whatever it may be called, including a decree or order, and a determination of costs or expenses by the court (including an officer of the court), provided that the determination relates to a decision on the merits which may be recognised or enforced under this Convention. An interim measure of protection is not a judgment.
2. For the purposes of this Convention, an entity or person other than a natural person shall be considered to be resident in the State -

a) where it has its statutory seat;
b) under whose law it was incorporated or formed;
c) where it has its central administration; or

d) where it has its principal place of business.

CHAPTER II – JURISDICTION

Article 5 Jurisdiction of the chosen court

1. The court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State.
2. A court that has jurisdiction under paragraph 1 shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State.
3. The preceding paragraphs shall not affect rules -

a) on jurisdiction related to subject matter or to the value of the claim;
b) on the internal allocation of jurisdiction among the courts of a Contracting State. However, where the chosen court has discretion as to whether to transfer a case, due consideration should be given to the choice of the parties.

Article 6 Obligations of a court not chosen

A court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies unless -

a) the agreement is null and void under the law of the State of the chosen court;
b) a party lacked the capacity to conclude the agreement under the law of the State of the court seised;
c) giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised;
d) for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed; or
e) the chosen court has decided not to hear the case.

Article 7 Interim measures of protection

Interim measures of protection are not governed by this Convention. This Convention neither requires nor precludes the grant, refusal or termination of interim measures of protection by a court of a Contracting State and does not affect whether or not a party may request or a court should grant, refuse or terminate such measures.

CHAPTER III – RECOGNITION AND ENFORCEMENT

Article 8 Recognition and enforcement

1. A judgment given by a court of a Contracting State designated in an exclusive choice of court agreement shall be recognised and enforced in other Contracting States in accordance with this Chapter. Recognition or enforcement may be refused only on the grounds specified in this Convention.
2. Without prejudice to such review as is necessary for the application of the provisions of this Chapter, there shall be no review of the merits of the judgment given by the court of origin. The court addressed shall be bound by the findings of fact on which the court of origin based its jurisdiction, unless the judgment was given by default.
3. A judgment shall be recognised only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin.

4. Recognition or enforcement may be postponed or refused if the judgment is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired. A refusal does not prevent a subsequent application for recognition or enforcement of the judgment.
5. This Article shall also apply to a judgment given by a court of a Contracting State pursuant to a transfer of the case from the chosen court in that Contracting State as permitted by Article 5, paragraph 3. However, where the chosen court had discretion as to whether to transfer the case to another court, recognition or enforcement of the judgment may be refused against a party who objected to the transfer in a timely manner in the State of origin.

Article 9 Refusal of recognition or enforcement
Recognition or enforcement may be refused if -

a) the agreement was null and void under the law of the State of the chosen court, unless the chosen court has determined that the agreement is valid;
b) a party lacked the capacity to conclude the agreement under the law of the requested State;
c) the document which instituted the proceedings or an equivalent document, including the essential elements of the claim,

i) was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant entered an appearance and presented his case without contesting notification in the court of origin, provided that the law of the State of origin permitted notification to be contested; or
ii) was notified to the defendant in the requested State in a manner that is incompatible with fundamental principles of the requested State concerning service of documents;
d) the judgment was obtained by fraud in connection with a matter of procedure;
e) recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State;
f) the judgment is inconsistent with a judgment given in the requested State in a dispute between the same parties; or
g) the judgment is inconsistent with an earlier judgment given in another State between the same parties on the same cause of action, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested State.

Article 10 Preliminary questions
1. Where a matter excluded under Article 2, paragraph 2, or under Article 21, arose as a preliminary question, the ruling
on that question shall not be recognised or enforced under this Convention.
2. Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment was based on a ruling on a matter excluded under Article 2, paragraph 2.
3. However, in the case of a ruling on the validity of an intellectual property right other than copyright or a related right, recognition or enforcement of a judgment may be refused or postponed under the preceding paragraph only where -

a) that ruling is inconsistent with a judgment or a decision of a competent authority on that matter given in the State under the law of which the intellectual property right arose; or
b) proceedings concerning the validity of the intellectual property right are pending in that State.
4. Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment was based on a ruling on a matter excluded pursuant to a declaration made by the requested State under Article 21.

Article 11 Damages

1. Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered.
2. The court addressed shall take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings.

Article 12 Judicial settlements (transactions judiciaires)

Judicial settlements (transactions judiciaires) which a court of a Contracting State designated in an exclusive choice of court agreement has approved, or which have been concluded before that court in the course of proceedings, and which are enforceable in the same manner as a judgment in the State of origin, shall be enforced under this Convention in the same manner as a judgment.

Article 13 Documents to be produced

1. The party seeking recognition or applying for enforcement shall produce -

a) a complete and certified copy of the judgment;
b) the exclusive choice of court agreement, a certified copy thereof, or other evidence of its existence;
c) if the judgment was given by default, the original or a certified copy of a document establishing that the document which instituted the proceedings or an equivalent document was notified to the defaulting party;
d) any documents necessary to establish that the judgment has effect or, where applicable, is enforceable in the State of origin;
e) in the case referred to in Article 12, a certificate of a court of the State of origin that the judicial settlement or a part of it is enforceable in the same manner as a judgment in the State of origin.
2. If the terms of the judgment do not permit the court addressed to verify whether the conditions of this Chapter have been complied with, that court may require any necessary documents.
3. An application for recognition or enforcement may be accompanied by a document, issued by a court (including an officer of the court) of the State of origin, in the form recommended and published by the Hague Conference on Private International Law.
4. If the documents referred to in this Article are not in an official language of the requested State, they shall be accompanied by a certified translation into an official language, unless the law of the requested State provides otherwise.

Article 14 Procedure

The procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment, are governed by the law of the requested State unless this Convention provides otherwise. The court addressed shall act expeditiously.

Article 15 Severability

Recognition or enforcement of a severable part of a judgment shall be granted where recognition or enforcement of that part is applied for, or only part of the judgment is capable of being recognised or enforced under this Convention.

CHAPTER IV – GENERAL CLAUSES

Article 16 Transitional provisions
1. This Convention shall apply to exclusive choice of court agreements concluded after its entry into force for the State of the chosen court.
2. This Convention shall not apply to proceedings instituted before its entry into force for the State of the court seised.

Article17 Contracts of insurance and reinsurance
1. Proceedings under a contract of insurance or reinsurance are not excluded from the scope of this Convention on the ground that the contract of insurance or reinsurance relates to a matter to which this Convention does not apply.
2. Recognition and enforcement of a judgment in respect of liability under the terms of a contract of insurance or reinsurance may not be limited or refused on the ground that the liability under that contract includes liability to indemnify the insured or reinsured in respect of -

a) a matter to which this Convention does not apply; or
b) an award of damages to which Article 11 might apply.

Article 18 No legalisation

All documents forwarded or delivered under this Convention shall be exempt from legalisation or any analogous formality, including an Apostille.

Article 19 Declarations limiting jurisdiction
A State may declare that its courts may refuse to determine disputes to which an exclusive choice of court agreement applies if, except for the location of the chosen court, there is no connection between that State and the parties or the dispute.

Article 20 Declarations limiting recognition and enforcement
A State may declare that its courts may refuse to recognise or enforce a judgment given by a court of another Contracting State if the parties were resident in the requested State, and the relationship of the parties and all other elements relevant to the dispute, other than the location of the chosen court, were connected only with the requested State.

Article 21 Declarations with respect to specific matters
1. Where a State has a strong interest in not applying this Convention to a specific matter, that State may declare that it will not apply the Convention to that matter. The State making such a declaration shall ensure that the declaration is no broader than necessary and that the specific matter excluded is clearly and precisely defined.
2. With regard to that matter, the Convention shall not apply -

a) in the Contracting State that made the declaration;
b) in other Contracting States, where an exclusive choice of court agreement designates the courts, or one or more specific courts, of the State that made the declaration.

Article 22 Reciprocal declarations on non-exclusive choice of court agreements
1. A Contracting State may declare that its courts will recognise and enforce judgments given by courts of other

Contracting States designated in a choice of court agreement concluded by two or more parties that meets the requirements of Article 3, paragraph c), and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, a court or courts of one or more Contracting States (a non-exclusive choice of court agreement).
2. Where recognition or enforcement of a judgment given in a Contracting State that has made such a declaration is sought in another Contracting State that has made such a declaration, the judgment shall be recognised and enforced under this Convention, if -

a) the court of origin was designated in a non-exclusive choice of court agreement;
b) there exists neither a judgment given by any other court before which proceedings could be brought in accordance with the non-exclusive choice of court agreement, nor a proceeding pending between the same parties in any other such court on the same cause of action; and
c) the court of origin was the court first seised.

Article 23 Uniform interpretation
In the interpretation of this Convention, regard shall be had to its international character and to the need to promote uniformity in its application.

Article 24 Review of operation of the Convention
The Secretary General of the Hague Conference on Private International Law shall at regular intervals make arrangements for -

a) review of the operation of this Convention, including any declarations; and
b) consideration of whether any amendments to this Convention are desirable.

Article 25 Non-unified legal systems
1. In relation to a Contracting State in which two or more systems of law apply in different territorial units with regard to any matter dealt with in this Convention -

a) any reference to the law or procedure of a State shall be construed as referring, where appropriate, to the law or procedure in force in the relevant territorial unit;
b) any reference to residence in a State shall be construed as referring, where appropriate, to residence in the relevant territorial unit;
c) any reference to the court or courts of a State shall be construed as referring, where appropriate, to the court or courts in the relevant territorial unit;
d) any reference to a connection with a State shall be construed as referring, where appropriate, to a connection with the relevant territorial unit.
2. Notwithstanding the preceding paragraph, a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to apply this Convention to situations which involve solely such different territorial units.
3. A court in a territorial unit of a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to recognise or enforce a judgment from another Contracting State solely because the judgment has been recognised or enforced in another territorial unit of the same Contracting State under this Convention.
4. This Article shall not apply to a Regional Economic Integration Organisation.

Article 26 Relationship with other international instruments

1. This Convention shall be interpreted so far as possible to be compatible with other treaties in force for Contracting States, whether concluded before or after this Convention.
2. This Convention shall not affect the application by a Contracting State of a treaty, whether concluded before or after this Convention, in cases where none of the parties is resident in a Contracting State that is not a Party to the treaty.
3. This Convention shall not affect the application by a Contracting State of a treaty that was concluded before this Convention entered into force for that Contracting State, if applying this Convention would be inconsistent with the obligations of that Contracting State to any non-Contracting State. This paragraph shall also apply to treaties that revise or replace a treaty concluded before this Convention entered into force for that Contracting State, except to the extent that the revision or replacement creates new inconsistencies with this Convention.
4. This Convention shall not affect the application by a Contracting State of a treaty, whether concluded before or after this Convention, for the purposes of obtaining recognition or enforcement of a judgment given by a court of a Contracting State that is also a Party to that treaty. However, the judgment shall not be recognised or enforced to a lesser extent than under this Convention.
5. This Convention shall not affect the application by a Contracting State of a treaty which, in relation to a specific matter, governs jurisdiction or the recognition or enforcement of judgments, even if concluded after this Convention and even if all States concerned are Parties to this Convention. This paragraph shall apply only if the Contracting State has made a declaration in respect of the treaty under this paragraph. In the case of such a declaration, other Contracting States shall not be obliged to apply this Convention to that specific matter to the extent of any inconsistency, where an exclusive choice of court agreement designates the courts, or one or more specific courts, of the Contracting State that made the declaration.
6. This Convention shall not affect the application of the rules of a Regional Economic Integration Organisation that is a Party to this Convention, whether adopted before or after this Convention -

a) where none of the parties is resident in a Contracting State that is not a Member State of the Regional Economic Integration Organisation;
b) as concerns the recognition or enforcement of judgments as between Member States of the Regional Economic Integration Organisation.

CHAPTER V – FINAL CLAUSES

Article 27 Signature, ratification, acceptance, approval or accession

1. This Convention is open for signature by all States.
2. This Convention is subject to ratification, acceptance or approval by the signatory States.
3. This Convention is open for accession by all States.
4. Instruments of ratification, acceptance, approval or accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.

Article 28 Declarations with respect to non-unified legal systems

1. If a State has two or more territorial units in which different systems of law apply in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that the Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

2. A declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.
3. If a State makes no declaration under this Article, the Convention shall extend to all territorial units of that State.
4. This Article shall not apply to a Regional Economic Integration Organisation.

Article 29 Regional Economic Integration Organisations
1. A Regional Economic Integration Organisation which is constituted solely by sovereign States and has competence over some or all of the matters governed by this Convention may similarly sign, accept, approve or accede to this Convention. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that the Organisation has competence over matters governed by this Convention.
2. The Regional Economic Integration Organisation shall, at the time of signature, acceptance, approval or accession, notify the depositary in writing of the matters governed by this Convention in respect of which competence has been transferred to that Organisation by its Member States. The Organisation shall promptly notify the depositary in writing of any changes to its competence as specified in the most recent notice given under this paragraph.
3. For the purposes of the entry into force of this Convention, any instrument deposited by a Regional Economic Integration Organisation shall not be counted unless the Regional Economic Integration Organisation declares in accordance with Article 30 that its Member States will not be Parties to this Convention.
4. Any reference to a "Contracting State" or "State" in this Convention shall apply equally, where appropriate, to a Regional Economic Integration Organisation that is a Party to it.

Article 30 Accession by a Regional Economic Integration Organisation without its Member States
1. At the time of signature, acceptance, approval or accession, a Regional Economic Integration Organisation may declare that it exercises competence over all the matters governed by this Convention and that its Member States will not be Parties to this Convention but shall be bound by virtue of the signature, acceptance, approval or accession of the Organisation.
2. In the event that a declaration is made by a Regional Economic Integration Organisation in accordance with paragraph 1, any reference to a "Contracting State" or "State" in this Convention shall apply equally, where appropriate, to the Member States of the Organisation.

Article 31 Entry into force
1. This Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the second instrument of ratification, acceptance, approval or accession referred to in Article 27.
2. Thereafter this Convention shall enter into force -

a) for each State or Regional Economic Integration Organisation subsequently ratifying, accepting, approving or acceding to it, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance, approval or accession;
b) for a territorial unit to which this Convention has been extended in accordance with Article 28, paragraph 1, on the first day of the month following the expiration of three months after the notification of the declaration referred to in that Article.

Article 32 Declarations

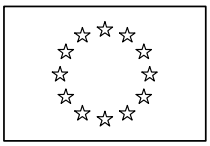
1. Declarations referred to in Articles 19, 20, 21, 22 and 26 may be made upon signature, ratification, acceptance, approval or accession or at any time thereafter, and may be modified or withdrawn at any time.
2. Declarations, modifications and withdrawals shall be notified to the depositary.
3. A declaration made at the time of signature, ratification, acceptance, approval or accession shall take effect simultaneously with the entry into force of this Convention for the State concerned.
4. A declaration made at a subsequent time, and any modification or withdrawal of a declaration, shall take effect
on the first day of the month following the expiration of three months after the date on which the notification is received by the depositary.
5. A declaration under Articles 19, 20, 21 and 26 shall not apply to exclusive choice of court agreements concluded before it takes effect.

Article 33 Denunciation
1. This Convention may be denounced by notification in writing to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which this Convention applies.
2. The denunciation shall take effect on the first day of the month following the expiration of twelve months after the date on which the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the date on which the notification is received by the depositary.

Article 34 Notifications by the depositary
The depositary shall notify the Members of the Hague Conference on Private International Law, and other States and Regional Economic Integration Organisations which have signed, ratified, accepted, approved or acceded in accordance with Articles 27, 29 and 30 of the following -

a) the signatures, ratifications, acceptances, approvals and accessions referred to in Articles 27, 29 and 30;
b) the date on which this Convention enters into force in accordance with Article 31;
c) the notifications, declarations, modifications and withdrawals of declarations referred to in Articles 19, 20, 21, 22, 26, 28, 29 and 30;
d) the denunciations referred to in Article 33.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.
Done at The Hague, on 30 June 2005, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the Member States of the Hague Conference on Private International Law as of the date of its Twentieth Session and to each State which participated in that Session.
Annex to the Convention: recommended form



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 5.9.2008
COM(2008) 538 final

Proposal for a

COUNCIL DECISION

on the signing by the European Community of the Convention on Choice-of-Court Agreements

(presented by the Commission)

{SEC(2008) 2389}
{SEC(2008) 2390}

EXPLANATORY MEMORANDUM

Objective

1. The Convention on Choice-of-Court Agreements was concluded on the 30 June 2005 under The Hague Conference on Private International Law. The Convention is designed to offer greater certainty and predictability for parties involved in business-to-business agreements and international litigation by creating an optional worldwide judicial alternative to the existing arbitration system.

2. Conclusion of the Convention by the Community would reduce legal uncertainty for EU companies trading outside the EU by ensuring that choice-of-court agreements included in their international trading contracts were respected, and by ensuring that the judgements issued by the courts designated in such agreements would be eligible for recognition in the other Contracting Parties to the Convention.

3. The European Commission negotiated the Convention on behalf of the European Community on the basis of a Council Decision, and the resulting Convention is in line with the negotiating guidelines given by the Council.

Development of a common judicial area within the Community

4. The European Community has set itself the objective of creating a genuine judicial area based on the principle of mutual recognition of judicial decisions.

5. Conclusion of the Convention by the Community would complement realisation of the aims underlying existing Community rules on recognition and enforcement of judgments, in particular Regulation (EC) 44/2001 of 22 December 2000 on the jurisdiction and recognition and enforcement of judgments in civil and commercial matters ("the Brussels I Regulation"), by creating a harmonised set of rules within the Community in respect of third countries which will become Contracting Parties to the Convention.

The 2005 Choice-of-Court Convention

6. The objective of the Convention is to promote international trade and investment through enhanced judicial cooperation by introducing uniform rules on jurisdiction based on exclusive choice-of-court agreements and on recognition and enforcement of judgments given by the chosen courts in its Contracting States. The aim of the Convention is to improve legal certainty and predictability in enforcement of decisions relating to international commerce.

7. The Convention seeks to achieve a balance between (i) the need to guarantee to the parties that only the courts chosen by them will hear the case and that the resulting judgment will be recognised and enforced abroad, and (ii) the need to allow States to pursue some aspects of their public policy related in particular to protection of weaker parties, protection against serious unfairness in particular situations and guaranteed respect for some grounds of exclusive jurisdiction of States.

8. The relationship between the rules contained in the Convention and the existing and future Community rules is set out in Article 26(6) of the Convention as follows:

"This Convention shall not affect the application of the rules of a Regional Economic Integration Organisation that is a Party to this Convention, whether adopted before or after this Convention

a) where none of the parties is resident in a Contracting State that is not a Member State of the Regional Economic Integration Organisation;

b) as concerns the recognition or enforcement of judgments as between Member States of the regional Economic Integration Organisation."

9. Consequently the Convention affects the application of the Brussels I Regulation if at least one of the parties is resident in a Contracting State to the Convention, with the exception of the rules on recognition and enforcement contained therein.

10. The Convention contains the possibility for a Regional Economic Integration Organisation to conclude the Convention together with its Member States (Article 29) or alone, with the consequence of binding its Member States (Article 30).

Commission proposals

11. According to the jurisprudence of the European Court of Justice[1], the issues of international jurisdiction and recognition and enforcement of judgments with respect to third countries come under exclusive external Community competence. Consequently, the European Community will conclude the Convention while using Article 30 thereof.

12. Article 30 of the Convention allows the European Community to make a declaration, at the time of signing, acceptance, approval or accession, saying that it exercises competence over all the matters governed by the Convention and that its Member States will not be Parties to the Convention, but shall be bound by it. In view of the political importance to third countries of the Community signing the Convention, it is advisable to make such a declaration at the time of signing to clarify the situation as to the lack of signatures by those Member States of the European Community which have transferred competence to the European Community.

13. The Commission has prepared an Impact Assessment on conclusion of the Convention by the European Community which is annexed to this proposal. The Impact Assessment concludes that conclusion of the Convention may be beneficial to promoting legal certainty and predictability for European businesses in respect of third countries.

14. The Impact Assessment also indicates that it might be necessary for the Community to make a declaration under Article 21 of the Convention and thereby exclude from the scope of the Convention matters relating to insurance contracts where the policyholder is domiciled in the EU and the risk or insured event, item or property is related exclusively to the EU and copyright and related rights where the validity of these rights is linked to a Member State.

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[1] Judgment of the Court of 31 March 1971, Case 22-70, Commission v Council — European Agreement on Road Transport, Opinion 1/03 of the Court of 7 February 2006 on the competence of the Community to conclude the new Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.

15. Declarations under Article 21 of the Convention can be made at any time. It is suggested that such declarations be made at the time of conclusion of the Convention by the Community, as the feasibility and the extent of such exclusions need to be further examined. This process will also be informed by the discussions of the follow-up to the forthcoming Commission Report on application of the Brussels I Regulation.

Proposal for a

COUNCIL DECISION

on the signing by the European Community of the Convention on Choice-of-Court Agreements

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and Article 300 thereof,

Having regard to the proposal from the Commission[2],

Whereas:

(1) The Community is working towards the establishment of a common judicial area based on the principle of mutual recognition of judicial decisions.

(2) The Convention on Choice-of-Court Agreements concluded on 30 June 2005 under the Hague Conference on Private International Law, (hereinafter referred to as the Convention) makes a valuable contribution to promoting party autonomy in international commercial transactions and developing predictability of judicial solutions in such transactions.

(3) The Convention affects Community secondary legislation on jurisdiction based on choice by the parties and the recognition and enforcement of the resulting judgments, in particular Council Regulation (EC) 44/2001 of 22 December 2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[3].

(4) The Community has exclusive competence in all matters governed by the Convention.

(5) Article 30 of the Convention allows the Community to sign, accept, approve or accede to the Convention.

(6) [The United Kingdom and Ireland are taking part in the adoption and application of this Decision.]

(7) Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, is not taking part in the adoption of this Decision and is therefore not bound by it nor subject to its application,

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2 OJ C , , p. .

3 OJ L 12, 16.01.2001, p.1. Regulation as last amended by Regulation (EC) N° 1791/2006 (OJ L 363, 20.12.2006, p. 1).

HAS DECIDED AS FOLLOWS:

Article 1

Subject to a possible conclusion at a later date, the signing of the Convention on Choice-of-Court agreements concluded at The Hague on 30 June 2005 is hereby approved on behalf of the Community. The President of the Council is hereby authorised to designate the person(s) empowered to sign, on behalf of the European Community, the Convention on Choice-of-Court Agreements concluded at The Hague on 30 June 2005, subject to the conditions set out in Article 2.

The text of the Convention is attached to this Decision.

Article 2

When signing the Convention, the Community shall make the following declaration in accordance with Article 30 of the Convention:

"The European Community declares, in accordance with Article 30 of the Convention, that it exercises competence over all the matters governed by this Convention. Its Member States will not sign, ratify, accept or approve the Convention, but shall be bound by the Convention by virtue of its conclusion by the European Community.

For the purpose of this declaration, the term "European Community" does not include Denmark by virtue of Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community [and the United Kingdom and Ireland by virtue of Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and the Treaty establishing the European Community]".

Done at Brussels,

For the Council
The President
…

ANNEX

CONVENTION ON CHOICE OF COURT AGREEMENTS

The States Parties to the present Convention,

Desiring to promote international trade and investment through enhanced judicial co-operation,

Believing that such co-operation can be enhanced by uniform rules on jurisdiction and on recognition and enforcement of foreign judgments in civil or commercial matters,

Believing that such enhanced co-operation requires in particular an international legal regime that provides certainty and ensures the effectiveness of exclusive choice of court agreements between parties to commercial transactions and that governs the recognition and enforcement of judgments resulting from proceedings based on such agreements,

Have resolved to conclude this Convention and have agreed upon the following provisions -

CHAPTER I – SCOPE AND DEFINITIONS

Article 1 Scope

1. This Convention shall apply in international cases to exclusive choice of court agreements concluded in civil or commercial matters.

2. For the purposes of Chapter II, a case is international unless the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State.

3. For the purposes of Chapter III, a case is international where recognition or enforcement of a foreign judgment is sought.

Article 2 Exclusions from scope

1. This Convention shall not apply to exclusive choice of court agreements -

a) to which a natural person acting primarily for personal, family or household purposes (a consumer) is a party;

b) relating to contracts of employment, including collective agreements.

2. This Convention shall not apply to the following matters -

a) the status and legal capacity of natural persons;

b) maintenance obligations;

c) other family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships;

d) wills and succession;

e) insolvency, composition and analogous matters;

f) the carriage of passengers and goods;

g) marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage;

h) anti-trust (competition) matters;

i) liability for nuclear damage;

j) claims for personal injury brought by or on behalf of natural persons;

k) tort or delict claims for damage to tangible property that do not arise from a contractual relationship;

l) rights *in rem* in immovable property, and tenancies of immovable property;

m) the validity, nullity, or dissolution of legal persons, and the validity of decisions of their organs;

n) the validity of intellectual property rights other than copyright and related rights;

o) infringement of intellectual property rights other than copyright and related rights, except where infringement proceedings are brought for breach of a contract between the parties relating to such rights, or could have been brought for breach of that contract;

p) the validity of entries in public registers.

3. Notwithstanding paragraph 2, proceedings are not excluded from the scope of this Convention where a matter excluded under that paragraph arises merely as a preliminary question and not as an object of the proceedings. In particular, the mere fact that a matter excluded under paragraph 2 arises by way of defence does not exclude proceedings from the Convention, if that matter is not an object of the proceedings.

4. This Convention shall not apply to arbitration and related proceedings.

5. Proceedings are not excluded from the scope of this Convention by the mere fact that a State, including a government, a governmental agency or any person acting for a State, is a party thereto.

6. Nothing in this Convention shall affect privileges and immunities of States or of international organisations, in respect of themselves and of their property.

Article 3 Exclusive choice of court agreements

For the purposes of this Convention -

a) "exclusive choice of court agreement" means an agreement concluded by two or more parties that meets the requirements of paragraph *c)* and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts;

b) a choice of court agreement which designates the courts of one Contracting State or one or more specific courts of one Contracting State shall be deemed to be exclusive unless the parties have expressly provided otherwise;

c) an exclusive choice of court agreement must be concluded or documented -

i) in writing; or

ii) by any other means of communication which renders information accessible so as to be usable for subsequent reference;

d) an exclusive choice of court agreement that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. The validity of the exclusive choice of court agreement cannot be contested solely on the ground that the contract is not valid.

Article 4 Other definitions

1. In this Convention, "judgment" means any decision on the merits given by a court, whatever it may be called, including a decree or order, and a determination of costs or expenses by the court (including an officer of the court), provided that the determination relates to a decision on the merits which may be recognised or enforced under this Convention. An interim measure of protection is not a judgment.

2. For the purposes of this Convention, an entity or person other than a natural person shall be considered to be resident in the State -

a) where it has its statutory seat;

b) under whose law it was incorporated or formed;

c) where it has its central administration; or

d) where it has its principal place of business.

CHAPTER II – JURISDICTION

Article 5 Jurisdiction of the chosen court

1. The court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State.

2. A court that has jurisdiction under paragraph 1 shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State.

3. The preceding paragraphs shall not affect rules -

a) on jurisdiction related to subject matter or to the value of the claim;

b) on the internal allocation of jurisdiction among the courts of a Contracting State. However, where the chosen court has discretion as to whether to transfer a case, due consideration should be given to the choice of the parties.

Article 6 Obligations of a court not chosen

A court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies unless -

a) the agreement is null and void under the law of the State of the chosen court;

b) a party lacked the capacity to conclude the agreement under the law of the State of the court seised;

c) giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised;

d) for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed; or

e) the chosen court has decided not to hear the case.

Article 7 Interim measures of protection

Interim measures of protection are not governed by this Convention. This Convention neither requires nor precludes the grant, refusal or termination of interim measures of protection by a court of a Contracting State and does not affect whether or not a party may request or a court should grant, refuse or terminate such measures.

CHAPTER III – RECOGNITION AND ENFORCEMENT

Article 8 Recognition and enforcement

1. A judgment given by a court of a Contracting State designated in an exclusive choice of court agreement shall be recognised and enforced in other Contracting States in accordance with this Chapter. Recognition or enforcement may be refused only on the grounds specified in this Convention.

2. Without prejudice to such review as is necessary for the application of the provisions of this Chapter, there shall be no review of the merits of the judgment given by the court of origin. The court addressed shall be bound by the findings of fact on which the court of origin based its jurisdiction, unless the judgment was given by default.

3. A judgment shall be recognised only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin.

4. Recognition or enforcement may be postponed or refused if the judgment is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired. A refusal does not prevent a subsequent application for recognition or enforcement of the judgment.

5. This Article shall also apply to a judgment given by a court of a Contracting State pursuant to a transfer of the case from the chosen court in that Contracting State as permitted by Article 5, paragraph 3. However, where the chosen court had discretion as to whether to transfer the case to another court, recognition or enforcement of the judgment may be refused against a party who objected to the transfer in a timely manner in the State of origin.

Article 9 Refusal of recognition or enforcement

Recognition or enforcement may be refused if -

a) the agreement was null and void under the law of the State of the chosen court, unless the chosen court has determined that the agreement is valid;

b) a party lacked the capacity to conclude the agreement under the law of the requested State;

c) the document which instituted the proceedings or an equivalent document, including the essential elements of the claim,

i) was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant entered an appearance and presented his case without contesting notification in the court of origin, provided that the law of the State of origin permitted notification to be contested; or

ii) was notified to the defendant in the requested State in a manner that is incompatible with fundamental principles of the requested State concerning service of documents;

d) the judgment was obtained by fraud in connection with a matter of procedure;

e) recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State;

f) the judgment is inconsistent with a judgment given in the requested State in a dispute between the same parties; or

g) the judgment is inconsistent with an earlier judgment given in another State between the same parties on the same cause of action, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested State.

Article 10 Preliminary questions

1. Where a matter excluded under Article 2, paragraph 2, or under Article 21, arose as a preliminary question, the ruling on that question shall not be recognised or enforced under this Convention.

2. Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment was based on a ruling on a matter excluded under Article 2, paragraph 2.

3. However, in the case of a ruling on the validity of an intellectual property right other than copyright or a related right, recognition or enforcement of a judgment may be refused or postponed under the preceding paragraph only where -

a) that ruling is inconsistent with a judgment or a decision of a competent authority on that matter given in the State under the law of which the intellectual property right arose; or

b) proceedings concerning the validity of the intellectual property right are pending in that State.

4. Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment was based on a ruling on a matter excluded pursuant to a declaration made by the requested State under Article 21.

Article 11 Damages

1. Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered.

2. The court addressed shall take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings.

*Article 12 Judicial settlements (*transactions judiciaires*)*

Judicial settlements (*transactions judiciaires*) which a court of a Contracting State designated in an exclusive choice of court agreement has approved, or which have been concluded before that court in the course of proceedings, and which are enforceable in the same manner as a judgment in the State of origin, shall be enforced under this Convention in the same manner as a judgment.

Article 13 Documents to be produced

1. The party seeking recognition or applying for enforcement shall produce -

a) a complete and certified copy of the judgment;

b) the exclusive choice of court agreement, a certified copy thereof, or other evidence of its existence;

c) if the judgment was given by default, the original or a certified copy of a document establishing that the document which instituted the proceedings or an equivalent document was notified to the defaulting party;

d) any documents necessary to establish that the judgment has effect or, where applicable, is enforceable in the State of origin;

e) in the case referred to in Article 12, a certificate of a court of the State of origin that the judicial settlement or a part of it is enforceable in the same manner as a judgment in the State of origin.

2. If the terms of the judgment do not permit the court addressed to verify whether the conditions of this Chapter have been complied with, that court may require any necessary documents.

3. An application for recognition or enforcement may be accompanied by a document, issued by a court (including an officer of the court) of the State of origin, in the form recommended and published by the Hague Conference on Private International Law.

4. If the documents referred to in this Article are not in an official language of the requested State, they shall be accompanied by a certified translation into an official language, unless the law of the requested State provides otherwise.

Article 14 Procedure

The procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment, are governed by the law of the requested State unless this Convention provides otherwise. The court addressed shall act expeditiously.

Article 15 Severability

Recognition or enforcement of a severable part of a judgment shall be granted where recognition or enforcement of that part is applied for, or only part of the judgment is capable of being recognised or enforced under this Convention.

CHAPTER IV – GENERAL CLAUSES

Article 16 Transitional provisions

1. This Convention shall apply to exclusive choice of court agreements concluded after its entry into force for the State of the chosen court.

2. This Convention shall not apply to proceedings instituted before its entry into force for the State of the court seised.

Article17 Contracts of insurance and reinsurance

1. Proceedings under a contract of insurance or reinsurance are not excluded from the scope of this Convention on the ground that the contract of insurance or reinsurance relates to a matter to which this Convention does not apply.

2. Recognition and enforcement of a judgment in respect of liability under the terms of a contract of insurance or reinsurance may not be limited or refused on the ground that the

liability under that contract includes liability to indemnify the insured or reinsured in respect of -

a) a matter to which this Convention does not apply; or

b) an award of damages to which Article 11 might apply.

Article 18 No legalisation

All documents forwarded or delivered under this Convention shall be exempt from legalisation or any analogous formality, including an Apostille.

Article 19 Declarations limiting jurisdiction

A State may declare that its courts may refuse to determine disputes to which an exclusive choice of court agreement applies if, except for the location of the chosen court, there is no connection between that State and the parties or the dispute.

Article 20 Declarations limiting recognition and enforcement

A State may declare that its courts may refuse to recognise or enforce a judgment given by a court of another Contracting State if the parties were resident in the requested State, and the relationship of the parties and all other elements relevant to the dispute, other than the location of the chosen court, were connected only with the requested State.

Article 21 Declarations with respect to specific matters

1. Where a State has a strong interest in not applying this Convention to a specific matter, that State may declare that it will not apply the Convention to that matter. The State making such a declaration shall ensure that the declaration is no broader than necessary and that the specific matter excluded is clearly and precisely defined.

2. With regard to that matter, the Convention shall not apply -

a) in the Contracting State that made the declaration;

b) in other Contracting States, where an exclusive choice of court agreement designates the courts, or one or more specific courts, of the State that made the declaration.

Article 22 Reciprocal declarations on non-exclusive choice of court agreements

1. A Contracting State may declare that its courts will recognise and enforce judgments given by courts of other Contracting States designated in a choice of court agreement concluded by two or more parties that meets the requirements of Article 3, paragraph c), and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, a court or courts of one or more Contracting States (a non-exclusive choice of court agreement).

2. Where recognition or enforcement of a judgment given in a Contracting State that has made such a declaration is sought in another Contracting State that has made such a declaration, the judgment shall be recognised and enforced under this Convention, if -

a) the court of origin was designated in a non-exclusive choice of court agreement;

b) there exists neither a judgment given by any other court before which proceedings could be brought in accordance with the non-exclusive choice of court agreement, nor a proceeding pending between the same parties in any other such court on the same cause of action; and

c) the court of origin was the court first seised.

Article 23 Uniform interpretation

In the interpretation of this Convention, regard shall be had to its international character and to the need to promote uniformity in its application.

Article 24 Review of operation of the Convention

The Secretary General of the Hague Conference on Private International Law shall at regular intervals make arrangements for -

a) review of the operation of this Convention, including any declarations; and

b) consideration of whether any amendments to this Convention are desirable.

Article 25 Non-unified legal systems

1. In relation to a Contracting State in which two or more systems of law apply in different territorial units with regard to any matter dealt with in this Convention -

a) any reference to the law or procedure of a State shall be construed as referring, where appropriate, to the law or procedure in force in the relevant territorial unit;

b) any reference to residence in a State shall be construed as referring, where appropriate, to residence in the relevant territorial unit;

c) any reference to the court or courts of a State shall be construed as referring, where appropriate, to the court or courts in the relevant territorial unit;

d) any reference to a connection with a State shall be construed as referring, where appropriate, to a connection with the relevant territorial unit.

2. Notwithstanding the preceding paragraph, a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to apply this Convention to situations which involve solely such different territorial units.

3. A court in a territorial unit of a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to recognise or enforce a judgment from

another Contracting State solely because the judgment has been recognised or enforced in another territorial unit of the same Contracting State under this Convention.

4. This Article shall not apply to a Regional Economic Integration Organisation.

Article 26 Relationship with other international instruments

1. This Convention shall be interpreted so far as possible to be compatible with other treaties in force for Contracting States, whether concluded before or after this Convention.

2. This Convention shall not affect the application by a Contracting State of a treaty, whether concluded before or after this Convention, in cases where none of the parties is resident in a Contracting State that is not a Party to the treaty.

3. This Convention shall not affect the application by a Contracting State of a treaty that was concluded before this Convention entered into force for that Contracting State, if applying this Convention would be inconsistent with the obligations of that Contracting State to any non-Contracting State. This paragraph shall also apply to treaties that revise or replace a treaty concluded before this Convention entered into force for that Contracting State, except to the extent that the revision or replacement creates new inconsistencies with this Convention.

4. This Convention shall not affect the application by a Contracting State of a treaty, whether concluded before or after this Convention, for the purposes of obtaining recognition or enforcement of a judgment given by a court of a Contracting State that is also a Party to that treaty. However, the judgment shall not be recognised or enforced to a lesser extent than under this Convention.

5. This Convention shall not affect the application by a Contracting State of a treaty which, in relation to a specific matter, governs jurisdiction or the recognition or enforcement of judgments, even if concluded after this Convention and even if all States concerned are Parties to this Convention. This paragraph shall apply only if the Contracting State has made a declaration in respect of the treaty under this paragraph. In the case of such a declaration, other Contracting States shall not be obliged to apply this Convention to that specific matter to the extent of any inconsistency, where an exclusive choice of court agreement designates the courts, or one or more specific courts, of the Contracting State that made the declaration.

6. This Convention shall not affect the application of the rules of a Regional Economic Integration Organisation that is a Party to this Convention, whether adopted before or after this Convention -

a) where none of the parties is resident in a Contracting State that is not a Member State of the Regional Economic Integration Organisation;

b) as concerns the recognition or enforcement of judgments as between Member States of the Regional Economic Integration Organisation.

CHAPTER V – FINAL CLAUSES

Article 27 Signature, ratification, acceptance, approval or accession

1. This Convention is open for signature by all States.

2. This Convention is subject to ratification, acceptance or approval by the signatory States.

3. This Convention is open for accession by all States.

4. Instruments of ratification, acceptance, approval or accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.

Article 28 Declarations with respect to non-unified legal systems

1. If a State has two or more territorial units in which different systems of law apply in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that the Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

2. A declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.

3. If a State makes no declaration under this Article, the Convention shall extend to all territorial units of that State.

4. This Article shall not apply to a Regional Economic Integration Organisation.

Article 29 Regional Economic Integration Organisations

1. A Regional Economic Integration Organisation which is constituted solely by sovereign States and has competence over some or all of the matters governed by this Convention may similarly sign, accept, approve or accede to this Convention. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that the Organisation has competence over matters governed by this Convention.

2. The Regional Economic Integration Organisation shall, at the time of signature, acceptance, approval or accession, notify the depositary in writing of the matters governed by this Convention in respect of which competence has been transferred to that Organisation by its Member States. The Organisation shall promptly notify the depositary in writing of any changes to its competence as specified in the most recent notice given under this paragraph.

3. For the purposes of the entry into force of this Convention, any instrument deposited by a Regional Economic Integration Organisation shall not be counted unless the Regional Economic Integration Organisation declares in accordance with Article 30 that its Member States will not be Parties to this Convention.

4. Any reference to a "Contracting State" or "State" in this Convention shall apply equally, where appropriate, to a Regional Economic Integration Organisation that is a Party to it.

Article 30 Accession by a Regional Economic Integration Organisation without its Member States

1. At the time of signature, acceptance, approval or accession, a Regional Economic Integration Organisation may declare that it exercises competence over all the matters governed by this Convention and that its Member States will not be Parties to this Convention but shall be bound by virtue of the signature, acceptance, approval or accession of the Organisation.

2. In the event that a declaration is made by a Regional Economic Integration Organisation in accordance with paragraph 1, any reference to a "Contracting State" or "State" in this Convention shall apply equally, where appropriate, to the Member States of the Organisation.

Article 31 Entry into force

1. This Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the second instrument of ratification, acceptance, approval or accession referred to in Article 27.

2. Thereafter this Convention shall enter into force -

a) for each State or Regional Economic Integration Organisation subsequently ratifying, accepting, approving or acceding to it, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance, approval or accession;

b) for a territorial unit to which this Convention has been extended in accordance with Article 28, paragraph 1, on the first day of the month following the expiration of three months after the notification of the declaration referred to in that Article.

Article 32 Declarations

1. Declarations referred to in Articles 19, 20, 21, 22 and 26 may be made upon signature, ratification, acceptance, approval or accession or at any time thereafter, and may be modified or withdrawn at any time.

2. Declarations, modifications and withdrawals shall be notified to the depositary.

3. A declaration made at the time of signature, ratification, acceptance, approval or accession shall take effect simultaneously with the entry into force of this Convention for the State concerned.

4. A declaration made at a subsequent time, and any modification or withdrawal of a declaration, shall take effect on the first day of the month following the expiration of three months after the date on which the notification is received by the depositary.

5. A declaration under Articles 19, 20, 21 and 26 shall not apply to exclusive choice of court agreements concluded before it takes effect.

Article 33 Denunciation

1. This Convention may be denounced by notification in writing to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which this Convention applies.

2. The denunciation shall take effect on the first day of the month following the expiration of twelve months after the date on which the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the date on which the notification is received by the depositary.

Article 34 Notifications by the depositary

The depositary shall notify the Members of the Hague Conference on Private International Law, and other States and Regional Economic Integration Organisations which have signed, ratified, accepted, approved or acceded in accordance with Articles 27, 29 and 30 of the following -

a) the signatures, ratifications, acceptances, approvals and accessions referred to in Articles 27, 29 and 30;

b) the date on which this Convention enters into force in accordance with Article 31;

c) the notifications, declarations, modifications and withdrawals of declarations referred to in Articles 19, 20, 21, 22, 26, 28, 29 and 30;

d) the denunciations referred to in Article 33.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on 30 June 2005, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the Member States of the Hague Conference on Private International Law as of the date of its Twentieth Session and to each State which participated in that Session.

CONVENTION ON THE CHOICE OF COURT

(Concluded November 25, 1965)

The States signatory to the present Convention,
Desiring to establish common provisions on the validity and effects of agreements on the choice of court,
Have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

Article 1
In the matters to which this Convention applies and subject to the conditions which it prescribes, parties may by an agreement on the choice of court designate, for the purpose of deciding disputes which have arisen or may arise between them in connection with a specific legal relationship, either –
(1) the courts of one of the Contracting States, the particular competent court being then determined (if at all) by the internal legal system or systems of that State, or
(2) a court expressly named of one of the Contracting States, provided always that this court is competent according to the internal legal system or systems of that State.

Article 2
This Convention shall apply to agreements on the choice of court concluded in civil or commercial matters in situations having an international character.
It shall not apply to agreements on the choice of court concluded in the following matters –
(1) the status or capacity of persons or questions of family law including the personal or financial rights or obligations between parents and children or between spouses;
(2) maintenance obligations not included in sub-paragraph (1);
(3) questions of succession;
(4) questions of bankruptcy, compositions or analogous proceedings, including decisions which may result therefrom and which relate to the validity of the acts of the debtor;
(5) rights in immovable property.

Article 3
This Convention shall apply whatever the nationality of the parties.

Article 4
For the purpose of this Convention the agreement on the choice of court shall have been validly made if it is the result of the acceptance by one party of a written proposal by the other party expressly designating the chosen court or courts.
The existence of such an agreement shall not be presumed from the mere failure of a party to appear in an action brought against him in the chosen court.
The agreement on the choice of court shall be void or voidable if it has been obtained by an abuse of economic power or other unfair means.

Article 5
Unless the parties have otherwise agreed only the chosen court or courts shall have jurisdiction.
The chosen court shall be free to decline jurisdiction if it has proof that a court of another Contracting State could avail itself of the provisions of Article 6(2).

Article 6

Every court other than the chosen court or courts shall decline jurisdiction except –
(1) where the choice of court made by the parties is not exclusive,
(2) where under the internal law of the State of the excluded court, the parties were unable, because of the subject-matter, to agree to exclude the jurisdiction of the courts of that State,
(3) where the agreement on the choice of court is void or voidable in the sense of Article 4,
(4) for the purpose of provisional or protective measures.

Article 7
Where, in their agreement, the parties have designated a court or the courts of a Contracting State without excluding the jurisdiction of other courts, proceedings already pending in any court thus having jurisdiction and which may result in a decision capable of being recognised in the State where the defence is pleaded, shall constitute the basis for the defence of *lis pendens*.

Article 8
Decisions given by a chosen court in the sense of this Convention in one of the Contracting States shall be recognised and enforced in the other Contracting States in accordance with the rules for the recognition and enforcement of foreign judgments in force in those States.

Article 9
Where the conditions for recognition and enforcement of a decision rendered on the basis of an agreement on the choice of court are not fulfilled in another Contracting State, the agreement shall not preclude any party from bringing a new action in the courts of that State.

Article 10
Settlements made in the chosen court in the course of proceedings there pending which are enforceable in the State of that court shall be treated in the same manner as decisions made by that court.

Article 11
This Convention shall not derogate from Conventions containing provisions on the matters governed by this Convention to which the Contracting States are, or shall become, Parties.

Article 12
Any Contracting State may reserve the right not to recognise agreements on the choice of court concluded between persons who, at the time of the conclusion of such agreements, were its nationals and had their habitual residence in its territory.

Article 13
Any Contracting State may make a reservation according to the terms of which it will treat as an internal matter the juridical relations established in its territory between, on the one hand, physical or juridical persons who are there and, on the other hand, establishments registered on local registers, even if such establishments are branches, agencies or other representatives of foreign firms in the territory in question.

Article 14
Any Contracting State may make a reservation according to the terms of which it may extend its exclusive jurisdiction to the juridical relations established in its territory between, on the one hand, physical or juridical persons who are there and on the other hand establishments registered on local registers, even if such establishments are branches, agencies or other representatives of foreign firms in the territory in question.

Article 15

Any Contracting State may reserve the right not to recognise agreements on the choice of court if the dispute has no connection with the chosen court, or if, in the circumstances, it would be seriously inconvenient for the matter to be dealt with by the chosen court.

Article 16
The present Convention shall be open for signature by the States represented at the Tenth Session of the Hague Conference on Private International Law.
It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 17
The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of Article 16.
The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

Article 18
Any State not represented at the Tenth Session of the Hague Conference on Private International Law may accede to the present Convention after it has entered into force in accordance with the first paragraph of Article 17. The instruments of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.
The Convention shall enter into force for such a State in the absence of any objection from a State, which has ratified the Convention before such deposit, notified to the Ministry of Foreign Affairs of the Netherlands within a period of six months after the date on which the said Ministry has notified it of such accession.
In the absence of any such objection, the Convention shall enter into force for the acceding State on the first day of the month following the expiration of the last of the periods referred to in the preceding paragraph.

Article 19
Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.
At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.
The Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification referred to in the preceding paragraph.

Article 20
Any State may, not later than the moment of its ratification or accession, make one or more of the reservations mentioned in Articles 12, 13, 14 and 15 of the present Convention. No other reservation shall be permitted.
Each Contracting State may also, when notifying an extension of the Convention in accordance with Article 19, make one or more of the said reservations, with its effect limited to all or some of the territories mentioned in the extension.
Each Contracting State may at any time withdraw a reservation it has made. Such a withdrawal shall be notified to the Ministry of Foreign Affairs of the Netherlands.
Such a reservation shall cease to have effect on the sixtieth day after the notification referred to in the preceding paragraph.

Article 21
The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 17, even for States which have ratified it or acceded to it subsequently.
If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.
It may be limited to certain of the territories to which the Convention applies.
The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 22
The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in Article 16, and to the States which have acceded in accordance with Article 18, of the following –
a) the signatures and ratifications referred to in Article 16;
b) the date on which the present Convention enters into force in accordance with the first paragraph of Article 17;
c) the accessions referred to in Article 18 and the dates on which they take effect;
d) the extensions referred to in Article 19 and the dates on which they take effect;
e) the reservations and withdrawals referred to in Article 20;
f) the denunciations referred to in the third paragraph of Article 21.

In witness whereof the undersigned, being duly authorised thereto, have signed the present Convention.
Done at The Hague, on the 25th day of November, 1965, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States represented at the Tenth Session of the Hague Conference on Private International Law.

41998A0716(01) Official Journal C 221 , 16/07/1998 p. 0002 - 0018 1

Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters - Declaration, annexed to the minutes of the Council, adopted during the Justice and Home Affairs Council on 28 and 29 May 1998 when drawing up the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters

ANNEX

CONVENTION drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters

THE HIGH CONTRACTING PARTIES to this Convention, Member States of the European Union,

REFERRING to the Council Act of 28 May 1998 drawing up, on the basis of Article K.3 of the Treaty on European Union, the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters,

DESIROUS of laying down rules determining the jurisdiction of Member States' courts with regard to proceedings relating to divorce, legal separation and marriage annulment,

AWARE of the importance of laying down rules of jurisdiction concerning parental responsibility over the children of both spouses on the occasion of proceedings to dissolve or loosen the marriage bond,

WISHING to ensure simplification of the formalities governing the recognition and enforcement of such judgments in the European area,

BEARING IN MIND the principles on which the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, signed in Brussels on 27 September 1968, is based,

WHEREAS Article K.3(2)(c) of the Treaty on European Union provides that conventions drawn up on the basis of Article K.3 of that Treaty may stipulate that the Court of Justice of the European Communities shall have jurisdiction to interpret their provisions, in accordance with such arrangements as they may lay down,

HAVE AGREED ON THE FOLLOWING PROVISIONS:

TITLE I SCOPE

Article 1

1. This Convention shall apply to:

(a) civil proceedings relating to divorce, legal separation or marriage annulment;

(b) civil proceedings relating to parental responsibility for the children of both spouses on the occasion of the matrimonial proceedings referred to in (a).

2. Other proceedings officially recognised in a Member State shall be regarded as equivalent to judicial proceedings. The term 'court` shall cover all the authorities with jurisdiction in these matters in the Member States.

TITLE II JURISDICTION

SECTION 1 GENERAL PROVISIONS

Article 2 Divorce, legal separation and marriage annulment

1. In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State:

(a) in whose territory:

- the spouses are habitually resident, or
- the spouses were last habitually resident, in so far as one of them still resides there, or
- the respondent is habitually resident, or
- in the event of a joint application, either of the spouses is habitually resident, or
- the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or
- the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or is 'domiciled` there;

b) of nationality of both spouses or of 'domicile of both spouses` established on a long-term settled basis.

2. Each Member State shall stipulate in a declaration made when giving the notification referred to in Article 47(2) whether it will be applying the criterion of nationality or of 'domicile` referred to in paragraph 1.

3. For the purpose of this Convention, 'domicile` shall have the same meaning as it has under the legal systems of the United Kingdom and Ireland.

Article 3 Parental responsibility

1. The Courts of a Member State exercising jurisdiction by virtue of Article 2 on an application for divorce, legal separation or marriage annulment shall have jurisdiction in a matter relating to parental responsibility over a child of both spouses where the child is habitually resident in that Member State.

2. Where the child is not habitually resident in the Member State referred to in paragraph 1, the courts of that State shall have jurisdiction in such a matter if the child is habitually resident in one of the Member States and

(a) at least one of the spouses has parental responsibility in relation to the child and,

(b) the jurisdiction of the courts has been accepted by the spouses and is in the best interests of the child.

3. The jurisdiction conferred by paragraphs 1 and 2 shall cease as soon as:

(a) the judgment allowing or refusing the application for divorce, legal separation or marriage annulment has become final, or

(b) in those cases where proceedings in relation to parental responsibility are still pending on the date referred to in (a), a judgment in these proceedings has become final, or

(c) the proceedings referred to in (a) and (b) have come to an end for another reason.

Article 4 Child abduction

The courts with jurisdiction within the meaning of Article 3 shall exercise their jurisdiction in conformity with the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, and in particular Articles 3 and 16 thereof.

Article 5 Counterclaim

The court in which proceedings are pending on the basis of Articles 2 to 4 shall also have jurisdiction to examine a counterclaim, in so far as the latter comes within the scope of this Convention.

Article 6 Conversion of legal separation into divorce

Without prejudice to Article 2, a court of a Member State which has given a judgment on a legal separation shall also have jurisdiction for converting that judgment into a divorce, if the law of that Member State so provides.

Article 7 Exclusive nature of jurisdiction under Articles 2 to 6

A spouse who:

(a) is habitually resident in the territory of a Member State; or

(b) is a national of a Member State or who has his or her 'domicile` in the territory of a Member State within the meaning of Article 2(2),

may be sued in another Member State only in accordance with Articles 2 to 6.

Article 8 Residual jurisdiction

1. Where no court of a Member State has jurisdiction pursuant to Articles 2 to 6, jurisdiction shall be determined, in each Member State, by the laws of that State.

2. As against a respondent who is not habitually resident and is not either a national or does not have his 'domicile` within the territory of a Member State within the meaning of Article 2(2), any national of a Member State who is habitually resident within the territory of another Member State may, like the nationals of that State, avail himself of the rules of jurisdiction applicable in that State.

SECTION 2 EXAMINATION AS TO JURISDICTION AND ADMISSIBILITY

Article 9 Examination as to jurisdiction

Where a court of a Member State is seised of a case over which it has no jurisdiction under this Convention and over which a court of another Member State has jurisdiction by virtue of this Convention, it shall declare of its own motion that it has no jurisdiction.

Article 10 Examination as to admissibility

1. Where a respondent does not enter an appearance, the court with jurisdiction shall stay the proceedings so long as it is not shown that the respondent 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.

2. The provisions of Article 19 of the Convention of 26 May 1997 on the Service in the Member States of the European Union of Judicial and Extrajudicial Documents in Civil or Commercial Matters shall be applied instead of the provisions in paragraph 1 if the document instituting the proceedings had to be transmitted abroad in accordance with that Convention.

SECTION 3 LIS PENDENS AND DEPENDENT ACTIONS

Article 11

1. Where proceedings involving the same cause of action and between the same parties are brought

before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. Where proceedings for divorce, legal separation or marriage annulment not involving the same cause of action and between the same parties are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

3. Where the jurisdiction of the court first seised is established, the court second seised shall decline jurisdiction in favour of that court.

In that case, the party who brought the relevant action before the court second seised may bring that action before the court first seised.

SECTION 4 PROVISIONAL AND PROTECTIVE MEASURES

Article 12

In urgent cases, the provisions of this Convention shall not prevent the courts of a Member State from taking such provisional, including protective, measures in respect of persons or assets in that State as may be available under the law of that Member State, even if, under this Convention, the court of another Member State has jurisdiction as to the substance of the matter.

TITLE III RECOGNITION AND ENFORCEMENT

Article 13 Meaning of judgment

1. For the purposes of this Convention, 'judgment` means a divorce, legal separation or marriage annulment pronounced by a court of a Member State, as well as a judgment relating to the parental responsibility of the spouses given on the occasion of such matrimonial proceedings, whatever the judgment may be called, including a decree, order or decision.

2. The provisions of this Title shall also apply to the determination of the amount of costs and expenses of proceedings under this Convention and to the enforcement of any order concerning such costs and expenses.

3. For the purposes of implementing this Convention, documents which have been formally drawn up or registered as authentic instruments and are enforceable in one Member State and also settlements which have been approved by a court in the course of proceedings and are enforceable in the Member State in which they were concluded shall be recognised and declared enforceable under the same conditions as the judgments referred to in paragraph 1.

SECTION 1 RECOGNITION

Article 14 Recognition of a judgment

1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.

2. In particular, and without prejudice to paragraph 3, no special procedure shall be required for up-dating the civil-status records of a Member State on the basis of a judgment relating to divorce, legal separation or marriage annulment given in another Member State, and against which no further appeal lies under the law of that Member State.

3. Any interested party may, in accordance with the procedures provided for in Sections 2 and 3 of this Title, apply for a decision that the judgment be or not be recognised.

4. Where the recognition of a judgment is raised as an incidental question in a court of a Member State, that court may determine that issue.

Article 15 Grounds of non-recognition

1. A judgment relating to a divorce, legal separation or marriage annulment shall not be recognised:

(a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought;

(b) where it was given in default of appearance, if the respondent was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable the respondent to arrange for his or her defence unless it is determined that the respondent has accepted the judgment unequivocally;

(c) if it is irreconcilable with a judgment given in proceedings between the same parties in the Member State in which recognition is sought;

(d) if it is irreconcilable with an earlier judgment given in another Member State or in a non-Member State between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.

2. A judgment relating to the parental responsibility of the spouses given on the occasion of matrimonial proceedings as referred to in Article 13 shall not be recognised:

(a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought taking into account the best interests of the child;

(b) if it was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought;

(c) where it was given in default of appearance, if the person in default was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable that person to arrange for his or her defence unless it is determined that such person has accepted the judgment unequivocally;

(d) on the request of any person claiming that the judgment infringes his or her parental responsibility, if it was given without such person having been given an opportunity to be heard;

(e) if it is irreconcilable with a later judgment relating to parental responsibility given in the Member State in which recognition is sought; or

(f) if it is irreconcilable with a later judgment relating to parental responsibility given in another Member State or in the non-Member State of the habitual residence of the child provided that the later judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.

Article 16 Non-recognition and findings of fact

1. Moreover, a judgment shall not be recognised in a case provided for in Article 43.

2. In its examination of the grounds of jurisdiction in the case referred to in paragraph 1, the court applied to shall be bound by the findings of fact on which the court of the Member State of origin based its jurisdiction.

3. Without prejudice to paragraph 1, the jurisdiction of the court of the Member State of origin may not be reviewed. The test of public policy referred to in Article 15(1)(a) and (2)(a) may not be applied to the rules relating to jurisdiction set out in Articles 2 to 8.

Article 17 Differences in applicable law

The recognition of a judgment relating to a divorce, legal separation or a marriage annulment may not be refused because the law of the Member State in which such recognition is sought would not allow divorce, legal separation or marriage annulment on the same facts.

Article 18 Non-review as to substance

Under no circumstances may a judgment be reviewed as to its substance.

Article 19 Stay of proceedings

1. A court of a Member State in which recognition is sought of a judgment given in another Member State may stay the proceedings if an ordinary appeal against the judgment has been lodged.

2. A court of a Member State in which recognition is sought of a judgment given in Ireland or the United Kingdom may stay the proceedings if enforcement is suspended in the Member State of origin by reason of an appeal.

SECTION 2 ENFORCEMENT

Article 20 Enforceable judgments

1. A judgment on the exercise of parental responsibility in respect of a child of both parties given in a Member State and enforceable in that Member State shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there.

2. However, in the United Kingdom, such a judgment shall be enforced in England and Wales, in Scotland or in Northern Ireland when, on the application of any interested party, it has been registered for enforcement in that part of the United Kingdom.

Article 21 Jurisdiction of local courts

1. The application shall be submitted:

- in Belgium, to the 'Tribunal de première instance` or the 'Rechtbank van eerste aanleg` or the 'erstinstanzliche Gericht`,
- in Denmark, to the 'byret (fogedret)`,
- in the Federal Republic of Germany, to the 'Familiengericht`,
- in Greece, to the 'öïíïiåe¡o áñùôïäéêåßï`,
- in Spain, to the 'Juzgado de Primera Instancia`,
- in France, to the presiding Judge of the 'Tribunal de grande instance`,
- in Ireland, to the High Court,
- in Italy, to the 'Corte d'apello`,
- in Luxembourg, to the presiding Judge of the 'Tribunal d'arrondissement`,
- in the Netherlands, to the presiding Judge of the 'arrondissementsrechtbank`,
- in Austria, to the 'Bezirksgericht`,
- in Portugal, to the 'Tribunal de Comarca` or 'Tribunal de Família`,
- in Finland, to the 'käräjäoikeus/tingsrätt`,
- in Sweden, to the 'Svea hovrätt`,

- in the United Kingdom,

(a) in England and Wales, to the High Court of Justice;

(b) in Scotland, to the Court of Session;

(c) in Northern Ireland, to the High Court of Justice.

2. (a) The jurisdiction of local courts in relation to an application for enforcement shall be determined by reference to the place of the habitual residence of the person against whom enforcement is sought or by reference to the place of habitual residence of any child to whom the application relates;

(b) Where neither of the places referred to in (a) can be found in the Member State where enforcement is sought, the jurisdiction of local courts is determined by reference to the place of enforcement.

3. In relation to procedures referred to in Article 14(3), the jurisdiction of local courts shall be determined by the internal law of the Member State in which proceedings for recognition or non-recognition are brought.

Article 22 Procedure for enforcement

1. The procedure for making the application shall be governed by the law of the Member State in which enforcement is sought.

2. The applicant must give an address for service within the area of jurisdiction of the court applied to. However, if the law of the Member State in which enforcement is sought does not provide for the furnishing of such an address, the applicant shall appoint a representative ad litem.

3. The documents referred to in Articles 33 and 34 shall be attached to the application.

Article 23 Decision of the court

1. The court applied to shall give its decision without delay. The person against whom enforcement is sought shall not at this stage of the proceedings be entitled to make any submissions on the application.

2. The application may be refused only for one of the reasons specified in Articles 15 and 16.

3. Under no circumstances may a judgment be reviewed as to its substance.

Article 24 Notice of the decision

The appropriate officer of the court shall without delay bring to the notice of the applicant the decision given on the application in accordance with the procedure laid down by the law of the Member State in which enforcement is sought.

Article 25 Appeal against the enforcement decision

1. If enforcement is authorised, the person against whom enforcement is sought may appeal against the decision within one month of service thereof.

2. If that person is habitually resident in a Member State other than that in which the decision authorising enforcement was given, the time for appealing shall be two months and shall run from the date of service, either on him or at his residence. No extension of time may be granted on account of distance.

Article 26 Courts of appeal and means of contest

1. An appeal against the judgment authorising enforcement shall be lodged, in accordance with the rules governing procedure in contradictory matters:

- in Belgium, with the 'Tribunal de première instance` or the 'Rechtbank van eerste aanleg` or the 'erstinstanzliche Gericht`,
- in Denmark, with the 'landsret`,
- in the Federal Republic of Germany, with the 'Oberlandesgericht`,
- in Greece, with the 'Åöåôåßï`,
- in Spain, with the 'Audiencia Provincial`,
- in France, with the 'Cour d'appel`,
- in Ireland, with the High Court,
- in Italy, with the 'Corte d'appello`,
- in Luxembourg, with the 'Cour d'appel`,
- in the Netherlands, with the 'arrondissementsrechtbank`,
- in Austria, with the 'Bezirksgericht`,
- in Portugal, with the 'Tribunal da Relaçao`,
- in Finland, with the 'Hovioikeus/Hovrätt`,
- in Sweden, with the 'Svea hovrätt`,
- in the United Kingdom,

(a) in England and Wales, with the High Court of Justice;

(b) in Scotland, with the Court of Session;

(c) in Northern Ireland, with the High Court of Justice.

2. The judgment given on appeal may be contested only:

- in Belgium, Greece, Spain, France, Italy, Luxembourg and in the Netherlands by an appeal in cassation,
- in Denmark, by an appeal to the 'Højesteret`, with leave of the 'Procesbevillingsnævnet`,
- in the Federal Republic of Germany, by a 'Rechtsbeschwerde`,
- in Ireland, by an appeal on a point of law to the Supreme Court,
- in Austria, by a 'Revisionsrekurs`,
- in Portugal, by a 'recurso restrito à matéria de direito`,
- in Finland, by an appeal to 'Korkein oikeus/högsta domstolen`,
- in Sweden, by an appeal to the 'Högsta domstolen`,
- in the United Kingdom, by a single further appeal on a point of law.

Article 27 Stay of proceedings

1. The court with which the appeal is lodged may, on the application of the appellant, stay the proceedings if an ordinary appeal has been lodged against the judgment in the Member State of origin or if the time for such appeal has not yet expired. In the latter case, the court may specify the time within which an appeal is to be lodged.

2. Where the judgment was given in Ireland or the United Kingdom, any form of appeal available

in the Member State of origin shall be treated as an ordinary appeal for the purposes of paragraph 1.

Article 28 Court of appeal against a judgment refusing enforcement

1. If the application for enforcement is refused, the applicant may appeal:

- in Belgium, to the 'Cour d'appel` or the 'hof van beroep`,
- in Denmark, to the 'Landsret`,
- in the Federal Republic of Germany, to the 'Oberlandesgericht`,
- in Greece, to the 'Åöåôåßï`,
- in Spain, to the 'Audiencia Provincial`,
- in France, to the 'Cour d'appel`,
- in Ireland, to the High Court,
- in Italy, to the 'Corte d'appello`,
- in Luxembourg, to the 'Cour d'appel`,
- in the Netherlands, to the 'gerechtshof`,
- in Austria, to the 'Bezirksgericht`,
- in Portugal, to the 'Tribunal da Relaçao`,
- in Finland, to 'Hovioikeus/Hovrätten`,
- in Sweden, to the 'Svea hovrätt`,
- in the United Kingdom,

(a) in England and Wales, to the High Court of Justice;

(b) in Scotland, to the Court of Session;

(c) in Northern Ireland, to the High Court of Justice.

2. The person against whom enforcement is sought shall be summoned to appear before the appellate court. If such person fails to appear, the provisions of Article 10 shall apply.

Article 29 Contest of the appeal decision

A judgment given on appeal provided for in Article 28 may be contested only:

- in Belgium, Greece, Spain, France, Italy, Luxembourg and in the Netherlands, by an appeal in cassation,
- in Denmark, by an appeal to the 'Højesteret` with leave of the 'Procesbevillingsnævnet`,
- in the Federal Republic of Germany, by a 'Rechtsbeschwerde`,
- in Ireland, by an appeal on a point of law to the Supreme Court,
- in Austria, by a 'Revisionsrekurs`,
- in Portugal, by a 'recurso restrito à matéria de direito`,
- in Finland, by an appeal to the 'Korkein oikeus/högsta domstolen`,
- in Sweden, by an appeal to the 'Högsta Domstolen`,

- in the United Kingdom, by a single further appeal on a point of law.

Article 30 Partial enforcement

1. Where a judgment has been given in respect of several matters and enforcement cannot be authorised for all of them, the court shall authorise enforcement for one or more of them.

2. An applicant may request partial enforcement of a judgment.

Article 31 Legal aid

1. An applicant who, in the Member State of origin, has benefited from complete or partial legal aid or exemption from costs or expenses shall be entitled, in the procedures provided for in Articles 21 to 24, to benefit from the most favourable legal aid or the most extensive exemption from costs and expenses provided for by the law of the Member State addressed.

2. An applicant who requests the enforcement of a judgment given by an administrative authority in Denmark may, in the Member State addressed, be eligible for the provisions of paragraph 1 if he presents a statement from the Danish Ministry of Justice to the effect that he fulfils the economic requirements to qualify for the grant of complete or partial legal aid or exemption from costs or expenses.

Article 32 Security, bond or deposit

No security, bond or deposit, however described, shall be required of a party who in one Member State applies for enforcement of a judgment given in another Member State on the ground that he or she is a foreign national or that he or she is not 'domiciled` or habitually resident in the Member State in which enforcement is sought.

SECTION 3 COMMON PROVISIONS

Article 33 Documents

1. A party seeking or contesting recognition or applying for enforcement of a judgment shall produce:

(a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity;

(b) where appropriate, a document showing that the applicant is in receipt of legal aid in the Member State of origin.

2. In addition, in the case of a judgment given in default, the party seeking recognition or applying for enforcement shall produce:

(a) the original or certified true copy of the document which establishes that the defaulting party was served with the document instituting the proceedings or with an equivalent document; or

(b) any document indicating that the defendant has accepted the judgment unequivocally.

3. A person requiring the updating of the civil-status records of a Member State, as referred to in Article 14(2), shall also produce a document indicating that the judgment is no longer subject to a further appeal under the law of the Member State where the judgment was given.

Article 34 Other documents

A party applying for enforcement shall also produce documents of whatever nature which establish that, according to the law of the Member State of origin, the judgment is enforceable and has been served.

Article 35 Absence of documents

1. If the documents specified in Article 33(1)(b) or (2) are not produced, the court may specify

a time for their production, accept equivalent documents or, if it considers that it has sufficient information before it, dispense with their production.

2. If the Court so requires, a translation of such documents shall be furnished. The translation shall be certified by a person qualified to do so in one of the Member States.

Article 36 Legalisation or other similar formality

No legalisation or other similar formality shall be required in respect of the documents referred to in Articles 33, 34 and 35(2) or in respect of a document appointing a representative ad litem.

TITLE IV TRANSITIONAL PROVISIONS

Article 37

1. The provisions of this Convention shall apply only to legal proceedings instituted, to documents formally drawn up or registered as authentic instruments and to settlements which have been approved by a court in the course of proceedings after its entry into force in the Member State of origin and, where recognition or enforcement of a judgment or authentic instruments is sought, in the Member State addressed.

2. However, judgments given after the date of entry into force of this Convention between the Member State of origin and the Member State addressed in proceedings instituted before that date shall be recognised and enforced in accordance with the provisions of Title III if jurisdiction was founded on rules which accorded with those provided for either in Title II of this Convention or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted.

TITLE V GENERAL PROVISIONS

Article 38 Relation with other Conventions

1. Subject to the provisions of Articles 37, 40 and paragraph 2 of this Article, this Convention shall, for the Member States which are parties to it, supersede conventions existing at the time of entry into force of this Convention which have been concluded between two or more Member States and relate to matters governed by this Convention.

2. (a) At the time of the notification referred to in Article 47, Denmark, Finland and Sweden shall have the option of declaring that the Convention of 6 February 1931 between Denmark, Finland, Iceland, Norway and Sweden comprising international private law provisions on marriage, adoption and guardianship, together with the Final Protocol thereto, will apply, in whole or in part, in their mutual relations, in place of the rules of this Convention. This declaration may be withdrawn, in whole or in part, at any moment;

(b) the principle of non-discrimination on the grounds of nationality between citizens of the Union shall be respected and monitored by the Court of Justice, in accordance with the procedures laid down in the Protocol on the interpretation by the Court of Justice of this Convention;

(c) the rules of jurisdiction in any future Agreement to be concluded between the Member States referred to in (a) and which relate to matters governed by this Convention shall be in line with those laid down in this Convention;

(d) judgments handed down in any of the Nordic States which have made the declaration provided for in (a) under a forum of jurisdiction corresponding to one of those laid down in Title II of this Convention, shall be recognised and enforced in the other Member States under the rules

laid down in Title III thereof.

3. After entry into force of this Convention, Member States may not conclude or apply agreements between themselves except in order to supplement the provisions of the Convention or to facilitate application of the principles contained therein.

4. Member States shall send to the depositary of this Convention:

(a) a copy of the agreements and uniform laws implementing these agreements referred to in paragraphs 2(a) and (c) and 3;

(b) any denunciations of, or amendments to, those agreements or uniform laws.

Article 39 Relation with certain multilateral conventions

In relations between the Member States which are parties to it, this Convention shall take precedence over the following Conventions in so far as they concern matters governed by this Convention:

- the Hague Convention of 5 October 1961 concerning the Powers of Authorities and the Law Applicable in respect of the Protection of Minors,
- the Luxembourg Convention of 8 September 1967 on the Recognition of Decisions Relating to the Validity of Marriages,
- the Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations,
- the European Convention of 20 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children,
- the Hague Convention of 19 October 1996 on Jurisdiction, Applicable law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, provided that the child concerned is habitually resident in a Member State.

Article 40 Extent of effects

1. The agreements and conventions referred to in Articles 38 and 39 shall continue to have effect in relation to matters to which this Convention does not apply.

2. They shall continue to have effect in respect of judgments given and documents formally drawn up or registered as authentic before the entry into force of this Convention.

Article 41 Agreements between Member States

Without prejudice to the grounds for non-recognition provided for in Title III, judgments given pursuant to the agreements referred to in Article 38(3) shall be recognised and enforced in Member States which are not parties to those agreements provided that those judgments were given in a forum consistent with a forum provided for in Title II.

Article 42 Treaties with the Holy See

1. This Convention shall apply without prejudice to the International Treaty (Concordat) between The Holy See and the Portuguese Republic, signed at Vatican City on 7 May 1940.

2. Any decision as to the invalidity of a marriage taken under the Treaty referred to in paragraph 1 shall be recognised in the Member States on the conditions laid down in Title III of this Convention.

3. The provisions laid down in paragraphs 1 and 2 shall also apply to the following International Treaties (Concordats) with the Holy See:

- Concordato lateranense of 11 February 1929 between the Italian Republic and the Holy See, modified by the agreement, with additional Protocol signed in Rome on 18 February 1984,

- Agreement between the Holy See and the Spanish State on legal affairs of 3 January 1979.

4. Member States shall send to the depositary of this Convention:

(a) a copy of the Treaties referred to in paragraphs 1 and 3;

(b) any denunciations of or amendments to those Treaties.

Article 43 Non-recognition and non-enforcement of judgments based on Article 8

This Convention shall not prevent a Member State from assuming, in a convention on the recognition and enforcement of judgments, an obligation towards a non-Member State not to recognise a judgment given in another Member State where, in cases provided for in Article 8, the judgment could only be founded on grounds of jurisdiction other than those specified in Articles 2 to 7.

Article 44 Member States with two or more legal systems

With regard to a Member State in which two or more systems of law or sets of rules concerning matters governed by this Convention apply in different territorial units:

(a) any reference to habitual residence in that Member State shall refer to habitual residence in a territorial unit;

(b) any reference to nationality shall refer to the territorial unit designated by the law of that State;

(c) any reference to the authority of a Member State having received an application for divorce or legal separation or for marriage annulment shall refer to the authority of a territorial unit which has received such an application;

(d) any reference to the rules of the requested Member State shall refer to the rules of the territorial unit in which jurisdiction, recognition or enforcement is invoked.

TITLE VI COURT OF JUSTICE

Article 45

The Court of Justice of the European Communities shall have jurisdiction to give rulings on the interpretation of this Convention, in accordance with the provisions of the Protocol drawn up by the Council Act of 28 May 1998.

TITLE VII FINAL PROVISIONS

Article 46 Declarations and reservations

1. Without prejudice to Article 38(2) and 42, this Convention may not be subject to any reservation.

2. Notwithstanding paragraph 1, this Convention shall operate subject to the declarations made by Ireland and Italy annexed to this Convention.

3. The Member State concerned may at any moment withdraw such a declaration in whole or in part. Any such declaration shall cease to have effect 90 days after the notification to the depositary of the withdrawal.

Article 47 Adoption and entry into force

1. This Convention shall be subject to adoption by the Member States in accordance with their respective constitutional rules.

2. Member States shall notify the depositary of the completion of the constitutional rules for the adoption of this Convention.

3. This Convention and any amendment to it referred to in Article 49(2) shall enter into force 90 days after the notification referred to in paragraph 2 by the State which, being a member of the European Union at the time the Council adopts the Act drawing up this Convention, is the last to complete that formality.

4. Until this Convention enters into force, any Member State, may, when giving the notification referred to in paragraph 2 or at any later date, declare that as far as it is concerned the Convention, with the exception of Article 45, shall apply to its relations with Member States that have made the same declaration. Such declarations shall apply 90 days after the date of deposit.

Article 48 Accession

1. This Convention shall be open to accession by any State that becomes a member of the European Union.

2. The text of this Convention in the language or languages of the acceding Member State, as drawn up by the Council, shall be authentic.

3. The instruments of accession shall be deposited with the depositary.

4. This Convention shall enter into force with respect to any Member State that accedes to it 90 days after the deposit of its instrument of accession or on the date of entry into force of the Convention if it has not already entered into force at the time of expiry of the said period of 90 days.

5. Where this Convention is not in force at the time of the deposit of their instrument of accession, Article 47(4) shall apply to acceding Member States.

Article 49 Amendments

1. Amendments to this Convention may be proposed by any Member State or by the Commission. Any proposal for amendment shall be forwarded to the depositary, who shall communicate it to the Council.

2. Amendments shall be drawn up by the Council, which shall recommend their adoption by the Member States in accordance with their respective constitutional rules. Amendments thus adopted shall enter into force in accordance with Article 47(3).

3. However, at the request of the Member State concerned, the naming of the courts or means of appeal referred to in Articles 21(1), 26(1) and (2), 28(1) and 29 may be amended by decision of the Council.

Article 50 Depositary and publication

1. The Secretary-General of the Council shall act as depositary of this Convention.

2. The depositary shall publish in the Official Journal of the European Communities:

(a) the adoptions and accessions;

(b) the date on which the Convention enters into force;

(c) declarations referred to in Articles 2(2), 38(2), 46, 47(4) and 48(5), as well as the modifications or withdrawals of such declarations;

(d) amendments to this Convention referred to in Article 49(2) and (3).

En fe de lo cual los plenipotenciarios abajo firmantes suscriben el presente Convenio.

Til bekræftelse heraf har undertegnede befuldmægtigede underskrevet denne konvention.

Zu Urkund dessen haben die unterzeichneten Bevollmächtigten ihre Unterschrift unter dieses Übereinkommen gesetzt.

Oå =ßoôùoç ôùí aíùô¡ñù, ïé o=ïañÜöïíôåo =eçñåiïuoéïé ¡èåoaí ôçí o=ïañaö« ôïoo êÜôù a=ü ôçí =añïuoa ouiâaoç.

In witness whereof, the undersigned Plenipotentiaries have signed this Convention.

En foi de quoi, les plénipotentiaires soussignés ont apposé leurs signatures au bas de la présente convention.

Da fhianu sin, chuir na Lanchumhachtaigh thíos-sínithe a lamh leis an gCoinbhinsiun seo.

In fede di che i plenipotenziari sottoscritti hanno apposto le loro firme in calce alla presente convenzione.

Ten blijke waarvan de ondergetekende gevolmachtigden hun handtekening onder dit verdrag hebben gesteld.

Em fé do que, os plenipotenciarios abaixo-assinados apuseram as suas assinaturas no final da presente convençao.

Tämän vakuudeksi alla mainitut täysivaltaiset edustajat ovat allekirjoittaneet tämän yleissopimuksen.

Till bekräftelse härav har undertecknade befullmäktigade ombud undertecknat denna konvention.

Hecho en Bruselas, el veintiocho de mayo de mil novecientos noventa y ocho, en un ejemplar unico en lenguas alemana, danesa, española, finesa, francesa, griega, inglesa, irlandesa, italiana, neerlandesa, portuguesa y sueca, siendo cada uno de estos textos igualmente auténtico, que se depositara en los archivos de la Secretaría General del Consejo de la Union Europea.

Udfærdiget i Bruxelles, den otteogtyvende maj nitten hundrede og otteoghalvfems, i ét eksemplar på dansk, engelsk, finsk, fransk, græsk, irsk, italiensk, nederlandsk, portugisisk, spansk, svensk og tysk, idet hver af disse tekster har samme gyldighed; de deponeres i arkiverne i Generalsekretariatet for Rådet for Den Europæiske Union.

Geschehen zu Brüssel am achtundzwanzigsten Mai neunzehnhundertachtundneunzig in einer Urschrift in dänischer, deutscher, englischer, finnischer, französischer, griechischer, irischer, italienischer, niederländischer, portugiesischer, schwedischer und spanischer Sprache, wobei jeder Wortlaut gleichermaßen verbindlich ist; die Urschrift wird im Archiv des Generalsekretariats des Rates der Europäischen Union hinterlegt.

êaéíå oôéo Añoi¡eeåo, oôéo åßêïoé ïêô¦ öaAno eéa åííéaêüoéa åíåí«íôa ïêô¦, oå ¡ía iüíï aíôßôo=ï oôçí aaaeéê«, aaeeéê«, aåñiaíéê«, äaíéê«, åeeçíéê«, éñeaíäéê«, éo=aíéê«, éôaeéê«, ïeeaíäéê«, =ïñôïaaeéê«, oïoçäéê« êaé öéíeaíäéê« ae¦ooa. êêaoôï êåßiåíï åßíaé åißoïo aoèåíôéêü, ôï äå =ñùôüôo=ï aoôü êaôaôßèåôaé oôa añ ßa ôço Aåíéê«o Añaiiaôåßao ôïo Ooiâïoeßïo ôço Åoñù=auê«o êíùoço.

Done at Brussels on the twenty-eighth day of May in the year one thousand nine hundred and ninety-eight, in a single original, in the Danish, Dutch, English, Finnish, French, German, Greek, Irish, Italian, Portuguese, Spanish and Swedish languages, each text being equally authentic, such original being deposited in the archives of the General Secretariat of the Council of the European Union.

Fait à Bruxelles, le vingt-huit mai mil neuf cent quatre-vingt-dix-huit, en un exemplaire unique, en langues allemande, anglaise, danoise, espagnole, finnoise, française, grecque, irlandaise, italienne, néerlandaise, portugaise et suédoise, les textes établis dans chacune de ces langues faisant également foi, exemplaire qui est déposé dans les archives du secrétariat général du Conseil de l'Union européenne.

Arna dhéanamh sa Bhruiséil, ar an ochtu la is fiche de Bhealtaine sa bhliain míle naoi gcéad nocha a hocht, i scríbhinn bhunaidh amhain sa Bhéarla, sa Danmhairgis, san Fhionlainnis, sa Fhraincis, sa Ghaeilge, sa Ghearmainis, sa Ghréigis, san Iodailis, san Ollainnis, sa Phortaingéilis, sa Spainnis agus sa tSualainnis, agus comhudaras ag gach ceann de na téacsanna sin; déanfar an scríbhinn bhunaidh sin a thaisceadh i gcartlann Ardrunaíocht Chomhairle an Aontais Eorpaigh.

Fatto a Bruxelles, addi ventotto maggio millenovecentonovantotto, in unico esemplare in lingua danese, finlandese, francese, greca, inglese, irlandese, italiana, olandese, portoghese, spagnola, svedese e tedesca, ciascun testo facente ugualmente fede; l'esemplare è depositato negli archivi del Segretariato generale del Consiglio dell'Unione europea.

Gedaan te Brussel, de achtentwintigste mei negentienhonderd achtennegentig, in één exemplaar in de Deense, de Duitse, de Engelse, de Finse, de Franse, de Griekse, de Ierse, de Italiaanse, de Nederlandse, de Portugese, de Spaanse en de Zweedse taal, zijnde alle teksten gelijkelijk authentiek, dat wordt nedergelegd in het archief van het Secretariaat-generaal van de Raad van de Europese Unie.

Feito em Bruxelas, em vinte e oito de Maio de mil novecentos e noventa e oito, em exemplar unico, nas línguas alema, dinamarquesa, espanhola, finlandesa, francesa, grega, inglesa, irlandesa, italiana, neerlandesa, portuguesa e sueca, fazendo igualmente fé cada um dos textos, ficando esse exemplar depositado nos arquivos do Secretariado-Geral do Conselho da Uniao Europeia.

Tehty Brysselissä kahdentenakymmenentenäkahdeksantena päivänä toukokuuta vuonna tuhatyhdeksänsataayhdeksänkymmentäkahdeksan englannin, espanjan, hollannin, iirin, italian, kreikan, portugalin, ranskan, ruotsin, saksan, suomen ja tanskan kielellä yhtenä kappaleena, jonka jokainen teksti on yhtä todistusvoimainen ja joka talletetaan Euroopan unionin neuvoston pääsihteeristön arkistoon.

Som skedde i Bryssel den tjugoåttonde maj nittonhundranittioåtta i ett enda exemplar på danska, engelska, finska, franska, grekiska, iriska, italienska, nederländska, portugisiska, spanska, svenska och tyska språken, varvid varje text äger samma giltighet, och detta exemplar skall deponeras i arkiven hos generalsekretariatet för Europeiska unionens råd.

Pour le gouvernement du Royaume de Belgique

Voor de regering van het Koninkrijk Belgie

Für die Regierung des Königreichs Belgien

For regeringen for Kongeriget Danmark

Für die Regierung der Bundesrepublik Deutschland

Aéa ôçí êoâ¡ñíçoç ôço Åeeçíéê«o Æçiïêñaôßao

Por el Gobierno del Reino de España

Pour le gouvernement de la République française

Thar ceann Rialtas na hEireann

For the Government of Ireland

Per il governo della Repubblica italiana

Pour le gouvernement du Grand-Duché de Luxembourg

Voor de regering van het Koninkrijk der Nederlanden

Für die Regierung der Republik Osterreich

Pelo Governo da Republica Portuguesa

Suomen hallituksen puolesta

På finska regeringens vägnar

På svenska regeringens vägnar

For the Government of the United Kingdom of Great Britain and Northern Ireland

DECLARATION BY IRELAND, TO BE ANNEXED TO THE CONVENTION

Notwithstanding the provisions of this Convention, Ireland may maintain the jurisdiction which it has to refuse to recognise a divorce obtained in another Member State where that divorce has been obtained as a result of the party, or parties, deliberately misleading a court of the State in question in relation to its jurisdictional requirements such that recognition of the divorce would not be compatible with the Constitution of Ireland.

This declaration will apply for a period of five years. It will be renewable every five years.

DECLARATION, TO BE ANNEXED TO THE CONVENTION BY ANY OF THE NORDIC MEMBER STATES ENTITLED TO MAKE A DECLARATION WITHIN THE MEANING OF ARTICLE 38(2)

The application of the Convention of 6 February 1931 between Denmark, Finland, Iceland, Norway and Sweden comprising international private law provisions on marriage, adoption and guardianship, together with the Final Protocol thereto, is in line with Article K.7 of the Treaty in that the Convention does not prevent the establishment of closer cooperation between two or more Member States in so far as such cooperation does not conflict with, or impede, that provided for in the Convention.

They undertake no longer to apply Article 7(2) of the 1931 Nordic Agreement in their mutual relations and to review at an early date the rules of jurisdiction applicable in the framework of that Agreement in the light of the principle set out in Article 38(2)(b) of the Convention.

The grounds for refusal used in the context of the uniform laws are in practice applied in a manner consistent with those laid down in Title III of this Convention.

DECLARATION BY THE ITALIAN DELEGATION, TO BE ANNEXED TO THE CONVENTION

With regard to Article 42 of the Convention, Italy reserves the right, in respect of judgments by Portuguese ecclesiastical courts, to adopt the procedures and carry out the checks provided for in its own legal system in respect of similar judgments by ecclesiastical courts, on the basis of the agreements it has concluded with the Holy See.

Declaration, annexed to the minutes of the Council, adopted during the Justice and Home Affairs Council on 28 and 29 May 1998 when drawing up the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters (98/C 221/02)

The Council, conscious of the adverse effect which the length of proceedings on requests before the Court of Justice of the European Communities might have in the field of family law, stresses the need for an examination as soon as possible of possible ways of reducing the length of such proceedings; the Council proposes that this examination be carried out by the Competent body within the Council, together with the Court of Justice.

DOCNUM 41998A0716(01)

AUTHOR	REPRESENTATIVES OF THE GOVERNMENTS OF THE MEMBER STATES
FORM	CONVENTION
TREATY	European Union
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PUBREF	Official Journal C 221 , 16/07/1998 p. 0002 - 0018
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REGISTER	19200000
AUTLANG	THE OFFICIAL LANGUAGES ; GERMAN ; DANISH ; SPANISH ; ENGLISH ; FRENCH ; ITALIAN ; DUTCH ; FINNISH ; GREEK ; SWEDISH ; PORTUGUESE ; GAELIC
DEPOS	Council of the European Union-General Secretariat
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41998Y0716(01) Official Journal C 221 , 16/07/1998 p. 0001 - 0001

Council Act of 28 May 1998 drawing up, on basis of Article K.3 of the Treaty on European Union, the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters

COUNCIL ACT of 28 May 1998 drawing up, on basis of Article K.3 of the Treaty on European Union, the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters (98/C 221/01)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article K.3(2)(c) thereof,

Whereas, for the purposes of achieving the objectives of the Union, the Member States regard the laying down of rules on jurisdiction, recognition and enforcement of judgments in proceedings relating to divorce, legal separation and marriage annulment, and those relating to parental responsibility over the children of both spouses on the occasion of matrimonial proceedings, as matters of common interest falling within the scope of judicial cooperation in civil matters provided for in Title VI of the Treaty;

Having examined the views of the European Parliament (1) following the consultation conducted by the Presidency in accordance with Article K.6 of the Treaty,

HAS DECIDED that the Convention, the text of which is given in the Annex and which has been signed today by the representatives of the Governments of the Member States, is hereby drawn up,

RECOMMENDS that it be adopted by the Member States in accordance with their respective constitutional rules.

Done at Brussels, 28 May 1998.

For the Council

The President

J. STRAW

(1) Opinion delivered on 30 April 1998 (OJ C 152, 18.5.1998).

ANNEX

CONVENTION drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters

THE HIGH CONTRACTING PARTIES to this Convention, Member States of the European Union,

REFERRING to the Council Act of 28 May 1998 drawing up, on the basis of Article K.3 of the Treaty on European Union, the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters,

DESIROUS of laying down rules determining the jurisdiction of Member States' courts with regard to proceedings relating to divorce, legal separation and marriage annulment,

AWARE of the importance of laying down rules of jurisdiction concerning parental responsibility over the children of both spouses on the occasion of proceedings to dissolve or loosen the marriage bond,

WISHING to ensure simplification of the formalities governing the recognition and enforcement

of such judgments in the European area,

BEARING IN MIND the principles on which the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, signed in Brussels on 27 September 1968, is based,

WHEREAS Article K.3(2)(c) of the Treaty on European Union provides that conventions drawn up on the basis of Article K.3 of that Treaty may stipulate that the Court of Justice of the European Communities shall have jurisdiction to interpret their provisions, in accordance with such arrangements as they may lay down,

HAVE AGREED ON THE FOLLOWING PROVISIONS:

TITLE I SCOPE

Article 1

1. This Convention shall apply to:

(a) civil proceedings relating to divorce, legal separation or marriage annulment;

(b) civil proceedings relating to parental responsibility for the children of both spouses on the occasion of the matrimonial proceedings referred to in (a).

2. Other proceedings officially recognised in a Member State shall be regarded as equivalent to judicial proceedings. The term 'court` shall cover all the authorities with jurisdiction in these matters in the Member States.

TITLE II JURISDICTION

SECTION 1 GENERAL PROVISIONS

Article 2 Divorce, legal separation and marriage annulment

1. In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State:

(a) in whose territory:

- the spouses are habitually resident, or
- the spouses were last habitually resident, in so far as one of them still resides there, or
- the respondent is habitually resident, or
- in the event of a joint application, either of the spouses is habitually resident, or
- the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or
- the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or is 'domiciled` there;

b) of nationality of both spouses or of 'domicile of both spouses` established on a long-term settled basis.

2. Each Member State shall stipulate in a declaration made when giving the notification referred to in Article 47(2) whether it will be applying the criterion of nationality or of 'domicile` referred to in paragraph 1.

3. For the purpose of this Convention, 'domicile` shall have the same meaning as it has under the legal systems of the United Kingdom and Ireland.

Article 3 Parental responsibility

1. The Courts of a Member State exercising jurisdiction by virtue of Article 2 on an application for divorce, legal separation or marriage annulment shall have jurisdiction in a matter relating to parental responsibility over a child of both spouses where the child is habitually resident in that Member State.

2. Where the child is not habitually resident in the Member State referred to in paragraph 1, the courts of that State shall have jurisdiction in such a matter if the child is habitually resident in one of the Member States and

(a) at least one of the spouses has parental responsibility in relation to the child and,

(b) the jurisdiction of the courts has been accepted by the spouses and is in the best interests of the child.

3. The jurisdiction conferred by paragraphs 1 and 2 shall cease as soon as:

(a) the judgment allowing or refusing the application for divorce, legal separation or marriage annulment has become final, or

(b) in those cases where proceedings in relation to parental responsibility are still pending on the date referred to in (a), a judgment in these proceedings has become final, or

(c) the proceedings referred to in (a) and (b) have come to an end for another reason.

Article 4 Child abduction

The courts with jurisdiction within the meaning of Article 3 shall exercise their jurisdiction in conformity with the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, and in particular Articles 3 and 16 thereof.

Article 5 Counterclaim

The court in which proceedings are pending on the basis of Articles 2 to 4 shall also have jurisdiction to examine a counterclaim, in so far as the latter comes within the scope of this Convention.

Article 6 Conversion of legal separation into divorce

Without prejudice to Article 2, a court of a Member State which has given a judgment on a legal separation shall also have jurisdiction for converting that judgment into a divorce, if the law of that Member State so provides.

Article 7 Exclusive nature of jurisdiction under Articles 2 to 6

A spouse who:

(a) is habitually resident in the territory of a Member State; or

(b) is a national of a Member State or who has his or her 'domicile` in the territory of a Member State within the meaning of Article 2(2),

may be sued in another Member State only in accordance with Articles 2 to 6.

Article 8 Residual jurisdiction

1. Where no court of a Member State has jurisdiction pursuant to Articles 2 to 6, jurisdiction shall be determined, in each Member State, by the laws of that State.

2. As against a respondent who is not habitually resident and is not either a national or does not have his 'domicile` within the territory of a Member State within the meaning of Article 2(2), any national of a Member State who is habitually resident within the territory of another Member State may, like the nationals of that State, avail himself of the rules of jurisdiction applicable in that State.

SECTION 2 EXAMINATION AS TO JURISDICTION AND ADMISSIBILITY

Article 9 Examination as to jurisdiction

Where a court of a Member State is seised of a case over which it has no jurisdiction under this Convention and over which a court of another Member State has jurisdiction by virtue of this Convention, it shall declare of its own motion that it has no jurisdiction.

Article 10 Examination as to admissibility

1. Where a respondent does not enter an appearance, the court with jurisdiction shall stay the proceedings so long as it is not shown that the respondent 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.

2. The provisions of Article 19 of the Convention of 26 May 1997 on the Service in the Member States of the European Union of Judicial and Extrajudicial Documents in Civil or Commercial Matters shall be applied instead of the provisions in paragraph 1 if the document instituting the proceedings had to be transmitted abroad in accordance with that Convention.

SECTION 3 LIS PENDENS AND DEPENDENT ACTIONS

Article 11

1. Where proceedings involving the same cause of action and between the same parties are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. Where proceedings for divorce, legal separation or marriage annulment not involving the same cause of action and between the same parties are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

3. Where the jurisdiction of the court first seised is established, the court second seised shall decline jurisdiction in favour of that court.

In that case, the party who brought the relevant action before the court second seised may bring that action before the court first seised.

SECTION 4 PROVISIONAL AND PROTECTIVE MEASURES

Article 12

In urgent cases, the provisions of this Convention shall not prevent the courts of a Member State from taking such provisional, including protective, measures in respect of persons or assets in that State as may be available under the law of that Member State, even if, under this Convention,

the court of another Member State has jurisdiction as to the substance of the matter.

TITLE III RECOGNITION AND ENFORCEMENT

Article 13 Meaning of judgment

1. For the purposes of this Convention, 'judgment` means a divorce, legal separation or marriage annulment pronounced by a court of a Member State, as well as a judgment relating to the parental responsibility of the spouses given on the occasion of such matrimonial proceedings, whatever the judgment may be called, including a decree, order or decision.

2. The provisions of this Title shall also apply to the determination of the amount of costs and expenses of proceedings under this Convention and to the enforcement of any order concerning such costs and expenses.

3. For the purposes of implementing this Convention, documents which have been formally drawn up or registered as authentic instruments and are enforceable in one Member State and also settlements which have been approved by a court in the course of proceedings and are enforceable in the Member State in which they were concluded shall be recognised and declared enforceable under the same conditions as the judgments referred to in paragraph 1.

SECTION 1 RECOGNITION

Article 14 Recognition of a judgment

1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.

2. In particular, and without prejudice to paragraph 3, no special procedure shall be required for up-dating the civil-status records of a Member State on the basis of a judgment relating to divorce, legal separation or marriage annulment given in another Member State, and against which no further appeal lies under the law of that Member State.

3. Any interested party may, in accordance with the procedures provided for in Sections 2 and 3 of this Title, apply for a decision that the judgment be or not be recognised.

4. Where the recognition of a judgment is raised as an incidental question in a court of a Member State, that court may determine that issue.

Article 15 Grounds of non-recognition

1. A judgment relating to a divorce, legal separation or marriage annulment shall not be recognised:

(a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought;

(b) where it was given in default of appearance, if the respondent was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable the respondent to arrange for his or her defence unless it is determined that the respondent has accepted the judgment unequivocally;

(c) if it is irreconcilable with a judgment given in proceedings between the same parties in the Member State in which recognition is sought;

(d) if it is irreconcilable with an earlier judgment given in another Member State or in a non-Member State between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.

2. A judgment relating to the parental responsibility of the spouses given on the occasion of matrimonial

proceedings as referred to in Article 13 shall not be recognised:

(a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought taking into account the best interests of the child;

(b) if it was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought;

(c) where it was given in default of appearance, if the person in default was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable that person to arrange for his or her defence unless it is determined that such person has accepted the judgment unequivocally;

(d) on the request of any person claiming that the judgment infringes his or her parental responsibility, if it was given without such person having been given an opportunity to be heard;

(e) if it is irreconcilable with a later judgment relating to parental responsibility given in the Member State in which recognition is sought; or

(f) if it is irreconcilable with a later judgment relating to parental responsibility given in another Member State or in the non-Member State of the habitual residence of the child provided that the later judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.

Article 16 Non-recognition and findings of fact

1. Moreover, a judgment shall not be recognised in a case provided for in Article 43.

2. In its examination of the grounds of jurisdiction in the case referred to in paragraph 1, the court applied to shall be bound by the findings of fact on which the court of the Member State of origin based its jurisdiction.

3. Without prejudice to paragraph 1, the jurisdiction of the court of the Member State of origin may not be reviewed. The test of public policy referred to in Article 15(1)(a) and (2)(a) may not be applied to the rules relating to jurisdiction set out in Articles 2 to 8.

Article 17 Differences in applicable law

The recognition of a judgment relating to a divorce, legal separation or a marriage annulment may not be refused because the law of the Member State in which such recognition is sought would not allow divorce, legal separation or marriage annulment on the same facts.

Article 18 Non-review as to substance

Under no circumstances may a judgment be reviewed as to its substance.

Article 19 Stay of proceedings

1. A court of a Member State in which recognition is sought of a judgment given in another Member State may stay the proceedings if an ordinary appeal against the judgment has been lodged.

2. A court of a Member State in which recognition is sought of a judgment given in Ireland or the United Kingdom may stay the proceedings if enforcement is suspended in the Member State of origin by reason of an appeal.

SECTION 2 ENFORCEMENT

Article 20 Enforceable judgments

1. A judgment on the exercise of parental responsibility in respect of a child of both parties given in a Member State and enforceable in that Member State shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there.

2. However, in the United Kingdom, such a judgment shall be enforced in England and Wales, in Scotland or in Northern Ireland when, on the application of any interested party, it has been registered for enforcement in that part of the United Kingdom.

Article 21 Jurisdiction of local courts

1. The application shall be submitted:

- in Belgium, to the 'Tribunal de première instance` or the 'Rechtbank van eerste aanleg` or the 'erstinstanzliche Gericht`,
- in Denmark, to the 'byret (fogedret)`,
- in the Federal Republic of Germany, to the 'Familiengericht`,
- in Greece, to the 'öïíïïiåe¡o áñùôïäéêåßï`,
- in Spain, to the 'Juzgado de Primera Instancia`,
- in France, to the presiding Judge of the 'Tribunal de grande instance`,
- in Ireland, to the High Court,
- in Italy, to the 'Corte d'apello`,
- in Luxembourg, to the presiding Judge of the 'Tribunal d'arrondissement`,
- in the Netherlands, to the presiding Judge of the 'arrondissementsrechtbank`,
- in Austria, to the 'Bezirksgericht`,
- in Portugal, to the 'Tribunal de Comarca` or 'Tribunal de Família`,
- in Finland, to the 'käräjäoikeus/tingsrätt`,
- in Sweden, to the 'Svea hovrätt`,
- in the United Kingdom,

(a) in England and Wales, to the High Court of Justice;

(b) in Scotland, to the Court of Session;

(c) in Northern Ireland, to the High Court of Justice.

2. (a) The jurisdiction of local courts in relation to an application for enforcement shall be determined by reference to the place of the habitual residence of the person against whom enforcement is sought or by reference to the place of habitual residence of any child to whom the application relates;

(b) Where neither of the places referred to in (a) can be found in the Member State where enforcement is sought, the jurisdiction of local courts is determined by reference to the place of enforcement.

3. In relation to procedures referred to in Article 14(3), the jurisdiction of local courts shall be determined by the internal law of the Member State in which proceedings for recognition or non-recognition are brought.

Article 22 Procedure for enforcement

1. The procedure for making the application shall be governed by the law of the Member State in

which enforcement is sought.

2. The applicant must give an address for service within the area of jurisdiction of the court applied to. However, if the law of the Member State in which enforcement is sought does not provide for the furnishing of such an address, the applicant shall appoint a representative ad litem.

3. The documents referred to in Articles 33 and 34 shall be attached to the application.

Article 23 Decision of the court

1. The court applied to shall give its decision without delay. The person against whom enforcement is sought shall not at this stage of the proceedings be entitled to make any submissions on the application.

2. The application may be refused only for one of the reasons specified in Articles 15 and 16.

3. Under no circumstances may a judgment be reviewed as to its substance.

Article 24 Notice of the decision

The appropriate officer of the court shall without delay bring to the notice of the applicant the decision given on the application in accordance with the procedure laid down by the law of the Member State in which enforcement is sought.

Article 25 Appeal against the enforcement decision

1. If enforcement is authorised, the person against whom enforcement is sought may appeal against the decision within one month of service thereof.

2. If that person is habitually resident in a Member State other than that in which the decision authorising enforcement was given, the time for appealing shall be two months and shall run from the date of service, either on him or at his residence. No extension of time may be granted on account of distance.

Article 26 Courts of appeal and means of contest

1. An appeal against the judgment authorising enforcement shall be lodged, in accordance with the rules governing procedure in contradictory matters:

- in Belgium, with the 'Tribunal de première instance` or the 'Rechtbank van eerste aanleg` or the 'erstinstanzliche Gericht`,
- in Denmark, with the 'landsret`,
- in the Federal Republic of Germany, with the 'Oberlandesgericht`,
- in Greece, with the 'Åöåôåßï`,
- in Spain, with the 'Audiencia Provincial`,
- in France, with the 'Cour d'appel`,
- in Ireland, with the High Court,
- in Italy, with the 'Corte d'appello`,
- in Luxembourg, with the 'Cour d'appel`,
- in the Netherlands, with the 'arrondissementsrechtbank`,
- in Austria, with the 'Bezirksgericht`,
- in Portugal, with the 'Tribunal da Relaçao`,

- in Finland, with the 'Hovioikeus/Hovrätt`,
- in Sweden, with the 'Svea hovrätt`,
- in the United Kingdom,

(a) in England and Wales, with the High Court of Justice;

(b) in Scotland, with the Court of Session;

(c) in Northern Ireland, with the High Court of Justice.

2. The judgment given on appeal may be contested only:

- in Belgium, Greece, Spain, France, Italy, Luxembourg and in the Netherlands by an appeal in cassation,
- in Denmark, by an appeal to the 'Højesteret`, with leave of the 'Procesbevillingsnævnet`,
- in the Federal Republic of Germany, by a 'Rechtsbeschwerde`,
- in Ireland, by an appeal on a point of law to the Supreme Court,
- in Austria, by a 'Revisionsrekurs`,
- in Portugal, by a 'recurso restrito à matéria de direito`,
- in Finland, by an appeal to 'Korkein oikeus/högsta domstolen`,
- in Sweden, by an appeal to the 'Högsta domstolen`,
- in the United Kingdom, by a single further appeal on a point of law.

Article 27 Stay of proceedings

1. The court with which the appeal is lodged may, on the application of the appellant, stay the proceedings if an ordinary appeal has been lodged against the judgment in the Member State of origin or if the time for such appeal has not yet expired. In the latter case, the court may specify the time within which an appeal is to be lodged.

2. Where the judgment was given in Ireland or the United Kingdom, any form of appeal available in the Member State of origin shall be treated as an ordinary appeal for the purposes of paragraph 1.

Article 28 Court of appeal against a judgment refusing enforcement

1. If the application for enforcement is refused, the applicant may appeal:

- in Belgium, to the 'Cour d'appel` or the 'hof van beroep`,
- in Denmark, to the 'Landsret`,
- in the Federal Republic of Germany, to the 'Oberlandesgericht`,
- in Greece, to the 'Åöåôåßï`,
- in Spain, to the 'Audiencia Provincial`,
- in France, to the 'Cour d'appel`,
- in Ireland, to the High Court,
- in Italy, to the 'Corte d'appello`,
- in Luxembourg, to the 'Cour d'appel`,

- in the Netherlands, to the 'gerechtshof`,
- in Austria, to the 'Bezirksgericht`,
- in Portugal, to the 'Tribunal da Relaçao`,
- in Finland, to 'Hovioikeus/Hovrätten`,
- in Sweden, to the 'Svea hovrätt`,
- in the United Kingdom,

(a) in England and Wales, to the High Court of Justice;

(b) in Scotland, to the Court of Session;

(c) in Northern Ireland, to the High Court of Justice.

2. The person against whom enforcement is sought shall be summoned to appear before the appellate court. If such person fails to appear, the provisions of Article 10 shall apply.

Article 29 Contest of the appeal decision

A judgment given on appeal provided for in Article 28 may be contested only:

- in Belgium, Greece, Spain, France, Italy, Luxembourg and in the Netherlands, by an appeal in cassation,
- in Denmark, by an appeal to the 'Højesteret` with leave of the 'Procesbevillingsnævnet`,
- in the Federal Republic of Germany, by a 'Rechtsbeschwerde`,
- in Ireland, by an appeal on a point of law to the Supreme Court,
- in Austria, by a 'Revisionsrekurs`,
- in Portugal, by a 'recurso restrito à matéria de direito`,
- in Finland, by an appeal to the 'Korkein oikeus/högsta domstolen`,
- in Sweden, by an appeal to the 'Högsta Domstolen`,
- in the United Kingdom, by a single further appeal on a point of law.

Article 30 Partial enforcement

1. Where a judgment has been given in respect of several matters and enforcement cannot be authorised for all of them, the court shall authorise enforcement for one or more of them.

2. An applicant may request partial enforcement of a judgment.

Article 31 Legal aid

1. An applicant who, in the Member State of origin, has benefited from complete or partial legal aid or exemption from costs or expenses shall be entitled, in the procedures provided for in Articles 21 to 24, to benefit from the most favourable legal aid or the most extensive exemption from costs and expenses provided for by the law of the Member State addressed.

2. An applicant who requests the enforcement of a judgment given by an administrative authority in Denmark may, in the Member State addressed, be eligible for the provisions of paragraph 1 if he presents a statement from the Danish Ministry of Justice to the effect that he fulfils the economic requirements to qualify for the grant of complete or partial legal aid or exemption from costs or expenses.

Article 32 Security, bond or deposit

No security, bond or deposit, however described, shall be required of a party who in one Member State applies for enforcement of a judgment given in another Member State on the ground that he or she is a foreign national or that he or she is not 'domiciled` or habitually resident in the Member State in which enforcement is sought.

SECTION 3 COMMON PROVISIONS

Article 33 Documents

1. A party seeking or contesting recognition or applying for enforcement of a judgment shall produce:

(a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity;

(b) where appropriate, a document showing that the applicant is in receipt of legal aid in the Member State of origin.

2. In addition, in the case of a judgment given in default, the party seeking recognition or applying for enforcement shall produce:

(a) the original or certified true copy of the document which establishes that the defaulting party was served with the document instituting the proceedings or with an equivalent document; or

(b) any document indicating that the defendant has accepted the judgment unequivocally.

3. A person requiring the updating of the civil-status records of a Member State, as referred to in Article 14(2), shall also produce a document indicating that the judgment is no longer subject to a further appeal under the law of the Member State where the judgment was given.

Article 34 Other documents

A party applying for enforcement shall also produce documents of whatever nature which establish that, according to the law of the Member State of origin, the judgment is enforceable and has been served.

Article 35 Absence of documents

1. If the documents specified in Article 33(1)(b) or (2) are not produced, the court may specify a time for their production, accept equivalent documents or, if it considers that it has sufficient information before it, dispense with their production.

2. If the Court so requires, a translation of such documents shall be furnished. The translation shall be certified by a person qualified to do so in one of the Member States.

Article 36 Legalisation or other similar formality

No legalisation or other similar formality shall be required in respect of the documents referred to in Articles 33, 34 and 35(2) or in respect of a document appointing a representative ad litem.

TITLE IV TRANSITIONAL PROVISIONS

Article 37

1. The provisions of this Convention shall apply only to legal proceedings instituted, to documents formally drawn up or registered as authentic instruments and to settlements which have been approved by a court in the course of proceedings after its entry into force in the Member State of origin and, where recognition or enforcement of a judgment or authentic instruments is sought, in the Member

State addressed.

2. However, judgments given after the date of entry into force of this Convention between the Member State of origin and the Member State addressed in proceedings instituted before that date shall be recognised and enforced in accordance with the provisions of Title III if jurisdiction was founded on rules which accorded with those provided for either in Title II of this Convention or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted.

TITLE V GENERAL PROVISIONS

Article 38 Relation with other Conventions

1. Subject to the provisions of Articles 37, 40 and paragraph 2 of this Article, this Convention shall, for the Member States which are parties to it, supersede conventions existing at the time of entry into force of this Convention which have been concluded between two or more Member States and relate to matters governed by this Convention.

2. (a) At the time of the notification referred to in Article 47, Denmark, Finland and Sweden shall have the option of declaring that the Convention of 6 February 1931 between Denmark, Finland, Iceland, Norway and Sweden comprising international private law provisions on marriage, adoption and guardianship, together with the Final Protocol thereto, will apply, in whole or in part, in their mutual relations, in place of the rules of this Convention. This declaration may be withdrawn, in whole or in part, at any moment;

(b) the principle of non-discrimination on the grounds of nationality between citizens of the Union shall be respected and monitored by the Court of Justice, in accordance with the procedures laid down in the Protocol on the interpretation by the Court of Justice of this Convention;

(c) the rules of jurisdiction in any future Agreement to be concluded between the Member States referred to in (a) and which relate to matters governed by this Convention shall be in line with those laid down in this Convention;

(d) judgments handed down in any of the Nordic States which have made the declaration provided for in (a) under a forum of jurisdiction corresponding to one of those laid down in Title II of this Convention, shall be recognised and enforced in the other Member States under the rules laid down in Title III thereof.

3. After entry into force of this Convention, Member States may not conclude or apply agreements between themselves except in order to supplement the provisions of the Convention or to facilitate application of the principles contained therein.

4. Member States shall send to the depositary of this Convention:

(a) a copy of the agreements and uniform laws implementing these agreements referred to in paragraphs 2(a) and (c) and 3;

(b) any denunciations of, or amendments to, those agreements or uniform laws.

Article 39 Relation with certain multilateral conventions

In relations between the Member States which are parties to it, this Convention shall take precedence over the following Conventions in so far as they concern matters governed by this Convention:

- the Hague Convention of 5 October 1961 concerning the Powers of Authorities and the Law Applicable in respect of the Protection of Minors,
- the Luxembourg Convention of 8 September 1967 on the Recognition of Decisions Relating to the

Validity of Marriages,

- the Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations,
- the European Convention of 20 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children,
- the Hague Convention of 19 October 1996 on Jurisdiction, Applicable law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, provided that the child concerned is habitually resident in a Member State.

Article 40 Extent of effects

1. The agreements and conventions referred to in Articles 38 and 39 shall continue to have effect in relation to matters to which this Convention does not apply.

2. They shall continue to have effect in respect of judgments given and documents formally drawn up or registered as authentic before the entry into force of this Convention.

Article 41 Agreements between Member States

Without prejudice to the grounds for non-recognition provided for in Title III, judgments given pursuant to the agreements referred to in Article 38(3) shall be recognised and enforced in Member States which are not parties to those agreements provided that those judgments were given in a forum consistent with a forum provided for in Title II.

Article 42 Treaties with the Holy See

1. This Convention shall apply without prejudice to the International Treaty (Concordat) between The Holy See and the Portuguese Republic, signed at Vatican City on 7 May 1940.

2. Any decision as to the invalidity of a marriage taken under the Treaty referred to in paragraph 1 shall be recognised in the Member States on the conditions laid down in Title III of this Convention.

3. The provisions laid down in paragraphs 1 and 2 shall also apply to the following International Treaties (Concordats) with the Holy See:

- Concordato lateranense of 11 February 1929 between the Italian Republic and the Holy See, modified by the agreement, with additional Protocol signed in Rome on 18 February 1984,
- Agreement between the Holy See and the Spanish State on legal affairs of 3 January 1979.

4. Member States shall send to the depositary of this Convention:

(a) a copy of the Treaties referred to in paragraphs 1 and 3;

(b) any denunciations of or amendments to those Treaties.

Article 43 Non-recognition and non-enforcement of judgments based on Article 8

This Convention shall not prevent a Member State from assuming, in a convention on the recognition and enforcement of judgments, an obligation towards a non-Member State not to recognise a judgment given in another Member State where, in cases provided for in Article 8, the judgment could only be founded on grounds of jurisdiction other than those specified in Articles 2 to 7.

Article 44 Member States with two or more legal systems

With regard to a Member State in which two or more systems of law or sets of rules concerning matters governed by this Convention apply in different territorial units:

(a) any reference to habitual residence in that Member State shall refer to habitual residence in a territorial unit;

(b) any reference to nationality shall refer to the territorial unit designated by the law of that State;

(c) any reference to the authority of a Member State having received an application for divorce or legal separation or for marriage annulment shall refer to the authority of a territorial unit which has received such an application;

(d) any reference to the rules of the requested Member State shall refer to the rules of the territorial unit in which jurisdiction, recognition or enforcement is invoked.

TITLE VI COURT OF JUSTICE

Article 45

The Court of Justice of the European Communities shall have jurisdiction to give rulings on the interpretation of this Convention, in accordance with the provisions of the Protocol drawn up by the Council Act of 28 May 1998.

TITLE VII FINAL PROVISIONS

Article 46 Declarations and reservations

1. Without prejudice to Article 38(2) and 42, this Convention may not be subject to any reservation.

2. Notwithstanding paragraph 1, this Convention shall operate subject to the declarations made by Ireland and Italy annexed to this Convention.

3. The Member State concerned may at any moment withdraw such a declaration in whole or in part. Any such declaration shall cease to have effect 90 days after the notification to the depositary of the withdrawal.

Article 47 Adoption and entry into force

1. This Convention shall be subject to adoption by the Member States in accordance with their respective constitutional rules.

2. Member States shall notify the depositary of the completion of the constitutional rules for the adoption of this Convention.

3. This Convention and any amendment to it referred to in Article 49(2) shall enter into force 90 days after the notification referred to in paragraph 2 by the State which, being a member of the European Union at the time the Council adopts the Act drawing up this Convention, is the last to complete that formality.

4. Until this Convention enters into force, any Member State, may, when giving the notification referred to in paragraph 2 or at any later date, declare that as far as it is concerned the Convention, with the exception of Article 45, shall apply to its relations with Member States that have made the same declaration. Such declarations shall apply 90 days after the date of deposit.

Article 48 Accession

1. This Convention shall be open to accession by any State that becomes a member of the European Union.

2. The text of this Convention in the language or languages of the acceding Member State, as drawn up by the Council, shall be authentic.

3. The instruments of accession shall be deposited with the depositary.

4. This Convention shall enter into force with respect to any Member State that accedes to it 90 days after the deposit of its instrument of accession or on the date of entry into force of the Convention if it has not already entered into force at the time of expiry of the said period of 90 days.

5. Where this Convention is not in force at the time of the deposit of their instrument of accession, Article 47(4) shall apply to acceding Member States.

Article 49 Amendments

1. Amendments to this Convention may be proposed by any Member State or by the Commission. Any proposal for amendment shall be forwarded to the depositary, who shall communicate it to the Council.

2. Amendments shall be drawn up by the Council, which shall recommend their adoption by the Member States in accordance with their respective constitutional rules. Amendments thus adopted shall enter into force in accordance with Article 47(3).

3. However, at the request of the Member State concerned, the naming of the courts or means of appeal referred to in Articles 21(1), 26(1) and (2), 28(1) and 29 may be amended by decision of the Council.

Article 50 Depositary and publication

1. The Secretary-General of the Council shall act as depositary of this Convention.

2. The depositary shall publish in the Official Journal of the European Communities:

(a) the adoptions and accessions;

(b) the date on which the Convention enters into force;

(c) declarations referred to in Articles 2(2), 38(2), 46, 47(4) and 48(5), as well as the modifications or withdrawals of such declarations;

(d) amendments to this Convention referred to in Article 49(2) and (3).

En fe de lo cual los plenipotenciarios abajo firmantes suscriben el presente Convenio.

Til bekræftelse heraf har undertegnede befuldmægtigede underskrevet denne konvention.

Zu Urkund dessen haben die unterzeichneten Bevollmächtigten ihre Unterschrift unter dieses Übereinkommen gesetzt.

Oå =ßoôùoç ôùí aíùô¡ñù, ïé o=ïañÜöïíôåo =eçñåiïuoéïé ¡èåoaí ôçí o=ïañaö« ôïoo êÜôù a=ü ôçí =añïuoa ouiâaoç.

In witness whereof, the undersigned Plenipotentiaries have signed this Convention.

En foi de quoi, les plénipotentiaires soussignés ont apposé leurs signatures au bas de la présente convention.

Da fhianu sin, chuir na Lanchumhachtaigh thíos-sínithe a lamh leis an gCoinbhinsiun seo.

In fede di che i plenipotenziari sottoscritti hanno apposto le loro firme in calce alla presente convenzione.

Ten blijke waarvan de ondergetekende gevolmachtigden hun handtekening onder dit verdrag hebben gesteld.

Em fé do que, os plenipotenciarios abaixo-assinados apuseram as suas assinaturas no final da presente

convençao.

Tämän vakuudeksi alla mainitut täysivaltaiset edustajat ovat allekirjoittaneet tämän yleissopimuksen.

Till bekräftelse härav har undertecknade befullmäktigade ombud undertecknat denna konvention.

Hecho en Bruselas, el veintiocho de mayo de mil novecientos noventa y ocho, en un ejemplar unico en lenguas alemana, danesa, española, finesa, francesa, griega, inglesa, irlandesa, italiana, neerlandesa, portuguesa y sueca, siendo cada uno de estos textos igualmente auténtico, que se depositara en los archivos de la Secretaría General del Consejo de la Union Europea.

Udfærdiget i Bruxelles, den otteogtyvende maj nitten hundrede og otteoghalvfems, i ét eksemplar på dansk, engelsk, finsk, fransk, græsk, irsk, italiensk, nederlandsk, portugisisk, spansk, svensk og tysk, idet hver af disse tekster har samme gyldighed; de deponeres i arkiverne i Generalsekretariatet for Rådet for Den Europæiske Union.

Geschehen zu Brüssel am achtundzwanzigsten Mai neunzehnhundertachtundneunzig in einer Urschrift in dänischer, deutscher, englischer, finnischer, französischer, griechischer, irischer, italienischer, niederländischer, portugiesischer, schwedischer und spanischer Sprache, wobei jeder Wortlaut gleichermaßen verbindlich ist; die Urschrift wird im Archiv des Generalsekretariats des Rates der Europäischen Union hinterlegt.

êaéíå oôéo Añoi¡eeåo, oôéo åßêïoé ïêô¦ öaAno eéa åííéaêüoéa åíåí«íôa ïêô¦, oå ¡ía iüíï aíôßôo=ï oôçí aaaeéê«, aaeeéê«, aåñiaíéê«, äaíéê«, åeeçíéê«, éñeaíäéê«, éo=aíéê«, éôaeéê«, ïeeaíäéê«, =ïñôïaaeéê«, oïoçäéê« êaé öéíeaíäéê« ae¦ooa. êêaoôï êåßiåíï åßíaé åißoïo aoèåíôéêü, ôï äå =ñùôüôo=ï aoôü êaôaôßèåôaé oôa añ ßa ôço Aåíéê«o Añaiiaôåßao ôïo Ooiâïoeßïo ôço Åoñù=auê«o êíùoço.

Done at Brussels on the twenty-eighth day of May in the year one thousand nine hundred and ninety-eight, in a single original, in the Danish, Dutch, English, Finnish, French, German, Greek, Irish, Italian, Portuguese, Spanish and Swedish languages, each text being equally authentic, such original being deposited in the archives of the General Secretariat of the Council of the European Union.

Fait à Bruxelles, le vingt-huit mai mil neuf cent quatre-vingt-dix-huit, en un exemplaire unique, en langues allemande, anglaise, danoise, espagnole, finnoise, française, grecque, irlandaise, italienne, néerlandaise, portugaise et suédoise, les textes établis dans chacune de ces langues faisant également foi, exemplaire qui est déposé dans les archives du secrétariat général du Conseil de l'Union européenne.

Arna dhéanamh sa Bhruiséil, ar an ochtu la is fiche de Bhealtaine sa bhliain míle naoi gcéad nocha a hocht, i scríbhinn bhunaidh amhain sa Bhéarla, sa Danmhairgis, san Fhionlainnis, sa Fhraincis, sa Ghaeilge, sa Ghearmainis, sa Ghréigis, san Iodailis, san Ollainnis, sa Phortaingéilis, sa Spainnis agus sa tSualainnis, agus comhudaras ag gach ceann de na téacsanna sin; déanfar an scríbhinn bhunaidh sin a thaisceadh i gcartlann Ardrunaíocht Chomhairle an Aontais Eorpaigh.

Fatto a Bruxelles, addi ventotto maggio millenovecentonovantotto, in unico esemplare in lingua danese, finlandese, francese, greca, inglese, irlandese, italiana, olandese, portoghese, spagnola, svedese e tedesca, ciascun testo facente ugualmente fede; l'esemplare è depositato negli archivi del Segretariato generale del Consiglio dell'Unione europea.

Gedaan te Brussel, de achtentwintigste mei negentienhonderd achtennegentig, in één exemplaar in de Deense, de Duitse, de Engelse, de Finse, de Franse, de Griekse, de Ierse, de Italiaanse, de Nederlandse, de Portugese, de Spaanse en de Zweedse taal, zijnde alle teksten gelijkelijk authentiek, dat wordt nedergelegd in het archief van het Secretariaat-generaal van de Raad van de Europese Unie.

Feito em Bruxelas, em vinte e oito de Maio de mil novecentos e noventa e oito, em exemplar unico, nas línguas alema, dinamarquesa, espanhola, finlandesa, francesa, grega, inglesa, irlandesa, italiana,

neerlandesa, portuguesa e sueca, fazendo igualmente fé cada um dos textos, ficando esse exemplar depositado nos arquivos do Secretariado-Geral do Conselho da Uniao Europeia.

Tehty Brysselissä kahdentenakymmenentenäkahdeksantena päivänä toukokuuta vuonna tuhatyhdeksänsataayhdeksänkymmentäkahdeksan englannin, espanjan, hollannin, iirin, italian, kreikan, portugalin, ranskan, ruotsin, saksan, suomen ja tanskan kielellä yhtenä kappaleena, jonka jokainen teksti on yhtä todistusvoimainen ja joka talletetaan Euroopan unionin neuvoston pääsihteeristön arkistoon.

Som skedde i Bryssel den tjugoåttonde maj nittonhundranittioåtta i ett enda exemplar på danska, engelska, finska, franska, grekiska, iriska, italienska, nederländska, portugisiska, spanska, svenska och tyska språken, varvid varje text äger samma giltighet, och detta exemplar skall deponeras i arkiven hos generalsekretariatet för Europeiska unionens råd.

Pour le gouvernement du Royaume de Belgique

Voor de regering van het Koninkrijk Belgie

Für die Regierung des Königreichs Belgien

For regeringen for Kongeriget Danmark

Für die Regierung der Bundesrepublik Deutschland

Aéa ôçí êoâ¡ñíçoç ôço Åeeçíéê«o Æçiïêñaôßao

Por el Gobierno del Reino de España

Pour le gouvernement de la République française

Thar ceann Rialtas na hEireann

For the Government of Ireland

Per il governo della Repubblica italiana

Pour le gouvernement du Grand-Duché de Luxembourg

Voor de regering van het Koninkrijk der Nederlanden

Für die Regierung der Republik Osterreich

Pelo Governo da Republica Portuguesa

Suomen hallituksen puolesta

På finska regeringens vägnar

På svenska regeringens vägnar

For the Government of the United Kingdom of Great Britain and Northern Ireland

DECLARATION BY IRELAND, TO BE ANNEXED TO THE CONVENTION

Notwithstanding the provisions of this Convention, Ireland may maintain the jurisdiction which it has to refuse to recognise a divorce obtained in another Member State where that divorce has been obtained as a result of the party, or parties, deliberately misleading a court of the State in question in relation to its jurisdictional requirements such that recognition of the divorce would not be compatible with the Constitution of Ireland.

This declaration will apply for a period of five years. It will be renewable every five years.

DECLARATION, TO BE ANNEXED TO THE CONVENTION BY ANY OF THE NORDIC MEMBER STATES ENTITLED TO MAKE A DECLARATION WITHIN THE MEANING OF ARTICLE 38(2)

The application of the Convention of 6 February 1931 between Denmark, Finland, Iceland, Norway and Sweden comprising international private law provisions on marriage, adoption and guardianship, together with the Final Protocol thereto, is in line with Article K.7 of the Treaty in that the Convention does not prevent the establishment of closer cooperation between two or more Member States in so far as such cooperation does not conflict with, or impede, that provided for in the Convention.

They undertake no longer to apply Article 7(2) of the 1931 Nordic Agreement in their mutual relations and to review at an early date the rules of jurisdiction applicable in the framework of that Agreement in the light of the principle set out in Article 38(2)(b) of the Convention.

The grounds for refusal used in the context of the uniform laws are in practice applied in a manner consistent with those laid down in Title III of this Convention.

DECLARATION BY THE ITALIAN DELEGATION, TO BE ANNEXED TO THE CONVENTION

With regard to Article 42 of the Convention, Italy reserves the right, in respect of judgments by Portuguese ecclesiastical courts, to adopt the procedures and carry out the checks provided for in its own legal system in respect of similar judgments by ecclesiastical courts, on the basis of the agreements it has concluded with the Holy See.

Declaration, annexed to the minutes of the Council, adopted during the Justice and Home Affairs Council on 28 and 29 May 1998 when drawing up the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters (98/C 221/02)

The Council, conscious of the adverse effect which the length of proceedings on requests before the Court of Justice of the European Communities might have in the field of family law, stresses the need for an examination as soon as possible of possible ways of reducing the length of such proceedings; the Council proposes that this examination be carried out by the Competent body within the Council, together with the Court of Justice.

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Explanatory Report on the Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters (approved by the Council on 28 May 1998) prepared by Dr Alegría Borras Professor of Private International Law University of Barcelona

EXPLANATORY REPORT on the Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters (approved by the Council on 28 May 1998) prepared by Dr ALEGRIA BORRAS Professor of Private International Law University of Barcelona (98/C 221/04)

I. BACKGROUND TO THE CONVENTION

1. European integration was mainly an economic affair to begin with and for that reason the legal instruments established were designed to serve an economic purpose. However, the situation has changed fundamentally in recent times so that integration is now no longer purely economic and is coming to have an increasingly profound effect on the life of the European citizen, who finds it hard to understand that he encounters problems in matters of family law while so much progress has been made in property law. The issue of family law therefore has to be faced as part of the phenomenon of European integration. We only need to look at the questions put in the European Parliament not only on dissolution of marriages but also on more general aspects of family law (marriage contracts, paternity, child abduction, adoption, etc.). This Convention is a first step, and a positive and decisive one, along this new road and it may open the way to other texts on matters of family law and succession.

2. This Convention was made possible by the Maastricht Treaty, which opened up new channels for judicial cooperation in civil matters under Article K.3 (see Section II, paragraph 11). Until then, what limited scope there was depended only on Article 220 of the Treaty establishing the European Economic Community. In that Article, the Member States undertook, so far as is necessary, to enter into negotiations with each other with a view to securing for the benefit of their nationals the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards. In a note sent to the Member States on 22 October 1959 inviting them to commence negotiations, the Commission pointed out that:

'a true internal market between the six States will be achieved only if adequate legal protection can be secured. The economic life of the Community may be subject to disturbances and difficulties unless it is possible, where necessary by judicial means, to ensure the recognition and enforcement of the various rights arising from the existence of a multiplicity of legal relationships. As jurisdiction in both civil and commercial matters is derived from the sovereignty of Member States, and since the effect of judicial acts is confined to each national territory, legal protection and, hence, legal certainty in the common market are essentially dependent on the adoption by the Member States of a satisfactory solution to the problem of recognition and enforcement of judgments`.

Various Conventions have been concluded directly or indirectly on the basis of Article 220 of the Treaty establishing the European Economic Community. The major achievement in judicial matters was the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters and the various amendments resulting from enlargement of the Community. Article 1(2) of that Convention excludes a range of matters from its scope. These exclusions were based on a great variety of grounds and some of the matters excluded have been dealt with in other Conventions, for instance the Convention on insolvency proceedings signed in Brussels on 23 November 1995.

In addition, the 30 years which have passed since its conclusion and the practical application of the Brussels Convention have led to the initiation of a process of revision of the latter, carried

out at the same time as that of the Lugano Convention of 16 September 1988 (the so-called parallel Convention). As only preliminary studies have been carried out and only two meetings have been held of the ad hoc Working Party set up to prepare the revised text, it has not been possible to take account of those proceedings in the drafting of this Convention. There is still the possibility, therefore, of adapting this Convention to the revised Brussels Convention at a later date.

As the situation changed, it was normal that Member States should endeavour to respond to European citizens' new requirements and this Convention is the latest such endeavour. The desire to extend the 1968 Brussels Convention to family issues is a recent development and the grounds are twofold.

3. In the first place, the grounds for exclusion from the 1968 Brussels Convention need to be recalled. The Jenard report (explanatory report on the original version of the Convention) justified the exclusion of matters relating to natural persons as follows:

'Even assuming that the Committee managed to unify the rules of jurisdiction in this field, and whatever the nature of the rules selected, there was such disparity on these matters between the various systems of law, in particular regarding the rules of conflict of laws, that it would have been difficult not to re-examine the rules of jurisdiction at the enforcement stage. This in turn would have meant changing the nature of the Convention and making it much less effective. In addition, if the Committee had agreed to withdraw from the court of enforcement all powers of examination, even in matters not relating to property rights, that court would surely have been encouraged to abuse the notion of public policy, using it to refuse recognition to foreign judgments referred to it. The members of the Committee chose the lesser of the two evils, retaining the unity and effectiveness of their draft while restricting its scope. The most serious difficulty with regard to status and legal capacity is obviously that of divorce, a problem which is complicated by the extreme divergences between the various systems of law.`

The 1968 Convention is therefore the 'general convention` on recognition and enforcement, under the mandate in Article 220 of the Treaty establishing the European Economic Community; it does not exclude any civil or commercial matter per se and could have dealt with status and legal capacity. They were excluded because of their complexity and the fact that they did not directly affect economic integration.

4. In the second place, in family law the major issue is divorce, matrimonial matters as dealt with in this Convention. It should be noted that the Jenard report refers to the 'extreme divergences` between systems of law at a time when there were only six Member States; those divergences are clearly greater now that there are 15 Member States, so that the difficulties facing the Working Party were greater. These are not minor differences; some of them even have constitutional implications. In other cases the difficulties affect the recognition or non-recognition of the various forms of civil status affected by the Convention (for instance, separation and annulment are unknown in the national law of Finland and Sweden). Even among States which have all the various forms covered, there are significant differences in the rules (grounds, prior separation requirement, etc.).

Neither the time required to achieve a convention nor the compromise solutions which had to be worked out in some instances can therefore come as a surprise. The exclusion of this matter from the 1968 Convention and the preparation of this Convention highlight the difference between family litigation and property litigation. European integration has advanced considerably in the 30 years since the 1968 Brussels Convention was drawn up. The achievement of free movement of persons and establishment of increasingly frequent family links between individuals who are nationals or residents of different countries demanded a judicial response which is provided by this Convention, taking account of the various elements involved.

5. A full discussion was held on the question whether a convention on jurisdiction and the recognition and enforcement of judgments in matrimonial matters was necessary. Some Member States, which were parties to the Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations, expressed satisfaction at the results achieved by applying it. Other Member States, however, which were not parties to the 1970 Hague Convention, declared that they were not prepared to become parties to it. There were three fundamental arguments in favour of considering the advantages of drawing up a new convention in a European context:

(a) the desire to introduce uniform standards for jurisdiction in matrimonial matters;

(b) the need to introduce modern rules for the recognition and enforcement of judgments on annulment, divorce and separation among the Member States of the European Union, establishing a uniform procedure;

(c) the avoidance of parallel procedures on matrimonial matters in different Member States, establishing rules on lis pendens, an innovation that on its own would be justification for the Convention and would contribute to the prevention of contradictory rulings.

For all those reasons the Council decided to initiate negotiations on the conclusion of a convention on these matters. It should also be pointed out that Article 18 of the 1970 Hague Convention allows the States party to it to conclude conventions on those matters.

6. The initial purpose of the Convention was to extend the 1968 Brussels Convention to cover matrimonial matters. Hence the starting-point for the preparation of this Convention lies in the text of the 1968 Convention which is cited in the preamble. It would have been impossible to disregard such an important background text which has been demonstrably successful and is accompanied by extensive case-law from the Court of Justice of the European Communities, making it possible to pinpoint its most controversial features in the section applicable to this text. Nevertheless, the differing matters covered in both texts result in significant differences on a number of points (e. g. the fact that there is no general forum and the absence of any hierarchy in the grounds of jurisdiction) whereas in other areas the rules are more convergent (as for lis pendens and automatic recognition). The outcome is therefore a separate convention although the objectives pursued are the same: to unify the rules on international jurisdiction and to facilitate international recognition and enforcement of judgments.

Unless stated otherwise, the identical terms in the 1968 Brussels Convention and in this Convention must in principle be considered to mean the same thing and therefore the case-law of the Court of Justice of the European Communities must be taken into consideration. It should be noted that on provisions for which the wording is the same as in the Brussels Convention, there is little to add to the explanatory reports on the 1968 Convention and the subsequent amendments thereto. It seemed advisable, nevertheless, to reproduce the necessary sections of the earlier report in this one for ease of consultation by the judiciary, who are thus not obliged to consult several different texts in conjunction.

7. In the early 1990s consideration was given in the context of European political cooperation to the viability of a convention at European level on proceedings to dissolve or loosen the marriage bond. On the basis of a questionnaire drawn up by the United Kingdom Presidency in 1992 and a synthesis of the replies prepared by the Danish Presidency in the first half of 1993, the Member States conducted an initial exchange of views on the matter. Under the Belgian Presidency in the second half of 1993, before the Treaty on European Union came into force, Professor Marc Fallon was invited to a meeting of the Working Party in his capacity as Secretary of the European Group on Private International Law and reported on the Heidelberg Project, which was prepared by that Group and is so called because it was approved in Heidelberg on 2 October 1993. The European

Group, as a group of specialists whose sole objective is to make proposals in the fields in which Community law and private international law come together, approved a proposal for a convention on jurisdiction and the enforcement of judgments in family and succession matters which was of considerably broader scope than this Convention. The need to achieve results and developments in the studies carried out made it necessary to focus the work within the European Union on a more limited range of subjects.

8. At its meeting in Brussels on 10 and 11 December 1993 the European Council considered that the entry into force of the Treaty opened up new prospects for the European citizen, requiring additional work to be carried out in respect of certain aspects of the citizen's family life. To that end, the Council considered that examination of the possibilities of extending the scope of the 1968 Brussels Convention to matters of family law should be actively pursued. In the first half of 1994 the Greek Presidency circulated a questionnaire to the Member States to identify the general outline of what the Convention should contain. In the light of the replies received, a synthesis was drawn up and used as a basis for the instruction to draw up a draft convention given by the European Council in June 1994. In the second half of 1994 the German Presidency presented a draft convention covering only divorce, legal separation and marriage annulment. The Spanish and French delegations then requested the inclusion of child custody within the scope of the convention.

9. When describing the background to the Convention, we cannot fail to mention the contacts maintained with the Hague Conference on Private International Law. While the European Union was preparing the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters, the Hague Conference on Private International Law was revising the Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants. That situation must be taken into account in relation to the possibility of a provision in the new Hague Convention relating to the competence of the authorities of the country of divorce to adopt measures to protect the children, although differing working methods require different approaches. Thus, while the European Union has observer status at the Hague Conference (so that representatives of the Commission and the Council Secretariat are attending the proceedings in The Hague), the reverse is not possible under the Treaty establishing the European Community and the Treaty on European Union. For that reason, beginning with the French Presidency in the first half of 1995, the Troika, the Council Secretariat and the Commission, alongside the official meetings, held informal meetings with the Permanent Bureau of The Hague Conference on Private International Law in view of the links between the texts under preparation in both forums.

The initial problems regarding the relationship between the two Conventions under preparation were thus resolved and the result is visible both in the Convention which is the subject of this report, concluded between the Member States of the European Union, and in the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children. At the Council of Ministers of Justice and Home Affairs on 25 September 1995, it was agreed that 'it was essential to make provision for custody of children in the context of these proceedings, in the form of measures supplementary to those laid down in the Hague Convention`. Therefore once the Hague Convention had been concluded, its provisions were taken into account by the Working Party, particularly those directly affecting the Convention now under consideration, i. e. Article 10 regarding the jurisdiction of the courts deciding on the annulment of a marriage, an application for divorce or legal separation of the parents to take measures directed to the protection of the child and Article 52 regarding the relationship between the Hague Convention and other Conventions, and particularly the possibility for one or more Contracting States to conclude agreements which contain, in respect of children habitually resident in any of the States Parties to such agreements, provisions on matters governed by the Hague Convention.

10. Preparation of the text of the Convention became the responsibility of the Working Party on Extension of the Brussels Convention which has been meeting on a constant basis since 1993. The negotiations were lengthy and on some points particularly difficult. At the Council meeting in December 1997, under the Luxembourg Presidency, final political agreement was reached on a series of provisions on the basis of the final compromise solution proposed by the Presidency.

In broad terms, that is the history of the laborious but fruitful work which went into preparing the Convention now before us.

II. GENERAL LAYOUT OF THE CONVENTION

11. The first point of interest is the legal basis for the text. When the Brussels Convention was concluded in 1968 only Article 220 of the Treaty was available as a basis. At present we have, in addition to that Article, another provision which can serve as a legal basis for the Convention: the new provision introduced by the Maastricht Treaty, i. e. Article K.3 in conjunction with Article K.1. In point 6 of Article K.1, 'judicial cooperation in civil matters` is listed as one of the 'matters of common interest` referred to in the introductory wording to that Article for the purposes of achieving the objectives of the Union. Such cooperation undoubtedly contributes to the achievement of one of the objectives of the Union, 'to develop close cooperation on justice` (Article B).

Dealing in a precise and appropriate manner with the matter which is the subject of the Convention is undoubtedly a significant achievement in terms of provisions on judicial cooperation between the Member States of the European Union in civil matters. Accordingly Article K.3 of the Treaty was chosen as the legal basis for the Convention although Article 220 would also have been a theoretically possible legal basis. Finally, it should be pointed out that the legal basis has consequences for the drafting process, but not for legal practitioners or for the citizen as regards the application of the Convention.

In line with the provisions of Title VI, the Commission was fully associated with the proceedings of the Working Party, that is to say it took an active, positive part in the preparation of the text. At the close of the Working Party's proceedings, the Presidency, in accordance with Article K.6 of the Treaty on European Union, presented the text of the draft Convention for consideration by the European Parliament.

The European Parliament delivered its opinion in the plenary session of 30 April 1998. During May 1998 the relevant Council bodies studied the opinions expressed by the European Parliament.

On 28 May 1998 the Council approved the Convention, signed on the same day by the representatives of all the Member States.

12. The concerns and the thinking underlying the preparation of the Convention are clear from the Preamble, which highlights four aspects:

1. The desire to introduce uniform modern standards for jurisdiction on annulment, divorce and separation and to facilitate the rapid and automatic recognition among Member States of judgments on such matters given in the Member States.

2. The importance of laying down rules of jurisdiction concerning parental responsibility over the children of both spouses on the occasion of such proceedings and therefore simplifying the formalities governing the rapid and automatic recognition and enforcement of the relevant judgments.

3. The need to bear in mind the principles on which the 1968 Brussels Convention is based; this Convention is therefore influenced by the Brussels Convention but differs in so far as the matter covered is different.

4. The possibility of giving jurisdiction to the Court of Justice of the European Communities

to interpret the provisions of the Convention.

13. Two characteristics of the Convention need to be emphasised:

A. The Convention is what is known as a 'double treaty` in that it contains rules of direct jurisdiction and also rules for the recognition and enforcement of foreign judgments. It is modelled on the Brussels Convention, which was at the time a revolutionary step, but it introduces substantial changes. Rules of international jurisdiction are thus laid down which have to be respected by the court of origin and may lead it to decline jurisdiction where it does not consider that jurisdiction lies with it under the rules of the Convention. The citizen thus enjoys legal certainty and a climate of mutual confidence is established allowing the introduction of a system of automatic recognition and a greatly simplified enforcement system.

B. Once the Convention has been adopted in the Member States in accordance with constitutional requirements and has entered into force in each Member State, it will become applicable ex officio. This means that it is compulsory to apply all the rules in the Convention and that, between the States party to it, those rules will, as from the date of entry into force, replace all other national or contractual provisions, subject only to the limitations resulting from the Convention itself and within the relevant constitutional framework. The mechanism is thus at once founded on and incorporated into each Member State's national legislation. Situations not covered by the Convention will therefore be subject to national law.

14. The Convention is divided into seven titles, as follows:

Title I:	Scope
Title II:	Jurisdiction
Title III:	Recognition and enforcement of judgments
Title IV:	Transitional provisions
Title V:	General provsions
Title VI:	Court of Justice
Title VII:	Final provisions

It will be obvious that the core of the Convention, and therefore the section which gave rise to most discussion, lies in Titles II and III (jurisdiction and recognition and enforcement of judgments). Discussion of those issues also reflected, to a large extent, the whole debate on scope (Title I).

15. Title I of the Convention (scope) contains only one Article which was the subject of lengthy discussion which had to be resolved by a political agreement setting the material scope of the Convention to include proceedings on divorce, legal separation or marriage annulment and proceedings relating to parental responsibility for the children of both spouses on the occasion of the application.

16. Title II contains rules of direct international jurisdiction, i.e. rules which must be respected by the court of origin prior to a judgment in matrimonial proceedings. Such provisions do not, however, affect the distribution of territorial jurisdiction within each State or the situations of States the legal systems of which have not been unified. The existence of direct jurisdiction in matrimonial matters is undoubtedly the major innovation in this Convention. Conventions dealing with such matters are normally confined to the recognition and enforcement of judgments and the concomitant inclusion of rules on indirect jurisdiction, that is to say the examination of the jurisdiction

of the court of origin to be made by the court of the State in which recognition is sought.

This Title is divided into four sections:

(a) Section 1 contains the provisions on grounds of jurisdiction, that is to say the grounds of jurisdiction stricto sensu (Articles 2 to 8). The central provision is Article 2 which establishes the grounds in matrimonial matters and it is supplemented by Article 3 on parental responsibility and Article 4 regarding the particular rule relating to the 1980 Hague Convention. The text then deals with counterclaims (Article 5) and conversion of legal separation into divorce (Article 6) and Article 7 covers the exclusive nature of jurisdiction under Articles 2 to 6 while Article 8 covers residual jurisdiction and is parallel to the provision in Article 4 of the 1968 Brussels Convention.

(b) Section 2 (Articles 9 and 10) deals with examination as to jurisdiction in accordance with the grounds in the Convention and as to whether the respondent has been able to arrange for his defence.

(c) Section 3 (Article 11) deals with lis pendens and dependent actions.

(d) Section 4 (Article 12) deals with provisional and protective measures.

17. Title III is the logical consequence of Title II and deals with recognition and enforcement of judgments. At first sight, it might seem that once the subjects covered in the earlier Articles had been resolved, matters would be easy, but that was not the case. Discussions focused mainly on the effects of automatic recognition in relation to the civil-status records and the grounds of non-recognition and non-enforcement. In the same way, account had to be taken of the restriction of recognition to the dissolution of the link and its not affecting other matters (see paragraphs 22 and 64). The problem also affects the need for enforcement and the issue is in turn resolved in relation to the scope. The procedure for enforcement is similar to that in the Brussels Convention.

18. Title IV contains the transitional provisions and Title V the general provisions while Title VI relates to interpretation by the Court of Justice and Title VII contains the final provisions.

III. ANALYSIS OF THE PROVISIONS

TITLE I A. Scope

Article 1 Scope

19. This matter is the essential point which justifies the very existence of the Convention and its extent which, as indicated in paragraph 12, includes rules on jurisdiction and the recognition and enforcement of judgments in matrimonial matters. Determining the scope involves separate issues, relating on the one hand to the type of proceedings conducted and on the other to matters covered.

20. As to the type of proceedings, paragraph 1 refers to 'civil proceedings`, to the exclusion of all other types of proceedings, since these are the normal proceedings conducted in matters of divorce, legal separation or marriage annulment. The term 'civil` is nevertheless intended to define the object of the Convention clearly. It is to be understood not only as a means of including the administrative proceedings referred to in paragraph 2 but also as a means of excluding all merely religious proceedings. The result is as follows:

A. In addition to civil judicial proceedings, the scope of the Convention also includes other non-judicial proceedings occuring in matrimonial matters in certain States. Administrative procedures officially recognised in a Member State are therefore included. In Denmark, for instance, there is, in addition to the judicial course of action, an administrative procedure before the Statsamt (District Council) or before the Københavns Overpræsidium (which performs the same functions as the Statsamt for Copenhagen). For that procedure to apply, there must be grounds for divorce and

agreement between the spouses both on the divorce and on matters connected with it (custody, maintenance, etc.). Appeals against the judgments given by the Statsamt and the Københavns Overpræsidium lie to the Ministry of Justice (Civil Law Directorate) and may then be subject to judicial review through the normal procedure. In the same way, it may be noted that in 1983 Finland adopted a system under which matters relating to custody, residence and visiting may be settled outwith the legal proceedings by agreement that must be approved by the 'kunnan sosiaalilautakunta/kommunal socialnämnd` (communal social (welfare) board): 'Laki lapsen huollosta ja tapaamisoikeudesta`/'Lag angående vårdnad om barn och umgängesrätt`, Law 361 of 8 April 1983, Sections 7, 8, 10, 11 and 12).

For that reason, the text stipulates, as did Article 1 of the 1970 Hague Convention on the recognition of divorces and legal separations, that the term 'court` shall cover all the authorities, judicial or otherwise, with jurisdiction in matrimonial matters in the Member States.

B. The Convention excludes from its scope religious proceedings, which may become more frequent as a result of immigration (Muslim and Hindu marriages, for instance).

Article 42 safeguards agreements concluded between certain Member States and the Holy See (see commentary on Article 42 paragraph 120).

21. In the matters covered, a distinction also needs to be made between purely matrimonial questions and questions of parental responsibility.

22. The Convention is confined to proceedings relating to the marriage bond as such, i.e. annulment, divorce and legal separation. So the recognition of divorce and annulment rulings affects only the dissolution of the marriage link. Dispite the fact that they may be interrelated, the Convention does not affect issues such as, for example, fault of the spouses, property consequences of the marriage, the maintenance obligation or other possible accessory measures (such as the right to a name, etc.). As to maintenance, in addition to other international instruments, jurisdiction and the recognition and enforcement of judgments are covered by the 1968 Brussels Convention which contains a specific jurisdiction rule (Article 5(2)) and there is also the Rome Convention of 6 November 1990 on the simplification of procedures for the recovery of maintenance payments, which is no longer in force. On all other issues the rules (national or international) currently applicable between the States in question will continue to apply.

23. The most complex issue is parental responsibility since in some States the legal system requires that the decision on matrimonial matters includes parental responsibility, while in others matrimonial and child-protection issues follow totally separate routes, that is to say the judgment on the marriage does not necessarily cover parental responsibility and may even refer judgment on it to other authorities. For that reason, separate problems had to be faced and it was difficult to bring all States to accept the text in paragraph 1(b) which includes the issue in this Convention rather than leaving it for a separate text, as some delegations had originally proposed. It is a question, however, only of the matters relating to parental responsibility that appear to be linked to the matrimonial proceedings when those take place (see Article 3(3)).

24. The first problem to be resolved was the inclusion of the topic of parental responsibility. In addition to the differences in legal systems mentioned above, difficulties also arose from the fact that the Hague Conference was preparing the 1996 Convention on child protection. The consequences of that situation are reflected in the text of Article 3. The concept of 'parental responsibility` presents problems too, since it has to be defined by the legal system of the Member State in which responsibility is under consideration. For matters concerning maintenance, see paragraph 22. The term 'parental responsibility`, which is a difficult one to translate for some countries, appears, however, in various international Conventions and in particular in the 1996 Hague Convention so that it does have a degree of unifying potential.

25. The second problem was to determine which children were affected by the provision. There was agreement that the provision covers both biological and adopted children of the couple. Some States also raised the possibility of dealing with parental responsibility not just for children of both spouses but also what are called 'children of the family`. That would include, for instance, the children of one or other of the spouses from a previous union. That situation is known in English, Scots and Netherlands law. The view that prevailed was that the Convention had to be confined to children of both spouses, in view of the fact that the context is that of measures relating to parental responsibility taken in close conjunction with divorce, separation or annulment proceedings. The other solution could also affect the fundamental rights of the father or mother living in another Member State. The consequence of that provision is to be seen in Article 3(3), which determines when the jurisdiction regarding parental responsibility conferred on the authorities of the State in which a decision is to be taken on the matrimonial proceedings is to cease.

The decision to restrict the scope of the Convention as regards parental responsibility to judgments concerning the 'children of both spouses` will not, however, prevent Member States from deciding in future to apply jurisdictional criteria identical to those laid down in Article 3 to 'children of the family` not included in the former category. The jurisdictional criteria applicable to such children will not be affected by the Convention and it will therefore be internal law that will govern jurisdiction and the recognition and enforcement of judgments relating to such children.

26. Finally, in the light of other international texts, particularly the 1989 United Nations Convention on the rights of the child it must be understood that each child is to be considered individually. That means that although the issue is included in general terms in the scope of the Convention, for application it will be necessary to ensure that the conditions set out in Article 3 apply in respect of each one of the children.

TITLE II B. Jurisdiction

Section 1 General provisions

Article 2 Divorce, legal separation and marriage annulment

27. The Forums of jurisdiction adopted are designed to meet objective requirements, are in line with the interests of the parties, involve flexible rules to deal with mobility and are intended to meet individuals' needs without sacrificing legal certainty. It is therefore not surprising that, in view of these requirements, this Article, along with Article 3, occupied a large part of the lengthy discussions which led to the adoption of this text. The solution adopted is the result of a difficult balance between some of the jurisdictional criteria adopted. It was necessary to establish grounds of jurisdiction in matrimonial proceedings without becoming involved in any examination of the situation in which the validity of a marriage needs to be considered as part of annulment proceedings when one of the spouses is deceased or after the decease of both spouses, since that situation is not within the scope of the Convention. Such situations arise, in the majority of cases, as preliminary questions relating to successions. Instead, it will be resolved by the international instruments applicable in the matter, such as the 1970 Hague Convention on the Recognition of Divorces and Legal Separations, or according to the internal legislation of the State where that is possible.

28. The view was that, unlike the 1968 Brussels Convention, which involves an interplay of the general rule laid down in Article 2 and the special grounds of jurisdiction set out in Article 5, the peculiarity of the matter covered in this instance did not lend itself to a provision similar to Article 2 of the Brussels Convention establishing a general forum, nor should a hierarchy be established between the grounds adopted. The exclusion of a general forum and the establishment of a concrete list of forums is a logical step since, precisely as a result of marriage breakdown,

the situation constantly changes at short notice.

The result is that the grounds adopted are objective, alternative and exclusive, in the manner explained below.

Only objective grounds appear in Article 2 and they are subject to the examination as to jurisdiction provided for in Article 9. Therefore if a spouse initiates proceedings in a Member State whose courts do not have jurisdiction on any of the grounds set out in Article 2, those courts cannot claim jurisdiction by reason of the fact that the other spouse makes an appearance to contest the application. Instead the court must examine whether it has jurisdiction and if it does not, must decline. For the role of personal choice, see paragraph 31 of Article 2(1)(a).

The grounds in Article 2 are therefore set out as alternatives and inclusion in either (a) or (b) is not to be interpreted as an order of precedence. Point (a) uses habitual residence in order to determine international jurisdiction, whereas the Brussels Convention uses domicile. In point (b), bearing in mind the specific aspects of certain national legislation, the ground of jurisdiction is either nationality or 'domicile` as the term is used in the United Kingdom and Ireland. Under the 1968 Brussels Convention, a party's domicile is determined in accordance with the internal law of the State of the forum (Article 52). In this case, there was discussion as to whether a similar provision should be included in relation to habitual residence: on this issue see paragraph 31.

29. The grounds set out in this Article are the only ones which can be used for the matter covered; they can therefore be termed 'exclusive` (see commentary on Article 7). That term, however, cannot be understood in the same way as in the Brussels Convention where, for certain matters provided for in Article 16 thereof, only the courts of a particular Member State have jurisdiction and that rule takes precedence over other grounds. In the case we are dealing with here, the term 'exclusive` must be understood as meaning that only the grounds set out may be used and that they are alternatives none of which takes precedence over the rest. The list is therefore exhaustive and closed. It is therefore not necessary to include a rule similar to the one in Article 28(1) of the 1968 Brussels Convention.

30. The grounds for determining the jurisdiction of a State's courts to rule on matrimonial matters coming within the scope of the Convention fall into two groups which are set out in points (a) and (b) respectively. Paragraph 2 of the Article applies to point (b) of paragraph 1 and also to the last indent in point (a) (for the effects of the declaration, see Article 7 and Article 8(2)).

The grounds adopted are based on the principle of a genuine connection between the person and a Member State. The decision to include particular grounds reflects their existence in various national legal systems and their acceptance by the other Member States or the effort to find points of agreement acceptable to all.

31. Of the grounds in point (a) of paragraph 1, the rule that international jurisdiction should lie with the courts of the place in which the spouses are habitually resident at the time of application (first indent) is a ground widely accepted in the Member States and will undoubtedly apply in the great majority of cases. Nor does the ground in the third indent (place in which 'the respondent is habitually resident`) create any problems in that it corresponds to the general ground based on the principle of actor sequitur. There was also a broad consensus on the ground to apply in the event of a joint application (fourth indent) as the application may be made to the authorities of the place in which either spouse is habitually resident; in that case, it should be noted that, unlike the 1968 Brussels Convention, this Convention allows only a minor role for the spouses' free choice, which appears only in this limited form: it is logical that it should be so since the issue is matrimonial proceedings.

32. Acceptance of the other grounds in this paragraph was more problematic. In principle, there should be no objection to the jurisdiction of the courts of the State in which the spouses were last habitually resident, in so far as one of them still resides there (second indent). The problem arising for some Member States was how to reconcile that situation with the situation of the other spouse who, as a result of the marriage breakdown, often returns to his/her country of domicile or nationality prior to the marriage and there comes under the limitations laid down in the fifth and sixth indents, provisions which will undoubtedly have consequences regarding lis pendens (see Article 11).

Both these provisions allow forum actoris in exceptional cases on the basis of habitual residence combined with other elements. That is why the fifth indent allows jurisdiction to lie with the courts of the Member State in which the applicant is habitually resident if he or she resided there for at least a year. Since some Member States did not find the rule set out in those terms sufficient and bearing in mind the frequency with which the spouse's new residence is in the State of nationality or of 'domicile`, in the sense in which this term is used in the United Kingdom and Ireland, the sixth indent adds the possibility of having the matrimonial proceedings heard by the courts of the Member State in which the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made, provided that that State is the State of nationality or of domicile as defined in the United Kingdom and in Ireland. That provision was introduced as a result of the political compromise adopted in December 1997 following a formal statement by some States that acceptance of that forum was an essential prerequisite of vital importance for an overall compromise solution.

The solution takes into account the situation of the spouse who returns to his or her country but does not mean establishing a ground based solely on the forum of the applicant: on the one hand, the existence of nationality or 'domicile` demonstrates that there is an initial connection with that Member State; on the other hand, in order to initiate proceedings in that Member State, he or she must have resided there for at least six months immediately before the application was made. The last requirement led to a discussion of establishment of habitual residence, taking account of the situation of the spouse who returns to the country of origin as a consequence of the breakdown of the marriage. The existence of the connection will be assessed by the court. Although the possibility of including a provision determining habitual residence similar to the one in Article 52 of the 1968 Brussels Convention was discussed, in the end it was decided not to insert any specific provision on the matter. However, although not applicable under the 1968 Brussels Convention, particular account was taken of the definition given on numerous occasisons by the Court of Justice, i.e. 'the place where the person had established, on a fixed basis, his permanent or habitual centre of interests, with all the relevant facts being taken into account for the purpose of determining such residence`. Other proposals were therefore rejected whereby it would be sufficient for the applicant to have his or her habitual residence there for a total of at least one year in the five years immediately before the application was made, even when combined with nationality or 'domicile`.

Moreover, the mutual confidence which underlies the preparation of this Convention, like the 1968 Brussels Convention, should be sufficient to overcome the existing reluctance to have a case heard by the courts of another State.

33. Another alternative to the grounds listed above, which for organisational reasons appears in a separate point (point (b) of paragraph 1), is to allow the matrimonial proceedings to take place before the courts of the State of nationality of both spouses or of 'domicile of both spouses` established on a long-term settled basis. This provision merits particular attention and comment.

In the first instance, it is worth emphasising that the nationality or 'domicile` must be common to both spouses. Some States wanted to allow that condition to apply to only one spouse. That possibility was rejected since it would be equivalent to pure forum actoris, often with no real

connection whatsoever with the State in question, and would thus be contrary to the spirit of the Convention.

Establishing the possibility of having the authorities of the State of nationality or 'domicile` of both spouses handle proceedings does not mean that the courts of the State can in every instance examine whether one or other of those criteria has been met. What is intended is that in the light of their internal system, States will adopt one or other of the criteria. Hence, just as common nationality may be acceptable to Spain, 'domicile` will be the criterion for the United Kingdom and for Ireland.

It is precisely for that reason that paragraph 2 of this Article requires the Member States to stipulate in a declaration made when giving the notification referred to in Article 47(2) whether it will be applying the criterion of nationality or of 'domicile` referred to in paragraph 1(b).

The Convention is silent on the consequences of dual nationality, so the judicial bodies of each State will apply their national rules within the framework of general Community rules on the matter.

34. The problems arising from the many language versions of the Convention made it necessary to make some special arrangements for the term 'domicile` as it appears in this text but only in relation to this Convention. That is the purpose of Article 2(3). The problems and solutions appearing in the 1968 Brussels Convention have been adverted to. In this instance, when extending the Convention to matrimonial matters and having to include nationality as a criterion for determining international jurisdiction, it was not possible to follow the 1968 criteria. While nationality is a criterion which does not raise any major problems as to meaning, domicile presented a more complex problem since it appears in this text with the meaning it has in the United Kingdom and Ireland. This is the reason why in most texts the equivalent of the word 'domicile` appears in inverted commas to indicate that it has a special meaning. There can therefore be no possibility of equating this term with habitual residence as referred to in paragraph 1.

In a detailed document, the United Kingdom delegation provided clarification on the concept of 'domicile`, purely for the purposes of the Convention without attempting to give a definitive account. The essential purpose of domicile is to connect a person with the country in which he has his home permanently or indefinitely. It is used so as to make that person subject to the law and legal system of that country for several purposes of broad application, principally concerning important matters affecting family relations and family property. In United Kingdom law, the rules for determining a person's domicile operate generally to ensure that every person has a domicile, and only one domicile, at all times. In addition to rules for determining the domicile of children (domicile of origin), there are rules for establishing the domicile of adults, either by acquisition of a new domicile (domicile of choice) or by revival of the domicile of origin. The same principles apply in Irish law.

Article 3 Parental responsibility

35. Article 1 having established that proceedings relating to parental responsibility (for the use of this term see commentary on Article 1) which are seen to be connected with the proceedings relating to divorce, legal separation or marriage annulment fall within the scope of the Convention, Article 3 determines where and under what conditions authorities of the State, the judicial bodies of which have jurisdiction in matrimonial proceedings in accordance with the grounds set out in Article 2, have jurisdiction in a matter relating to parental responsibility over a child of both spouses. Article 3 thus comprises three paragraphs: paragraph 1 establishes the jurisdiction of the authorities of the Member State whose courts have jurisdiction in the matrimonial proceedings and paragraph 2 deals with cases where the child is not habitually resident in that Member State. Paragraph 3 sets a time limit for such jurisdiction.

36. The structure and content of this provision are the product of difficult negotiation, both within the Community and in relation to worldwide provisions, particularly the 1996 Hague Convention. The fact that the Community Convention limits itself to children habitually resident in the Member States facilitates its compatibility with the Hague Convention.

The agreement between the Member States to include this matter within the scope of the Convention simply transferred the problem to the establishment of grounds of jurisdiction, since while there were no problems where the child is habitually resident in the State whose authorities have jurisdiction in the matrimonial proceedings, the same does not apply to cases where the child is habitually resident in another Member State.

The problem is further complicated by the fact that Article 52(2) of the 1996 Hague Convention provides that that Convention does not affect the possibility for one or more Contracting States to conclude agreements which contain, in respect of children habitually resident in any of the States Parties to such agreements, provisions on matters governed by that Convention. As a result, where both Conventions are in force, the Convention to which this report relates will take precedence in respect of children resident in Member States of the European Union which are party to it, whereas the Hague Convention will apply to other cases.

37. There are no problems in relation to Article 3(1) which establishes jurisdiction in a matter relating to parental responsibility over a child of both spouses where the child is habitually resident in the Member State whose authorities also exercise jurisdiction in the matrimonial proceedings. It needs to be made clear that in no case does that provision mean that it must be the same authorities in the State concerned who rule on the matrimonial issue and on the parental responsibility: the rule is intended only to establish that the authorities deciding on both matters are authorities of the same State. In practice, they will be the same authorities in some States and separate authorities in others. For the purposes of the Convention, the only point of interest is that they be authorities of the same Member State, with due regard for the internal distribution of competence.

38. Paragraph 2 sets out the conditions under which the authorities of the Member State exercising jurisdiction on the divorce also have jurisdiction to decide on parental responsibility where the child is resident not in that State but in another Member State. Both of the following conditions have to be met: at least one of the spouses must have parental responsibility in relation to the child and the jurisdiction of the courts must have been accepted by the spouses and must be in the best interests of the child. This provision is taken from Article 10(1) of the 1996 Hague Convention, which guarantees that there is no contradiction between Article 3(2) of the Convention under discussion and the relevant provisions of the said Hague Convention. The relevant provision of the Hague Convention says practically the same thing, the only difference being that in addition to requiring that one of the parents have parental responsibility, it also requires that at the time of commencement of the proceedings, one of the parents habitually resides in that State.

The difference derives from the differing subject matters of the two Conventions: the Hague Convention deals with protection of children, whereas the Convention to which this report relates deals with matrimonial matters and for that reason the parents' connection with the territory of a State for the purposes of determining jurisdiction in matrimonial matters is determined by the grounds set out in Article 2. Article 3(2) is designed to cover one particular situation in which the best solution is to use the same grounds as in the Hague Convention.

39. The Convention chose not to enshrine perpetuatio jurisdiccionis for the divorce forum in relation to protection of the child of both spouses and for that reason paragraph 3 determines when the jurisdiction conferred by paragraphs 1 and 2 will cease, listing three alternative events any of which will cause it to cease. This provision follows Article 10(2) of the 1996 Hague Convention, the object being to avoid any contradiction between the two texts.

(a) Subparagraph (a) deals with the basic assumption that the judgment allowing or refusing the application for divorce, legal separation or marriage annulment has become final, that is to say that no further appeal or review of any kind is possible. Once that happens, and without prejudice to subparagraph (b), Article 3(1) and (2) no longer apply. Parental responsibility will then have to be determined either by national law or by the relevant international Conventions.

(b) In addition to this well-known situation, and without prejudice to the residual rule in subparagraph (c), subparagraph (b) adds another situation where, on the date on which the judgment on the matrimonial proceedings becomes final, in the sense that such a judgment cannot be the subject of any sort of appeal, proceedings in relation to parental responsibility are still pending and provides that jurisdiction will not cease until a judgment in the responsibility proceedings has become final; in any event in this situation jurisdiction on parental responsibility may be exercised even if the judgment allowing or refusing the application for divorce, legal separation or marriage annulment has become final. It was necessary to insert this provision in this Convention because it is conceivable that when different authorities within the same country are involved or in cases before the same authorities, the judgment on the matrimonial proceedings may be final at a time when the proceedings on parental responsibility have not yet come to an end. Jurisdiction on the parental responsibility therefore ceases on whichever of those two dates applies. It is therefore understood that proceedings on parental responsibility, once initiated, must continue until a final judgment is reached. The fact that the application relating to the marriage has been resolved may not prejudice the expectations created both for the parents and for the child that the parental responsibility proceedings will terminate in the Member State in which they began. Although not expressly stated, the intention is that there should be no perpetuatio jurisdiccionis but that proceedings on parental responsibility initiated in connection with matrimonial proceedings should not be interrupted.

(c) Subparagraph (c) deals with the residual or concluding situation where the proceedings have come to an end for another reason (for example, the application for divorce is withdrawn or one of the spouses dies).

Article 4 International child abduction

40. One of the risks, and perhaps the major risk, to which the child of both spouses is exposed when a marriage breaks down is being taken out of the country by one of the parents, with all the stability and protection problems which that entails. To resolve such problems, very special attention was paid to the Hague Convention of 25 October 1980 on the civil aspects of international child abduction. But Conventions on the protection of children such as the 1996 Hague Convention and this Convention on matrimonial matters, which involve questions of protection for the child of both spouses at times of crisis, may have a negative effect on the return of the child if appropriate steps are not taken. That is the purpose of Article 4 of the Convention under discussion.

41. In that instance, a special rule of jurisdiction has been established referring to the 1980 Hague Convention, creating a situation different from the relation with certain other Conventions established in Article 39. That Article states that this Convention supersedes other Conventions between States which are party to both, whereas Article 4 contains a rule to the effect that the jurisdiction conferred by Article 3 must be exercised within the limits established in the 1980 Hague Convention and particularly Articles 3 and 16 thereof. That safeguards the habitual residence as the ground of jurisdiction where, as a result of wrongful removal or retention, there has in fact been a change in habitual residence.

It is important for various reasons to refer to both Articles. In the first instance, because Article 3 of the 1980 Hague Convention provides that the removal or the retention of a child is to be considered wrongful where:

'(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention, and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.The rights of custody mentioned in subparagraph (a), may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State`.

In the second instance, the reference is important because the consequences of wrongful removal or retention, for the interested parties, are dealt with in Article 16 which provides that:

'After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under the Convention is not lodged within a reasonable time following receipt of the notice`.

Accordingly, the habitual residence has changed and it might be thought appropriate to use the grounds of jurisdiction allowed in this Convention, the priority role accorded to Article 16 of the Hague Convention would prevent any steps being taken which would alter parental responsibility prior to any decision on return or non-return.

This Article assumes that the Member States are parties to the 1980 Hague Convention. Accordingly, if in future new Member States accede, it would be advantageous if they acceded to the 1980 Hague Convention if they have not already done so.

Article 5 Counterclaim

42. This Convention contains the classic rule on counterclaims, giving jurisdiction to the court in which the initial proceedings are pending should a counterclaim be made. The limited scope of the Convention and the frequency with which matters covered by it arise in connection with other matters make it necessary to specify that that rule applies only when the subject of both the initial proceedings and the counterclaim come within the scope of this Convention. This provision has to be seen in conjunction with Article 11 (see commentary on that Article in relation to lis pendens) in order to differentiate between the situations covered by each Article although in practice they may in many cases produce identical effects.

Article 6 Conversion of legal separation into divorce

43. The conversion of legal separation into divorce is fairly frequent in some legal systems. In some State separation is an obligatory step prior to divorce and a stated period of time must usually elapse between the separation and the divorce. That distinction is, however, unknown in other legal systems.

The Working Party arrived at this provision after having checked whether there were other situations in which applications might arise to supplement or update a judgment in matrimonial proceedings. The finding was that only conversion of legal separation into divorce should be covered by this provision.

In such instances, in accordance with the provisions of the Convention it is possible to obtain the divorce either before the courts of the State having jurisdiction under Article 2 or before the courts of the State in which the separation was obtained, it being clearly understood that the fact that conversion is possible does not itself depend on the Convention but is a possibility

allowed under the internal law of the State in question.

Article 7 Exclusive nature of jurisdiction under Articles 2 to 6

44. The essential characteristics of the jurisdiction rules provided for in this Convention have been examined in connection with Article 2 (see paragraph 29); that is to say, only the criteria listed in Articles 2 to 6 may be used, as alternatives and without any order of precedence. However, this Article is intended to emphasise the exclusive nature of the grounds contained in earlier Articles for determining the jurisdiction of a State's authorities. It should be noted that the exclusive nature of the jurisdiction established refers only to matrimonial matters and questions of parental responsibility connected with such cases and does not therefore affect the rules of jurisdiction in matters of protection of minors where they are independent of the matrimonial proceedings. The exclusive nature should be understood without prejudice to the rules laid down in Articles 8(1) and 38(2).

45. Where the grounds under Article 2 are either the spouse's habitual residence or his or her nationality or 'domicile` (see statement provided for in Article 2(2), to which paragraph 33 refers), an application may be made to a court only in accordance with the rules laid down in the earlier Articles. That limitation on the rules of jurisdiction opens the way to the residual jurisdiction provided for in Article 8. Accordingly, if the United Kingdom adopts the criterion of domicile and Spain that of nationality, a spouse of British nationality domiciled in Spain and habitually resident in Brazil would not be subject to the rules laid down in Article 7 and could still be subject to an application made in accordance with Article 8.

Article 8 Residual jurisdiction

46. This Article corresponds to the rules of exorbitant jurisdiction referred to in Articles 3 and 4 of the 1968 Brussels Convention. There are, however, differences between the two texts. The nature of the jurisdictions laid down in the aforementioned Articles renders unnecessary a provision such as Article 3 of the 1968 Brussels Convention.

47. Following the provision in Article 7 (exclusive nature of jurisdiction under Articles 2 to 6), this Article deals with arrangements existing in the national legal system which can be used only in the context of this Article. For some States, when one of the spouses resides in a non-Member State and none of the jurisdictional criteria of the Convention is met, jurisdiction should be determined in accordance with the law applicable in the Member State in question. To deal with that situation, the solution adopted is an assimilatory one whereby the applicant who is a national of a Member State who is habitually resident within the territory of another Member State may, like the nationals of that State, avail himself of the rules of jurisdiction applicable in that State. The prerequisite for applying that provision is that the respondent does not have his habitual residence in a Member State and does not have his 'domicile` within the territory of a Member State and is not a national of a Member State according to the criteria applicable to the case in accordance with the statement provided for in Article 2(2) (see above).

Such jurisdiction is termed 'residual` in view of its nature and the place it occupies in relation to the grounds of jurisdiction established by the Convention. That description was regarded as preferable to 'extra-Community disputes`. In view of the function that that Article performs, like that of Article 4 of the Brussels Convention, contrary to the practice followed in Article 3 of the 1968 Brussels Convention, a list of these types of jurisdiction has not been included in this Article.

Some States, like the Netherlands, have no jurisdiction in their internal legal system which can be defined as 'residual` for the purposes of Article 2 of the Convention.

Such jurisdiction does, however, exist in other national systems. Some examples are set out below.

In Germany, the rules of jurisdiction provided for in sections (1), (3) and (4) of Article 606a of the 'Zivilprozessordnung` could be described as residual; they provide that German courts have international jurisdiction when (1) one spouse is German or was German when the marriage took place; (2) one spouse is stateless and is habitually resident in Germany; or (3) one spouse is habitually resident in Germany, except where any judgment reached in their case could not be recognised in any of the States to which either spouse belonged.

In Finland, under Section 8 of the 'Laki eräistä kansainvälisluontoisista perheoikeudellisista suhteista`/'Lag angående vissa familjerättsliga förhållanden av internationell natur` (International Family Relations Act) revised in 1987, Finnish courts will hear matrimonial cases even where neither spouse is habitually resident in Finland if the courts of the State of habitual residence of either of the spouses do not have jurisdiction or if application to the courts of the State of habitual residence would cause unreasonable difficulties and, furthermore, in the circumstances it would appear to be appropriate to assume jurisdiction (forum conveniens).

In Spain the only example would be one of the rules contained in Article 22(3) of the 'Ley Organica del Poder Judicial` (Law on the judicial system) of 1 July 1985 which allows the application to be made in Spain when the applicant is Spanish and is resident in Spain but does not meet any of the requirements in Article 2(1) of this Convention such as the express or tacit submission referred to in Article 22(2). Apart from that, all the other grounds for international jurisdiction in matrimonial matters which exist in Spanish law are contained in the Convention, these being that both spouses are habitually resident in Spain at the time of the application or that both spouses are of Spanish nationality, whatever their place of residence, provided that the application is made either jointly or with the agreement of the other spouse.

In France, Article 14 of the Civil Code would give French courts jurisdiction if the petitioner had French nationality.

In Ireland the courts would have jurisdiction in matters of annulment (Section 39 of the Family Law Act, 1995) divorce (Section 39 of the Family Law (Divorce) Act, 1996), and legal separation (Section 31 of the Judicial Separation and Family Law Reform Act, 1989), when either of the spouses is domiciled, for the purposes of Article 2(3), in the State on the date of institution of proceedings.

In Italy, the rules laid down in Articles 3, 4, 32 and 37 of Law 218 of 31 May 1995 on the reform of the Italian system of private international law are of this nature.

In the United Kingdom, a distinction has to be made between divorce, separation and annulment proceedings and custody orders relating to such proceedings. With regard to divorce, annulment and legal separation proceedings, this Article may cover grounds of jurisdiction based on the 'domicile` of either party in the United Kingdom at the time the application is made or on habitual residence for a year immediately preceding that date. In the case of divorce and separation proceedings, the Sheriff Courts in Scotland have jurisdiction if one party is either resident in the place for 40 days immediately prior to the submission of the application or has resided there for a period of at least 40 days ending not more than 40 days before that date and has no known residence in Scotland on that date. For custody orders contained in divorce, annulment and legal separation judgments, United Kingdom judicial bodies, including the Sheriff Courts in Scotland, will have jurisdiction, but if a court outwith the United Kingdom is conducting relevant proceedings, United Kingdom courts have a wide discretion to decline jurisdiction, provided that those proceedings continue and, in addition, that the proceedings continue before a judicial body that has jurisdiction under its national legislation.

In the case of Sweden, the jurisdictional rules of Swedish courts for divorce matters are to be found in the 'lag om vissa internationella rättsförhållanden rörande äktenskap och förmynderskap` (Act on certain international legal relations concerning marriage and guardianship) 1904, as amended in 1973. As regards Article 7 of the Convention, Swedish courts have jurisdiction in matters of divorce if both spouses are Swedish citizens, if the petitioner is Swedish and is habitually resident in Sweden or has been so at any time since reaching the age of 18 or if, in other cases, the government gives its consent to the cases being heard in Sweden. The government can give its consent only if one of the spouses is Swedish or the petitioner cannot bring the case before the courts of the State of which he is a national.

48. Taking into account the grounds of jurisdiction laid down in Articles 2 to 6 of the Convention, paragraph 1 sets the boundary between grounds of an exclusive nature established by the Convention and the principle of applying internal rules of jurisdiction, thus demonstrating the geographical limits of the Convention. The requirements set out in Article 8(2) must be examined in the following sense:

(a) the applicant must be a national of a Member State habitually resident in another Member State. Hence the principle of assimilation between citizens of Member States for the purposes of paragraph 1;

(b) the respondent must meet two conditions: on the one hand he or she must be habitually resident outside the Member States; on the other hand, he or she must not be a national of a Member State or have his or her 'domicile` in a Member State (declaration provided for in Article 2(2)). Both conditions are concurrent, otherwise the situation would be one requiring application of one of the grounds in Article 2.

Section 2 C. Examination as to jurisdiction and admissibility

Article 9 Examination as to jurisdiction

49. It is worth emphasising the special importance attaching in this Convention to the examination as to jurisdiction carried out automatically by the court of origin, without any need for any party to request it. Internal legal systems are particularly sensitive to matrimonial matters, more sensitive than they are to the property matters covered by the 1968 Brussels Convention.

Bearing in mind the major differences between internal regulations in the Member States and the interplay of choice-of-law rules applicable, it is easy to imagine that the fact that the grounds of jurisdiction set out in Article 2 are alternatives may lead some spouses to attempt to make their application in matrimonial matters before the courts of a State which, by virtue of its choice-of-law rules, applies the legislation most favourable to their interests. For that reason, the court first seised must examine its jurisdiction, which might not happen if the issue were discussed in that Member State only as an exception.

On this topic, see also Ireland's particular problem regarding recognition of foreign judgments in the commentary on Article 48.

Article 10 Examination as to admissibility

50. The purpose of this provision is to guarantee the right of defence. It is not sufficient to examine jurisdiction alone, as provided for in the previous Article; it is also necessary to establish a similar rule for examining admissibility, involving staying the proceedings so long as it is not shown that the respondent 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. The intention is that court can thus satisfy itself that international jurisdiction is well founded and so avoid possible causes of refusal of recognition wherever possible.

51. The provision is based on Article 20 of the 1968 Brussels Convention and, on the same topic, the provisions in the 1965 Hague Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters. The court, when applying one of the grounds of jurisdiction provided for in the Convention, will examine its jurisdiction where the respondent does not enter an appearance. The wording adopted is simpler than in other Conventions but the essential elements are covered:

(a) an obligation on the court to stay proceedings, not merely an option;

(b) the respondent's rights of defence to be examined by the court, both as to whether he has been able to receive the document 'in sufficient time to enable him to arrange for his defence` and as to whether 'all necessary steps have been taken to this end`.

The recent signing of the Convention of 26 May 1997 on the service in the Member States of the European Union of judicial and extrajudicial documents in civil or commercial matters has led to a provision that, once it has entered into force, Article 19 thereof will be applied instead of the provisions in paragraph 1. Bearing in mind the possibility of the early application of the 1997 Convention, there will be a gradual substitution of the European Community Convention for the Hague Convention and there will not, therefore, be a general entry into force. As Articles 15 and 16 of the Hague Convention are reproduced in the 1997 Convention the change of Convention applicable will not entail any significant changes.

Section 3 D. Lis pendens and dependent actions

Article 11 Lis pendens and dependent actions

52. This provision is based on Article 21 of the Brussels Convention and is related to Article 13 of the 1996 Hague Convention with regard to child protection. It was one of the provisions on which discussion continued until the very last moment and there were two reasons for the difficulty.

On the one hand, the case-law of the Court of Justice of the European Communities on Article 21 of the 1968 Brussels Convention has demonstrated the problems caused by that provision as currently worded and the problems of delimitation in relation to dependent actions, as many cases have been drawn towards lis pendens. It is no accident that that Article of the Brussels Convention will require special attention during the joint review of the Brussels and Lugano Convention set in motion in January 1998, even if as yet only in the form of preliminary studies which cannot affect the text we are dealing with here.

On the other hand, the differences between the legal systems in the Member States are particularly evident on this topic. Account will need to be taken of the situation in States such as Sweden and Finland, where the only legal form of the dissolution of marriage between living spouses is divorce and national law makes no provision for separation or annulment, so that some divorce proceedings in those countries correspond to annulment proceedings under other legal systems.

The difference in rules between the Member States also affects the very notion of lis pendens. The notion is more restricted in some States (France, Spain, Italy and Portugal) requiring the same subject-matter, the same cause of action and the same parties, and broader in others which require only the same cause of action and the same parties.

The lis pendens mechanism is designed to avoid parallel actions and consequently the possibility of irreconcilable judgments on the same issues and the objective was to provide a rule which, on the basis of the basic principle of prior temporis, could provide a solution for the various possibilities in family law, which differ from those in property law. The traditional lis pendens arrangement did not solve all the problems and there was therefore a need to find a new wording which would achieve the objective desired. After lengthy discussion, it was the Luxembourg Presidency which

proposed the text finally accepted by the Member States.

53. Paragraph 1 contains the traditional lis pendens rule, that is to say the prior temporis rule applicable to all proceedings covered by the Convention, provided the subject-matter and cause of action are the same between the same parties. To avoid the risk of negative conflict of jurisdiction, it is stipulated that the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

54. Paragraph 2 contains an innovation designed specifically to deal with the differences in legislation between the various Member States on the admissibility of proceedings for separation, divorce or marriage annulment. The provision in that paragraph therefore relates to what are called 'dependent actions` and could be termed 'false lis pendens`.

The solution adopted was proposed by the Luxembourg Presidency as a compromise solution and should be examined particularly in connection with paragraph 3 since the cases covered by paragraph 1 are relatively rare. The solution adopted was regarded as preferable to the other solution proposed which would have involved retaining the force of attraction of the jurisdiction producing the greatest effects in order to provide certainty and prevent problems for those States which do not have legal separation or annulment. For others, more flexible rules on dependent actions, similar to those of the 1968 Brussels Convention, would have been preferable.

It might seem on a first reading that, since it applies the same solution as in paragraph 1 to proceedings not involving the same cause of action, paragraph 2 is repetitive and superfluous. That conclusion would, however, be erroneous since, unlike paragraph 1 which also includes parental responsibility, paragraph 2 is deliberately confined to divorce, legal separation and marriage annulment: only in relation to them does the lis pendens rule apply where the cause of action is not the same.

55. Paragraph 3 sets out the consequences of the acceptance of jurisdiction by the court first seised. The provision contains a general rule, which is that the court second seised shall decline jurisdiction in favour of that court. It also contains a special rule whereby the party who brought the relevant action before the court second seised may, if he so wishes, bring that action before the court which claims jurisdiction because it was seised earlier. The first words in the second paragraph of paragraph 3, 'in that case`, must therefore be interpreted as meaning that only when the court second seised declines jurisdiction does the party have the possibility of bringing the action before the court having claimed jurisdiction because it was first seised. The rule in paragraph 3 is part of the political agreement reached in December 1997 and the Working Party therefore confined itself to expressing it appropriately. It should be noted, however, that some members of the Working Party did not agree with the broad scope given to that paragraph and were in favour of having the possibility offered to the applicant in the second action limited to the cases covered by paragraph 2.

In any event, it needs to be noted that the rule in paragraph 3 of this Article differs from the one in Article 5 (counterclaim). The rule in Article 5 is a rule of jurisdiction whereas the one in Article 10 is a provision applying the rules of jurisdiction in dependent actions. We must also remember that it will operate differently since there will be cases in which no counterclaim would be possible (for instance because the time is not right), but it would still be possible to apply the rule in Article 11(3).

56. The consequence of including the rule on dependent actions is the disappearance of an Article on related actions given that it was not considered that there were cases, involving the subject matter of the Convention, which would be outside the framework of the dependent action provision.

57. It should be emphasised that, under this rule, the court second seised must always decline jurisdiction in favour of the court first seised, even when the internal law of that Member State

does not provide for separation or annulment. That would be the case, for instance, if an application for divorce were presented in Sweden and an application for annulment in Austria: the Austrian court would have to decline jurisdiction even though Swedish law makes no provision for annulment. Once the divorce ruling was final in Sweden, however, the interested party could apply to a court in Austria, in order to ensure that those effects of the divorce which would be null under Austrian law would have the necessary effects ex tunc as opposed to divorce which has only effects ex nunc, bearing in mind, moreover, that the recognition of the scope of this Convention is restricted to changes in civil status (see paragraph 64). The same principle would apply to the reverse situation. That is to say that the Convention will not prevent an Austrian judgment on annulment from being the object, in Sweden, of a subsequent court judgment to the effect that the annulment will have the effect of a divorce ruling in Sweden. The same problems would not, however, arise in relation to separation since, although Swedish law does not provide for it, divorce produces effects which are more extensive than and superimposed on the effects of separation.

Section 4 E. Provisional and protective measures

Article 12

58. As regards the rule on provisional and protective measures, it must be observed that it is not subject to the jurisdictional rules of the Convention because it refers to proceedings encountered within its scope and this Article applies only to urgent cases. This provision is taken from Article 24 of the 1968 Brussels Convention, although it goes further than the provisions of that Article. Although Article 24 of the Brussels Convention presents problems which are under consideration in the current review of the Brussels and Lugano Conventions, it was considered preferable not to innovate on this occasion or to incorporate any of the suggestions made on the matter. In this instance, as in some others, the question of how any improvements made to the equivalent provision in the Brussels Convention can be incorporated will be left until later.

59. As to the content of the provision, it should be noted that although provisional and protective measures may be adopted in connection with proceedings within the scope of the Convention and are applicable only in urgent cases, they relate to both persons and to property and therefore touch on matters not covered by the Convention, in the case of actions provided for in national rules. The differences with respect to the Brussels Convention are significant, as in the Brussels Convention the measures to which Article 24(a) refers are restricted to matters within the scope of the Convention: those in (b) on the other hand, have extraterritorial effects. The measures to be adopted are very broad since they can affect both persons and assets in the State in which they are adopted, something which is very necessary in matrimonial disputes. The Convention says nothing bout the type of measures or about their connection with the matrimonial proceedings. These measures, accordingly, affect even matters that do not come within the scope of the Convention. This is a rule which enshrines national law jurisdiction, thereby derogating from the rules laid down in the first part of the Convention. The provision makes it clear that such measures may be adopted in one State even though the court of another State has jurisdiction to hear the case. The measures will, of course, cease to apply once the court having jurisdiction gives a judgment on the basis of one of the grounds of jurisdiction set out in the Convention and that judgment is recognised (or enforced) under the Convention. Other measures relating to matters excluded from the scope of the Convention will continue to apply until appropriate judgments are given by a court with jurisdiction for, for example, marriage contracts.

The rule laid down in this Article is confined to establishing territorial effects in the State in which the measures are adopted.

TITLE III F. Recognition and enforcement

Article 13 Meaning of the term 'judgment`

60. The provisions in this Article have been taken partly from Article 25 of the 1968 Brussels Convention. The aim is to define what is meant by a 'judgment`, for the purposes of recognition and enforcement. Thus, in addition to the general definition in paragraph 1, paragraph 2 makes it clear that the provisions of Title III shall also apply to the determination of the amount of costs and expenses of proceedings and any order concerning such costs and expenses. For the purposes of this Article account must be taken of the fact that it also covers judgments given by the bodies referred to in Article 1(2) (see paragraph 20(A)).

In some language versions, one term is used to refer to both the judgment adopted in the state of origin and that relating to execution. In other versions different terms are used for each.

There was much discussion as to whether the term 'judgment` covered only positive decisions or whether it also covered negative decisions adopted in a Member State, that is to say decisions which did not grant a divorce, legal separation or marriage annulment. Taking into account, on the one hand, the mandate received, which was to prepare a Convention to facilitate recognition and enforcement of divorces, legal separations and marriage annulments, and, on the other hand, the major differences between the Member States on divorce and separation, it is understood that the word 'judgment` refers only to positive decisions, that is to say those that do grant a divorce, legal separation or marriage annulment. As regards decisions on parental responsibility that come within the scope of the Convention and are subject to the jurisdictional rules laid down in Article 3, some positive judgments may have negative effects with regard to parental responsibility for a person different from the person in whose favour the judgment was given. Clearly a judgment of that sort comes within the scope of the Convention.

Special attention must be given to divorce judgments given by Netherlands and Belgian courts. Under Netherlands law, a divorce judgment must be registered if the divorce is to be effective. If registration is not effected within six months of the date of the judgment, the judgment loses its effect as a res judicata. Under Belgian law (Articles 1275, 1303, 1309 and 1310 of the 'Code judiciaire`/'Gerechtelijk wetboek`) the enacting terms of the divorce or legal separation judgment must be recorded in the register of marital status within one month of notification of the judgment to the registrar; this requirement does not appear in connection with judgments for marriage annulment; however, failure to record the judgment only prevents the divorce from being relied on as against third parties.

It is for national legislation to determine what is meant by measures relating 'to parental responsibility`. For this concept, see the commentary on Article 1.

In relation to costs, the provision in Article 38(1) regarding the application of the 1954 Hague Convention on Civil Procedure and, where appropriate, the 1980 Hague Convention on International Access to Justice needs to be taken into account.

61. Paragraph 3 is designed to meet a specific objective. In the 1968 Brussels Convention, the title on recognition and enforcement is followed by a special title on authentic instruments and court settlements of which recognition or enforcement can be refused only if contrary to public policy. At the beginning, consideration was given to doing the same in this Convention or to deleting the rule. However, after examination of the national laws, it became apparent that while in some States there were no concrete instances in which this rule would be necessary, in others it was essential, for example situations existing in Scotland or custody agreements approved by the administrative authority with jurisdiction in Sweden or Finland. Examination of the possibilities which existed led to the conclusion that there were no reasons to justify copying the Brussels Convention exactly

and it was considered more appropriate to include a third paragraph in Article 13 applying the same treatment to 'documents which have been formally drawn up or registered as authentic instruments and are enforceable in one Member State and also settlements which have been approved by a court in the course of proceedings and are enforceable in the Member State in which they were concluded' as to the 'judgments` referred to in paragraph 1.

In the United Kingdom, authentic documents, although recognised in all jurisdictions for the purposes of enforcement, can only be created under the Scottish legal system. They must be documents whose enforceability is established by a public authority and can be recorded in public registers existing in the Higher Courts in Scotland, known as the Books of Council and Session and the Books of the Sheriff Court. Entry in those books gives the document the force of a court judgment. Such instruments in Scottish family law practice may refer to any aspect of the reorganisation of the spouses' affairs after the divorce. They will accordingly include matters not covered by this Convention, such as matrimonial property, but they may include matters relating to the children that do not come under parental responsibility, such as residence, visiting rights and other settlements. The intention is to distinguish it from the agreements that may be concluded by unmarried parents in connection with their parental responsibility towards their children, as laid down in Article 4 of the Children (Scotland) Act, 1995.

Although in practice the public-order exception may be sufficient, when its use is considered necessary, to prevent such settlements having an effect on civil status in another State, it did not seem sufficient to include a provision such as the one in Article 50 of the Brussels Convention since in matters of family law, there may be other cases of non-recognition (for example Article 15(2)(b)) and therefore the question of non-recognition of settlements needs to be examined in conjunction with the grounds of non-recognition of judgments.

Section 1 G. Recognition of a judgment

Article 14 Recognition

62. The provisions in this Article are based on Article 26 of the 1968 Brussels Convention. However, there is a fundamental difference in view of the matters covered by this Convention, and it relates to the effects of recognition. While there was agreement on the provision in paragraph 1 which involves automatic recognition, in the sense of recognition that does not imply any specific procedure, in all the Member States of judgments given in each one, the same level of agreement did not exist on the effects which should follow, particularly in relation to the most important issue, the updating of civil-status records.

63. That is why, after lengthy discussion, agreement was reached on Article 14(2) which requires no special procedure for updating the civil-status records of a Member State, the existence of a final judgment relating to divorce, legal separation or marriage annulment given in another Member State being sufficient for the purpose. The recognition involved is therefore not judicial but is equivalent to recognition for the purposes of civil-status records.

In the wording of this provision account was taken of Article 8 of the Convention of 8 September 1967 on the Recognition of Decisions Relating to the Validity of Marriages, prepared in the International Commission on Civil Status. That is an important change and it will be much appreciated by European citizens since that is the effect most frequently sought and, once the Convention enters into force, updating civil-status records without the need for any additional decision will save time and money, thus representing a considerable advance over the 1968 Brussels Convention. It should be noted that the judgment must be a final one against which no further appeal lies, and that too is different from the 1968 Brussels Convention situation. See Article 33(3) regarding the documents to be presented.

64. As specified in Article 1 in relation to the scope of the Convention in terms of matters covered,

it is sufficient to repeat here that the recognition referred to in this Article does not affect questions of the fault of spouses, marriage contract, maintenance or any other consequences of an economic or any other nature included in the same judgment. It is a question, therefore, only of recognition of the dissolution of the link of marriage or of the legal separation (see paragraph 22). For provisional measures, see Article 12(59).

65. As specified in the 1968 Brussels Convention, the recognition of the foreign judgment may be accepted or contested, and the procedure set out in paragraph 3 for enforcement will be followed. The concept of an 'interested party` entitled to apply for a decision as to whether the judgment should or should not be recognised must be interpreted in the broad sense under the national law applicable and may include the public prosecutor or other similar bodies where permitted in the State in which the judgment is to be recognised or contested.

66. The provision on recognition as an incidental question comes from Article 26 of the Brussels Convention with some amendments. It is for reasons of simplicity that the courts hearing the main case also have jurisdiction to determine recognition of a judgment of incidental form.

Article 15 Grounds of non-recognition

67. This Article corresponds to Article 27 of the 1968 Brussels Convention and contains the grounds for non-recognition or non-enforcement. In view of the matter dealt with in the Convention, the grounds of non-recognition provided for in Article 23 of the 1996 Hague Convention also had to be taken into consideration in order to facilitate harmonious application of both Conventions when the time comes. Whereas some States wanted the grounds of non-recognition to be optional, most States were in favour of making them compulsory as in Article 27 of the 1968 Brussels Convention. Those rules need to be seen in conjunction with the limitations set out in Article 16 and the reference to Article 43.

68. The structure of this Article may seem rather surprising. Paragraph 1 sets out the grounds of non-recognition of judgments relating to a divorce, legal separation or marriage annulment, while paragraph 2 sets out the grounds of non-recognition of judgments relating to parental responsibility given on the occasion of matrimonial proceedings. The reason for the division is that, although both types of judgment are closely connected with the matrimonial proceedings, they may have been given by different authorities, depending on the internal distribution of jurisdiction within the State of origin. Another reason for the division may be that the objective of the matrimonial proceedings and the objective of the parental-responsibility proceedings differ in such a way that the grounds for non-recognition cannot be the same in both cases. It was therefore advisable to split the grounds of non-recognition into two paragraphs.

69. In line with normal practice, the first ground of non-recognition of judgments relating to a divorce, legal separation or marriage annulment is the fact that it is manifestly contrary to public policy in the State in which recognition is sought, something Member States do not want to give up even though experience demonstrates that the corresponding provision in Article 27(1) of the Brussels Convention has been of no practical significance. Nevertheless, sensitivity regarding the basic principles that justify the considerations of public order is less in cases involving property than in family cases. It needs to be borne in mind, too, that Article 18 of this Convention prevents a judgment being reviewed as to its substance, Article 17 prohibits non-recognition of a foreign judgment because the law of the Member State in which such recognition is sought would not allow divorce, legal separation or marriage annulment on the same facts and Article 16(3) states that the test of public policy may not be applied to the rules relating to jurisdiction.

Nevertheless, it should be noted that the States are extremely sensitive on this issue on account of the major discrepancies between their laws on divorce. Those Member States in which dissolution

of the marriage bond is easiest fear that their judgements may not be recognised in Member States with more stringent rules. To provide adequate guarantees for both groups of States, a system is being established whereby, on the one hand, non-recognition on grounds that recognition is manifestly contrary to the public policy of the State in which recognition is sought is retained (Article 15(1)(a)) and, on the other hand, Article 17 stipulates that recognition may not be refused on the grounds that divorce, legal separation or marriage annulment would not be allowed on the same facts (see commentary on Article 17). At the time of recognition, the court having jurisdiction must examine the judgment given in the State of origin in the light of the provisions referred to in the preceding paragraph. That solution is based on the arrangement under the 1970 Hague Convention on the Recognition of Divorces and Legal Separations to which some Member States are party.

On this issue, see also the statement by Ireland (in connection with Article 46(2), with due regard for the provision in Article 9 which refers to examination as to jurisdiction by the court of origin).

70. Paragraph 1(b) includes the ground of non-recognition which gave rise to the highest number of cases of non-recognition under the 1968 Brussels Convention (Article 27(2)) and therefore to the largest number of problems and questions put to the Court of Justice in relation to grounds of non-recognition. We are referring to non-recognition in cases where the judgment was given in default of appearance, if the respondent was not notified properly and in good time to defend himself. A point has been added to the original provision. It provides that the judgment must be recognised, as is the normal consequence of the proper operation of the Convention, where the respondent has accepted it unequivocally, as for instance by remarrying.

71. Irreconcilability of the judgment with other judgments is dealt with in two separate provisions, points (c) and (d) of paragraph 1. In contrast to the provisions of Article 27(5) of the 1968 Brussels Convention, there is no requirement for the objective and the ground to be identical.

The first refers to irreconcilability with a judgment given in proceedings between the same parties in the Member State in which recognition is sought, regardless of whether the judgment in the latter State predates or postdates the judgment given in the State of origin. A special problem arises when one judgment is on divorce and the other is on separation. An example may clarify the situation. Consider the case of a separation judgment given in State A and a subsequent divorce judgment given in State B. If recognition of the second judgment is sought in State A, recognition cannot be refused on grounds of its irreconcilability with the judgment given previously in State A, since separation may be considered a preliminary to divorce and, consequently, there would be not conflict with a subsequent divorce judgment. However, if recognition of the separation judgment given in State A were sought in State B, where the marriage had been dissolved by a divorce judgment, the judgment would have to be rejected since the separation judgment had been replaced by a divorce judgment in State B. The advantage of this interpretation is that it guarantees that the matrimonial situation of the spouses will be considered the same throughout the 15 Member States. Any other interpretation would mean that the spouses could be considered divorced in 14 States but only as legally separated in State A.

The second provision relates to cases in which the judgment, whether given in another Member State or in a non-Member State between the same parties, meets two conditions: (a) it was given earlier; (b) it fulfils the conditions necessary for its recognition in the Member State in which recognition is sought. An example may clarify the situation to which this provision refers. In non-member State E a separation judgment is given that meets the requirements for recognition in State B. Subsequently, a decision granting the same spouses a divorce is given in Member State C, requesting recognition of that judgment in Member State B. In this situation, the divorce judgment given in Member State C is not irreconcilable with the previous legal separation judgment given in non-member State E and is therefore recognised in Member State B. In the opposite case, that is to say if a divorce

judgment is given in non-member State E and subsequently a separation judgment is given in Member State C, Member State B will refuse to recognise Member State C's judgment on the ground that it is irreconcilable with a divorce judgment given in non-member State E which meets the requirements for recognition in Member State B.

72. Paragraph 2 covers the grounds of non-recognition of judgments relating to parental responsibility understood in the broad sense and therefore including not only court judgments but also decisions of whatever kind by whatever authority provided that they are closely connected with the divorce. In addition to the general comment above on the justification for the separation of these grounds of non-recognition from those relating to matrimonial judgments, the grounds included merit some further comment.

73. The provision on public policy, which also appears in paragraph 2(a), corresponds exactly to the provision in Article 23(2)(d) of the 1996 Hague Convention, in that it makes it impossible to refuse recognition purely because the judgment is manifestly contrary to public policy and requires that consideration be given to taking the best interests of the child into account as well.

Default of appearance is dealt with in point (c) and the comments on point (b) of paragraph 1 also apply.

As in the 1996 Hague Convention (Article 23(2)(b) and (c)), the grounds of non-recognition include (in points (b) and (d)) the fact that the child was not given an opportunity to be heard or that any person claiming that the judgment infringes his or her parental responsibility was not given an opportunity to be heard. The child must be heard in accordance with the rules applicable in the Member State concerned, which must include the rules in the United Nations Convention of 20 November 1989 on the Rights of the Child and in particular Article 12 thereof, which provides:

'1. The States party shall guarantee any child who is in a position to form a judgment of his own the right to express an opinion freely on any matter affecting him, and that due account is taken of the child's opinion, in the light of his age and maturity.

2. To that end the child shall be given an opportunity to be heard in any legal or administrative proceedings affecting him, either directly or through a representative or an appropriate body, in accordance with the rules of procedure of national law`.

Finally, points (e) and (f) deal with non-recognition on grounds of irreconcilability with another judgment and lay down different rules, depending on whether the judgment is given in the Member State in which recognition is sought or in another Member State or in the non-Member State of the habitual residence of the child. Solely with regard to parental responsibility, the judgment with which the judgment for which recognition is sought is irreconcilable must have been given later since earlier judgments will have been taken into account in the judgment connected with the divorce. The objective is to prevent the contradiction which could result, for instance, between a judgment given in another Member State regarding divorce and custody and a judgment given in the forum denying paternity. The commentary on Article 3(3) also needs to be taken into account in this connection (end of jurisdiction of the court hearing the matrimonial proceedings in matters of parental responsibility).

Article 16 Non-recognition and finding of facts

74. Further to Article 15 paragraph 1 of this Article provides that a judgment shall not be recognised in a case provided for in Article 43 (see commentary on Article 43, paragraph 125), which corresponds to Article 59 of the 1968 Brussels Convention. Article 43 enables a Member State not to recognise a judgment given in another Member State where the judgment is not founded on grounds of jurisdiction specified in Articles 2 to 7 but solely on grounds of national law, in accordance with Article 8. For that purpose, however, the Member State and the third country must have concluded a Convention

on recognition and enforcement of judgments which is applicable between them. Article 16(1) is therefore an exception to the recognition of judgments adopted in a Member State within the framework of the residual jurisdiction which may apply under Article 8.

75. This provision means that the Member State in which recognition is sought must examine the grounds of jurisdiction on the basis of which the judgment in the Member State of origin has been adopted. The court is, however, subject to certain limitations in the matter. Under paragraph 2, the court in which recognition is sought is bound by the findings of fact on which the court of the Member State of origin based its jurisdiction. Secondly, under paragraph 3 it may not review the jurisdiction of the court of origin nor may it apply the test of public policy to the rules relating to jurisdiction set out in Articles 2 to 8.

Article 17 Differences in applicable law

76. This provision is to be seen in conjunction with Article 15(1)(a) (see commentary on the provision). It is designed to meet the concerns of States with more tolerant internal provisions on divorce who fear that the judgments given by their courts might not be recognised in another State because they are based on grounds unknown in the legislation of the State in which recognition is sought. The provision therefore limits indiscriminate use of public policy. An example might be legal separation as a basis for divorce: if in the State of origin divorce can be granted after a separation of two years, an incorrect interpretation of the public policy of the State in which recognition is sought, where the law requires five years of separation, could result in the refusal of recognition.

The drafting difficulties encountered in the Working Party resulted in a text which refers only to the 'law` of the Member State in which recognition is sought and the word 'internal` has been deleted: the reason for the deletion was to include both internal substantive provisions and private international law provisions. The objective is simply to ensure that differences between legislation in the Member States cannot result in non-recognition and, ultimately, the very purpose of the Convention being turned into a dead letter.

Article 18 Non-review as to substance

77. This is the classic prohibition on review as to substance at the time of recognition or enforcement. The same provision appears in Article 29 of the 1968 Brussels Convention and in other Conventions on enforcement. It is a necessary rule in Conventions of this kind in order not to subvert the meaning of the exequatur procedure, which does not mean allowing the court in the State in which recognition is sought to rule again on the ruling made by the court in the State of origin.

78. The inclusion of this rule in this Convention led to some reluctance by certain delegations in so far as it could mean making the measures adopted in connection with parental responsibility immovable. The object of the provision is to prevent the measures from being reviewed in the exequatur procedure, although it may in no case lead to their being set in stone. The basic principle is that the Member State in which recognition is sought may not review the original judgment, which is the logical consequence of a double Convention. However, a change in circumstances may lead to a need for revision of the protective measures, as always happens when we are dealing with situations which, despite having a degree of permanence in time, may need modification. In that sense, for instance, Article 27 of the 1996 Hague Convention makes it clear that the prohibition on review as to substance does not prevent such review as is necessary of the protective measures adopted. In this case too, the provision in this Article must be understood as being without prejudice to the adoption by the competent authority of a new ruling on parental responsibility when a change in circumstances occurs at a later stage.

Article 19 Stay of proceedings

79. This provision must be seen in conjunction with the provisions of the Convention (specifically Article 14(2)) providing that automatic recognition and in particular the updating of civil-status records do not require any special procedure if the judgment of the State of origin is one against which no further appeal lies under the law of that Member State.

This Article allows the court of a Member State in which recognition is sought to stay the proceedings if an ordinary appeal against the judgment has been lodged. For stay of enforcement, see Article 27 (and the commentary thereon in paragraph 94).

In the case of judgments given in Ireland or the United Kingdom, provision is made for special features of their national legislation.

Section 2 H. Enforcement

Article 20 Enforceable judgments

80. This provision governs the need for exequatur if a judgment given in one Member State is to be enforced in another. All that is required is that the courts referred to in the subsequent Articles decide, on the application of any interested party, on the possibility of enforcement in the State in which recognition is sought, a possibility which can only be refused on the grounds listed in Articles 15 (grounds of non-recognition) and 16 (see Article 23(2) and the commentary thereon in paragraph 89). While, for matrimonial matters, recognition procedures are sufficient, in view of the limited scope of the Convention and the fact that recognition includes amendment of civil-status records, rules for enforcement are necessary in relation to the exercise of parental responsibility for a child of both spouses.

'Interested party`, for the purposes of the application, covers not only the spouses or children but must also include the public authority (Public Prosecutor's Office or similar authority) in States where that is possible.

81. The purpose of this provision is solely to make it possible to enforce a judgment given in another State in relation to parental responsibility since the procedure for enforcement in the strict sense is governed by each State's internal law. Thus, once exequatur has been obtained in a State, that State's internal law will govern the practical measures for enforcement.

The various provisions which follow are intended to establish a procedure common to all the Member States for obtaining exequatur which will replace the relevant provisions in internal legislation or in other Conventions.

Paragraph 2 contains a provision taking account of the particular situation in the United Kingdom.

Article 21 Jurisdiction of local courts

82. This provision is based on Article 32 of the 1968 Brussels Convention but, unlike that Article, it is divided into three paragraphs: the first governs the type of authority with international jurisdiction for enforcement and the other two refer to the court having jurisdiction within that State. These provisions are applicable to recognition, via Article 14(3), as well as to enforcement. The intention is to make matters easier for the European citizen, who will know from the beginning which court is to be seised.

83. Paragraph 1 lists the authorities having international jurisdiction. It follows the same system as in Article 32(1) of the 1968 Brussels Convention.

84. The solution differs from the one adopted in the 1968 Brussels Convention in relation to determining the court with local jurisdiction within the Member State. The reason for this is that, in relation to judgments both in matrimonial matters and on custody, there were major differences between the positions adopted since for some the rule ought to be deleted whereas for others its existence was

vital, even though its content was open to discussion.

The solution ultimately adopted was to distinguish between two separate scenarios, depending on whether the application is for enforcement or for recognition. The possibilities offered by the 1968 Brussels Convention are thus extended.

Thus, what constitutes the general rule is stated first, i.e. the rule concerning an application for exequatur. Paragraph 2(a) provides that jurisdiction will lie with the local court of the place of the habitual residence of the person against whom enforcement is sought or of the place of habitual residence of any child to whom the application relates. It was noted, however, that there could be situations in which neither the person against whom enforcement was sought nor the child was habitually resident in a Member State, and point (b) provides that in such cases jurisdiction lies with the local court of the place of enforcement.

In the second scenario, where there was action to have a judgment given in another Member State recognised or not recognised, paragraph 3 leaves the matter to the internal legislation of the State in which the application is made.

Article 22 Procedure for enforcement

85. This Article governs the various aspects of the procedure to be followed for enforcement of judgments. As under the 1968 Brussels Convention, the arrangements are based on a procedure at the request of a party which will be a Community one, that is to say that the same procedure, which will be fast and simple, will apply in all Member States, which is an undoubted advantage. It is not necessary to mention that the procedure follows the same pattern as established in the 1968 Brussels Convention, with only such modifications as are necessary owing to the different matters covered by the two Conventions. Thus, with those exceptions, the commentaries on many of these provisions refer to the reports on the various versions of the 1968 Brussels Convention, particularly the Jenard report, as indicated at the beginning.

This provision deals with the action to be taken by the applicant. In the first place, it provides that the detailed rules for submitting the application will be determined in accordance with the internal law of the State in which enforcement is sought (paragraph 1). This means that national legislation must be consulted for the information to appear in the application, the number of copies to be submitted to the court, the authority with which they are to be deposited, the language in which they are to be drawn up and also whether or not a lawyer or any other representative or agent needs to be involved.

86. This Article also requires (paragraph 2) that the applicant give an address for service or else appoint a representative ad litem within the area of jurisdiction of the court applied to. That provision is of interest both as to the notice of the judgment to the applicant (Article 24) and the appeal against the judgment granting exequatur, which will be contradictory (Article 26).

87. Finally, paragraph 3 requires that the documents referred to in Articles 33 and 34 be attached to the application. For the consequences of failure to attach the documents, see Article 35 (and commentary thereon in paragraph 107).

Article 23 Decision of the Court

88. Paragraph 1 establishes the unilateral, ex parte, nature of the exequatur procedure, in which the person against whom enforcement is sought will not be entitled to make any submissions on the application, even in exceptional cases, since such submissions would systematically change the procedure from a unilateral into a contradictory one. The rights of defence are respected by allowing the person against whom enforcement is sought to appeal against the decision granting enforcement.

The court may rule only on enforcement and may not at this stage review the custody measures, for

instance, in line with the 1996 Hague Convention: Article 39 would prevent that. The court must give its decision 'without delay` but it was not considered advisable to set a time limit since such a limit does not exist in judicial practice and no sanction would be possible if it were not met. Since the general rule is the grant of exequatur on the basis of the mutual confidence created by the assumption that all courts within the Community will have applied the Convention correctly, the procedure in this instance, as in the 1968 Brussels Convention, remains unilateral and rapid given that there is provision for appeal in the later Articles of the Convention in cases in which there are problems.

89. This provision stipulates that the application may be refused only for one of the reasons specified in Articles 15 and 16 (paragraph 2) and that under no circumstances may a foreign judgment be reviewed as to its substance (paragraph 3).

Article 24 Notice of the decision

90. This Article provides that the application will be notified in accordance with the law of the State in which enforcement is sought. It illustrates the importance of an address for service or appointment of a representative ad litem (see Article 22) and has implications for the lodging of appeals referred to in the Articles that follow.

Article 25 Appeal against the enforcement decision

91. Like the 1968 Brussels Convention, this Article provides that if enforcement is authorised, the person against whom enforcement is sought may appeal against the decision, while Articles 28 and 29 deal with appeal arrangements in cases in which it was not considered appropriate to authorise enforcement.

Since normal operation of the Convention leads to the grant of exequatur, it is logical that the time allowed for appeal should be brief, just one month (paragraph 1). If the person against whom enforcement is sought is resident in a Member State other than that in which the decision authorising enforcement was given, the time for appealing is to be two months from the date of service, either on him or at his residence. No extension of time may be granted on account of distance.

Article 26 Courts of appeal and means of contest

92. Paragraph 1 lists the courts of appeal against a judgment authorising enforcement. In this case, the procedure in contradictory matters will be followed, unlike the application and original judgment for which procedure is unilateral. It should be emphasised that the sole requirement established by the Convention is that the appeal procedure be contradictory, in contrast to the original judgment which is decided by unilateral procedure. This topic needs to be taken into account particularly with regard to the language differences, which must not, under any circumstances, equate 'contradictory` with 'contentious`. In some States the term means contentious as well as contradictory, whereas such is not the case in others. Hence, although the procedure must always be contradictory, whether or not it is also contentious will depend on internal law, in the same way as the law of the forum determines the procedure (lex fori regit processum).

93. The only means of contesting a judgment given on appeal is in cassation or by any other top-level appeal procedure in States which do not have a cassation system. The objective of limiting the avenues of appeal in this way is to avoid unnecessary appeals which could be unfounded delaying manoeuvres. The ultimate purpose is to safeguard the objective of the Convention which is to facilitate free movement of judgments. For that reason, some delegations even considered it more appropriate to dispense with the appeal procedure provided for in paragraph 2. However, it was considered more advisable to retain the same system as in the 1968 Brussels Convention, especially as it is difficult to see this avenue being used to excess in the area of family law.

Article 27 Stay of proceedings

94. In some cases it may happen that the judgment in the court of origin is enforceable even though an appeal has been initiated or the time limit for appeal has not come to an end. In such circumstances, it is desirable to avoid complicating the situation which would result from the grant of exequatur of the judgment. This provision therefore provides that the court with which the appeal is lodged may stay the proceedings if an ordinary appeal has been lodged against the decision in the Member State of origin or if the time for such appeal has not yet expired, but is not obliged to do so. The stay of proceedings can only take place on the application of the appellant.

For stay of recognition, see Article 19 (and the commentary in paragraph 79).

95. Paragraph 2 deals with the special circumstances in Ireland and the United Kingdom.

Article 28 Court of appeal against a judgment refusing enforcement

96. In parallel with the establishment of an appeal procedure for cases in which enforcement is granted, there is also a possibility of appeal by the applicant when enforcement is refused, and paragraph 1 lists the courts of appeal having jurisdiction. However, unlike the first case, there is no time limit for this appeal. As in the 1968 Brussels Convention, the reason is that, if the applicant's application has been rejected, he has the right to appeal when he thinks fit and when, for example, he is able to assemble the relevant documentation. Once again, the objective of the Convention denotes the difference in the procedure to be followed: the normal consequence is for the judgment to be enforced and, accordingly, after the first decision, taken rapidly by the unilateral procedure, every opportunity must be given for this aim to be achieved.

97. The fact that the procedure is contradictory and the need to protect the rights of the party against whom enforcement was requested have led to a provision in paragraph 2 that the person against whom enforcement is sought be summoned to appear and, if he fails to appear, the provisions of Article 10 (examination as to jurisdiction) will apply, whether he resides in a Member State or in a non-Member State.

Article 29 Contest of the appeal decision

98. As in Article 26(2) (see commentary in paragraph 93), only the limited procedures indicated are available to contest the appeal decision.

Article 30 Partial enforcement

99. Like Article 42 of the 1968 Brussels Convention, this Article deals with two separate issues. Paragraph 1 deals with the case where a judgment has been given in respect of several matters and enforcement cannot be authorised for all of them; in that case the court will authorise enforcement for one or more of them. The second hypothesis, in paragraph 2, is that the applicant may request only partial enforcement of a judgment.

Article 31 Exemption from legal costs

100. As is the pattern in other treaties on enforcement, if the applicant has benefited in the State of origin from complete or partial legal aid or exemption from costs or expenses he will also be entitled, in the State in which enforcement is sought, to benefit from the most favourable legal aid or the most extensive exemption from costs and expenses provided for by the law of the State addressed.

Article 32 Bond or deposit

101. This Article repeats the now well established principle that no security, bond or deposit, however described, shall be required of a party who in one Member State applies for recognition

or enforcement of a judgment given in another Member State (cautio judicatum solvi).

Section 3 I. Common provisions

Article 33 Documents

102. A distinction needs to be made in this case between the various paragraphs and the various aspects referred to in each one.

103. To begin with, paragraph 1 refers to the documents which must be produced in any event by a party seeking or contesting recognition or applying for enforcement of a judgment. All enforcement treaties require a copy of the judgment which satisfies the conditions necessary to establish its authenticity in accordance with the locus regit actum rule, that is to say the law of the place in which the judgment was given. Where appropriate, a document must also be produced showing that the applicant is in receipt of legal aid in the State of origin.

104. Paragraph 2 refers to the documents which must be produced in the case of a judgment given in default and it is logical that it confines itself to cases in which recognition or enforcement is being sought because, precisely in cases of non-recognition it is normal that no such documents exist, as a judgment given in default is concerned. In cases of non-recognition (see commentary on Article 15), proof must be provided in the required form that the written application or a similar document was notified or, in the case of a judgment in divorce, legal separation or marriage annulment proceedings, that the respondent has unequivocally accepted the content of the judgment (see comment on Article 15 concerning cases of non-recognition).

Paragraph 2(b) is worded in such a way as to be consistent with Article 15(1)(b) and (2)(c).

105. Finally, paragraph 3 states the document to be produced, in addition to those provided for in paragraphs 1 and 2, for updating the civil-status records. Given that the civil-status records authenticate the data registered in them, it is also necessary to produce a document indicating that the judgment is no longer subject to a further appeal under the law of the Member State of origin.

Article 34 Other documents

106. In addition to the documents required under Article 33, the party applying for enforcement must also produce documents which establish that, according to the law of the Member State of origin, the judgment is enforceable and has been served.

Article 35 Absence of documents

107. In the spirit of the Convention and in order to facilitate attainment of its objective, there is provision to facilitate the production of documents, allowing the court to specify a time for their production, accept equivalent documents or, if it considers that it has sufficient information before it, dispense with their production (e.g. where documents have been destroyed). This possibility is allowed only for documents specified in Article 33(1)(b) and (2) and does not apply to those in paragraph 3 for updating the civil-status records. A copy of the judgment in question is therefore always necessary.

This provision must be seen in conjunction with the provision in Article 21 regarding the consequences if the application for exequatur is not supported by the documents required in earlier Articles. The question was discussed at great length in the work on the 1968 Brussels Convention with the result that it was stipulated that if, despite the mechanisms put in place, the documents presented were insufficient and the court did not succeed in obtaining the information desired, it could declare the application inadmissible.

108. In line with the simplification aimed at in the Convention, a translation will be necessary

only if the court so requires. In addition, the translation can be certified by a person qualified to do so in any of the Member States and not necessarily in the State of origin or the State in which enforcement is sought.

Article 36 Legalisation and similar formalities

109. No legalisation or other similar formality is required for the documents referred to in Articles 33, 34 and 35(2) or for a document appointing a representative ad litem in the proceedings for obtaining exequatur. See also Article 21(2). This provision is also in line with the 1968 Brussels Convention.

TITLE IV J. Transitional provisions

Article 37

110. This provision corresponds to Article 54 of the 1968 Brussels Convention. The general rule is that the Convention applies only to legal proceedings instituted, to documents formally drawn up or registered as authentic instruments and to settlements which have been approved by a court in the course of proceedings after its entry into force in the Member State of origin and, where recognition or enforcement of a judgment or authentic instruments is sought, in the Member State addressed. It will not therefore apply where proceedings were instituted and the judgment given before the date of entry into force of the Convention (in conjunction with Article 47(3) and (4) and Article 48(4)).

111. There is, however, provision for the possibility of allowing a judgment to benefit from the system in the Convention, even if the action was brought before its entry into force, if the following requirements are met: (a) the Convention is in force between the Member State of origin and the Member State addressed; (b) jurisdiction was founded on rules which accorded with those provided for either in Title II of this Convention or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted. The provision that the rules of jurisdiction applied 'accorded with those provided for in Title II` means that the court in the State addressed will have to examine the jurisdiction of the court of origin, which could not have been examined at the request of the respondent in the State of origin on the basis of the Convention (see Article 8, and Article 40(2)).

TITLE V K. General provisions

Article 38 Relation with other conventions

112. Paragraph 1 contains the general rule that this Convention shall, for the Member States which are parties to it, supersede bilateral or multilateral conventions existing between the Member States. Unlike the 1968 Brussels Convention (Article 55), this provision does not list the Conventions which exist. The reason is that in relation to other conventions this Convention is the basic Convention on the matters covered by it (Article 1). Nevertheless, a special situation does arise in respect of certain multilateral conventions and they are dealt with in Article 39 (see commentary on that Article). Bilateral and multilateral conventions apply only in the circumstances dealt with in Article 40.

113. The Nordic States which are Member States of the European Union (i.e. Denmark, Finland and Sweden) are party to the Agreement of 6 February 1931 between Denmark, Finland, Iceland, Norway and Sweden which contains rules of international private law concerning marriage, adoption and custody. That Agreement was amended most recently by an Agreement adopted in Stockholm in 1973. As a result of the political agreement reached in December 1997 within the European Union,

Article 38(2) refers to this particular situation, enabling the Nordic Member States to continue applying the Nordic Agreement in their mutual relations. However, the conditions laid down in that Article must be fulfilled.

Application by the Nordic Member States of the 1931 Nordic Agreement in their mutual relations is in line with Article K.7 of the Treaty on European Union, which does not prevent the establishment of closer cooperation between two or more Member States in so far as such cooperation does not conflict with, or impede, that provided for in the Convention.

(a) Under Article 39(2)(a) of that Agreement, each one of the Nordic Member States shall have the right to declare that the 1931 Nordic Agreement will apply in whole or in part in their mutual relations in place of the rules contained in this Convention. That declaration shall be made at the time of notification of the adoption of this Convention in accordance with the internal constitutional rules of the State concerned. Such a statement shall be effective until it is withdrawn in whole or in part.

In accordance with the political agreement of December 1997, this exception to the general application of this Convention shall apply only when both spouses are nationals of a Nordic Member State and their usual place of residence is situated within one of those States. For that reason, the Nordic Member States which make use of the option to continue applying the Nordic Agreement undertake in a statement annexed to this Convention to cease applying Article 7(2) of that Agreement in as much as the rule is based on the nationality of only one spouse and also undertake to revise the grounds of jurisdiction applicable under that Agreement in the near future in the light of the principle of non-discrimination on grounds of nationality (see Article 8, paragraph 47).

In addition, in the annexed declaration, the Nordic Member States declare that the grounds for refusal of recognition contained in the Nordic Agreement are applied in practice in a manner consistent with Title III of this Convention.

(b) Pursuant to paragraph 2(b), the principle of non-discrimination on grounds of nationality will be observed and monitored by the Court of Justice with regard to the exception to the general application of this Convention.

(c) The provisions contained in paragraph (c) are included to guarantee that the rules governing jurisdiction included in any future agreement between the Nordic Member States concerning the matters included in the Convention comply with this Convention.

(d) A judgment handed down in a Nordic Member State pursuant to the Nordic Agreement shall also be recognised and enforced in the other Member States in accordance with the rules contained in Title III of this Convention, provided that the grounds of jurisdiction used by the Nordic court correspond to those laid down in Title II of this Convention.

114. Paragraph 3 contains the general provision that Member States may not conclude or apply agreements between themselves having an objective which goes beyond supplementing the provisions of the Convention or facilitating its application. Member States may thus transcend the Convention; two Member States could, for instance, conclude a convention dispensing with all or some of the grounds of non-recognition provided for in Article 15. The provision confirms the logic of Article 39.

Article 39 Relation with certain multilateral conventions

115. This provision contains the general rule that this Convention takes precedence over other international conventions to which the Member States are party in so far as they concern matters governed by both Conventions.

The text adopted means that this Convention takes precedence and that it must therefore be compulsory to apply it in place of such other agreements. Some Member States wanted the use of this Convention

to be optional in relation to one or other of the conventions listed or even to apply internal rules in its place if they were more favourable, but that proposal was rejected. Legal certainty and mutual confidence require the rule which was finally adopted whereby there is an obligation to give precedence to the application of this Convention. It should be noted in particular that, inasmuch as its scope includes matters concerning parental responsibility for a child of both spouses, this Convention takes precedence over the 1996 Hague Convention in cases in which protection of the child is linked to the divorce process, also bearing in mind that the application of this Convention is confined to children residing in the Member States. The inclusion of the 1970 Hague Convention on divorce means that this Convention must take precedence since it is also a double Convention.

116. It should be pointed out that not all the Member States are party to all the conventions mentioned in this Article and that their inclusion in the list does not mean that the Member States are recommended to accede to them. The provision is simply a practical statement of the relationship between this Convention and other treaty texts.

117. A clear distinction needs to be made between the question dealt with in this provision and the one referred to in Article 4 which relates to a particular rule of jurisdiction subordinate to the 1980 Hague Convention on the civil aspects of international child abduction. The situation is different in relation to the European Convention of 20 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children, although on many occasions that Convention has been used as an alternative to the Hague Convention, the conditions for its application differ significantly from those of the Hague Convention, particularly in relation to the need for a judgment to be in place regarding custody, a requirement which makes a provision like the one in this Convention necessary.

Article 40 Extent of effects

118. This Article lays down a rule for the application of the international conventions referred to in Articles 38 and 39 both in relation to matters to which this Convention does not apply (paragraph 1) and in respect of judgments given before the entry into force of this Convention (paragraph 2) but does not provide for any transitional rule on the latter issue, without prejudice to what is laid down in Article 37, allowing recognition under this Convention for judgments given by virtue of a ground of jurisdiction recognised in the Convention.

Article 41 Agreements between Member States

119. This Article provides that judgments given pursuant to agreements concluded between Member States party to this Convention in order to facilitate or supplement the Convention may be recognised and enforced in other Member States, within the limits of non-recognition provided for in Title III; this is a logical solution since those complementary agreements cannot breach the provisions of this Convention and the solution therefore does no violence to the content of the Convention.

Article 42 Treaties with the Holy See

120. When the scope of the Convention was being examined (see commentary on Article 1, paragraph 20 part B) it was pointed out that certain treaties with the Holy See enjoyed special arrangements. There remained to be resolved the difficult problem linked to the fact that in Portugal, ecclesiastical courts have exclusive jurisdiction to annul a Catholic marriage concluded in accordance with the Concordat, pursuant to Article XXV of the Concordat (the term used to describe international treaties with the Holy See) between Portugal and the Holy See of 7 May 1940, as amended by the additional Protocol of 4 April 1975 and Articles 1625 and 1626 of the Portuguese Civil Code.

It is necessary to point out that the 1975 additional Protocol has no bearing on this Convention because it is limited to amending Article XXIV of the Concordat to enable civil courts to issue

a decree of divorce in the case of canonical marriages, which was forbidden to both civil and ecclesiastical courts by the original version of the Concordat as canonical law does not recognise the dissolution of marriage by divorce.

For Portugal, the problem lay in the exclusive competence of ecclesiastical courts to annul canonical marriages. Portugal would in fact violate the international obligations it assumed under the Concordat if it agreed to ratify the Convention recognising the competence (pursuant to Articles 2, et seq.) of civil courts to annul Portuguese canonical marriages.

The safeguarding of the Concordat, in accordance with Article 42(1), thus confers on Portugal the option of not recognising such competence nor any judgments to annul the marriages referred to which these courts might hand down.

Secondly, in accordance with paragraph 2, annulment judgments pronounced pursuant to the rules of the Concordat or the Portuguese Civil Code are recognised in the Member States once they have been incorporated into the Portuguese legal system.

On the same topic, Italy (see paragraph 129 concerning Article 46) is making a declaration to be annexed to the Convention in which it reserves the right, in respect of judgments by Portuguese ecclesiastical courts, to adopt the procedures and carry out the checks provided for in its own legal system in respect of similar judgments by ecclesiastical courts, on the basis of the agreements it has concluded with the Holy See.

121. The situation in Portugal is different from that in Spain and Italy where the ecclesiastical courts' jurisdiction to declare annulment is not exclusive but concurrent and there is a particular procedure for recognition in the civil system. For that reason, a separate paragraph refers to those Concordats and stipulates that judgments given under them will enjoy the same system of recognition, although there is no exclusive jurisdiction.

122. In Spain there is an Agreement between the Holy See and the Spanish State on legal affairs of 3 January 1979. Article VI.2 thereof provides that 'the contracting parties may, under the provisions of Canon Law, seise the ecclesiastical courts to apply for a declaration of annulment or a pontifical declaration on an unconsummated marriage. At the request of either party, such ecclesiastical decisions will be effective in the civil order if they are declared to comply with the Law of the State in a judgment given by the civil court having jurisdiction`.

Separation and divorce are, however, matters for the civil courts. The ecclesiastical courts' exclusive jurisdiction in relation to annulment disappeared after the entry into force of the 1978 Constitution; the civil courts and the ecclesiastical courts now have alternative jurisdiction and there is provision for recognition of civil effects. In such cases, in addition to the 1979 Agreement mentioned above, account needs to be taken of Article 80 of the Civil Code and the second additional Provision to Law 30/1981 of 7 July which amends the rules on matrimony in the Civil Code and determines the procedure to be followed in annulment, separation and divorce cases. The consequences of these provisions are as follows: firstly, canonical decisions and judgments only produce civil effects if both parties consent and neither contests. Secondly, there having been no contest, the ordinary court determines whether the canonical judgment has civil effects or not and, if it does, proceeds to enforce it in accordance with the Civil Code provisions on annulment and dissolution cases. Thirdly, annulment cases in canon law and in civil law do not coincide. For that reason, there is discussion as to whether canonical judgments 'which accord with State law` can be considered effective in the civil order. Fourthly, Article 80 of the Civil Code refers to Article 954 of the Law on Civil Procedure, regarding the conditions for enforcing foreign judgments. Such reference is relevant to default of appearance by the respondent. The essential issue is whether or not one of the parties has opposed the application to give the canonical judgments and decisions on marriage

annulment civil effect.

123. In Italy the relevant agreement is the Agreement of 18 February 1984 between the Italian Republic and the Holy See amending the 'Concordato Lateranense` of 11 February 1929. Article 8(2) provides that marriage annulment judgments by the ecclesiastical courts which are enforceable will produce effects in Italy by decision of the 'Corte d'appello` having jurisdiction, provided that: (a) the ecclesiastical court had jurisdiction over the case in that it was a marriage celebrated in accordance with the requirements laid down by that Article; (b) the procedure before the ecclesiastical courts afforded the parties the right to appear and to be defended, in accordance with the fundamental principles of the Italian legal system; (c) the conditions required by Italian legislation for declaring foreign judgments effective have been met. Although Law 218 of 31 May 1995 on the reform of the Italian system of private international law (Article 73) derogated from Articles 796 et seq. of the 'Codice di Procedura Civile` (Code of Civil Procedure), in practice it is understood that, pursuant to Article 2 thereof (international agreements), those Articles remain in force for recognition of ecclesiastical judgments on annulment of marriages.

124. Paragraph 4, like Article 38, requires Member States party to such international treaties or concordats to send to the depositary of this Convention a copy of the treaties and to notify any denunciation of or amendments to them. Deletions from the list of agreements will be made in accordance with the arrangements in Article 49(3).

Article 43 Non-recognition and non-enforcement of judgments based on Article 8

125. This Article transposes the rule in Article 59 of the 1968 Brussels Convention and needs to be seen in conjunction with Article 16(1) (see commentary in paragraph 74). It lays down a rule attenuating the effects in Member States of judgments given on the basis of residual jurisdiction. Article 43 gives a Member State the option of not recognising a judgment given in another Member State when it is founded on grounds of jurisdiction other than those specified in Articles 2 to 7, i.e. solely on national law, as set out in Article 8. But for that the Member State and the non-member country must have concluded a convention applicable between them on the recognition and enforcement of judgments in which the Member State undertakes not to recognise judgments given in another Member State purely under Article 8. The reason for this is that Article 8 does not impose a common rule, hence Member States are free to conclude such agreements.

Article 44 Member States with two or more legal systems

126. This provision takes direct account of the provisions in the 1996 Hague Convention on child protection for cases in which there are two or more systems of law or sets of rules from the point of view of court procedure. The objective is to arrive at complementary criteria for identifying the territorial units. However, the only grounds included are the ones relating to matters included in this Convention.

TITLE VI L. Court of Justice

Article 45

127. The establishment of Court of Justice jurisdiction to ensure uniform interpretation of this Convention gave rise to a great deal of discussion. For some delegations it was an important issue, endorsed by the practice of uniform interpretation of the 1968 Brussels Convention. Other States considered that such jurisdiction either should not be conferred or should, in any event, be confined to cases heard by the highest judicial organs in a Member State, thus excluding appellate courts in the Member States.

As a compromise, the solution adopted was simply to state the jurisdiction of the Court of Justice in the Convention and leave the rules of application to a Protocol to be adopted by the Council at the same time as the Convention (see the report on the Protocol). Therefore, only the courts and authorities of Member States which ratify the Protocol as well as the Convention may refer to the Court of Justice of the European Communities.

TITLE VII M. Final provisions

Article 46 Declarations and reservations

128. The integration which a collective intra-Community convention presupposes brings with it the provision in paragraph 1 whereby, without prejudice to Articles 38(2) (Nordic Agreement) and 42 (Concordats), this Convention may not be subject to any reservation.

129. The difficulties encountered by some States in connection with particular situations led to agreement to include in paragraph 2 acceptance by the Member States of the declarations made by Ireland (see comment on Article 9, paragraph 49) and Italy (see comment on Article 42, paragraph 120) and the exclusion of other declarations on the same subject.

Ireland's situation merits special attention. Ireland has no difficulty in recognising divorce judgments given in another Member State on the basis of more liberal grounds or rules than those prevailing in Ireland. However, it wants checks to ensure that parties petitioning for divorce have actually habitually resided in a particular Member State in order to avoid situations of fraud or circumvention of the aims of the Convention, which could be in contravention of the Irish Constitution. Taking account of the provision in Article 16(3) according to which public policy cannot be used to check jurisdiction, Ireland is particularly concerned that courts of the States of origin should verify the genuine existence of the connections provided for in Article 2 (jurisdiction in matrimonial matters). It was not, however possible to accept the initial Irish proposal to amend the Convention to allow refusal of recognition or enforcement of a divorce judgment given in another Member State if the jurisdiction to give the judgment was not based on a genuine link between one or both spouses and the Member State in question. That proposal was unacceptable in so far as it called into question one of the fundamental principles of the Convention, the mutual confidence between the States pursuant to which the substance of a judgment given in a Member State may not be reviewed in the Member State in which recognition is sought (see Article 18 in this connection). The delegations did, however, take into consideration the fact that the Irish Constitution contains specific provisions concerning divorce and that divorce had been introduced into Ireland very recently following a referendum. For that reason the declaration annexed to the Convention was accepted for a renewable transitional period of five years. In the long term, that position may lead to broader application of the provisions of the Convention.

130. Paragraph 3 established the system for withdrawing such declarations and the time at which withdrawal will take effect.

Article 47 Adoption and entry into force

131. Pursuant to this Article, the entry into force of the Convention will take place in accordance with the provisions established by the Council of the European Union.

The Convention will enter into force 90 days after the notification of deposit of the instrument of ratification by the last of the 15 States Members of the European Union at the time the Council adopts the Act establishing this Convention on 28 May 1998 to complete that formality.

132. However, as was done under judicial cooperation arrangements concluded earlier between the Member States, paragraph 4 provides that any Member State, may, at the time of adoption or at any later date, declare that as far as it is concerned the Convention will apply to its relations

with Member States that have made the same declaration. Such declarations will apply 90 days after the date of their deposit.

Member States may not, however, declare that the Court of Justice has jurisdiction to interpret the Convention during the period of advance application since that step requires adoption by all 15 Member States of the provisions of the Convention and the entry into force thereof.

Article 48 Accession

133. This Article provides that the Convention is open to accession by any State that becomes a member of the European Union and carries out the procedures for accession. On the other hand, a State which is not a member of the European Union may not accede to the Convention.

If the Convention has already entered into force when the new Member State accedes, it will enter into force with respect to that State 90 days after the deposit of its instrument of accession. If it has not already entered into force at the time of expiry of the said period of 90 days, it will enter into force for that State, as for all the others, under the conditions set out in Article 47(3). In that case, the acceding State may make a declaration of advance application.

The accession of the new Member State will not be a condition for the entry into force of the Convention in respect of the other States which were members at the time of adoption by the Council of the Act establishing the Convention.

Article 49 Amendments

134. This Article lays down the procedure for amending the Convention. Amendments may be proposed by any Member State or by the Commission in accordance with Title VI of the Treaty on European Union. There are different arrangements depending on the nature of the amendments proposed.

135. The first scenario is dealt with in paragraphs 1 and 2 under which amendments will be drawn up by the Council, which will recommend their adoption by the Member States in accordance with their respective constitutional rules.

136. The second system is in paragraph 3 which allows a simplified procedure enabling the Council to adopt amendments to the naming of the courts or means of appeal referred to in Articles 21(1), 26(1) and (2), 28(1) and 29.

Article 50 Depositary and publication

137. This Article makes the Secretary-General of the Council the depositary of the Convention.

The Secretary-General will inform the Member States of all notifications relating to the Convention and publish them in the 'C` series of the Official Journal of the European Communities.

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FORM REPORT

TREATY European Union

TYPDOC 4 ; SUPPLEMENTARY LEGAL ACTS ; 1998 ; Y

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Protocol drawn up on the basis of Article K.3 of the Treaty on European Union, on the interpretation by the Court of Justice of the European Communities of the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters

PROTOCOL drawn up on the basis of Article K.3 of the Treaty on European Union, on the interpretation by the Court of Justice of the European Communities of the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters

THE HIGH CONTRACTING PARTIES to this Protocol, Member States of the European Union,

REFERRING to the Council Act of 28 May 1998 drawing up, on the basis of Article K.3 of the Treaty on European Union, the Protocol on the Interpretation by the Court of Justice of the European Communities of the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters,

REFERRING to Article 45 of the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters, which provides that the Court of Justice of the European Communities shall have jurisdiction to give rulings on the interpretation of that Convention and this Protocol,

WISHING to regulate the conditions under which the Court of Justice of the European Communities shall have jurisdiction to give rulings on questions of interpretation of the Convention and this Protocol,

HAVE AGREED UPON THE FOLLOWING PROVISIONS:

Article 1

In accordance with Article 45 of the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters, hereinafter referred to as 'the Convention`, the Court of Justice of the European Communities shall have jurisdiction, under the conditions laid down in this Protocol, to give rulings on the interpretation of the Convention and this Protocol.

Article 2

1. At the time of the notification referred to in Article 9(2), each Member State shall indicate which courts may request the Court of Justice to give preliminary rulings on questions of interpretation.

2. The courts to which this right may be granted shall be either:

a) the highest courts of Member States listed in Article 3, or

b) the highest courts listed in Article 3 and the other courts of the Member States where they are sitting in an appellate capacity.

Article 3

1. For the purposes of applying this Protocol, the highest courts of Member States are those listed below:

- in Belgium: the 'Cour de Cassation` or the 'Hof van Cassatie` and the 'Conseil d'Etat` or the 'Raad van State`,
- in Denmark: the 'Højesteret`,
- in Germany: the 'Obersten Gerichtshöfe des Bundes`,
- in Greece: 'Aø¦ôaôï Åéäéêü Æéêaoô«ñéï`, 'A±åéïo áÜaïo`, 'Ooiâïueéï Å=éêñaôåßao`, 'Åeåaêôéêü Ooí¡äñéï`,
- in Spain: the 'Tribunal Supremo`,
- in France: the 'Cour de Cassation` and the 'Conseil d'Etat`,
- in Ireland: the Supreme Court,
- in Italy: the 'Corte Suprema di Cassazione`,
- in Luxembourg: the 'Cour supérieure de justice` sitting as a Cassation Court,
- in the Netherlands: the 'Hoge Raad`,
- in Austria: the 'Oberste Gerichtshof`, the 'Verwaltungsgerichtshof` and the 'Verfassungsgerichtshof`,
- in Portugal: the 'Supremo Tribunal de Justiça`,
- in Finland: 'korkein oikeus/högsta domstolen` and 'korkein hallinto-oikeus/högsta förvaltningsdomstolen`,
- in Sweden: 'Högsta domstolen and Regerings`rtten`,
- in the United Kingdom: the Judicial Committee of the House of Lords.

2. At the request of the Member State concerned, the list of Member States' highest courts referred to in paragraph 1 may be amended by a decision of the Council.

Article 4

1. Where a question of interpretation is raised in a case pending before one of the highest courts listed in Article 3(1), that court shall, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

2. Where such a question is raised before a court sitting in an appellate capacity, that court may, under the conditions laid down in paragraph 1, request the Court of Justice to give a ruling thereon.

Article 5

The Council, the Commission and the Member States shall have the right to submit to the Court statements of cases or written observations in cases brought before it under Article 1.

Article 6

1. The competent authority of a Member State may request the Court of Justice to give a ruling on a question of interpretation if judgments given by courts of that State conflict with the interpretation

given either by the Court of Justice or in a judgment of one of the courts of another Member State referred to in Article 2, if that Member State is a Party to this Protocol. The provisions of this paragraph shall apply only to judgments which have become res judicata.

2. The interpretation given by the Court of Justice in response to such a request shall not affect the judgments which gave rise to the request for interpretation.

3. The Procurators-General of the Courts of Cassation of the Member States, or any other authority designated by a Member State, shall be entitled to request the Court of Justice for a ruling on interpretation in accordance with paragraph 1.

4. The Registrar of the Court of Justice shall give notice of the request to the Member States, to the Commission and to the Council. They shall then be entitled within two months of the notification to submit statements of case or written observations to the Court.

5. No fees shall be levied or any costs or expenses awarded in respect of the proceedings provided for in this Article.

Article 7

The Protocol on the Statute of the Court of Justice of the European Community and the Rules of Procedure of that Court shall apply.

Article 8

This Protocol may not be subject to any reservation.

Article 9

1. This Protocol shall be subject to adoption by the Member States in accordance with their respective constitutional rules.

2. Member States shall notify the depositary of the completion of their respective constitutional requirements for the adoption of this Protocol.

3. This Protocol shall enter into force 90 days after the notification referred to in paragraph 2 by the third State which, being a member of the European Union at the time the Council adopts the act drawing up this Protocol, completes that formality. However, it shall at the earliest enter into force at the same time as the Convention.

Article 10

1. This Protocol shall be open to acession by any State that becomes a member of the European Union.

2. Instruments of accession shall be deposited with the depositary.

3. When depositing its instruments of accession, the acceding Member State shall indicate in a

declaration:

a) the conditions for the application of Article 2 with respect to it;

b) which of its highest Courts has, or shall have, the right to ask the Court of Justice to give preliminary rulings on questions of interpretation in accordance with Article 3(1).

4. Before the date on which this Protocol enters into force in respect of the acceding Member State, the Council shall adopt, in accordance with Article 3(2), amendments to the list of highest Courts in Article 3(1).

5. The text of this Protocol in the language or languages of the acceding Member State, as drawn up by the Council, shall be authentic.

6. This Protocol shall enter into force with respect to any Member State that accedes to it 90 days after the date of deposit of its instrument of accession or on the date of entry into force of this Protocol if it has not already entered into force at the time of expiry of the said period of 90 days.

Article 11

1. Without prejudice to Article 3(2) and Article 10(4), amendments to this Protocol may be proposed by any Member State party to this Protocol or by the Commission. Any proposal for an amendment shall be sent to the depositary, who shall forward it to the Council.

2. Amendments shall be drawn up by the Council, which shall recommend that they be adopted by the Member States in accordance with their respective constitutional rules.

3. Amendments thus adopted shall enter into force in accordance with the provisions of Article 9.

Article 12

1. The Secretary-General of the Council shall act as depositary of this Protocol.

2. The depositary shall publish in the Official Journal of the European Communities the notifications, instruments or communications concerning this Protocol.

En fe de lo cual los plenipotenciarios abajo firmantes suscriben el presente Protocolo.

Til bekræftelse heraf har undertegnede befuldmægtigede underskrevet denne protokol.

Zu Urkund dessen haben die unterzeichneten Bevollmächtigten ihre Unterschrift unter dieses Protokoll gesetzt.

Oå =éoô¦oç ôùí aíùô¡ñù, ïé o=ïañÜöïíôåo =eçñåiïuoéïé ¡èåoaí ôçí o=ïañaö« ôïoo êÜôù a=ü ôï =añüí =ñùôüêïeeï.

In witness whereof, the undersigned Plenipotentiaries have signed this Protocol.

En foi de quoi, les plénipotentiaires soussignés ont apposé leurs signatures au bas du présent protocole.

Da fhianu sin, chuir na Lanchumhachtaigh thíos-sínithe a lamh leis an bProtacal seo.

In fede di che i plenipotenziari sottoscritti hanno apposto le loro firme in calce al presente protocollo.

Ten blijke waarvan de ondergetekende gevolmachtigden hun handtekening onder dit protocol hebben gesteld.

Em fé do que, os plenipotenciarios abaixo-assinados apuseram as suas assinaturas no presente protocolo.

Tämän vakuudeksi alla mainitut täysivaltaiset edustajat ovat allekirjoittaneet tämän pöytäkirjan.

Till bekräftelse härav har undertecknade befullmäktigade ombud undertecknat detta protokoll.

Hecho en Bruselas, el veintiocho de mayo de mil novecientos noventa y ocho, en un ejemplar unico en lenguas alemana, danesa, española, finesa, francesa, griega, inglesa, irlandesa, italiana, neerlandesa, portuguesa y sueca, siendo cada uno de estos textos igualmente auténtico, que sera depositado en los archivos de la Secretaría General del Consejo de la Union Europea.

Udfærdiget i Bruxelles, den otteogtyvende maj nitten hundrede og otteoghalvfems, i ét eksemplar på dansk, engelsk, finsk, fransk, græsk, irsk, italiensk, nederlandsk, portugisisk, spansk, svensk og tysk, idet hver af disse tekster har samme gyldighed; de deponeres i arkiverne i Generalsekretariatet for Rådet for Den Europæiske Union.

Geschehen zu Brüssel am achtundzwanzigsten Mai neunzehnhundertachtundneunzig in einer Urschrift in dänischer, deutscher, englischer, finnischer, französischer, griechischer, irischer, italienischer, niederländischer, portugiesischer, schwedischer und spanischer Sprache, wobei jeder Wortlaut gleichermaßen verbindlich ist; die Urschrift wird im Archiv des Generalsekretariats des Rates der Europäischen Union hinterlegt.

êaéíå oôéo Añoi¡eeåo, oôéo åßêïoé ïêô¦ öaAno eéa åííéaêüoéa åíåí«íôa ïêô¦, oå ¡ía iüíï aíôßôo=ï oôçí aaaeéê«, aaeeéê«, aåñiaíéê«, äaíéê«, åeeçíéê«, éñeaíäéê«, éo=aíéê«, éôaeéê«, ïeeaíäéê«, =ïñôïaaeéê«, oïoçäéê« êaé öéíeaíäéê« ae¦ooa. îea ôa êåßiåía åßíaé åißoïo aoèåíôéêÜ. Oï =ñùôüêïeeï èa êaôaôåèåß oôa añ ßa ôço Aåíéê«o Añaiiaôåßao ôïo Ooiâïoeßïo ôço Åoñù=auê«o êíùoço.

Done at Brussels on the twenty-eighth day of May in the year one thousand nine hundred and ninety-eight, in a single original in the Danish, Dutch, English, Finnish, French, German, Greek, Irish, Italian, Portuguese, Spanish and Swedish languages, each text being equally authentic, such original being deposited in the archives of the General Secretariat of the Council of the European Union.

Fait à Bruxelles, le vingt-huit mai mil neuf cent quatre-vingt-dix-huit, en un exemplaire unique, en langues allemande, anglaise, danoise, espagnole, finnoise, française, grecque, irlandaise, italienne, néerlandaise, portugaise et suédoise, chaque texte faisant également foi, cet exemplaire étant déposé dans les archives du secrétariat général du Conseil de l'Union européenne.

Arna dhéanamh sa Bhruiséil, ar an ochtu la is fiche de Bhealtaine sa bhliain míle naoi gcéad nocha a hocht, i scríbhinn bhunaidh amhain sa Bhéarla, sa Danmhairgis, san Fhionlainnis, sa Fhraincis, sa Ghaeilge, sa Ghearmainis, sa Ghréigis, san Iodailis, san Ollainnis, sa Phortaingéilis, sa Spainnis agus sa tSualainnis, agus comhudaras ag gach ceann de na téacsanna sin; déanfar an scríbhinn bhunaidh sin a thaisceadh i gcartlann Ardrunaíocht Chomhairle an Aontais Eorpaigh.

Fatto a Bruxelles, addi ventotto maggio millenovecentonovantotto, in unico esemplare in lingua danese, finlandese, francese, greca, inglese, irlandese, italiana, olandese, portoghese, spagnola, svedese e tedesca, ciascun testo facente ugualmente fede; l'esemplare è depositato negli archivi del Segretariato generale del Consiglio dell'Unione europea.

Gedaan te Brussel, de achtentwintigste mei negentienhonderd achtennegentig, in één exemplaar in de Deense, de Duitse, de Engelse, de Finse, de Franse, de Griekse, de Ierse, de Italiaanse, de Nederlandse, de Portugese, de Spaanse en de Zweedse taal, zijnde alle teksten gelijkelijk authentiek, dat wordt nedergelegd in het archief van het Secretariaat-generaal van de Raad van de Europese

Unie.

Feito em Bruxelas, em vinte e oito de Maio de mil novecentos e noventa e oito, em exemplar unico, nas línguas alema, dinamarquesa, espanhola, finlandesa, francesa, grega, inglesa, irlandesa, italiana, neerlandesa, portuguesa e sueca, fazendo igualmente fé cada um dos textos, ficando esse exemplar depositado nos arquivos do Secretariado-Geral do Conselho da Uniao Europeia.

Tehty Brysselissä kahdentenakymmenentenäkahdeksantena päivänä toukokuuta vuonna tuhatyhdeksänsataayhdeksänkymmentäkahdeksan englannin, espanjan, hollannin, iirin, italian, kreikan, portugalin, ranskan, ruotsin, saksan, suomen ja tanskan kielellä yhtenä kappaleena, jonka jokainen teksti on yhtä todistusvoimainen ja joka talletetaan Euroopan unionin neuvoston pääsihteeristön arkistoon.

Som skedde i Bryssel den tjugoåttonde maj nittonhundranittioåtta i ett enda exemplar på danska, engelska, finska, franska, grekiska, iriska, italienska, nederländska, portugisiska, spanska, svenska och tyska språken, varvid varje text äger samma giltighet, och detta exemplar skall deponeras i arkiven hos generalsekretariatet för Europeiska unionens råd.

Pour le gouvernement du Royaume de Belgique

Voor de regering van het Koninkrijk Belgie

Für die Regierung des Königreichs Belgien

For regeringen for Kongeriget Danmark

Für die Regierung der Bundesrepublik Deutschland

Aéa ôçí êoâ¡ñíçoç ôço Åeeçíéê«o Æçiïêñaôßao

Por el Gobierno del Reino de España

Pour le gouvernement de la République française

Thar ceann Rialtas na hEireann

For the Government of Ireland

Per il governo della Repubblica italiana

Pour le gouvernement du Grand-Duché de Luxembourg

Voor de regering van het Koninkrijk der Nederlanden

Für die Regierung der Republik Osterreich

Pelo Governo da Republica Portuguesa

Suomen hallituksen puolesta

På finska regeringens vägnar

På svenska regeringens vägnar

For the Government of the United Kingdom of Great Britain and Northern Ireland

DOCNUM 41998A0716(02)

AUTHOR REPRESENTATIVES OF THE GOVERNMENTS OF THE MEMBER STATES

FORM	PROTOCOL
TREATY	European Union
TYPDOC	4 ; SUPPLEMENTARY LEGAL ACTS ; 1998 ; A
PUBREF	Official Journal C 221 , 16/07/1998 p. 0020 - 0026
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PUB	1998/07/16
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INFORCE	0000/00/00=EV
ENDVAL	9999/99/99
SIGNED	1998/05/28=BRUSSELS
LEGBASE	11992MK03.....
LEGCIT	41998A0716(01).....
SUBSPREP	LINKED-TO..... 41998Y0716(02)..... LINKED-TO..... 41998Y0716(04).....
SUB	JUSTICE AND HOME AFFAIRS
REGISTER	19200000
AUTLANG	THE OFFICIAL LANGUAGES ; GERMAN ; DANISH ; SPANISH ; ENGLISH ; FRENCH ; ITALIAN ; DUTCH ; FINNISH ; GREEK ; SWEDISH ; PORTUGUESE ; GAELIC
DEPOS	Council of the European Union-General Secretariat
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Council Act of 28 May 1998 drawing up, on the basis of Article K.3 of the Treaty on European Union, the Protocol on the interpretation by the Court of Justice of the European Communities of the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters

COUNCIL ACT of 28 May 1998 drawing up, on the basis of Article K.3 of the Treaty on European Union, the Protocol on the interpretation by the Court of Justice of the European Communities of the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters (98/C 221/03)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article K.3(2)(c) thereof,

Having regard to Article 45 of the Convention on jurisdiction and the recognition and enforcement of judgments in matrimonial matters,

Whereas Article K.3(2)(c) of the Treaty provides that conventions drawn up on the basis of Article K.3 thereof may stipulate that the Court of Justice of the European Communities shall have jurisdiction to interpret their provisions in accordance with such arrangements as they may lay down;

Having examined the views of the European Parliament (1), following the consultation conducted by the Presidency in accordance with Article K.6 of the Treaty,

HAS DECIDED, that the Protocol, the text of which is given in the Annex and which has been signed today by the representatives of the Governments of the Member States, is hereby drawn up,

RECOMMENDS that it be adopted by the Member States in accordance with their respective constitutional rules.

Done at Brussels, 28 May 1998.

For the Council

The President

J. STRAW

(1) Opinion delivered on 30 April 1998 (OJ C 152, 18.5.1998).

DOCNUM	41998Y0716(02)
AUTHOR	COUNCIL
FORM	VARIOUS ACTS
TREATY	European Union
TYPDOC	4 ; SUPPLEMENTARY LEGAL ACTS ; 1998 ; Y
PUBREF	Official Journal C 221 , 16/07/1998 p. 0019 - 0019
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ENDVAL	9999/99/99
LEGBASE	11992MK03-P2PTC.....
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EARLACTS	41998A0716(02).....LINKAGE.....
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REGISTER	19200000
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41998Y0716(04) Official Journal C 221 , 16/07/1998 p. 0065 - 0068

Explanatory Report on the Protocol, drawn up on the basis of Article K.3 of the Treaty on European Union, on the interpretation by the Court of Justice of the European Communities of the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters (Text approved by the Council on 28 May 1998)

EXPLANATORY REPORT on the Protocol, drawn up on the basis of Article K.3 of the Treaty on European Union, on the interpretation by the Court of Justice of the European Communities of the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters (Text approved by the Council on 28 May 1998) (98/C 221/05)

I. GENERAL REMARKS

1. At its meeting on 10 and 11 December 1993, the European Council instructed the Working Party on Extension of the Brussels Convention to consider the possibility of extending the scope of the Brussels Convention to family matters.

In the course of work on such extension, which led to the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters, it was considered necessary to give the Court of Justice jurisdiction to interpret its rules, in order to ensure uniform application. A draft protocol on the interpretation by the Court of Justice was thus drawn up.

Following the political compromise of December 1997, the Presidency requested the views of the European Parliament, in accordance with Article K.6 of the Treaty on European Union, on the text of the draft Convention and on the essential elements of the draft Protocol. The views of the European Parliament were published in the Official Journal of the European Communities on 18 May 1998 (1).

On 28 May 1998 the Council adopted the two instruments drawing up, on the one hand, the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters, hereinafter referred to as 'the Convention`, and, on the other hand, the Protocol on the interpretation by the Court of Justice of the European Communities of the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters, the subject of this explanatory report. Both these instruments were signed on the same day by the representatives of all the Member States.

2. a) The enacting terms drawn up are based primarily on Article 177 of the EC Treaty. They echo to a very large extent the Protocol of 3 June 1971 (hereinafter referred to as the 1971 Protocol) on the interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and the Protocol of 25 May 1997 on the interpretation, by the Court, of the Convention on the Service in the Member States of the European Union of Judicial and Extrajudicial Documents in Civil or Commercial Matters (hereinafter referred to as the 1997 Protocol).

In particular, the Protocol subsumes the two methods of bringing proceedings before the Court provided for in the 1971 Protocol.

b) The procedures for the entry into force of the Protocol are similar to those established by the first and second Protocols of 19 December 1988 (hereinafter referred to as the 1988 Protocols) on the interpretation by the Court of Justice of the Convention on the Law applicable to Contractual Obligations and identical to those provided for in the 1997 Protocol.

The principle of assignment of jurisdiction to the Court is referred to in the Convention under discussion (Article 45), but it is the Protocol which defines the conditions for bringing proceedings and the national courts competent to do so.

The entry into force of the Convention, which will take place after its ratification by the 15 Member States, must precede that of the Protocol, which is subject only to adoption by three of

those States.

Accordingly, the earliest that the Protocol can enter into force is at the same time as the Convention. As a result, only the courts of a Member State that is a party to both the Convention and the Protocol will be able to ask the Court of Justice for a ruling or an opinion on a question of interpretation.

c) Lastly, the final provisions are similar to those laid down in this area by the Council of the European Union in respect of the Conventions established in the context of Title VI of the Treaty on European Union. They correspond to those of the Convention, mutatis mutandis.

II. COMMENTS ON THE ARTICLES

Article 1

3. Article 1 establishes the principle, posited in the 1971 and 1997 Protocols, of assignment of jurisdiction to the Court of Justice for interpreting the provisions of the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and of the Protocol itself.

Article 2

4. Article 2 is a new provision by comparison with the 1971, 1988 and 1997 Protocols. Paragraph 1 thereof provides that each Member State shall indicate, in accordance with whichever of the alternative systems provided for in paragraph 2 is chosen, which courts in that Member State may request the Court of Justice to give preliminary rulings on questions of interpretation.

The reason for this provision is that some delegations wanted jurisdiction restricted to the highest courts. They took the view that judgments on matters covered by the Convention needed to be given as promptly as possible in order not to prejudice the interests of individuals where there are proceedings for divorce, legal separation or marriage annulment (especially because there is no possibility for the national courts to give provisional, including protective measures, in these cases) or proceedings relating to parental responsibility for the children of both spouses. Therefore only cases brought before the highest national courts would appear likely to require referral to the Court of Justice.

The mechanism provided for in that Article is inspired by Article K.7 as worded in the Treaty of Amsterdam, which was signed in 1997.

Each Member State must indicate its choice of courts at the time of the notification referred to in Article 9(2). Although the text does not say so, it is clear from the discussions that Member States which have indicated that only the highest courts may request the Court of Justice to give a preliminary ruling could at any time extend that option to other courts sitting in an appellate capacity.

5. Paragraph 2 defines the courts of the Member States which are competent to make a referral to the Court of Justice for a preliminary ruling on a question of interpretation, on the basis of the declaration made by the Member State concerned pursuant to paragraph 1.

These are, firstly, the highest courts of Member States, which are listed in Article 3(1).

Secondly, under the terms of paragraph 2, the courts of Member States sit in an appellate capacity. This essentially refers, therefore, to appeal courts, except when they are sitting as tribunals

of first instance, and to other national courts hearing cases in their capacity as appeal courts.

Courts sitting in judgment at first instance, however, have no power to refer questions to the Court of Justice.

Article 3

6. This Article defines the highest courts of the Member States which are competent to make a referral to the Court of Justice for a preliminary ruling on a question of interpretation.

The list is limitative and any other supreme courts which might exist in Member States have no powers of referral, even if their decisions have civil impact.

7. The list given in paragraph 1 may be modified at the request of the Member State concerned. That possibility was introduced for the first time by the 1997 Protocol.

Such modification may prove necessary, for example, where a change takes place in a Member State's judicial system.

The request must be sent to the Secretary-General of the Council, in his capacity as depositary of the Protocol. He informs the other Member States of the request as quickly as possible, including the States which are not yet party to the Protocol.

The decision on the modification of the list is taken by the Council in accordance with the rules of procedure applicable.

Once it has been adopted, the modification displays its effects under the conditions specified in the Council decision (stipulating for instance the date of entry into force of the modification). Given the nature of the decision, it did not seem necessary for it to be adopted by the Member States in accordance with their respective constitutional requirements. Provision has therefore been made for specific rules, which constitute an exception to the amendment procedure laid down in Article 11 of the Protocol.

In the event of accession to the Protocol by a State which becomes a member of the European Union, that State will have to indicate, when it deposits its instrument of accession the conditions for application of Article 2 and which of its highest courts will be competent to ask the Court of Justice to rule on a question of interpretation. (Article 10(3)).

Such a mechanism allows for monitoring by Member States, even those not party to the Protocol, of the courts designated, which should enable the system to continue to operate on a sound basis.

Article 4

8. This Article, which is based on Article 177 of the EC Treaty and subsumes Article 3 of the 1971 Protocol and Article 3 of the 1997 Protocol, concerns the procedure for referral for a preliminary ruling.

Paragraph 1 stipulates that, where the courts listed in Article 3(1) consider an interpretation necessary to enable them to give judgment, they must refer such questions to the Court of Justice.

In so far as it imposes a requirement on the highest courts, the purpose of such a provision is to promote uniform application of the Convention within the Member States of the European Union.

9. Article 4(2) stipulates that, when sitting in an appellate capacity, courts have the option of referring a question to the Court of Justice with a request for interpretation where they consider a decision necessary on a point raised in a case pending before them.

Article 5

10. All Member States, even those not party to the Protocol, as well as the Commission and the Council of the European Union, are entitled to submit statements of case or written observations to the Court of Justice, once the latter has received a request for interpretation.

Article 6

11. This Article replicates Article 4 of the 1971 Protocol and Article 4 of the 1997 Protocol. It makes provision for a second procedure, which enables the Procurators-General of the Courts of Cassation or any other authority designated by the Member States to ask the Court of Justice for a ruling on a question of interpretation, where they are of the opinion that a judgment by a court in their State which has become res judicata conflicts with the interpretation given on that point by the Court of Justice or by such court as referred to in Article 2(2) of another Member State party to the Protocol.

This provision is also designed to ensure uniform interpretation of the Convention.

It is for the competent judicial authority to assess the advisability of making a request for interpretation to the Court of Justice in such a case.

Article 7

12. As in the 1971 and 1997 Protocols, this Article establishes the principle that the Statute of the Court of Justice and its Rules of Procedure are to apply.

Article 8

13. This Article, which stipulates that this Protocol may not be subject to any reservation, requires no particular comment.

Article 9

14. This Article makes provision for the entry into force of the Protocol in accordance with the rules laid down in this regard by the Council of the European Union.

In order to enable the Court of Justice to exercise its jurisdiction as soon as possible, the entry into force of the Protocol has been set at the expiry of a 90-day period following deposit of its instrument of adoption by the third of the 15 States which were members of the European

Union on 28 May 1998, the date of adoption by the Council of the Act drawing up this Protocol, to do so.

However, the Protocol cannot enter into force before the Convention. In accordance with Article 47 of the latter, the Convention will enter into force 90 days after notification of completion of the constitutional procedures required for its adoption by the Member State which, as a Member of the European Union at the time the Council draws up the Act establishing the Convention, is the last to complete that formality.

Thus, advance application of the Convention within the meaning of Article 47(4) cannot provide a legal basis for the assignment to the Court of Justice of jurisdiction in respect of interpretation, within the meaning of Article 45 thereof. Neither would adoption of the Protocol by all the Member States entitle the Court of Justice to interpret the provisions of the Convention as long as the latter had not entered into force.

Article 10

15. This Article stipulates that the Protocol is open to accession by any State which becomes a member of the European Union. Conversely, a State which is not a member of the European Union can accede neither to the Convention nor to the Protocol.

With regard to the procedures for acceding to the Protocol, the Article makes provision in particular for simplified procedures for modifying the list of the highest courts contained in Article 3(1), following the designation of those of a new Member State.

Between the date of deposit of the instrument of accession and the date of entry into force of the Protocol with respect to the acceding Member State, the Council is to adopt the modifications to be made to the list of highest courts.

Article 11

16. This Article concerns the procedure for amending the Protocol.

Only Member States which are party to the Protocol, and the Commission, are entitled to propose amendments.

The Council recommends adoption by the Member States, in accordance with their respective constitutional requirements, of the amendments it adopts.

This procedure does not apply to the simple modification of the list of highest courts.

Article 12

17. This Article entrusts to the Secretary-General of the Council the role of depositary of the Protocol.

The Secretary-General is to inform the Member States of all notifications concerning the Protocol and ensure their publication in the 'C` series of the Official Journal of the European Communities.

(1) OJ C 152, 18.5.1998.

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Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000

Council Regulation (EC) No 2201/2003

of 27 November 2003

concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and Article 67(1) thereof,

Having regard to the proposal from the Commission(1),

Having regard to the opinion of the European Parliament(2),

Having regard to the opinion of the European Economic and Social Committee(3),

Whereas:

(1) The European Community has set the objective of creating an area of freedom, security and justice, in which the free movement of persons is ensured. To this end, the Community is to adopt, among others, measures in the field of judicial cooperation in civil matters that are necessary for the proper functioning of the internal market.

(2) The Tampere European Council endorsed the principle of mutual recognition of judicial decisions as the cornerstone for the creation of a genuine judicial area, and identified visiting rights as a priority.

(3) Council Regulation (EC) No 1347/2000(4) sets out rules on jurisdiction, recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility for the children of both spouses rendered on the occasion of the matrimonial proceedings. The content of this Regulation was substantially taken over from the Convention of 28 May 1998 on the same subject matter(5).

(4) On 3 July 2000 France presented an initiative for a Council Regulation on the mutual enforcement of judgments on rights of access to children(6).

(5) In order to ensure equality for all children, this Regulation covers all decisions on parental responsibility, including measures for the protection of the child, independently of any link with a matrimonial proceeding.

(6) Since the application of the rules on parental responsibility often arises in the context of matrimonial proceedings, it is more appropriate to have a single instrument for matters of divorce and parental responsibility.

(7) The scope of this Regulation covers civil matters, whatever the nature of the court or tribunal.

(8) As regards judgments on divorce, legal separation or marriage annulment, this Regulation should apply only to the dissolution of matrimonial ties and should not deal with issues such as the grounds for divorce, property consequences of the marriage or any other ancillary measures.

(9) As regards the property of the child, this Regulation should apply only to measures for the protection of the child, i.e. (i) the designation and functions of a person or body having charge of the child's property, representing or assisting the child, and (ii) the administration, conservation or disposal of the child's property. In this context, this Regulation should, for instance,

apply in cases where the parents are in dispute as regards the administration of the child's property. Measures relating to the child's property which do not concern the protection of the child should continue to be governed by Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters(7).

(10) This Regulation is not intended to apply to matters relating to social security, public measures of a general nature in matters of education or health or to decisions on the right of asylum and on immigration. In addition it does not apply to the establishment of parenthood, since this is a different matter from the attribution of parental responsibility, nor to other questions linked to the status of persons. Moreover, it does not apply to measures taken as a result of criminal offences committed by children.

(11) Maintenance obligations are excluded from the scope of this Regulation as these are already covered by Council Regulation No 44/2001. The courts having jurisdiction under this Regulation will generally have jurisdiction to rule on maintenance obligations by application of Article 5(2) of Council Regulation No 44/2001.

(12) The grounds of jurisdiction in matters of parental responsibility established in the present Regulation are shaped in the light of the best interests of the child, in particular on the criterion of proximity. This means that jurisdiction should lie in the first place with the Member State of the child's habitual residence, except for certain cases of a change in the child's residence or pursuant to an agreement between the holders of parental responsibility.

(13) In the interest of the child, this Regulation allows, by way of exception and under certain conditions, that the court having jurisdiction may transfer a case to a court of another Member State if this court is better placed to hear the case. However, in this case the second court should not be allowed to transfer the case to a third court.

(14) This Regulation should have effect without prejudice to the application of public international law concerning diplomatic immunities. Where jurisdiction under this Regulation cannot be exercised by reason of the existence of diplomatic immunity in accordance with international law, jurisdiction should be exercised in accordance with national law in a Member State in which the person concerned does not enjoy such immunity.

(15) 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(8) should apply to the service of documents in proceedings instituted pursuant to this Regulation.

(16) This Regulation should not prevent the courts of a Member State from taking provisional, including protective measures, in urgent cases, with regard to persons or property situated in that State.

(17) In cases of wrongful removal or retention of a child, the return of the child should be obtained without delay, and to this end the Hague Convention of 25 October 1980 would continue to apply as complemented by the provisions of this Regulation, in particular Article 11. The courts of the Member State to or in which the child has been wrongfully removed or retained should be able to oppose his or her return in specific, duly justified cases. However, such a decision could be replaced by a subsequent decision by the court of the Member State of habitual residence of the child prior to the wrongful removal or retention. Should that judgment entail the return of the child, the return should take place without any special procedure being required for recognition and enforcement of that judgment in the Member State to or in which the child has been removed or retained.

(18) Where a court has decided not to return a child on the basis of Article 13 of the 1980 Hague

Convention, it should inform the court having jurisdiction or central authority in the Member State where the child was habitually resident prior to the wrongful removal or retention. Unless the court in the latter Member State has been seised, this court or the central authority should notify the parties. This obligation should not prevent the central authority from also notifying the relevant public authorities in accordance with national law.

(19) The hearing of the child plays an important role in the application of this Regulation, although this instrument is not intended to modify national procedures applicable.

(20) The hearing of a child in another Member State may take place under the arrangements laid down in Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters(9).

(21) The recognition and enforcement of judgments given in a Member State should be based on the principle of mutual trust and the grounds for non-recognition should be kept to the minimum required.

(22) Authentic instruments and agreements between parties that are enforceable in one Member State should be treated as equivalent to "judgments" for the purpose of the application of the rules on recognition and enforcement.

(23) The Tampere European Council considered in its conclusions (point 34) that judgments in the field of family litigation should be "automatically recognised throughout the Union without any intermediate proceedings or grounds for refusal of enforcement". This is why judgments on rights of access and judgments on return that have been certified in the Member State of origin in accordance with the provisions of this Regulation should be recognised and enforceable in all other Member States without any further procedure being required. Arrangements for the enforcement of such judgments continue to be governed by national law.

(24) The certificate issued to facilitate enforcement of the judgment should not be subject to appeal. It should be rectified only where there is a material error, i.e. where it does not correctly reflect the judgment.

(25) Central authorities should cooperate both in general matter and in specific cases, including for purposes of promoting the amicable resolution of family disputes, in matters of parental responsibility. To this end central authorities shall participate in the European Judicial Network in civil and commercial matters created by Council Decision 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters(10).

(26) The Commission should make publicly available and update the lists of courts and redress procedures communicated by the Member States.

(27) The measures necessary for the implementation of this Regulation should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission(11).

(28) This Regulation replaces Regulation (EC) No 1347/2000 which is consequently repealed.

(29) For the proper functioning of this Regulation, the Commission should review its application and propose such amendments as may appear necessary.

(30) The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community, have given notice of their wish to take part in the adoption and application of this Regulation.

(31) Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, is not

participating in the adoption of this Regulation and is therefore not bound by it nor subject to its application.

(32) Since the objectives of this Regulation cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.

(33) This Regulation recognises the fundamental rights and observes the principles of the Charter of Fundamental Rights of the European Union. In particular, it seeks to ensure respect for the fundamental rights of the child as set out in Article 24 of the Charter of Fundamental Rights of the European Union,

HAS ADOPTED THE PRESENT REGULATION:

CHAPTER I

SCOPE AND DEFINITIONS

Article 1

Scope

1. This Regulation shall apply, whatever the nature of the court or tribunal, in civil matters relating to:

(a) divorce, legal separation or marriage annulment;

(b) the attribution, exercise, delegation, restriction or termination of parental responsibility.

2. The matters referred to in paragraph 1(b) may, in particular, deal with:

(a) rights of custody and rights of access;

(b) guardianship, curatorship and similar institutions;

(c) the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child;

(d) the placement of the child in a foster family or in institutional care;

(e) measures for the protection of the child relating to the administration, conservation or disposal of the child's property.

3. This Regulation shall not apply to:

(a) the establishment or contesting of a parent-child relationship;

(b) decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption;

(c) the name and forenames of the child;

(d) emancipation;

(e) maintenance obligations;

(f) trusts or succession;

(g) measures taken as a result of criminal offences committed by children.

Article 2

Definitions

For the purposes of this Regulation:

1. the term "court" shall cover all the authorities in the Member States with jurisdiction in the matters falling within the scope of this Regulation pursuant to Article 1;

2. the term "judge" shall mean the judge or an official having powers equivalent to those of a judge in the matters falling within the scope of the Regulation;

3. the term "Member State" shall mean all Member States with the exception of Denmark;

4. the term "judgment" shall mean a divorce, legal separation or marriage annulment, as well as a judgment relating to parental responsibility, pronounced by a court of a Member State, whatever the judgment may be called, including a decree, order or decision;

5. the term "Member State of origin" shall mean the Member State where the judgment to be enforced was issued;

6. the term "Member State of enforcement" shall mean the Member State where enforcement of the judgment is sought;

7. the term "parental responsibility" shall mean all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect. The term shall include rights of custody and rights of access;

8. the term "holder of parental responsibility" shall mean any person having parental responsibility over a child;

9. the term "rights of custody" shall include rights and duties relating to the care of the person of a child, and in particular the right to determine the child's place of residence;

10. the term "rights of access" shall include in particular the right to take a child to a place other than his or her habitual residence for a limited period of time;

11. the term "wrongful removal or retention" shall mean a child's removal or retention where:

(a) it is in breach of rights of custody acquired by judgment or by operation of law or by an agreement having legal effect under the law of the Member State where the child was habitually resident immediately before the removal or retention;

and

(b) provided that, at the time of removal or retention, the rights of custody were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. Custody shall be considered to be exercised jointly when, pursuant to a judgment or by operation of law, one holder of parental responsibility cannot decide on the child's place of residence without the consent of another holder of parental responsibility.

CHAPTER II

JURISDICTION

SECTION 1

Divorce, legal separation and marriage annulment

Article 3

General jurisdiction

1. In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State

(a) in whose territory:

- the spouses are habitually resident, or

- the spouses were last habitually resident, insofar as one of them still resides there, or

- the respondent is habitually resident, or

- in the event of a joint application, either of the spouses is habitually resident, or

- the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or

- the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her "domicile" there;

(b) of the nationality of both spouses or, in the case of the United Kingdom and Ireland, of the "domicile" of both spouses.

2. For the purpose of this Regulation, "domicile" shall have the same meaning as it has under the legal systems of the United Kingdom and Ireland.

Article 4

Counterclaim

The court in which proceedings are pending on the basis of Article 3 shall also have jurisdiction to examine a counterclaim, insofar as the latter comes within the scope of this Regulation.

Article 5

Conversion of legal separation into divorce

Without prejudice to Article 3, a court of a Member State that has given a judgment on a legal separation shall also have jurisdiction for converting that judgment into a divorce, if the law of that Member State so provides.

Article 6

Exclusive nature of jurisdiction under Articles 3, 4 and 5

A spouse who:

(a) is habitually resident in the territory of a Member State; or

(b) is a national of a Member State, or, in the case of the United Kingdom and Ireland, has his or her "domicile" in the territory of one of the latter Member States,

may be sued in another Member State only in accordance with Articles 3, 4 and 5.

Article 7

Residual jurisdiction

1. Where no court of a Member State has jurisdiction pursuant to Articles 3, 4 and 5, jurisdiction shall be determined, in each Member State, by the laws of that State.

2. As against a respondent who is not habitually resident and is not either a national of a Member State or, in the case of the United Kingdom and Ireland, does not have his "domicile" within the territory of one of the latter Member States, any national of a Member State who is habitually resident within the territory of another Member State may, like the nationals of that State, avail himself of the rules of jurisdiction applicable in that State.

SECTION 2

Parental responsibility

Article 8

General jurisdiction

1. The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised.

2. Paragraph 1 shall be subject to the provisions of Articles 9, 10 and 12.

Article 9

Continuing jurisdiction of the child's former habitual residence

1. Where a child moves lawfully from one Member State to another and acquires a new habitual residence there, the courts of the Member State of the child's former habitual residence shall, by way of exception to Article 8, retain jurisdiction during a three-month period following the move for the purpose of modifying a judgment on access rights issued in that Member State before the child moved, where the holder of access rights pursuant to the judgment on access rights continues to have his or her habitual residence in the Member State of the child's former habitual residence.

2. Paragraph 1 shall not apply if the holder of access rights referred to in paragraph 1 has accepted the jurisdiction of the courts of the Member State of the child's new habitual residence by participating in proceedings before those courts without contesting their jurisdiction.

Article 10

Jurisdiction in cases of child abduction

In case of wrongful removal or retention of the child, the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention shall retain their jurisdiction until the child has acquired a habitual residence in another Member State and:

(a) each person, institution or other body having rights of custody has acquiesced in the removal or retention;

or

(b) the child has resided in that other Member State for a period of at least one year after the person, institution or other body having rights of custody has had or should have had knowledge of the whereabouts of the child and the child is settled in his or her new environment and at least one of the following conditions is met:

(i) within one year after the holder of rights of custody has had or should have had knowledge of the whereabouts of the child, no request for return has been lodged before the competent authorities of the Member State where the child has been removed or is being retained;

(ii) a request for return lodged by the holder of rights of custody has been withdrawn and no new request has been lodged within the time limit set in paragraph (i);

(iii) a case before the court in the Member State where the child was habitually resident immediately before the wrongful removal or retention has been closed pursuant to Article 11(7);

(iv) a judgment on custody that does not entail the return of the child has been issued by the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention.

Article 11

Return of the child

1. Where a person, institution or other body having rights of custody applies to the competent authorities in a Member State to deliver a judgment on the basis of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereinafter "the 1980 Hague Convention"), in order to obtain the return of a child that has been wrongfully removed or retained in a Member State other than the Member State where the child was habitually resident immediately before the wrongful removal or retention, paragraphs 2 to 8 shall apply.

2. When applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity.

3. A court to which an application for return of a child is made as mentioned in paragraph 1 shall act expeditiously in proceedings on the application, using the most expeditious procedures available in national law.

Without prejudice to the first subparagraph, the court shall, except where exceptional circumstances make this impossible, issue its judgment no later than six weeks after the application is lodged.

4. A court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return.

5. A court cannot refuse to return a child unless the person who requested the return of the child has been given an opportunity to be heard.

6. If a court has issued an order on non-return pursuant to Article 13 of the 1980 Hague Convention, the court must immediately either directly or through its central authority, transmit a copy of the court order on non-return and of the relevant documents, in particular a transcript of the hearings before the court, to the court with jurisdiction or central authority in the Member State where the child was habitually resident immediately before the wrongful removal or retention, as determined by national law. The court shall receive all the mentioned documents within one month of the date of the non-return order.

7. Unless the courts in the Member State where the child was habitually resident immediately before the wrongful removal or retention have already been seised by one of the parties, the court or central authority that receives the information mentioned in paragraph 6 must notify it to the parties and invite them to make submissions to the court, in accordance with national law, within three months of the date of notification so that the court can examine the question of custody of the child.

Without prejudice to the rules on jurisdiction contained in this Regulation, the court shall close the case if no submissions have been received by the court within the time limit.

8. Notwithstanding a judgment of non-return pursuant to Article 13 of the 1980 Hague Convention, any subsequent judgment which requires the return of the child issued by a court having jurisdiction under this Regulation shall be enforceable in accordance with Section 4 of Chapter III below in order to secure the return of the child.

Article 12

Prorogation of jurisdiction

1. The courts of a Member State exercising jurisdiction by virtue of Article 3 on an application for divorce, legal separation or marriage annulment shall have jurisdiction in any matter relating to parental responsibility connected with that application where:

(a) at least one of the spouses has parental responsibility in relation to the child;

and

(b) the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by the spouses and by the holders of parental responsibility, at the time the court is seised, and is in the superior interests of the child.

2. The jurisdiction conferred in paragraph 1 shall cease as soon as:

(a) the judgment allowing or refusing the application for divorce, legal separation or marriage annulment has become final;

(b) in those cases where proceedings in relation to parental responsibility are still pending on the date referred to in (a), a judgment in these proceedings has become final;

(c) the proceedings referred to in (a) and (b) have come to an end for another reason.

3. The courts of a Member State shall also have jurisdiction in relation to parental responsibility

in proceedings other than those referred to in paragraph 1 where:

(a) the child has a substantial connection with that Member State, in particular by virtue of the fact that one of the holders of parental responsibility is habitually resident in that Member State or that the child is a national of that Member State;

and

(b) the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings at the time the court is seised and is in the best interests of the child.

4. Where the child has his or her habitual residence in the territory of a third State which is not a contracting party to the Hague Convention of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children, jurisdiction under this Article shall be deemed to be in the child's interest, in particular if it is found impossible to hold proceedings in the third State in question.

Article 13

Jurisdiction based on the child's presence

1. Where a child's habitual residence cannot be established and jurisdiction cannot be determined on the basis of Article 12, the courts of the Member State where the child is present shall have jurisdiction.

2. Paragraph 1 shall also apply to refugee children or children internationally displaced because of disturbances occurring in their country.

Article 14

Residual jurisdiction

Where no court of a Member State has jurisdiction pursuant to Articles 8 to 13, jurisdiction shall be determined, in each Member State, by the laws of that State.

Article 15

Transfer to a court better placed to hear the case

1. By way of exception, the courts of a Member State having jurisdiction as to the substance of the matter may, if they consider that a court of another Member State, with which the child has a particular connection, would be better placed to hear the case, or a specific part thereof, and where this is in the best interests of the child:

(a) stay the case or the part thereof in question and invite the parties to introduce a request before the court of that other Member State in accordance with paragraph 4; or

(b) request a court of another Member State to assume jurisdiction in accordance with paragraph 5.

2. Paragraph 1 shall apply:

(a) upon application from a party; or

(b) of the court's own motion; or

(c) upon application from a court of another Member State with which the child has a particular connection, in accordance with paragraph 3.

A transfer made of the court's own motion or by application of a court of another Member State must be accepted by at least one of the parties.

3. The child shall be considered to have a particular connection to a Member State as mentioned in paragraph 1, if that Member State:

(a) has become the habitual residence of the child after the court referred to in paragraph 1 was seised; or

(b) is the former habitual residence of the child; or

(c) is the place of the child's nationality; or

(d) is the habitual residence of a holder of parental responsibility; or

(e) is the place where property of the child is located and the case concerns measures for the protection of the child relating to the administration, conservation or disposal of this property.

4. The court of the Member State having jurisdiction as to the substance of the matter shall set a time limit by which the courts of that other Member State shall be seised in accordance with paragraph 1.

If the courts are not seised by that time, the court which has been seised shall continue to exercise jurisdiction in accordance with Articles 8 to 14.

5. The courts of that other Member State may, where due to the specific circumstances of the case, this is in the best interests of the child, accept jurisdiction within six weeks of their seisure in accordance with paragraph 1(a) or 1(b). In this case, the court first seised shall decline jurisdiction. Otherwise, the court first seised shall continue to exercise jurisdiction in accordance with Articles 8 to 14.

6. The courts shall cooperate for the purposes of this Article, either directly or through the central authorities designated pursuant to Article 53.

SECTION 3

Common provisions

Article 16

Seising of a Court

1. A court shall be deemed to be seised:

(a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the applicant has not subsequently failed to take the steps he was required to take to have service effected on the respondent;

or

(b) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the applicant has not subsequently failed to take the steps he was required to take to have the document lodged with the court.

Article 17

Examination as to jurisdiction

Where a court of a Member State is seised of a case over which it has no jurisdiction under this Regulation and over which a court of another Member State has jurisdiction by virtue of this Regulation, it shall declare of its own motion that it has no jurisdiction.

Article 18

Examination as to admissibility

1. Where a respondent habitually resident in a State other than the Member State where the action was brought does not enter an appearance, the court with jurisdiction shall stay the proceedings so long as it is not shown that the respondent 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.

2. Article 19 of Regulation (EC) No 1348/2000 shall apply instead of the provisions of paragraph 1 of this Article if the document instituting the proceedings or an equivalent document had to be transmitted from one Member State to another pursuant to that Regulation.

3. Where the provisions of Regulation (EC) No 1348/2000 are not applicable, Article 15 of the Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial matters shall apply if the document instituting the proceedings or an equivalent document had to be transmitted abroad pursuant to that Convention.

Article 19

Lis pendens and dependent actions

1. Where proceedings relating to divorce, legal separation or marriage annulment between the same parties are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. Where proceedings relating to parental responsibility relating to the same child and involving the same cause of action are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

3. Where the jurisdiction of the court first seised is established, the court second seised shall decline jurisdiction in favour of that court.

In that case, the party who brought the relevant action before the court second seised may bring

that action before the court first seised.

Article 20

Provisional, including protective, measures

1. In urgent cases, the provisions of this Regulation shall not prevent the courts of a Member State from taking such provisional, including protective, measures in respect of persons or assets in that State as may be available under the law of that Member State, even if, under this Regulation, the court of another Member State has jurisdiction as to the substance of the matter.

2. The measures referred to in paragraph 1 shall cease to apply when the court of the Member State having jurisdiction under this Regulation as to the substance of the matter has taken the measures it considers appropriate.

CHAPTER III

RECOGNITION AND ENFORCEMENT

SECTION 1

Recognition

Article 21

Recognition of a judgment

1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.

2. In particular, and without prejudice to paragraph 3, no special procedure shall be required for updating the civil-status records of a Member State on the basis of a judgment relating to divorce, legal separation or marriage annulment given in another Member State, and against which no further appeal lies under the law of that Member State.

3. Without prejudice to Section 4 of this Chapter, any interested party may, in accordance with the procedures provided for in Section 2 of this Chapter, apply for a decision that the judgment be or not be recognised.

The local jurisdiction of the court appearing in the list notified by each Member State to the Commission pursuant to Article 68 shall be determined by the internal law of the Member State in which proceedings for recognition or non-recognition are brought.

4. Where the recognition of a judgment is raised as an incidental question in a court of a Member State, that court may determine that issue.

Article 22

Grounds of non-recognition for judgments relating to divorce, legal separation or marriage annulment

A judgment relating to a divorce, legal separation or marriage annulment shall not be recognised:

(a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought;

(b) where it was given in default of appearance, if the respondent was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable the respondent to arrange for his or her defence unless it is determined that the respondent has accepted the judgment unequivocally;

(c) if it is irreconcilable with a judgment given in proceedings between the same parties in the Member State in which recognition is sought; or

(d) if it is irreconcilable with an earlier judgment given in another Member State or in a non-Member State between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.

Article 23

Grounds of non-recognition for judgments relating to parental responsibility

A judgment relating to parental responsibility shall not be recognised:

(a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought taking into account the best interests of the child;

(b) if it was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought;

(c) where it was given in default of appearance if the person in default was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable that person to arrange for his or her defence unless it is determined that such person has accepted the judgment unequivocally;

(d) on the request of any person claiming that the judgment infringes his or her parental responsibility, if it was given without such person having been given an opportunity to be heard;

(e) if it is irreconcilable with a later judgment relating to parental responsibility given in the Member State in which recognition is sought;

(f) if it is irreconcilable with a later judgment relating to parental responsibility given in another Member State or in the non-Member State of the habitual residence of the child provided that the later judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.

or

(g) if the procedure laid down in Article 56 has not been complied with.

Article 24

Prohibition of review of jurisdiction of the court of origin

The jurisdiction of the court of the Member State of origin may not be reviewed. The test of public policy referred to in Articles 22(a) and 23(a) may not be applied to the rules relating to jurisdiction

set out in Articles 3 to 14.

Article 25

Differences in applicable law

The recognition of a judgment may not be refused because the law of the Member State in which such recognition is sought would not allow divorce, legal separation or marriage annulment on the same facts.

Article 26

Non-review as to substance

Under no circumstances may a judgment be reviewed as to its substance.

Article 27

Stay of proceedings

1. A court of a Member State in which recognition is sought of a judgment given in another Member State may stay the proceedings if an ordinary appeal against the judgment has been lodged.

2. A court of a Member State in which recognition is sought of a judgment given in Ireland or the United Kingdom may stay the proceedings if enforcement is suspended in the Member State of origin by reason of an appeal.

SECTION 2

Application for a declaration of enforceability

Article 28

Enforceable judgments

1. A judgment on the exercise of parental responsibility in respect of a child given in a Member State which is enforceable in that Member State and has been served shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there.

2. However, in the United Kingdom, such a judgment shall be enforced in England and Wales, in Scotland or in Northern Ireland only when, on the application of any interested party, it has been registered for enforcement in that part of the United Kingdom.

Article 29

Jurisdiction of local courts

1. An application for a declaration of enforceability shall be submitted to the court appearing in the list notified by each Member State to the Commission pursuant to Article 68.

2. The local jurisdiction shall be determined by reference to the place of habitual residence of the person against whom enforcement is sought or by reference to the habitual residence of any child to whom the application relates.

Where neither of the places referred to in the first subparagraph can be found in the Member State of enforcement, the local jurisdiction shall be determined by reference to the place of enforcement.

Article 30

Procedure

1. The procedure for making the application shall be governed by the law of the Member State of enforcement.

2. The applicant must give an address for service within the area of jurisdiction of the court applied to. However, if the law of the Member State of enforcement does not provide for the furnishing of such an address, the applicant shall appoint a representative ad litem.

3. The documents referred to in Articles 37 and 39 shall be attached to the application.

Article 31

Decision of the court

1. The court applied to shall give its decision without delay. Neither the person against whom enforcement is sought, nor the child shall, at this stage of the proceedings, be entitled to make any submissions on the application.

2. The application may be refused only for one of the reasons specified in Articles 22, 23 and 24.

3. Under no circumstances may a judgment be reviewed as to its substance.

Article 32

Notice of the decision

The appropriate officer of the court shall without delay bring to the notice of the applicant the decision given on the application in accordance with the procedure laid down by the law of the Member State of enforcement.

Article 33

Appeal against the decision

1. The decision on the application for a declaration of enforceability may be appealed against by either party.

2. The appeal shall be lodged with the court appearing in the list notified by each Member State to the Commission pursuant to Article 68.

3. The appeal shall be dealt with in accordance with the rules governing procedure in contradictory matters.

4. If the appeal is brought by the applicant for a declaration of enforceability, the party against whom enforcement is sought shall be summoned to appear before the appellate court. If such person fails to appear, the provisions of Article 18 shall apply.

5. An appeal against a declaration of enforceability must be lodged within one month of service thereof. If the party against whom enforcement is sought is habitually resident in a Member State other than that in which the declaration of enforceability was given, the time for appealing shall be two months and shall run from the date of service, either on him or at his residence. No extension of time may be granted on account of distance.

Article 34

Courts of appeal and means of contest

The judgment given on appeal may be contested only by the proceedings referred to in the list notified by each Member State to the Commission pursuant to Article 68.

Article 35

Stay of proceedings

1. The court with which the appeal is lodged under Articles 33 or 34 may, on the application of the party against whom enforcement is sought, stay the proceedings if an ordinary appeal has been lodged in the Member State of origin, or if the time for such appeal has not yet expired. In the latter case, the court may specify the time within which an appeal is to be lodged.

2. Where the judgment was given in Ireland or the United Kingdom, any form of appeal available in the Member State of origin shall be treated as an ordinary appeal for the purposes of paragraph 1.

Article 36

Partial enforcement

1. Where a judgment has been given in respect of several matters and enforcement cannot be authorised for all of them, the court shall authorise enforcement for one or more of them.

2. An applicant may request partial enforcement of a judgment.

SECTION 3

Provisions common to Sections 1 and 2

Article 37

Documents

1. A party seeking or contesting recognition or applying for a declaration of enforceability shall produce:

(a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity;

and

(b) the certificate referred to in Article 39.

2. In addition, in the case of a judgment given in default, the party seeking recognition or applying for a declaration of enforceability shall produce:

(a) the original or certified true copy of the document which establishes that the defaulting party was served with the document instituting the proceedings or with an equivalent document;

or

(b) any document indicating that the defendant has accepted the judgment unequivocally.

Article 38

Absence of documents

1. If the documents specified in Article 37(1)(b) or (2) are not produced, the court may specify a time for their production, accept equivalent documents or, if it considers that it has sufficient information before it, dispense with their production.

2. If the court so requires, a translation of such documents shall be furnished. The translation shall be certified by a person qualified to do so in one of the Member States.

Article 39

Certificate concerning judgments in matrimonial matters and certificate concerning judgments on parental responsibility

The competent court or authority of a Member State of origin shall, at the request of any interested party, issue a certificate using the standard form set out in Annex I (judgments in matrimonial matters) or in Annex II (judgments on parental responsibility).

SECTION 4

Enforceability of certain judgments concerning rights of access and of certain judgments which require the return of the child

Article 40

Scope

1. This Section shall apply to:

(a) rights of access;

and

(b) the return of a child entailed by a judgment given pursuant to Article 11(8).

2. The provisions of this Section shall not prevent a holder of parental responsibility from seeking recognition and enforcement of a judgment in accordance with the provisions in Sections 1 and 2 of this Chapter.

Article 41

Rights of access

1. The rights of access referred to in Article 40(1)(a) granted in an enforceable judgment given in a Member State shall be recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin in accordance with paragraph 2.

Even if national law does not provide for enforceability by operation of law of a judgment granting access rights, the court of origin may declare that the judgment shall be enforceable, notwithstanding any appeal.

2. The judge of origin shall issue the certificate referred to in paragraph 1 using the standard form in Annex III (certificate concerning rights of access) only if:

(a) where the judgment was given in default, the person defaulting was served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable that person to arrange for his or her defense, or, the person has been served with the document but not in compliance with these conditions, it is nevertheless established that he or she accepted the decision unequivocally;

(b) all parties concerned were given an opportunity to be heard;

and

(c) the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity.

The certificate shall be completed in the language of the judgment.

3. Where the rights of access involve a cross-border situation at the time of the delivery of the judgment, the certificate shall be issued ex officio when the judgment becomes enforceable, even if only provisionally. If the situation subsequently acquires a cross-border character, the certificate shall be issued at the request of one of the parties.

Article 42

Return of the child

1. The return of a child referred to in Article 40(1)(b) entailed by an enforceable judgment given

in a Member State shall be recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin in accordance with paragraph 2.

Even if national law does not provide for enforceability by operation of law, notwithstanding any appeal, of a judgment requiring the return of the child mentioned in Article 11(b)(8), the court of origin may declare the judgment enforceable.

2. The judge of origin who delivered the judgment referred to in Article 40(1)(b) shall issue the certificate referred to in paragraph 1 only if:

(a) the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity;

(b) the parties were given an opportunity to be heard; and

(c) the court has taken into account in issuing its judgment the reasons for and evidence underlying the order issued pursuant to Article 13 of the 1980 Hague Convention.

In the event that the court or any other authority takes measures to ensure the protection of the child after its return to the State of habitual residence, the certificate shall contain details of such measures.

The judge of origin shall of his or her own motion issue that certificate using the standard form in Annex IV (certificate concerning return of the child(ren)).

The certificate shall be completed in the language of the judgment.

Article 43

Rectification of the certificate

1. The law of the Member State of origin shall be applicable to any rectification of the certificate.

2. No appeal shall lie against the issuing of a certificate pursuant to Articles 41(1) or 42(1).

Article 44

Effects of the certificate

The certificate shall take effect only within the limits of the enforceability of the judgment.

Article 45

Documents

1. A party seeking enforcement of a judgment shall produce:

(a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity;

and

(b) the certificate referred to in Article 41(1) or Article 42(1).

2. For the purposes of this Article,

- the certificate referred to in Article 41(1) shall be accompanied by a translation of point 12 relating to the arrangements for exercising right of access,

- the certificate referred to in Article 42(1) shall be accompanied by a translation of its point 14 relating to the arrangements for implementing the measures taken to ensure the child's return.

The translation shall be into the official language or one of the official languages of the Member State of enforcement or any other language that the Member State of enforcement expressly accepts. The translation shall be certified by a person qualified to do so in one of the Member States.

SECTION 5

Authentic instruments and agreements

Article 46

Documents which have been formally drawn up or registered as authentic instruments and are enforceable in one Member State and also agreements between the parties that are enforceable in the Member State in which they were concluded shall be recognised and declared enforceable under the same conditions as judgments.

SECTION 6

Other provisions

Article 47

Enforcement procedure

1. The enforcement procedure is governed by the law of the Member State of enforcement.

2. Any judgment delivered by a court of another Member State and declared to be enforceable in accordance with Section 2 or certified in accordance with Article 41(1) or Article 42(1) shall be enforced in the Member State of enforcement in the same conditions as if it had been delivered in that Member State.

In particular, a judgment which has been certified according to Article 41(1) or Article 42(1) cannot be enforced if it is irreconcilable with a subsequent enforceable judgment.

Article 48

Practical arrangements for the exercise of rights of access

1. The courts of the Member State of enforcement may make practical arrangements for organising the exercise of rights of access, if the necessary arrangements have not or have not sufficiently been made in the judgment delivered by the courts of the Member State having jurisdiction as to the substance of the matter and provided the essential elements of this judgment are respected.

2. The practical arrangements made pursuant to paragraph 1 shall cease to apply pursuant to a later

judgment by the courts of the Member State having jurisdiction as to the substance of the matter.

Article 49

Costs

The provisions of this Chapter, with the exception of Section 4, shall also apply to the determination of the amount of costs and expenses of proceedings under this Regulation and to the enforcement of any order concerning such costs and expenses.

Article 50

Legal aid

An applicant who, in the Member State of origin, has benefited from complete or partial legal aid or exemption from costs or expenses shall be entitled, in the procedures provided for in Articles 21, 28, 41, 42 and 48 to benefit from the most favourable legal aid or the most extensive exemption from costs and expenses provided for by the law of the Member State of enforcement.

Article 51

Security, bond or deposit

No security, bond or deposit, however described, shall be required of a party who in one Member State applies for enforcement of a judgment given in another Member State on the following grounds:

(a) that he or she is not habitually resident in the Member State in which enforcement is sought; or

(b) that he or she is either a foreign national or, where enforcement is sought in either the United Kingdom or Ireland, does not have his or her "domicile" in either of those Member States.

Article 52

Legalisation or other similar formality

No legalisation or other similar formality shall be required in respect of the documents referred to in Articles 37, 38 and 45 or in respect of a document appointing a representative ad litem.

CHAPTER IV

COOPERATION BETWEEN CENTRAL AUTHORITIES IN MATTERS OF PARENTAL RESPONSIBILITY

Article 53

Designation

Each Member State shall designate one or more central authorities to assist with the application of this Regulation and shall specify the geographical or functional jurisdiction of each. Where a Member State has designated more than one central authority, communications shall normally be sent direct to the relevant central authority with jurisdiction. Where a communication is sent to a central authority without jurisdiction, the latter shall be responsible for forwarding it to the central authority with jurisdiction and informing the sender accordingly.

Article 54

General functions

The central authorities shall communicate information on national laws and procedures and take measures to improve the application of this Regulation and strengthening their cooperation. For this purpose the European Judicial Network in civil and commercial matters created by Decision No 2001/470/EC shall be used.

Article 55

Cooperation on cases specific to parental responsibility

The central authorities shall, upon request from a central authority of another Member State or from a holder of parental responsibility, cooperate on specific cases to achieve the purposes of this Regulation. To this end, they shall, acting directly or through public authorities or other bodies, take all appropriate steps in accordance with the law of that Member State in matters of personal data protection to:

(a) collect and exchange information:

(i) on the situation of the child;

(ii) on any procedures under way; or

(iii) on decisions taken concerning the child;

(b) provide information and assistance to holders of parental responsibility seeking the recognition and enforcement of decisions on their territory, in particular concerning rights of access and the return of the child;

(c) facilitate communications between courts, in particular for the application of Article 11(6) and (7) and Article 15;

(d) provide such information and assistance as is needed by courts to apply Article 56; and

(e) facilitate agreement between holders of parental responsibility through mediation or other means, and facilitate cross-border cooperation to this end.

Article 56

Placement of a child in another Member State

1. Where a court having jurisdiction under Articles 8 to 15 contemplates the placement of a child

in institutional care or with a foster family and where such placement is to take place in another Member State, it shall first consult the central authority or other authority having jurisdiction in the latter State where public authority intervention in that Member State is required for domestic cases of child placement.

2. The judgment on placement referred to in paragraph 1 may be made in the requesting State only if the competent authority of the requested State has consented to the placement.

3. The procedures for consultation or consent referred to in paragraphs 1 and 2 shall be governed by the national law of the requested State.

4. Where the authority having jurisdiction under Articles 8 to 15 decides to place the child in a foster family, and where such placement is to take place in another Member State and where no public authority intervention is required in the latter Member State for domestic cases of child placement, it shall so inform the central authority or other authority having jurisdiction in the latter State.

Article 57

Working method

1. Any holder of parental responsibility may submit, to the central authority of the Member State of his or her habitual residence or to the central authority of the Member State where the child is habitually resident or present, a request for assistance as mentioned in Article 55. In general, the request shall include all available information of relevance to its enforcement. Where the request for assistance concerns the recognition or enforcement of a judgment on parental responsibility that falls within the scope of this Regulation, the holder of parental responsibility shall attach the relevant certificates provided for in Articles 39, 41(1) or 42(1).

2. Member States shall communicate to the Commission the official language or languages of the Community institutions other than their own in which communications to the central authorities can be accepted.

3. The assistance provided by the central authorities pursuant to Article 55 shall be free of charge.

4. Each central authority shall bear its own costs.

Article 58

Meetings

1. In order to facilitate the application of this Regulation, central authorities shall meet regularly.

2. These meetings shall be convened in compliance with Decision No 2001/470/EC establishing a European Judicial Network in civil and commercial matters.

CHAPTER V

RELATIONS WITH OTHER INSTRUMENTS

Article 59

Relation with other instruments

1. Subject to the provisions of Articles 60, 63, 64 and paragraph 2 of this Article, this Regulation shall, for the Member States, supersede conventions existing at the time of entry into force of this Regulation which have been concluded between two or more Member States and relate to matters governed by this Regulation.

2. (a) Finland and Sweden shall have the option of declaring that the Convention of 6 February 1931 between Denmark, Finland, Iceland, Norway and Sweden comprising international private law provisions on marriage, adoption and guardianship, together with the Final Protocol thereto, will apply, in whole or in part, in their mutual relations, in place of the rules of this Regulation. Such declarations shall be annexed to this Regulation and published in the Official Journal of the European Union. They may be withdrawn, in whole or in part, at any moment by the said Member States.

(b) The principle of non-discrimination on the grounds of nationality between citizens of the Union shall be respected.

(c) The rules of jurisdiction in any future agreement to be concluded between the Member States referred to in subparagraph (a) which relate to matters governed by this Regulation shall be in line with those laid down in this Regulation.

(d) Judgments handed down in any of the Nordic States which have made the declaration provided for in subparagraph (a) under a forum of jurisdiction corresponding to one of those laid down in Chapter II of this Regulation, shall be recognised and enforced in the other Member States under the rules laid down in Chapter III of this Regulation.

3. Member States shall send to the Commission:

(a) a copy of the agreements and uniform laws implementing these agreements referred to in paragraph 2(a) and (c);

(b) any denunciations of, or amendments to, those agreements or uniform laws.

Article 60

Relations with certain multilateral conventions

In relations between Member States, this Regulation shall take precedence over the following Conventions in so far as they concern matters governed by this Regulation:

(a) the Hague Convention of 5 October 1961 concerning the Powers of Authorities and the Law Applicable in respect of the Protection of Minors;

(b) the Luxembourg Convention of 8 September 1967 on the Recognition of Decisions Relating to the Validity of Marriages;

(c) the Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations;

(d) the European Convention of 20 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children;

and

(e) the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

Article 61

Relation with the Hague Convention of 19 October 1996 on Jurisdiction, Applicable law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children

As concerns the relation with the Hague Convention of 19 October 1996 on Jurisdiction, Applicable law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, this Regulation shall apply:

(a) where the child concerned has his or her habitual residence on the territory of a Member State;

(b) as concerns the recognition and enforcement of a judgment given in a court of a Member State on the territory of another Member State, even if the child concerned has his or her habitual residence on the territory of a third State which is a contracting Party to the said Convention.

Article 62

Scope of effects

1. The agreements and conventions referred to in Articles 59(1), 60 and 61 shall continue to have effect in relation to matters not governed by this Regulation.

2. The conventions mentioned in Article 60, in particular the 1980 Hague Convention, continue to produce effects between the Member States which are party thereto, in compliance with Article 60.

Article 63

Treaties with the Holy See

1. This Regulation shall apply without prejudice to the International Treaty (Concordat) between the Holy See and Portugal, signed at the Vatican City on 7 May 1940.

2. Any decision as to the invalidity of a marriage taken under the Treaty referred to in paragraph 1 shall be recognised in the Member States on the conditions laid down in Chapter III, Section 1.

3. The provisions laid down in paragraphs 1 and 2 shall also apply to the following international treaties (Concordats) with the Holy See:

(a) "Concordato lateranense" of 11 February 1929 between Italy and the Holy See, modified by the agreement, with additional Protocol signed in Rome on 18 February 1984;

(b) Agreement between the Holy See and Spain on legal affairs of 3 January 1979.

4. Recognition of the decisions provided for in paragraph 2 may, in Italy or in Spain, be subject

to the same procedures and the same checks as are applicable to decisions of the ecclesiastical courts handed down in accordance with the international treaties concluded with the Holy See referred to in paragraph 3.

5. Member States shall send to the Commission:

(a) a copy of the Treaties referred to in paragraphs 1 and 3;

(b) any denunciations of or amendments to those Treaties.

CHAPTER VI

TRANSITIONAL PROVISIONS

Article 64

1. The provisions of this Regulation shall apply only to legal proceedings instituted, to documents formally drawn up or registered as authentic instruments and to agreements concluded between the parties after its date of application in accordance with Article 72.

2. Judgments given after the date of application of this Regulation in proceedings instituted before that date but after the date of entry into force of Regulation (EC) No 1347/2000 shall be recognised and enforced in accordance with the provisions of Chapter III of this Regulation if jurisdiction was founded on rules which accorded with those provided for either in Chapter II or in Regulation (EC) No 1347/2000 or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted.

3. Judgments given before the date of application of this Regulation in proceedings instituted after the entry into force of Regulation (EC) No 1347/2000 shall be recognised and enforced in accordance with the provisions of Chapter III of this Regulation provided they relate to divorce, legal separation or marriage annulment or parental responsibility for the children of both spouses on the occasion of these matrimonial proceedings.

4. Judgments given before the date of application of this Regulation but after the date of entry into force of Regulation (EC) No 1347/2000 in proceedings instituted before the date of entry into force of Regulation (EC) No 1347/2000 shall be recognised and enforced in accordance with the provisions of Chapter III of this Regulation provided they relate to divorce, legal separation or marriage annulment or parental responsibility for the children of both spouses on the occasion of these matrimonial proceedings and that jurisdiction was founded on rules which accorded with those provided for either in Chapter II of this Regulation or in Regulation (EC) No 1347/2000 or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted.

CHAPTER VII

FINAL PROVISIONS

Article 65

Review

No later than 1 January 2012, and every five years thereafter, the Commission shall present to

the European Parliament, to the Council and to the European Economic and Social Committee a report on the application of this Regulation on the basis of information supplied by the Member States. The report shall be accompanied if need be by proposals for adaptations.

Article 66

Member States with two or more legal systems

With regard to a Member State in which two or more systems of law or sets of rules concerning matters governed by this Regulation apply in different territorial units:

(a) any reference to habitual residence in that Member State shall refer to habitual residence in a territorial unit;

(b) any reference to nationality, or in the case of the United Kingdom "domicile", shall refer to the territorial unit designated by the law of that State;

(c) any reference to the authority of a Member State shall refer to the authority of a territorial unit within that State which is concerned;

(d) any reference to the rules of the requested Member State shall refer to the rules of the territorial unit in which jurisdiction, recognition or enforcement is invoked.

Article 67

Information on central authorities and languages accepted

The Member States shall communicate to the Commission within three months following the entry into force of this Regulation:

(a) the names, addresses and means of communication for the central authorities designated pursuant to Article 53;

(b) the languages accepted for communications to central authorities pursuant to Article 57(2);

and

(c) the languages accepted for the certificate concerning rights of access pursuant to Article 45(2).

The Member States shall communicate to the Commission any changes to this information.

The Commission shall make this information publicly available.

Article 68

Information relating to courts and redress procedures

The Member States shall notify to the Commission the lists of courts and redress procedures referred to in Articles 21, 29, 33 and 34 and any amendments thereto.

The Commission shall update this information and make it publicly available through the publication in the Official Journal of the European Union and any other appropriate means.

Article 69

Amendments to the Annexes

Any amendments to the standard forms in Annexes I to IV shall be adopted in accordance with the consultative procedure set out in Article 70(2).

Article 70

Committee

1. The Commission shall be assisted by a committee (committee).

2. Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468/EC shall apply.

3. The committee shall adopt its rules of procedure.

Article 71

Repeal of Regulation (EC) No 1347/2000

1. Regulation (EC) No 1347/2000 shall be repealed as from the date of application of this Regulation.

2. Any reference to Regulation (EC) No 1347/2000 shall be construed as a reference to this Regulation according to the comparative table in Annex V.

Article 72

Entry into force

This Regulation shall enter into force on 1 August 2004.

The Regulation shall apply from 1 March 2005, with the exception of Articles 67, 68, 69 and 70, which shall apply from 1 August 2004.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

Done at Brussels, 27 November 2003.

For the Council

The President

R. Castelli

(1) OJ C 203 E, 27.8.2002, p. 155.

(2) Opinion delivered on 20 September 2002 (not yet published in the Official Journal).

(3) OJ C 61, 14.3.2003, p. 76.

(4) OJ L 160, 30.6.2000, p. 19.

(5) At the time of the adoption of Regulation (EC) No 1347/2000 the Council took note of the explanatory report concerning that Convention prepared by Professor Alegria Borras (OJ C 221, 16.7.1998, p. 27).

(6) OJ C 234, 15.8.2000, p. 7.

(7) OJ L 12, 16.1.2001, p. 1. Regulation as last amended by Commission Regulation (EC) No 1496/2002 (OJ L 225, 22.8.2002, p. 13).

(8) OJ L 160, 30.6.2000, p. 37.

(9) OJ L 174, 27.6.2001, p. 1.

(10) OJ L 174, 27.6.2001, p. 25.

(11) OJ L 184, 17.7.1999, p. 23.

ANNEX I

CERTIFICATE REFERRED TO IN ARTICLE 39 CONCERNING JUDGMENTS IN MATRIMONIAL MATTERS(1)

1. Member State of origin

2. Court or authority issuing the certificate

2.1. Name

2.2. Address

2.3. Tel./fax/e-mail

3. Marriage

3.1. Wife

3.1.1. Full name

3.1.2. Address

3.1.3. Country and place of birth

3.1.4. Date of birth

3.2. Husband

3.2.1. Full name

3.2.2. Address

3.2.3. Country and place of birth

3.2.4. Date of birth

3.3. Country, place (where available) and date of marriage

3.3.1. Country of marriage

3.3.2. Place of marriage (where available)

3.3.3. Date of marriage

4. Court which delivered the judgment

4.1. Name of Court

4.2. Place of Court

5. Judgment

5.1. Date

5.2. Reference number

5.3. Type of judgment

5.3.1. Divorce

5.3.2. Marriage annulment

5.3.3. Legal separation

5.4. Was the judgment given in default of appearance?

5.4.1. No

5.4.2. Yes(2)

6. Names of parties to whom legal aid has been granted

7. Is the judgment subject to further appeal under the law of the Member State of origin?

7.1. No

7.2. Yes

8. Date of legal effect in the Member State where the judgment was given

8.1. Divorce

8.2. Legal separation

Done at ..., date...

Signature and/or stamp

(1) Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

(2) Documents referred to in Article 37(2) must be attached.

ANNEX II

CERTIFICATE REFERRED TO IN ARTICLE 39 CONCERNING JUDGMENTS ON PARENTAL RESPONSIBILITY(1)

1. Member State of origin

2. Court or authority issuing the certificate

2.1. Name

2.2. Address

2.3. Tel./Fax/e-mail

3. Person(s) with rights of access

3.1. Full name

3.2. Address

3.3. Date and place of birth (where available)

4. Holders of parental responsibility other than those mentioned under 3(2)

4.1. 4.1.1. Full name

4.1.2. Address

4.1.3. Date and place of birth (where available)

4.2. 4.2.1. Full Name

4.2.2. Address

4.2.3. Date and place of birth (where available)

4.3. 4.3.1. Full name

4.3.2. Address

4.3.3. Date and place of birth (where available)

5. Court which delivered the judgment

5.1. Name of Court

5.2. Place of Court

6. Judgment

6.1. Date

6.2. Reference number

6.3. Was the judgment given in default of appearance?

6.3.1. No

6.3.2. Yes(3)

7. Children who are covered by the judgment(4)

7.1. Full name and date of birth

7.2. Full name and date of birth

7.3. Full name and date of birth

7.4. Full name and date of birth

8. Names of parties to whom legal aid has been granted

9. Attestation of enforceability and service

9.1. Is the judgment enforceable according to the law of the Member State of origin?

9.1.1. Yes

9.1.2. No

9.2. Has the judgment been served on the party against whom enforcement is sought?

9.2.1. Yes

9.2.1.1. Full name of the party

9.2.1.2. Address

9.2.1.3. Date of service

9.2.2. No

10. Specific information on judgments on rights of access where "exequatur" is requested under Article 28. This possibility is foreseen in Article 40(2).

10.1. Practical arrangements for exercise of rights of access (to the extent stated in the judgment)

10.1.1. Date and time

10.1.1.1. Start

10.1.1.2. End

10.1.2. Place

10.1.3. Specific obligations on holders of parental responsibility

10.1.4. Specific obligations on the person with right of access

10.1.5. Any restrictions attached to the exercise of rights of access

11. Specific information for judgments on the return of the child in cases where the "exequatur" procedure is requested under Article 28. This possibility is foreseen under Article 40(2).

11.1. The judgment entails the return of the child

11.2. Person to whom the child is to be returned (to the extent stated in the judgment)

11.2.1. Full name

11.2.2 Address

Done at ..., date....

Signature and/or stamp

(1) Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

(2) In cases of joint custody, a person already mentioned under item 3 may also be mentioned under item 4.

(3) Documents referred to in Article 37(2) must be attached.

(4) If more than four children are covered, use a second form.

ANNEX III

CERTIFICATE REFERRED TO IN ARTICLE 41(1) CONCERNING JUDGMENTS ON RIGHTS OF ACCESS(1)

1. Member State of origin

2. Court or authority issuing the certificate

2.1. Name

2.2. Address

2.3. Tel./fax/e-mail

3. Person(s) with rights of access

3.1. Full name

3.2. Address

3.3. Date and place of birth (where available)

4. Holders of parental responsibility other than those mentioned under 3(2)(3)

4.1. 4.1.1. Full name

4.1.2. Address

4.1.3. Date and place of birth (where available)

4.2. 4.2.1. Full name

4.2.2. Address

4.2.3. Date and place of birth (where available)

4.3. Other

4.3.1. Full name

4.3.2. Address

4.3.3. Date and place of birth (where available)

5. Court which delivered the judgment

5.1. Name of Court

5.2. Place of Court

6. Judgment

6.1. Date

6.2. Reference number

7. Children who are covered by the judgment(4)

7.1. Full name and date of birth

7.2. Full name and date of birth

7.3. Full name and date of birth

7.4. Full name and date of birth

8. Is the judgment enforceable in the Member State of origin?

8.1. Yes

8.2. No

9. Where the judgment was given in default of appearance, the person defaulting was served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable that person to arrange for his or her defence, or the person has been served with the document but not in compliance with these conditions, it is nevertheless established that he or she accepted the decision unequivocally

10. All parties concerned were given an opportunity to be heard

11. The children were given an opportunity to be heard, unless a hearing was considered inappropriate having regard to their age or degree of maturity

12. Practical arrangements for exercise of rights of access (to the extent stated in the judgment)

12.1. Date and time

12.1.1. Start

12.1.2. End

12.2. Place

12.3. Specific obligations on holders of parental responsibility

12.4. Specific obligations on the person with right of access

12.5. Any restrictions attached to the exercise of rights of access

13. Names of parties to whom legal aid has been granted

Done at ..., date....

Signature and/or stamp

(1) Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

(2) In cases of joint custody, a person already mentioned under item 3 may also be mentioned in item 4.

(3) Please put a cross in the box corresponding to the person against whom the judgment should be enforced.

(4) If more than four children are concerned, use a second form.

ANNEX IV

CERTIFICATE REFERRED TO IN ARTICLE 42(1) CONCERNING THE RETURN OF THE CHILD(1)

1. Member State of origin

2. Court or authority issuing the certificate

2.1. Name

2.2. Address

2.3. Tel./fax/e-mail

3. Person to whom the child has to be returned (to the extent stated in the judgment)

3.1. Full name

3.2. Address

3.3. Date and place of birth (where available)

4. Holders of parental responsibility(2)

4.1. Mother

4.1.1. Full name

4.1.2. Address (where available)

4.1.3. Date and place of birth (where available)

4.2. Father

4.2.1. Full name

4.2.2. Address (where available)

4.2.3. Date and place of birth (where available)

4.3. Other

4.3.1. Full name

4.3.2. Address (where available)

4.3.3. Date and place of birth (where available)

5. Respondent (where available)

5.1. Full name

5.2. Address (where available)

6. Court which delivered the judgment

6.1. Name of Court

6.2. Place of Court

7. Judgment

7.1. Date

7.2. Reference number

8. Children who are covered by the judgment(3)

8.1. Full name and date of birth

8.2. Full name and date of birth

8.3. Full name and date of birth

8.4. Full name and date of birth

9. The judgment entails the return of the child

10. Is the judgment enforceable in the Member State of origin?

10.1. Yes

10.2. No

11. The children were given an opportunity to be heard, unless a hearing was considered inappropriate having regard to their age or degree of maturity

12. The parties were given an opportunity to be heard

13. The judgment entails the return of the children and the court has taken into account in issuing its judgment the reasons for and evidence underlying the decision issued pursuant to Article 13 of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

14. Where applicable, details of measures taken by courts or authorities to ensure the protection of the child after its return to the Member State of habitual residence

15. Names of parties to whom legal aid has been granted

Done at ..., date....

Signature and/or stamp

(1) Council Regulation (EC) No 2201 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

(2) This item is optional.

(3) If more than four children are covered, use a second form.

ANNEX V

COMPARATIVE TABLE WITH REGULATION (EC) No 1347/2000

>TABLE>

ANNEX VI

Declarations by Sweden and Finland pursuant to Article 59(2)(a) of the Council Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

Declaration by Sweden:

Pursuant to Article 59(2)(a) of the Council Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No 1347/2000, Sweden hereby declares that the Convention of 6 February 1931 between Denmark, Finland, Iceland, Norway and Sweden comprising international private law provisions on marriage, adoption and guardianship, together with the Final Protocol thereto, will apply in full in relations between Sweden and Finland, in place of the rules of the Regulation.

Declaration by Finland:

Pursuant to Article 59(2)(a) of the Council Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No 1347/2000, Finland hereby declares that the Convention of 6 February 1931 between Finland, Denmark, Iceland, Norway and Sweden comprising international private law provisions on marriage, adoption and guardianship, together with the Final Protocol thereto, will apply in

full in relations between Finland and Sweden, in place of the rules of the Regulation.

DOCNUM	32003R2201
AUTHOR	Council
FORM	Regulation
TREATY	European Community
PUBREF	Official Journal L 338 , 23/12/2003 P. 0001 - 0029
PUB	2003/12/23
DOC	2003/11/27
INFORCE	2004/08/01=EV ; 2004/08/01=MA/PART ; 2005/03/01=MA
ENDVAL	9999/99/99
LEGBASE	12002E061 12002E067
LEGCIT	41998A0716(01) 51998XG0716 32000Y0815(01) 32001R0044 32000R1348 32001R1206 32001D0470 31999D0468 11997D/PRO/04 11997D/PRO/05 12002E005 32000X1218(01)
MODIFIES	32000R1347 Repeal 52002PC0222 Adoption
MODIFIED	Amended by 32004R2116 Completion Article 63.3 from 01/03/2005 Amended by 32004R2116 Replacement Article 63.4 from 01/03/2005
SUBSPREP	Amendment proposed by 52004PC0616
SUB	Justice and home affairs ; Approximation of laws

REGISTER	19200000
PREPWORK	PR;COMM;CO 2002/0222 FIN ; JO C 203E/2002 P 155 PCONS;; AV;PE;RENDU 20/09/2002 AV;CES;JO C 61/2003 P 76
MISCINF	N/APPL DK CNS 2002/0110
DATES	of document: 27/11/2003 of effect: 01/08/2004; Entry into force See Art 72 of effect: 01/08/2004; Partial implementation See Art 72 of effect: 01/03/2005; Implementation See Art 72 end of validity: 99/99/9999

Council Regulation (EC) No 2116/2004 of 2 December 2004 amending Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, as regards treaties with the Holy See

Council Regulation (EC) No 2116/2004

of 2 December 2004

amending Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, as regards treaties with the Holy See

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community,

Having regard to the Act of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, and in particular Article 57(2) thereof,

Having regard to the proposal from the Commission,

Whereas:

(1) Article 40 of Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses [1] provides that decisions as to the invalidity of a marriage taken under the treaties between the Holy See and Portugal, Italy and Spain (Concordats) are to be recognised in the Member States on the conditions laid down in Chapter III of that Regulation.

(2) Article 40 of Regulation (EC) No 1347/2000 was amended by Annex II of the 2003 Act of Accession so as to mention Malta's Agreement with the Holy See on the recognition of civil effects to canonical marriages and to decisions of ecclesiastical authorities and tribunals on those marriages of 3 February 1993, with the second Additional Protocol of 6 January 1995.

(3) Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 [2] entered into force on 1 August 2004 and will apply from 1 March 2005 in all Member States with the exception of Denmark.

(4) Malta has requested that Article 63 of Regulation (EC) No 2201/2003, which corresponds to Article 40 of Regulation (EC) No 1347/2000, be amended so as to mention its Agreement with the Holy See.

(5) Article 57 of the 2003 Act of Accession provides that acts adopted prior to accession which require adaptation by reason of accession may be adapted through a simplified procedure whereby the Council acts by qualified majority on a proposal from the Commission.

(6) It is justified to take account of Malta's request and to amend Regulation (EC) No 2201/2003 accordingly,

HAS ADOPTED THIS REGULATION:

Article 1

Article 63 of Regulation (EC) No 2201/2003 is amended as follows:

1. in paragraph 3, the following point shall be added:

   "(c) Agreement between the Holy See and Malta on the recognition of civil effects to canonical marriages and to decisions of ecclesiastical authorities and tribunals on those marriages of 3 February 1993, including the Protocol of application of the same date, with the second Additional Protocol of 6 January 1995";

2. paragraph 4 shall be replaced by the following:

   "4. Recognition of the decisions provided for in paragraph 2 may, in Spain, Italy or Malta, be subject to the same procedures and the same checks as are applicable to decisions of the ecclesiastical courts handed down in accordance with the international treaties concluded with the Holy See referred to in paragraph 3".

Article 2

This Regulation shall enter into force on the 20th day following that of its publication in the Official Journal of the European Union.

This Regulation shall apply from 1 March 2005.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

Done at Brussels, 2 December 2004.

For the Council

The President

J. P. H. Donner

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[1] OJ L 160, 30.6.2000, p. 19. Regulation as last amended by Commission Regulation (EC) No 1804/2004 (OJ L 318, 19.10.2004, p. 7).

[2] OJ L 338, 23.12.2003, p. 1.

DOCNUM	32004R2116
AUTHOR	Council
FORM	Regulation
TREATY	European Community
PUBREF	Official Journal L 367 , 14/12/2004 P. 0001 - 0002
PUB	2004/12/14
DOC	2004/12/02

INFORCE	2005/01/03=EV ; 2005/03/01=MA
ENDVAL	9999/99/99
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SUB	Justice and home affairs ; Approximation of laws
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PREPWORK	PR;COMM;CO 2004/0616 FIN
DATES	of document: 02/12/2004 of effect: 03/01/2005; Entry into force Date pub. + 20 See Art 2 of effect: 01/03/2005; Implementation See Art 2 end of validity: 99/99/9999

Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses

Council Regulation (EC) No 1347/2000

of 29 May 2000

on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and Article 67(1) thereof,

Having regard to the proposal from the Commission(1),

Having regard to the opinion of the European Parliament(2),

Having regard to the opinion of the Economic and Social Committee(3),

Whereas:

(1) The Member States have set themselves the objective of maintaining and developing the Union as an area of freedom, security and justice, in which the free movement of persons is assured. To establish such an area, the Community is to adopt, among others, the measures in the field of judicial cooperation in civil matters needed for the proper functioning of the internal market.

(2) The proper functioning of the internal market entails the need to improve and simplify the free movement of judgments in civil matters.

(3) This is a subject now falling within the ambit of Article 65 of the Treaty.

(4) Differences between certain national rules governing jurisdiction and enforcement hamper the free movement of persons and the sound operation of the internal market. There are accordingly grounds for enacting provisions to unify the rules of conflict of jurisdiction in matrimonial matters and in matters of parental responsibility so as to simplify the formalities for rapid and automatic recognition and enforcement of judgments.

(5) In accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty, the objectives of this Regulation cannot be sufficiently achieved by the Member States and can therefore be better achieved by the Community. This Regulation does not go beyond what is necessary to achieve those objectives.

(6) The Council, by an Act(4) dated 28 May 1998, drew up a Convention on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and recommended it for adoption by the Member States in accordance with their respective constitutional rules. Continuity in the results of the negotiations for conclusion of the Convention should be ensured. The content of this Regulation is substantially taken over from the Convention, but this Regulation contains a number of new provisions not in the Convention in order to secure consistency with certain provisions of the proposed regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

(7) In order to attain the objective of free movement of judgments in matrimonial matters and in matters of parental responsibility within the Community, it is necessary and appropriate that the cross-border recognition of jurisdiction and judgments in relation to the dissolution of matrimonial ties and to parental responsibility for the children of both spouses be governed

by a mandatory, and directly applicable, Community legal instrument.

(8) The measures laid down in this Regulation should be consistent and uniform, to enable people to move as widely as possible. Accordingly, it should also apply to nationals of non-member States whose links with the territory of a Member State are sufficiently close, in keeping with the grounds of jurisdiction laid down in the Regulation.

(9) The scope of this Regulation should cover civil proceedings and non-judicial proceedings in matrimonial matters in certain States, and exclude purely religious procedures. It should therefore be provided that the reference to "courts" includes all the authorities, judicial or otherwise, with jurisdiction in matrimonial matters.

(10) This Regulation should be confined to proceedings relating to divorce, legal separation or marriage annulment. The recognition of divorce and annulment rulings affects only the dissolution of matrimonial ties; despite the fact that they may be interrelated, the Regulation does not affect issues such as the fault of the spouses, property consequences of the marriage, the maintenance obligation or any other ancillary measures.

(11) This Regulation covers parental responsibility for children of both spouses on issues that are closely linked to proceedings for divorce, legal separation or marriage annulment.

(12) The grounds of jurisdiction accepted in this Regulation are based on the rule that there must be a real link between the party concerned and the Member State exercising jurisdiction; the decision to include certain grounds corresponds to the fact that they exist in different national legal systems and are accepted by the other Member States.

(13) One of the risks to be considered in relation to the protection of the children of both spouses in a marital crisis is that one of the parents will take the child to another country. The fundamental interests of the children must therefore be protected, in accordance with, in particular, the Hague Convention of 25 October 1980 on the Civil Aspects of the International Abduction of Children. The lawful habitual residence is accordingly maintained as the grounds of jurisdiction in cases where, because the child has been moved or has not been returned without lawful reason, there has been a de facto change in the habitual residence.

(14) This Regulation does not prevent the courts of a Member State from taking provisional, including protective, measures, in urgent cases, with regard to persons or property situated in that State.

(15) The word "judgment" refers only to decisions that lead to divorce, legal separation or marriage annulment. Those documents which have been formally drawn up or registered as authentic instruments and are enforceable in one Member State are treated as equivalent to such "judgments".

(16) The recognition and enforcement of judgments given in a Member State are based on the principle of mutual trust. The grounds for non-recognition are kept to the minimum required. Those proceedings should incorporate provisions to ensure observance of public policy in the State addressed and to safeguard the rights of the defence and those of the parties, including the individual rights of any child involved, and so as to withhold recognition of irreconcilable judgments.

(17) The State addressed should review neither the jurisdiction of the State of origin nor the findings of fact.

(18) No procedures may be required for the updating of civil-status documents in one Member State on the basis of a final judgment given in another Member State.

(19) The Convention concluded by the Nordic States in 1931 should be capable of application within the limits set by this Regulation.

(20) Spain, Italy and Portugal had concluded Concordats before the matters covered by this Regulation

were brought within the ambit of the Treaty: It is necessary to ensure that these States do not breach their international commitments in relation to the Holy See.

(21) The Member States should remain free to agree among themselves on practical measures for the application of the Regulation as long as no Community measures have been taken to that end.

(22) Annexes I to III relating to the courts and redress procedures should be amended by the Commission on the basis of amendments transmitted by the Member State concerned. Amendments to Annexes IV and V should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission(5).

(23) No later than five years after the date of the entry into force of this Regulation, the Commission is to review its application and propose such amendments as may appear necessary.

(24) The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community, have given notice of their wish to take part in the adoption and application of this Regulation.

(25) Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, is not participating in the adoption of this Regulation, and is therefore not bound by it nor subject to its application,

HAS ADOPTED THIS REGULATION:

CHAPTER I

SCOPE

Article 1

1. This Regulation shall apply to:

(a) civil proceedings relating to divorce, legal separation or marriage annulment;

(b) civil proceedings relating to parental responsibility for the children of both spouses on the occasion of the matrimonial proceedings referred to in (a).

2. Other proceedings officially recognised in a Member State shall be regarded as equivalent to judicial proceedings. The term "court" shall cover all the authorities with jurisdiction in these matters in the Member States.

3. In this Regulation, the term "Member State" shall mean all Member States with the exception of Denmark.

CHAPTER II

JURISDICTION

Section 1

General provisions

Article 2

Divorce, legal separation and marriage annulment

1. In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State:

(a) in whose territory:

- the spouses are habitually resident, or

- the spouses were last habitually resident, in so far as one of them still resides there, or

- the respondent is habitually resident, or

- in the event of a joint application, either of the spouses is habitually resident, or

- the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or

- the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his "domicile" there;

(b) of the nationality of both spouses or, in the case of the United Kingdom and Ireland, of the "domicile" of both spouses.

2. For the purpose of this Regulation, "domicile" shall have the same meaning as it has under the legal systems of the United Kingdom and Ireland.

Article 3

Parental responsibility

1. The Courts of a Member State exercising jurisdiction by virtue of Article 2 on an application for divorce, legal separation or marriage annulment shall have jurisdiction in a matter relating to parental responsibility over a child of both spouses where the child is habitually resident in that Member State.

2. Where the child is not habitually resident in the Member State referred to in paragraph 1, the courts of that State shall have jurisdiction in such a matter if the child is habitually resident in one of the Member States and:

(a) at least one of the spouses has parental responsibility in relation to the child;

and

(b) the jurisdiction of the courts has been accepted by the spouses and is in the best interests of the child.

3. The jurisdiction conferred by paragraphs 1 and 2 shall cease as soon as:

(a) the judgment allowing or refusing the application for divorce, legal separation or marriage annulment has become final;

or

(b) in those cases where proceedings in relation to parental responsibility are still pending on the date referred to in (a), a judgment in these proceedings has become final;

or

(c) the proceedings referred to in (a) and (b) have come to an end for another reason.

Article 4

Child abduction

The courts with jurisdiction within the meaning of Article 3 shall exercise their jurisdiction in conformity with the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, and in particular Articles 3 and 16 thereof.

Article 5

Counterclaim

The court in which proceedings are pending on the basis of Articles 2 to 4 shall also have jurisdiction to examine a counterclaim, in so far as the latter comes within the scope of this Regulation.

Article 6

Conversion of legal separation into divorce

Without prejudice to Article 2, a court of a Member State which has given a judgment on a legal separation shall also have jurisdiction for converting that judgment into a divorce, if the law of that Member State so provides.

Article 7

Exclusive nature of jurisdiction under Articles 2 to 6

A spouse who:

(a) is habitually resident in the territory of a Member State;

or

(b) is a national of a Member State, or, in the case of the United Kingdom and Ireland, has his or her "domicile" in the territory of one of the latter Member States,

may be sued in another Member State only in accordance with Articles 2 to 6.

Article 8

Residual jurisdiction

1. Where no court of a Member State has jurisdiction pursuant to Articles 2 to 6, jurisdiction shall be determined, in each Member State, by the laws of that State.

2. As against a respondent who is not habitually resident and is not either a national of a Member State or, in the case of the United Kingdom and Ireland, does not have his "domicile" within the territory of one of the latter Member States, any national of a Member State who is habitually resident within the territory of another Member State may, like the nationals of that State, avail himself of the rules of jurisdiction applicable in that State.

Section 2

Examination as to jurisdiction and admissibility

Article 9

Examination as to jurisdiction

Where a court of a Member State is seised of a case over which it has no jurisdiction under this Regulation and over which a court of another Member State has jurisdiction by virtue of this Regulation, it shall declare of its own motion that it has no jurisdiction.

Article 10

Examination as to admissibility

1. Where a respondent habitually resident in a State other than the Member State where the action was brought does not enter an appearance, the court with jurisdiction shall stay the proceedings so long as it is not shown that the respondent 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.

2. Article 19 of 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(6), shall apply instead of the provisions of paragraph 1 of this Article if the document instituting the proceedings or an equivalent document had to be transmitted from one Member State to another pursuant to that Regulation.

3. Where the provisions of Council Regulation (EC) No 1348/2000 are not applicable, Article 15 of the Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial matters shall apply if the document instituting the proceedings or an equivalent document had to be transmitted abroad pursuant to that Convention.

Section 3

Lis pendens and dependent actions

Article 11

1. Where proceedings involving the same cause of action and between the same parties are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. Where proceedings for divorce, legal separation or marriage annulment not involving the same cause of action and between the same parties are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

3. Where the jurisdiction of the court first seised is established, the court second seised shall decline jurisdiction in favour of that court.

In that case, the party who brought the relevant action before the court second seised may bring that action before the court first seised.

4. For the purposes of this Article, a court shall be deemed to be seised:

(a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the applicant has not subsequently failed to take the steps he was required to take to have service effected on the respondent;

or

(b) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the applicant has not subsequently failed to take the steps he was required to take to have the document lodged with the court.

Section 4

Provisional, including protective, measures

Article 12

In urgent cases, the provisions of this Regulation shall not prevent the courts of a Member State from taking such provisional, including protective, measures in respect of persons or assets in that State as may be available under the law of that Member State, even if, under this Regulation, the court of another Member State has jurisdiction as to the substance of the matter.

CHAPTER III

RECOGNITION AND ENFORCEMENT

Article 13

Meaning of "judgment"

1. For the purposes of this Regulation, "judgment" means a divorce, legal separation or marriage annulment pronounced by a court of a Member State, as well as a judgment relating to the parental responsibility of the spouses given on the occasion of such matrimonial proceedings, whatever the judgment may be called, including a decree, order or decision.

2. The provisions of this chapter shall also apply to the determination of the amount of costs and expenses of proceedings under this Regulation and to the enforcement of any order concerning such costs and expenses.

3. For the purposes of implementing this Regulation, documents which have been formally drawn up or registered as authentic instruments and are enforceable in one Member State and also settlements which have been approved by a court in the course of proceedings and are enforceable in the Member State in which they were concluded shall be recognised and declared enforceable under the same conditions as the judgments referred to in paragraph 1.

Section 1

Recognition

Article 14

Recognition of a judgment

1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.

2. In particular, and without prejudice to paragraph 3, no special procedure shall be required for up-dating the civil-status records of a Member State on the basis of a judgment relating to divorce, legal separation or marriage annulment given in another member State, and against which no further appeal lies under the law of that Member State.

3. Any interested party may, in accordance with the procedures provided for in Sections 2 and 3 of this Chapter, apply for a decision that the judgment be or not be recognised.

4. Where the recognition of a judgment is raised as an incidental question in a court of a Member State, that court may determine that issue.

Article 15

Grounds of non-recognition

1. A judgment relating to a divorce, legal separation or marriage annulment shall not be recognised:

(a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought;

(b) where it was given in default of appearance, if the respondent was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable the respondent to arrange for his or her defence unless it is determined that the respondent has accepted the judgment unequivocally;

(c) if it is irreconcilable with a judgment given in proceedings between the same parties in the Member State in which recognition is sought;

or

(d) if it is irreconcilable with an earlier judgment given in another Member State or in a non-member State between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.

2. A judgment relating to the parental responsibility of the spouses given on the occasion of matrimonial proceedings as referred to in Article 13 shall not be recognised:

(a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought taking into account the best interests of the child;

(b) if it was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought;

(c) where it was given in default of appearance if the person in default was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable that person to arrange for his or her defence unless it is determined that such person has accepted the judgment unequivocally;

(d) on the request of any person claiming that the judgment infringes his or her parental responsibility, if it was given without such person having been given an opportunity to be heard;

(e) if it is irreconcilable with a later judgment relating to parental responsibility given in the Member State in which recognition is sought;

or

(f) if it is irreconcilable with a later judgment relating to parental responsibility given in another Member State or in the non-member State of the habitual residence of the child provided that the later judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.

Article 16

Agreement with third States

A court of a Member State may, on the basis of an agreement on the recognition and enforcement of judgments, not recognise a judgment given in another Member State where, in cases provided for in Article 8, the judgment could only be founded on grounds of jurisdiction other than those specified in Articles 2 to 7.

Article 17

Prohibition of review of jurisdiction of court of origin

The jurisdiction of the court of the Member State of origin may not be reviewed. The test of public policy referred to in Article 15(1)(a) and (2)(a) may not be applied to the rules relating to jurisdiction set out in Articles 2 to 8.

Article 18

Differences in applicable law

The recognition of a judgment relating to a divorce, legal separation or a marriage annulment may not be refused because the law of the Member State in which such recognition is sought would not allow divorce, legal separation or marriage annulment on the same facts.

Article 19

Non-review as to substance

Under no circumstances may a judgment be reviewed as to its substance.

Article 20

Stay of proceedings

1. A court of a Member State in which recognition is sought of a judgment given in another Member State may stay the proceedings if an ordinary appeal against the judgment has been lodged.

2. A court of a Member State in which recognition is sought of a judgment given in Ireland or the United Kingdom may stay the proceedings if enforcement is suspended in the Member State of origin by reason of an appeal.

Section 2

Enforcement

Article 21

Enforceable judgments

1. A judgment on the exercise of parental responsibility in respect of a child of both parties given in a Member State which is enforceable in that Member State and has been served shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there.

2. However, in the United Kingdom, such a judgment shall be enforced in England and Wales, in Scotland or in Northern Ireland when, on the application of any interested party, it has been registered for enforcement in that part of the United Kingdom.

Article 22

Jurisdiction of local courts

1. An application for a declaration of enforceability shall be submitted to the court appearing in the list in Annex I.

2. The local jurisdiction shall be determined by reference to the place of the habitual residence of the person against whom enforcement is sought or by reference to the habitual residence of any child to whom the application relates.

Where neither of the places referred to in the first subparagraph can be found in the Member State where enforcement is sought, the local jurisdiction shall be determined by reference to the place of enforcement.

3. In relation to procedures referred to in Article 14(3), the local jurisdiction shall be determined by the internal law of the Member State in which proceedings for recognition or non-recognition are brought.

Article 23

Procedure for enforcement

1. The procedure for making the application shall be governed by the law of the Member State in which enforcement is sought.

2. The applicant must give an address for service within the area of jurisdiction of the court applied to. However, if the law of the Member State in which enforcement is sought does not provide for the furnishing of such an address, the applicant shall appoint a representative ad litem.

3. The documents referred to in Articles 32 and 33 shall be attached to the application.

Article 24

Decision of the court

1. The court applied to shall give its decision without delay. The person against whom enforcement is sought shall not at this stage of the proceedings be entitled to make any submissions on the application.

2. The application may be refused only for one of the reasons specified in Articles 15, 16 and 17.

3. Under no circumstances may a judgment be reviewed as to its substance.

Article 25

Notice of the decision

The appropriate officer of the court shall without delay bring to the notice of the applicant the decision given on the application in accordance with the procedure laid down by the law of the Member State in which enforcement is sought.

Article 26

Appeal against the enforcement decision

1. The decision on the application for a declaration of enforceability may be appealed against by either party.

2. The appeal shall be lodged with the court appearing in the list in Annex II

3. The appeal shall be dealt with in accordance with the rules governing procedure in contradictory matters.

4. If the appeal is brought by the applicant for a declaration of enforceability, the party against whom enforcement is sought shall be summoned to appear before the appellate court. If such person fails to appear, the provisions of Article 10 shall apply.

5. An appeal against a declaration of enforceability must be lodged within one month of service thereof. If the party against whom enforcement is sought is habitually resident in a Member State other than that in which the declaration of enforceability was given, the time for appealing shall be two months and shall run from the date of service, either on him or at his residence. No extension of time may be granted on account of distance.

Article 27

Courts of appeal and means of contest

The judgment given on appeal may be contested only by the proceedings referred to in Annex III.

Article 28

Stay of proceedings

1. The court with which the appeal is lodged under Articles 26 or 27 may, on the application of the party against whom enforcement is sought, stay the proceedings if an ordinary appeal has been lodged in the Member State of origin or if the time for such appeal has not yet expired. In the latter case, the court may specify the time within which an appeal is to be lodged.

2. Where the judgment was given in Ireland or the United Kingdom, any form of appeal available in the Member State of origin shall be treated as an ordinary appeal for the purposes of paragraph 1.

Article 29

Partial enforcement

1. Where a judgment has been given in respect of several matters and enforcement cannot be authorised for all of them, the court shall authorise enforcement for one or more of them.

2. An applicant may request partial enforcement of a judgment.

Article 30

Legal aid

An applicant who, in the Member State of origin, has benefited from complete or partial legal aid or exemption from costs or expenses shall be entitled, in the procedures provided for in Articles 22 to 25, to benefit from the most favourable legal aid or the most extensive exemption from costs and expenses provided for by the law of the Member State addressed.

Article 31

Security, bond or deposit

No security, bond or deposit, however described, shall be required of a party who in one Member State applies for enforcement of a judgment given in another Member State on the following grounds:

(a) that he or she is not habitually resident in the Member State in which enforcement is sought; or

(b) that he or she is either a foreign national or, where enforcement is sought in either the United Kingdom or Ireland, does not have his or her "domicile" in either of those Member States.

Section 3

Common provisions

Article 32

Documents

1. A party seeking or contesting recognition or applying for a declaration of enforceability shall produce:

(a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity;

and

(b) a certificate referred to in Article 33.

2. In addition, in the case of a judgment given in default, the party seeking recognition or applying for a declaration of enforceability shall produce:

(a) the original or certified true copy of the document which establishes that the defaulting party was served with the document instituting the proceedings or with an equivalent document;

or

(b) any document indicating that the defendant has accepted the judgment unequivocally.

Article 33

Other documents

The competent court or authority of a Member State where a judgment was given shall issue, at the request of any interested party, a certificate using the standard form in Annex IV (judgments in matrimonial matters) or Annex V (judgments on parental responsibility).

Article 34

Absence of documents

1. If the documents specified in Article 32(1)(b) or (2) are not produced, the court may specify a time for their production, accept equivalent documents or, if it considers that it has sufficient information before it, dispense with their production.

2. If the Court so requires, a translation of such documents shall be furnished. The translation shall be certified by a person qualified to do so in one of the Member States.

Article 35

Legalisation or other similar formality

No legalisation or other similar formality shall be required in respect of the documents referred to in Articles 32, 33 and 34(2) or in respect of a document appointing a representative ad litem.

CHAPTER IV

GENERAL PROVISIONS

Article 36

Relation with other instruments

1. Subject to the provisions of Articles 38, 42 and paragraph 2 of this Article, this Regulation shall, for the Member States, supersede conventions existing at the time of entry into force of this Regulation which have been concluded between two or more Member States and relate to matters governed by this Regulation.

(2) (a) Finland and Sweden shall have the option of declaring that the Convention of 6 February 1931 between Denmark, Finland, Iceland, Norway and Sweden comprising international private law provisions on marriage, adoption and guardianship, together with the Final Protocol thereto, will apply, in whole or in part, in their mutual relations, in place of the rules of this Regulation. Such declarations shall be annexed to this Regulation and published in the Official Journal of the European Communities. They may be withdrawn, in whole or in part, at any moment by the said Member States(7).

(b) The principle of non-discrimination on the grounds of nationality between citizens of the Union shall be respected.

(c) The rules of jurisdiction in any future agreement to be concluded between the Member States referred to in subparagraph (a) which relate to matters governed by this Regulation shall be in line with those laid down in this Regulation.

(d) Judgments handed down in any of the Nordic States which have made the declaration provided for in subparagraph (a) under a forum of jurisdiction corresponding to one of those laid down in Chapter II, shall be recognised and enforced in the other Member States under the rules laid down in Chapter III.

3. Member States shall send to the Commission:

(a) a copy of the agreements and uniform laws implementing these agreements referred to in paragraphs 2(a) and (c);

(b) any denunciations of, or amendments to, those agreements or uniform laws.

Article 37

Relations with certain multilateral conventions

In relations between Member States, this Regulation shall take precedence over the following Conventions in so far as they concern matters governed by this Regulation:

- the Hague Convention of 5 October 1961 concerning the Powers of Authorities and the Law Applicable in respect of the Protection of Minors,

- the Luxembourg Convention of 8 September 1967 on the Recognition of Decisions Relating to the Validity of Marriages,

- the Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations,

- the European Convention of 20 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children,

- the Hague Convention of 19 October 1996 on Jurisdiction, Applicable law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, provided that the child concerned is habitually resident in a Member State.

Article 38

Extent of effects

1. The agreements and conventions referred to in Articles 36(1) and 37 shall continue to have effect in relation to matters to which this Regulation does not apply.

2. They shall continue to have effect in respect of judgments given and documents formally drawn up or registered as authentic before the entry into force of this Regulation.

Article 39

Agreements between Member States

1. Two or more Member States may conclude agreements or arrangements to amplify this Regulation or to facilitate its application.

Member States shall send to the Commission:

(a) a copy of the draft agreements;

and

(b) any denunciations of, or amendments to, these agreements.

2. In no circumstances may the agreements or arrangements derogate from Chapters II or III.

Article 40

Treaties with the Holy See

1. This Regulation shall apply without prejudice to the International Treaty (Concordat) between the Holy See and Portugal, signed at the Vatican City on 7 May 1940.

2. Any decision as to the invalidity of a marriage taken under the Treaty referred to in paragraph 1 shall be recognised in the Member States on the conditions laid down in Chapter III.

3. The provisions laid down in paragraphs 1 and 2 shall also apply to the following international treaties (Concordats) with the Holy See:

(a) Concordato lateranense of 11 February 1929 between Italy and the Holy See, modified by the agreement, with additional Protocol signed in Rome on 18 February 1984;

(b) Agreement between the Holy See and Spain on legal affairs of 3 January 1979.

4. Recognition of the decisions provided for in paragraph 2 may, in Italy or in Spain, be subject to the same procedures and the same checks as are applicable to decisions of the ecclesiastical courts handed down in accordance with the international treaties concluded with the Holy See referred to in paragraph 3.

5. Member States shall send to the Commission:

(a) a copy of the Treaties referred to in paragraphs 1 and 3;

(b) any denunciations of or amendments to those Treaties.

Article 41

Member States with two or more legal systems

With regard to a Member State in which two or more systems of law or sets of rules concerning matters governed by this Regulation apply in different territorial units:

(a) any reference to habitual residence in that Member State shall refer to habitual residence in a territorial unit;

(b) any reference to nationality, or in the case of the United Kingdom "domicile", shall refer to the territorial unit designated by the law of that State;

(c) any reference to the authority of a Member State having received an application for divorce or legal separation or for marriage annulment shall refer to the authority of a territorial unit which has received such an application;

(d) any reference to the rules of the requested Member State shall refer to the rules of the territorial unit in which jurisdiction, recognition or enforcement is invoked.

CHAPTER V

TRANSITIONAL PROVISIONS

Article 42

1. The provisions of this Regulation shall apply only to legal proceedings instituted, to documents formally drawn up or registered as authentic instruments and to settlements which have been approved

by a court in the course of proceedings after its entry into force.

2. Judgments given after the date of entry into force of this Regulation in proceedings instituted before that date shall be recognised and enforced in accordance with the provisions of Chapter III if jurisdiction was founded on rules which accorded with those provided for either in Chapter II of this Regulation or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted.

CHAPTER VI

FINAL PROVISIONS

Article 43

Review

No later than 1 March 2006, and every five years thereafter, the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Regulation, and in particular Articles 36, 39 and 40(2) thereof. The report shall be accompanied if need be by proposals for adaptations.

Article 44

Amendment to lists of courts and redress procedures

1. Member States shall notify the Commission of the texts amending the lists of courts and redress procedures set out in Annexes I to III. The Commission shall adapt the Annexes concerned accordingly.

2. The updating or making of technical amendments to the standard forms set out in Annexes IV and V shall be adopted in accordance with the advisory procedure set out in Article 45(2).

Article 45

1. The Commission shall be assisted by a committee.

2. Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468 EC shall apply.

3. The committee shall adopt its rules of procedure.

Article 46

Entry into force

This Regulation shall enter into force on 1 March 2001

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

Done at Brussels, 29 May 2000.

For the Council

The President

A. Costa

(1) OJ C 247, 31.8.1999, p. 1.

(2) Opinion delivered on 17 November 1999 (not yet published in the Official Journal).

(3) OJ C 368, 20.12.1999, p. 23.

(4) OJ C 221, 16.7.1998; p. 1. On the same day as the Convention was drawn up, the Council took note of the explanatory report to the Convention, as prepared by Prof. Alegría Borras. This explanatory report is set out on page 27 of the aforementioned Official Journal.

(5) OJ L 184, 17.7.1999, p. 23.

(6) See p. 37 of this Official Journal.

(7) None of these Member States made this statement when the Regulation was adopted.

ANNEX I

The applications provided for by Article 22 shall be submitted to the following courts:

- in Belgium, the "tribunal de première instance"/"rechtbank van eerste aanleg"/"erstinstanzliches Gericht",

- in Germany:

- in the district of the "Kammergericht" (Berlin), the "Familiengericht Pankow/Weissensee",

- in the districts of the remaining "Oberlandesgerichte" to the "Familiengericht" located at the seat of the respective "Oberlandesgericht"

- in Greece, the "! ISO_7! öïíïiåe¡o áñùôïäéêåßï",

- ! ISO_1! in Spain, the "Juzgado de Primera Instancia",

- in France, the presiding Judge of the "tribunal de grande instance",

- in Ireland, the High Court,

- in Italy, the "Corte d'apello",

- in Luxembourg, the presiding Judge of the "Tribunal d'arrondissement",

- in the Netherlands, the presiding Judge of the "arrondissementsrechtbank",

- in Austria, the "Bezirksgericht",

- in Portugal, the "Tribunal de Comarca" or "Tribunal de Familia",

- in Finland, the "käräjäoikeus"/"tingsrätt",

- in Sweden, the "Svea hovrätt",

- in the United Kingdom:

(a) in England and Wales, the High Court of Justice;

(b) in Scotland, the Court of Session;

(c) in Northern Ireland, the High Court of Justice;

(d) in Gibraltar, the Supreme Court.

ANNEX II

The appeal provided for by Article 26 shall be lodged with the courts listed below:

- in Belgium:

(a) a person applying for a declaration of enforceability may lodge an appeal with the "cour d'appel" or the "hof van beroep";

(b) the person against whom enforcement is sought may lodge opposition with the "tribunal de première instance"/"rechtbank van eerste aanleg"/"erstinstanzliches Gericht",

- in Germany, the "Oberlandesgericht",

- in Greece, the "! ISO_7! Åöåôåßï",

- ! ISO_1! in Spain, the "Audiencia Provincial",

- in France, the "Cour d'appel",

- in Ireland, the High Court,

- in Italy, the "Corte d'appello",

- Luxembourg, the "Cour d'appel",

- in the Netherlands:

(a) if the applicant or the respondent who has appeared lodges the appeal: with the "gerechtshof";

(b) if the respondent who has been granted leave not to appear lodges the appeal: with the "arrondissementsrechtbank",

- in Austria, the "Bezirksgericht",

- in Portugal, the "Tribunal da Relaçao",

- in Finland, the "hovioikeus"/"hovrätt",

- in Sweden, the "Svea hovrätt",

- in the United Kingdom:

(a) in England and Wales, the High Court of Justice;

(b) in Scotland, the Court of Session;

(c) in Northern Ireland, the High Court of Justice;

(d) in Gibraltar, the Court of Appeal.

ANNEX III

The appeals provided for by Article 27 may be brought only:

- in Belgium, Greece, Spain, France, Italy, Luxembourg and in the Netherlands, by an appeal in cassation,
- in Germany, by a "Rechtsbeschwerde",
- in Ireland, by an appeal on a point of law to the Supreme Court,
- in Austria, by a "Revisionsrekurs",
- in Portugal, by a "recurso restrito à matéria de direito",
- in Finland, by an appeal to "korkein oikeus"/"högsta domstolen",
- in Sweden, by an appeal to the "Högsta domstolen",
- in the United Kingdom, by a single further appeal on a point of law.

ANNEX IV

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! PIC FILE= "L_2000160EN.003401.EPS"!

ANNEX V

! PIC FILE= "L_2000160EN.003502.EPS"!

! PIC FILE= "L_2000160EN.003601.EPS"!

DOCNUM	32000R1347
AUTHOR	Council
FORM	Regulation
TREATY	European Community
TYPDOC	3 ; secondary legislation ; 2000 ; R
PUBREF	Official Journal L 160 , 30/06/2000 P. 0019 - 0029
DESCRIPT	judicial cooperation ; jurisdiction of the courts ; matrimonial law ; parental responsibility ; EC internal market
PUB	2000/06/30
DOC	2000/05/29
INFORCE	2001/03/01=EV

ENDVAL	9999/99/99
LEGBASE	11997E061-PTC..... 11997E067-P1.....
LEGCIT	11997D/PRO/04..... 11997D/PRO/05..... 11997E005..... 11997E065..... 41998Y0716(01)..... 31999D0468..... 32000R1348.....
MODIFIES	51999PC0220..... ADOPTION.....
MODIFIED	LINKED-TO..... 42001X0228(01).....
SUB	Internal market ; Justice and home affairs
REGISTER	19200000
PREPWORK	Proposal Commission;Com 99/0220 Final
DATES	OF DOCUMENT.....: 29/05/2000 OF EFFECT.....: 01/03/2001; Entry into force See Art 46 OF END OF VALIDITY: 99/99/9999

2003/93/EC: Council Decision of 19 December 2002 authorising the Member States, in the interest of the Community, to sign the 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility andmeasures for the protection of children

Council decision

of 19 December 2002

authorising the Member States, in the interest of the Community, to sign the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children

(2003/93/CE)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and Article 300 thereof,

Having regard to the proposal from the Commission,

Whereas:

(1) The Community is working towards the establishment of a common judicial area based on the principle of mutual recognition of judicial decisions.

(2) The Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children concluded on 19 October 1996 in the framework of The Hague Conference on Private International Law, (hereinafter referred to as the Convention) makes a valuable contribution to the protection of children at international level, and it is therefore desirable that its provisions be applied as soon as possible.

(3) Certain articles of the Convention affect Community secondary legislation on jurisdiction and the recognition and enforcement of judgments, in particular Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses(1).

(4) The Community has exclusive competence for the relevant provisions of the Convention insofar as those articles affect Community rules adopted in this area. The Member States should retain their competence in the areas covered by the Convention which do not affect Community law.

(5) Pursuant to the Convention, only sovereign States may be party to it. For that reason, the Community may not at present sign, ratify or accede to it.

(6) The Council should therefore authorise the Member States, by way of exception, to sign the Convention in the interest of the Community, under the conditions set out in this Decision.

(7) Taking account of Articles 23, 26 and 52 of the Convention, a Decision taken by a Member State on matters governed by the Convention may be recognised and enforced in another Member State in accordance with the relevant internal rules of Community law.

(8) The United Kingdom and Ireland are taking part in the adoption and application of this Decision.

(9) Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, is not taking part in the adoption of this Decision and is therefore not bound by it nor subject to

its application,

HAS ADOPTED THIS DECISION:

Article 1

1. The Council hereby authorises the Member States to sign the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children, concluded on 19 October 1996, in the interest of the Community, subject to the conditions set out in the following articles.

2. The text of the Convention is attached to this Decision(2).

3. In this Decision, the term "Member State" shall mean all Member States with the exception of Denmark.

Article 2

When signing the Convention, Member States shall make the following declaration:

"Articles 23, 26 and 52 of the Convention allow Contracting Parties a degree of flexibility in order to apply a simple and rapid regime for the recognition and enforcement of judgments. The Community rules provide for a system of recognition and enforcement which is at least as favourable as the rules laid down in the Convention. Accordingly, a judgment given in a Court of a Member State of the European Union, in respect of a matter relating to the Convention, shall be recognised and enforced in(3) by application of the relevant internal rules of Community law(4)."

Article 3

Member States shall make the necessary arrangements for the Convention to be signed before 1 June 2003.

Article 4

When signing the Convention, Member States shall inform the Ministry of Foreign Affairs of the Kingdom of the Netherlands in writing that the signing has taken place in accordance with this Decision.

This Decision is addressed to the Member States in accordance with the Treaty establishing the European Community.

Done at Brussels, 19 December 2002.

For the Council

The President

L. Espersen

(1) OJ L 160, 30.6.2000, p. 19. Regulation as amended by Commission Regulation (EC) No 1185/2002 (OJ L 173, 3.7.2002, p. 3).

(2) See page 3 of this Official Journal.

(3) Member State making the declaration.

(4) Regulation (EC) No 1347/2000 plays a special role in this field since it relates to jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses.

DOCNUM	32003D0093
AUTHOR	Council
FORM	Decision
TREATY	European Community
PUBREF	OJ L 48, 21.2.2003, p. 1-2 (ES, DA, DE, EL, EN, FR, IT, NL, PT, FI, SV)
DOC	2002/12/19
NOTIFIED	0000/00/00
INFORCE	0000/00/00=EV
ENDVAL	9999/99/99
LEGBASE	11997E061 11997E300
LEGCIT	32000R1347
MODIFIES	52001PC0680 Adoption 22003A0221(01) Relation 22003A0221(02) Relation
SUB	Justice and home affairs
REGISTER	19200000;11307000
ADDRESS	The Member States
PREPWORK	PR;COMM;CO 2001/0680 FIN

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DATES of document: 19/12/2002
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of effect: 00/00/0000; Entry into force Date notif.
end of validity: 99/99/9999

2008/431/EC: Council Decision of 5 June 2008 authorising certain Member States to ratify, or accede to, in the interest of the European Community, the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children and authorising certain Member States to make a declaration on the application of the relevant internal rules of Community law - Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children

Council Decision

of 5 June 2008

authorising certain Member States to ratify, or accede to, in the interest of the European Community, the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children and authorising certain Member States to make a declaration on the application of the relevant internal rules of Community law

(2008/431/EC)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and Article 67(1) in conjunction with the first subparagraph of Article 300(2), and the first subparagraph of Article 300(3), thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament [1],

Whereas:

(1) The Community is working towards the establishment of a common judicial area based on the principle of mutual recognition of judicial decisions.

(2) The Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children concluded on 19 October 1996 within the Hague Conference on Private International Law (hereinafter referred to as the Convention) makes a valuable contribution to the protection of children at the international level. It is therefore desirable that its provisions be applied as soon as possible.

(3) Council Decision 2003/93/EC of 19 December 2002 [2] authorised the Member States to sign the Convention in the interest of the Community. Those States which were Member States of the Community at that time signed the Convention on 1 April 2003, with the exception of the Netherlands which had already signed the Convention. Other Member States which were not Member States of the Community on 1 April 2003 have also signed the Convention.

(4) Upon the adoption of Decision 2003/93/EC the Council and the Commission agreed that the Decision would be followed by a Commission proposal for a Council Decision authorising the Member States to ratify, or accede to, the Convention in the interest of the Community at the appropriate time.

(5) Some Member States have already ratified, or acceded to, the Convention.

(6) Certain Articles of the Convention affect secondary Community legislation on jurisdiction and recognition and enforcement of judgments, in particular Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility [3]. The Member States retain their

competence in the areas covered by the Convention which do not affect Community law. The Community and the Member States thus share competence to conclude the Convention.

(7) Pursuant to the Convention, only sovereign States may be party to it. For that reason, the Community may not ratify, or accede to, the Convention.

(8) The Council should therefore authorise the Member States, by way of exception, to ratify, or accede to, the Convention in the interest of the Community, under the conditions set out in this Decision, however not those Member States which have already ratified, or acceded to, the Convention.

(9) In order to safeguard the application of Community rules on recognition and enforcement of judgments within the Community, Article 2 of Decision 2003/93/EC required the Member States to make a declaration when signing the Convention.

(10) The Member States which signed the Convention on 1 April 2003 made the declaration set out in Article 2 of Decision 2003/93/EC on that occasion. Other Member States which did not sign the Convention pursuant to Decision 2003/93/EC made the declaration after their accession to the European Union. Some Member States have, however, not made the declaration and should therefore now make the declaration set out in Article 2 of this Decision.

(11) The Member States which are authorised to ratify, or accede to, the Convention by this Decision, should do so simultaneously. Those Member States should therefore exchange information on the state of their ratification or accession procedures in order to prepare the simultaneous deposit of their instruments of ratification or accession.

(12) The United Kingdom and Ireland are taking part in the adoption and application of this Decision.

(13) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark does not take part in the adoption of this Decision and is not bound by it or subject to its application,

HAS ADOPTED THIS DECISION:

Article 1

1. The Council hereby authorises Belgium, Germany, Ireland, Greece, Spain, France, Italy, Cyprus, Luxembourg, Malta, the Netherlands, Austria, Poland, Portugal, Romania, Finland, Sweden and the United Kingdom to ratify, or accede to, the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children (hereinafter referred to as the Convention), in the interest of the Community, subject to the conditions set out in Articles 3 and 4.

2. The text of the Convention is attached to this Decision.

Article 2

The Council hereby authorises Bulgaria, Cyprus, Latvia, Malta, the Netherlands and Poland to make the following declaration:

"Articles 23, 26 and 52 of the Convention allow Contracting Parties a degree of flexibility in order to apply a simple and rapid regime for the recognition and enforcement of judgments.

The Community rules provide for a system of recognition and enforcement which is at least as favourable as the rules laid down in the Convention. Accordingly, a judgment given in a court of a Member State of the European Union, in respect of a matter relating to the Convention, shall be recognised and enforced in... [4] by application of the relevant internal rules of Community law [5].

Article 3

1. The Member States mentioned in Article 1(1) shall take the necessary steps to deposit simultaneously their instruments of ratification or accession with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, if possible before 5 June 2010.

2. The Member States referred to in paragraph 1 shall exchange information with the Commission within the Council, before 5 December 2009, on the prospective date of completion of their parliamentary procedures required for ratification or accession. On this basis, the date and modalities of the simultaneous deposit shall be determined.

Article 4

The Member States mentioned in Article 1(1) shall inform the Ministry of Foreign Affairs of the Kingdom of the Netherlands in writing when their parliamentary procedures required for ratification or accession have been carried out indicating that their instruments of ratification or accession will be deposited at a later stage in accordance with this Decision.

Article 5

Decision shall apply from the day of its publication in the Official Journal of the European Union.

Article 6

This Decision is addressed to all Member States with the exception of Denmark, the Czech Republic, Estonia, Lithuania, Hungary, Slovenia and Slovakia.

Done at Luxembourg, 5 June 2008.

For the Council

The President

D. Mate

[1] OJ C 82 E, 1.4.2004, p. 307.

[2] OJ L 48, 21.2.2003, p. 3.

[3] OJ L 338, 23.12.2003, p. 1. Regulation as last amended by Regulation (EC) No 2116/2004 (OJ L 367, 14.12.2004, p. 1).

[4] Member State making the declaration.

[5] Council Regulation (EC) No 2201/2003 plays a special role in this field since it relates to jurisdiction and recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility."

Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children

(Concluded on 19 October 1996)

The States signatory to the present Convention,

Considering the need to improve the protection of children in international situations,

Wishing to avoid conflicts between their legal systems in respect of jurisdiction, applicable law, recognition and enforcement of measures for the protection of children,

Recalling the importance of international cooperation for the protection of children,

Confirming that the best interests of the child are to be a primary consideration,

Noting that the Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors is in need of revision,

Desiring to establish common provisions to this effect, taking into account the United Nations Convention on the Rights of the Child of 20 November 1989,

Have agreed on the following provisions:

CHAPTER I

SCOPE OF THE CONVENTION

Article 1

1. The objects of the present Convention are:

(a) to determine the State whose authorities have jurisdiction to take measures directed to the protection of the person or property of the child;

(b) to determine which law is to be applied by such authorities in exercising their jurisdiction;

(c) to determine the law applicable to parental responsibility;

(d) to provide for the recognition and enforcement of such measures of protection in all Contracting States;

(e) to establish such cooperation between the authorities of the Contracting States as may be necessary in order to achieve the purposes of this Convention.

2. For the purposes of this Convention, the term "parental responsibility" includes parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child.

Article 2

The Convention applies to children from the moment of their birth until they reach the age of 18 years.

Article 3

The measures referred to in Article 1 may deal in particular with:

(a) the attribution, exercise, termination or restriction of parental responsibility, as well as its delegation;

(b) rights of custody, including rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence, as well as rights of access including the right to take a child for a limited period of time to a place other than the child's habitual residence;

(c) guardianship, curatorship and analogous institutions;

(d) the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child;

(e) the placement of the child in a foster family or in institutional care, or the provision of care by kafala or an analogous institution;

(f) the supervision by a public authority of the care of a child by any person having charge of the child;

(g) the administration, conservation or disposal of the child's property.

Article 4

The Convention does not apply to:

(a) the establishment or contesting of a parent-child relationship;

(b) decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption;

(c) the name and forename of the child;

(d) emancipation;

(e) maintenance obligations;

(f) trusts or succession;

(g) social security;

(h) public measures of a general nature in matters of education or health;

(i) measures taken as a result of penal offences committed by children;

(j) decisions on the right of asylum and on immigration.

CHAPTER II

JURISDICTION

Article 5

1. The judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property.

2. Subject to Article 7, in case of a change of the child's habitual residence to another Contracting State, the authorities of the State of the new habitual residence have jurisdiction.

Article 6

1. For refugee children and children who, due to disturbances occurring in their country, are internationally displaced, the authorities of the Contracting State on the territory of which these children are present as a result of their displacement have the jurisdiction provided for in paragraph 1 of Article 5.

2. The provisions of the preceding paragraph also apply to children whose habitual residence cannot be established.

Article 7

1. In case of wrongful removal or retention of the child, the authorities of the Contracting State in which the child was habitually resident immediately before the removal or retention keep their jurisdiction until the child has acquired a habitual residence in another State, and:

(a) each person, institution or other body having rights of custody has acquiesced in the removal or retention; or

(b) the child has resided in that other State for a period of at least one year after the person, institution or other body having rights of custody has or should have had knowledge of the whereabouts of the child, no request for return lodged within that period is still pending, and the child is settled in his or her new environment.

2. The removal or the retention of a child is to be considered wrongful where:

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in subparagraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

3. So long as the authorities first mentioned in paragraph 1 keep their jurisdiction, the authorities of the Contracting State to which the child has been removed or in which he or she has been retained

can take only such urgent measures under Article 11 as are necessary for the protection of the person or property of the child.

Article 8

1. By way of exception, the authority of a Contracting State having jurisdiction under Articles 5 or 6, if it considers that the authority of another Contracting State would be better placed in the particular case to assess the best interests of the child, may either:

- request that other authority, directly or with the assistance of the Central Authority of its State, to assume jurisdiction to take such measures of protection as it considers to be necessary, or,

- suspend consideration of the case and invite the parties to introduce such a request before the authority of that other State.

2. The Contracting States whose authorities may be addressed as provided in the preceding paragraph are:

(a) a State of which the child is a national;

(b) a State in which property of the child is located;

(c) a State whose authorities are seised of an application for divorce or legal separation of the child's parents, or for annulment of their marriage;

(d) a State with which the child has a substantial connection.

3. The authorities concerned may proceed to an exchange of views.

4. The authority addressed as provided in paragraph 1 may assume jurisdiction, in place of the authority having jurisdiction under Articles 5 or 6, if it considers that this is in the child's best interests.

Article 9

1. If the authorities of a Contracting State referred to in Article 8(2), consider that they are better placed in the particular case to assess the child's best interests, they may either:

- request the competent authority of the Contracting State of the habitual residence of the child, directly or with the assistance of the Central Authority of that State, that they be authorised to exercise jurisdiction to take the measures of protection which they consider to be necessary, or

- invite the parties to introduce such a request before the authority of the Contracting State of the habitual residence of the child.

2. The authorities concerned may proceed to an exchange of views.

3. The authority initiating the request may exercise jurisdiction in place of the authority of the Contracting State of the habitual residence of the child only if the latter authority has accepted the request.

Article 10

1. Without prejudice to Articles 5 to 9, the authorities of a Contracting State exercising jurisdiction to decide upon an application for divorce or legal separation of the parents of a child habitually resident in another Contracting State, or for annulment of their marriage, may, if the law of their State so provides, take measures directed to the protection of the person or property of such child if:

(a) at the time of commencement of the proceedings, one of his or her parents habitually resides in that State and one of them has parental responsibility in relation to the child; and

(b) the jurisdiction of these authorities to take such measures has been accepted by the parents, as well as by any other person who has parental responsibility in relation to the child, and is in the best interests of the child.

2. The jurisdiction provided for by paragraph 1 to take measures for the protection of the child ceases as soon as the decision allowing or refusing the application for divorce, legal separation or annulment of the marriage has become final, or the proceedings have come to an end for another reason.

Article 11

1. In all cases of urgency, the authorities of any Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take any necessary measures of protection.

2. The measures taken under the preceding paragraph with regard to a child habitually resident in a Contracting State shall lapse as soon as the authorities which have jurisdiction under Articles 5 to 10 have taken the measures required by the situation.

3. The measures taken under paragraph 1 with regard to a child who is habitually resident in a non-Contracting State shall lapse in each Contracting State as soon as measures required by the situation and taken by the authorities of another State are recognised in the Contracting State in question.

Article 12

1. Subject to Article 7, the authorities of a Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take measures of a provisional character for the protection of the person or property of the child which have a territorial effect limited to the State in question, in so far as such measures are not incompatible with measures already taken by authorities which have jurisdiction under Articles 5 to 10.

2. The measures taken under the preceding paragraph with regard to a child habitually resident in a Contracting State shall lapse as soon as the authorities which have jurisdiction under Articles 5 to 10 have taken a decision in respect of the measures of protection which may be required by the situation.

3. The measures taken under paragraph 1 with regard to a child who is habitually resident in a

non-Contracting State shall lapse in the Contracting State where the measures were taken as soon as measures required by the situation and taken by the authorities of another State are recognised in the Contracting State in question.

Article 13

1. The authorities of a Contracting State which have jurisdiction under Articles 5 to 10 to take measures for the protection of the person or property of the child must abstain from exercising this jurisdiction if, at the time of the commencement of the proceedings, corresponding measures have been requested from the authorities of another Contracting State having jurisdiction under Articles 5 to 10 at the time of the request and are still under consideration.

2. The provisions of the preceding paragraph shall not apply if the authorities before whom the request for measures was initially introduced have declined jurisdiction.

Article 14

The measures taken in application of Articles 5 to 10 remain in force according to their terms, even if a change of circumstances has eliminated the basis upon which jurisdiction was founded, so long as the authorities which have jurisdiction under the Convention have not modified, replaced or terminated such measures.

CHAPTER III

APPLICABLE LAW

Article 15

1. In exercising their jurisdiction under the provisions of Chapter II, the authorities of the Contracting States shall apply their own law.

2. However, in so far as the protection of the person or the property of the child requires, they may exceptionally apply or take into consideration the law of another State with which the situation has a substantial connection.

3. If the child's habitual residence changes to another Contracting State, the law of that other State governs, from the time of the change, the conditions of application of the measures taken in the State of the former habitual residence.

Article 16

1. The attribution or extinction of parental responsibility by operation of law, without the intervention of a judicial or administrative authority, is governed by the law of the State of the habitual residence of the child.

2. The attribution or extinction of parental responsibility by an agreement or a unilateral act, without intervention of a judicial or administrative authority, is governed by the law of the State

of the child's habitual residence at the time when the agreement or unilateral act takes effect.

3. Parental responsibility which exists under the law of the State of the child's habitual residence subsists after a change of that habitual residence to another State.

4. If the child's habitual residence changes, the attribution of parental responsibility by operation of law to a person who does not already have such responsibility is governed by the law of the State of the new habitual residence.

Article 17

The exercise of parental responsibility is governed by the law of the State of the child's habitual residence. If the child's habitual residence changes, it is governed by the law of the State of the new habitual residence.

Article 18

The parental responsibility referred to in Article 16 may be terminated, or the conditions of its exercise modified, by measures taken under this Convention.

Article 19

1. The validity of a transaction entered into between a third party and another person who would be entitled to act as the child's legal representative under the law of the State where the transaction was concluded cannot be contested, and the third party cannot be held liable, on the sole ground that the other person was not entitled to act as the child's legal representative under the law designated by the provisions of this Chapter, unless the third party knew or should have known that the parental responsibility was governed by the latter law.

2. The preceding paragraph applies only if the transaction was entered into between persons present on the territory of the same State.

Article 20

The provisions of this Chapter apply even if the law designated by them is the law of a non-Contracting State.

Article 21

1. In this Chapter the term "law" means the law in force in a State other than its choice of law rules.

2. However, if the law applicable according to Article 16 is that of a non-Contracting State and if the choice of law rules of that State designate the law of another non-Contracting State which

would apply its own law, the law of the latter State applies. If that other non-Contracting State would not apply its own law, the applicable law is that designated by Article 16.

Article 22

The application of the law designated by the provisions of this Chapter can be refused only if this application would be manifestly contrary to public policy, taking into account the best interests of the child.

CHAPTER IV

RECOGNITION AND ENFORCEMENT

Article 23

1. The measures taken by the authorities of a Contracting State shall be recognised by operation of law in all other Contracting States.

2. Recognition may however be refused:

(a) if the measure was taken by an authority whose jurisdiction was not based on one of the grounds provided for in Chapter II;

(b) if the measure was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, without the child having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the requested State;

(c) on the request of any person claiming that the measure infringes his or her parental responsibility, if such measure was taken, except in a case of urgency, without such person having been given an opportunity to be heard;

(d) if such recognition is manifestly contrary to public policy of the requested State, taking into account the best interests of the child;

(e) if the measure is incompatible with a later measure taken in the non-Contracting State of the habitual residence of the child, where this later measure fulfils the requirements for recognition in the requested State;

(f) if the procedure provided in Article 33 has not been complied with.

Article 24

Without prejudice to Article 23(1) any interested person may request from the competent authorities of a Contracting State that they decide on the recognition or non-recognition of a measure taken in another Contracting State. The procedure is governed by the law of the requested State.

Article 25

The authority of the requested State is bound by the findings of fact on which the authority of the State where the measure was taken based its jurisdiction.

Article 26

1. If measures taken in one Contracting State and enforceable there require enforcement in another Contracting State, they shall, upon request by an interested party, be declared enforceable or registered for the purpose of enforcement in that other State according to the procedure provided in the law of the latter State.

2. Each Contracting State shall apply to the declaration of enforceability or registration a simple and rapid procedure.

3. The declaration of enforceability or registration may be refused only for one of the reasons set out in Article 23(2).

Article 27

Without prejudice to such review as is necessary in the application of the preceding Articles, there shall be no review of the merits of the measure taken.

Article 28

Measures taken in one Contracting State and declared enforceable, or registered for the purpose of enforcement, in another Contracting State shall be enforced in the latter State as if they had been taken by the authorities of that State. Enforcement takes place in accordance with the law of the requested State to the extent provided by such law, taking into consideration the best interests of the child.

CHAPTER V

COOPERATION

Article 29

1. A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention on such authorities.

2. Federal States, States with more than one system of law or States having autonomous territorial units shall be free to appoint more than one Central Authority and to specify the territorial or personal extent of their functions. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which any communication may be addressed for transmission to the appropriate Central Authority within that State.

Article 30

1. Central Authorities shall cooperate with each other and promote cooperation amongst the competent authorities in their States to achieve the purposes of the Convention.

2. They shall, in connection with the application of the Convention, take appropriate steps to provide information as to the laws of, and services available in, their States relating to the protection of children.

Article 31

The Central Authority of a Contracting State, either directly or through public authorities or other bodies, shall take all appropriate steps to:

(a) facilitate the communications and offer the assistance provided for in Articles 8 and 9 and in this Chapter;

(b) facilitate, by mediation, conciliation or similar means, agreed solutions for the protection of the person or property of the child in situations to which the Convention applies;

(c) provide, on the request of a competent authority of another Contracting State, assistance in discovering the whereabouts of a child where it appears that the child may be present and in need of protection within the territory of the requested State.

Article 32

On a request made with supporting reasons by the Central Authority or other competent authority of any Contracting State with which the child has a substantial connection, the Central Authority of the Contracting State in which the child is habitually resident and present may, directly or through public authorities or other bodies:

(a) provide a report on the situation of the child;

(b) request the competent authority of its State to consider the need to take measures for the protection of the person or property of the child.

Article 33

1. If an authority having jurisdiction under Articles 5 to 10 contemplates the placement of the child in a foster family or institutional care, or the provision of care by kafala or an analogous institution, and if such placement or such provision of care is to take place in another Contracting State, it shall first consult with the Central Authority or other competent authority of the latter State. To that effect it shall transmit a report on the child together with the reasons for the proposed placement or provision of care.

2. The decision on the placement or provision of care may be made in the requesting State only if the Central Authority or other competent authority of the requested State has consented to

the placement or provision of care, taking into account the child's best interests.

Article 34

1. Where a measure of protection is contemplated, the competent authorities under the Convention, if the situation of the child so requires, may request any authority of another Contracting State which has information relevant to the protection of the child to communicate such information.

2. A Contracting State may declare that requests under paragraph 1 shall be communicated to its authorities only through its Central Authority.

Article 35

1. The competent authorities of a Contracting State may request the authorities of another Contracting State to assist in the implementation of measures of protection taken under this Convention, especially in securing the effective exercise of rights of access as well as of the right to maintain direct contacts on a regular basis.

2. The authorities of a Contracting State in which the child does not habitually reside may, on the request of a parent residing in that State who is seeking to obtain or to maintain access to the child, gather information or evidence and may make a finding on the suitability of that parent to exercise access and on the conditions under which access is to be exercised. An authority exercising jurisdiction under Articles 5 to 10 to determine an application concerning access to the child, shall admit and consider such information, evidence and finding before reaching its decision.

3. An authority having jurisdiction under Articles 5 to 10 to decide on access may adjourn a proceeding pending the outcome of a request made under paragraph 2, in particular, when it is considering an application to restrict or terminate access rights granted in the State of the child's former habitual residence.

4. Nothing in this Article shall prevent an authority having jurisdiction under Articles 5 to 10 from taking provisional measures pending the outcome of the request made under paragraph 2.

Article 36

In any case where the child is exposed to a serious danger, the competent authorities of the Contracting State where measures for the protection of the child have been taken or are under consideration, if they are informed that the child's residence has changed to, or that the child is present in another State, shall inform the authorities of that other State about the danger involved and the measures taken or under consideration.

Article 37

An authority shall not request or transmit any information under this Chapter if to do so would, in its opinion, be likely to place the child's person or property in danger, or constitute a serious threat to the liberty or life of a member of the child's family.

Article 38

1. Without prejudice to the possibility of imposing reasonable charges for the provision of services, Central Authorities and other public authorities of Contracting States shall bear their own costs in applying the provisions of this Chapter.

2. Any Contracting State may enter into agreements with one or more other Contracting States concerning the allocation of charges.

Article 39

Any Contracting State may enter into agreements with one or more other Contracting States with a view to improving the application of this Chapter in their mutual relations. The States which have concluded such an agreement shall transmit a copy to the depositary of the Convention.

CHAPTER VI

GENERAL PROVISIONS

Article 40

1. The authorities of the Contracting State of the child's habitual residence, or of the Contracting State where a measure of protection has been taken, may deliver to the person having parental responsibility or to the person entrusted with protection of the child's person or property, at his or her request, a certificate indicating the capacity in which that person is entitled to act and the powers conferred upon him or her.

2. The capacity and powers indicated in the certificate are presumed to be vested in that person, in the absence of proof to the contrary.

3. Each Contracting State shall designate the authorities competent to draw up the certificate.

Article 41

Personal data gathered or transmitted under the Convention shall be used only for the purposes for which they were gathered or transmitted.

Article 42

The authorities to whom information is transmitted shall ensure its confidentiality, in accordance with the law of their State.

Article 43

All documents forwarded or delivered under this Convention shall be exempt from legalisation or any analogous formality.

Article 44

Each Contracting State may designate the authorities to which requests under Articles 8, 9 and 33 are to be addressed.

Article 45

1. The designations referred to in Articles 29 and 44 shall be communicated to the Permanent Bureau of the Hague Conference on Private International Law.

2. The declaration referred to in Article 34(2) shall be made to the depositary of the Convention.

Article 46

A Contracting State in which different systems of law or sets of rules of law apply to the protection of the child and his or her property shall not be bound to apply the rules of the Convention to conflicts solely between such different systems or sets of rules of law.

Article 47

In relation to a State in which two or more systems of law or sets of rules of law with regard to any matter dealt with in this Convention apply in different territorial units:

1. any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit;

2. any reference to the presence of the child in that State shall be construed as referring to presence in a territorial unit;

3. any reference to the location of property of the child in that State shall be construed as referring to location of property of the child in a territorial unit;

4. any reference to the State of which the child is a national shall be construed as referring to the territorial unit designated by the law of that State or, in the absence of relevant rules, to the territorial unit with which the child has the closest connection;

5. any reference to the State whose authorities are seised of an application for divorce or legal separation of the child's parents, or for annulment of their marriage, shall be construed as referring to the territorial unit whose authorities are seised of such application;

6. any reference to the State with which the child has a substantial connection shall be construed

as referring to the territorial unit with which the child has such connection;

7. any reference to the State to which the child has been removed or in which he or she has been retained shall be construed as referring to the relevant territorial unit to which the child has been removed or in which he or she has been retained;

8. any reference to bodies or authorities of that State, other than Central Authorities, shall be construed as referring to those authorised to act in the relevant territorial unit;

9. any reference to the law or procedure or authority of the State in which a measure has been taken shall be construed as referring to the law or procedure or authority of the territorial unit in which such measure was taken;

10. any reference to the law or procedure or authority of the requested State shall be construed as referring to the law or procedure or authority of the territorial unit in which recognition or enforcement is sought.

Article 48

For the purpose of identifying the applicable law under Chapter III, in relation to a State which comprises two or more territorial units each of which has its own system of law or set of rules of law in respect of matters covered by this Convention, the following rules apply:

(a) if there are rules in force in such a State identifying which territorial unit's law is applicable, the law of that unit applies;

(b) in the absence of such rules, the law of the relevant territorial unit as defined in Article 47 applies.

Article 49

For the purpose of identifying the applicable law under Chapter III, in relation to a State which has two or more systems of law or sets of rules of law applicable to different categories of persons in respect of matters covered by this Convention, the following rules apply:

(a) if there are rules in force in such a State identifying which among such laws applies, that law applies;

(b) in the absence of such rules, the law of the system or the set of rules of law with which the child has the closest connection applies.

Article 50

This Convention shall not affect the application of the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, as between Parties to both Conventions. Nothing, however, precludes provisions of this Convention from being invoked for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organising access rights.

Article 51

In relations between the Contracting States this Convention replaces the Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors, and the Convention governing the guardianship of minors, signed at The Hague 12 June 1902, without prejudice to the recognition of measures taken under the Convention of 5 October 1961 mentioned above.

Article 52

1. This Convention does not affect any international instrument to which Contracting States are Parties and which contains provisions on matters governed by the Convention, unless a contrary declaration is made by the States Parties to such instrument.

2. This Convention does not affect the possibility for one or more Contracting States to conclude agreements which contain, in respect of children habitually resident in any of the States Parties to such agreements, provisions on matters governed by this Convention.

3. Agreements to be concluded by one or more Contracting States on matters within the scope of this Convention do not affect, in the relationship of such States with other Contracting States, the application of the provisions of this Convention.

4. The preceding paragraphs also apply to uniform laws based on special ties of a regional or other nature between the States concerned.

Article 53

1. The Convention shall apply to measures only if they are taken in a State after the Convention has entered into force for that State.

2. The Convention shall apply to the recognition and enforcement of measures taken after its entry into force as between the State where the measures have been taken and the requested State.

Article 54

1. Any communication sent to the Central Authority or to another authority of a Contracting State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the other State or, where that is not feasible, a translation into French or English.

2. However, a Contracting State may, by making a reservation in accordance with Article 60, object to the use of either French or English, but not both.

Article 55

1. A Contracting State may, in accordance with Article 60:

(a) reserve the jurisdiction of its authorities to take measures directed to the protection of property of a child situated on its territory;

(b) reserve the right not to recognise any parental responsibility or measure in so far as it is incompatible with any measure taken by its authorities in relation to that property.

2. The reservation may be restricted to certain categories of property.

Article 56

The Secretary General of the Hague Conference on Private International Law shall at regular intervals convoke a Special Commission in order to review the practical operation of the Convention.

CHAPTER VII

FINAL CLAUSES

Article 57

1. The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Eighteenth Session.

2. It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.

Article 58

1. Any other State may accede to the Convention after it has entered into force in accordance with Article 61(1).

2. The instrument of accession shall be deposited with the depositary.

3. Such accession shall have effect only as regards the relations between the acceding State and those Contracting States which have not raised an objection to its accession in the six months after the receipt of the notification referred to in Article 63(b). Such an objection may also be raised by States at the time when they ratify, accept or approve the Convention after an accession. Any such objection shall be notified to the depositary.

Article 59

1. If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that the Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

2. Any such declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.

3. If a State makes no declaration under this Article, the Convention is to extend to all territorial units of that State.

Article 60

1. Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 59, make one or both of the reservations provided for in Articles 54(2) and 55. No other reservation shall be permitted.

2. Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the depositary.

3. The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

Article 61

1. The Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the third instrument of ratification, acceptance or approval referred to in Article 57.

2. Thereafter the Convention shall enter into force:

(a) for each State ratifying, accepting or approving it subsequently, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance, approval or accession;

(b) for each State acceding, on the first day of the month following the expiration of three months after the expiration of the period of six months provided in Article 58(3);

(c) for a territorial unit to which the Convention has been extended in conformity with Article 59, on the first day of the month following the expiration of three months after the notification referred to in that Article.

Article 62

1. A State Party to the Convention may denounce it by a notification in writing addressed to the depositary. The denunciation may be limited to certain territorial units to which the Convention applies.

2. The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period.

Article 63

The depositary shall notify the States Members of the Hague Conference on Private International Law and the States which have acceded in accordance with Article 58 of the following:

(a) the signatures, ratifications, acceptances and approvals referred to in Article 57;

(b) the accessions and objections raised to accessions referred to in Article 58;

(c) the date on which the Convention enters into force in accordance with Article 61;

(d) the declarations referred to in Articles 34(2) and 59;

(e) the agreements referred to in Article 39;

(f) the reservations referred to in Articles 54(2) and 55 and the withdrawals referred to in Article 60(2);

(g) the denunciations referred to in Article 62.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on the nineteenth day of October 1996, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Eighteenth Session.

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CONVENTION ON JURISDICTION, APPLICABLE LAW, RECOGNITION, ENFORCEMENT AND CO-OPERATION IN RESPECT OF PARENTAL RESPONSIBILITY AND MEASURES FOR THE PROTECTION OF CHILDREN

(Concluded 19 October 1996)
(Entered into force 1 January 2002)

The States signatory to the present Convention,
Considering the need to improve the protection of children in international situations,
Wishing to avoid conflicts between their legal systems in respect of jurisdiction, applicable law, recognition and enforcement of measures for the protection of children,
Recalling the importance of international co-operation for the protection of children,
Confirming that the best interests of the child are to be a primary consideration,
Noting that the Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors is in need of revision,
Desiring to establish common provisions to this effect, taking into account the United Nations Convention on the Rights of the Child of 20 November 1989,
Have agreed on the following provisions –

CHAPTER I – SCOPE OF THE CONVENTION

Article 1

1 The objects of the present Convention are –
a to determine the State whose authorities have jurisdiction to take measures directed to the protection of the person or property of the child;
b to determine which law is to be applied by such authorities in exercising their jurisdiction;
c to determine the law applicable to parental responsibility;
d to provide for the recognition and enforcement of such measures of protection in all Contracting States;
e to establish such co-operation between the authorities of the Contracting States as may be necessary in order to achieve the purposes of this Convention.
2 For the purposes of this Convention, the term ‘parental responsibility’ includes parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child.

Article 2

The Convention applies to children from the moment of their birth until they reach the age of 18 years.

Article 3

The measures referred to in Article 1 may deal in particular with –
a the attribution, exercise, termination or restriction of parental responsibility, as well as its delegation;
b rights of custody, including rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence, as well as rights of access including the right to take a child for a limited period of time to a place other than the child's habitual residence;
c guardianship, curatorship and analogous institutions;
d the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child;

e the placement of the child in a foster family or in institutional care, or the provision of care by *kafala* or an analogous institution;
f the supervision by a public authority of the care of a child by any person having charge of the child;
g the administration, conservation or disposal of the child's property.

Article 4
The Convention does not apply to –
a the establishment or contesting of a parent-child relationship;
b decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption;
c the name and forenames of the child;
d emancipation;
e maintenance obligations;
f trusts or succession;
g social security;
h public measures of a general nature in matters of education or health;
i measures taken as a result of penal offences committed by children;
j decisions on the right of asylum and on immigration.

CHAPTER II – JURISDICTION
Article 5
1 The judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property.
2 Subject to Article 7, in case of a change of the child's habitual residence to another Contracting State, the authorities of the State of the new habitual residence have jurisdiction.

Article 6
1 For refugee children and children who, due to disturbances occurring in their country, are internationally displaced, the authorities of the Contracting State on the territory of which these children are present as a result of their displacement have the jurisdiction provided for in paragraph 1 of Article 5.
2 The provisions of the preceding paragraph also apply to children whose habitual residence cannot be established.

Article 7
1 In case of wrongful removal or retention of the child, the authorities of the Contracting State in which the child was habitually resident immediately before the removal or retention keep their jurisdiction until the child has acquired a habitual residence in another State, and
a each person, institution or other body having rights of custody has acquiesced in the removal or retention; or
b the child has resided in that other State for a period of at least one year after the person, institution or other body having rights of custody has or should have had knowledge of the whereabouts of the child, no request for return lodged within that period is still pending, and the child is settled in his or her new environment.
2 The removal or the retention of a child is to be considered wrongful where _
a it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
b at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.
The rights of custody mentioned in sub-paragraph *a* above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

3 So long as the authorities first mentioned in paragraph 1 keep their jurisdiction, the authorities of the Contracting State to which the child has been removed or in which he or she has been retained can take only such urgent measures under Article 11 as are necessary for the protection of the person or property of the child.

Article 8

1 By way of exception, the authority of a Contracting State having jurisdiction under Article 5 or 6, if it considers that the authority of another Contracting State would be better placed in the particular case to assess the best interests of the child, may either

– request that other authority, directly or with the assistance of the Central Authority of its State, to assume jurisdiction to take such measures of protection as it considers to be necessary, or

– suspend consideration of the case and invite the parties to introduce such a request before the authority of that other State.

2 The Contracting States whose authorities may be addressed as provided in the preceding paragraph are

a a State of which the child is a national,

b a State in which property of the child is located,

c a State whose authorities are seised of an application for divorce or legal separation of the child's parents, or for annulment of their marriage,

d a State with which the child has a substantial connection.

3 The authorities concerned may proceed to an exchange of views.

4 The authority addressed as provided in paragraph 1 may assume jurisdiction, in place of the authority having jurisdiction under Article 5 or 6, if it considers that this is in the child's best interests.

Article 9

1 If the authorities of a Contracting State referred to in Article 8, paragraph 2, consider that they are better placed in the particular case to assess the child's best interests, they may either

– request the competent authority of the Contracting State of the habitual residence of the child, directly or with the assistance of the Central Authority of that State, that they be authorised to exercise jurisdiction to take the measures of protection which they consider to be necessary, or

– invite the parties to introduce such a request before the authority of the Contracting State of the habitual residence of the child.

2 The authorities concerned may proceed to an exchange of views.

3 The authority initiating the request may exercise jurisdiction in place of the authority of the Contracting State of the habitual residence of the child only if the latter authority has accepted the request.

Article 10

1 Without prejudice to Articles 5 to 9, the authorities of a Contracting State exercising jurisdiction to decide upon an application for divorce or legal separation of the parents of a child habitually resident in another Contracting State, or for annulment of their marriage, may, if the law of their State so provides, take measures directed to the protection of the person or property of such child if

a at the time of commencement of the proceedings, one of his or her parents habitually resides in that State and one of them has parental responsibility in relation to the child, and

b the jurisdiction of these authorities to take such measures has been accepted by the parents, as well as by any other person who has parental responsibility in relation to the child, and is in the best interests of the child.

2 The jurisdiction provided for by paragraph 1 to take measures for the protection of the child ceases as soon as the decision allowing or refusing the application for divorce, legal separation or annulment of the marriage has become final, or the proceedings have come to an end for another reason.

Article 11

1 In all cases of urgency, the authorities of any Contracting State in whose territory the child or property

belonging to the child is present have jurisdiction to take any necessary measures of protection.
2 The measures taken under the preceding paragraph with regard to a child habitually resident in a Contracting State shall lapse as soon as the authorities which have jurisdiction under Articles 5 to 10 have taken the measures required by the situation.
3 The measures taken under paragraph 1 with regard to a child who is habitually resident in a non-Contracting State shall lapse in each Contracting State as soon as measures required by the situation and taken by the authorities of another State are recognised in the Contracting State in question.

Article 12
1 Subject to Article 7, the authorities of a Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take measures of a provisional character for the protection of the person or property of the child which have a territorial effect limited to the State in question, in so far as such measures are not incompatible with measures already taken by authorities which have jurisdiction under Articles 5 to 10.
2 The measures taken under the preceding paragraph with regard to a child habitually resident in a Contracting State shall lapse as soon as the authorities which have jurisdiction under Articles 5 to 10 have taken a decision in respect of the measures of protection which may be required by the situation.
3 The measures taken under paragraph 1 with regard to a child who is habitually resident in a non-Contracting State shall lapse in the Contracting State where the measures were taken as soon as measures required by the situation and taken by the authorities of another State are recognised in the Contracting State in question.

Article 13
1 The authorities of a Contracting State which have jurisdiction under Articles 5 to 10 to take measures for the protection of the person or property of the child must abstain from exercising this jurisdiction if, at the time of the commencement of the proceedings, corresponding measures have been requested from the authorities of another Contracting State having jurisdiction under Articles 5 to 10 at the time of the request and are still under consideration.
2 The provisions of the preceding paragraph shall not apply if the authorities before whom the request for measures was initially introduced have declined jurisdiction.

Article 14
The measures taken in application of Articles 5 to 10 remain in force according to their terms, even if a change of circumstances has eliminated the basis upon which jurisdiction was founded, so long as the authorities which have jurisdiction under the Convention have not modified, replaced or terminated such measures.

CHAPTER III – APPLICABLE LAW
Article 15
1 In exercising their jurisdiction under the provisions of Chapter II, the authorities of the Contracting States shall apply their own law.
2 However, in so far as the protection of the person or the property of the child requires, they may exceptionally apply or take into consideration the law of another State with which the situation has a substantial connection.
3 If the child's habitual residence changes to another Contracting State, the law of that other State governs, from the time of the change, the conditions of application of the measures taken in the State of the former habitual residence.

Article 16
1 The attribution or extinction of parental responsibility by operation of law, without the intervention of a judicial or administrative authority, is governed by the law of the State of the habitual residence of the child.
2 The attribution or extinction of parental responsibility by an agreement or a unilateral act, without intervention of a judicial or administrative authority, is governed by the law of the State of the child's habitual residence at the

time when the agreement or unilateral act takes effect.
3 Parental responsibility which exists under the law of the State of the child's habitual residence subsists after a change of that habitual residence to another State.
4 If the child's habitual residence changes, the attribution of parental responsibility by operation of law to a person who does not already have such responsibility is governed by the law of the State of the new habitual residence.

Article 17
The exercise of parental responsibility is governed by the law of the State of the child's habitual residence. If the child's habitual residence changes, it is governed by the law of the State of the new habitual residence.

Article 18
The parental responsibility referred to in Article 16 may be terminated, or the conditions of its exercise modified, by measures taken under this Convention.

Article 19
1 The validity of a transaction entered into between a third party and another person who would be entitled to act as the child's legal representative under the law of the State where the transaction was concluded cannot be contested, and the third party cannot be held liable, on the sole ground that the other person was not entitled to act as the child's legal representative under the law designated by the provisions of this Chapter, unless the third party knew or should have known that the parental responsibility was governed by the latter law.
2 The preceding paragraph applies only if the transaction was entered into between persons present on the territory of the same State.

Article 20
The provisions of this Chapter apply even if the law designated by them is the law of a non-Contracting State.

Article 21
1 In this Chapter the term "law" means the law in force in a State other than its choice of law rules.
2 However, if the law applicable according to Article 16 is that of a non-Contracting State and if the choice of law rules of that State designate the law of another non-Contracting State which would apply its own law, the law of the latter State applies. If that other non-Contracting State would not apply its own law, the applicable law is that designated by Article 16.

Article 22
The application of the law designated by the provisions of this Chapter can be refused only if this application would be manifestly contrary to public policy, taking into account the best interests of the child.

CHAPTER IV – RECOGNITION AND ENFORCEMENT
Article 23
1 The measures taken by the authorities of a Contracting State shall be recognised by operation of law in all other Contracting States.
2 Recognition may however be refused –
a if the measure was taken by an authority whose jurisdiction was not based on one of the grounds provided for in Chapter II;
b if the measure was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, without the child having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the requested State;
c on the request of any person claiming that the measure infringes his or her parental responsibility, if such measure was taken, except in a case of urgency, without such person having been given an opportunity to be

heard;
d if such recognition is manifestly contrary to public policy of the requested State, taking into account the best interests of the child;
e if the measure is incompatible with a later measure taken in the non-Contracting State of the habitual residence of the child, where this later measure fulfils the requirements for recognition in the requested State;
f if the procedure provided in Article 33 has not been complied with.

Article 24
Without prejudice to Article 23, paragraph 1, any interested person may request from the competent authorities of a Contracting State that they decide on the recognition or non-recognition of a measure taken in another Contracting State. The procedure is governed by the law of the requested State.

Article 25
The authority of the requested State is bound by the findings of fact on which the authority of the State where the measure was taken based its jurisdiction.

Article 26
1 If measures taken in one Contracting State and enforceable there require enforcement in another Contracting State, they shall, upon request by an interested party, be declared enforceable or registered for the purpose of enforcement in that other State according to the procedure provided in the law of the latter State.
2 Each Contracting State shall apply to the declaration of enforceability or registration a simple and rapid procedure.
3 The declaration of enforceability or registration may be refused only for one of the reasons set out in Article 23, paragraph 2.

Article 27
Without prejudice to such review as is necessary in the application of the preceding Articles, there shall be no review of the merits of the measure taken.

Article 28
Measures taken in one Contracting State and declared enforceable, or registered for the purpose of enforcement, in another Contracting State shall be enforced in the latter State as if they had been taken by the authorities of that State. Enforcement takes place in accordance with the law of the requested State to the extent provided by such law, taking into consideration the best interests of the child.

CHAPTER V – CO-OPERATION
Article 29
1 A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention on such authorities.
2 Federal States, States with more than one system of law or States having autonomous territorial units shall be free to appoint more than one Central Authority and to specify the territorial or personal extent of their functions. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which any communication may be addressed for transmission to the appropriate Central Authority within that State.

Article 30
1 Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their States to achieve the purposes of the Convention.
2 They shall, in connection with the application of the Convention, take appropriate steps to provide information as to the laws of, and services available in, their States relating to the protection of children.

Article 31
The Central Authority of a Contracting State, either directly or through public authorities or other bodies, shall take all appropriate steps to –
a facilitate the communications and offer the assistance provided for in Articles 8 and 9 and in this Chapter;
b facilitate, by mediation, conciliation or similar means, agreed solutions for the protection of the person or property of the child in situations to which the Convention applies;
c provide, on the request of a competent authority of another Contracting State, assistance in discovering the whereabouts of a child where it appears that the child may be present and in need of protection within the territory of the requested State.

Article 32
On a request made with supporting reasons by the Central Authority or other competent authority of any Contracting State with which the child has a substantial connection, the Central Authority of the Contracting State in which the child is habitually resident and present may, directly or through public authorities or other bodies,
a provide a report on the situation of the child;
b request the competent authority of its State to consider the need to take measures for the protection of the person or property of the child.

Article 33
1 If an authority having jurisdiction under Articles 5 to 10 contemplates the placement of the child in a foster family or institutional care, or the provision of care by *kafala* or an analogous institution, and if such placement or such provision of care is to take place in another Contracting State, it shall first consult with the Central Authority or other competent authority of the latter State. To that effect it shall transmit a report on the child together with the reasons for the proposed placement or provision of care.
2 The decision on the placement or provision of care may be made in the requesting State only if the Central Authority or other competent authority of the requested State has consented to the placement or provision of care, taking into account the child's best interests.

Article 34
1 Where a measure of protection is contemplated, the competent authorities under the Convention, if the situation of the child so requires, may request any authority of another Contracting State which has information relevant to the protection of the child to communicate such information.
2 A Contracting State may declare that requests under paragraph 1 shall be communicated to its authorities only through its Central Authority.

Article 35
1 The competent authorities of a Contracting State may request the authorities of another Contracting State to assist in the implementation of measures of protection taken under this Convention, especially in securing the effective exercise of rights of access as well as of the right to maintain direct contacts on a regular basis.
2 The authorities of a Contracting State in which the child does not habitually reside may, on the request of a parent residing in that State who is seeking to obtain or to maintain access to the child, gather information or evidence and may make a finding on the suitability of that parent to exercise access and on the conditions under which access is to be exercised. An authority exercising jurisdiction under Articles 5 to 10 to determine an application concerning access to the child, shall admit and consider such information, evidence and finding before reaching its decision.
3 An authority having jurisdiction under Articles 5 to 10 to decide on access may adjourn a proceeding pending the outcome of a request made under paragraph 2, in particular, when it is considering an application to restrict or terminate access rights granted in the State of the child's former habitual residence.

4 Nothing in this Article shall prevent an authority having jurisdiction under Articles 5 to 10 from taking provisional measures pending the outcome of the request made under paragraph 2.

Article 36
In any case where the child is exposed to a serious danger, the competent authorities of the Contracting State where measures for the protection of the child have been taken or are under consideration, if they are informed that the child's residence has changed to, or that the child is present in another State, shall inform the authorities of that other State about the danger involved and the measures taken or under consideration.

Article 37
An authority shall not request or transmit any information under this Chapter if to do so would, in its opinion, be likely to place the child's person or property in danger, or constitute a serious threat to the liberty or life of a member of the child's family.

Article 38
1 Without prejudice to the possibility of imposing reasonable charges for the provision of services, Central Authorities and other public authorities of Contracting States shall bear their own costs in applying the provisions of this Chapter.
2 Any Contracting State may enter into agreements with one or more other Contracting States concerning the allocation of charges.

Article 39
Any Contracting State may enter into agreements with one or more other Contracting States with a view to improving the application of this Chapter in their mutual relations. The States which have concluded such an agreement shall transmit a copy to the depositary of the Convention.

CHAPTER VI – GENERAL PROVISIONS
Article 40
1 The authorities of the Contracting State of the child's habitual residence, or of the Contracting State where a measure of protection has been taken, may deliver to the person having parental responsibility or to the person entrusted with protection of the child's person or property, at his or her request, a certificate indicating the capacity in which that person is entitled to act and the powers conferred upon him or her.
2 The capacity and powers indicated in the certificate are presumed to be vested in that person, in the absence of proof to the contrary.
3 Each Contracting State shall designate the authorities competent to draw up the certificate.

Article 41
Personal data gathered or transmitted under the Convention shall be used only for the purposes for which they were gathered or transmitted.

Article 42
The authorities to whom information is transmitted shall ensure its confidentiality, in accordance with the law of their State.

Article 43
All documents forwarded or delivered under this Convention shall be exempt from legalisation or any analogous formality.

Article 44

Each Contracting State may designate the authorities to which requests under Articles 8, 9 and 33 are to be addressed.

Article 45

1 The designations referred to in Articles 29 and 44 shall be communicated to the Permanent Bureau of the Hague Conference on Private International Law.

2 The declaration referred to in Article 34, paragraph 2, shall be made to the depositary of the Convention.

Article 46

A Contracting State in which different systems of law or sets of rules of law apply to the protection of the child and his or her property shall not be bound to apply the rules of the Convention to conflicts solely between such different systems or sets of rules of law.

Article 47

In relation to a State in which two or more systems of law or sets of rules of law with regard to any matter dealt with in this Convention apply in different territorial units –

1 any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit;

2 any reference to the presence of the child in that State shall be construed as referring to presence in a territorial unit;

3 any reference to the location of property of the child in that State shall be construed as referring to location of property of the child in a territorial unit;

4 any reference to the State of which the child is a national shall be construed as referring to the territorial unit designated by the law of that State or, in the absence of relevant rules, to the territorial unit with which the child has the closest connection;

5 any reference to the State whose authorities are seised of an application for divorce or legal separation of the child's parents, or for annulment of their marriage, shall be construed as referring to the territorial unit whose authorities are seised of such application;

6 any reference to the State with which the child has a substantial connection shall be construed as referring to the territorial unit with which the child has such connection;

7 any reference to the State to which the child has been removed or in which he or she has been retained shall be construed as referring to the relevant territorial unit to which the child has been removed or in which he or she has been retained;

8 any reference to bodies or authorities of that State, other than Central Authorities, shall be construed as referring to those authorised to act in the relevant territorial unit;

9 any reference to the law or procedure or authority of the State in which a measure has been taken shall be construed as referring to the law or procedure or authority of the territorial unit in which such measure was taken;

10 any reference to the law or procedure or authority of the requested State shall be construed as referring to the law or procedure or authority of the territorial unit in which recognition or enforcement is sought.

Article 48

For the purpose of identifying the applicable law under Chapter III, in relation to a State which comprises two or more territorial units each of which has its own system of law or set of rules of law in respect of matters covered by this Convention, the following rules apply –

a if there are rules in force in such a State identifying which territorial unit's law is applicable, the law of that unit applies;

b in the absence of such rules, the law of the relevant territorial unit as defined in Article 47 applies.

Article 49

For the purpose of identifying the applicable law under Chapter III, in relation to a State which has two or more systems of law or sets of rules of law applicable to different categories of persons in respect of matters covered by this Convention, the following rules apply –
a if there are rules in force in such a State identifying which among such laws applies, that law applies;
b in the absence of such rules, the law of the system or the set of rules of law with which the child has the closest connection applies.

Article 50
This Convention shall not affect the application of the *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, as between Parties to both Conventions. Nothing, however, precludes provisions of this Convention from being invoked for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organising access rights.

Article 51
In relations between the Contracting States this Convention replaces the *Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors*, and the *Convention governing the guardianship of minors*, signed at The Hague 12 June 1902, without prejudice to the recognition of measures taken under the Convention of 5 October 1961 mentioned above.

Article 52
1 This Convention does not affect any international instrument to which Contracting States are Parties and which contains provisions on matters governed by the Convention, unless a contrary declaration is made by the States Parties to such instrument.
2 This Convention does not affect the possibility for one or more Contracting States to conclude agreements which contain, in respect of children habitually resident in any of the States Parties to such agreements, provisions on matters governed by this Convention.
3 Agreements to be concluded by one or more Contracting States on matters within the scope of this Convention do not affect, in the relationship of such States with other Contracting States, the application of the provisions of this Convention.
4 The preceding paragraphs also apply to uniform laws based on special ties of a regional or other nature between the States concerned.

Article 53
1 The Convention shall apply to measures only if they are taken in a State after the Convention has entered into force for that State.
2 The Convention shall apply to the recognition and enforcement of measures taken after its entry into force as between the State where the measures have been taken and the requested State.

Article 54
1 Any communication sent to the Central Authority or to another authority of a Contracting State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the other State or, where that is not feasible, a translation into French or English.
2 However, a Contracting State may, by making a reservation in accordance with Article 60, object to the use of either French or English, but not both.

Article 55
1 A Contracting State may, in accordance with Article 60,
a reserve the jurisdiction of its authorities to take measures directed to the protection of property of a child situated on its territory;

b reserve the right not to recognise any parental responsibility or measure in so far as it is incompatible with any measure taken by its authorities in relation to that property.
2 The reservation may be restricted to certain categories of property.

Article 56
The Secretary General of the Hague Conference on Private International Law shall at regular intervals convoke a Special Commission in order to review the practical operation of the Convention.

CHAPTER VII – FINAL CLAUSES
Article 57
1 The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Eighteenth Session.
2 It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.

Article 58
1 Any other State may accede to the Convention after it has entered into force in accordance with Article 61, paragraph 1.
2 The instrument of accession shall be deposited with the depositary.
3 Such accession shall have effect only as regards the relations between the acceding State and those Contracting States which have not raised an objection to its accession in the six months after the receipt of the notification referred to in sub-paragraph *b* of Article 63. Such an objection may also be raised by States at the time when they ratify, accept or approve the Convention after an accession. Any such objection shall be notified to the depositary.

Article 59
1 If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that the Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.
2 Any such declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.
3 If a State makes no declaration under this Article, the Convention is to extend to all territorial units of that State.

Article 60
1 Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 59, make one or both of the reservations provided for in Articles 54, paragraph 2, and 55. No other reservation shall be permitted.
2 Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the depositary.
3 The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

Article 61
1 The Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the third instrument of ratification, acceptance or approval referred to in Article 57.
2 Thereafter the Convention shall enter into force –
a for each State ratifying, accepting or approving it subsequently, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance, approval or accession;
b for each State acceding, on the first day of the month following the expiration of three months after the

expiration of the period of six months provided in Article 58, paragraph 3;
c for a territorial unit to which the Convention has been extended in conformity with Article 59, on the first day of the month following the expiration of three months after the notification referred to in that Article.

Article 62
1 A State Party to the Convention may denounce it by a notification in writing addressed to the depositary. The denunciation may be limited to certain territorial units to which the Convention applies.
2 The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period.

Article 63
The depositary shall notify the States Members of the Hague Conference on Private International Law and the States which have acceded in accordance with Article 58 of the following –
a the signatures, ratifications, acceptances and approvals referred to in Article 57;
b the accessions and objections raised to accessions referred to in Article 58;
c the date on which the Convention enters into force in accordance with Article 61;
d the declarations referred to in Articles 34, paragraph 2, and 59;
e the agreements referred to in Article 39;
f the reservations referred to in Articles 54, paragraph 2, and 55 and the withdrawals referred to in Article 60, paragraph 2;
g the denunciations referred to in Article 62.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.
Done at The Hague, on the 19th day of October 1996, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Eighteenth Session.

HccH
HAGUE CONFERENCE ON
PRIVATE INTERNATIONAL LAW
CONFÉRENCE DE LA HAYE
DE DROIT INTERNATIONAL PRIVÉ

The Hague Convention of 1996 on the International Protection of Children[1]

The Hague Children's Conventions

The Hague Conference has, for more than a century, concerned itself with the protection under civil law of children at risk in cross-frontier situations. During the last part of the 20th Century, the opening up of national borders, ease of travel and the breaking down of cultural barriers have, with all their advantages, increased those risks considerably. The cross-border trafficking and exploitation of children and their international displacement from war civil disturbance or natural disaster have become major problems. There are also the children caught in the turmoil of broken relationships within transnational families, with disputes over custody and relocation, with the hazards of international parental abduction, the problems of maintaining contact between the child and both parents, and the uphill struggle of securing cross-frontier child support. There has also been an upsurge in the cross-border placement of children through intercountry adoption or shorter term arrangements, with the risks inherent in a situation where some countries find it difficult to ensure family care for all of their children while in others the demand for children from childless couples grows.

Three Hague Children's Conventions have been developed over the last twenty-five years, a fundamental purpose being to provide the practical machinery to enable States which share a common interest in protecting children to co-operate together to do so. The first of these modern Hague Children's Conventions is the *1980 Convention on the Civil Aspects of International Child Abduction* under which 75 States now co-operate together to protect children from the harmful effects of their wrongful removal or retention abroad. The *1993 Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, designed to regulate intercountry adoption to protect the interests of the children concerned, is now in force in more than 65 receiving countries and countries of origin.

The 1996 Convention

The third of the modern Hague Conventions, the *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children*, is much broader in scope than the first two, covering as it does a very wide range of civil measures of protection concerning children, from orders concerning parental responsibility and contact to public measures of protection or care, and from matters of representation to the protection of children's property.

The Convention has uniform rules determining which country's authorities are competent to take the necessary measures of protection. These rules, which avoid the possibility of conflicting decisions, give the primary responsibility to the authorities of the country where the child has his or her habitual residence, but also allow any country where the child is present to take necessary emergency or provisional measures of protection. The Convention determines which country's laws are to be applied, and it provides for the recognition and enforcement of measures taken in one Contracting State in all other Contracting States. In addition, the co-operation provisions of the Convention provide the basic framework for the exchange of

[1] As of 15 November 2006, the Convention is in force for the following States: Australia, the Czech Republic, Ecuador, Estonia, Hungary, Latvia, Lithuania, Monaco, Morocco, Slovakia and Slovenia. It has been signed by all other EU States (except Malta), Switzerland and Romania; Bulgaria acceded to the Convention on 8 March 2006 (entry into force: 1 February 2007).

information and for the necessary degree of collaboration between administrative (child protection) authorities in the different Contracting States. The following are some of the areas in which the Convention is particularly helpful –

Parental disputes over custody and contact

The Convention provides a structure for the resolution of issues of custody and contact which may arise when parents are separated and living in different countries. The Convention avoids the problems that may arise if the courts in more than one country are competent to decide these matters. The recognition and enforcement provisions avoid the need for re-litigating custody and contact issues and ensure that decisions taken by the authorities of the country where the child has his or her habitual residence enjoy primacy. The co-operation provisions provide for any necessary exchange of information and offer a structure through which, by mediation or other means, agreed solutions may be found.

Reinforcement of the 1980 Child Abduction Convention

The 1996 Convention reinforces the 1980 Convention by underlining the primary role played by the authorities of the child's habitual residence in deciding upon any measures which may be needed to protect the child in the long term. It also adds to the efficacy of any temporary protective measures ordered by a judge when returning a child to the country from which the child was taken, by making such orders enforceable in that country until such time as the authorities there are able themselves to put in place necessary protections.

Unaccompanied minors

The co-operation procedures within the Convention can be helpful in the increasing number of circumstances in which unaccompanied minors cross borders and find themselves in vulnerable situations in which they may be subject to exploitation and other risks. Whether the unaccompanied minor is a refugee, an asylum seeker, a displaced person or simply a teenage runaway, the Convention assists by providing for co-operation in locating the child, by determining which country's authorities are competent to take any necessary measures of protection, and by providing for co-operation between national authorities in the receiving country and country of origin in exchanging necessary information and in the institution of any necessary protective measures.

Cross-frontier placements of children

The Convention provides for co-operation between States in relation to the growing number of cases in which children are being placed in alternative care across frontiers, for example under fostering or other long-term arrangements falling short of adoption. This includes arrangements made by way of the Islamic law institution of Kafala, which is a functional equivalent of adoption but falls outside the scope of the 1993 Intercountry Adoption Convention.

Other features of the Convention

An integrated system

The Convention is based on a view that child protection provisions should constitute an integrated whole. This is why the Convention's scope is broad, covering both public and private measures of protection or care. The Convention overcomes the uncertainty that otherwise arises if separate rules apply to different categories of protective measure when both may be involved in the same case.

An inclusive system

The Convention takes account of the wide variety of legal institutions and systems of protection that exist around the world. It does not attempt to create a uniform international

law of child protection; the basic elements of such a law are already to be found in the 1989 UN Convention on the Rights of the Child. The function of the 1996 Hague Convention is to avoid legal and administrative conflicts and to build the structure for effective international co-operation in child protection matters between the different systems. In this respect, the Convention provides a remarkable opportunity for the building of bridges between legal systems having diverse cultural or religious backgrounds. It is of great significance that one of the first States to ratify the Convention was Morocco, whose legal system is set in the Islamic tradition.

Monitoring and review

The Hague Conference has developed a unique system of "post-Convention services" in respect of its Children's Conventions. The aim is to promote widespread ratification, to assist Contracting States to implement the Conventions effectively and to promote consistency and the adoption of good practices in the daily operation of the Conventions. Contracting States are both beneficiaries and partners in this continuing enterprise.

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Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings

Council regulation (EC) No 1346/2000

of 29 May 2000

on insolvency proceedings

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 61(c) and 67(1) thereof,

Having regard to the initiative of the Federal Republic of Germany and the Republic of Finland,

Having regard to the opinion of the European Parliament(1),

Having regard to the opinion of the Economic and Social Committee(2),

Whereas:

(1) The European Union has set out the aim of establishing an area of freedom, security and justice.

(2) The proper functioning of the internal market requires that cross-border insolvency proceedings should operate efficiently and effectively and this Regulation needs to be adopted in order to achieve this objective which comes within the scope of judicial cooperation in civil matters within the meaning of Article 65 of the Treaty.

(3) The activities of undertakings have more and more cross-border effects and are therefore increasingly being regulated by Community law. While the insolvency of such undertakings also affects the proper functioning of the internal market, there is a need for a Community act requiring coordination of the measures to be taken regarding an insolvent debtor's assets.

(4) It is necessary for the proper functioning of the internal market to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position (forum shopping).

(5) These objectives cannot be achieved to a sufficient degree at national level and action at Community level is therefore justified.

(6) In accordance with the principle of proportionality this Regulation should be confined to provisions governing jurisdiction for opening insolvency proceedings and judgments which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings. In addition, this Regulation should contain provisions regarding the recognition of those judgments and the applicable law which also satisfy that principle.

(7) Insolvency proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings are excluded from the scope of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters(3), as amended by the Conventions on Accession to this Convention(4).

(8) In order to achieve the aim of improving the efficiency and effectiveness of insolvency proceedings having cross-border effects, it is necessary, and appropriate, that the provisions on jurisdiction, recognition and applicable law in this area should be contained in a Community law measure which is binding and directly applicable in Member States.

(9) This Regulation should apply to insolvency proceedings, whether the debtor is a natural person or a legal person, a trader or an individual. The insolvency proceedings to which this Regulation

applies are listed in the Annexes. Insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings holding funds or securities for third parties and collective investment undertakings should be excluded from the scope of this Regulation. Such undertakings should not be covered by this Regulation since they are subject to special arrangements and, to some extent, the national supervisory authorities have extremely wide-ranging powers of intervention.

(10) Insolvency proceedings do not necessarily involve the intervention of a judicial authority; the expression "court" in this Regulation should be given a broad meaning and include a person or body empowered by national law to open insolvency proceedings. In order for this Regulation to apply, proceedings (comprising acts and formalities set down in law) should not only have to comply with the provisions of this Regulation, but they should also be officially recognised and legally effective in the Member State in which the insolvency proceedings are opened and should be collective insolvency proceedings which entail the partial or total divestment of the debtor and the appointment of a liquidator.

(11) This Regulation acknowledges the fact that as a result of widely differing substantive laws it is not practical to introduce insolvency proceedings with universal scope in the entire Community. The application without exception of the law of the State of opening of proceedings would, against this background, frequently lead to difficulties. This applies, for example, to the widely differing laws on security interests to be found in the Community. Furthermore, the preferential rights enjoyed by some creditors in the insolvency proceedings are, in some cases, completely different. This Regulation should take account of this in two different ways. On the one hand, provision should be made for special rules on applicable law in the case of particularly significant rights and legal relationships (e.g. rights in rem and contracts of employment). On the other hand, national proceedings covering only assets situated in the State of opening should also be allowed alongside main insolvency proceedings with universal scope.

(12) This Regulation enables the main insolvency proceedings to be opened in the Member State where the debtor has the centre of his main interests. These proceedings have universal scope and aim at encompassing all the debtor's assets. To protect the diversity of interests, this Regulation permits secondary proceedings to be opened to run in parallel with the main proceedings. Secondary proceedings may be opened in the Member State where the debtor has an establishment. The effects of secondary proceedings are limited to the assets located in that State. Mandatory rules of coordination with the main proceedings satisfy the need for unity in the Community.

(13) The "centre of main interests" should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.

(14) This Regulation applies only to proceedings where the centre of the debtor's main interests is located in the Community.

(15) The rules of jurisdiction set out in this Regulation establish only international jurisdiction, that is to say, they designate the Member State the courts of which may open insolvency proceedings. Territorial jurisdiction within that Member State must be established by the national law of the Member State concerned.

(16) The court having jurisdiction to open the main insolvency proceedings should be enabled to order provisional and protective measures from the time of the request to open proceedings. Preservation measures both prior to and after the commencement of the insolvency proceedings are very important to guarantee the effectiveness of the insolvency proceedings. In that connection this Regulation should afford different possibilities. On the one hand, the court competent for the main insolvency proceedings should be able also to order provisional protective measures covering assets situated in the territory of other Member States. On the other hand, a liquidator temporarily appointed

prior to the opening of the main insolvency proceedings should be able, in the Member States in which an establishment belonging to the debtor is to be found, to apply for the preservation measures which are possible under the law of those States.

(17) Prior to the opening of the main insolvency proceedings, the right to request the opening of insolvency proceedings in the Member State where the debtor has an establishment should be limited to local creditors and creditors of the local establishment or to cases where main proceedings cannot be opened under the law of the Member State where the debtor has the centre of his main interest. The reason for this restriction is that cases where territorial insolvency proceedings are requested before the main insolvency proceedings are intended to be limited to what is absolutely necessary. If the main insolvency proceedings are opened, the territorial proceedings become secondary.

(18) Following the opening of the main insolvency proceedings, the right to request the opening of insolvency proceedings in a Member State where the debtor has an establishment is not restricted by this Regulation. The liquidator in the main proceedings or any other person empowered under the national law of that Member State may request the opening of secondary insolvency proceedings.

(19) Secondary insolvency proceedings may serve different purposes, besides the protection of local interests. Cases may arise where the estate of the debtor is too complex to administer as a unit or where differences in the legal systems concerned are so great that difficulties may arise from the extension of effects deriving from the law of the State of the opening to the other States where the assets are located. For this reason the liquidator in the main proceedings may request the opening of secondary proceedings when the efficient administration of the estate so requires.

(20) Main insolvency proceedings and secondary proceedings can, however, contribute to the effective realisation of the total assets only if all the concurrent proceedings pending are coordinated. The main condition here is that the various liquidators must cooperate closely, in particular by exchanging a sufficient amount of information. In order to ensure the dominant role of the main insolvency proceedings, the liquidator in such proceedings should be given several possibilities for intervening in secondary insolvency proceedings which are pending at the same time. For example, he should be able to propose a restructuring plan or composition or apply for realisation of the assets in the secondary insolvency proceedings to be suspended.

(21) Every creditor, who has his habitual residence, domicile or registered office in the Community, should have the right to lodge his claims in each of the insolvency proceedings pending in the Community relating to the debtor's assets. This should also apply to tax authorities and social insurance institutions. However, in order to ensure equal treatment of creditors, the distribution of proceeds must be coordinated. Every creditor should be able to keep what he has received in the course of insolvency proceedings but should be entitled only to participate in the distribution of total assets in other proceedings if creditors with the same standing have obtained the same proportion of their claims.

(22) This Regulation should provide for immediate recognition of judgments concerning the opening, conduct and closure of insolvency proceedings which come within its scope and of judgments handed down in direct connection with such insolvency proceedings. Automatic recognition should therefore mean that the effects attributed to the proceedings by the law of the State in which the proceedings were opened extend to all other Member States. Recognition of judgments delivered by the courts of the Member States should be based on the principle of mutual trust. To that end, grounds for non-recognition should be reduced to the minimum necessary. This is also the basis on which any dispute should be resolved where the courts of two Member States both claim competence to open the main insolvency proceedings. The decision of the first court to open proceedings should

be recognised in the other Member States without those Member States having the power to scrutinise the court's decision.

(23) This Regulation should set out, for the matters covered by it, uniform rules on conflict of laws which replace, within their scope of application, national rules of private international law. Unless otherwise stated, the law of the Member State of the opening of the proceedings should be applicable (lex concursus). This rule on conflict of laws should be valid both for the main proceedings and for local proceedings; the lex concursus determines all the effects of the insolvency proceedings, both procedural and substantive, on the persons and legal relations concerned. It governs all the conditions for the opening, conduct and closure of the insolvency proceedings.

(24) Automatic recognition of insolvency proceedings to which the law of the opening State normally applies may interfere with the rules under which transactions are carried out in other Member States. To protect legitimate expectations and the certainty of transactions in Member States other than that in which proceedings are opened, provisions should be made for a number of exceptions to the general rule.

(25) There is a particular need for a special reference diverging from the law of the opening State in the case of rights in rem, since these are of considerable importance for the granting of credit. The basis, validity and extent of such a right in rem should therefore normally be determined according to the lex situs and not be affected by the opening of insolvency proceedings. The proprietor of the right in rem should therefore be able to continue to assert his right to segregation or separate settlement of the collateral security. Where assets are subject to rights in rem under the lex situs in one Member State but the main proceedings are being carried out in another Member State, the liquidator in the main proceedings should be able to request the opening of secondary proceedings in the jurisdiction where the rights in rem arise if the debtor has an establishment there. If a secondary proceeding is not opened, the surplus on sale of the asset covered by rights in rem must be paid to the liquidator in the main proceedings.

(26) If a set-off is not permitted under the law of the opening State, a creditor should nevertheless be entitled to the set-off if it is possible under the law applicable to the claim of the insolvent debtor. In this way, set-off will acquire a kind of guarantee function based on legal provisions on which the creditor concerned can rely at the time when the claim arises.

(27) There is also a need for special protection in the case of payment systems and financial markets. This applies for example to the position-closing agreements and netting agreements to be found in such systems as well as to the sale of securities and to the guarantees provided for such transactions as governed in particular by Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems(5). For such transactions, the only law which is material should thus be that applicable to the system or market concerned. This provision is intended to prevent the possibility of mechanisms for the payment and settlement of transactions provided for in the payment and set-off systems or on the regulated financial markets of the Member States being altered in the case of insolvency of a business partner. Directive 98/26/EC contains special provisions which should take precedence over the general rules in this Regulation.

(28) In order to protect employees and jobs, the effects of insolvency proceedings on the continuation or termination of employment and on the rights and obligations of all parties to such employment must be determined by the law applicable to the agreement in accordance with the general rules on conflict of law. Any other insolvency-law questions, such as whether the employees' claims are protected by preferential rights and what status such preferential rights may have, should be determined by the law of the opening State.

(29) For business considerations, the main content of the decision opening the proceedings should be published in the other Member States at the request of the liquidator. If there is an establishment in the Member State concerned, there may be a requirement that publication is compulsory. In neither case, however, should publication be a prior condition for recognition of the foreign proceedings.

(30) It may be the case that some of the persons concerned are not in fact aware that proceedings have been opened and act in good faith in a way that conflicts with the new situation. In order to protect such persons who make a payment to the debtor because they are unaware that foreign proceedings have been opened when they should in fact have made the payment to the foreign liquidator, it should be provided that such a payment is to have a debt-discharging effect.

(31) This Regulation should include Annexes relating to the organisation of insolvency proceedings. As these Annexes relate exclusively to the legislation of Member States, there are specific and substantiated reasons for the Council to reserve the right to amend these Annexes in order to take account of any amendments to the domestic law of the Member States.

(32) The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community, have given notice of their wish to take part in the adoption and application of this Regulation.

(33) Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, is not participating in the adoption of this Regulation, and is therefore not bound by it nor subject to its application,

HAS ADOPTED THIS REGULATION:

CHAPTER I

GENERAL PROVISIONS

Article 1

Scope

1. This Regulation shall apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator.

2. This Regulation shall not apply to insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings which provide services involving the holding of funds or securities for third parties, or to collective investment undertakings.

Article 2

Definitions

For the purposes of this Regulation:

(a) "insolvency proceedings" shall mean the collective proceedings referred to in Article 1(1). These proceedings are listed in Annex A;

(b) "liquidator" shall mean any person or body whose function is to administer or liquidate assets of which the debtor has been divested or to supervise the administration of his affairs. Those persons and bodies are listed in Annex C;

(c) "winding-up proceedings" shall mean insolvency proceedings within the meaning of point (a) involving realising the assets of the debtor, including where the proceedings have been closed by a composition or other measure terminating the insolvency, or closed by reason of the insufficiency of the assets. Those proceedings are listed in Annex B;

(d) "court" shall mean the judicial body or any other competent body of a Member State empowered to open insolvency proceedings or to take decisions in the course of such proceedings;

(e) "judgment" in relation to the opening of insolvency proceedings or the appointment of a liquidator shall include the decision of any court empowered to open such proceedings or to appoint a liquidator;

(f) "the time of the opening of proceedings" shall mean the time at which the judgment opening proceedings becomes effective, whether it is a final judgment or not;

(g) "the Member State in which assets are situated" shall mean, in the case of:

- tangible property, the Member State within the territory of which the property is situated,

- property and rights ownership of or entitlement to which must be entered in a public register, the Member State under the authority of which the register is kept,

- claims, the Member State within the territory of which the third party required to meet them has the centre of his main interests, as determined in Article 3(1);

(h) "establishment" shall mean any place of operations where the debtor carries out a non-transitory economic activity with human means and goods.

Article 3

International jurisdiction

1. The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.

2. Where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.

3. Where insolvency proceedings have been opened under paragraph 1, any proceedings opened subsequently under paragraph 2 shall be secondary proceedings. These latter proceedings must be winding-up proceedings.

4. Territorial insolvency proceedings referred to in paragraph 2 may be opened prior to the opening of main insolvency proceedings in accordance with paragraph 1 only:

(a) where insolvency proceedings under paragraph 1 cannot be opened because of the conditions laid down by the law of the Member State within the territory of which the centre of the debtor's main interests is situated; or

(b) where the opening of territorial insolvency proceedings is requested by a creditor who has his domicile, habitual residence or registered office in the Member State within the territory of which the establishment is situated, or whose claim arises from the operation of that establishment.

Article 4

Law applicable

1. Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened, hereafter referred to as the "State of the opening of proceedings".

2. The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. It shall determine in particular:

(a) against which debtors insolvency proceedings may be brought on account of their capacity;

(b) the assets which form part of the estate and the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings;

(c) the respective powers of the debtor and the liquidator;

(d) the conditions under which set-offs may be invoked;

(e) the effects of insolvency proceedings on current contracts to which the debtor is party;

(f) the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of lawsuits pending;

(g) the claims which are to be lodged against the debtor's estate and the treatment of claims arising after the opening of insolvency proceedings;

(h) the rules governing the lodging, verification and admission of claims;

(i) the rules governing the distribution of proceeds from the realisation of assets, the ranking of claims and the rights of creditors who have obtained partial satisfaction after the opening of insolvency proceedings by virtue of a right in rem or through a set-off;

(j) the conditions for and the effects of closure of insolvency proceedings, in particular by composition;

(k) creditors' rights after the closure of insolvency proceedings;

(l) who is to bear the costs and expenses incurred in the insolvency proceedings;

(m) the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors.

Article 5

Third parties' rights in rem

1. The opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets - both specific assets and collections of indefinite assets as a whole which change from time to time - belonging to the debtor which are situated within the territory of another Member State at the time of the opening

of proceedings.

2. The rights referred to in paragraph 1 shall in particular mean:

(a) the right to dispose of assets or have them disposed of and to obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a lien or a mortgage;

(b) the exclusive right to have a claim met, in particular a right guaranteed by a lien in respect of the claim or by assignment of the claim by way of a guarantee;

(c) the right to demand the assets from, and/or to require restitution by, anyone having possession or use of them contrary to the wishes of the party so entitled;

(d) a right in rem to the beneficial use of assets.

3. The right, recorded in a public register and enforceable against third parties, under which a right in rem within the meaning of paragraph 1 may be obtained, shall be considered a right in rem.

4. Paragraph 1 shall not preclude actions for voidness, voidability or unenforceability as referred to in Article 4(2)(m).

Article 6

Set-off

1. The opening of insolvency proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of the debtor, where such a set-off is permitted by the law applicable to the insolvent debtor's claim.

2. Paragraph 1 shall not preclude actions for voidness, voidability or unenforceability as referred to in Article 4(2)(m).

Article 7

Reservation of title

1. The opening of insolvency proceedings against the purchaser of an asset shall not affect the seller's rights based on a reservation of title where at the time of the opening of proceedings the asset is situated within the territory of a Member State other than the State of opening of proceedings.

2. The opening of insolvency proceedings against the seller of an asset, after delivery of the asset, shall not constitute grounds for rescinding or terminating the sale and shall not prevent the purchaser from acquiring title where at the time of the opening of proceedings the asset sold is situated within the territory of a Member State other than the State of the opening of proceedings.

3. Paragraphs 1 and 2 shall not preclude actions for voidness, voidability or unenforceability as referred to in Article 4(2)(m).

Article 8

Contracts relating to immoveable property

The effects of insolvency proceedings on a contract conferring the right to acquire or make use of immoveable property shall be governed solely by the law of the Member State within the territory of which the immoveable property is situated.

Article 9

Payment systems and financial markets

1. Without prejudice to Article 5, the effects of insolvency proceedings on the rights and obligations of the parties to a payment or settlement system or to a financial market shall be governed solely by the law of the Member State applicable to that system or market.

2. Paragraph 1 shall not preclude any action for voidness, voidability or unenforceability which may be taken to set aside payments or transactions under the law applicable to the relevant payment system or financial market.

Article 10

Contracts of employment

The effects of insolvency proceedings on employment contracts and relationships shall be governed solely by the law of the Member State applicable to the contract of employment.

Article 11

Effects on rights subject to registration

The effects of insolvency proceedings on the rights of the debtor in immoveable property, a ship or an aircraft subject to registration in a public register shall be determined by the law of the Member State under the authority of which the register is kept.

Article 12

Community patents and trade marks

For the purposes of this Regulation, a Community patent, a Community trade mark or any other similar right established by Community law may be included only in the proceedings referred to in Article 3(1).

Article 13

Detrimental acts

Article 4(2)(m) shall not apply where the person who benefited from an act detrimental to all the

creditors provides proof that:

- the said act is subject to the law of a Member State other than that of the State of the opening of proceedings, and

- that law does not allow any means of challenging that act in the relevant case.

Article 14

Protection of third-party purchasers

Where, by an act concluded after the opening of insolvency proceedings, the debtor disposes, for consideration, of:

- an immoveable asset, or

- a ship or an aircraft subject to registration in a public register, or

- securities whose existence presupposes registration in a register laid down by law,

the validity of that act shall be governed by the law of the State within the territory of which the immoveable asset is situated or under the authority of which the register is kept.

Article 15

Effects of insolvency proceedings on lawsuits pending

The effects of insolvency proceedings on a lawsuit pending concerning an asset or a right of which the debtor has been divested shall be governed solely by the law of the Member State in which that lawsuit is pending.

CHAPTER II

RECOGNITION OF INSOLVENCY PROCEEDINGS

Article 16

Principle

1. Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings.

This rule shall also apply where, on account of his capacity, insolvency proceedings cannot be brought against the debtor in other Member States.

2. Recognition of the proceedings referred to in Article 3(1) shall not preclude the opening of the proceedings referred to in Article 3(2) by a court in another Member State. The latter proceedings shall be secondary insolvency proceedings within the meaning of Chapter III.

Article 17

Effects of recognition

1. The judgment opening the proceedings referred to in Article 3(1) shall, with no further formalities, produce the same effects in any other Member State as under this law of the State of the opening of proceedings, unless this Regulation provides otherwise and as long as no proceedings referred to in Article 3(2) are opened in that other Member State.

2. The effects of the proceedings referred to in Article 3(2) may not be challenged in other Member States. Any restriction of the creditors' rights, in particular a stay or discharge, shall produce effects vis-à-vis assets situated within the territory of another Member State only in the case of those creditors who have given their consent.

Article 18

Powers of the liquidator

1. The liquidator appointed by a court which has jurisdiction pursuant to Article 3(1) may exercise all the powers conferred on him by the law of the State of the opening of proceedings in another Member State, as long as no other insolvency proceedings have been opened there nor any preservation measure to the contrary has been taken there further to a request for the opening of insolvency proceedings in that State. He may in particular remove the debtor's assets from the territory of the Member State in which they are situated, subject to Articles 5 and 7.

2. The liquidator appointed by a court which has jurisdiction pursuant to Article 3(2) may in any other Member State claim through the courts or out of court that moveable property was removed from the territory of the State of the opening of proceedings to the territory of that other Member State after the opening of the insolvency proceedings. He may also bring any action to set aside which is in the interests of the creditors.

3. In exercising his powers, the liquidator shall comply with the law of the Member State within the territory of which he intends to take action, in particular with regard to procedures for the realisation of assets. Those powers may not include coercive measures or the right to rule on legal proceedings or disputes.

Article 19

Proof of the liquidator's appointment

The liquidator's appointment shall be evidenced by a certified copy of the original decision appointing him or by any other certificate issued by the court which has jurisdiction.

A translation into the official language or one of the official languages of the Member State within the territory of which he intends to act may be required. No legalisation or other similar formality shall be required.

Article 20

Return and imputation

1. A creditor who, after the opening of the proceedings referred to in Article 3(1) obtains by any means, in particular through enforcement, total or partial satisfaction of his claim on the assets belonging to the debtor situated within the territory of another Member State, shall return what he has obtained to the liquidator, subject to Articles 5 and 7.

2. In order to ensure equal treatment of creditors a creditor who has, in the course of insolvency proceedings, obtained a dividend on his claim shall share in distributions made in other proceedings only where creditors of the same ranking or category have, in those other proceedings, obtained an equivalent dividend.

Article 21

Publication

1. The liquidator may request that notice of the judgment opening insolvency proceedings and, where appropriate, the decision appointing him, be published in any other Member State in accordance with the publication procedures provided for in that State. Such publication shall also specify the liquidator appointed and whether the jurisdiction rule applied is that pursuant to Article 3(1) or Article 3(2).

2. However, any Member State within the territory of which the debtor has an establishment may require mandatory publication. In such cases, the liquidator or any authority empowered to that effect in the Member State where the proceedings referred to in Article 3(1) are opened shall take all necessary measures to ensure such publication.

Article 22

Registration in a public register

1. The liquidator may request that the judgment opening the proceedings referred to in Article 3(1) be registered in the land register, the trade register and any other public register kept in the other Member States.

2. However, any Member State may require mandatory registration. In such cases, the liquidator or any authority empowered to that effect in the Member State where the proceedings referred to in Article 3(1) have been opened shall take all necessary measures to ensure such registration.

Article 23

Costs

The costs of the publication and registration provided for in Articles 21 and 22 shall be regarded as costs and expenses incurred in the proceedings.

Article 24

Honouring of an obligation to a debtor

1. Where an obligation has been honoured in a Member State for the benefit of a debtor who is subject to insolvency proceedings opened in another Member State, when it should have been honoured for the benefit of the liquidator in those proceedings, the person honouring the obligation shall be deemed to have discharged it if he was unaware of the opening of proceedings.

2. Where such an obligation is honoured before the publication provided for in Article 21 has been effected, the person honouring the obligation shall be presumed, in the absence of proof to the contrary, to have been unaware of the opening of insolvency proceedings; where the obligation is honoured after such publication has been effected, the person honouring the obligation shall be presumed, in the absence of proof to the contrary, to have been aware of the opening of proceedings.

Article 25

Recognition and enforceability of other judgments

1. Judgments handed down by a court whose judgment concerning the opening of proceedings is recognised in accordance with Article 16 and which concern the course and closure of insolvency proceedings, and compositions approved by that court shall also be recognised with no further formalities. Such judgments shall be enforced in accordance with Articles 31 to 51, with the exception of Article 34(2), of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Conventions of Accession to this Convention.

The first subparagraph shall also apply to judgments deriving directly from the insolvency proceedings and which are closely linked with them, even if they were handed down by another court.

The first subparagraph shall also apply to judgments relating to preservation measures taken after the request for the opening of insolvency proceedings.

2. The recognition and enforcement of judgments other than those referred to in paragraph 1 shall be governed by the Convention referred to in paragraph 1, provided that that Convention is applicable.

3. The Member States shall not be obliged to recognise or enforce a judgment referred to in paragraph 1 which might result in a limitation of personal freedom or postal secrecy.

Article 26 (6)

Public policy

Any Member State may refuse to recognise insolvency proceedings opened in another Member State or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual.

CHAPTER III

SECONDARY INSOLVENCY PROCEEDINGS

Article 27

Opening of proceedings

The opening of the proceedings referred to in Article 3(1) by a court of a Member State and which is recognised in another Member State (main proceedings) shall permit the opening in that other Member State, a court of which has jurisdiction pursuant to Article 3(2), of secondary insolvency proceedings without the debtor's insolvency being examined in that other State. These latter proceedings must be among the proceedings listed in Annex B. Their effects shall be restricted to the assets of the debtor situated within the territory of that other Member State.

Article 28

Applicable law

Save as otherwise provided in this Regulation, the law applicable to secondary proceedings shall be that of the Member State within the territory of which the secondary proceedings are opened.

Article 29

Right to request the opening of proceedings

The opening of secondary proceedings may be requested by:

(a) the liquidator in the main proceedings;

(b) any other person or authority empowered to request the opening of insolvency proceedings under the law of the Member State within the territory of which the opening of secondary proceedings is requested.

Article 30

Advance payment of costs and expenses

Where the law of the Member State in which the opening of secondary proceedings is requested requires that the debtor's assets be sufficient to cover in whole or in part the costs and expenses of the proceedings, the court may, when it receives such a request, require the applicant to make an advance payment of costs or to provide appropriate security.

Article 31

Duty to cooperate and communicate information

1. Subject to the rules restricting the communication of information, the liquidator in the main proceedings and the liquidators in the secondary proceedings shall be duty bound to communicate information to each other. They shall immediately communicate any information which may be relevant

to the other proceedings, in particular the progress made in lodging and verifying claims and all measures aimed at terminating the proceedings.

2. Subject to the rules applicable to each of the proceedings, the liquidator in the main proceedings and the liquidators in the secondary proceedings shall be duty bound to cooperate with each other.

3. The liquidator in the secondary proceedings shall give the liquidator in the main proceedings an early opportunity of submitting proposals on the liquidation or use of the assets in the secondary proceedings.

Article 32

Exercise of creditors' rights

1. Any creditor may lodge his claim in the main proceedings and in any secondary proceedings.

2. The liquidators in the main and any secondary proceedings shall lodge in other proceedings claims which have already been lodged in the proceedings for which they were appointed, provided that the interests of creditors in the latter proceedings are served thereby, subject to the right of creditors to oppose that or to withdraw the lodgement of their claims where the law applicable so provides.

3. The liquidator in the main or secondary proceedings shall be empowered to participate in other proceedings on the same basis as a creditor, in particular by attending creditors' meetings.

Article 33

Stay of liquidation

1. The court, which opened the secondary proceedings, shall stay the process of liquidation in whole or in part on receipt of a request from the liquidator in the main proceedings, provided that in that event it may require the liquidator in the main proceedings to take any suitable measure to guarantee the interests of the creditors in the secondary proceedings and of individual classes of creditors. Such a request from the liquidator may be rejected only if it is manifestly of no interest to the creditors in the main proceedings. Such a stay of the process of liquidation may be ordered for up to three months. It may be continued or renewed for similar periods.

2. The court referred to in paragraph 1 shall terminate the stay of the process of liquidation:

- at the request of the liquidator in the main proceedings,

- of its own motion, at the request of a creditor or at the request of the liquidator in the secondary proceedings if that measure no longer appears justified, in particular, by the interests of creditors in the main proceedings or in the secondary proceedings.

Article 34

Measures ending secondary insolvency proceedings

1. Where the law applicable to secondary proceedings allows for such proceedings to be closed without liquidation by a rescue plan, a composition or a comparable measure, the liquidator in the main

proceedings shall be empowered to propose such a measure himself.

Closure of the secondary proceedings by a measure referred to in the first subparagraph shall not become final without the consent of the liquidator in the main proceedings; failing his agreement, however, it may become final if the financial interests of the creditors in the main proceedings are not affected by the measure proposed.

2. Any restriction of creditors' rights arising from a measure referred to in paragraph 1 which is proposed in secondary proceedings, such as a stay of payment or discharge of debt, may not have effect in respect of the debtor's assets not covered by those proceedings without the consent of all the creditors having an interest.

3. During a stay of the process of liquidation ordered pursuant to Article 33, only the liquidator in the main proceedings or the debtor, with the former's consent, may propose measures laid down in paragraph 1 of this Article in the secondary proceedings; no other proposal for such a measure shall be put to the vote or approved.

Article 35

Assets remaining in the secondary proceedings

If by the liquidation of assets in the secondary proceedings it is possible to meet all claims allowed under those proceedings, the liquidator appointed in those proceedings shall immediately transfer any assets remaining to the liquidator in the main proceedings.

Article 36

Subsequent opening of the main proceedings

Where the proceedings referred to in Article 3(1) are opened following the opening of the proceedings referred to in Article 3(2) in another Member State, Articles 31 to 35 shall apply to those opened first, in so far as the progress of those proceedings so permits.

Article 37 (7)

Conversion of earlier proceedings

The liquidator in the main proceedings may request that proceedings listed in Annex A previously opened in another Member State be converted into winding-up proceedings if this proves to be in the interests of the creditors in the main proceedings.

The court with jurisdiction under Article 3(2) shall order conversion into one of the proceedings listed in Annex B.

Article 38

Preservation measures

Where the court of a Member State which has jurisdiction pursuant to Article 3(1) appoints a temporary administrator in order to ensure the preservation of the debtor's assets, that temporary administrator

shall be empowered to request any measures to secure and preserve any of the debtor's assets situated in another Member State, provided for under the law of that State, for the period between the request for the opening of insolvency proceedings and the judgment opening the proceedings.

CHAPTER IV

PROVISION OF INFORMATION FOR CREDITORS AND LODGEMENT OF THEIR CLAIMS

Article 39

Right to lodge claims

Any creditor who has his habitual residence, domicile or registered office in a Member State other than the State of the opening of proceedings, including the tax authorities and social security authorities of Member States, shall have the right to lodge claims in the insolvency proceedings in writing.

Article 40

Duty to inform creditors

1. As soon as insolvency proceedings are opened in a Member State, the court of that State having jurisdiction or the liquidator appointed by it shall immediately inform known creditors who have their habitual residences, domiciles or registered offices in the other Member States.

2. That information, provided by an individual notice, shall in particular include time limits, the penalties laid down in regard to those time limits, the body or authority empowered to accept the lodgement of claims and the other measures laid down. Such notice shall also indicate whether creditors whose claims are preferential or secured in rem need lodge their claims.

Article 41

Content of the lodgement of a claim

A creditor shall send copies of supporting documents, if any, and shall indicate the nature of the claim, the date on which it arose and its amount, as well as whether he alleges preference, security in rem or a reservation of title in respect of the claim and what assets are covered by the guarantee he is invoking.

Article 42

Languages

1. The information provided for in Article 40 shall be provided in the official language or one of the official languages of the State of the opening of proceedings. For that purpose a form shall be used bearing the heading "Invitation to lodge a claim. Time limits to be observed" in all the official languages of the institutions of the European Union.

2. Any creditor who has his habitual residence, domicile or registered office in a Member State other than the State of the opening of proceedings may lodge his claim in the official language or one of the official languages of that other State. In that event, however, the lodgement of his claim shall bear the heading "Lodgement of claim" in the official language or one of the official languages of the State of the opening of proceedings. In addition, he may be required to provide a translation into the official language or one of the official languages of the State of the opening of proceedings.

CHAPTER V

TRANSITIONAL AND FINAL PROVISIONS

Article 43

Applicability in time

The provisions of this Regulation shall apply only to insolvency proceedings opened after its entry into force. Acts done by a debtor before the entry into force of this Regulation shall continue to be governed by the law which was applicable to them at the time they were done.

Article 44

Relationship to Conventions

1. After its entry into force, this Regulation replaces, in respect of the matters referred to therein, in the relations between Member States, the Conventions concluded between two or more Member States, in particular:

(a) the Convention between Belgium and France on Jurisdiction and the Validity and Enforcement of Judgments, Arbitration Awards and Authentic Instruments, signed at Paris on 8 July 1899;

(b) the Convention between Belgium and Austria on Bankruptcy, Winding-up, Arrangements, Compositions and Suspension of Payments (with Additional Protocol of 13 June 1973), signed at Brussels on 16 July 1969;

(c) the Convention between Belgium and the Netherlands on Territorial Jurisdiction, Bankruptcy and the Validity and Enforcement of Judgments, Arbitration Awards and Authentic Instruments, signed at Brussels on 28 March 1925;

(d) the Treaty between Germany and Austria on Bankruptcy, Winding-up, Arrangements and Compositions, signed at Vienna on 25 May 1979;

(e) the Convention between France and Austria on Jurisdiction, Recognition and Enforcement of Judgments on Bankruptcy, signed at Vienna on 27 February 1979;

(f) the Convention between France and Italy on the Enforcement of Judgments in Civil and Commercial Matters, signed at Rome on 3 June 1930;

(g) the Convention between Italy and Austria on Bankruptcy, Winding-up, Arrangements and Compositions, signed at Rome on 12 July 1977;

(h) the Convention between the Kingdom of the Netherlands and the Federal Republic of Germany on the Mutual Recognition and Enforcement of Judgments and other Enforceable Instruments in Civil and Commercial Matters, signed at The Hague on 30 August 1962;

(i) the Convention between the United Kingdom and the Kingdom of Belgium providing for the Reciprocal Enforcement of Judgments in Civil and Commercial Matters, with Protocol, signed at Brussels on 2 May 1934;

(j) the Convention between Denmark, Finland, Norway, Sweden and Iceland on Bankruptcy, signed at Copenhagen on 7 November 1933;

(k) the European Convention on Certain International Aspects of Bankruptcy, signed at Istanbul on 5 June 1990.

2. The Conventions referred to in paragraph 1 shall continue to have effect with regard to proceedings opened before the entry into force of this Regulation.

3. This Regulation shall not apply:

(a) in any Member State, to the extent that it is irreconcilable with the obligations arising in relation to bankruptcy from a convention concluded by that State with one or more third countries before the entry into force of this Regulation;

(b) in the United Kingdom of Great Britain and Northern Ireland, to the extent that is irreconcilable with the obligations arising in relation to bankruptcy and the winding-up of insolvent companies from any arrangements with the Commonwealth existing at the time this Regulation enters into force.

Article 45

Amendment of the Annexes

The Council, acting by qualified majority on the initiative of one of its members or on a proposal from the Commission, may amend the Annexes.

Article 46

Reports

No later than 1 June 2012, and every five years thereafter, the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Regulation. The report shall be accompanied if need be by a proposal for adaptation of this Regulation.

Article 47

Entry into force

This Regulation shall enter into force on 31 May 2002.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

Done at Brussels, 29 May 2000.

For the Council

The President

A. Costa

(1) Opinion delivered on 2 March 2000 (not yet published in the Official Journal).

(2) Opinion delivered on 26 January 2000 (not yet published in the Official Journal).

(3) OJ L 299, 31.12.1972, p. 32.

(4) OJ L 204, 2.8.1975, p. 28; OJ L 304, 30.10.1978, p. 1; OJ L 388, 31.12.1982, p. 1; OJ L 285, 3.10.1989, p. 1; OJ C 15, 15.1.1997, p. 1.

(5) OJ L 166, 11.6.1998, p. 45.

(6) Note the Declaration by Portugal concerning the application of Articles 26 and 37 (OJ C 183, 30.6.2000, p. 1).

(7) Note the Declaration by Portugal concerning the application of Articles 26 and 37 (OJ C 183, 30.6.2000, p. 1).

ANNEX A

Insolvency proceedings referred to in Article 2(a)

BELGIE-/BELGIQUE

- Het faillissementLa faillite
- Het gerechtelijk akkoordLe concordat judiciaire
- De collectieve schuldenregelingLe règlement collectif de dettes

DEUTSCHLAND

- Das Konkursverfahren
- Das gerichtliche Vergleichsverfahren
- Das Gesamtvollstreckungsverfahren
- Das Insolvenzverfahren

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! ISO_1! ESPAÑA

- Concurso de acreedores
- Quiebra
- Suspension de pagos

FRANCE

- Liquidation judiciaire

- Redressement judiciaire avec nomination d'un administrateur

IRELAND

- Compulsory winding up by the court

- Bankruptcy

- The administration in bankruptcy of the estate of persons dying insolvent

- Winding-up in bankruptcy of partnerships

- Creditors' voluntary winding up (with confirmation of a Court)

- Arrangements under the control of the court which involve the vesting of all or part of the property of the debtor in the Official Assignee for realisation and distribution

- Company examinership

ITALIA

- Fallimento

- Concordato preventivo

- Liquidazione coatta amministrativa

- Amministrazione straordinaria

- Amministrazione controllata

LUXEMBOURG

- Faillite

- Gestion contrôlée

- Concordat préventif de faillite (par abandon d'actif)

- Régime spécial de liquidation du notariat

NEDERLAND

- Het faillissement

- De surséance van betaling

- De schuldsaneringsregeling natuurlijke personen

OSTERREICH

- Das Konkursverfahren

- Das Ausgleichsverfahren

PORTUGAL

- O processo de falência

- Os processos especiais de recuperaçao de empresa, ou seja:

- A concordata

- A reconstituiçao empresarial

- A reestruturaçao financeira
- A gestao controlada

SUOMI-/FINLAND

- Konkurssikonkurs
- Yrityssaneerausföretagssanering

SVERIGE

- Konkurs
- Företagsrekonstruktion

UNITED KINGDOM

- Winding up by or subject to the supervision of the court
- Creditors' voluntary winding up (with confirmation by the court)
- Administration
- Voluntary arrangements under insolvency legislation
- Bankruptcy or sequestration

ANNEX B

Winding up proceedings referred to in Article 2(c)

BELGIE-/BELGIQUE

- Het faillissementLa faillite

DEUTSCHLAND

- Das Konkursverfahren
- Das Gesamtvollstreckungsverfahren
- Das Insolvenzverfahren

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! ISO_1! ESPAÑA

- Concurso de acreedores
- Quiebra
- Suspension de pagos basada en la insolvencia definitiva

FRANCE

- Liquidation judiciaire

IRELAND

- Compulsory winding up

- Bankruptcy

- The administration in bankruptcy of the estate of persons dying insolvent

- Winding-up in bankruptcy of partnerships

- Creditors' voluntary winding up (with confirmation of a court)

- Arrangements under the control of the court which involve the vesting of all or part of the property of the debtor in the Official Assignee for realisation and distribution

ITALIA

- Fallimento

- Liquidazione coatta amministrativa

LUXEMBOURG

- Faillite

- Régime spécial de liquidation du notariat

NEDERLAND

- Het faillissement

- De schuldsaneringsregeling natuurlijke personen

OSTERREICH

- Das Konkursverfahren

PORTUGAL

- O processo de falência

SUOMI-/FINLAND

- Konkurssikonkurs

SVERIGE

- Konkurs

UNITED KINGDOM

- Winding up by or subject to the supervision of the court

- Creditors' voluntary winding up (with confirmation by the court)

- Bankruptcy or sequestration

ANNEX C

Liquidators referred to in Article 2(b)

BELGIE-/BELGIQUE

- De curatorLe curateur

- De commissaris inzake opschortingLe commissaire au sursis

- De schuldbemiddelaarLe médiateur de dettes

DEUTSCHLAND

- Konkursverwalter
- Vergleichsverwalter
- Sachwalter (nach der Vergleichsordnung)
- Verwalter
- Insolvenzverwalter
- Sachwalter (nach der Insolvenzordnung)
- Treuhänder
- Vorläufiger Insolvenzverwalter

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! ISO_1! ESPAÑA

- Depositario-administrador
- Interventor o Interventores
- Síndicos
- Comisario

FRANCE

- Représentant des créanciers
- Mandataire liquidateur
- Administrateur judiciaire
- Commissaire à l'exécution de plan

IRELAND

- Liquidator
- Official Assignee
- Trustee in bankruptcy
- Provisional Liquidator
- Examiner

ITALIA

- Curatore
- Commissario

LUXEMBOURG

- Le curateur
- Le commissaire
- Le liquidateur
- Le conseil de gérance de la section d'assainissement du notariat

NEDERLAND

- De curator in het faillissement
- De bewindvoerder in de surséance van betaling
- De bewindvoerder in de schuldsaneringsregeling natuurlijke personen

OSTERREICH

- Masseverwalter
- Ausgleichsverwalter
- Sachwalter
- Treuhänder
- Besondere Verwalter
- Vorläufiger Verwalter
- Konkursgericht

PORTUGAL

- Gestor judicial
- Liquidatario judicial
- Comissao de credores

SUOMI-/FINLAND

- Pesänhoitajaboförvaltare
- Selvittäjäutredare

SVERIGE

- Förvaltare
- God man
- Rekonstruktör

UNITED KINGDOM

- Liquidator
- Supervisor of a voluntary arrangement
- Administrator
- Official Receiver
- Trustee

- Judicial factor

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end of validity: 99/99/9999

Council Regulation (EC) No 694/2006 of 27 April 2006 amending the lists of insolvency proceedings, winding-up proceedings and liquidators in Annexes A, B and C to Regulation (EC) No 1346/2000 on insolvency proceedings

Council Regulation (EC) No 694/2006

of 27 April 2006

amending the lists of insolvency proceedings, winding-up proceedings and liquidators in Annexes A, B and C to Regulation (EC) No 1346/2000 on insolvency proceedings

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings [1], and in particular Article 45 thereof,

Having regard to the proposal from the Commission,

Having regard to the initiative of the Slovak Republic [2],

Whereas:

(1) The Annexes to Regulation (EC) No 1346/2000 list the designations given in the national legislation of the Member States to the proceedings and liquidators to which that Regulation applies. Annex A to that Regulation lists the insolvency proceedings referred to in Article 2(a) of that Regulation. Annex B to that Regulation lists the winding-up proceedings referred to in Article 2(c) and Annex C thereto lists the liquidators referred to in Article 2(b) of that Regulation.

(2) Annexes A, B and C to Regulation (EC) No 1346/2000 were amended by the 2003 Act of Accession so as to include the insolvency proceedings, the winding-up proceedings and the liquidators of the new Member States, and by Council Regulation (EC) No 603/2005 [3] in order to modify the said Annexes as regards several Member States.

(3) On 29 November 2005 the French Republic notified the Commission, pursuant to Article 45 of Regulation (EC) No 1346/2000, of amendments to the lists set out in Annexes A and C to that Regulation.

(4) On 6 March 2006 the Slovak Republic notified the Council General Secretariat, pursuant to Article 45 of Regulation (EC) No 1346/2000, of amendments to the lists set out in Annexes A, B and C to that Regulation.

(5) The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community, have given notice of their wish to take part in the adoption and application of this Regulation.

(6) Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, is not participating in the adoption of this Regulation, and is therefore not bound by it nor subject to its application.

(7) Regulation (EC) No 1346/2000 should therefore be amended accordingly,

HAS ADOPTED THIS REGULATION:

Article 1

Regulation (EC) No 1346/2000 is hereby amended as follows:

1. Annex A shall be replaced by the text set out in Annex I to this Regulation;

2. Annex B shall be replaced by the text set out in Annex II to this Regulation;

3. Annex C shall be replaced by the text set out in Annex III to this Regulation.

Article 2

This Regulation shall enter into force on the day following its publication in the Official Journal of the European Union.

This Regulation shall be binding in its entirety and directly applicable in all Member States in accordance with the Treaty establishing the European Community.

Done at Luxembourg, 27 April 2006.

For the Council

The President

L. Prokop

[1] OJ L 160, 30.6.2000, p. 1. Regulation as last amended by Regulation (EC) No 603/2005 (OJ L 100, 20.4.2005, p. 1).

[2] Not yet published in the Official Journal.

[3] OJ L 100, 20.4.2005, p. 1.

ANNEX I

"

"ANNEX A

Insolvency proceedings referred to in Article 2(a)

BELGIE/BELGIQUE

- Het faillissement/La faillite
- Het gerechtelijk akkoord/Le concordat judiciaire
- De collectieve schuldenregeling/Le règlement collectif de dettes
- De vrijwillige vereffening/La liquidation volontaire
- De gerechtelijke vereffening/La liquidation judiciaire
- De voorlopige ontneming van beheer, bepaald in artikel 8 van de faillissementswet/Le dessaisissement

provisoire, visé à l'article 8 de la loi sur les faillites

ESKA REPUBLIKA

- Konkurs
- Nucené vyrovnaní
- Vyrovnaní

DEUTSCHLAND

- Das Konkursverfahren
- Das gerichtliche Vergleichsverfahren
- Das Gesamtvollstreckungsverfahren
- Das Insolvenzverfahren

EESTI

- Pankrotimenetlus
-
-
- .
-

ESPAÑA

- Concurso

FRANCE

- Sauvegarde
- Redressement judiciaire
- Liquidation judiciaire

IRELAND

- Compulsory winding-up by the court
- Bankruptcy
- The administration in bankruptcy of the estate of persons dying insolvent
- Winding-up in bankruptcy of partnerships
- Creditors' voluntary winding-up (with confirmation of a court)
- Arrangements under the control of the court which involve the vesting of all or part of the property of the debtor in the Official Assignee for realisation and distribution
- Company examinership

ITALIA

- Fallimento
- Concordato preventivo
- Liquidazione coatta amministrativa

- Amministrazione straordinaria
-
-
-
-
-
-

LATVIJA

- Bankrots
- Izlgums
- Sancija

LIETUVA

- mons restruktrizavimo byla
- mons bankroto byla
- mons bankroto procesas ne teismo tvarka

LUXEMBOURG

- Faillite
- Gestion contrôlée
- Concordat préventif de faillite (par abandon d'actif)
- Régime spécial de liquidation du notariat

MAGYARORSZAG

- Csdeljaras
- Felszamolasi eljaras

MALTA

- Xoljiment
- Amministrazzjoni
- Stral volontarju mill-membri jew mill-kredituri
- Stral mill-Qorti
- Falliment f'ka ta' negozjant

NEDERLAND

- Het faillissement
- De surseance van betaling
- De schuldsaneringsregeling natuurlijke personen

OSTERREICH

- Das Konkursverfahren
- Das Ausgleichsverfahren

POLSKA

- Postpowanie upadociowe
- Postpowanie ukadowe
- Upado obejmujca likwidacj
- Upado z moliwoci zawarcia ukadu

PORTUGAL

- O processo de insolvência
- O processo de falência
- Os processos especiais de recuperaçao de empresa, ou seja:

A concordata

A reconstituiçao empresarial

A reestruturaçao financeira

A gestao controlada

SLOVENIJA

- Steajni postopek
- Skrajani steajni postopek
- Postopek prisilne poravnave
- Prisilna poravnava v steaju

SLOVENSKO

- Konkurzné konanie
- Retrukturalizané konanie

SUOMI/FINLAND

- Konkurssi/konkurs
- Yrityssaneeraus/företagssanering

SVERIGE

- Konkurs
- Företagsrekonstruktion

UNITED KINGDOM

- Winding-up by or subject to the supervision of the court
- Creditors' voluntary winding-up (with confirmation by the court)
- Administration, including appointments made by filing prescribed documents with the court
- Voluntary arrangements under insolvency legislation

- Bankruptcy or sequestration"

"

ANNEX II

"

"ANNEX B

Winding-up proceedings referred to in Article 2(c)

BELGIE/BELGIQUE

- Het faillissement/La faillite
- De vrijwillige vereffening/La liquidation volontaire
- De gerechtelijke vereffening/La liquidation judiciaire

ESKA REPUBLIKA

- Konkurs
- Nucené vyrovnaní

DEUTSCHLAND

- Das Konkursverfahren
- Das Gesamtvollstreckungsverfahren
- Das Insolvenzverfahren

EESTI

- Pankrotimenetlus
-
-

ESPAÑA

- Concurso

FRANCE

- Liquidation judiciaire

IRELAND

- Compulsory winding-up
- Bankruptcy
- The administration in bankruptcy of the estate of persons dying insolvent
- Winding-up in bankruptcy of partnerships
- Creditors' voluntary winding-up (with confirmation of a court)

- Arrangements under the control of the court which involve the vesting of all or part of the property of the debtor in the Official Assignee for realisation and distribution

ITALIA

- Fallimento
- Liquidazione coatta amministrativa
- Concordato preventivo con cessione dei beni
-
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- ( )
-
-

LATVIJA

- Bankrots

LIETUVA

- mons bankroto byla
- mons bankroto procesas ne teismo tvarka

LUXEMBOURG

- Faillite
- Régime spécial de liquidation du notariat

MAGYARORSZAG

- Felszamolasi eljaras

MALTA

- Stral volontarju
- Stral mill-Qorti
- Falliment inklu il-ru ta' mandat ta' qbid mill-Kuratur f'ka ta' negozjant fallut

NEDERLAND

- Het faillissement
- De schuldsaneringsregeling natuurlijke personen

OSTERREICH

- Das Konkursverfahren

POLSKA

- Postpowanie upadociowe
- Upado obejmujca likwidacj

PORTUGAL

- O processo de insolvência

- O processo de falência

SLOVENIJA

- Steajni postopek

- Skrajani steajni postopek

SLOVENSKO

- Konkurzné konanie

SUOMI/FINLAND

- Konkurssi/konkurs

SVERIGE

- Konkurs

UNITED KINGDOM

- Winding-up by or subject to the supervision of the court

- Winding-up through administration, including appointments made by filing prescribed documents with the court

- Creditors' voluntary winding-up (with confirmation by the court)

- Bankruptcy or sequestration"

"

ANNEX III

"

"ANNEX C

Liquidators referred to in Article 2(b)

BELGIE/BELGIQUE

- De curator/Le curateur

- De commissaris inzake opschorting/Le commissaire au sursis

- De schuldbemiddelaar/Le médiateur de dettes

- De vereffenaar/Le liquidateur

- De voorlopige bewindvoerder/L'administrateur provisoire

ESKA REPUBLIKA

- Spravce podstaty

- Pedbnu spravce

- Vyrovnací spravce

- Zvlatní spravce

- Zastupce spravce

DEUTSCHLAND

- Konkursverwalter
- Vergleichsverwalter
- Sachwalter (nach der Vergleichsordnung)
- Verwalter
- Insolvenzverwalter
- Sachwalter (nach der Insolvenzordnung)
- Treuhänder
- Vorläufiger Insolvenzverwalter

EESTI

- Pankrotihaldur
- Ajutine pankrotihaldur
- Usaldusisik
-
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ESPAÑA

- Administradores concursales

FRANCE

- Mandataire judiciaire
- Liquidateur
- Administrateur judiciaire
- Commissaire à l'exécution du plan

IRELAND

- Liquidator
- Official Assignee
- Trustee in bankruptcy
- Provisional liquidator
- Examiner

ITALIA

- Curatore
- Commissario

- Liquidatore giudiziale
-
-
-
-

LATVIJA

- Makstnespjas procesa administrators

LIETUVA

- Bankrutuojani moni administratorius
- Restruktrizuojam moni administratorius

LUXEMBOURG

- Le curateur
- Le commissaire
- Le liquidateur
- Le conseil de gérance de la section d'assainissement du notariat

MAGYARORSZAG

- Vagyonfelügyel
- Felszamolo

MALTA

- Amministratur Proviorju
- Rievitur Uffijali
- Straljarju
- Manager Spejali
- Kuraturi f'ka ta' proeduri ta' falliment

NEDERLAND

- De curator in het faillissement
- De bewindvoerder in de surseance van betaling
- De bewindvoerder in de schuldsaneringsregeling natuurlijke personen

OSTERREICH

- Masseverwalter
- Ausgleichsverwalter
- Sachwalter
- Treuhänder
- Besondere Verwalter

- Konkursgericht

POLSKA

- Syndyk
- Nadzorca sdowy
- Zarzdca

PORTUGAL

- Administrador da insolvência
- Gestor judicial
- Liquidatario judicial
- Comissao de credores

SLOVENIJA

- Upravitelj prisilne poravnave
- Steajni upravitelj
- Sodie, pristojno za postopek prisilne poravnave
- Sodie, pristojno za steajni postopek

SLOVENSKO

- Predbenu spravca
- Spravca

SUOMI/FINLAND

- Pesänhoitaja/boförvaltare
- Selvittäjä/utredare

SVERIGE

- Förvaltare
- God man
- Rekonstruktör

UNITED KINGDOM

- Liquidator
- Supervisor of a voluntary arrangement
- Administrator
- Official receiver
- Trustee
- Provisional liquidator
- Judicial factor"

"

DOCNUM	32006R0694
AUTHOR	Council
FORM	Regulation
TREATY	European Community
PUBREF	OJ L 121, 6.5.2006, p. 1-13 (ES, CS, DA, DE, ET, EL, EN, FR, IT, LV, LT, HU, NL, PL, PT, SK, SL, FI, SV) OJ L 294M , 25.10.2006, p. 10-22 (MT)
PUB	2006/05/06
DOC	2006/04/27
INFORCE	2006/05/07=EV
ENDVAL	9999/99/99
LEGBASE	32000R1346
LEGCIT	32005R0603
MODIFIES	32000R1346 Amendment Replacement Annex A from 07/05/2006 32000R1346 Amendment Replacement Annex B from 07/05/2006 32000R1346 Amendment Replacement Annex C from 07/05/2006 52006PC0038 Adoption
SUB	Approximation of laws ; Justice and home affairs
REGISTER	19200000
PREPWORK	PR;COMM;CO 2006/0038 FIN
DATES	of document: 27/04/2006 of effect: 07/05/2006; Entry into force Date pub. + 1 See Art 2 end of validity: 99/99/9999

Council Regulation (EC) No 603/2005 of 12 April 2005 amending the lists of insolvency proceedings, winding-up proceedings and liquidators in Annexes A, B and C to Regulation (EC) No 1346/2000 on insolvency proceedings

Council Regulation (EC) No 603/2005

of 12 April 2005

amending the lists of insolvency proceedings, winding-up proceedings and liquidators in Annexes A, B and C to Regulation (EC) No 1346/2000 on insolvency proceedings

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings [1], and in particular Article 45 thereof,

Having regard to the proposal from the Commission,

Whereas:

(1) The Annexes to Regulation (EC) No 1346/2000 list the designations given in the national legislation of the Member States to the proceedings and liquidators to which that Regulation applies. Annex A to that Regulation lists the insolvency proceedings referred to in Article 2(a) of that Regulation. Annex B of that Regulation lists the winding-up proceedings referred to in Article 2(c) and Annex C of that Regulation lists the liquidators referred to in Article 2(b) of that Regulation.

(2) Annexes A, B and C to Regulation (EC) No 1346/2000 were amended by the 2003 Act of Accession so as to include the insolvency proceedings, the winding-up proceedings and the liquidators of the new Member States.

(3) Belgium, Spain, Italy, Latvia, Lithuania, Malta, Hungary, Austria, Poland, Portugal and the United Kingdom have notified the Commission, pursuant to Article 45 of Regulation (EC) No 1346/2000, of amendments to the lists set out in Annexes A, B and C to that Regulation.

(4) The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community, have given notice of their wish to take part in the adoption and application of this Regulation.

(5) Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, is not participating in the adoption of this Regulation, and is therefore not bound by it nor subject to its application.

(6) Regulation (EC) No 1346/2000 should therefore be amended accordingly,

HAS ADOPTED THIS REGULATION:

Article 1

Regulation (EC) No 1346/2000 is amended as follows:

1. Annex A is replaced by the text set out in Annex I to this Regulation;

2. Annex B is replaced by the text set out in Annex II to this Regulation;

3. Annex C is replaced by the text set out in Annex III to this Regulation.

Article 2

This Regulation shall enter into force on the day following its publication in the Official Journal of the European Union.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

Done at Luxembourg, 12 April 2005.

For the Council

The President

J.-C. Juncker

[1] OJ L 160, 30.6.2000, p. 1. Regulation as amended by the 2003 Act of Accession.

ANNEX I

ANNEX II

ANNEX III

DOCNUM	32005R0603
AUTHOR	Council
FORM	Regulation
TREATY	European Community
PUBREF	OJ L 100, 20.4.2005, p. 1-8 (ES, CS, DA, DE, ET, EL, EN, FR, IT, LV, LT, HU, NL, PL, PT, SK, SL, FI, SV) OJ L 159M , 13.6.2006, p. 377-384 (MT)

PUB	2005/04/20
DOC	2005/04/12
INFORCE	2005/04/21=EV
ENDVAL	9999/99/99
LEGBASE	32000R1346
LEGCIT	11997D/PRO/04 11997D/PRO/05
MODIFIES	32000R1346 Amendment Replacement Annex A from 21/04/2005 32000R1346 Amendment Replacement Annex B from 21/04/2005 32000R1346 Amendment Replacement Annex C from 21/04/2005
MODIFIED	Corrected by 32005R0603R(01)
SUB	Justice and home affairs
REGISTER	19200000
PREPWORK	PR;COMM;CO 2004/0827 FIN
MISCINF	N/APPL DK APPL GB APPL IRL
DATES	of document: 12/04/2005 of effect: 21/04/2005; Entry into force Date pub. See Art 2 end of validity: 99/99/9999

Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims

Regulation (EC) No 805/2004 of the European Parliament and of the Council

of 21 April 2004

creating a European Enforcement Order for uncontested claims

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 61(c) and the second indent of Article 67(5) thereof,

Having regard to the proposal from the Commission(1),

Having regard to the Opinion of the European Economic and Social Committee(2),

Acting in accordance with the procedure laid down in Article 251 of the Treaty(3),

Whereas:

(1) The Community has set itself the objective of maintaining and developing an area of freedom, security and justice, in which the free movement of persons is ensured. To this end, the Community is to adopt, inter alia, measures in the field of judicial cooperation in civil matters that are necessary for the proper functioning of the internal market.

(2) On 3 December 1998, the Council adopted an Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice(4) (the Vienna Action Plan).

(3) The European Council meeting in Tampere on 15 and 16 October 1999 endorsed the principle of mutual recognition of judicial decisions as the cornerstone for the creation of a genuine judicial area.

(4) On 30 November 2000, the Council adopted a programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters(5). This programme includes in its first stage the abolition of exequatur, that is to say, the creation of a European Enforcement Order for uncontested claims.

(5) The concept of "uncontested claims" should cover all situations in which a creditor, given the verified absence of any dispute by the debtor as to the nature or extent of a pecuniary claim, has obtained either a court decision against that debtor or an enforceable document that requires the debtor's express consent, be it a court settlement or an authentic instrument.

(6) The absence of objections from the debtor as stipulated in Article 3(1)(b) can take the shape of default of appearance at a court hearing or of failure to comply with an invitation by the court to give written notice of an intention to defend the case.

(7) This Regulation should apply to judgments, court settlements and authentic instruments on uncontested claims and to decisions delivered following challenges to judgments, court settlements and authentic instruments certified as European Enforcement Orders.

(8) In its Tampere conclusions, the European Council considered that access to enforcement in a Member State other than that in which the judgment has been given should be accelerated and simplified by dispensing with any intermediate measures to be taken prior to enforcement in the Member State in which enforcement is sought. A judgment that has been certified as a European Enforcement Order by the court of origin should, for enforcement purposes, be treated as if

it had been delivered in the Member State in which enforcement is sought. In the United Kingdom, for example, the registration of a certified foreign judgment will therefore follow the same rules as the registration of a judgment from another part of the United Kingdom and is not to imply a review as to the substance of the foreign judgment. Arrangements for the enforcement of judgments should continue to be governed by national law.

(9) Such a procedure should offer significant advantages as compared with the exequatur procedure provided for in Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters(6), in that there is no need for approval by the judiciary in a second Member State with the delays and expenses that this entails.

(10) Where a court in a Member State has given judgment on an uncontested claim in the absence of participation of the debtor in the proceedings, the abolition of any checks in the Member State of enforcement is inextricably linked to and dependent upon the existence of a sufficient guarantee of observance of the rights of the defence.

(11) This Regulation seeks to promote the fundamental rights and takes into account the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, it seeks to ensure full respect for the right to a fair trial as recognised in Article 47 of the Charter.

(12) Minimum standards should be established for the proceedings leading to the judgment in order to ensure that the debtor is informed about the court action against him, the requirements for his active participation in the proceedings to contest the claim and the consequences of his non-participation in sufficient time and in such a way as to enable him to arrange for his defence.

(13) Due to differences between the Member States as regards the rules of civil procedure and especially those governing the service of documents, it is necessary to lay down a specific and detailed definition of those minimum standards. In particular, any method of service that is based on a legal fiction as regards the fulfilment of those minimum standards cannot be considered sufficient for the certification of a judgment as a European Enforcement Order.

(14) All the methods of service listed in Articles 13 and 14 are characterised by either full certainty (Article 13) or a very high degree of likelihood (Article 14) that the document served has reached its addressee. In the second category, a judgment should only be certified as a European Enforcement Order if the Member State of origin has an appropriate mechanism in place enabling the debtor to apply for a full review of the judgment under the conditions set out in Article 19 in those exceptional cases where, in spite of compliance with Article 14, the document has not reached the addressee.

(15) Personal service on certain persons other than the debtor himself pursuant to Article 14(1)(a) and (b) should be understood to meet the requirements of those provisions only if those persons actually accepted/received the document in question.

(16) Article 15 should apply to situations where the debtor cannot represent himself in court, as in the case of a legal person, and where a person to represent him is determined by law as well as situations where the debtor has authorised another person, in particular a lawyer, to represent him in the specific court proceedings at issue.

(17) The courts competent for scrutinising full compliance with the minimum procedural standards should, if satisfied, issue a standardised European Enforcement Order certificate that makes that scrutiny and its result transparent.

(18) Mutual trust in the administration of justice in the Member States justifies the assessment

by the court of one Member State that all conditions for certification as a European Enforcement Order are fulfilled to enable a judgment to be enforced in all other Member States without judicial review of the proper application of the minimum procedural standards in the Member State where the judgment is to be enforced.

(19) This Regulation does not imply an obligation for the Member States to adapt their national legislation to the minimum procedural standards set out herein. It provides an incentive to that end by making available a more efficient and rapid enforceability of judgments in other Member States only if those minimum standards are met.

(20) Application for certification as a European Enforcement Order for uncontested claims should be optional for the creditor, who may instead choose the system of recognition and enforcement under Regulation (EC) No 44/2001 or other Community instruments.

(21) When a document has to be sent from one Member State to another for service there, this Regulation and in particular the rules on service set out herein should apply together with 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(7), and in particular Article 14 thereof in conjunction with Member States declarations made under Article 23 thereof.

(22) Since the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the action, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.

(23) The measures necessary for the implementation of this Regulation should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission(8).

(24) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community, the United Kingdom and Ireland have notified their wish to take part in the adoption and application of this Regulation.

(25) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, Denmark does not take part in the adoption of this Regulation, and is therefore not bound by it or subject to its application.

(26) Pursuant to the second indent of Article 67(5) of the Treaty, the codecision procedure is applicable from 1 February 2003 for the measures laid down in this Regulation,

HAVE ADOPTED THIS REGULATION:

CHAPTER I

SUBJECT MATTER, SCOPE AND DEFINITIONS

Article 1

Subject matter

The purpose of this Regulation is to create a European Enforcement Order for uncontested claims

to permit, by laying down minimum standards, the free circulation of judgments, court settlements and authentic instruments throughout all Member States without any intermediate proceedings needing to be brought in the Member State of enforcement prior to recognition and enforcement.

Article 2

Scope

1. This Regulation shall apply in civil and commercial matters, whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters or the liability of the State for acts and omissions in the exercise of State authority ("acta iure imperii").

2. This Regulation shall not apply to:

(a) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession;

(b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;

(c) social security;

(d) arbitration.

3. In this Regulation, the term "Member State" shall mean Member States with the exception of Denmark.

Article 3

Enforcement titles to be certified as a European Enforcement Order

1. This Regulation shall apply to judgments, court settlements and authentic instruments on uncontested claims.

A claim shall be regarded as uncontested if:

(a) the debtor has expressly agreed to it by admission or by means of a settlement which has been approved by a court or concluded before a court in the course of proceedings; or

(b) the debtor has never objected to it, in compliance with the relevant procedural requirements under the law of the Member State of origin, in the course of the court proceedings; or

(c) the debtor has not appeared or been represented at a court hearing regarding that claim after having initially objected to the claim in the course of the court proceedings, provided that such conduct amounts to a tacit admission of the claim or of the facts alleged by the creditor under the law of the Member State of origin; or

(d) the debtor has expressly agreed to it in an authentic instrument.

2. This Regulation shall also apply to decisions delivered following challenges to judgments, court settlements or authentic instruments certified as European Enforcement Orders.

Article 4

Definitions

For the purposes of this Regulation, the following definitions shall apply:

1. "judgment": any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court;

2. "claim": a claim for payment of a specific sum of money that has fallen due or for which the due date is indicated in the judgment, court settlement or authentic instrument;

3. "authentic instrument":

(a) a document which has been formally drawn up or registered as an authentic instrument, and the authenticity of which:

(i) relates to the signature and the content of the instrument; and

(ii) has been established by a public authority or other authority empowered for that purpose by the Member State in which it originates;

or

b) an arrangement relating to maintenance obligations concluded with administrative authorities or authenticated by them;

4. "Member State of origin": the Member State in which the judgment has been given, the court settlement has been approved or concluded or the authentic instrument has been drawn up or registered, and is to be certified as a European Enforcement Order;

5. "Member State of enforcement": the Member State in which enforcement of the judgment, court settlement or authentic instrument certified as a European Enforcement Order is sought;

6. "court of origin": the court or tribunal seised of the proceedings at the time of fulfilment of the conditions set out in Article 3(1)(a), (b) or (c);

7. in Sweden, in summary proceedings concerning orders to pay (betalningsföreläggande), the expression "court" includes the Swedish enforcement service (kronofogdemyndighet).

CHAPTER II

EUROPEAN ENFORCEMENT ORDER

Article 5

Abolition of exequatur

A judgment which has been certified as a European Enforcement Order in the Member State of origin shall be recognised and enforced in the other Member States without the need for a declaration of enforceability and without any possibility of opposing its recognition.

Article 6

Requirements for certification as a European Enforcement Order

1. A judgment on an uncontested claim delivered in a Member State shall, upon application at any time to the court of origin, be certified as a European Enforcement Order if:

(a) the judgment is enforceable in the Member State of origin; and

(b) the judgment does not conflict with the rules on jurisdiction as laid down in sections 3 and 6 of Chapter II of Regulation (EC) No 44/2001; and

(c) the court proceedings in the Member State of origin met the requirements as set out in Chapter III where a claim is uncontested within the meaning of Article 3(1)(b) or (c); and

(d) the judgment was given in the Member State of the debtor's domicile within the meaning of Article 59 of Regulation (EC) No 44/2001, in cases where

- a claim is uncontested within the meaning of Article 3(1)(b) or (c); and

- it relates to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession; and

- the debtor is the consumer.

2. Where a judgment certified as a European Enforcement Order has ceased to be enforceable or its enforceability has been suspended or limited, a certificate indicating the lack or limitation of enforceability shall, upon application at any time to the court of origin, be issued, using the standard form in Annex IV.

3. Without prejudice to Article 12(2), where a decision has been delivered following a challenge to a judgment certified as a European Enforcement Order in accordance with paragraph 1 of this Article, a replacement certificate shall, upon application at any time, be issued, using the standard form in Annex V, if that decision on the challenge is enforceable in the Member State of origin.

Article 7

Costs related to court proceedings

Where a judgment includes an enforceable decision on the amount of costs related to the court proceedings, including the interest rates, it shall be certified as a European Enforcement Order also with regard to the costs unless the debtor has specifically objected to his obligation to bear such costs in the course of the court proceedings, in accordance with the law of the Member State of origin.

Article 8

Partial European Enforcement Order certificate

If only parts of the judgment meet the requirements of this Regulation, a partial European Enforcement Order certificate shall be issued for those parts.

Article 9

Issue of the European Enforcement Order certificate

1. The European Enforcement Order certificate shall be issued using the standard form in Annex I.

2. The European Enforcement Order certificate shall be issued in the language of the judgment.

Article 10

Rectification or withdrawal of the European Enforcement Order certificate

1. The European Enforcement Order certificate shall, upon application to the court of origin, be

(a) rectified where, due to a material error, there is a discrepancy between the judgment and the certificate;

(b) withdrawn where it was clearly wrongly granted, having regard to the requirements laid down in this Regulation.

2. The law of the Member State of origin shall apply to the rectification or withdrawal of the European Enforcement Order certificate.

3. An application for the rectification or withdrawal of a European Enforcement Order certificate may be made using the standard form in Annex VI.

4. No appeal shall lie against the issuing of a European Enforcement Order certificate.

Article 11

Effect of the European Enforcement Order certificate

The European Enforcement Order certificate shall take effect only within the limits of the enforceability of the judgment.

CHAPTER III

MINIMUM STANDARDS FOR UNCONTESTED CLAIMS PROCEDURES

Article 12

Scope of application of minimum standards

1. A judgment on a claim that is uncontested within the meaning of Article 3(1)(b) or (c) can be certified as a European Enforcement Order only if the court proceedings in the Member State of origin met the procedural requirements as set out in this Chapter.

2. The same requirements shall apply to the issuing of a European Enforcement Order certificate

or a replacement certificate within the meaning of Article 6(3) for a decision following a challenge to a judgment where, at the time of that decision, the conditions of Article 3(1)(b) or (c) are fulfilled.

Article 13

Service with proof of receipt by the debtor

1. The document instituting the proceedings or an equivalent document may have been served on the debtor by one of the following methods:

(a) personal service attested by an acknowledgement of receipt, including the date of receipt, which is signed by the debtor;

(b) personal service attested by a document signed by the competent person who effected the service stating that the debtor has received the document or refused to receive it without any legal justification, and the date of the service;

(c) postal service attested by an acknowledgement of receipt including the date of receipt, which is signed and returned by the debtor;

(d) service by electronic means such as fax or e-mail, attested by an acknowledgement of receipt including the date of receipt, which is signed and returned by the debtor.

2. Any summons to a court hearing may have been served on the debtor in compliance with paragraph 1 or orally in a previous court hearing on the same claim and stated in the minutes of that previous court hearing.

Article 14

Service without proof of receipt by the debtor

1. Service of the document instituting the proceedings or an equivalent document and any summons to a court hearing on the debtor may also have been effected by one of the following methods:

(a) personal service at the debtor's personal address on persons who are living in the same household as the debtor or are employed there;

(b) in the case of a self-employed debtor or a legal person, personal service at the debtor's business premises on persons who are employed by the debtor;

(c) deposit of the document in the debtor's mailbox;

(d) deposit of the document at a post office or with competent public authorities and the placing in the debtor's mailbox of written notification of that deposit, provided that the written notification clearly states the character of the document as a court document or the legal effect of the notification as effecting service and setting in motion the running of time for the purposes of time limits;

(e) postal service without proof pursuant to paragraph 3 where the debtor has his address in the Member State of origin;

(f) electronic means attested by an automatic confirmation of delivery, provided that the debtor has expressly accepted this method of service in advance.

2. For the purposes of this Regulation, service under paragraph 1 is not admissible if the debtor's address is not known with certainty.

3. Service pursuant to paragraph 1, (a) to (d), shall be attested by:

(a) a document signed by the competent person who effected the service, indicating:

(i) the method of service used; and

(ii) the date of service; and

(iii) where the document has been served on a person other than the debtor, the name of that person and his relation to the debtor,

or

b) an acknowledgement of receipt by the person served, for the purposes of paragraphs 1(a) and (b).

Article 15

Service on the debtor's representatives

Service pursuant to Articles 13 or 14 may also have been effected on a debtor's representative.

Article 16

Provision to the debtor of due information about the claim

In order to ensure that the debtor was provided with due information about the claim, the document instituting the proceedings or the equivalent document must have contained the following:

(a) the names and the addresses of the parties;

(b) the amount of the claim;

(c) if interest on the claim is sought, the interest rate and the period for which interest is sought unless statutory interest is automatically added to the principal under the law of the Member State of origin;

(d) a statement of the reason for the claim.

Article 17

Provision to the debtor of due information about the procedural steps necessary to contest the claim

The following must have been clearly stated in or together with the document instituting the proceedings, the equivalent document or any summons to a court hearing:

(a) the procedural requirements for contesting the claim, including the time limit for contesting the claim in writing or the time for the court hearing, as applicable, the name and the address of the institution to which to respond or before which to appear, as applicable, and whether it is mandatory to be represented by a lawyer;

(b) the consequences of an absence of objection or default of appearance, in particular, where applicable, the possibility that a judgment may be given or enforced against the debtor and the liability for costs related to the court proceedings.

Article 18

Cure of non-compliance with minimum standards

1. If the proceedings in the Member State of origin did not meet the procedural requirements as set out in Articles 13 to 17, such non-compliance shall be cured and a judgment may be certified as a European Enforcement Order if:

(a) the judgment has been served on the debtor in compliance with the requirements pursuant to Article 13 or Article 14; and

(b) it was possible for the debtor to challenge the judgment by means of a full review and the debtor has been duly informed in or together with the judgment about the procedural requirements for such a challenge, including the name and address of the institution with which it must be lodged and, where applicable, the time limit for so doing; and

(c) the debtor has failed to challenge the judgment in compliance with the relevant procedural requirements.

2. If the proceedings in the Member State of origin did not comply with the procedural requirements as set out in Article 13 or Article 14, such non-compliance shall be cured if it is proved by the conduct of the debtor in the court proceedings that he has personally received the document to be served in sufficient time to arrange for his defence.

Article 19

Minimum standards for review in exceptional cases

1. Further to Articles 13 to 18, a judgment can only be certified as a European Enforcement Order if the debtor is entitled, under the law of the Member State of origin, to apply for a review of the judgment where:

(a) (i) the document instituting the proceedings or an equivalent document or, where applicable, the summons to a court hearing, was served by one of the methods provided for in Article 14; and

(ii) service was not effected in sufficient time to enable him to arrange for his defence, without any fault on his part;

or

(b) the debtor was prevented from objecting to the claim by reason of force majeure, or due to extraordinary circumstances without any fault on his part,

provided in either case that he acts promptly.

2. This Article is without prejudice to the possibility for Member States to grant access to a review of the judgment under more generous conditions than those mentioned in paragraph 1.

CHAPTER IV

ENFORCEMENT

Article 20

Enforcement procedure

1. Without prejudice to the provisions of this Chapter, the enforcement procedures shall be governed by the law of the Member State of enforcement.

A judgment certified as a European Enforcement Order shall be enforced under the same conditions as a judgment handed down in the Member State of enforcement.

2. The creditor shall be required to provide the competent enforcement authorities of the Member State of enforcement with:

(a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity; and

(b) a copy of the European Enforcement Order certificate which satisfies the conditions necessary to establish its authenticity; and

(c) where necessary, a transcription of the European Enforcement Order certificate or a translation thereof into the official language of the Member State of enforcement or, if there are several official languages in that Member State, the official language or one of the official languages of court proceedings of the place where enforcement is sought, in conformity with the law of that Member State, or into another language that the Member State of enforcement has indicated it can accept. Each Member State may indicate the official language or languages of the institutions of the European Community other than its own which it can accept for the completion of the certificate. The translation shall be certified by a person qualified to do so in one of the Member States.

3. No security, bond or deposit, however described, shall be required of a party who in one Member State applies for enforcement of a judgment certified as a European Enforcement Order in another Member State on the ground that he is a foreign national or that he is not domiciled or resident in the Member State of enforcement.

Article 21

Refusal of enforcement

1. Enforcement shall, upon application by the debtor, be refused by the competent court in the Member State of enforcement if the judgment certified as a European Enforcement Order is irreconcilable with an earlier judgment given in any Member State or in a third country, provided that:

(a) the earlier judgment involved the same cause of action and was between the same parties; and

(b) the earlier judgment was given in the Member State of enforcement or fulfils the conditions necessary for its recognition in the Member State of enforcement; and

(c) the irreconcilability was not and could not have been raised as an objection in the court proceedings in the Member State of origin.

2. Under no circumstances may the judgment or its certification as a European Enforcement Order be reviewed as to their substance in the Member State of enforcement.

Article 22

Agreements with third countries

This Regulation shall not affect agreements by which Member States undertook, prior to the entry into force of Regulation (EC) No 44/2001, pursuant to Article 59 of the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, not to recognise judgments given, in particular in other Contracting States to that Convention, against defendants domiciled or habitually resident in a third country where, in cases provided for in Article 4 of that Convention, the judgment could only be founded on a ground of jurisdiction specified in the second paragraph of Article 3 of that Convention.

Article 23

Stay or limitation of enforcement

Where the debtor has

- challenged a judgment certified as a European Enforcement Order, including an application for review within the meaning of Article 19, or

- applied for the rectification or withdrawal of a European Enforcement Order certificate in accordance with Article 10,

the competent court or authority in the Member State of enforcement may, upon application by the debtor:

(a) limit the enforcement proceedings to protective measures; or

(b) make enforcement conditional on the provision of such security as it shall determine; or

(c) under exceptional circumstances, stay the enforcement proceedings.

CHAPTER V

COURT SETTLEMENTS AND AUTHENTIC INSTRUMENTS

Article 24

Court settlements

1. A settlement concerning a claim within the meaning of Article 4(2) which has been approved by a court or concluded before a court in the course of proceedings and is enforceable in the Member State in which it was approved or concluded shall, upon application to the court that approved it or before which it was concluded, be certified as a European Enforcement Order using the standard form in Annex II.

2. A settlement which has been certified as a European Enforcement Order in the Member State of origin shall be enforced in the other Member States without the need for a declaration of enforceability and without any possibility of opposing its enforceability.

3. The provisions of Chapter II, with the exception of Articles 5, 6(1) and 9(1), and of Chapter

IV, with the exception of Articles 21(1) and 22, shall apply as appropriate.

Article 25

Authentic instruments

1. An authentic instrument concerning a claim within the meaning of Article 4(2) which is enforceable in one Member State shall, upon application to the authority designated by the Member State of origin, be certified as a European Enforcement Order, using the standard form in Annex III.

2. An authentic instrument which has been certified as a European Enforcement Order in the Member State of origin shall be enforced in the other Member States without the need for a declaration of enforceability and without any possibility of opposing its enforceability.

3. The provisions of Chapter II, with the exception of Articles 5, 6(1) and 9(1), and of Chapter IV, with the exception of Articles 21(1) and 22, shall apply as appropriate.

CHAPTER VI

TRANSITIONAL PROVISION

Article 26

Transitional provision

This Regulation shall apply only to judgments given, to court settlements approved or concluded and to documents formally drawn up or registered as authentic instruments after the entry into force of this Regulation.

CHAPTER VII

RELATIONSHIP WITH OTHER COMMUNITY INSTRUMENTS

Article 27

Relationship with Regulation (EC) No 44/2001

This Regulation shall not affect the possibility of seeking recognition and enforcement, in accordance with Regulation (EC) No 44/2001, of a judgment, a court settlement or an authentic instrument on an uncontested claim.

Article 28

Relationship with Regulation (EC) No 1348/2000

This Regulation shall not affect the application of Regulation (EC) No 1348/2000.

CHAPTER VIII

GENERAL AND FINAL PROVISIONS

Article 29

Information on enforcement procedures and authorities

The Member States shall cooperate to provide the general public and professional circles with information on:

(a) the methods and procedures of enforcement in the Member States; and

(b) the competent authorities for enforcement in the Member States,

in particular via the European Judicial Network in civil and commercial matters established in accordance with Decision 2001/470/EC(9).

Article 30

Information relating to redress procedures, languages and authorities

1. The Member States shall notify the Commission of:

(a) the procedures for rectification and withdrawal referred to in Article 10(2) and for review referred to in Article 19(1);

(b) the languages accepted pursuant to Article 20(2)(c);

(c) the lists of the authorities referred to in Article 25;

and any subsequent changes thereof.

2. The Commission shall make the information notified in accordance with paragraph 1 publicly available through publication in the Official Journal of the European Union and through any other appropriate means.

Article 31

Amendments to the Annexes

Any amendment to the standard forms in the Annexes shall be adopted in accordance with the advisory procedure referred to in Article 32(2).

Article 32

Committee

1. The Commission shall be assisted by the committee provided for by Article 75 of Regulation (EC) No 44/2001.

2. Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

3. The Committee shall adopt its Rules of Procedure.

Article 33

Entry into force

This Regulation shall enter into force on 21 January 2004.

It shall apply from 21 October 2005, with the exception of Articles 30, 31 and 32, which shall apply from 21 January 2005.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

Done at Strasbourg, 21 April 2004.

For the European Parliament

The President

P. Cox

For the Council

The President

D. Roche

(1) OJ C 203 E, 27.8.2002, p. 86.

(2) OJ C 85, 8.4.2003, p. 1.

(3) Opinion of the European Parliament of 8 April 2003 (OJ C 64 E, 12.3.2004, p. 79), Council Common Position of 6.2.2004 (not yet published in the Official Journal) and Position of the European Parliament of 30.3.2004 (not yet published in the Official Journal).

(4) OJ C 19, 23.1.1999, p. 1.

(5) OJ C 12, 15.1.2001, p. 1.

(6) OJ L 12, 16.1.2001, p. 1. Regulation as last amended by Commission Regulation (EC) No 1496/2002 (OJ L 225, 22.8.2002, p. 13).

(7) OJ L 160, 30.6.2000, p. 37.

(8) OJ L 184, 17.7.1999, p. 23.

(9) OJ L 174, 27.6.2001, p. 25.

ANNEX I

EUROPEAN ENFORCEMENT ORDER CERTIFICATE - JUDGMENT

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ANNEX II

EUROPEAN ENFORCEMENT ORDER CERTIFICATE - COURT SETTLEMENT

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ANNEX III

EUROPEAN ENFORCEMENT ORDER CERTIFICATE - AUTHENTIC INSTRUMENT

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ANNEX IV

CERTIFICATE OF LACK OR LIMITATION OF ENFORCEABILITY (Article 6(2))

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ANNEX V

EUROPEAN ENFORCEMENT ORDER REPLACEMENT CERTIFICATE FOLLOWING A CHALLENGE (Article 6(3))

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ANNEX VI

APPLICATION FOR RECTIFICATION OR WITHDRAWAL OF THE EUROPEAN ENFORCEMENT ORDER CERTIFICATE (Article 10(3))

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DOCNUM	32004R0805
AUTHOR	European Parliament ; Council
FORM	Regulation
TREATY	European Community
PUBREF	Official Journal L 143 , 30/04/2004 P. 0015 - 0039
PUB	2004/04/30
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INFORCE	2005/01/21=EV ; 2005/10/21=MA/PART ; 2005/01/21=MA/PART
ENDVAL	9999/99/99
LEGBASE	12002E061 12002E067 12002E251
LEGCIT	32001R0044 32000R1348 32001D0470 31999D0468
MODIFIES	52002PC0159 Adoption
MODIFIED	Corrected by 32004R0805R(01)
SUB	Justice and home affairs ; Approximation of laws
REGISTER	19200000
PREPWORK	PR;COMM;CO 2002/0159 FIN; JO C 203 E/2002 P 86 AV;CES;JO C 85/2003 P 1 PCODE;; AV;PE;JO C 64 E/2004 P 79 POCO;CONS;RENDU 06/02/2004 PO;PE;RENDU 30/03 /2004
MISCINF	COD 2002/0090
DATES	of document: 21/04/2004 of effect: 21/01/2005; Entry into force See Art 33.1 of effect: 21/10/2005; Partial implementation See Art 33.2 of effect: 21/01/2005; Partial implementation See Art 33.2 end of validity: 99/99/9999

Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure

Regulation (EC) No 1896/2006 of the European Parliament and of the Council

of 12 December 2006

creating a European order for payment procedure

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) thereof,

Having regard to the proposal from the Commission,

Having regard to the Opinion of the European Economic and Social Committee [1],

Acting in accordance with the procedure laid down in Article 251 of the Treaty [2],

Whereas:

(1) The Community has set itself the objective of maintaining and developing an area of freedom, security and justice in which the free movement of persons is ensured. For the gradual establishment of such an area, the Community is to adopt, inter alia, measures in the field of judicial cooperation in civil matters having cross-border implications and needed for the proper functioning of the internal market.

(2) According to Article 65(c) of the Treaty, these measures are to include measures eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.

(3) The European Council meeting in Tampere on 15 and 16 October 1999 invited the Council and the Commission to prepare new legislation on issues that are instrumental to smooth judicial cooperation and to enhanced access to law and specifically made reference, in that context, to orders for money payment.

(4) On 30 November 2000, the Council adopted a joint Commission and Council programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters [3]. The programme envisages the possibility of a specific, uniform or harmonised procedure laid down within the Community to obtain a judicial decision in specific areas including that of uncontested claims. This was taken forward by the Hague Programme, adopted by the European Council on 5 November 2004, which called for work to be actively pursued on the European order for payment.

(5) The Commission adopted a Green Paper on a European order for payment procedure and on measures to simplify and speed up small claims litigation on 20 December 2002. The Green Paper launched consultations on the possible objectives and features of a uniform or harmonised European procedure for the recovery of uncontested claims.

(6) The swift and efficient recovery of outstanding debts over which no legal controversy exists is of paramount importance for economic operators in the European Union, as late payments constitute a major reason for insolvency threatening the survival of businesses, particularly small and medium-sized enterprises, and resulting in numerous job losses.

(7) All Member States are trying to tackle the issue of mass recovery of uncontested claims, in the majority of States by means of a simplified order for payment procedure, but both the content of national legislation and the performance of domestic procedures vary substantially. Furthermore, the procedures currently in existence are frequently either inadmissible or impracticable in cross-border

cases.

(8) The resulting impediments to access to efficient justice in cross-border cases and the distortion of competition within the internal market due to imbalances in the functioning of procedural means afforded to creditors in different Member States necessitate Community legislation guaranteeing a level playing field for creditors and debtors throughout the European Union.

(9) The purpose of this Regulation is to simplify, speed up and reduce the costs of litigation in cross-border cases concerning uncontested pecuniary claims by creating a European order for payment procedure, and to permit the free circulation of European orders for payment throughout the Member States by laying down minimum standards, compliance with which renders unnecessary any intermediate proceedings in the Member State of enforcement prior to recognition and enforcement.

(10) The procedure established by this Regulation should serve as an additional and optional means for the claimant, who remains free to resort to a procedure provided for by national law. Accordingly, this Regulation neither replaces nor harmonises the existing mechanisms for the recovery of uncontested claims under national law.

(11) The procedure should be based, to the largest extent possible, on the use of standard forms in any communication between the court and the parties in order to facilitate its administration and enable the use of automatic data processing.

(12) When deciding which courts are to have jurisdiction to issue a European order for payment, Member States should take due account of the need to ensure access to justice.

(13) In the application for a European order for payment, the claimant should be obliged to provide information that is sufficient to clearly identify and support the claim in order to place the defendant in a position to make a well-informed choice either to oppose the claim or to leave it uncontested.

(14) In that context, it should be compulsory for the claimant to include a description of evidence supporting the claim. For that purpose the application form should include as exhaustive a list as possible of types of evidence that are usually produced in support of pecuniary claims.

(15) The lodging of an application for a European order for payment should entail the payment of any applicable court fees.

(16) The court should examine the application, including the issue of jurisdiction and the description of evidence, on the basis of the information provided in the application form. This would allow the court to examine prima facie the merits of the claim and inter alia to exclude clearly unfounded claims or inadmissible applications. The examination should not need to be carried out by a judge.

(17) There is to be no right of appeal against the rejection of the application. This does not preclude, however, a possible review of the decision rejecting the application at the same level of jurisdiction in accordance with national law.

(18) The European order for payment should apprise the defendant of his options to pay the amount awarded to the claimant or to send a statement of opposition within a time limit of 30 days if he wishes to contest the claim. In addition to being provided with full information concerning the claim as supplied by the claimant, the defendant should be advised of the legal significance of the European order for payment and in particular of the consequences of leaving the claim uncontested.

(19) Due to differences between Member States' rules of civil procedure and especially those governing the service of documents, it is necessary to lay down a specific and detailed definition of minimum standards that should apply in the context of the European order for payment procedure. In particular, as regards the fulfilment of those standards, any method based on legal fiction should not be considered sufficient for the service of the European order for payment.

(20) All the methods of service listed in Articles 13 and 14 are characterised by either complete certainty (Article 13) or a very high degree of likelihood (Article 14) that the document served has reached its addressee.

(21) Personal service on certain persons other than the defendant himself pursuant to Article 14(1)(a) and (b) should be deemed to meet the requirements of those provisions only if those persons actually accepted/received the European order for payment.

(22) Article 15 should apply to situations where the defendant cannot represent himself in court, as in the case of a legal person, and where a person authorised to represent him is determined by law, as well as to situations where the defendant has authorised another person, in particular a lawyer, to represent him in the specific court proceedings at issue.

(23) The defendant may submit his statement of opposition using the standard form set out in this Regulation. However, the courts should take into account any other written form of opposition if it is expressed in a clear manner.

(24) A statement of opposition filed within the time limit should terminate the European order for payment procedure and should lead to an automatic transfer of the case to ordinary civil proceedings unless the claimant has explicitly requested that the proceedings be terminated in that event. For the purposes of this Regulation the concept of ordinary civil proceedings should not necessarily be interpreted within the meaning of national law.

(25) After the expiry of the time limit for submitting the statement of opposition, in certain exceptional cases the defendant should be entitled to apply for a review of the European order for payment. Review in exceptional cases should not mean that the defendant is given a second opportunity to oppose the claim. During the review procedure the merits of the claim should not be evaluated beyond the grounds resulting from the exceptional circumstances invoked by the defendant. The other exceptional circumstances could include a situation where the European order for payment was based on false information provided in the application form.

(26) Court fees covered by Article 25 should not include for example lawyers' fees or costs of service of documents by an entity other than a court.

(27) A European order for payment issued in one Member State which has become enforceable should be regarded for the purposes of enforcement as if it had been issued in the Member State in which enforcement is sought. Mutual trust in the administration of justice in the Member States justifies the assessment by the court of one Member State that all conditions for issuing a European order for payment are fulfilled to enable the order to be enforced in all other Member States without judicial review of the proper application of minimum procedural standards in the Member State where the order is to be enforced. Without prejudice to the provisions of this Regulation, in particular the minimum standards laid down in Article 22(1) and (2) and Article 23, the procedures for the enforcement of the European order for payment should continue to be governed by national law.

(28) For the purposes of calculating time limits, Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits [4] should apply. The defendant should be advised of this and should be informed that account will be taken of the public holidays of the Member State in which the court issuing the European order for payment is situated.

(29) Since the objective of this Regulation, namely to establish a uniform rapid and efficient mechanism for the recovery of uncontested pecuniary claims throughout the European Union, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of the Regulation, be better achieved at Community level, the Community may adopt measures in

accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve that objective.

(30) The measures necessary for the implementation of this Regulation should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission [5].

(31) The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community, have given notice of their wish to take part in the adoption and application of this Regulation.

(32) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, Denmark does not take part in the adoption of this Regulation, and is not bound by it or subject to its application,

HAVE ADOPTED THIS REGULATION:

Article 1

Subject matter

1. The purpose of this Regulation is:

(a) to simplify, speed up and reduce the costs of litigation in cross-border cases concerning uncontested pecuniary claims by creating a European order for payment procedure;

and

(b) to permit the free circulation of European orders for payment throughout the Member States by laying down minimum standards, compliance with which renders unnecessary any intermediate proceedings in the Member State of enforcement prior to recognition and enforcement.

2. This Regulation shall not prevent a claimant from pursuing a claim within the meaning of Article 4 by making use of another procedure available under the law of a Member State or under Community law.

Article 2

Scope

1. This Regulation shall apply to civil and commercial matters in cross-border cases, whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters or the liability of the State for acts and omissions in the exercise of State authority ("acta iure imperii").

2. This Regulation shall not apply to:

(a) rights in property arising out of a matrimonial relationship, wills and succession;

(b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;

(c) social security;

(d) claims arising from non-contractual obligations, unless:

(i) they have been the subject of an agreement between the parties or there has been an admission of debt, or

(ii) they relate to liquidated debts arising from joint ownership of property.

3. In this Regulation, the term "Member State" shall mean Member States with the exception of Denmark.

Article 3

Cross-border cases

1. For the purposes of this Regulation, a cross-border case is one in which at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the court seised.

2. Domicile shall be determined in accordance with Articles 59 and 60 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [6].

3. The relevant moment for determining whether there is a cross-border case shall be the time when the application for a European order for payment is submitted in accordance with this Regulation.

Article 4

European order for payment procedure

The European order for payment procedure shall be established for the collection of pecuniary claims for a specific amount that have fallen due at the time when the application for a European order for payment is submitted.

Article 5

Definitions

For the purposes of this Regulation, the following definitions shall apply:

1) "Member State of origin" means the Member State in which a European order for payment is issued;

2) "Member State of enforcement" means the Member State in which enforcement of a European order for payment is sought;

3) "court" means any authority in a Member State with competence regarding European orders for payment or any other related matters;

4) "court of origin" means the court which issues a European order for payment.

Article 6

Jurisdiction

1. For the purposes of applying this Regulation, jurisdiction shall be determined in accordance with the relevant rules of Community law, in particular Regulation (EC) No 44/2001.

2. However, if the claim relates to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, and if the defendant is the consumer, only the courts in the Member State in which the defendant is domiciled, within the meaning of Article 59 of Regulation (EC) No 44/2001, shall have jurisdiction.

Article 7

Application for a European order for payment

1. An application for a European order for payment shall be made using standard form A as set out in Annex I.

2. The application shall state:

(a) the names and addresses of the parties, and, where applicable, their representatives, and of the court to which the application is made;

(b) the amount of the claim, including the principal and, where applicable, interest, contractual penalties and costs;

(c) if interest on the claim is demanded, the interest rate and the period of time for which that interest is demanded unless statutory interest is automatically added to the principal under the law of the Member State of origin;

(d) the cause of the action, including a description of the circumstances invoked as the basis of the claim and, where applicable, of the interest demanded;

(e) a description of evidence supporting the claim;

(f) the grounds for jurisdiction;

and

(g) the cross-border nature of the case within the meaning of Article 3.

3. In the application, the claimant shall declare that the information provided is true to the best of his knowledge and belief and shall acknowledge that any deliberate false statement could lead to appropriate penalties under the law of the Member State of origin.

4. In an Appendix to the application the claimant may indicate to the court that he opposes a transfer to ordinary civil proceedings within the meaning of Article 17 in the event of opposition by the defendant. This does not prevent the claimant from informing the court thereof subsequently, but in any event before the order is issued.

5. The application shall be submitted in paper form or by any other means of communication, including electronic, accepted by the Member State of origin and available to the court of origin.

6. The application shall be signed by the claimant or, where applicable, by his representative.

Where the application is submitted in electronic form in accordance with paragraph 5, it shall be signed in accordance with Article 2(2) of Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures [7]. The signature shall be recognised in the Member State of origin and may not be made subject to additional requirements.

However, such electronic signature shall not be required if and to the extent that an alternative electronic communications system exists in the courts of the Member State of origin which is available to a certain group of pre-registered authenticated users and which permits the identification of those users in a secure manner. Member States shall inform the Commission of such communications systems.

Article 8

Examination of the application

The court seised of an application for a European order for payment shall examine, as soon as possible and on the basis of the application form, whether the requirements set out in Articles 2, 3, 4, 6 and 7 are met and whether the claim appears to be founded. This examination may take the form of an automated procedure.

Article 9

Completion and rectification

1. If the requirements set out in Article 7 are not met and unless the claim is clearly unfounded or the application is inadmissible, the court shall give the claimant the opportunity to complete or rectify the application. The court shall use standard form B as set out in Annex II.

2. Where the court requests the claimant to complete or rectify the application, it shall specify a time limit it deems appropriate in the circumstances. The court may at its discretion extend that time limit.

Article 10

Modification of the application

1. If the requirements referred to in Article 8 are met for only part of the claim, the court shall inform the claimant to that effect, using standard form C as set out in Annex III. The claimant shall be invited to accept or refuse a proposal for a European order for payment for the amount specified by the court and shall be informed of the consequences of his decision. The claimant shall reply by returning standard form C sent by the court within a time limit specified by the court in accordance with Article 9(2).

2. If the claimant accepts the court's proposal, the court shall issue a European order for payment, in accordance with Article 12, for that part of the claim accepted by the claimant. The consequences with respect to the remaining part of the initial claim shall be governed by national law.

3. If the claimant fails to send his reply within the time limit specified by the court or refuses

the court's proposal, the court shall reject the application for a European order for payment in its entirety.

Article 11

Rejection of the application

1. The court shall reject the application if:

(a) the requirements set out in Articles 2, 3, 4, 6 and 7 are not met;

or

(b) the claim is clearly unfounded;

or

(c) the claimant fails to send his reply within the time limit specified by the court under Article 9(2);

or

(d) the claimant fails to send his reply within the time limit specified by the court or refuses the court's proposal, in accordance with Article 10.

The claimant shall be informed of the grounds for the rejection by means of standard form D as set out in Annex IV.

2. There shall be no right of appeal against the rejection of the application.

3. The rejection of the application shall not prevent the claimant from pursuing the claim by means of a new application for a European order for payment or of any other procedure available under the law of a Member State.

Article 12

Issue of a European order for payment

1. If the requirements referred to in Article 8 are met, the court shall issue, as soon as possible and normally within 30 days of the lodging of the application, a European order for payment using standard form E as set out in Annex V.

The 30-day period shall not include the time taken by the claimant to complete, rectify or modify the application.

2. The European order for payment shall be issued together with a copy of the application form. It shall not comprise the information provided by the claimant in Appendices 1 and 2 to form A.

3. In the European order for payment, the defendant shall be advised of his options to:

(a) pay the amount indicated in the order to the claimant;

or

(b) oppose the order by lodging with the court of origin a statement of opposition, to be sent within 30 days of service of the order on him.

4. In the European order for payment, the defendant shall be informed that:

(a) the order was issued solely on the basis of the information which was provided by the claimant and was not verified by the court;

(b) the order will become enforceable unless a statement of opposition has been lodged with the court in accordance with Article 16;

(c) where a statement of opposition is lodged, the proceedings shall continue before the competent courts of the Member State of origin in accordance with the rules of ordinary civil procedure unless the claimant has explicitly requested that the proceedings be terminated in that event.

5. The court shall ensure that the order is served on the defendant in accordance with national law by a method that shall meet the minimum standards laid down in Articles 13, 14 and 15.

Article 13

Service with proof of receipt by the defendant

The European order for payment may be served on the defendant in accordance with the national law of the State in which the service is to be effected, by one of the following methods:

(a) personal service attested by an acknowledgement of receipt, including the date of receipt, which is signed by the defendant;

(b) personal service attested by a document signed by the competent person who effected the service stating that the defendant has received the document or refused to receive it without any legal justification, and the date of service;

(c) postal service attested by an acknowledgement of receipt, including the date of receipt, which is signed and returned by the defendant;

(d) service by electronic means such as fax or e-mail, attested by an acknowledgement of receipt, including the date of receipt, which is signed and returned by the defendant.

Article 14

Service without proof of receipt by the defendant

1. The European order for payment may also be served on the defendant in accordance with the national law of the State in which service is to be effected, by one of the following methods:

(a) personal service at the defendant's personal address on persons who are living in the same household as the defendant or are employed there;

(b) in the case of a self-employed defendant or a legal person, personal service at the defendant's business premises on persons who are employed by the defendant;

(c) deposit of the order in the defendant's mailbox;

(d) deposit of the order at a post office or with competent public authorities and the placing in the defendant's mailbox of written notification of that deposit, provided that the written notification clearly states the character of the document as a court document or the legal effect of the notification as effecting service and setting in motion the running of time for the purposes of time limits;

(e) postal service without proof pursuant to paragraph 3 where the defendant has his address in the Member State of origin;

(f) electronic means attested by an automatic confirmation of delivery, provided that the defendant has expressly accepted this method of service in advance.

2. For the purposes of this Regulation, service under paragraph 1 is not admissible if the defendant's address is not known with certainty.

3. Service pursuant to paragraph 1(a), (b), (c) and (d) shall be attested by:

(a) a document signed by the competent person who effected the service, indicating:

(i) the method of service used;

and

(ii) the date of service;

and

(iii) where the order has been served on a person other than the defendant, the name of that person and his relation to the defendant;

or

(b) an acknowledgement of receipt by the person served, for the purposes of paragraphs (1)(a) and (b).

Article 15

Service on a representative

Service pursuant to Articles 13 or 14 may also be effected on a defendant's representative.

Article 16

Opposition to the European order for payment

1. The defendant may lodge a statement of opposition to the European order for payment with the court of origin using standard form F as set out in Annex VI, which shall be supplied to him together with the European order for payment.

2. The statement of opposition shall be sent within 30 days of service of the order on the defendant.

3. The defendant shall indicate in the statement of opposition that he contests the claim, without having to specify the reasons for this.

4. The statement of opposition shall be submitted in paper form or by any other means of communication, including electronic, accepted by the Member State of origin and available to the court of origin.

5. The statement of opposition shall be signed by the defendant or, where applicable, by his representative. Where the statement of opposition is submitted in electronic form in accordance with paragraph 4, it shall be signed in accordance with Article 2(2) of Directive 1999/93/EC. The signature shall be recognised in the Member State of origin and may not be made subject to additional requirements.

However, such electronic signature shall not be required if and to the extent that an alternative electronic communications system exists in the courts of the Member State of origin which is available to a certain group of pre-registered authenticated users and which permits the identification of those users in a secure manner. Member States shall inform the Commission of such communications systems.

Article 17

Effects of the lodging of a statement of opposition

1. If a statement of opposition is entered within the time limit laid down in Article 16(2), the proceedings shall continue before the competent courts of the Member State of origin in accordance with the rules of ordinary civil procedure unless the claimant has explicitly requested that the proceedings be terminated in that event.

Where the claimant has pursued his claim through the European order for payment procedure, nothing under national law shall prejudice his position in subsequent ordinary civil proceedings.

2. The transfer to ordinary civil proceedings within the meaning of paragraph 1 shall be governed by the law of the Member State of origin.

3. The claimant shall be informed whether the defendant has lodged a statement of opposition and of any transfer to ordinary civil proceedings.

Article 18

Enforceability

1. If within the time limit laid down in Article 16(2), taking into account an appropriate period of time to allow a statement to arrive, no statement of opposition has been lodged with the court of origin, the court of origin shall without delay declare the European order for payment enforceable using standard form G as set out in Annex VII. The court shall verify the date of service.

2. Without prejudice to paragraph 1, the formal requirements for enforceability shall be governed by the law of the Member State of origin.

3. The court shall send the enforceable European order for payment to the claimant.

Article 19

Abolition of exequatur

A European order for payment which has become enforceable in the Member State of origin shall be recognised and enforced in the other Member States without the need for a declaration of enforceability and without any possibility of opposing its recognition.

Article 20

Review in exceptional cases

1. After the expiry of the time limit laid down in Article 16(2) the defendant shall be entitled to apply for a review of the European order for payment before the competent court in the Member State of origin where:

(a) (i) the order for payment was served by one of the methods provided for in Article 14,

and

(ii) service was not effected in sufficient time to enable him to arrange for his defence, without any fault on his part,

or

(b) the defendant was prevented from objecting to the claim by reason of force majeure or due to extraordinary circumstances without any fault on his part,

provided in either case that he acts promptly.

2. After expiry of the time limit laid down in Article 16(2) the defendant shall also be entitled to apply for a review of the European order for payment before the competent court in the Member State of origin where the order for payment was clearly wrongly issued, having regard to the requirements laid down in this Regulation, or due to other exceptional circumstances.

3. If the court rejects the defendant's application on the basis that none of the grounds for review referred to in paragraphs 1 and 2 apply, the European order for payment shall remain in force.

If the court decides that the review is justified for one of the reasons laid down in paragraphs 1 and 2, the European order for payment shall be null and void.

Article 21

Enforcement

1. Without prejudice to the provisions of this Regulation, enforcement procedures shall be governed by the law of the Member State of enforcement.

A European order for payment which has become enforceable shall be enforced under the same conditions as an enforceable decision issued in the Member State of enforcement.

2. For enforcement in another Member State, the claimant shall provide the competent enforcement authorities of that Member State with:

(a) a copy of the European order for payment, as declared enforceable by the court of origin, which satisfies the conditions necessary to establish its authenticity;

and

(b) where necessary, a translation of the European order for payment into the official language of the Member State of enforcement or, if there are several official languages in that Member State, the official language or one of the official languages of court proceedings of the place where enforcement is sought, in conformity with the law of that Member State, or into another language that the Member State of enforcement has indicated it can accept. Each Member State may indicate the official language or languages of the institutions of the European Union other than its own which it can accept for the European order for payment. The translation shall be certified by a person qualified to do so in one of the Member States.

3. No security, bond or deposit, however described, shall be required of a claimant who in one Member State applies for enforcement of a European order for payment issued in another Member State on the ground that he is a foreign national or that he is not domiciled or resident in the Member State of enforcement.

Article 22

Refusal of enforcement

1. Enforcement shall, upon application by the defendant, be refused by the competent court in the Member State of enforcement if the European order for payment is irreconcilable with an earlier decision or order previously given in any Member State or in a third country, provided that:

(a) the earlier decision or order involved the same cause of action between the same parties;

and

(b) the earlier decision or order fulfils the conditions necessary for its recognition in the Member State of enforcement;

and

(c) the irreconcilability could not have been raised as an objection in the court proceedings in the Member State of origin.

2. Enforcement shall, upon application, also be refused if and to the extent that the defendant has paid the claimant the amount awarded in the European order for payment.

3. Under no circumstances may the European order for payment be reviewed as to its substance in the Member State of enforcement.

Article 23

Stay or limitation of enforcement

Where the defendant has applied for a review in accordance with Article 20, the competent court in the Member State of enforcement may, upon application by the defendant:

(a) limit the enforcement proceedings to protective measures;

or

(b) make enforcement conditional on the provision of such security as it shall determine;

or

(c) under exceptional circumstances, stay the enforcement proceedings.

Article 24

Legal representation

Representation by a lawyer or another legal professional shall not be mandatory:

(a) for the claimant in respect of the application for a European order for payment;

(b) for the defendant in respect of the statement of opposition to a European order for payment.

Article 25

Court fees

1. The combined court fees of a European order for payment procedure and of the ordinary civil proceedings that ensue in the event of a statement of opposition to a European order for payment in a Member State shall not exceed the court fees of ordinary civil proceedings without a preceding European order for payment procedure in that Member State.

2. For the purposes of this Regulation, court fees shall comprise fees and charges to be paid to the court, the amount of which is fixed in accordance with national law.

Article 26

Relationship with national procedural law

All procedural issues not specifically dealt with in this Regulation shall be governed by national law.

Article 27

Relationship with Regulation (EC) No 1348/2000

This Regulation shall not affect the application of Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil and commercial matters [8].

Article 28

Information relating to service costs and enforcement

Member States shall cooperate to provide the general public and professional circles with information on:

(a) costs of service of documents;

and

(b) which authorities have competence with respect to enforcement for the purposes of applying Articles 21, 22 and 23,

in particular via the European Judicial Network in civil and commercial matters established in accordance with Council Decision 2001/470/EC [9].

Article 29

Information relating to jurisdiction, review procedures, means of communication and languages

1. By 12 June 2008, Member States shall communicate to the Commission:

(a) which courts have jurisdiction to issue a European order for payment;

(b) the review procedure and the competent courts for the purposes of the application of Article 20;

(c) the means of communication accepted for the purposes of the European order for payment procedure and available to the courts;

(d) languages accepted pursuant to Article 21(2)(b).

Member States shall apprise the Commission of any subsequent changes to this information.

2. The Commission shall make the information notified in accordance with paragraph 1 publicly available through publication in the Official Journal of the European Union and through any other appropriate means.

Article 30

Amendments to the Annexes

The standard forms set out in the Annexes shall be updated or technically adjusted, ensuring full conformity with the provisions of this Regulation, in accordance with the procedure referred to in Article 31(2).

Article 31

Committee

1. The Commission shall be assisted by the committee established by Article 75 of Regulation (EC) No 44/2001.

2. Where reference is made to this paragraph, Article 5a(1)-(4) and Article 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

3. The Committee shall adopt its Rules of Procedure.

Article 32

Review

By 12 December 2013, the Commission shall present to the European Parliament, the Council and the European Economic and Social Committee a detailed report reviewing the operation of the European order for payment procedure. That report shall contain an assessment of the procedure as it has operated and an extended impact assessment for each Member State.

To that end, and in order to ensure that best practice in the European Union is duly taken into account and reflects the principles of better legislation, Member States shall provide the Commission with information relating to the cross-border operation of the European order for payment. This information shall cover court fees, speed of the procedure, efficiency, ease of use and the internal payment order procedures of the Member States.

The Commission's report shall be accompanied, if appropriate, by proposals for adaptation.

Article 33

Entry into force

This Regulation shall enter into force on the day following the date of its publication in the Official Journal of the European Union.

It shall apply from 12 December 2008, with the exception of Articles 28, 29, 30 and 31 which shall apply from 12 June 2008.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

Done at Strasbourg, 12 December 2006.

For the European Parliament

The President

J. Borrell Fontelles

For the Council

The President

M. Pekkarinen

[1] OJ C 221, 8.9.2005, p. 77.

[2] Opinion of the European Parliament of 13 December 2005 (not yet published in the Official Journal), Council Common Position of 30 June 2006 (not yet published in the Official Journal) and Position of the European Parliament of 25 October 2006. Council Decision of 11 December 2006.

[3] OJ C 12, 15.1.2001, p. 1.

[4] OJ L 124, 8.6.1971, p. 1.

[5] OJ L 184, 17.7.1999, p. 23. Decision as amended by Decision 2006/512/EC (OJ L 200, 22.7.2006, p. 11).

[6] OJ L 12, 16.1.2001, p. 1. Regulation as last amended by Commission Regulation (EC) No 2245/2004 (OJ L 381, 28.12.2004, p. 10).

[7] OJ L 13, 19.1.2000, p. 12.

[8] OJ L 160, 30.6.2000, p. 37.

[9] OJ L 174, 27.6.2001, p. 25.

ANNEX I

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ANNEX VI

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ANNEX VII

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Corrigendum to Regulation 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (OJ L 399, 30.12.2006)

Corrigendum to Regulation 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure

(Official Journal of the European Union L 399 of 30 December 2006)

On page 14, in box 7 of the Annex, the last three entries in the table should read as follows, in English:

"ID * ¦ Code ¦ Interest rate (%) ¦ % over base rate (ECB) ¦ on (amount) ¦ Starting from ¦ to ¦

ID * ¦ Code ¦ Interest rate (%) ¦ % over base rate (ECB) ¦ on (amount) ¦ Starting from ¦ to ¦

ID * ¦ Code ¦ Interest rate (%) ¦ % over base rate (ECB) ¦ on (amount) ¦ Starting from ¦ to" ¦

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Proposal for a Regulation of the European Parliament and of the Council creating a European order for payment procedure
/* COM/2004/0173 final/3 - COD 2004/0055 */

Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL creating a European order for payment procedure

(presented by the Commission)

EXPLANATORY MEMORANDUM

1. INTRODUCTION AND BACKGROUND

1.1. Introduction

With the entry into force of the Treaty of Amsterdam the European Union has set itself the objective of progressively establishing an area of freedom, security and justice, amongst others by adopting measures in the field of judicial cooperation in civil matters. Pursuant to Article 65 (c) of the Treaty establishing the European Community such measures shall include the elimination of obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.

The Vienna Action Plan of the Council and the Commission, adopted by the Council in 1998 [1], called for the identification of the rules on civil procedure which are urgent to approximate for the purpose of facilitating access to justice for the citizens of Europe and for the examination of the elaboration of additional measures to improve compatibility of civil procedure.

[1] OJ C 19, 23.1.1999, p.1, point 41 (d).

In the conclusions of the European Council in Tampere 1999 [2] the Council and the Commission were called upon to prepare new legislation on those elements of civil procedure which are instrumental to smooth judicial cooperation and to enhanced access to law. Orders for money payment were specifically included in a list of issues that warrant such legislative initiatives.

[2] Presidency conclusions, point 38.

The joint programme of the Commission and the Council of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters, adopted by the Council on 30 November 2000 [3], singled out the abolition of exequatur for uncontested claims as one of the Community's priorities. The programme, clearly focused on facilitating the recognition and enforcement of judgments, also makes reference to the approximation of procedural law as an accompanying measure that may, in some areas, be a precondition for the desired progress in attempting to gradually dispense with any exequatur procedure. It is against that background that the document underscores that in some areas, particularly with regard to the recovery of uncontested claims, abolition of exequatur might take the form of establishing a true European enforcement order, obtained following a specific, uniform or harmonised procedure laid down within the Community [4]. It has to be emphasised, however, that the abolition of exequatur and the harmonisation of procedural law, although joined together in the above-mentioned passage of the programme, are two distinct issues. The former presupposes the delivery of a decision and concerns the access to enforcement in another Member State whereas the latter relates to the access to justice in order to obtain a decision regardless of whether it has to be enforced abroad. These matters are separate in nature and can be addressed independently and on their own merits as evidenced by the Tampere conclusions that deal with both issues without forging a link between them.

[3] OJ C 12, 15.1.2001, p. 1.

[4] Section II A 2 b of the programme. Although no mention of an order for payment procedure (nor any other specific procedure) is made in this section the later reference to the proposal for a European enforcement order for uncontested claims at the first stage of the implementation in section III A proves that harmonisation along these lines has been envisaged particularly for the recovery of uncontested claims.

The Commission has decided to pursue both objectives - the mutual recognition of decisions on uncontested claims on the one hand and the creation of a specific procedure for the attainment of decisions on uncontested claims on the other - in two different legislative instruments. This two-tiered strategy does not entail the risk of an overlap or of contradictions between both projects since they are clearly demarcated by their strict limitation to the stages before (creation of an order for payment procedure) and after (recognition and enforcement) the delivery of the enforceable decision, respectively. Quite on the contrary, this approach offers a number of significant advantages over a legislative initiative combining both aspects. For example, it allows a broader scope of application for the abolition of exequatur, extending it to all judgments handed down in the verifiable absence of any dispute over the nature and extent of a debt and not only to decisions delivered in one specific procedure.

In April 2002, the Commission presented a proposal for a Council Regulation creating a European Enforcement Order for uncontested claims [5] which provides for the elimination of intermediate measures for all enforceable titles on uncontested claims conditional upon the compliance with a number of minimum procedural standards regarding the service of documents. The present proposal represents the second leg of the strategy outlined above.

[5] COM (2002) 159 final, OJ C 203 E, 27.8.2002, p.86.

1.2. The Green Paper on a European order for payment procedure and on measures to simplify and speed up small claims litigation

The adoption of this proposal was preceded by a wide-ranging consultation of both Member States and all interested parties of civil society. The Green Paper on a European order for payment procedure and on measures to simplify and speed up small claims litigation presented by the Commission on 20 December 2002 [6] gave an overview of the currently existing models of order for payment procedures under the legislation of the Member States. Based on a comparative study of how Member States deal with the relevant procedural issues it formulated a multitude of questions concerning the desirable scope and features of a European instrument. The most fundamental issues raised in the Green Paper can be summarised as follows:

[6] COM (2002) 746 final.

- Should a European instrument on an order for payment procedure be applicable to cross-border cases only or to purely internal litigation as well?

- What types of claims should the European order for payment be available for? Should the scope of application be restricted to pecuniary demands and, if so, should any further sub-categories of pecuniary claims be excluded?

- Is there a need for specific rules on international jurisdiction or even on the attribution of jurisdiction within the Member States?

- Should the European order for payment procedure require the presentation of documentary evidence to support the claim at issue and involve a summary examination of the merits of that claim by the court or should a simple description of the claim and the lack of objections be sufficient for the delivery of an enforceable decision?

- Should the defendant have the opportunity to contest the claim and bring about a transfer to

ordinary proceedings once or twice?

The Commission received roughly 60 replies from Member States and other interested parties representing the interests of businesses, consumers and legal professions. These reactions to the Green Paper that were further debated in a public hearing organised by the Commission on 26 June 2003 revealed that the creation of a European order for payment procedure is almost unanimously considered a step ahead in the creation of an area of freedom, security and justice.

The European Parliament, in its resolution on the Green Paper [7], warmly welcomed the Commission's initiative. It recalled the political objective, stipulated by the Tampere European Council, to lay down common European rules for the rapid and efficient recovery of uncontested debts and underscored the immense significance of this project for all economic operators having an interest in the proper functioning of the internal market. The Parliament's opinion coincides, to a considerable extent, with the characteristics of this proposal, for example concerning the choice of a Regulation as the appropriate instrument and the fact that the European order for payment procedure should represent an alternative to the procedures existing under the national law of the Member States.

[7] Not yet published.

The European Economic and Social Committee, in its opinion on the Green Paper [8], emphatically welcomed the Commission's initiative to launch a consultation on this issue. It considered the introduction of a rapid, efficient and fair order for payment procedure a key component of the fundamental right of access to justice and encouraged and urged the Commission to submit a legislative proposal for the establishment of a standard European procedure.

[8] CESE 742/2003, adopted on 18 June 2003.

References to the reactions on the detailed questions in the Green Paper and the way in which these have been taken into account in the preparation of this proposal will be made in the following parts of this explanatory memorandum, most notably in the comments on the specific Articles.

2. OBJECTIVES AND SCOPE

2.1. Overall objective

2.1.1. The significance of an efficient mechanism for the recovery of uncontested claims

It is an established fact of life that the main purpose of a substantial percentage of court proceedings in the Member States is not to obtain an authoritative impartial decision on contentious questions of fact or law. Rather, it is increasingly not the exception but the rule that in the verifiable absence of any dispute the creditor has to turn to the judiciary to attain an enforceable title allowing him to collect a claim by means of forced execution that the debtor is simply unwilling or unable to honour. In 2000 the Commission launched a study on specific procedures on small claims in the Member States. The questionnaire distributed to the Member States in that context also contained some questions on uncontested claims. The answers of the Member States reveal that where comprehensive statistical data is available the percentage of uncontested claims ranges between around 50 % and more than 80 % out of all cases dealt with by ordinary lower civil courts [9].

[9] Evelyne Serverin (Directeur de recherche au CNRS IDHE-ENS CACHAN), Des Procedures de traitement judiciares des demandes de faible importance ou non contestées dans les droits des Etats-Membres de l'Union Européenne, Cachan 2001, p. 30

The swift recovery of outstanding debts whose justification is not called into question is of paramount importance for economic operators in the European Union and for the proper functioning of the internal market. A legal framework that does not guarantee a creditor access to the rapid settlement of uncontested claims may afford bad debtors a certain degree of impunity and thus provide an incentive

to withhold payments intentionally to their own advantage [10]. Late payments are a major reason for insolvency threatening the survival of businesses, particularly small and medium-sized ones, and resulting in numerous job losses. The need to engage in lengthy, cumbersome and costly court proceedings even for the collection of uncontested debts inevitably exacerbates those detrimental economic effects.

[10] Based on the results of a study conducted at the Commission's request in 1994 ('European Late Payment Survey' - Intrum Justitia), the Commission estimated the proportion of intentional payment delays throughout the European Union at 35 % in its Communication to the Council and the European Parliament 'Towards greater efficiency in obtaining and enforcing judgments in the European Union', OJ C 33, 31.1.1998, p. 3, para. 38.

This situation implies a multi-faceted challenge for the Member States' judicial systems. It has become essential to distinguish the truly contentious cases at the earliest possible stage of the proceedings from those where no real legal dispute exists. Such a differentiation is a necessary, albeit not sufficient condition to make efficient use of the limited resources allocated to the courts. It enables them to concentrate on the controversial litigation and to adjudicate it within a reasonable period of time. This desired result can be achieved, however, only if a speedy and efficient procedure for uncontested claims is available and produces the relief of the judiciary that is indispensable for the prevention of considerable backlogs. Thus, given the sheer number of non-contentious cases referred to above, the existence of a procedural legislation that ensures their efficient adjudication is a determining factor for the performance of a judicial system as a whole.

2.1.2. Definition of an order for payment procedure

All the Member States try to tackle the issue of mass recovery of uncontested claims through their courts from their national perspectives within the framework of their procedural systems and traditions. Not surprisingly, the solutions that have been devised differ widely, both in their technical nature and in their rate of success. In some Member States, judgments by default, special summary proceedings within the structure of ordinary civil procedure or even provisional measures that are quasi-definitive as in practice main proceedings hardly ever ensue are the principal procedural instruments to cope with uncontested claims.

In most Member States, however, a specific payment order procedure has proven to be a particularly valuable tool to ensure the rapid and cost-effective collection of claims that are not the subject of a legal controversy. As of today, eleven Member States (Austria, Belgium, Finland, France, Germany, Greece, Italy, Luxembourg, Portugal, Spain, Sweden) have such a procedure as an integral part of their civil procedural legislation, the French injonction de payer and the German Mahnverfahren being the most famous examples. In fact, recent years have seen the introduction of payment orders in two Member States (Spain, Portugal) that had not offered an enforceable title of that nature to their creditors before. This development testifies to the growing appreciation of this type of procedure throughout the European Union.

The payment order procedures available in the Member States vary considerably with regard to such crucial aspects as the scope of application, the attribution of competence to issue an order or the formal and substantive requirements for obtaining a favourable decision. In spite of these discrepancies between the existing models of legislation, all of them share the following distinctive features that can serve as elements of a definition of a payment order procedure.

Upon application by the claimant, the court or other competent authority takes a decision on the claim at issue ex parte, i.e. without any prior possibility for the defendant to participate. This decision is served on the defendant with an instruction to abide by the order or to contest the claim within a certain time limit. If the defendant fails to act either way, the payment order

acquires enforceability. Only if he lodges a statement of opposition the case is transferred to ordinary proceedings. Hence, as opposed to normal procedural rules the burden to initiate adversarial proceedings rests with the addressee of the payment order. This shift of responsibility, referred to in French as 'inversion du contentieux', combined with the protection of the rights of the defence as embodied in the opportunity to prevent an enforceable title from coming into being constitutes the core characteristic of the payment order procedure.

2.2. Scope

2.2.1. The need for action at Community level

It appears to be rather self-evident that the duration and cost of ordinary civil proceedings that are inappropriate for claims where no legal dispute exists tend to grow even more disproportionate in cases with cross-border implications. The lack of knowledge of the legal systems of other Member States and the consequential need to consult a lawyer, the time-consuming service of court documents on parties in a Member State other than the one where the proceedings take place and the expenses related to translation are only the most conspicuous factors that complicate the lives of creditors of cross-border claims. These problems are inherent in every cross-border litigation irrespective of the contested or uncontested nature of a claim. Nevertheless, the contrast between a rapid recovery procedure available for purely internal lawsuits and the delays and expenses that ensue where parties are domiciled in different Member States reaches an intolerable extent if the justification of the claim at stake is not even challenged by the defendant. This situation privileges bad debtors in cross-border relations and may provide a disincentive for economic operators to extend their activities beyond their Member State of origin, thus limiting commercial transactions between Member States. Even the availability of an effective national procedure for the recovery of uncontested debts in every Member State - a far cry from the current situation as even in those Member States that know an order for payment procedure it is often either inadmissible or impracticable where the defendant is domiciled abroad - would not necessarily be a decisive improvement since the profound differences between such procedures and the lack of familiarity with them present significant obstacles to the settlement of cross-border cases in themselves. A uniform European order for payment will go a long way towards providing easier access to efficient justice.

2.2.2. The scope of the proposal

For the reasons set out above the need for a uniform European procedure for the recovery of uncontested claims is most conspicuous with regard to cross-border litigation. The Commission would, however, consider it not only inappropriate but counterproductive to constrain the scope of application of this procedure to cross-border cases only.

Article 65 of the Treaty establishing the European Community attributes legislative powers to the Community with regard to judicial cooperation in civil matters having cross-border implications in so far as necessary for the proper functioning of the internal market. Whilst the existence of cross-border implications is a prerequisite for Community competence, this does not mean that the rules that can be adopted pursuant to this basis could only apply to cross-border litigation, i.e. to cases of a concrete cross-border nature. That would be an overly narrow interpretation of that provision not necessitated by its wording. The conscious use of the more open terminology of matters with cross-border implications in the specific context of Article 65 allows some flexibility to adopt legislation that governs more than cross-border litigation particularly where a common tool embracing both cross-border and domestic cases plays an instrumental role for the working of the internal market. The latter requirement is fulfilled in the light of the fundamental economic significance of an efficient procedure for the recovery of undisputed debts and the repercussions of the vast differences between national systems for the internal market as further elaborated above (2.1.1) and in this section. Under these circumstances, the legislation envisaged is sufficiently

characterised by a cross-border element, and Article 65 permits such legislation not confined to cross-border lawsuits in concreto but also open for use in purely internal situations; in this context, it should also be taken into account that the instrument will apply on an optional basis. The optional nature of the European order for payment procedure and its implications for Member States are set out in more detail below (2.2.3).

Besides, the distinction between "cross-border" and "internal" scenarios is much more difficult than it might appear to be at first sight and would inevitably contain an element of arbitrariness. For example, if two persons both domiciled in France had a car accident in Germany and litigate over damages before a French court, is this a purely internal situation because both parties and the court are situated in the same Member State or does it transcend the domestic sphere because of the link to another Member State whose courts would have had jurisdiction to hear the case if the claimant had preferred to bring action there? Opting for the first alternative would amount to predicating the cross-border nature of a case on the subjective choice of the claimant; depending on his decision on which courts to turn to, one and the same situation would have to be considered as either having an international dimension or as being purely internal in spite of the existence of aspects linking it with two Member States. Conceivably, every case that possesses connecting factors to more than one Member State should be regarded as having cross-border implications. But first of all, it would unavoidably be an intricate exercise to define what constitutes a sufficient connecting factor. Should the applicability of the substantive law of a Member State other than the forum State be sufficient to establish such a link? Moreover, a European order for payment with its explicit objective to speed up and simplify the recovery of uncontested claims does not appear to be the most suitable procedure for the scrutiny of such complex matters as incidental questions relating to the admissibility of an application.

These ambiguities, taken together with the potential for every judgment to take on a cross-border nature if it needs to be enforced in another Member State, call into question the merits of the distinction between "internal" and "cross-border" matters.

Furthermore, in the specific context of a procedure for the recovery of uncontested claims a limitation to cross-border situations would produce undesirable political and economic results. Firstly, the access of economic operators to mechanisms of substantially differing performance levels entails a distortion of competition in the internal market regardless of whether actors are domiciled in different Member States or in the same Member State. Two companies competing in one Member State only one of which is domiciled in that same Member State are not on an equal footing if only the one domiciled abroad can make use of an efficient European order for payment procedure. Similarly, an enterprise with the majority of clients abroad might enjoy a significant advantage, due to the availability of such a procedure, over a competitor domiciled in the same Member State which does most of its business domestically. Besides, especially for those Member States that currently do not provide a very efficient tool for the collection of undisputed debts it will be politically difficult to explain both to creditors and debtors why they have access or are subject to a more efficient mechanism in a cross-border situation than domestically. The vast majority of the comments on the Green Paper submitted by economic operators or organisations representing them as well as the opinion of the European Economic and Social Committee confirm the demand for a European order for payment procedure that is universally applicable without a differentiation between internal and cross-border cases.

2.2.3. Subsidiarity and proportionality

It goes without saying that the very objective of this proposal, the creation of a uniform European procedure for the swift attainment of an enforceable decision on a claim whose justification is not challenged, cannot be sufficiently accomplished by the Member States themselves as they cannot

guarantee the equivalence of rules applicable throughout the Community. The objective can therefore be only achieved at Community level.

The present proposal is fully consistent with the principle of proportionality in that it is strictly limited to what is necessary in order to reach this objective. In that context, it is particularly essential to underscore the effects of the combination of the legal instrument chosen (Regulation) with the optional nature of the European order for payment procedure in relation to comparable mechanisms under the national procedural law of the Member States. Whilst ensuring the uniformity and direct applicability of the procedure, the Regulation proposed here would only oblige Member States to make the European recovery mechanism available as an additional tool. It would force them neither to abandon their pre-existing legislation on orders for payment or any other procedure for the collection of undisputed debts nor to modify such legislation to bring it into line with Community law. Hence, this proposal for a Regulation which leaves untouched the Member States' right to continue the application of their domestic rules alongside the European order for payment encroaches much less on their procedural systems than a Directive that would require an adaptation of national legislation to the standards set in that instrument. This legislative technique, in fact, assures a minimum level in the efficiency of the recovery of uncontested claims but it permits Member States that have developed an even better-functioning domestic system to retain it. Ultimately, it will be left to the creditors to judge which procedure they consider as being either superior in performance or more convenient in terms of accessibility, the latter criterion being particularly relevant for those operating in several Member States and being spared the need to make themselves familiar with the procedural law of every one of them by the availability of a uniform European order for payment. Finally, it should be borne in mind that an order for payment procedure is, by definition, particularly suitable to respect the principles of subsidiarity and proportionality as this type of procedure is not inextricably interrelated with the other rules governing civil procedure but rather a chapter apart. It is only the end of the payment order procedure caused by the defendant's opposition that triggers the transfer to ordinary civil proceedings. Hence, the introduction of a European order for payment does not entail the need for further approximation of national procedural legislation and thus keeps interference with domestic law to an absolute minimum.

3. COMMENTS ON THE SPECIFIC ARTICLES

Article 1 -Scope

The general scope of application, limited to civil and commercial matters, as set out in paragraph 1 coincides with that of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Paragraph 2 excludes certain types of civil and commercial claims from the scope. Rights in property arising out of matrimonial and similar (e.g. registered partnership) relationships were excluded as very often in these family law cases courts are obliged to examine the facts of their own motion and thus cannot content themselves with the lack of the defendant's objections to the claimant's allegations. As in Regulation No 44/2001, matters relating to insolvency and social security do not fall within the scope of application. Apart from those items the Commission has not identified reasons for the elimination of other claims from the scope of application. The mere jurisdiction of specialised courts or tribunals (e.g. labour tribunals for claims arising out of employment) instead of ordinary civil courts does not constitute a persuasive ground for not admitting an order for payment procedure. Any other limitation of the applicability of the procedure related to the nature or the legal basis of the claim does not appear to be warranted by compelling reasons; on the contrary, any such constraint would inevitably bring about complex problems of the demarcation of eligible and inadmissible demands. Finally, in accordance with the vast majority of comments

on the Green Paper this proposal does not introduce a ceiling as to the amount that can be claimed in the order for payment procedure since the contested or uncontested nature of a claim does not appear to be related to the value of the claim in question in any way that would necessitate the restriction of the accessibility of the procedure to the recovery of amounts below a certain limit. If, as alleged by some, the likelihood of contentious proceedings increased with the rising value of the demand this would not justify a ceiling amount as it is left to the creditor's judgement whether he assesses the probability of the absence of opposition as sufficiently high to make it worthwhile to use the order for payment procedure; if that is not the case he will directly initiate ordinary proceedings.

The discrepancy between the list of exclusions from the scope of application of this proposal and the parallel provision of Regulation No 44/2001 is explained by the fact that they are governing different matters that call for a substantially different approach and a different perspective. This draft instrument is focused on the procedural rules and requirements for the attainment of an enforceable decision and addresses none of the questions dealt with in Regulation No 44/2001. It is not concerned with the international jurisdiction for the order for payment procedure as Regulation No 44/2001 strikes such a fair balance between the interests of plaintiffs and defendants that no justification could be identified to departing from those rules and setting up a special regime of jurisdiction for the European order for payment. Questions of recognition and enforcement in a Member State other than that whose courts delivered the order for payment are exclusively left to Regulation No 44/2001 and, as from its entry into force, to the future Regulation creating a European Enforcement Order for uncontested claims. Therefore, it is self-evident that the considerations underlying the removal of some types of claims or procedures some of which cannot even conceivably encompass money debts from the scope of application of Regulation No 44/2001 are irrelevant or even nonsensical in the context of this proposal.

Article 2 - European order for payment procedure

Paragraph 1 confines the applicability of the European order for payment procedure to the recovery of liquidated and payable pecuniary claims. It is thus not available for money claims that cannot be specified in terms of a concrete amount (as in the case of immaterial damages, for example) and for demands that concern obligations to act or to refrain from a certain action such as the delivery or restitution of property or eviction. Theoretically, the principle underlying the identification of uncontested claims could be extended to other types of claims than those implying the payment of money and indeed the systems of some Member States cover certain non-pecuniary demands. Nevertheless, it is common grounds and confirmed by the feedback to the Green Paper that those other claims which would make up a minuscule percentage of the cases dealt with in this procedure at any rate are much less amenable to a standardised handling. Just to give one example, the mere formulation of the demand in such a way as to fulfil the requirements for the precision of an enforceable title will often present an insurmountable obstacle at least for legal laymen and would entail the rejection of a significant share of applications just for that reason or create a disproportionate amount of work for the courts.

Paragraph 2 specifies the optional nature of the European order for payment procedure. It is fully at the creditor's discretion if he prefers to pursue a claim that falls within the scope of this proposal by applying for a European order for payment or by making use of a summary or ordinary procedure available under the law of the forum Member State.

Article 3 - Application for a European order for payment

This provision lists the elements that the application for a European order for payment must contain relating to the identification of parties to the proceedings and to the description of the claim and its justification. Most of the items indicated in the Article are self-explanatory.

It needs to be underscored that this proposal refrains from making the presentation of documentary evidence a prerequisite for the granting of a European order for payment. In the light of the analysis of the replies to the Green Paper on this crucial distinction between the two existing models of order for payment procedures (referred to as the "evidence" and the "no evidence" schools in the Green Paper) the Commission came to the conclusion that such a requirement would imply a substantial risk to the uniform application of the Regulation as to what types of documents are considered satisfactory proof of the claim. Moreover and more importantly, it has to be taken into consideration that the sole purpose of the written evidence accompanying the application consists in serving as the basis of the summary examination of the merits of the claim that is prescribed under the law of the Member States that follow the "evidence" model. This proposal does not foresee a systematic and comprehensive or summary examination of the justification of the demand.

Rather, the Commission has attempted to identify a solution that combines the advantages of a "no evidence" order for payment as concerns the simplicity and efficiency of the procedure with an adequate protection of the defendant's rights. One element of the latter objective is the requirement for the applicant, pursuant to paragraph 2 (e), not to actually present but to describe some evidence he could rely on in ordinary proceedings if the claim were contested. This prerequisite, which enables the applicant to refer to all admissible means of proof instead of just documents but does not oblige him to supply an exhaustive list of evidence, primarily constitutes a formal condition for the granting of the European order for payment that is easy to check.

The claimant has to provide the court with a description of the cause of action in accordance with paragraph 2 (d). This statement can and should be brief and concise, yet it must explain the legal relationship between the parties, the justification of the concrete claim and its amount and the link between the claim and the evidence offered.

Paragraph 3 permits, as an alternative to a hand-written signature, an electronic signature if, in accordance with Article 2 (2) of Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures, it is uniquely linked to the signatory and is capable of identifying him, if it is created using means that the signatory can maintain under his sole control and if it is linked to the data to which it relates in such a manner that any subsequent change of the data is detectable. This provision, reproduced in other parts of the proposal, reflects the general intention to permit the use of automatic data processing and electronic communication in the procedure under the condition of the adequate protection of the parties' rights.

Article 4 - Requirements for the delivery of a European order for payment

This Article is intended to comprise, in its paragraph 1, a complete and exhaustive list of the requirements for the issuance of a European order for payment whose fulfilment the court has to examine when seised of an application. The scrutiny has to cover but cannot go beyond

- The scope of application of the procedure as defined in Articles 1 and 2; and

- The formal requirements for the application as set out in Article 3.

Apart from these issues that have to be examined ex officio it is the defendant's responsibility to judge, based on the information provided in the application that allows him to clearly identify the claim made against him and to consider its merits, if he wants to contest it or to acquiesce in it. In the latter case, there is no further valid reason to deny the claimant a favourable decision.

Paragraph 2 affords the court a certain flexibility, without implying any obligation, to refer the application back to the claimant to allow him to remedy shortcomings of his request where he has not complied with all the formal requirements set out in Article 3 and the mistake appears

to be easily rectifiable, e.g. where he has simply not filled in a mandatory field of the application form. It is by no means the intention of this provision to hamper the rapid and efficient administration of the procedure. At any rate, in the event of a rejection the claimant retains the right to pursue the claim in ordinary proceedings in accordance with Article 5.

Article 5 - Rejection of the application

It is the principal purpose of paragraph 1 to clarify, in the interest of maintaining the simplicity and uniformity of the procedure and in order to avoid the potential split-up of the procedure into two separate components, that as far as the compliance with the requirements of Article 4 is concerned the court can only either grant the order for payment in full or refuse it altogether. Thus, where the application only partly meets these conditions it has to be rejected as a whole. To avoid such a rejection where it does not appear to be appropriate the court can make use of the option offered by Article 4 (2).

In line with the comments on the Green Paper and the existing national order for payment procedures, paragraph 3 spells out that the rejection of an application does not acquire the effect of res iudicata. This procedure only represents an optional tool for the creditor who presumes that the claim at issue will remain uncontested. If that presumption turns out to be wrong and the defendant objects the transfer to contentious proceedings is automatic. It must, however, also be possible to further pursue a claim in an ordinary civil procedure if the application is dismissed under paragraph 1 for reasons that are generally not at all linked to the justification of the claim but to formal or procedural circumstances such as the scope of application of this procedure. It is the logical corollary of this opportunity to continue the pursuit of the claim that there is no need for the availability of an appeal against the rejection of an application that would render the procedure unnecessarily cumbersome.

Article 6 - European payment notification

This proposal represents a "two-step" order for payment procedure in that the document issued by the court in the event of a favourable decision on the application is not yet the order for payment itself whose enforceability is only conditional upon the expiry of the time limit for lodging a statement of defence but a payment notification that informs the defendant about the claim as well as about his procedural rights and obligations including the prospective delivery of an enforceable order for payment should he fail to contest. It has to be borne in mind, however, that in the Member States that apply a "one-step" model a second involvement of the court is generally inevitable to verify that no objection was made to the claim and to append an enforcement clause (formule exécutoire). Where, as in this proposal, the second step does not imply any examination of the claim but the order for payment is issued automatically if no statement of defence was lodged the differences in terms of the efficiency of the procedure are marginal at the most. The main advantage resides in the existence of a separate decision that is subject to an appeal which is ordinarily not available in Member States that have opted for a "one-step" procedure but is considered necessary by the Commission in the context of a European order for payment as further explained in the comments on Article 11.

The European payment notification is, in its content, identical with the application form but supplemented by the information on the significance of this document as prescribed in paragraphs 3 and 4 in a prominent place and in terms that are easily comprehensible for recipients not familiar with legal matters. The necessary practical arrangements should be made to automatically copy the information contained in the application to the payment notification and eventually to the order for payment. The additional information for the defendant should be an integral part of the notification itself and not just attached to it in order to avoid the occurrence of any potential mistake that could give rise to procedural difficulties.

The proposal does not contain any specific rules on the service of the payment notification on the defendant which is thus governed by national law and, where applicable, by Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil and commercial matters. Paragraph 2 sets out the condition, however, that those methods of service which do not provide proof of receipt by the debtor personally are not admissible for the purposes of this proposal if the debtor's address is not known.

The period of three weeks for contesting the claim takes account of what is considered necessary to determine if one wants to defend the case under the law of the Member States. Given the simplicity of lodging a statement of defence pursuant to Article 7, this span of time should be sufficient in cross-border as well as in purely internal situations.

Paragraph 5 is intended to ensure that no creditor is deterred from making use of the order for payment procedure, although principally deemed appropriate, by the concern that the claim gets barred by the statute of limitations if he does not interrupt the running of time by bringing ordinary civil action. It confers on the payment notification the status of a writ of summons in ordinary civil proceedings in that particular respect.

Article 7 - Statement of defence

In accordance with the philosophy of the European order for payment procedure that is focused on the identification of undisputed claims and the delivery of enforceable decisions on them whilst refraining from an examination of the justification of the claim, this Article keeps the requirements for an admissible statement of defence to the indispensable minimum. The defendant only has to unequivocally communicate to the court within the time limit and in the written or under certain conditions in the electronic form, in whatever terms, that he wants to object to the claim in full or in part. No further explanation needs to be given; the presentation of the factual and legal arguments as well as of evidence can be left to the ensuing ordinary proceedings. The defendant may use the standard response form supplied to him together with the payment notification but is not obliged to do so.

Article 8 - Effects of a statement of defence

This provision sets out that an admissible statement of defence automatically brings the order of payment procedure to and end and entails the transfer of the matter to ordinary civil proceedings without any specific request to that end being necessary. It is based on the assumption that, as a rule, creditors who apply for an order for payment choose the procedure because they expect the claim to remain uncontested but are willing to continue to pursue the claim in ordinary proceedings if necessary. Paragraph 1 does foresee, however, the possibility for the claimant to indicate in the application that he wants litigation to be discontinued if the defendant enters a statement of defence. Such a request could be made whenever from the applicant's perspective the value of the claim in question is too low to justify the effort and the costs of contentious ordinary proceedings.

Paragraph 2 is intended to clarify that the technicalities of how exactly the transfer to ordinary proceedings is effected are governed by the law of the forum Member State.

Article 9 - European order for payment

If the defendant has admitted the claim or failed to contest it in full or in part by the expiration of the time limit the order for payment is delivered by the court of its own motion, i.e. without the need for a separate request by the claimant.

This provision is parallel in structure to Article 6 dealing with the payment notification as far as the rules on service and information of the defendant, albeit this time with regard to a statement of opposition instead of a statement of defence, are concerned.

Article 10 - Enforceability of the European order for payment

This Article stipulates that the European order for payment, once delivered, is enforceable without the provision of a security in spite of the remaining opportunity for the defendant to lodge a statement of opposition and possibly have it set aside. The fact that the defendant has chosen not to protest against the demand in full knowledge of the consequences of such conduct provides sufficient reason for the prima facie assessment that the claim is and will remain uncontested and thus for unrestricted enforceability.

Paragraph 2 reflects that this proposal intends neither to interfere with the enforcement legislation of the Member States nor to introduce a separate fully developed set of rules specifically for the order for payment procedure. The details of the formal prerequisites for enforceability as well as of the conditions for a stay or limitation of enforcement are left to national law. This includes, for example, the impact of the lodging of a statement of opposition on enforceability.

Article 11 - Opposition to the European order for payment

The requirements for lodging a statement of opposition to the order for payment coincide with those for a statement of defence. Therefore, reference can be made to the comments on Article 7.

The Commission is convinced that in the specific context of this proposal the defendant has to be given a second opportunity to contest the claim and bring about the transfer to ordinary proceedings even though in spite of having been instructed on his rights and obligations by the court in the payment notification he failed to declare his intention to defend the case. An irreversible final decision would appear to represent an overly harsh sanction, especially in comparison with judgments by default that are handed down in a similar situation, i.e. after the defendant has been summoned to a hearing and informed about the consequence of not appearing in court to defend the case and that are generally still subject to appeal or another legal remedy. This reasoning is further reinforced by the fact that, as opposed to the systems of most Member States that know a "one-step" order for payment procedure and do not admit a further appeal the European order for payment does not presuppose any general summary examination of the well-founded nature of the claim. This simplification of the procedure in the interest of its efficiency and thus of the claimant warrants a counterbalance in the form of the right to bring a remedy.

Paragraph 4 contains an additional safeguard for the defendant that the Commission considers vital in the light of the absence of any specific rules on the service of documents in this proposal. In the negotiations of the Regulation creating a European Enforcement Order for uncontested claims it was deemed indispensable to provide the defendant with an opportunity to challenge a judgment irrespective of the general time limits for an appeal where

- a method of service without proof of receipt by him personally was used and the document in question did not reach him in such a way as to enable him to arrange for his defence; or

- he was prevented from defending the case by reason of force majeure or due to extraordinary circumstances.

The pertaining rule of the above-mentioned Regulation has been transferred and adapted to the context of this proposal.

Article 12 - Effects of the lodging of a statement of opposition

As far as the transfer to ordinary proceedings is concerned this Article reproduces the provisions on the effects of the statement of defence in Article 8. It does not have an impact on the transfer to ordinary proceedings if the defendant chooses to contest the claim sooner or later in the course of the procedure. The difference in status between the payment notification and the order for payment consists in the enforceability of the latter document. The questions of enforceability are governed by Article 10.

Paragraph 3 clarifies that a statement of defence that reaches the court belatedly after it has already delivered the order for payment but before the expiration of the time limit for entering a statement of opposition is to be treated as a statement of opposition since it clearly reveals the intention to defend the case.

Article 13 - Legal representation

In the light of the objective of this proposal to provide creditors with a simple and cost-effective mechanism for the recovery of uncontested claims it would be a contradiction in terms to make the use of this procedure conditional upon the representation by a lawyer. Firstly, the requirements for applying for an order for payment and, even more so, for contesting the claim are sufficiently straightforward not to necessitate the expertise of a legal professional. Secondly, legal representation will inevitably drive up the costs of the procedure. Whilst seeking professional legal counsel remains, of course, possible for those who deem it useful it should not be turned into an obligation. As stated in paragraph 2 for the purpose of clarification this provision only covers the order for payment procedure itself but not the ordinary civil procedure that ensues if a statement of defence or opposition is lodged.

Article 14 - Costs

Creditors could be dissuaded from using this procedure if, in the case of the defendant's opposition, they had to face the risk of court fees higher than those arising when immediately opting for ordinary civil proceedings. By the same token, it would not seem to be justified to impose higher court fees on the defendant for the sole reason that the plaintiff chose to try, albeit without success, to obtain a decision through a simplified procedure first.

This Article establishes the principle of the neutrality of a preceding order for payment procedure in terms of the total amount of court fees for ordinary civil proceedings but leaves it to the Member States how compliance with this principle is to be ensured. One imaginable solution could be the absorption of the fees for the order for payment procedure, if any, by those for the ensuing ordinary procedure.

Article 15 - Relationship with national procedural law

In several Articles of this proposal reference is made to national law for specific aspects of the procedure. In order to avoid any potential misunderstanding this provision clearly sets out that all procedural issues that are not dealt with in the proposal and where the applicability of national law is not explicitly stipulated either are governed by the domestic law of the Member State in which the order for payment proceedings take place.

Article 16 - Information on the courts that have jurisdiction

This provision aims at facilitating the access to information on the courts to which citizens have to address an application for a European order for payment. Member States should indicate in their communication to the Commission which categories of courts have jurisdiction for this procedure, e.g. the lower or higher first instance courts in those Member States where such a distinction exists. In some Member States it might be necessary to list more than one category of courts, amongst others if specialised tribunals are in charge of certain claims (e.g. labour tribunals for claims arising out of employment contracts). This would also be an opportunity to indicate if the general rules on territorial jurisdiction apply to this procedure (without having to explain these rules in detail) or if a special rule has been stipulated such as the exclusive jurisdiction of the court for the defendant's domicile or the centralisation of jurisdiction in one court or a limited number of courts.

The Commission will make this information available in the most appropriate form including its

publication on the internet, possibly in the framework of the ongoing project of the creation of a European Judicial Atlas in civil matters, a database intended to provide user-friendly access in all official languages of the European Union.

Articles 17 and 18 - Implementing rules and committee

Article 18 refers to the Advisory Committee provided for by Regulation No 44/2001 that will assist the Commission in the implementation as necessary under Article 17, namely the updating of the standard forms in the Annexes or the making of technical amendments thereto. The Committee will be convened only if and when the need for such amendments arises.

2004/0055 (COD)

Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL creating a European order for payment procedure

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61 (c) thereof,

Having regard to the proposal from the Commission [11],

[11] OJ C , , p..

Having regard to the opinion of the European Economic and Social Committee [12],

[12] OJ C , , p..

Acting in accordance with the procedure laid down in Article 251 of the Treaty [13],

[13] OJ C , , p..

Whereas:

(1) The Community has set itself the objective of maintaining and developing an area of freedom, security and justice, in which the free movement of persons is ensured. To this end, the Community is to adopt, among others, measures in the field of judicial cooperation in civil matters that are necessary for the proper functioning of the internal market.

(2) The European Council meeting in Tampere on 15 and 16 October 1999 invited the Council and the Commission to prepare new legislation on issues that are instrumental to smooth judicial cooperation and to enhanced access to law and specifically made reference, in that context, to orders for money payment.

(3) On 30 November 2000, the Council adopted a joint programme of the Commission and the Council of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters [14]. The programme envisages the possibility of a specific, uniform or harmonised procedure to obtain a judicial decision laid down within the Community in specific areas including the one of uncontested claims.

[14] OJ C 12, 15.1.2001, p. 1.

(4) The Commission adopted a Green Paper on a European order for payment procedure and on measures to simplify and speed up small claims litigation on 20 December 2002. The Green Paper launched a consultation on the possible objectives and features of a uniform or harmonised European procedure for the recovery of uncontested claims.

(5) The swift and efficient recovery of outstanding debts over which no legal controversy exists is of paramount importance for the economic operators in the European Union as late payments

constitute a major reason for insolvency threatening the survival of businesses, particularly small and medium-sized ones, and result in numerous job losses.

(6) Whilst all Member States try to tackle the issue of mass recovery of uncontested claims, the majority of them by devising a simplified order for payment procedure, both the content of national legislation and the performance of the domestic procedures vary substantially. Furthermore, the currently existing procedures are frequently either inadmissible or impracticable in cross-border situations.

(7) The resulting impediments to access to efficient justice, particularly in cross-border cases, and the distortion of competition within the internal market due to the disequilibrium with regard to the functioning of the procedural means afforded to creditors in different Member States entail the need for Community legislation which guarantees a level playing field for creditors and debtors throughout the European Union.

(8) The European order for payment procedure should not replace or harmonise the existing mechanisms for the recovery of uncontested debts under national law but constitute an additional option for the creditor who remains free to resort to a procedure provided by domestic law.

(9) The European order for payment should be available for all civil pecuniary claims, contractual and non-contractual, with the exception of rights in property arising out of a matrimonial or similar relationship where even in default of objections courts often cannot rely on the claimant's allegations but have to examine the facts of their own motion. The procedure should not be restricted to claims below a certain ceiling amount. It should not apply, however, to claims that have not yet fallen due at the time of the application and in particular to future periodic payments.

(10) The procedure should be based, to the largest extent possible, on the use of standard forms in the communication between the court and the parties in order to facilitate its administration and enable the use of automatic data processing.

(11) In the application for a European order for payment, the claimant should be obliged to provide information that is sufficient to clearly identify the demand and its justification to put the defendant in the position of making a well-informed choice of opposing the claim or leaving it uncontested. In that context, it should be mandatory for the claimant to cite some evidence he could rely on to prove the correctness of his allegations without having to actually submit documentary evidence to the court.

(12) The court should deliver a European payment notification after an examination of compliance with the formal requirements set out in this Regulation. It should refrain from an assessment of the merits of the claim at stake.

(13) The European payment notification should apprise the defendant of his options to either pay his outstanding debt to the claimant or submit a statement of defence if he wants to contest the claim within a time limit of three weeks. In addition to the full information on the claim as supplied by the claimant the defendant should be advised of the legal significance of the notification and in particular of the consequences of leaving the claim uncontested.

(14) A statement of defence filed within the time limit should terminate the European order for payment procedure and should lead to an automatic transfer of the case to ordinary civil proceedings unless the claimant has explicitly requested to discontinue the proceedings in that event.

(15) The European order for payment to be issued in the absence of a statement of defence should be immediately enforceable against the defendant. It should be subject to opposition which should entail essentially the same consequences as a statement of defence. In default of the lodging of a statement of opposition the order for payment should have the same status as a final judgment

handed down in ordinary civil proceedings.

(16) This Regulation does not affect the application of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [15] or of 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 [16].

[15] OJ L 12, 16.1.2001, p. 1.

[16] OJ L 160, 30.6.2000, p. 37.

(17) Since the objectives of this Regulation, namely to establish a uniform rapid and efficient mechanism for the recovery of uncontested money claims throughout the European Union, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and the impact of the Regulation, be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the EC Treaty. In accordance with the principle of proportionality as set out in that same Article, this Regulation does not go beyond what is necessary in order to achieve those objectives; in particular, it restricts the interference with national procedural law to a minimum as it does not supplant domestic simplified procedures but adds an additional option.

(18) This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union as general principles of Community law. Specifically, it seeks to ensure full respect for the right to a fair trial as recognised in Article 47 of the Charter.

(19) The measures necessary for the implementation of this Regulation should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission [17].

[17] OJ L 184, 17.7.1999, p. 23.

(20) The United Kingdom and Ireland, in accordance with Articles 1 and 2 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community, are not participating in the adoption of this Regulation and are therefore not bound by it nor subject to its application.]/[The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community, have given notice of their wish to take part in the adoption and application of this Regulation.]

(21) Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, is not participating in the adoption of this Regulation, and is therefore not bound by it nor subject to its application.

HAVE ADOPTED THIS REGULATION:

Article 1

Scope

1. This Regulation shall apply in civil and commercial matters, whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.

2. The European order for payment procedure shall not be applicable to :

(a) rights in property arising out of a matrimonial or similar relationship;

(b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;

(c) social security.

3. For the purposes of this Regulation, the expression 'court' shall include the 'Swedish enforcement service' (kronofogdemyndighet).

4. In this Regulation, the term 'Member State' shall mean Member States with the exception of Denmark. [United Kingdom, Ireland]

Article 2

European order for payment procedure

1. The European order for payment procedure is hereby established for the collection of uncontested pecuniary claims for a specific amount that have fallen due at the time when the application for a European order for payment is submitted.

2. Nothing shall prevent a creditor from pursuing a claim within the meaning of paragraph 1 making use of another procedure available under the law of a Member State, be it an ordinary or a summary procedure.

Article 3

Application for a European order for payment

1. An application for a European order for payment shall be made using the standard form in Annex 1.

2. The application shall state:

(a) the names and addresses of the parties and the court to which the application is made,

(b) the amount of the claim;

(c) if interest on the claim is demanded, the interest rate and the time period that interest is demanded for unless a statutory interest is added to the principal without demand under the law of the Member State to whose courts the application is made;

(d) the cause of action, including a brief description of the circumstances invoked as the basis of the claim and, where applicable, of the demanded interest;

(e) the brief description of at least one means of evidence that could be adduced in ordinary civil proceedings to support the claim

3. The application shall be signed by the claimant or his representative manually or in the form of an advanced electronic signature within the meaning of Article 2 (2) of Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures.

Article 4

Requirements for the delivery of a European order for payment

1. The court seised of an application shall examine if the requirements as set out in Articles 1, 2 and 3 are met.

2. Where the court considers a rejection of the application due to a failure to fulfil the requirements of Article 3 it may give the claimant the opportunity to complete or rectify the application.

Article 5

Rejection of the application

1. The court shall reject the application in whole if the requirements laid down in Article 4 are not fulfilled for the claim at issue or parts thereof.

2. No appeal shall lie against the rejection of an application for a European order for payment.

3. The rejection shall not prevent the claimant from initiating ordinary court proceedings with regard to the same claim.

Article 6

European payment notification

1. If the requirements laid down in Article 4 are fulfilled the court shall issue a European payment notification using the standard form in Annex 2.

2. The European payment notification shall be served on the defendant. A method of service without proof of receipt by the defendant personally is not admissible if the defendant's address is not known with certainty.

3. In the notification the defendant shall be advised of his options to

(a) pay the claimed amount including the claimed interest and the claimed costs to the claimant and submit a statement informing about the payment; or

(b) submit a statement of defence to the claim or parts thereof

which has to reach the court within three weeks starting from the date of service of the European payment notification on him in accordance with the law of the Member State in which service is effected.

4. In the notification the defendant shall be informed that

(a) the court has not examined the justification of the claim before issuing the notification

(b) the court will deliver an enforceable decision unless it has received a statement of defence or a statement informing the court about the payment of the claim from the defendant within the time limit specified in paragraph 3.

5. For the purpose of the interruption of the statute of limitations, the European payment notification

shall be considered equivalent to a writ of summons in ordinary civil proceedings.

Article 7

Statement of defence

1. The defendant may submit a statement of defence either by making use of the standard response form attached to Annex 2 which shall be supplied to him together with the notification or otherwise.

2. The defendant shall clearly indicate in the statement if he contests the claim at issue in whole or in part. He does not have to specify the reasons for contesting the claim.

3. The statement of defence shall be signed by the defendant or his representative manually or in the form of an advanced electronic signature within the meaning of Article 2 (2) of Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures.

Article 8

Effects of a statement of defence

1. If a statement of defence is lodged within the time limit laid down in Article 6 (3) the proceedings shall continue in accordance with the rules of ordinary civil procedure unless the claimant has explicitly requested, in the application, to terminate the proceedings in that event.

2. The transfer to ordinary proceedings within the meaning of paragraph 1 shall be governed by the law of the Member State in which the European payment notification was issued.

Article 9

European order for payment

1. In the absence of a statement of defence or a statement informing about the payment lodged within the time limit laid down in Article 6 (3) the court shall deliver a European order for payment of its own motion using the standard form in Annex 3.

2. The European order for payment shall be served on the defendant. A method of service without proof of receipt by the defendant personally is not admissible if the defendant's address is not known with certainty.

3. In the European order for payment the defendant shall be informed that he can lodge a statement of opposition to the European order for payment which has to reach the court that has issued the order within three weeks starting from the date of service of the European order for payment on him in accordance with the law of the Member State in which service is effected.

Article 10

Enforceability of the European order for payment

1. The European order for payment shall be enforceable without the condition of the provision of a security.

2. Without prejudice to paragraph 1, the conditions of enforceability and its stay or limitation, in particular in the event of a statement of opposition pursuant to Article 11, shall be governed by the law of the Member State in which the order was issued.

Article 11

Opposition to the European order for payment

1. The defendant may lodge a statement of opposition to the European order for payment by making use of the standard form attached to Annex 3 which shall be supplied to him together with the European order for payment or otherwise.

2. The defendant shall clearly indicate in the statement of opposition if he contests the claim at issue in whole or in part and, in the latter case, which parts of the claim he objects to. He does not have to specify the reasons for contesting the claim.

3. The statement of opposition shall be signed by the defendant or his representative manually or in the form of an advanced electronic signature within the meaning of Article 2 (2) of Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures.

4. After expiry of the time limit specified in Article 9 (3) the debtor is entitled, under the conditions established by the law of the Member State in which the order for payment has been issued and communicated to the Commission pursuant to Article - (19 A) of Regulation ----/--/EC of the European Parliament and of the Council of ------- creating a European Enforcement Order for uncontested claims, to apply for a review of the order for payment where

a) (i) the order for payment was served by a method without proof of receipt by him personally; and

(ii) service was not effected in sufficient time or in such a way as to enable him to arrange for his defence without any fault on his part,

or

b) the debtor was prevented from objecting to the claim by reason of force majeure, or due to extraordinary circumstances without any fault on his part,

provided in either case that he acts promptly.

Article 12

Effects of the lodging of a statement of opposition

1. If a statement of opposition is entered within the time limit laid down in Article 9 (3) the proceedings shall continue in accordance with the rules of ordinary civil procedure unless the claimant has explicitly requested, in the application, to terminate the proceedings in that event.

2. The transfer to ordinary proceedings within the meaning of paragraph 1 shall be governed by the law of the Member State in which the European order for payment was issued.

3. A statement of defence lodged after the expiry of the time limit laid down in Article 6 (3) but within the time limit specified in Article 9 (3) shall produce the same effects as entering a statement of opposition.

Article 13

Legal representation

1. Representation by a lawyer or another legal professional shall not be mandatory

(a) for the claimant in respect of the application for a European order for payment

(b) for the defendant in respect of the statement of defence or of the statement of opposition to a European order for payment.

2. The requirement of legal representation in the ordinary civil proceedings following a statement of defence or a statement of opposition to a European order for payment shall be governed by the law of the Member State in which the proceedings take place.

Article 14

Costs

The combined court fees of a European order for payment procedure and of the ordinary civil proceedings that ensue in the event of a statement of defence or a statement of opposition to a European order for payment shall not exceed the costs of ordinary civil proceedings without a preceding European order for payment procedure.

Article 15

Relationship with national procedural law

All procedural issues not specifically dealt with in this Regulation shall be governed by the law of the Member State in which the European order for payment proceedings take place.

Article 16

Information on the courts that have jurisdiction

1. By 1 July 2005 each Member State shall communicate to the Commission which courts have jurisdiction to issue a European order for payment. Member States shall apprise the Commission of any subsequent changes to this information.

2. The Commission shall publish and update, when necessary, the information provided by the Member States in accordance with paragraph 1.

Article 17

Implementing rules

The standard forms set out in the Annexes shall be updated or amended in accordance with the advisory procedure referred to in Article 18.

Article 18

Committee

1. The Commission shall be assisted by the Committee provided for by Article 75 of Council Regulation (EC) No 44/2001.

2. Where reference is made to this Article, Articles 3 and 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

Article 19

Entry into force

This Regulation shall enter into force on 1 January 2006.

This Regulation shall be binding in its entirety and directly applicable in all Member States in accordance with the Treaty establishing the European Community.

Done at Brussels,

For the European Parliament For the Council

The President The President

ANNEX 1

APPLICATION FOR A EUROPEAN ORDER FOR PAYMENT

1. Court

1.1 Name:

1.2 Address:

2. Claimant

2.1 Name:

2.2 Address:

3. Claimant's representative

3.1 Name:

3.2 Address:

4. Defendant

4.1 Name:

4.2 Address:

5. Claim

5.1 Amount of principal (not including interest and costs):

5.2 Currency: | | EUR

| | Swedish Kroner

| | [British pounds]

6. Interest

6.1 Interest rate (claimed on the principal until payment is made)

6.1.1 % | |

6.1.2 % above the base rate of the ECB | |

6.1.3 Statutory interest rate | |

6.2 Interest to be collected as from:

7. Costs (amounts in same currency as under 5.2)

7.1 Costs related to this procedure

7.1.1 Application fee:

7.1.2 Claimant's representative's fee:

7.1.3 Other (explain):

7.2 Pre-litigation costs (explain):

7.3 Total costs claimed:

8. The claim relates to

8.1 Sales contract | |

8.2 Rental agreement - immovable | |

8.3 Rental agreement - movable | |

8.4 Insurance contract | |

8.5 Contract of service - electricity,

gas, water, telephone | |

8.6 Contract of service - other | |

8.7 Loan/guarantee | |

8.8 Damages - traffic accident | |

8.9 Damages - other | |

8.10 Other | |

9. Brief description of the basis of the principal claim:

10. Brief description of the basis of the interest rate claimed:

10.1 Statutory interest rate | |

10.2 Interest rate agreed upon by the parties | |

10.3 Interest rate of a loan taken out by the claimant at least in the amount of the principal claim | |

10.4 Other (explain):

11. Brief description of the reasons for international jurisdiction if the defendant is not domiciled in the Member State whose courts are seised:

12. Evidence

Acronyms: DE: documentary evidence TE: testimonial evidence EX: expert evidence

IN: inspection of an object or site OT: other

Type of evidence Description of the evidence offered

12.1

12.2

12.3

13. If the defendant enters a statement of defence or a statement of opposition the proceedings shall be discontinued | |

(REMINDER: UNLESS THE ABOVE BOX IS TICKED A TRANSFER TO ORDINARY CIVIL PROCEEDINGS WILL AUTOMATICALLY TAKE PLACE IN THE EVENT OF A STATEMENT OF DEFENCE OR A STATEMENT OF OPPOSITION)

14. Signature of the claimant/his representative

ANNEX 2

EUROPEAN PAYMENT NOTIFICATION

Reference:

1. Issuing Court:

Address:

Tel./fax/e-mail:

2. IMPORTANT NOTICE TO THE DEFENDANT:

By virtue of this notification the claimant demands from you the payment of the amount set out below. You have the options to

- either pay the full amount set out below including interest and costs to the claimant and submit a statement informing about the payment to the court

- or, if you intend to contest the claim, to lodge a statement of defence with the issuing court

within three weeks as from the service of the notification on you.

To comply with the time limit the statement of defence or the statement informing about the payment

has to reach the court before its expiration.

You may make use of the standard response form annexed to this notification but are not obliged to do so.

The issuing court has not examined the justification of the claim before granting this notification.

Nevertheless, if neither a statement informing about a payment nor a statement of defence is lodged until the expiry of the time limit a European order for payment that can be enforced against you will be issued without further scrutiny or notice. A statement of defence or a statement informing about payment are the only means to prevent the delivery of an order for payment.

3. Claimant

3.1 Name:

3.2 Address:

4. Claimant's representative

4.1 Name:

4.2 Address:

5. Defendant

5.1 Name:

5.2 Address:

6. Claim

6.1 Amount of principal (not including interest and costs):

6.2 Currency: | | EUR

| | Swedish Kroner

| | [British pounds]

7. Interest

7.1 Interest rate (claimed on the principal until payment is made)

7.1.1 % | |

7.1.2 % above the base rate of the ECB | |

7.1.3 Statutory interest rate | |

7.2 Interest to be collected as from:

8. Costs (amounts in same currency as under 6.2)

8.1 Costs related to this procedure

8.1.1 Application fee:

8.1.2. Claimant's representative's fee:

8.1.3 Other (explain):

8.2 Pre-litigation costs (explain):

8.3 Total costs claimed:

9. The claim relates to

9.1 Sales contract | |

9.2 Rental agreement - immovable | |

9.3 Rental agreement - movable | |

9.4 Insurance contract | |

9.5 Contract of service - electricity,

gas, water, telephone | |

9.6 Contract of service - other | |

9.7 Loan/guarantee | |

9.8 Damages - traffic accident | |

9.9 Damages - other | |

9.10 Other | |

10. Brief description of the basis of the principal claim:

11. Brief description of the basis of the interest rate claimed:

11.1 Statutory interest rate | |

11.2 Interest rate agreed upon by the parties | |

11.3 Interest rate of a loan taken out by the claimant at least in the amount of the principal claim | |

11.4 Other (explain):

12. Brief description of the reasons for international jurisdiction if the defendant is not domiciled in the Member State whose courts are seised:

13. Evidence

Acronyms: DE: documentary evidence TE: testimonial evidence EX: expert evidence

IN: inspection of an object or site OT: other

Type of evidence Description of the evidence offered

13.1

13.2

13.3

Done at Date

Signature and/or stamp

RESPONSE FORM - EUROPEAN PAYMENT NOTIFICATION

Reference:

1. The claim as set out in the European payment notification is justified; I have made the payment in the meantime | |

2. I hereby lodge a statement of defence relating to the claim in its entirety | |

3. I hereby lodge a statement of defence in respect of the following parts of

3.1 the principal claim: | |

3.2 the interest: | |

3.3 the costs: | |

4. Signature of the defendant/ his representative:

ANNEX 3

EUROPEAN ORDER FOR PAYMENT

Reference:

1. Issuing Court:

Address:

Tel./fax/e-mail:

2. IMPORTANT NOTICE TO THE DEFENDANT:

By virtue of this decision the court orders you to pay the full amount set out below including interest and costs to the claimant. The claimant is entitled to the enforcement of this obligation without further notice.

You can submit a statement informing the court about the payment having been effected in the meantime or challenge the order for payment by lodging a statement of opposition with the issuing court within three weeks as from the service of the order on you.

To comply with the time limit the statement of opposition or the statement informing about the payment has to reach the court before its expiration.

You may make use of the standard response form annexed to this order for payment but are not obliged to do so.

If no statement informing about a payment or statement of opposition is lodged until the expiry of the time limit the European order for payment will acquire the authority of a final decision and can no longer be challenged.

3. Claimant

3.1 Name:

3.2 Address:

4. Claimant's representative

4.1 Name:

4.2 Address:

5. Defendant

5.1 Name:

5.2 Address:

6. Claim

6.1 Amount of principal (not including interest and costs):

6.2 Currency: | | EUR

| | Swedish Kroner

| | [British pounds]

7. Interest

7.1 Interest rate (claimed on the principal until payment is made)

7.1.1 % | |

7.1.2 % above the base rate of the ECB | |

7.1.3 Statutory interest rate | |

7.2 Interest to be collected as from:

8. Costs (amounts in same currency as under 6.2)

8.1 Costs related to this procedure

8.1.1 Application fee:

8.1.2. Claimant's representative's fee:

8.1.3 Other (explain):

8.2 Pre-litigation costs (explain):

8.3 Total costs claimed:

9. The claim relates to

9.1 Sales contract | |

9.2 Rental agreement - immovable | |

9.3 Rental agreement - movable | |

9.4 Insurance contract | |

9.5 Contract of service - electricity,

gas, water, telephone | |

9.6 Contract of service - other | |

9.7 Loan/guarantee | |

9.8 Damages - traffic accident | |

9.9 Damages - other | |

9.10 Other | |

10. Brief description of the basis of the principal claim:

11. Brief description of the basis of the interest rate claimed:

11.1 Statutory interest rate | |

11.2 Interest rate agreed upon by the parties | |

11.3 Interest rate of a loan taken out by the claimant at least in the amount of the principal claim | |

11.4 Other (explain):

12. Brief description of the international jurisdiction of the defendant is not domiciled in the Member State whose courts are seised:

13. Evidence

Acronyms: DE: documentary evidence TE: testimonial evidence EX: expert evidence

IN: inspection of an object or site OT: other

Type of evidence Description of the evidence offered

13.1

13.2

13.3

Done at Date

Signature and/or stamp

RESPONSE FORM - EUROPEAN ORDER FOR PAYMENT

Reference:

1. The claim as set out in the European order for payment is justified; I have made the payment in the meantime | |

2. I hereby lodge a statement of opposition relating to the claim in its entirety | |

3. I hereby lodge a statement of opposition in respect of the following parts of

3.1 the principal claim: | |

3.2 the interest: | |

3.3 the costs: | |

4. Signature of the defendant/ his representative:

DOCNUM	52004PC0173R(02)
TYPDOC	5 ; preparatory documents ; 2004 ; PC
PUBREF	ES DA DE EL EN FR IT NL PT FI SV
DESCRIPT	injunction ; civil procedure ; civil proceedings ; claim ; drafting of Community law
MODIFIES	52004PC0173..... Corrigendum... (DA, DE, EL, EN, ES, FI, FR, IT, NL, PT, SV)

Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure

Regulation (EC) No 861/2007 of the European Parliament and of the Council

of 11 July 2007

establishing a European Small Claims Procedure

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and Article 67 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee [1],

Acting in accordance with the procedure laid down in Article 251 of the Treaty [2],

Whereas:

(1) The Community has set itself the objective of maintaining and developing an area of freedom, security and justice in which the free movement of persons is ensured. For the gradual establishment of such an area, the Community is to adopt, inter alia, measures in the field of judicial cooperation in civil matters having cross-border implications and needed for the proper functioning of the internal market.

(2) According to Article 65(c) of the Treaty, those measures are to include those eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.

(3) In this respect, the Community has, among other measures, already adopted 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 [3], Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [4], Council Decision 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters [5], Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims [6] and Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure [7].

(4) The European Council meeting in Tampere on 15 and 16 October 1999 invited the Council and the Commission to establish common procedural rules for simplified and accelerated cross-border litigation on small consumer and commercial claims.

(5) On 30 November 2000, the Council adopted a joint programme of the Commission and the Council of measures for the implementation of the principle of mutual recognition of decisions in civil and commercial matters [8]. The programme refers to simplifying and speeding up the settlement of cross-border litigation on small claims. This was taken forward by the Hague Programme [9], adopted by the European Council on 5 November 2004, which called for work on small claims to be actively pursued.

(6) On 20 December 2002, the Commission adopted a Green Paper on a European order for payment procedure and on measures to simplify and speed up small claims litigation. The Green Paper launched a consultation on measures concerning the simplification and the speeding up of small claims litigation.

(7) Many Member States have introduced simplified civil procedures for small claims since costs,

delays and complexities connected with litigation do not necessarily decrease proportionally with the value of the claim. The obstacles to obtaining a fast and inexpensive judgment are exacerbated in cross-border cases. It is therefore necessary to establish a European procedure for small claims (European Small Claims Procedure). The objective of such a procedure should be to facilitate access to justice. The distortion of competition within the internal market due to imbalances with regard to the functioning of the procedural means afforded to creditors in different Member States entails the need for Community legislation that guarantees a level playing-field for creditors and debtors throughout the European Union. It should be necessary to have regard to the principles of simplicity, speed and proportionality when setting the costs of dealing with a claim under the European Small Claims Procedure. It is appropriate that details of the costs to be charged be made public, and that the means of setting any such costs be transparent.

(8) The European Small Claims Procedure should simplify and speed up litigation concerning small claims in cross-border cases, whilst reducing costs, by offering an optional tool in addition to the possibilities existing under the laws of the Member States, which will remain unaffected. This Regulation should also make it simpler to obtain the recognition and enforcement of a judgment given in the European Small Claims Procedure in another Member State.

(9) This Regulation seeks to promote fundamental rights and takes into account, in particular, the principles recognised by the Charter of Fundamental Rights of the European Union. The court or tribunal should respect the right to a fair trial and the principle of an adversarial process, in particular when deciding on the necessity of an oral hearing and on the means of taking evidence and the extent to which evidence is to be taken.

(10) For the purposes of facilitating calculation of the value of a claim, all interest, expenses and disbursements should be disregarded. This should affect neither the power of the court or tribunal to award these in its judgment nor the national rules on the calculation of interest.

(11) In order to facilitate the commencement of the European Small Claims Procedure, the claimant should make an application by filling in a standard claim form and lodging it with the court or tribunal. The claim form should be submitted only to a court or tribunal that has jurisdiction.

(12) The claim form should be accompanied, where appropriate, by any relevant supporting documents. However, this does not prevent the claimant from submitting, where appropriate, further evidence during the procedure. The same principle should apply to the response by the defendant.

(13) The concepts of "clearly unfounded" in the context of the dismissal of a claim and of "inadmissible" in the context of the dismissal of an application should be determined in accordance with national law.

(14) The European Small Claims Procedure should be a written procedure, unless an oral hearing is considered necessary by the court or tribunal or a party so requests. The court or tribunal may refuse such a request. Such refusal may not be contested separately.

(15) The parties should not be obliged to be represented by a lawyer or another legal professional.

(16) The concept of "counterclaim" should be interpreted within the meaning of Article 6(3) of Regulation (EC) No 44/2001 as arising from the same contract or facts on which the original claim was based. Articles 2 and 4 as well as Article 5(3), (4) and (5) should apply, mutatis mutandis, to counterclaims.

(17) In cases where the defendant invokes a right of set-off during the proceedings, such claim should not constitute a counterclaim for the purposes of this Regulation. Therefore, the defendant should not be obliged to use standard Form A, as set out in Annex I, for invoking such a right.

(18) The Member State addressed for the purposes of the application of Article 6 is the Member

State where service is to be effected or to where the document is to be dispatched. In order to reduce costs and delays, documents should be served on the parties primarily by postal service attested by an acknowledgment of receipt, including the date of receipt.

(19) A party may refuse to accept a document at the time of service or by returning the document within one week if it is not written in, or accompanied by a translation into, the official language of the Member State addressed (or, if there are several official languages in that Member State, the official language or one of the official languages of the place where service is to be effected or to where the document is to be dispatched) or a language which the addressee understands.

(20) In the context of oral hearings and the taking of evidence, the Member States should encourage the use of modern communication technology subject to the national law of the Member State where the court or tribunal is situated. The court or tribunal should use the simplest and least costly method of taking evidence.

(21) The practical assistance to be made available to the parties should include technical information concerning the availability and the filling in of the forms.

(22) The information about procedural questions can also be given by the court or tribunal staff in accordance with national law.

(23) As the objective of this Regulation is to simplify and speed up litigation concerning small claims in cross-border cases, the court or tribunal should act as soon as possible even when this Regulation does not prescribe any time limit for a specific phase of the procedure.

(24) For the purposes of calculating time limits as provided for in this Regulation, Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits [10] should apply.

(25) In order to speed up the recovery of small claims, the judgment should be enforceable notwithstanding any possible appeal and without the condition of the provision of a security except as provided for in this Regulation.

(26) Any reference in this Regulation to an appeal should include any possible means of appeal available under national law.

(27) The court or tribunal must include a person qualified to serve as a judge in accordance with national law.

(28) Whenever the court or tribunal is required to set a time limit, the party concerned should be informed of the consequences of not complying with it.

(29) The unsuccessful party should bear the costs of the proceedings. The costs of the proceedings should be determined in accordance with national law. Having regard to the objectives of simplicity and cost-effectiveness, the court or tribunal should order that an unsuccessful party be obliged to pay only the costs of the proceedings, including for example any costs resulting from the fact that the other party was represented by a lawyer or another legal professional, or any costs arising from the service or translation of documents, which are proportionate to the value of the claim or which were necessarily incurred.

(30) In order to facilitate recognition and enforcement, a judgment given in a Member State in the European Small Claims Procedure should be recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition.

(31) There should be minimum standards for the review of a judgment in situations where the defendant was not able to contest the claim.

(32) Having regard to the objectives of simplicity and cost-effectiveness, the party seeking enforcement shall not be required to have an authorised representative or a postal address in the Member State of enforcement, other than with agents having competence for the enforcement procedure in accordance with the national law of that Member State.

(33) Chapter III of this Regulation should also apply to the determination of costs and expenses made by officers of the court or tribunal due to a judgment given pursuant to the procedure specified in this Regulation.

(34) The measures necessary for the implementation of this Regulation should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission [11].

(35) In particular, power should be conferred on the Commission to adopt measures necessary to update or make technical amendments to the forms set out in the Annexes. Since those measures are of general scope and are designed to amend non-essential elements of this Regulation and/or to supplement this Regulation by the addition of new non-essential elements, they should be adopted in accordance with the regulatory procedure with scrutiny provided for in Article 5a of Decision 1999/468/EC.

(36) Since the objectives of this Regulation, namely, the establishment of a procedure to simplify and speed up litigation concerning small claims in cross-border cases, and to reduce costs, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of this Regulation, be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary to achieve those objectives.

(37) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and to the Treaty establishing the European Community, the United Kingdom and Ireland have given notice of their wish to take part in the adoption and application of this Regulation.

(38) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark does not take part in the adoption of this Regulation and is not bound by it or subject to its application,

HAVE ADOPTED THIS REGULATION:

CHAPTER I

SUBJECT MATTER AND SCOPE

Article 1

Subject matter

This Regulation establishes a European procedure for small claims (hereinafter referred to as the "European Small Claims Procedure"), intended to simplify and speed up litigation concerning small claims in cross-border cases, and to reduce costs. The European Small Claims Procedure shall be available to litigants as an alternative to the procedures existing under the laws of the Member States.

This Regulation also eliminates the intermediate proceedings necessary to enable recognition and enforcement, in other Member States, of judgments given in one Member State in the European Small Claims Procedure.

Article 2

Scope

1. This Regulation shall apply, in cross-border cases, to civil and commercial matters, whatever the nature of the court or tribunal, where the value of a claim does not exceed EUR 2000 at the time when the claim form is received by the court or tribunal with jurisdiction, excluding all interest, expenses and disbursements. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (acta jure imperii).

2. This Regulation shall not apply to matters concerning:

(a) the status or legal capacity of natural persons;

(b) rights in property arising out of a matrimonial relationship, maintenance obligations, wills and succession;

(c) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;

(d) social security;

(e) arbitration;

(f) employment law;

(g) tenancies of immovable property, with the exception of actions on monetary claims; or

(h) violations of privacy and of rights relating to personality, including defamation.

3. In this Regulation, the term "Member State" shall mean Member States with the exception of Denmark.

Article 3

Cross-border cases

1. For the purposes of this Regulation, a cross-border case is one in which at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the court or tribunal seised.

2. Domicile shall be determined in accordance with Articles 59 and 60 of Regulation (EC) No 44/2001.

3. The relevant moment for determining whether there is a cross-border case is the date on which the claim form is received by the court or tribunal with jurisdiction.

CHAPTER II

THE EUROPEAN SMALL CLAIMS PROCEDURE

Article 4

Commencement of the Procedure

1. The claimant shall commence the European Small Claims Procedure by filling in standard claim Form A, as set out in Annex I, and lodging it with the court or tribunal with jurisdiction directly, by post or by any other means of communication, such as fax or e-mail, acceptable to the Member State in which the procedure is commenced. The claim form shall include a description of evidence supporting the claim and be accompanied, where appropriate, by any relevant supporting documents.

2. Member States shall inform the Commission which means of communication are acceptable to them. The Commission shall make such information publicly available.

3. Where a claim is outside the scope of this Regulation, the court or tribunal shall inform the claimant to that effect. Unless the claimant withdraws the claim, the court or tribunal shall proceed with it in accordance with the relevant procedural law applicable in the Member State in which the procedure is conducted.

4. Where the court or tribunal considers the information provided by the claimant to be inadequate or insufficiently clear or if the claim form is not filled in properly, it shall, unless the claim appears to be clearly unfounded or the application inadmissible, give the claimant the opportunity to complete or rectify the claim form or to supply supplementary information or documents or to withdraw the claim, within such period as it specifies. The court or tribunal shall use standard Form B, as set out in Annex II, for this purpose.

Where the claim appears to be clearly unfounded or the application inadmissible or where the claimant fails to complete or rectify the claim form within the time specified, the application shall be dismissed.

5. Member States shall ensure that the claim form is available at all courts and tribunals at which the European Small Claims Procedure can be commenced.

Article 5

Conduct of the Procedure

1. The European Small Claims Procedure shall be a written procedure. The court or tribunal shall hold an oral hearing if it considers this to be necessary or if a party so requests. The court or tribunal may refuse such a request if it considers that with regard to the circumstances of the case, an oral hearing is obviously not necessary for the fair conduct of the proceedings. The reasons for refusal shall be given in writing. The refusal may not be contested separately.

2. After receiving the properly filled in claim form, the court or tribunal shall fill in Part I of the standard answer Form C, as set out in Annex III.

A copy of the claim form, and, where applicable, of the supporting documents, together with the answer form thus filled in, shall be served on the defendant in accordance with Article 13. These documents shall be dispatched within 14 days of receiving the properly filled in claim form.

3. The defendant shall submit his response within 30 days of service of the claim form and answer form, by filling in Part II of standard answer Form C, accompanied, where appropriate, by any relevant supporting documents, and returning it to the court or tribunal, or in any other appropriate

way not using the answer form.

4. Within 14 days of receipt of the response from the defendant, the court or tribunal shall dispatch a copy thereof, together with any relevant supporting documents to the claimant.

5. If, in his response, the defendant claims that the value of a non-monetary claim exceeds the limit set out in Article 2(1), the court or tribunal shall decide within 30 days of dispatching the response to the claimant, whether the claim is within the scope of this Regulation. Such decision may not be contested separately.

6. Any counterclaim, to be submitted using standard Form A, and any relevant supporting documents shall be served on the claimant in accordance with Article 13. Those documents shall be dispatched within 14 days of receipt.

The claimant shall have 30 days from service to respond to any counterclaim.

7. If the counterclaim exceeds the limit set out in Article 2(1), the claim and counterclaim shall not proceed in the European Small Claims Procedure but shall be dealt with in accordance with the relevant procedural law applicable in the Member State in which the procedure is conducted.

Articles 2 and 4 as well as paragraphs 3, 4 and 5 of this Article shall apply, mutatis mutandis, to counterclaims.

Article 6

Languages

1. The claim form, the response, any counterclaim, any response to a counterclaim and any description of relevant supporting documents shall be submitted in the language or one of the languages of the court or tribunal.

2. If any other document received by the court or tribunal is not in the language in which the proceedings are conducted, the court or tribunal may require a translation of that document only if the translation appears to be necessary for giving the judgment.

3. Where a party has refused to accept a document because it is not in either of the following languages:

(a) the official language of the Member State addressed, or, if there are several official languages in that Member State, the official language or one of the official languages of the place where service is to be effected or to where the document is to be dispatched; or

(b) a language which the addressee understands,

the court or tribunal shall so inform the other party with a view to that party providing a translation of the document.

Article 7

Conclusion of the Procedure

1. Within 30 days of receipt of the response from the defendant or the claimant within the time limits laid down in Article 5(3) or (6), the court or tribunal shall give a judgment, or:

(a) demand further details concerning the claim from the parties within a specified period of time, not exceeding 30 days;

(b) take evidence in accordance with Article 9; or

(c) summon the parties to an oral hearing to be held within 30 days of the summons.

2. The court or tribunal shall give the judgment either within 30 days of any oral hearing or after having received all information necessary for giving the judgment. The judgment shall be served on the parties in accordance with Article 13.

3. If the court or tribunal has not received an answer from the relevant party within the time limits laid down in Article 5(3) or (6), it shall give a judgment on the claim or counterclaim.

Article 8

Oral hearing

The court or tribunal may hold an oral hearing through video conference or other communication technology if the technical means are available.

Article 9

Taking of evidence

1. The court or tribunal shall determine the means of taking evidence and the extent of the evidence necessary for its judgment under the rules applicable to the admissibility of evidence. The court or tribunal may admit the taking of evidence through written statements of witnesses, experts or parties. It may also admit the taking of evidence through video conference or other communication technology if the technical means are available.

2. The court or tribunal may take expert evidence or oral testimony only if it is necessary for giving the judgment. In making its decision, the court or tribunal shall take costs into account.

3. The court or tribunal shall use the simplest and least burdensome method of taking evidence.

Article 10

Representation of parties

Representation by a lawyer or another legal professional shall not be mandatory.

Article 11

Assistance for the parties

The Member States shall ensure that the parties can receive practical assistance in filling in the forms.

Article 12

Remit of the court or tribunal

1. The court or tribunal shall not require the parties to make any legal assessment of the claim.

2. If necessary, the court or tribunal shall inform the parties about procedural questions.

3. Whenever appropriate, the court or tribunal shall seek to reach a settlement between the parties.

Article 13

Service of documents

1. Documents shall be served by postal service attested by an acknowledgement of receipt including the date of receipt.

2. If service in accordance with paragraph 1 is not possible, service may be effected by any of the methods provided for in Articles 13 or 14 of Regulation (EC) No 805/2004.

Article 14

Time limits

1. Where the court or tribunal sets a time limit, the party concerned shall be informed of the consequences of not complying with it.

2. The court or tribunal may extend the time limits provided for in Article 4(4), Article 5(3) and (6) and Article 7(1), in exceptional circumstances, if necessary in order to safeguard the rights of the parties.

3. If, in exceptional circumstances, it is not possible for the court or tribunal to respect the time limits provided for in Article 5(2) to (6) and Article 7, it shall take the steps required by those provisions as soon as possible.

Article 15

Enforceability of the judgment

1. The judgment shall be enforceable notwithstanding any possible appeal. The provision of a security shall not be required.

2. Article 23 shall also apply in the event that the judgment is to be enforced in the Member State where the judgment was given.

Article 16

Costs

The unsuccessful party shall bear the costs of the proceedings. However, the court or tribunal shall not award costs to the successful party to the extent that they were unnecessarily incurred or are disproportionate to the claim.

Article 17

Appeal

1. Member States shall inform the Commission whether an appeal is available under their procedural law against a judgment given in the European Small Claims Procedure and within what time limit such appeal shall be lodged. The Commission shall make that information publicly available.

2. Article 16 shall apply to any appeal.

Article 18

Minimum standards for review of the judgment

1. The defendant shall be entitled to apply for a review of the judgment given in the European Small Claims Procedure before the court or tribunal with jurisdiction of the Member State where the judgment was given where:

(a) (i) the claim form or the summons to an oral hearing were served by a method without proof of receipt by him personally, as provided for in Article 14 of Regulation (EC) No 805/2004; and

(ii) service was not effected in sufficient time to enable him to arrange for his defence without any fault on his part,

or

(b) the defendant was prevented from objecting to the claim by reason of force majeure, or due to extraordinary circumstances without any fault on his part,

provided in either case that he acts promptly.

2. If the court or tribunal rejects the review on the basis that none of the grounds referred to in paragraph 1 apply, the judgment shall remain in force.

If the court or tribunal decides that the review is justified for one of the reasons laid down in paragraph 1, the judgment given in the European Small Claims Procedure shall be null and void.

Article 19

Applicable procedural law

Subject to the provisions of this Regulation, the European Small Claims Procedure shall be governed by the procedural law of the Member State in which the procedure is conducted.

CHAPTER III

RECOGNITION AND ENFORCEMENT IN ANOTHER MEMBER STATE

Article 20

Recognition and enforcement

1. A judgment given in a Member State in the European Small Claims Procedure shall be recognised and enforced in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition.

2. At the request of one of the parties, the court or tribunal shall issue a certificate concerning a judgment in the European Small Claims Procedure using standard Form D, as set out in Annex IV, at no extra cost.

Article 21

Enforcement procedure

1. Without prejudice to the provisions of this Chapter, the enforcement procedures shall be governed by the law of the Member State of enforcement.

Any judgment given in the European Small Claims Procedure shall be enforced under the same conditions as a judgment given in the Member State of enforcement.

2. The party seeking enforcement shall produce:

(a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity; and

(b) a copy of the certificate referred to in Article 20(2) and, where necessary, the translation thereof into the official language of the Member State of enforcement or, if there are several official languages in that Member State, the official language or one of the official languages of court or tribunal proceedings of the place where enforcement is sought in conformity with the law of that Member State, or into another language that the Member State of enforcement has indicated it can accept. Each Member State may indicate the official language or languages of the institutions of the European Union other than its own which it can accept for the European Small Claims Procedure. The content of Form D shall be translated by a person qualified to make translations in one of the Member States.

3. The party seeking the enforcement of a judgment given in the European Small Claims Procedure in another Member State shall not be required to have:

(a) an authorised representative; or

(b) a postal address

in the Member State of enforcement, other than with agents having competence for the enforcement procedure.

4. No security, bond or deposit, however described, shall be required of a party who in one Member State applies for enforcement of a judgment given in the European Small Claims Procedure in another Member State on the ground that he is a foreign national or that he is not domiciled or resident in the Member State of enforcement.

Article 22

Refusal of enforcement

1. Enforcement shall, upon application by the person against whom enforcement is sought, be refused by the court or tribunal with jurisdiction in the Member State of enforcement if the judgment given in the European Small Claims Procedure is irreconcilable with an earlier judgment given in any Member State or in a third country, provided that:

(a) the earlier judgment involved the same cause of action and was between the same parties;

(b) the earlier judgment was given in the Member State of enforcement or fulfils the conditions necessary for its recognition in the Member State of enforcement; and

(c) the irreconcilability was not and could not have been raised as an objection in the court or tribunal proceedings in the Member State where the judgment in the European Small Claims Procedure was given.

2. Under no circumstances may a judgment given in the European Small Claims Procedure be reviewed as to its substance in the Member State of enforcement.

Article 23

Stay or limitation of enforcement

Where a party has challenged a judgment given in the European Small Claims Procedure or where such a challenge is still possible, or where a party has made an application for review within the meaning of Article 18, the court or tribunal with jurisdiction or the competent authority in the Member State of enforcement may, upon application by the party against whom enforcement is sought:

(a) limit the enforcement proceedings to protective measures;

(b) make enforcement conditional on the provision of such security as it shall determine; or

(c) under exceptional circumstances, stay the enforcement proceedings.

CHAPTER IV

FINAL PROVISIONS

Article 24

Information

The Member States shall cooperate to provide the general public and professional circles with information on the European Small Claims Procedure, including costs, in particular by way of the European Judicial Network in Civil and Commercial Matters established in accordance with Decision 2001/470/EC.

Article 25

Information relating to jurisdiction, means of communication and appeals

1. By 1 January 2008 the Member States shall communicate to the Commission:

(a) which courts or tribunals have jurisdiction to give a judgment in the European Small Claims Procedure;

(b) which means of communication are accepted for the purposes of the European Small Claims Procedure and available to the courts or tribunals in accordance with Article 4(1);

(c) whether an appeal is available under their procedural law in accordance with Article 17 and with which court or tribunal this may be lodged;

(d) which languages are accepted pursuant to Article 21(2)(b); and

(e) which authorities have competence with respect to enforcement and which authorities have competence for the purposes of the application of Article 23.

Member States shall apprise the Commission of any subsequent changes to this information.

2. The Commission shall make the information notified in accordance with paragraph 1 publicly available through publication in the Official Journal of the European Union and through any other appropriate means.

Article 26

Implementing measures

The measures designed to amend non-essential elements of this Regulation, including by supplementing it, relating to updates or technical amendments to the forms in the Annexes shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 27(2).

Article 27

Committee

1. The Commission shall be assisted by a Committee.

2. Where reference is made to this paragraph, Article 5a(1) to (4), and Article 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

Article 28

Review

By 1 January 2014, the Commission shall present to the European Parliament, the Council and the European Economic and Social Committee a detailed report reviewing the operation of the European Small Claims Procedure, including the limit of the value of the claim referred to in Article 2(1).

That report shall contain an assessment of the procedure as it has operated and an extended impact assessment for each Member State.

To that end and in order to ensure that best practice in the European Union is duly taken into account and reflects the principles of better legislation, Member States shall provide the Commission with information relating to the cross-border operation of the European Small Claims Procedure. This information shall cover court fees, speed of the procedure, efficiency, ease of use and the internal small claims procedures of the Member States.

The Commission's report shall be accompanied, if appropriate, by proposals for adaptation.

Article 29

Entry into force

This Regulation shall enter into force on the day following its publication in the Official Journal of the European Union.

It shall apply from 1 January 2009, with the exception of Article 25, which shall apply from 1 January 2008.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

Done at Strasbourg, 11 July 2007.

For the European Parliament

The President

H.-G. Pöttering

For the Council

The President

M. Lobo Antunes

[1] OJ C 88, 11.4.2006, p. 61.

[2] Opinion of the European Parliament of 14 December 2006 (not yet published in the Official Journal) and Council Decision of 13 June 2007.

[3] OJ L 160, 30.6.2000, p. 37.

[4] OJ L 12, 16.1.2001, p. 1. Regulation as amended by Regulation (EC) No 1791/2006 (OJ L 363, 20.12.2006, p. 1).

[5] OJ L 174, 27.6.2001, p. 25.

[6] OJ L 143, 30.4.2004, p. 15. Regulation as amended by Commission Regulation (EC) No 1869/2005 (OJ L 300, 17.11.2005, p. 6).

[7] OJ L 399, 30.12.2006, p. 1.

[8] OJ C 12, 15.1.2001, p. 1.

[9] OJ C 53, 3.3.2005, p. 1.

[10] OJ L 124, 8.6.1971, p. 1.

[11] OJ L 184, 17.7.1999, p. 23. Decision as amended by Decision 2006/512/EC (OJ L 200, 22.7.2006, p. 11).

ANNEX I

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ANNEX II

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ANNEX III

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ANNEX IV

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INFORCE	2007/08/01=EV ; 2009/01/01=MA/PART ; 2008/01/01=MA/PART
ENDVAL	9999/99/99
LEGBASE	12006E061 12006E067 12006E251
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Brussels, 15.3.2005

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Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

establishing a European Small Claims Procedure

(presented by the Commission) {SEC(2005) 351}{SEC(2005) 352}

EXPLANATORY MEMORANDUM

1. INTRODUCTION AND BACKGROUND

1.1. Introduction

Following the 1975 Preliminary programme for a consumer protection and information policy[1] and the 1993 Green Paper on Access of consumers to justice and the settlement of consumer disputes in the single market[2], the Commission in 1996 adopted a Communication concerning an action plan on consumer access to justice and the settlement of consumer disputes in the internal market[3]. The action plan focused on the promotion and enhancement of procedures for settling individual consumer disputes, and made provision for the introduction of simplified access to court procedures. With the entry into force of the Treaty of Amsterdam in 1999, the European Union has set itself the objective of progressively establishing an area of freedom, security and justice, amongst others by adopting measures in the field of judicial cooperation in civil matters.

The European Council in Tampere 1999 invited the Council to establish special common procedural rules for simplified and accelerated litigation on small claims, and to abolish the intermediate measures which are still required to enable the recognition and enforcement of a decision or judgment in the requested State for all titles in respect of small claims (i.e. not limited to consumer claims).

The joint programme of the Commission and the Council of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters, adopted by the Council on 30 November 2000[4], called for simplifying and speeding up the settlement of small claims litigation. Discussions on simplifying and speeding up the settlement of small claims litigation would also facilitate the recognition and enforcement of judgments.

The need for simplified and accelerated small claims litigation has also been expressed by the European Parliament[5].

1.2. The Green Paper on a European Order for payment procedure and on measures to simplify and speed up small claims litigation

The adoption of this proposal was preceded by a wide-ranging consultation of both Member States and all interested parties of civil society. The Green Paper on a European order for payment procedure and on measures to simplify and speed up small claims litigation [6] presented by the Commission on 20 December 2002 gave an overview of the currently existing Small Claims procedures in the Member States. Based on a comparative study of how Member States deal with the relevant procedural issues it formulated a number of questions concerning the desirable scope and features of a European instrument.

The reactions to the Green Paper that were further debated in a public hearing organised by the Commission on 12 December 2003 revealed that an instrument to simplify and speed up small claims litigation is almost unanimously considered a step ahead in the creation of an area of freedom, security and justice.

In its opinion[7] of 18 June 2003 on the Green Paper, the European Economic and Social Committee welcomed the Commission's initiative to launch a consultation on this issue and the Commission's effort to accelerate civil proceedings and to make them cheaper and more efficient. It supported the establishment of a European procedure to simplify and speed up small claims litigation. It considered that suitable measures for speeding up such litigation should be defined without, at the same time, jeopardising the guarantees afforded to the parties in question under the rule of law.

In it opinion[8] of 12 February 2004 on the Green Paper, the European Parliament welcomed the Commission's initiative, and stated that the small claims procedure should not only apply to cases relating to payment of a sum of money, on the understanding that a limit must first be determined on the basis of the amount at issue, but also be extended to cover all other disputes concerning economic relationships falling under the heading of obligations. Furthermore, in the small claims procedure alternative dispute resolution (ADR) methods should be applied, the taking of evidence simplified, and the right of appeal limited.

On 16 March 2004 a meeting of experts of the Member States discussed a draft Regulation establishing a European Small Claims Procedure. The approach taken by this text was generally appreciated by the delegations, namely to adopt a regulation which would have as objectives to simplify and speed up litigation concerning small claims by establishing a European Small Claims Procedure available to litigants as an alternative to the procedures existing under the laws of the Member States which will remain unaffected, and to abolish the intermediate measures to enable the recognition and enforcement of a judgment given in a European Small Claims Procedure in another Member State.

2. OBJECTIVES AND SCOPE

2.1. Overall objective

2.1.1. The significance of efficient Small Claims procedures

Costs, delay and vexation of judicial proceedings do not necessarily decrease proportionally with the amount of the claim. On the contrary, the smaller the claim is, the more the weight of these obstacles increases. This has led to the creation of simplified civil procedures for Small Claims in many Member States. At the same time, the potential number of cross-border disputes is rising as a consequence of the increasing use of the EC Treaty rights of free movement of persons, goods and services. The obstacles to obtaining a fast and inexpensive judgment are clearly intensified in a cross-border context. It will often be necessary to hire two lawyers, there are additional translation and interpretation costs and miscellaneous other factors such as extra travel costs of litigants, witnesses, lawyers etc.

Potential problems are not limited to disputes between individuals. Also the owners of small businesses may face difficulties when they want to pursue their claims in another Member State. But as a consequence of the lack of a procedure which is proportional to the value of the litigation, the obstacles that the creditor is likely to encounter might make it questionable whether judicial recourse is economically sensible. The expense of obtaining a judgment, in particular against a defendant in another Member State, is often disproportionate to the amount of the claim involved. Many creditors, faced with the expense of the proceedings, and daunted by the practical difficulties that are likely to ensue, abandon any hope of obtaining what they believe is rightfully theirs.

2.1.2. Characteristic features of Small Claims procedures - procedural simplifications

Within the framework of their procedural systems and traditions, many Member States have introduced specific rules with respect to small claims litigation which provide for procedural simplifications compared with the ordinary procedure. It is not surprising that the solutions that have been devised differ from each other. Whereas in some Member States there are specific Small Claims procedures, others provide for certain procedural simplifications in Small Claims cases. There are also differences with respect to the degree to which specific procedural simplifications apply.

There are specific Small Claims Procedures which provide for various simplifications compared with the ordinary procedure in the United Kingdom (England/Wales, Scotland and Northern Ireland), Ireland, Sweden and Spain. In Germany courts may determine their procedures as they see fit in Small Claims cases. In France there is a simplified way of introducing the procedure for Small Claims (déclaration au greffe). The Codes of Civil Procedure of Austria, Finland and the Netherlands and other Member States contain several procedural simplifications compared with the ordinary procedure which are applicable in cases below certain thresholds. While one may not consider these procedural simplifications as amounting to a specific Small Claims Procedure in a strict sense, in practice very similar results are achieved.

The most important features of the existing Small Claims procedures and procedural simplifications can be summarised as follows[9]:

- All Member States with Small Claims procedures have quantitative thresholds for these procedures which vary, however, considerably[10]. Some Member States apply the Small Claims procedure additionally also to certain types of litigation, regardless of a threshold. In most Member States with Small Claims procedures, these procedures are available not only for monetary claims. The use of the simplified procedure is in most cases obligatory (for claims below the threshold), but a litigation can be transferred to the ordinary or a more formal procedure by the judge or on application of a party.

- In many existing Small Claims procedures, there are forms for filing the claim. There is no obligation to make legal references in the application in any Member State, i.e. only factual references are required. In most Member States there is support by a court clerk or help desk for the introduction of a procedure. Moreover, the judge gives assistance during the hearing to a party that is not represented by a lawyer (particularly on procedural issues), whilst observing the principle of impartiality. At present, no Member States requires mandatory representation by a lawyer in Small Claims procedures.

- The relaxation of rules concerning the taking of evidence is one of the issues crucial in the small claims procedures in most Member States. In many cases, the judge has a certain amount of discretion in this respect. The possibility of a purely written procedure (instead of oral hearings) exists presently in many cases. In some cases, the rules concerning the content of the judgment are relaxed. There is a time limit for the delivery of the judgment in many Member States. The procedural rules with respect to the reimbursement of costs differ significantly. In most Member States all costs have to be paid by the defendant alone if he loses. The laws of the Member States concerning the possibility to appeal against decisions in Small Claims procedures differ considerably.

2.2. Scope

2.2.1. The need for action at Community level

Article 65 of the EC Treaty attributes legislative powers to the Community with regard to judicial cooperation in civil matters having cross-border implications in so far as necessary for the proper functioning of the internal market.

With respect to the internal market requirement, there is a margin of appreciation for the Community

institutions in determining whether a measure is necessary for the proper functioning of the internal market. With respect to this proposal, the proper functioning of the internal market is facilitated because the establishment of a European Small Claims procedure will help to eliminate obstacles to the free movement of goods, persons, services or capital. As outlined above (2.1.2.), at present small claims procedures are substantially different in the Member States. The access of economic operators to judicial mechanisms of substantially different performance levels entails a distortion of competition in the internal market regardless of whether the actors are domiciled in different Member States or in the same Member State. If some operators have access to efficient and effective procedures while others do not, there is no level playing field for operators competing in the internal market. The existing disparities in the laws of the Member States put obstacles to the proper functioning of the internal market.Consequently, a situation implying a marked disequilibrium with regard to the efficiency of the procedural means afforded to creditors under different national laws amounts to a distortion of competition within the internal market. A European Small Claims procedure would thus facilitate the proper functioning of the internal market.

Concerning the cross-border requirement, most linguistic versions of the Treaty use the term matter, and not measure. It is therefore necessary and sufficient that the matter has cross-border implications. This interpretation is confirmed by letter (c) of Article 65 which provides that measures in the field of judicial cooperation in civil matters shall include eliminating obstacles to the good functioning of civil proceedings, and by Article III-269 of the Treaty establishing a Constitution for Europe.

Procedural law by its nature may have cross-border implications. The judge will always apply the lex fori whether or not the litigation has cross-border elements. Small Claims litigation constitutes a matter having cross-border implications since - taking into account the development of the internal market - most economic operators and consumers will sooner or later be involved in such litigation abroad.

A measure applying also to purely internal cases which is necessary for the proper functioning of the internal market, in particular because it eliminates distortions of competition between economic operators of the different Member States, has necessarily cross-border implications since the putting in place of an efficient Small Claims Procedure in every Member State will facilitate access to justice under equal conditions.

The internal market requirement in Article 65 is thus a restriction of the cross-border requirement. A measure which is necessary for the proper functioning of the internal market has necessarily cross-border implications, whereas a measure having cross-border implications may not always also be necessary for the proper functioning of the internal market. This interpretation is also confirmed by the negotiations leading to the adoption of Article 65 since the internal market requirement was introduced at a late stage of the negotiations in order to limit the scope of the provision. A more restrictive interpretation of Article 65 cannot have been intended by those who drafted it since it would create new obstacles to access to justice in the European Judicial Area. Every legal instrument would have to have its own cross-border definition since that definition would almost necessarily have to vary from one issue to another which would cause significant difficulties in the application of those instruments.

It would not only be inappropriate but even counterproductive to constrain the scope of application of the European Small Claims Procedure to cross-border cases.

Firstly, the creation of two different regimes for internal cases and for cases with cross-border aspects should be avoided. Such a duality of regimes would be inconsistent with the objective of a single and coherent area of justice for all.

Furthermore, as outlined above, not in all Member States speedy and inexpensive small claims procedures

are available to litigants. The lack of such procedures which are proportional to the value of the litigation make judicial recourse economically questionable in many cases and often creditors abstain from taking legal action. This limitation of effective access to justice causes economic costs which have significant negative macroeconomic impacts on the proper functioning of the internal market.

2.2.2. Subsidiarity and proportionality

The objective of this proposal, to simplify and speed up litigation concerning small claims by establishing a European Small Claims Procedure, cannot be sufficiently accomplished by the Member States themselves as they cannot guarantee the equivalence of rules applicable throughout the Community. The objective can therefore be only achieved at Community level.

The present proposal is fully consistent with the principle of proportionality in that it is strictly limited to what is necessary in order to reach this objective. In that context, it is particularly essential to underscore the effects of the combination of the legal instrument chosen (Regulation) with the optional nature of the European Small Claims Procedure in relation to comparable mechanisms under the national procedural law of the Member States. Whilst ensuring the uniformity and direct applicability of the procedure, the Regulation proposed here would only oblige Member States to make the European procedure available as an additional tool. It would force them neither to abandon their pre-existing legislation on small claims nor to modify such legislation to bring it into line with Community law. Hence, this proposal for a Regulation which leaves the right of the Member States unaffected to continue the application of their domestic rules alongside the European Small Claims Procedure encroaches much less on their procedural systems than a Directive that would require an adaptation of national legislation to the standards set in that instrument. This legislative technique, in fact, assures a common minimum level in the efficiency of the recovery of small claims but it permits Member States that have developed an even better-functioning domestic system to retain it. Ultimately, it will be left to the creditors to judge which procedure they consider as being either superior in performance or more convenient in terms of accessibility, the latter criterion being particularly relevant for those operating in several Member States and being spared the need to make themselves familiar with the procedural law of every one of them by the availability of a uniform European Small Claims Procedure. Finally, it should be borne in mind that Article 17 of the proposal provides that subject to the provisions of this Regulation, the European Small Claims Procedure shall be governed by the procedural law of the Member State in which the procedure is conducted. Hence, the introduction of a European Small Claims Procedure does not entail the need for further approximation of national procedural legislation and thus keeps interference with domestic law to an absolute minimum.

2005/0020 (COD)

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

establishing a European Small Claims Procedure

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61 (c) thereof,

Having regard to the proposal from the Commission[11],

Having regard to the opinion of the Economic and Social Committee[12],

Acting in accordance with the procedure laid down in Article 251 of the Treaty[13],

Whereas:

The European Union has set itself the objective of maintaining and developing the European Union as an area of freedom, security and justice in which the free movement of persons is ensured. For the gradual establishment of such an area, the Community is to adopt, among others, the measures relating to judicial cooperation in civil matters needed for the proper functioning of the internal market.

In this respect, the Community has among other measures already adopted 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[14], Council Decision 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters[15], Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[16] and Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims[17].

On 20 December 2002, the Commission adopted a Green Paper on a European order for payment procedure and on measures to simplify and speed up small claims litigation[18]. The Green Paper launched a consultation on measures concerning the simplification and the speeding up of small claims litigation.

Many Member States have introduced simplified civil procedures for Small Claims since costs, delay and vexation connected with litigation do not necessarily decrease proportionally with the amount of the claim. The obstacles to obtaining a fast and inexpensive judgment are intensified in cross-border cases. It is therefore necessary to create a European Small Claims Procedure. The objective of such a European procedure should be to facilitate access to justice by purveying a procedure of moderate duration at affordable costs.

The distortion of competition within the internal market due to the disequilibrium with regard to the functioning of the procedural means afforded to creditors in different Member States entails the need for Community legislation which guarantees a level playing field for creditors and debtors throughout the European Union.

The European Small Claims Procedure should apply also to purely domestic cases in order to eliminate distortions of competition between economic operators in different Member States and to facilitate access to justice under equal conditions in all Member States.

The European Small Claims Procedure should simplify and speed up litigation concerning small claims, whilst reducing costs, by offering an optional tool in addition to the possibilities existing under the laws of the Member States, which will remain unaffected. This Regulation should also make it simpler to obtain the recognition and enforcement of a judgment given in a European Small Claims Procedure in another Member State, including judgements which were initially of a purely domestic nature.

In order to facilitate the introduction of the procedure, the claimant should commence the European Small Claims Procedure by completing a claim form and lodging it at the competent court or tribunal.

In order to reduce costs and delays, documents should be served on the parties by registered letter with acknowledgment of receipt, or by any simpler means such as simple letter, fax or email. The procedure should be a written procedure, unless an oral hearing is considered necessary by the court or tribunal. The parties should not be obliged to be represented by a lawyer.

The court or tribunal should be given the possibility to hold a hearing through an audio, video or email conference. It should also be given the possibility to determine the means of proof and the extent of the taking of evidence according to its discretion and admit the taking of evidence through telephone, written statements of witnesses, and audio, video or email conferences.

The court or tribunal should respect the principle of an adversarial process.

In order to speed up the resolution of disputes, the judgment should be rendered within six months following the registration of the claim.

In order to speed up the recovery of small claims, the judgment should be immediately enforceable notwithstanding any possible appeal and without the condition of the provision of a security.

In order to reduce costs, when the unsuccessful party is a natural person and is not represented by a lawyer or another legal professional, he should not be obliged to reimburse the fees of a lawyer or another legal professional of the other party.

In order to facilitate recognition and enforcement, a judgment given in a Member State in a European Small Claims Procedure should be recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition.

This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. Specifically, it seeks to ensure full respect for the right to a fair trial as recognised in Article 47 of the Charter.

The measures necessary for the implementation of this Regulation should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission[19].

Since the objectives of the action to be taken namely the establishment of a procedure to simplify and speed up litigation concerning small claims, and reduce costs, cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality as set out in that Article this Regulation does not go beyond what is necessary to achieve those objectives.

[The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community, have given notice of their wish to take part in the adoption and application of this Regulation.]

Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, is not participating in the adoption of this Regulation, and is therefore not bound by it nor subject to its application,

HAVE ADOPTED THIS REGULATION:

CHAPTER I

SUBJECT MATTER AND SCOPE

Article 1 Subject matter

This Regulation establishes a European procedure for small claims (hereinafter referred to as the European Small Claims Procedure), intended to simplify and speed up litigation concerning small claims, and reduce costs. The European Small Claims Procedure shall be available to litigants as an alternative to the procedures existing under the laws of the Member States.

This Regulation also eliminates the intermediate measures necessary to enable recognition and enforcement, in other Member States, of judgments, with the exception of judgments on uncontested claims, given in one Member State in a European Small Claims Procedure.

Article 2 Scope

This Regulation shall apply in civil and commercial matters, whatever the nature of the court or tribunal, where the total value of a monetary or non-monetary claim excluding interests, expenses and outlays does not exceed EUR 2000 at the time the procedure is commenced. It shall not apply, in particular, to revenue, customs or administrative matters.

This Regulation shall not apply to matters concerning:

(a) the status or legal capacity of natural persons,

(b) rights in property arising out of a matrimonial relationship, wills and succession,

(c) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings,

(d) social security,

(e) arbitration,

(f) employment law.

In this Regulation, the term Member State shall mean Member States with the exception of Denmark. [United Kingdom, Ireland]

CHAPTER II

THE EUROPEAN SMALL CLAIMS PROCEDURE

Article 3 Commencement of the Procedure

The claimant shall commence the European Small Claims Procedure by completing the claim form set out in Annex I and lodging it with any relevant additional documents at the competent court or tribunal. The claim form may be lodged directly, by post or by any other means of communication such as fax or email acceptable to the Member State in which the procedure is commenced.

Member States shall inform the Commission which means of communication are acceptable to them. The Commission shall make such information publicly available.

The court or tribunal shall register the claim form immediately on receipt and note the date and time of receipt of all other documents it receives in the European Small Claims Procedure.

For the purpose of the interruption of periods of prescription or, as the case may be, limitation, the court or tribunal is deemed to be seized when the claim form is registered in accordance with paragraph 3.

Where a claim form does not relate to an action within the scope of this Regulation as set out in Article 2, the court or tribunal shall not treat the claim as a European Small Claim, but proceed to deal with it in accordance with the relevant procedural law applicable in the Member State in which the procedure is conducted. The court or tribunal shall inform the claimant to that effect.

Where the court or tribunal considers that the information provided by the claimant is insufficiently clear or adequate or if the claim form is not completed properly, it may give the claimant the opportunity to complete or rectify the form or to supply such supplementary information or documents as it may specify.

Member States shall ensure that the claim form is available at all courts or tribunals at which the European Small Claims Procedure can be commenced, and that practical assistance is available at all such courts or tribunals to assist claimants to complete the form.

Article 4 Conduct of the Procedure

The European Small Claims Procedure shall be a written procedure, unless an oral hearing is deemed to be necessary by the court or tribunal which shall take into account any observations or demands of the parties in this respect.

After receiving the claim form, the court or tribunal shall complete part I of the answer form set out in Annex II.

It shall serve a copy of the claim form, together with the answer form thus completed on the defendant within 8 days of receiving the claim form, in accordance with Article 11.

The defendant shall submit his response within one month of service of the claim form and answer form, by filling in Part II of the answer form, adding any additional documents and returning it to the court or tribunal, or in any other appropriate way not using the answer form.

Within eight days of receipt of the response from the defendant, the court or tribunal shall serve a copy of the response and any additional documents on the claimant in accordance with Article 11.

If, in his response, the defendant makes a counterclaim against the claimant, the court or tribunal shall inform the claimant of that counterclaim. The claimant shall respond to the counterclaim within one month of service of the response.

If the total value of the counterclaim exceeds the amount set out in Article 2 (1), the court or tribunal shall only consider the counterclaim if it arises from the same legal relationship as the claim and if the court or tribunal considers it appropriate to proceed in the European Small Claims Procedure.

If any additional document received by the court or tribunal is in a language other than the language in which the procedure is conducted, the court or tribunal shall only require a translation of that document, if the translation is necessary for rendering the judgment.

If a party has refused to accept a document because it is not in one of the languages provided for in Article 8 of Regulation (EC) No 1348/2000, the court or tribunal shall inform the other party thereof and advise it to provide a translation.

Article 5 Conclusion of the Procedure

Within one month following receipt of the response from the defendant or the claimant within the time limits laid down in Article 4 (3) and (5), the court or tribunal shall

(a) deliver a judgment, or

(b) demand further details concerning the claim from the parties within a specified period of time, or

(c) summon the parties to a hearing.

If the court or tribunal has not received an answer from the defendant within the time limit laid down in Article 4 (3), the court or tribunal shall deliver a default judgment.

Article 6 Hearing

The court or tribunal may hold a hearing through an audio, video or email conference, if the technical means are available and if both parties agree.

If a party does not attend the hearing and another person represents that party, the court or tribunal may ask that person to present a mandate or other authorization in writing from that party, if this is required by the procedural law applicable in the Member State in which the procedure is conducted.

Article 7 Taking of evidence

The court or tribunal may determine the means of proof and the extent to which evidence is taken according to its discretion. In particular, the court may admit the taking of evidence through telephone, written statements of witnesses, and through an audio, video or email conference.

In exceptional circumstances, the court or tribunal may receive evidence of expert witnesses if it is indispensable for the judgment.

Article 8 Representation of parties

The parties shall not be required to be represented by a lawyer or another legal professional.

Article 9 Remit of the court or tribunal

The court or tribunal shall respect the right to a fair trial and the principle of an adversarial process, in particular when deciding on the necessity of an oral hearing and on the means of proof and the extent to which evidence is taken.

The court or tribunal shall not oblige the parties to make any legal assessment of the claim.

If necessary, the court or tribunal shall support the parties in procedural questions and may ask them to provide any factual information relevant to the determination of the issues in the case.

Whenever appropriate, the court or tribunal shall seek to reach a settlement between the parties.

Article 10 Judgment

The judgment shall be rendered within six months following the registration of the claim form.

The court or tribunal shall serve the judgment on the parties in accordance with Article 11, unless it is delivered orally at the conclusion of a hearing at which both parties are present.

Article 11 Service of documents

Where documents are to be served in a Member State other than the Member State in which the procedure is conducted, they shall be served on the parties by registered letter with acknowledgment of receipt, respecting any additional conditions provided for in Article 14 of Regulation (EC) No 1348/2000, and having regard to Article 8 thereof.

Where documents are to be served in the Member State in which the procedure is conducted and the address of the addressee is known with certainty, documents shall be served on the parties by registered letter with acknowledgment of receipt, or by any simpler means such as simple letter, fax or email, if these simpler means are provided for in the procedural law of the Member State in which the procedure is conducted.

If, in exceptional circumstances, it is not possible to effect service in accordance with paragraphs 1 and 2, service may be effected through other means ensuring personal service.

Article 12 Time limits

The court or tribunal may prolong the time limits provided for in Article 4 (3) and (5), in exceptional circumstances, if necessary in order to guarantee an effective defence of the parties.

If, in exceptional circumstances, it is not possible for the court or tribunal to respect the time limits provided for in Articles 4 (2) and (4), Article 5 (1) and Article 10 (1) without jeopardising the proper conduct of proceedings, it shall take the necessary steps as soon as possible.

For the purpose of calculating the time limits provided for in this Regulation, Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods,

dates and time limits[20] shall apply.

Article 13 Enforceability of the judgment

The judgment shall be immediately enforceable, notwithstanding any possible appeal. It shall not be necessary to provide a security.

Article 14 Costs

The unsuccessful party shall bear the costs of the proceedings, except where this would be unfair or unreasonable. In that case, the court or tribunal shall make any order for payment of expenses on an equitable basis.

When the unsuccessful party is a natural person and is not represented by a lawyer or another legal professional, he shall not be obliged to reimburse the fees of a lawyer or another legal professional of the other party.

Article 15 Appeal

Member States shall inform the Commission whether an appeal is available under their procedural law against a judgment rendered in a European Small Claims Procedure. The Commission shall make that information publicly available.

In an appeal procedure against a judgment rendered in a European Small Claims Procedure, parties shall not be required to be represented by a lawyer or another legal professional.

There shall be no further ordinary appeal or cassation against an appeal judgment.

Article 16 Review of the judgment

Provided that he acts promptly, the defendant shall be entitled to apply for a review of the judgment rendered in a European Small Claims procedure, under the conditions established by the law of the Member State in which the judgment has been rendered and communicated to the Commission pursuant to Articles 19 and 30 of Regulation (EC) No 805/2004, where:

(a) (i) the claim form or the summons to a hearing were served by a method without proof of receipt by him personally; and

(ii) service was not effected in sufficient time or in such a way as to enable him to arrange for his defence without any fault on his part, or

(b) the defendant was prevented from objecting to the claim by reason of force majeure, or due to extraordinary circumstances without any fault on his part.

Article 17 Applicable procedural law

Subject to the provisions of this Regulation, the European Small Claims Procedure shall be governed by the procedural law of the Member State in which the procedure is conducted.

CHAPTER III

RECOGNITION AND ENFORCEMENT

Article 18 Recognition and enforcement

A judgment delivered in a Member State in a European Small Claims Procedure shall be recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition if it has been certified by the court or tribunal in the Member State of origin using the form set out in Annex III to this Regulation.

The judgment delivered in a European Small Claims Procedure shall be certified if it does not

conflict with the rules on jurisdiction as laid down in sections 3 and 6 of Chapter II of Regulation (EC) No 44/2001.

The certificate shall be established in the language of the judgment.

No appeal shall lie against the issuing of the certificate.

The law of the Member State in which the procedure is conducted shall apply to any rectification of the certificate.

Where, at the time when the judgment is delivered, it is likely that it will have to be enforced in another Member State, the certificate shall be issued ex officio at the time of the delivery of the judgment. Otherwise the certificate shall be issued if requested by one of the parties.

A party seeking enforcement of a judgment shall produce:

(a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity; and

(b) the certificate referred to in paragraph 1.

Paragraphs 1 to 4 shall not apply to judgments on uncontested claims within the meaning of Article 3 (1) of Regulation (EC) No 805/2004.

CHAPTER IV

RELATIONSHIP WITH OTHER COMMUNITY INSTRUMENTS

ARTICLE 19 Relationship with Regulation (EC) No 805/2004 and with Regulation (EC) No 44/2001

This Regulation shall not affect the application of Regulation (EC) No 805/2004 and of Regulation (EC) No 44/2001.

CHAPTER V

FINAL PROVISIONS

Article 20 Information

The competent national authorities shall cooperate to provide the general public and professional circles with information on the European Small Claims Procedure, in particular via the European Judicial Network in Civil and Commercial Matters established by Decision 2001/470/EC.

Article 21 Implementing measures

The measures necessary for the implementation of this Regulation relating to modification of the threshold established in Article 2 (1) and updates or technical amendments to the forms in the Annexes, or the introduction of additional forms shall be adopted by the Commission in accordance with the advisory procedure referred to in Article 22 (2).

Article 2 2 Committee

The Commission shall be assisted by the Committee provided for by Article 75 of Regulation (EC) No 44/2001.

Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468/EC shall apply having regard to the provisions of Article 8 thereof.

The Committee shall adopt its rules of procedure.

Article 23 Entry into force

This Regulation shall enter into force on [...].

This Regulation shall be binding in its entirety and directly applicable in all Member States in accordance with the Treaty establishing the European Community.

Done at Brussels, [...]

For the European Parliament For the Council

The President The President

[...] [...]

[1] OJ C 92, 25.4.1975, p. 2.

[2] COM(93) 576.

[3] COM(96) 13.

[4] OJ C 12, 15.1.2001, p. 1.

[5] OJ C 146, 17.5.2001, p. 4.

[6] COM(2002) 746 final.

[7] OJ C 220, 16.9.2003, p. 5.

[8] European Parliament resolution on the prospects for approximating civil procedural law in the European Union (COM(2002) 654 + COM(2002) 746 - C5-0201/2003 - 2003/2087(INI)), A5-0041/2004.

[9] See for more details Chaaw in the European Union (COM(2002) 654 + COM(2002) 746 - C5-0201/2003 - 2003/2087(INI)), A5-0041/2004.

[10] See for more details Chapter 4.3 of the Green Paper.

[11] Between 600 (Germany) and 8.234 (England/Wales).

[12] OJ C [...], [...], p. [...].

[13] OJ C [...], [...], p. [...].

[14] OJ C [...], [...], p. [...].

[15] OJ L 160, 30.6.2000, p. 37.

[16] OJ L 174, 27.6.2001, p. 25.

[17] OJ L 12, 16.1.2001, p. 1.

[18] OJ L 143, 30.4.2004, p. 15.

[19] COM(2002) 746 final.

[20] OJ L 184, 17.7.1999, p. 23.

[21] OJ L 124, 8.6.1971, p. 1.

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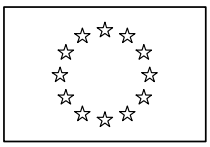

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 15.3.2005
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2005/0020 (COD)

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

establishing a European Small Claims Procedure

(presented by the Commission)

{SEC(2005) 351}
{SEC(2005) 352}

EXPLANATORY MEMORANDUM

1. INTRODUCTION AND BACKGROUND

1.1. Introduction

Following the 1975 Preliminary programme for a consumer protection and information policy[1] and the 1993 Green Paper on Access of consumers to justice and the settlement of consumer disputes in the single market[2], the Commission in 1996 adopted a Communication concerning an action plan on consumer access to justice and the settlement of consumer disputes in the internal market[3]. The action plan focused on the promotion and enhancement of procedures for settling individual consumer disputes, and made provision for the introduction of simplified access to court procedures. With the entry into force of the Treaty of Amsterdam in 1999, the European Union has set itself the objective of progressively establishing an area of freedom, security and justice, amongst others by adopting measures in the field of judicial cooperation in civil matters.

The European Council in Tampere 1999 invited the Council to establish special common procedural rules for simplified and accelerated litigation on small claims, and to abolish the intermediate measures which are still required to enable the recognition and enforcement of a decision or judgment in the requested State for all titles in respect of small claims (i.e. not limited to consumer claims).

The joint programme of the Commission and the Council of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters, adopted by the Council on 30 November 2000[4], called for simplifying and speeding up the settlement of small claims litigation. Discussions on simplifying and speeding up the settlement of small claims litigation would also facilitate the recognition and enforcement of judgments.

The need for simplified and accelerated small claims litigation has also been expressed by the European Parliament[5].

1.2. The Green Paper on a European Order for payment procedure and on measures to simplify and speed up small claims litigation

The adoption of this proposal was preceded by a wide-ranging consultation of both Member States and all interested parties of civil society. The Green Paper on a European order for payment procedure and on measures to simplify and speed up small claims litigation[6] presented by the Commission on 20 December 2002 gave an overview of the currently existing Small Claims procedures in the Member States. Based on a comparative study of how Member States deal with the relevant procedural issues it formulated a number of questions concerning the desirable scope and features of a European instrument.

The reactions to the Green Paper that were further debated in a public hearing organised by the Commission on 12 December 2003 revealed that an instrument to simplify and speed up

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1 OJ C 92, 25.4.1975, p. 2.
2 COM(93) 576.
3 COM(96) 13.
4 OJ C 12, 15.1.2001, p. 1.
5 OJ C 146, 17.5.2001, p. 4.
6 COM(2002) 746 final.

small claims litigation is almost unanimously considered a step ahead in the creation of an area of freedom, security and justice.

In its opinion[7] of 18 June 2003 on the Green Paper, the European Economic and Social Committee welcomed the Commission's initiative to launch a consultation on this issue and the Commission's effort to accelerate civil proceedings and to make them cheaper and more efficient. It supported the establishment of a European procedure to simplify and speed up small claims litigation. It considered that suitable measures for speeding up such litigation should be defined without, at the same time, jeopardising the guarantees afforded to the parties in question under the rule of law.

In it opinion[8] of 12 February 2004 on the Green Paper, the European Parliament welcomed the Commission's initiative, and stated that the small claims procedure should not only apply to cases relating to payment of a sum of money, on the understanding that a limit must first be determined on the basis of the amount at issue, but also be extended to cover all other disputes concerning economic relationships falling under the heading of obligations. Furthermore, in the small claims procedure alternative dispute resolution (ADR) methods should be applied, the taking of evidence simplified, and the right of appeal limited.

On 16 March 2004 a meeting of experts of the Member States discussed a draft Regulation establishing a European Small Claims Procedure. The approach taken by this text was generally appreciated by the delegations, namely to adopt a regulation which would have as objectives to simplify and speed up litigation concerning small claims by establishing a European Small Claims Procedure available to litigants as an alternative to the procedures existing under the laws of the Member States which will remain unaffected, and to abolish the intermediate measures to enable the recognition and enforcement of a judgment given in a European Small Claims Procedure in another Member State.

2. OBJECTIVES AND SCOPE

2.1. Overall objective

2.1.1. The significance of efficient Small Claims procedures

Costs, delay and vexation of judicial proceedings do not necessarily decrease proportionally with the amount of the claim. On the contrary, the smaller the claim is, the more the weight of these obstacles increases. This has led to the creation of simplified civil procedures for Small Claims in many Member States. At the same time, the potential number of cross-border disputes is rising as a consequence of the increasing use of the EC Treaty rights of free movement of persons, goods and services. The obstacles to obtaining a fast and inexpensive judgment are clearly intensified in a cross-border context. It will often be necessary to hire two lawyers, there are additional translation and interpretation costs and miscellaneous other factors such as extra travel costs of litigants, witnesses, lawyers etc.

Potential problems are not limited to disputes between individuals. Also the owners of small businesses may face difficulties when they want to pursue their claims in another Member State. But as a consequence of the lack of a procedure which is "proportional" to the value of

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7 OJ C 220, 16.9.2003, p. 5.

8 European Parliament resolution on the prospects for approximating civil procedural law in the European Union (COM(2002) 654 + COM(2002) 746 - C5-0201/2003 - 2003/2087(INI)), A5-0041/2004.

the litigation, the obstacles that the creditor is likely to encounter might make it questionable whether judicial recourse is economically sensible. The expense of obtaining a judgment, in particular against a defendant in another Member State, is often disproportionate to the amount of the claim involved. Many creditors, faced with the expense of the proceedings, and daunted by the practical difficulties that are likely to ensue, abandon any hope of obtaining what they believe is rightfully theirs.

2.1.2. Characteristic features of Small Claims procedures - procedural simplifications

Within the framework of their procedural systems and traditions, many Member States have introduced specific rules with respect to small claims litigation which provide for procedural simplifications compared with the ordinary procedure. It is not surprising that the solutions that have been devised differ from each other. Whereas in some Member States there are specific Small Claims procedures, others provide for certain procedural simplifications in Small Claims cases. There are also differences with respect to the degree to which specific procedural simplifications apply.

There are specific Small Claims Procedures which provide for various simplifications compared with the ordinary procedure in the United Kingdom (England/Wales, Scotland and Northern Ireland), Ireland, Sweden and Spain. In Germany courts may determine their procedures as they see fit in Small Claims cases. In France there is a simplified way of introducing the procedure for Small Claims ("déclaration au greffe"). The Codes of Civil Procedure of Austria, Finland and the Netherlands and other Member States contain several procedural simplifications compared with the ordinary procedure which are applicable in cases below certain thresholds. While one may not consider these procedural simplifications as amounting to a specific Small Claims Procedure in a strict sense, in practice very similar results are achieved.

The most important features of the existing Small Claims procedures and procedural simplifications can be summarised as follows[9]:

– All Member States with Small Claims procedures have quantitative thresholds for these procedures which vary, however, considerably[10]. Some Member States apply the Small Claims procedure additionally also to certain types of litigation, regardless of a threshold. In most Member States with Small Claims procedures, these procedures are available not only for monetary claims. The use of the simplified procedure is in most cases obligatory (for claims below the threshold), but a litigation can be transferred to the ordinary or a more formal procedure by the judge or on application of a party.

– In many existing Small Claims procedures, there are forms for filing the claim. There is no obligation to make legal references in the application in any Member State, i.e. only factual references are required. In most Member States there is support by a court clerk or help desk for the introduction of a procedure. Moreover, the judge gives assistance during the hearing to a party that is not represented by a lawyer (particularly on procedural issues), whilst observing the principle of impartiality. At

9 See for more details Chapter 4.3 of the Green Paper.

10 Between 600 € (Germany) and 8.234 € (England/Wales).

present, no Member States requires mandatory representation by a lawyer in Small Claims procedures.

– The relaxation of rules concerning the taking of evidence is one of the issues crucial in the small claims procedures in most Member States. In many cases, the judge has a certain amount of discretion in this respect. The possibility of a purely written procedure (instead of oral hearings) exists presently in many cases. In some cases, the rules concerning the content of the judgment are relaxed. There is a time limit for the delivery of the judgment in many Member States. The procedural rules with respect to the reimbursement of costs differ significantly. In most Member States all costs have to be paid by the defendant alone if he loses. The laws of the Member States concerning the possibility to appeal against decisions in Small Claims procedures differ considerably.

2.2. Scope

2.2.1. The need for action at Community level

Article 65 of the EC Treaty attributes legislative powers to the Community with regard to judicial cooperation in civil matters having cross-border implications in so far as necessary for the proper functioning of the internal market.

With respect to the internal market requirement, there is a margin of appreciation for the Community institutions in determining whether a measure is necessary for the proper functioning of the internal market. With respect to this proposal, the proper functioning of the internal market is facilitated because the establishment of a European Small Claims procedure will help to eliminate obstacles to the free movement of goods, persons, services or capital. As outlined above (2.1.2.), at present small claims procedures are substantially different in the Member States. The access of economic operators to judicial mechanisms of substantially different performance levels entails a distortion of competition in the internal market regardless of whether the actors are domiciled in different Member States or in the same Member State. If some operators have access to efficient and effective procedures while others do not, there is no level playing field for operators competing in the internal market. The existing disparities in the laws of the Member States put obstacles to the proper functioning of the internal market. Consequently, a situation implying a marked disequilibrium with regard to the efficiency of the procedural means afforded to creditors under different national laws amounts to a distortion of competition within the internal market. A European Small Claims procedure would thus facilitate the proper functioning of the internal market.

Concerning the cross-border requirement, most linguistic versions of the Treaty use the term "matter", and not "measure". It is therefore necessary and sufficient that the "matter" has cross-border implications. This interpretation is confirmed by letter (c) of Article 65 which provides that measures in the field of judicial cooperation in civil matters shall include eliminating obstacles to the good functioning of civil proceedings, and by Article III-269 of the Treaty establishing a Constitution for Europe.

Procedural law by its nature may have cross-border implications. The judge will always apply the lex fori whether or not the litigation has cross-border elements. Small Claims litigation constitutes a matter having cross-border implications since – taking into account the

development of the internal market - most economic operators and consumers will sooner or later be involved in such litigation abroad.

A measure applying also to purely internal cases which is necessary for the proper functioning of the internal market, in particular because it eliminates distortions of competition between economic operators of the different Member States, has necessarily cross-border implications since the putting in place of an efficient Small Claims Procedure in every Member State will facilitate access to justice under equal conditions.

The internal market requirement in Article 65 is thus a restriction of the cross-border requirement. A measure which is necessary for the proper functioning of the internal market has necessarily cross-border implications, whereas a measure having cross-border implications may not always also be necessary for the proper functioning of the internal market. This interpretation is also confirmed by the negotiations leading to the adoption of Article 65 since the internal market requirement was introduced at a late stage of the negotiations in order to limit the scope of the provision. A more restrictive interpretation of Article 65 cannot have been intended by those who drafted it since it would create new obstacles to access to justice in the European Judicial Area. Every legal instrument would have to have its own "cross-border" definition since that definition would almost necessarily have to vary from one issue to another which would cause significant difficulties in the application of those instruments.

It would not only be inappropriate but even counterproductive to constrain the scope of application of the European Small Claims Procedure to cross-border cases.

Firstly, the creation of two different regimes for internal cases and for cases with cross-border aspects should be avoided. Such a duality of regimes would be inconsistent with the objective of a single and coherent area of justice for all.

Furthermore, as outlined above, not in all Member States speedy and inexpensive small claims procedures are available to litigants. The lack of such procedures which are proportional to the value of the litigation make judicial recourse economically questionable in many cases and often creditors abstain from taking legal action. This limitation of effective access to justice causes economic costs which have significant negative macroeconomic impacts on the proper functioning of the internal market.

2.2.2. Subsidiarity and proportionality

The objective of this proposal, to simplify and speed up litigation concerning small claims by establishing a European Small Claims Procedure, cannot be sufficiently accomplished by the Member States themselves as they cannot guarantee the equivalence of rules applicable throughout the Community. The objective can therefore be only achieved at Community level.

The present proposal is fully consistent with the principle of proportionality in that it is strictly limited to what is necessary in order to reach this objective. In that context, it is particularly essential to underscore the effects of the combination of the legal instrument chosen (Regulation) with the optional nature of the European Small Claims Procedure in relation to comparable mechanisms under the national procedural law of the Member States. Whilst ensuring the uniformity and direct applicability of the procedure, the Regulation proposed here would only oblige Member States to make the European procedure available as

an additional tool. It would force them neither to abandon their pre-existing legislation on small claims nor to modify such legislation to bring it into line with Community law. Hence, this proposal for a Regulation which leaves the right of the Member States unaffected to continue the application of their domestic rules alongside the European Small Claims Procedure encroaches much less on their procedural systems than a Directive that would require an adaptation of national legislation to the standards set in that instrument. This legislative technique, in fact, assures a common minimum level in the efficiency of the recovery of small claims but it permits Member States that have developed an even better-functioning domestic system to retain it. Ultimately, it will be left to the creditors to judge which procedure they consider as being either superior in performance or more convenient in terms of accessibility, the latter criterion being particularly relevant for those operating in several Member States and being spared the need to make themselves familiar with the procedural law of every one of them by the availability of a uniform European Small Claims Procedure. Finally, it should be borne in mind that Article 17 of the proposal provides that "subject to the provisions of this Regulation, the European Small Claims Procedure shall be governed by the procedural law of the Member State in which the procedure is conducted". Hence, the introduction of a European Small Claims Procedure does not entail the need for further approximation of national procedural legislation and thus keeps interference with domestic law to an absolute minimum.

2005/0020 (COD)

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THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61 (c) thereof,

Having regard to the proposal from the Commission[11],

Having regard to the opinion of the Economic and Social Committee[12],

Acting in accordance with the procedure laid down in Article 251 of the Treaty[13],

Whereas:

(1) The European Union has set itself the objective of maintaining and developing the European Union as an area of freedom, security and justice in which the free movement of persons is ensured. For the gradual establishment of such an area, the Community is to adopt, among others, the measures relating to judicial cooperation in civil matters needed for the proper functioning of the internal market.

(2) In this respect, the Community has among other measures already adopted 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[14], Council Decision 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters[15], Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[16] and Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims[17].

(3) On 20 December 2002, the Commission adopted a Green Paper on a European order for payment procedure and on measures to simplify and speed up small claims

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11 OJ C […], […], p. […].
12 OJ C […], […], p. […].
13 OJ C […], […], p. […].
14 OJ L 160, 30.6.2000, p. 37.
15 OJ L 174, 27.6.2001, p. 25.
16 OJ L 12, 16.1.2001, p. 1.
17 OJ L 143, 30.4.2004, p. 15.

litigation[18]. The Green Paper launched a consultation on measures concerning the simplification and the speeding up of small claims litigation.

(4) Many Member States have introduced simplified civil procedures for Small Claims since costs, delay and vexation connected with litigation do not necessarily decrease proportionally with the amount of the claim. The obstacles to obtaining a fast and inexpensive judgment are intensified in cross-border cases. It is therefore necessary to create a European Small Claims Procedure. The objective of such a European procedure should be to facilitate access to justice by purveying a procedure of moderate duration at affordable costs.

(5) The distortion of competition within the internal market due to the disequilibrium with regard to the functioning of the procedural means afforded to creditors in different Member States entails the need for Community legislation which guarantees a level playing field for creditors and debtors throughout the European Union.

(6) The European Small Claims Procedure should apply also to purely domestic cases in order to eliminate distortions of competition between economic operators in different Member States and to facilitate access to justice under equal conditions in all Member States.

(7) The European Small Claims Procedure should simplify and speed up litigation concerning small claims, whilst reducing costs, by offering an optional tool in addition to the possibilities existing under the laws of the Member States, which will remain unaffected. This Regulation should also make it simpler to obtain the recognition and enforcement of a judgment given in a European Small Claims Procedure in another Member State, including judgements which were initially of a purely domestic nature.

(8) In order to facilitate the introduction of the procedure, the claimant should commence the European Small Claims Procedure by completing a claim form and lodging it at the competent court or tribunal.

(9) In order to reduce costs and delays, documents should be served on the parties by registered letter with acknowledgment of receipt, or by any simpler means such as simple letter, fax or email. The procedure should be a written procedure, unless an oral hearing is considered necessary by the court or tribunal. The parties should not be obliged to be represented by a lawyer.

(10) The court or tribunal should be given the possibility to hold a hearing through an audio, video or email conference. It should also be given the possibility to determine the means of proof and the extent of the taking of evidence according to its discretion and admit the taking of evidence through telephone, written statements of witnesses, and audio, video or email conferences.

(11) The court or tribunal should respect the principle of an adversarial process.

(12) In order to speed up the resolution of disputes, the judgment should be rendered within six months following the registration of the claim.

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[18] COM(2002) 746 final.

(13) In order to speed up the recovery of small claims, the judgment should be immediately enforceable notwithstanding any possible appeal and without the condition of the provision of a security.

(14) In order to reduce costs, when the unsuccessful party is a natural person and is not represented by a lawyer or another legal professional, he should not be obliged to reimburse the fees of a lawyer or another legal professional of the other party.

(15) In order to facilitate recognition and enforcement, a judgment given in a Member State in a European Small Claims Procedure should be recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition.

(16) This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. Specifically, it seeks to ensure full respect for the right to a fair trial as recognised in Article 47 of the Charter.

(17) The measures necessary for the implementation of this Regulation should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission[19].

(18) Since the objectives of the action to be taken namely the establishment of a procedure to simplify and speed up litigation concerning small claims, and reduce costs, cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality as set out in that Article this Regulation does not go beyond what is necessary to achieve those objectives.

(19) [The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community, have given notice of their wish to take part in the adoption and application of this Regulation.]

(20) Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, is not participating in the adoption of this Regulation, and is therefore not bound by it nor subject to its application,

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[19] OJ L 184, 17.7.1999, p. 23.

HAVE ADOPTED THIS REGULATION:

CHAPTER I

SUBJECT MATTER AND SCOPE

Article 1
Subject matter

This Regulation establishes a European procedure for small claims (hereinafter referred to as the "European Small Claims Procedure"), intended to simplify and speed up litigation concerning small claims, and reduce costs. The European Small Claims Procedure shall be available to litigants as an alternative to the procedures existing under the laws of the Member States.

This Regulation also eliminates the intermediate measures necessary to enable recognition and enforcement, in other Member States, of judgments, with the exception of judgments on uncontested claims, given in one Member State in a European Small Claims Procedure.

Article 2
Scope

1. This Regulation shall apply in civil and commercial matters, whatever the nature of the court or tribunal, where the total value of a monetary or non-monetary claim excluding interests, expenses and outlays does not exceed EUR 2000 at the time the procedure is commenced. It shall not apply, in particular, to revenue, customs or administrative matters.

2. This Regulation shall not apply to matters concerning:

   (a) the status or legal capacity of natural persons,

   (b) rights in property arising out of a matrimonial relationship, wills and succession,

   (c) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings,

   (d) social security,

   (e) arbitration,

   (f) employment law.

3. In this Regulation, the term "Member State" shall mean Member States with the exception of Denmark. [United Kingdom, Ireland]

CHAPTER II

THE EUROPEAN SMALL CLAIMS PROCEDURE

Article 3
Commencement of the Procedure

1. The claimant shall commence the European Small Claims Procedure by completing the claim form set out in Annex I and lodging it with any relevant additional documents at the competent court or tribunal. The claim form may be lodged directly, by post or by any other means of communication such as fax or email acceptable to the Member State in which the procedure is commenced.

2. Member States shall inform the Commission which means of communication are acceptable to them. The Commission shall make such information publicly available.

3. The court or tribunal shall register the claim form immediately on receipt and note the date and time of receipt of all other documents it receives in the European Small Claims Procedure.

4. For the purpose of the interruption of periods of prescription or, as the case may be, limitation, the court or tribunal is deemed to be seized when the claim form is registered in accordance with paragraph 3.

5. Where a claim form does not relate to an action within the scope of this Regulation as set out in Article 2, the court or tribunal shall not treat the claim as a European Small Claim, but proceed to deal with it in accordance with the relevant procedural law applicable in the Member State in which the procedure is conducted. The court or tribunal shall inform the claimant to that effect.

6. Where the court or tribunal considers that the information provided by the claimant is insufficiently clear or adequate or if the claim form is not completed properly, it may give the claimant the opportunity to complete or rectify the form or to supply such supplementary information or documents as it may specify.

7. Member States shall ensure that the claim form is available at all courts or tribunals at which the European Small Claims Procedure can be commenced, and that practical assistance is available at all such courts or tribunals to assist claimants to complete the form.

Article 4
Conduct of the Procedure

1. The European Small Claims Procedure shall be a written procedure, unless an oral hearing is deemed to be necessary by the court or tribunal which shall take into account any observations or demands of the parties in this respect.

2. After receiving the claim form, the court or tribunal shall complete part I of the answer form set out in Annex II.

It shall serve a copy of the claim form, together with the answer form thus completed on the defendant within 8 days of receiving the claim form, in accordance with Article 11.

3. The defendant shall submit his response within one month of service of the claim form and answer form, by filling in Part II of the answer form, adding any additional documents and returning it to the court or tribunal, or in any other appropriate way not using the answer form.

4. Within eight days of receipt of the response from the defendant, the court or tribunal shall serve a copy of the response and any additional documents on the claimant in accordance with Article 11.

5. If, in his response, the defendant makes a counterclaim against the claimant, the court or tribunal shall inform the claimant of that counterclaim. The claimant shall respond to the counterclaim within one month of service of the response.

6. If the total value of the counterclaim exceeds the amount set out in Article 2 (1), the court or tribunal shall only consider the counterclaim if it arises from the same legal relationship as the claim and if the court or tribunal considers it appropriate to proceed in the European Small Claims Procedure.

7. If any additional document received by the court or tribunal is in a language other than the language in which the procedure is conducted, the court or tribunal shall only require a translation of that document, if the translation is necessary for rendering the judgment.

If a party has refused to accept a document because it is not in one of the languages provided for in Article 8 of Regulation (EC) No 1348/2000, the court or tribunal shall inform the other party thereof and advise it to provide a translation.

Article 5
Conclusion of the Procedure

1. Within one month following receipt of the response from the defendant or the claimant within the time limits laid down in Article 4 (3) and (5), the court or tribunal shall

(a) deliver a judgment, or

(b) demand further details concerning the claim from the parties within a specified period of time, or

(c) summon the parties to a hearing.

2. If the court or tribunal has not received an answer from the defendant within the time limit laid down in Article 4 (3), the court or tribunal shall deliver a default judgment.

Article 6
Hearing

1. The court or tribunal may hold a hearing through an audio, video or email conference, if the technical means are available and if both parties agree.

2. If a party does not attend the hearing and another person represents that party, the court or tribunal may ask that person to present a mandate or other authorization in writing from that party, if this is required by the procedural law applicable in the Member State in which the procedure is conducted.

Article 7
Taking of evidence

1. The court or tribunal may determine the means of proof and the extent to which evidence is taken according to its discretion. In particular, the court may admit the taking of evidence through telephone, written statements of witnesses, and through an audio, video or email conference.

2. In exceptional circumstances, the court or tribunal may receive evidence of expert witnesses if it is indispensable for the judgment.

Article 8
Representation of parties

The parties shall not be required to be represented by a lawyer or another legal professional.

Article 9
Remit of the court or tribunal

1. The court or tribunal shall respect the right to a fair trial and the principle of an adversarial process, in particular when deciding on the necessity of an oral hearing and on the means of proof and the extent to which evidence is taken.

2. The court or tribunal shall not oblige the parties to make any legal assessment of the claim.

3. If necessary, the court or tribunal shall support the parties in procedural questions and may ask them to provide any factual information relevant to the determination of the issues in the case.

4. Whenever appropriate, the court or tribunal shall seek to reach a settlement between the parties.

Article 10
Judgment

1. The judgment shall be rendered within six months following the registration of the claim form.

2. The court or tribunal shall serve the judgment on the parties in accordance with Article 11, unless it is delivered orally at the conclusion of a hearing at which both parties are present.

Article 11
Service of documents

1. Where documents are to be served in a Member State other than the Member State in which the procedure is conducted, they shall be served on the parties by registered letter with acknowledgment of receipt, respecting any additional conditions provided for in Article 14 of Regulation (EC) No 1348/2000, and having regard to Article 8 thereof.

2. Where documents are to be served in the Member State in which the procedure is conducted and the address of the addressee is known with certainty, documents shall be served on the parties by registered letter with acknowledgment of receipt, or by any simpler means such as simple letter, fax or email, if these simpler means are provided for in the procedural law of the Member State in which the procedure is conducted.

3. If, in exceptional circumstances, it is not possible to effect service in accordance with paragraphs 1 and 2, service may be effected through other means ensuring personal service.

Article 12
Time limits

1. The court or tribunal may prolong the time limits provided for in Article 4 (3) and (5), in exceptional circumstances, if necessary in order to guarantee an effective defence of the parties.

2. If, in exceptional circumstances, it is not possible for the court or tribunal to respect the time limits provided for in Articles 4 (2) and (4), Article 5 (1) and Article 10 (1) without jeopardising the proper conduct of proceedings, it shall take the necessary steps as soon as possible.

3. For the purpose of calculating the time limits provided for in this Regulation, Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits[20] shall apply.

[20] OJ L 124, 8.6.1971, p. 1.

Article 13
Enforceability of the judgment

The judgment shall be immediately enforceable, notwithstanding any possible appeal. It shall not be necessary to provide a security.

Article 14
Costs

1. The unsuccessful party shall bear the costs of the proceedings, except where this would be unfair or unreasonable. In that case, the court or tribunal shall make any order for payment of expenses on an equitable basis.

2. When the unsuccessful party is a natural person and is not represented by a lawyer or another legal professional, he shall not be obliged to reimburse the fees of a lawyer or another legal professional of the other party.

Article 15
Appeal

1. Member States shall inform the Commission whether an appeal is available under their procedural law against a judgment rendered in a European Small Claims Procedure. The Commission shall make that information publicly available.

2. In an appeal procedure against a judgment rendered in a European Small Claims Procedure, parties shall not be required to be represented by a lawyer or another legal professional.

3. There shall be no further ordinary appeal or cassation against an appeal judgment.

Article 16
Review of the judgment

Provided that he acts promptly, the defendant shall be entitled to apply for a review of the judgment rendered in a European Small Claims procedure, under the conditions established by the law of the Member State in which the judgment has been rendered and communicated to the Commission pursuant to Articles 19 and 30 of Regulation (EC) No 805/2004, where:

(a) (i) the claim form or the summons to a hearing were served by a method without proof of receipt by him personally; and

(ii) service was not effected in sufficient time or in such a way as to enable him to arrange for his defence without any fault on his part, or

(b) the defendant was prevented from objecting to the claim by reason of force majeure, or due to extraordinary circumstances without any fault on his part.

Article 17
Applicable procedural law

Subject to the provisions of this Regulation, the European Small Claims Procedure shall be governed by the procedural law of the Member State in which the procedure is conducted.

CHAPTER III

RECOGNITION AND ENFORCEMENT

Article 18
Recognition and enforcement

1. A judgment delivered in a Member State in a European Small Claims Procedure shall be recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition if it has been certified by the court or tribunal in the Member State of origin using the form set out in Annex III to this Regulation.

2. The judgment delivered in a European Small Claims Procedure shall be certified if it does not conflict with the rules on jurisdiction as laid down in sections 3 and 6 of Chapter II of Regulation (EC) No 44/2001.

   The certificate shall be established in the language of the judgment.

   No appeal shall lie against the issuing of the certificate.

   The law of the Member State in which the procedure is conducted shall apply to any rectification of the certificate.

3. Where, at the time when the judgment is delivered, it is likely that it will have to be enforced in another Member State, the certificate shall be issued ex officio at the time of the delivery of the judgment. Otherwise the certificate shall be issued if requested by one of the parties.

4. A party seeking enforcement of a judgment shall produce:

   (a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity; and

   (b) the certificate referred to in paragraph 1.

5. Paragraphs 1 to 4 shall not apply to judgments on uncontested claims within the meaning of Article 3 (1) of Regulation (EC) No 805/2004.

CHAPTER IV

RELATIONSHIP WITH OTHER COMMUNITY INSTRUMENTS

Article 19

Relationship with Regulation (EC) No 805/2004 and with Regulation (EC) No 44/2001

This Regulation shall not affect the application of Regulation (EC) No 805/2004 and of Regulation (EC) No 44/2001.

CHAPTER V

FINAL PROVISIONS

Article 20
Information

The competent national authorities shall cooperate to provide the general public and professional circles with information on the European Small Claims Procedure, in particular via the European Judicial Network in Civil and Commercial Matters established by Decision 2001/470/EC.

Article 21
Implementing measures

The measures necessary for the implementation of this Regulation relating to modification of the threshold established in Article 2 (1) and updates or technical amendments to the forms in the Annexes, or the introduction of additional forms shall be adopted by the Commission in accordance with the advisory procedure referred to in Article 22 (2).

Article 22
Committee

1. The Commission shall be assisted by the Committee provided for by Article 75 of Regulation (EC) No 44/2001.

2. Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468/EC shall apply having regard to the provisions of Article 8 thereof.

3. The Committee shall adopt its rules of procedure.

Article 23
Entry into force

This Regulation shall enter into force on […].

This Regulation shall be binding in its entirety and directly applicable in all Member States in accordance with the Treaty establishing the European Community.

Done at Brussels, […]

For the European Parliament	*For the Council*
The President	*The President*
[...]	*[...]*

ANNEX I

EUROPEAN SMALL CLAIMS PROCEDURE – CLAIM FORM (CLAIMANT)

(Article 3(1) of Regulation … of the European Parliament and of the Council establishing a European Small Claims Procedure [1])

1. Court

1.1. Name:

1.2. Street and number/PO box:

1.3. Place and postal code:

1.4. Country:

2. Claimant

2.1. Name:

2.2. Street and number/PO box:

2.3. Place and postal code:

2.4. Country:

2.5. Tel (*):

2.6. E-mail (*):

3. Defendant

3.1. Name:

3.2. Street and number/PO box:

3.3. Place and postal code:

3.4. Country:

3.5. Tel (*):

3.6. E-mail (*):

4. Claim

Please specify your claim:

☐ 4.1 Monetary claim

4.1.1 Amount of Principal (excluding interest and costs): ……

Currency: □ Euro □ [Pound Sterling] □ Cyprus Pound □ Czech Koruna □ Estonian Kroon

□ Forint □ Maltese Lira □ Lats □ Litas □ Slovak Koruna □ Swedish Crown

□ Tolar □ Zloty □ other (please specify): ……..

4.1.2 Interest:

4.1.2.1 Interest rate: ☐ …… % ☐ ……. % above the base rate of the ECB ☐ other:……

[1] OJ L …

(*) This item is optional.

4.1.2.2 Interest to be collected as from: …….

☐ 4.2 Non-monetary claim:

4.2.1 Type of Claim:

□ Delivery of product or provision of service: please specify: …….

□ Repair of product or service: please specify: …….

□ Exchange of product: please specify: …….

□ Cancellation of sale: please specify: ……...

□ Honouring of commitments: please specify: …….

□ Conclusion of a contract: please specify: ……..

□ Correction of assessment of damage: please specify: ……

□ Other: please specify……..

4.2.2 Estimated value of the claim: ……..

Currency: □ Euro □ [British Pounds] □ Cypriot Pound □ Czech Koruna □ Estonian Kroon □ Forint □ Maltese Lira □ Latvian lat □ Litas □ Slovak Koruna □ Swedish Kronor □ Tolar □ Zloty □ other (please specify): …….

5. Details of Claim

Please outline the substance of your claim. If space is insufficient, you can add additional sheets.

You can indicate possible means of evidence, and add additional documents.

You can ask that an oral hearing is held. An oral hearing will be held if it is deemed necessary by the court.

6. Date and Signature

6.1. Date

6.2. Signature

ANNEX II

EUROPEAN SMALL CLAIMS PROCEDURE – ANSWER FORM (DEFENDANT)

(Article 4 (2) of Regulation … of the European Parliament and of the Council establishing a European Small Claims Procedure[1])

Notice for the defendant:

Please answer to the claim in the language of the procedure WITHIN 1 MONTH after you have received the claim form !!!

You can answer by filling in Part II of this form and returning it to the court, or in any other appropriate way not using the form.

Please note that if you DO NOT ANSWER within 1 month, the court shall deliver a default judgment !!!

Part I (to be filled in by the court)

Name of claimant:

Name of defendant:

Court:

Claim:

Case Reference:

[1] OJ L …

Part II (to be filled in by the defendant)

☐ I accept the claim.

☐ I do not accept the claim for the following reasons:

(Please explain why you do not accept the claim.)

☐ I make a counterclaim.

(Please attach a statement of the counterclaim.)

NOTE:

If space is insufficient, you can add additional sheets. You can indicate possible means of evidence, and add additional documents.

You can ask that an oral hearing is held. An oral hearing will be held if it is deemed necessary by the court.

Date

Signature

ANNEX III

CERTIFICATE CONCERNING A JUDGMENT IN THE EUROPEAN SMALL CLAIMS PROCEDURE[1]

1. Member State of origin:

A ☐ B ☐ CY ☐ CZ ☐ D ☐ E ☐ EL ☐ EW ☐ F ☐ FIN ☐ H ☐ I ☐ [IRL ☐] L ☐ LT ☐ LV ☐ M ☐ NL ☐ P ☐ PL ☐ S ☐ SK ☐ SLO ☐ [UK] ☐

2. Issuing Court

Name: ……

Address: ……

3. Judgement

3.1 Date: ……

3.2 Reference number: ……...

3.3 Parties

3.3.1 Name and address of claimant:: ……..

3.3.2 Name and address of defendant::……....

4. Claim

4.1. Monetary claim as certified

4.1.1 Amount of Principal (excluding interest and costs): ……..

Currency: ▫ Euro ▫ [Pound Sterling] ▫ Cyprus Pound ▫ Czech Koruna ▫ Estonian Kroon ▫ Forint ▫ Maltese Lira ▫ Latvian lat ▫ Litas ▫ Slovak Koruna ▫ Swedish Crown ▫ Tolar ▫ Zloty ▫ other (please specify): ……..

4.1.2 Interest:

4.1.2.1 Interest rate: ☐ …… % ☐ ……. % above the base rate of the ECB ☐ other:……

4.1.2.2 Interest to be collected as from: …….

4.2 Non-monetary claim as certified: ……

4.3 Amount of reimbursable cost if specified in the judgement: ……...

5. The judgment has not been given on an uncontested claim in the sense of Regulation (EC) No 805/2004.

6. The judgment does not conflict with the rules on jurisdiction as laid down in sections 3 and 6 of Chapter II of Regulation (EC) No 44/2001.

Done at . . . . . , date . . . . . .

Signature and/or stamp

[1] Regulation … of the European Parliament and of the Council establishing a European Small Claims Procedure.

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 15.3.2005
SEC(2005) 351

COMMISSION STAFF WORKING DOCUMENT

Annex to the **:**

Regulation of the European Parliament and of the Council

establishing a European Small Claims Procedure

EXTENDED IMPACT ASSESSMENT

{COM(2005)87 final}

This Extended Impact Assessment has been made on the basis of a "Report concerning an Extended Impact Assessment on a Proposal for a Community Small Claims Instrument" which has been prepared for the Commission by an external contractor.

1. WHAT PROBLEM IS THE PROPOSAL EXPECTED TO TACKLE?

1.1. The Problem

The disproportionate cost of litigation for small claims has led many Member States to provide simplified procedures for claims of small value which are intended to provide access to justice at a lower cost, thus influencing one of the three factors that determine the rationales in dispute resolution. The details of these procedures have been investigated and documented in detail in studies prepared for the Commission[1]. The evidence from these reports suggests that the costs and timescale associated with the domestic simplified measures, and thus their use and utility to claimants, varies widely.

The increasing volume of cross-border transactions with in the European Union, driven by the increasing use of the EC Treaty rights of free movement of persons, goods and services, adds a further dimension to the small claims problem. The obstacles to a fast and inexpensive judgement are intensified in a cross-border context. It may be necessary to hire two lawyers, there are additional translation and interpretation costs and miscellaneous other factors such as extra travel costs of litigants, witnesses, lawyers etc. In the absence of a procedure that is "proportional" to the value of the litigation, the obstacles that the creditor is likely to encounter are such that the claim is not pursued.

A 1995 study for the Commission[2] found evidence of how costs of cross-border claims were significant compared to the size of most potential claims, and that these costs varied substantially between Member States. The total costs of pursuing a cross-border claim with a value of € 2.000 was found to vary, depending on the combination of Member States, from € 980 to € 6.600, with an average quoted figure of € 2.489 for a proceeding at the plaintiff's residence. The study also showed that due to different and conflicting costing rules part of the costs have to be paid even by successful plaintiffs. Taking into account the risk of having to cover the full cost in unsuccessful cases plus a major part of the opponents' costs, the study concluded that a reasonable consumer would not sue for € 2.000. This conclusion is supported by the limited empirical evidence that suggests that

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1 *The Cost of Legal Obstacles to the Disadvantage of Consumers in the Single Market*, Von Freyhold, Vial & Partner Consultants, A Report for the European Commission, DG XXIV Consumer Policy and Consumer Health Protection, 1998; *Des procédures de traitement judiciaire des demandes de faible importance ou non contestées dans les droits des Etats membres de l'Union Européenne*, Rapport final, Centre National de la Recherche Scientifique IDHE-ENS CACHAN, 2001.

2 *Cost of Judicial Barriers for Consumers in the Single Market*. Hanno von Freyhold, Volkmar Gessner, Enzo L Vial, Helmut Wagner (Eds), A report for the European Commission (Directorate General XXIV). Zentrum für Europäische Rechtspolitik an der Universität Bremen, October/November 1995.

currently only a small number of cross-border civil cases are filed with a value of € 2.000 or less.

Time was found to be an important additional factor dissuading plaintiffs from taking action. Whereas some Member States offered proceedings which took a year or less, courts in some countries needed several years. The average duration of a cross-border civil law suit in the European Union was approximately two years when the proceedings took place at the defendant's residence and five months more when the proceedings took place at the plaintiff's residence (where service of documents abroad and the procedure for recognition and enforcement add to the time required).

Legal uncertainty creates barriers to the development of the Single Market. The 1995 study estimated an aggregate cost of cross-border legal uncertainty, with an estimate in the range € 7.230 million - € 74.790 million, with a central estimate of € 27.530 million. The bulk of this cost was attributable to consumers' risk-averse consuming behaviour – an outcome consistent with the findings of *Eurobarometer* surveys. With successful legal redress being unlikely in cross-border situations, consumers gain the impression that the risk of losing out in such a transaction is enhanced exactly because legal redress cannot be expected and, in addition, because rogue sellers and service providers may take advantage of this situation.

1.2. The Size of the Problem

Establishing the scale of the problem that the proposed Regulation will target, i.e. the potential number of small claims currently abandoned, is difficult for one simple reason: Small claims that are not pursued because of the disproportionate cost of litigation are not observable in the legal system and thus cannot be counted. In places where effective and affordable procedures for small claims are in place, they are used (usually for entirely domestic claims rather than cross-border matters). Where procedures are not cost-effective, or are absent, claims are not pursued and so data are not available. One is left searching for indirect indicators of the problem.

There is a further complication. Litigation is one means of seeking settlement of a grievance. For a case to come to court requires that (i) a transaction has, from the perspective of at least one party, been incomplete or satisfactory and (ii) that the plaintiff has decided to use court process to seek settlement. The potential population of claims is not the same as the number of "problematic" transactions, especially where the value is small. The plaintiff must want resolution strongly enough to bother to embark upon a court action. There is an argument that, without seeking to deny prompt access to justice, litigation is seen as the option of last resort, as something to be used only after direct dialogue and or alternative dispute resolution mechanisms have been tried but have failed.

On the other hand the outcome of small-claims that are pursued has an influence on the behaviour of the parties beyond the proceeding (i.e. on the number of transactions, and the proportion in this number of transactions in which expectations are not met and grievance occurs). In an ideal environment, efficient dispute resolution and legal certainty should lead to more transactions but to fewer disputes.

1.2.1. Cross-Border Claims

A survey of the available information suggests that the size and nature of the actual problem is an under-researched area. Evidence of the existence of consumers and businesses having problems resolving cross-border disputes comes, *inter alia,* from anecdotal reports from consumer bodies, including the European Consumer Centres, and indirect indicators arising from *Eurobarometer* surveys.

1.2.1.1 Data concerning Cross-Border Purchases

Eurobarometer 43.0 found in 1995 that 24% of the citizens of Member States bought goods or services of up to € 2.000 in other Member States on a sporadic basis, mostly while travelling abroad. 10% of these consumers were unsatisfied with their purchases and two thirds of those were unable or unwilling to pursue their claims. The survey conducted for this study suggested that, at that time, a Single Market for durable goods hardly existed. People were put off buying abroad due to the risks of not being able to claim repair or refund money.

Other *Eurobarometer* surveys provide periodic information on cross-border purchasing behaviour by consumers[3].

Of the more recent relevant surveys, *Eurobarometer* 57.2 focused on cross-border purchases by consumers, interviewing 16129 consumers in all Member States. EB 57.2 found that only 13,3 % of consumers had bought or ordered services or products for private use from shops or vendors in another Member State in the previous 12 months (excluding travel, accommodation, meals, subsistence expenditure), little different from the results of previous such surveys over the preceding decade (see *Table 1.1,* Annex I). 57% of purchases had been made on a holiday or business trip; 34% on cross-border shopping trips (see *Table 1.2,* Annex II). EB 57.2 provides survey data on the size of purchases but the largest category is "€ 200 or more", well below the threshold of most small claims procedures. However the vast majority of purchases captured in the survey were of less than € 200 (72% of holiday and shopping trips purchases and 83% of Internet purchases). Only where visiting sales reps from another Member State were involved did purchases above € 200 account for more than half of the sampled population. Most cross-border purchasing is of comparatively small value items, notwithstanding the fact that especially in border regions values of larger transactions take place frequently as well, especially in financing, insurance and in the construction business.

[3] Questions on cross-border purchasing have featured in *Eurobarometer* EB 35.1 (1991), EB 38.1 (1992), EB 39.1 (1993), EB 43.0 (1995), EB 43.1bis (1995), EB52.1 (1999), EB 56.0 (2001) and EB 57.2 (2002). Flash *Eurobarometer* 117 (01/2002) examined consumer rights. *Eurobarometer* 57.2 focused on cross-border purchases by consumers, interviewing 16129 consumers in all Member States.

1.2.1.2. Data concerning Cross-Border Litigation

If the data on cross-border shopping are relatively limited, information on how and how often such purchases lead to disputes is scarcer still.

A 2002 study[4] conducted a survey of European Consumer Centres (ECCs) and requested a ranking of the most important subjects of the requests for information related to cross-border trade in 2001. The results are shown in *Table 2.1* (Annex III). Access to justice appeared at the bottom of the list for all the ECCs. However telephone interviews conducted in conjunction with the survey suggested that many consumers would not pursue claims against dealers from another Member State if initial approaches were not successful. Again, the apparent "visibility" of the problem is not necessarily representative of its scale.

These results contrast with the results of *Eurobarometer* 35.1 (Spring 1991) and 43.1bis (Summer 1995) questions about what EU consumers saw as the main obstacles to buying or selling with another Member State. 29% of respondents in 1991 and 33% in 1995 identified that it was "too difficult to settle disputes"[5]. The more recent EB 57.2 and the 2002 survey of European Consumer Centres support these findings, with "difficulty of taking legal action through the courts" being ranked second among the lack of consumer confidence in cross-border trade (see *Table 2.2*, Annex IV).

By contrast, participants in focus groups for a qualitative study on cross-border shopping published in May 2004 put much less weight on legal issues[6]. Practical issues of delivery, price, branding and language appeared to be more significant to consumers considering cross-border purchases.

1.2.1.3. Data concerning Mutual Recognition

Other surveys suggest that there is support for mutual recognition of judicial decisions in relation to consumer rights or business disputes. *Table 2.3* (Annex V) shows the results of a more recent *Eurobarometer* survey[7] in which 85% of the sample of EU consumers questioned were broadly in favour of judicial decisions in commercial matters being recognised throughout the European Union. Coordinated action to simplify citizen's access to courts was similarly popular (*Table 2.4*, Annex VI).

The popularity of the mutual recognition principle appears to extend into the new Member States and Candidate Countries, based on *Eurobarometer* 2003.3, as reproduced in *Table 2.5* (Annex VII).

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4 *Ex-ante Impact Assessment of the options outlined in the Green Paper on EU Consumer Protection*. GFA Management GmbH for European Commission, DG SANCO. 2002.

5 *Eurobarometer* 43.1bis split the question into two sub-questions. Composite rankings here are taken from GFA Management, 2002.

6 *Qualitative Study on Cross-border Shopping in 28 European Countries*, May, 2004, Optem/Eurobarometer, DG Health and Consumer Protection.

7 European Opinion Research Group – 59.2 – Summer 2003.

1.2.1.4. Conclusion

In summary, there is less information than would be desirable on the population of potential beneficiaries from a new procedure available for facilitating cross-border claims. There are more data on the functionality and costs of the legal processes relevant to small claims across the European Union than there are on the cases brought or those claims not pursued by virtue of the cost, time, complexity or uncertainty of litigation.

1.2.2. Domestic Claims

Data on cases pursued within Member States, which in many instances have small claims procedures in place designed primarily for domestic cases, are more readily available.

In Germany, which has a population of 82 million, more than 1,8 million general civil cases are filed (not counting undisputed payment orders ("*Mahnbescheid*"), family matters or labour law)[8]. Almost 1,5 million of these cases are filed in the *Amtsgericht*, the lower court having a threshold of € 5.000 in general matters and exclusive jurisdiction in landlord-tenant disputes. Two thirds (i.e. almost a million) of these cases have a value of € 2.000 and below.

In England and Wales, with a population of 52 million, 1 million civil cases are filed annually; almost half of the total cases have a value of less than £ 1.000 (€ 1.400). The county courts hear most of the proceedings that would fall within the scope of the Regulation. Out of the 1 million cases filed, another 700.000 end in a judgment by default. Only 70.000 are disposed of by trial or small claims hearing[9].

In France, with a population of 60 million, about 2 million civil and commercial cases are filed, annually. Excluding family and personal law cases, about 300.000 civil and commercial cases are settled by the lower courts, the *Tribunaux d'Instance*. 80% fall within the scope of the proposed Regulation[10].

In Sweden (pop. 9 million), 30.000 rent and tenancy matters are dealt with in special tribunals and various consumer complaints boards deal with 10.000 cases annually.[11] Other than these, about 65.000 civil cases are filed annually.[12] In addition, there is a summary debt recovery procedure that is administered by the enforcement service, rather than the courts, with almost 700.000 annual proceedings[13].

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8 Source: Statistisches Bundesamt, *Fachserie 10 / Reihe 2.1, Rechtspflege*, Wiesbaden, 2002.

9 [U.K./England & Wales] Department for Constitutional Affairs, *Judicial Statistics*, London, 2002.

10 Direction de l'Administration générale et de l'Équipement, *Les chiffres-clés de la Justice*, Paris, 2003.

11 Statistiska centralbyran, Statistical *Yearbook of Sweden*, Stockholm, 2004.

12 For comparative purposes, in Denmark, approximately annually 110.000 civil cases are filed, 84.000 of which have values below € 2.600.

13 Source: "statteverket" *http://www.rsv.se/kronofogden/ ->Nyehetter ->statistics*, source date: 16.04.2004.

In Ireland (pop. 4 Million), 20.000 civil matters are filed in the High Court every year, 40.000 with the circuit court and 80.000 with the district courts[14]. A small claims procedure exists which disposed of 3.000 cases in 2001[15].

2. WHAT MAIN OBJECTIVE IS THE PROPOSAL SUPPOSED TO REACH?

2.1. Background

The background to the current proposal lies in the entry into force of the Amsterdam Treaty and the conclusions of the Tampere European Council, which set the goal of progressively establishing an "area of freedom, security and justice".

The *Vienna Action Plan of the Council and the Commission*[16] (adopted by the Council in 1998) called for the identification of the rules on civil procedure which are urgent to approximate for the purpose of facilitating access to justice for the citizens of Europe and for the examination of the elaboration of additional measures to improve compatibility of civil procedure.

The *Conclusions of the Tampere European Council* of October 1999 called for a simplification and acceleration of cross-border litigation on small consumer and commercial claims, and for further reduction of the intermediate measures which are still required to enable the recognition and enforcement of a decision or judgement in the requested State[17].

The *Programme of the Commission and the Council of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters*[18] of November 2000 called for simplifying and speeding up the settlement of cross-border litigation on Small Claims. It stated that the concept of litigation on small claims referred to by the Tampere European Council covered various situations of varying degrees of importance that give rise to different procedures according to the Member State concerned. Discussions on simplifying and speeding up the settlement of cross-border litigation on small claims, in line with the Tampere conclusions, would also, through the establishment of specific common rules of procedure or minimum standards, facilitate the recognition and enforcement of judgments. The programme, while being focused on facilitating the recognition and enforcement of judgments, makes thus also reference to the approximation of procedural law as an accompanying measure that may, in some areas, be a precondition for the desired progress in attempting to gradually dispense with any exequatur procedure.

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14 [Ireland] Court Service Annual Report 2001, published 2002, http://www.courts.ie/Home.nsf/Content/Press+Releases+Opening, source date: 16.04.2004.

15 Irish Department of Justice, Equality and Law Reform, *Annual Report of the Court Service 2001*, http://www.courts.ie/Home.nsf/Content/Press+Releases+Opening -> *Annual report,* source date: 26.04.2004.

16 OJ C 19, 23.1.1999, p.1, point 41 (d).

17 "V. Better access to justice in Europe

18 OJ C 12, 15.1.2001, p. 1.

2.2. The Objectives

The objectives of the Regulation as stated in the proposal are

– to simplify and speed up litigation concerning small claims by establishing a European Small Claims Procedure available to litigants as an alternative to the procedures existing under the laws of the Member States which will remain unaffected, and

– to abolish the intermediate measures to enable the recognition and enforcement of a judgement given in a European Small Claims Procedure in another Member State.

As specified in the Tampere conclusions, these two (proximate) objectives are part of two broader objectives, namely

– to provide better access to justice, and

– to enhance the mutual recognition of judgments.

2.2.1. Better Access to Justice

An effective administration of justice requires "access to justice" to the parties. Where financial, organisational and psychological barriers keep parties from seeking redress in court then it is the same as if such courts do not exist, cases are not resolved.

Legal-sociological research has shown that perspectives on the legal system and "access to justice" vary[19]:

- A first group ("power players") are actors who utilize economic and other powers to reach their goals and can thus avoid court proceedings almost entirely.
- A second group ("repeat players") utilize court proceedings regularly to achieve their goals. For these, going to court is a strategy among others that pays if the overall average proceeds are higher than the overall costs of these proceedings. For them, and only for them, the "average costs" of proceedings for the parties are therefore most important.
- A third group ("one-shotters") may have one, or sometimes two, legal cases in their lifetime. Their decision to litigate is an important one connected to special circumstances but they take it. The one case being so important for them, it is particularly important that - especially as claimants, they have a chance to fully recover the expenses.
- The final group ("no-shotters") do not go to court when aggrieved because any of the barriers prove to be too high to them. For them, in part, it is the risks of costs involved that play an important role.

An effective administration of justice also requires a resolution within reasonable time. Justice delayed is justice denied, and where it takes too long to obtain a resolution, such a

[19] Galanter, Marc, "The Legal Malaise: Or, Justice Observed," 19 Law and Society Review 537, 545 (1985); Vial, Enzo L., *Die Gerichtsstandswahl und der Zugang zum internationalen Zivilprozeß im deutsch-italienischen Rechtsverkehr*, Baden-Baden, 1999.

decision will not be able to provide guidance to the parties of the case nor to other parties in similar circumstances. The parties are aggrieved when they do not receive a resolution within reasonable time. The economic actors lose the very thing they needed: the predictability of the law and in many cases the money or goods they needed to continue with business. On the other hand, speed must never compromise justice itself. Throwing a dice is extremely fast, efficient and cheap but it lacks the predictability the economic actor requires and it does not fulfil the citizen's emotional needs. Nothing is gained with second-class law and justice for the small cases and the poor.

A simplified procedure is simplified because some of the stricter rules of civil procedure give way to discretion: the judge is trusted to be better able to make the right discretionary decisions appropriate to the individual case than the lawmaker. At the same time, certain limitations have to remain imposed and guidance as to the "preferable" decision might be given. One of the main features of the rule of law is the full predictability of the law, its theoretical forseeability in every detail, as opposed to the ancient "kadi" rule. Rules that apply to the procedure itself are an additional safeguard against injustice making for justice.

2.2.2. Mutual Recognition

At present, judicial decisions rendered in one Member State are not automatically recognised in another Member State. Individuals or companies wishing for a judicial decision to be recognised and enforced in another Member State must go through special intermediate proceedings ("exequatur") for its recognition in another Member State.

These proceedings often entail delays and additional costs and can in certain cases eventually lead to a refusal of recognition by the Member State concerned. Therefore the ultimate goal of the *Programme of the Commission and the Council of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters*[20] is the abolition of all intermediate measures for the recognition of judicial decisions among the Member States of the European Union. Judicial decisions will then no longer be treated differently or be subject to additional procedures because they were handed down in another Member State.

Through the adoption of *Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000*,[21] and *Regulation (EC) No 805/2004 of the European Parliament and of the Council creating a European Enforcement Order for uncontested claims*[22] the exequatur requirement has been abolished for certain cases and under specific conditions.

The paramount importance of the principle of mutual recognition for a genuine European Area of Justice in which individuals and businesses should not be prevented or

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20 OJ C 12, 15.1.2001, p. 1.

21 OJ L 338, 23.12.2003, p. 1.

22 OJ L 143, 30.04.2004, p. 15.

discouraged from exercising their rights by the incompatibility or complexity of legal and administrative systems in the Member States was confirmed by the conclusions of the Tampere European Council. They stated that "enhanced mutual recognition of judicial decisions and judgements and the necessary approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights. The European Council therefore endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union. The principle should apply both to judgements and to other decisions of judicial authorities."[23]

Article III-170 paragraph 1 of the *Draft Treaty establishing a Constitution for Europe* provides that "the Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and decisions in extrajudicial cases."

2.3. An Economic Perspective

From an economic point of view, an objective of the proposal is to provide a procedure which is economically viable, i.e. it should, for at least a proportion of claimants, provide the prospect of redress at an expected cost lower than the value of their claim. The last study to examine this issue in 1995 found that the average cost of pursuing a € 2000 claim was between € 980 and € 6.600 depending on the combination of Member States involved (in 1995 prices).

There is a population of disputed cross-border transactions in which the problem is not resolved by dialogue or ADR mechanisms. There is a frequency distribution to the size of such claims, and if the pattern of disputes broadly reflects the size distribution of purchase, there will be more small claims than large ones. Where a large amount of money is at stake, the expected cost of litigation is more likely to be smaller than the value of the claim and the claimants are more likely to make use of the law. However, there is a large population of claims where the expected cost of litigation is more than the value of the claim. The rational claimant would not litigate in these circumstances.

This basic economic argument is important, but one should not be overly simplistic. The comparative advantage of the procedure is influenced by much more than just the court fees applied to its use. Parameters such as the balance it strikes between the interests of plaintiff and defendant, the simplicity and transparency of the process and its timeliness, can be at least as important.

Even determination of the expected cost can be a complex calculation reflecting:

– the court charges associated with use of the procedure,

– the charges levied by legal advisers, where they are used (possibly including the lawyers of the opposing party),

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[23] No. 33.

– the probability of success in pursuing the claim,

– the rules governing reimbursement of costs and the allocation of costs between the successful and unsuccessful parties.

The expected cost of litigation of small claims through domestic procedures varies between Member States. Differences in legal process, court fees, lawyers' charges, etc. all give rise to variation in cost.

If the expected cost of litigation can be reduced, through a simplified, low-cost, mechanism that enjoys recognition across the European Union, there is the prospect of reducing the economic loss associated with the problem and increasing access to justice. The economic value of the claims viable under the new procedure is not, however, the limit of the economic benefit to the procedure. The major benefit is the increased trade (cross-border purchasing) triggered through the increased consumer and business confidence arising from the improved transparency and certainty of the legal process. Uncertainty about legal procedures in other Member States has emerged in surveys as a significant barrier to the development of the Internal Market. The primary cost of the status quo is the suppressed level of cross-border transactions. Removing this barrier should increase aggregate welfare for consumers and businesses.

The comparative cost arguments developed above for cross-border cases apply equally in the case of domestic cases.

3. WHAT ARE THE MAIN POLICY OPTIONS AVAILABLE TO REACH THE OBJECTIVE?

In order to understand the impacts of the proposal it is necessary to define a counter-factual, or "do nothing" scenario which represents the collective understanding of what is likely to unfold in the absence of the proposed new legislation.

The "do-nothing" scenario is defined by:

– A set of assumptions with regards to the civil law procedures available at Member State and European levels and the cost, duration and support given to those applicable to small claims;

– An assumption that there will be continued development of the Internal Market and the movement of people, goods and services.

The body of civil procedural law of the Member States is subject to on-going and incremental change. There is, however, nothing in prospect that will have a material impact on the problem of small claims as a European issue. It is to be hoped that where small claims procedures designed primarily for domestic cases are less effective they will be improved, but whilst helpful to domestic cases this will not, even where it happens, necessarily assist in making a cross-border small claim a more attractive proposition than it is today.

The implications of the do-nothing scenario are that increased intra-EU trade and exchange will only increase the number of interactions and transactions, a proportion of which will unavoidably lead to disputes. Some proportion of those will prove intractable and lead to the plaintiff seeking redress through litigation. There is little sign that access to justice in respect small claims will improve without a new instrument. The number of EU citizens denied that justice will increase, and the economic costs of the inefficiency and uncertainty rise with it.

4. WHAT ARE THE EXPECTED IMPACTS?

The following assessment of the impacts of the proposal focuses on the scope of the proposal (numbers of cases potential cases and parties concerned, financial volume, 4.1.), the time limit for rendering the judgement (4.2.), the issue of mutual recognition (4.3.), a cost assessment (4.4.), and other issues (such as the interplay between the European Small Claims Procedure and existing instruments, 4.5.).

4.1. Scope

4.1.1. Scope of Proposal

The proposal provides that the scope of application of the European Small Claims Procedure covers both domestic and cross-border cases. The availability of the procedure for domestic cases has profound ramifications for the range and scale of potential impacts.

The question of the appropriate level of the threshold was asked in the *Green Paper on a European order for payment procedure and on measures to simplify and speed up small claims litigation.*[24] Amounts between € 300 and € 5.000 were suggested. Currently, out of 17 jurisdictions in 15 Member States, at least 8 have existing small claims schemes in place, 6 do not have such procedure with no current information available for another 3 jurisdictions.[25] The proposed threshold amount of € 2.000 itself is more or less an "average" of the threshold amounts in place for small claims proceedings in these Member States. It amounts to about the average monthly income in Europe for 1.5 months.[26]

4.1.2. Numbers of Potential Cases and Parties Concerned

Given the availability of the Regulation also for domestic cases, and based on the data available on small civil cases processed within the Member States, the Report estimates that the theoretical scope of the Regulation is in the range of 5 million cases per year in

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24 COM 2002 746 final, Section 5.1.

25 CNRS Report, 2001. The Netherlands, Italy and Greece were not covered in the CNRS report.

26 Cepremap, Distribution of Disposable Income in 2000 (EU 15 / Enlarged EU) *http://www.cepremap.ens.fr/~askenazy/tablesarticle.pdf* (calculated in pps: World Bank, Relative prices and exchange rates, *http://siteresources.worldbank.org/ICPINT/Resources/Table5_7.pdf*, source date: 25.04.2004.

the European Union. The Report assumes that a procedure that provided an attractive route to litigation on cross-border small claims would be expected to lead to an initial increase in the number of cross-border small claims. This proportionate increase would not necessarily be sustained: To the extent that it gradually reduces legal uncertainty in relation to cross-border transactions it could even be expected that proportionately fewer claims would come to litigation.

The Report estimates furthermore that, discounting repeat players, probably 7 million European citizens are potentially directly involved in these disputes per year. Thus, over a period of several years, a very significant proportion of the population of the Member States may be directly affected by the Regulation.

4.1.3. Financial Volume

While the threshold is set at € 2.000, obviously not all cases will reach this amount. While few statistical data are available in this respect, the Report states that it is reasonable to presume that the average claim value within this threshold will be € 1.000. Accordingly, within the scope of the Regulation are cases that directly decide the fate of € 5 billion.

In order to estimate the costs of these proceedings, the Report attempts to follow a most simple and ideal domestic small claim in order to understand the transactional costs of a proceeding.

The individual claimant being sufficiently aggrieved and having decided to pursue a claim in court, will need to gather information on the potential rights and the proper proceeding, compile the necessary documents, where applicable, and prepare the case for filing in court. While this is very much guesswork and only serves as a possible scenario, a very well educated and fully literate person but without extensive prior knowledge may possibly be able to do all that in (maybe) six hours. By asking a professional for assistance - be it a lawyer, a consumer advice bureau, or a court clerk - the claimant may be able to significantly reduce this time. The claimant may be able to explain the case orally in half an hour, and a very efficient professional may be able to complete the complaint in another half an hour including support staff time. In preparation of a sufficiently simple claim for filing in court under an ideal situation, for either the own time invested by the claimant, or the professional time, it is thus reasonable to allocate an investment of € 100.

Once the claim is received at the court, it is reasonable to assume at least half an hour support staff time for the processing of the claim into the system, presenting the prepared case to a judge or legal clerk for initial review and preparing the service of claim to the defendant. Thereafter, service itself needs to take place. Almost another hour of labour will go into the initial processing of the claim, plus material and the overhead for office and equipment used by the court staff etc. All in all, maybe another € 100 can be assigned to the process.

The defendant, having been served will need to understand, gather information and documents and prepare an answer. Probably the same applies for the defendant, as for the claimant (= € 100).

Again, the file will need to be processed in court (€ 50).

Finally, a judge will need to review the entire case file, make a factual and legal appraisal of the case and write a judgment and the reasons for such judgment (€ 200), including a proportionate time for legal research.

The judgment needs to be served on the parties, and this service needs to be supervised and documented again. Eventually, the file will need to be stored at the court for some time and probably be destroyed after 30 years or whatever the laws provide (€ 100).

The Report states that based on this very crude outline, the processing of a simple small claim will require transactional costs of € 650 (without the enforcement which may have to take place after judgment is obtained).[27]

The Report concludes that based on these considerations and the current situation in some existing small claims schemes, the cost of these proceedings that are potentially governed by the scope of the Regulation, whoever bears them, be it the parties or be it the tax payer is at least another € 3 billion.[28]

Adding the case value to the direct cost of the proceedings potentially governed by the Regulation gives a "turnover" of at least € 8 billion.[29]

4.2. Time limit for rendering the Judgement

The proposal provides that a judgment shall be rendered with 6 months after the introduction of the procedure. If in exceptional circumstances it is not possible for the court or tribunal to respect this time limit in order not to jeopardize the proper conduct of proceedings, it shall take the necessary steps as soon as possible.

The impact of this rule is largely dependent on the average time proceedings will take and on the usual reasons why proceedings would take more than these 6 months. The current position varies widely across the Member States.

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27 In a common law system, it is on the average more difficult to determine the law of the case on a case-by-case basis than when the law can be determined on the basis of organized statutory provisions as in civil law systems. Thus the time to be allocated for the judges' legal research, their education and experience and thus the transactional costs might be increased in common law systems.

28 See also, Freitag, Jan, *Staatliche Handlungspflichten im Justizbereich, - Eine Arbeit über die Überlastung der Bundesdeutschen Justiz in den 90er Jahren,* Diss-Hamburg, Berlin, 2000, p. 152.

29 These estimates are based on current data - notably without certain possible changes of (current) plaintiff behaviour. If the Instrument works as intended, lowering the barriers of access to the courts, these numbers might become higher.

In Germany, more than a million out of the 1,5 million general civil cases go to trial or hearing.[30] Almost 80% of the cases at the *Amtsgericht* are disposed of within 6 months. About a third of the cases are settled, usually during the hearing and based on a suggestion of the judge. The average time for a disputed judgment, if settlement or other solution cannot be reached, is 7 months from the date of filing. Trials or hearings at the *Amtsgerichte* are usually about between 15-30 minutes and hardly ever take more than an hour and a half. There are approximately 700 *Amtsgerichte* and 15.000 judges for civil, criminal and family matters.

In the United Kingdom, according to official statistics, the average waiting time for a judgment in civil matters is 14 months from the date of filing, and the trials or hearings take 4 hours on average.[31] There are about 1.000 judges in England for all civil, criminal and family matters, large or small.

Official statistics, even where available, are often flawed by the fact that they include default judgements, acceptance, early settlements, claim withdrawals or other types of proceedings that end in a "fast" fashion. What is interesting here are the cases that actually "go to trial", where the case is discussed on the merits and witnesses heard.

Not the statistical average, but the reasonably expectable duration of full first instance civil proceedings in the Member States lies between 4 months and 24 months.[32] For these figures, practicing attorneys were asked on their general estimate based on the experience with the courts and to give further reasons and descriptions in order to make these non-representative estimates more reliable.[33] Under-funding of the legal system, lack of modern office management and equipment, lack of staff, together with inefficient procedural rules, can be considered to be the most significant contributing factors to most, if not all, procedural delays beyond a year. Compared to up to 24 months proceedings usually take in some Member States, a maximum duration of 6 months would be a significant improvement.

4.3. Mutual Recognition

The Report estimates that the abolition of the recognition and enforcement procedure will reduce the potential duration of cross-border proceedings by between 1 month and 18 months and will reduce the costs by € 250 to € 1.300.[34] This impact is of considerable significance, reducing costs and duration in appropriate cases by 20%.

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30 Source: Statistisches Bundesamt, *Fachserie 10 / Reihe 2.1, Rechtspflege*, Wiesbaden, 2002.

31 [U.K./England & Wales] Department for Constitutional Affairs, *Judicial Statistics*, London, 2002.

32 Von Freyhold, Gessner, Vial, Wagner, *Cost of Judicial Barriers for Consumers in the Single Market, A Report for the European Commission*, Bremen/Brussels 1995.

33 Please note that these figures relate to a disputed but not unusually difficult civil matter and do not include "pure" small-claims proceedings even if by the value of the matter these cases are handled by "lower" courts in some Member States.

34 Von Freyhold, Gessner, Vial, Wagner, *Cost of Judicial Barriers for Consumers in the Single Market, A Report for the European Commission*, Bremen/Brussels 1995.

In this context, it should, however, be stressed that cases of recognition and enforcement are not very common. Most judgments are paid voluntarily and the more consensual the outcome of the proceeding was and the more the debtor has participated, the more is it likely that he will pay.[35] As an example, in Germany, compared to 1,8 million general civil and commercial matters (plus 700.000 labour disputes), annually there are fewer than 5.500 applications for recognition of foreign judgments.[36] The numbers of recognition proceedings are particularly high in the United Kingdom which applies the Brussels I Regulation on internal matters between the three jurisdictions.

If judgments have to be enforced, the enforcement itself takes between 4 and 8 months. Due to the substantial amount of work, or work time, the transaction costs involved with the execution of judgments are quite substantial. The bailiff, judge or other execution official might have to physically visit the debtor's or third party premises, might have to attach items for sale, or might have to question the debtor to take his oath. Unless borne (in part) by the government when the fees are set too low, these costs have to be paid by the creditor and, should execution be successful, by the debtor. For a claim for € 2.000, the execution costs average € 300.

4.4. Cost Assessment

There is no "typical" European small claim: There is variation in the substance as well as the variation in the laws, court procedures, working practices and other idiosyncrasies of the Member States. The complex contextual environment for the proposed Regulation makes explanation and analysis of the costs of pursuing a small claim difficult – there are too many possible variants. Nonetheless an attempt has been made in the Report, as set out in the tables below.

*Table 3.1 (*Annex VIII) details the various activities that may be involved in pursuit of a cross-border claim under the new Regulation. Within a given Member State the actual cost will vary according to whether, for instance:

– lawyers are used,

– enforcement is required,

– the Member State is the domicile of the defendant or the plaintiff.

There is then the variation across Member States, which is substantial in almost every respect.

Table 3.2 (Annex IX) gives a summary of how these elements build into an aggregate cost and duration for a small claim in both the defendant's Member State of residence and in the plaintiff's domicile. The compilation of the summary data in *Table 3.2* is

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35 Schedler, et. al., *Arbeitsplatz Gericht, Effizienz der Zwangsvollstreckung,* interim report, Praktikerforschungsgruppe der Universität Konstanz, Stuttgart 1997.

36 Source: Statistisches Bundesamt, *Fachserie 10 / Reihe 2.1, Rechtspflege*, Wiesbaden, 2002. The figure 5.500 contains other types of applications as well.

shown in *Table 3.3* (Annex X) and *Table 3.4* (Annex XI) for cases in the defendant and plaintiff's domiciles respectively. In all instances the costs of a typical activity have been estimated, actual costs may vary.

The distilled results are shown below. Depending on the Member State and the claim, the potential cost of a € 2.000 small claim varies between € 520 and € 5.400.

	Cost (€)			**Duration (months)**		
	Min	**Max**	**Mean**	**Min**	**Max**	**Mean**
Defendant's place of residence	780	5400	2097	12	22	14.5
Plaintiff's place of residence	520	4300	1733	13	34	18.2

This analysis suggests that the potential plaintiff will need to be well informed about the costs that may arise in his particular circumstances if he is to proceed without risk of finding that the costs outweigh the value of the claim.

4.5. Other Issues

The European Small Claims Procedure would be available to litigants as an alternative to the procedures existing under the laws of the Member States which will remain unaffected. The Report states that the outcome of the interplay between the European Small Claims Procedure procedure and existing instruments is uncertain. It can be expected that individual claimants will compare factors such as the expected duration, expected cost, transparency, treatment of evidence, process of enforcement, uncertainties etc. of the new and existing procedures on a case-by-case basis. The existing procedures vary widely across the European Union across all of these parameters and the resulting shift in use of different court procedures cannot be predicted at this time.

The Report concludes furthermore that although the Regulation introduces a Europe-wide procedure with common basic rules, participants' experience of it, and the costs born by the parties will vary from Member State to Member State because the issues not directly addressed by the Regulation will be subject to national laws which vary widely.

The Report assumes furthermore that the Regulation will also affect most legal professionals (500.000 lawyers[37], judges and court clerks, bailiffs and a few hundred thousand of other employees at courts, law firms, debt collection agencies and many businesses).

4.6. Summary of Impacts

The potential impacts of the proposal can be summarised as follows:

(1) It can be estimated that the theoretical scope of the Regulation is in the range of **5.000.000 cases per year**. An **initial increase in the number of cross-border small claims** can be expected which would, however, not necessarily be sustained.

[37] Source: CCBE, *http://www.ccbe.org/en/ccbe/ccbe_en.htm*, source date: 16.04.2004.

(2) It can be estimated that **7.000.000 citizens** are potentially directly involved in a European Small Claims litigation per year.

(3) Based on the presumption that the **average claim value** will be **€ 1.000**, there are cases within the **scope of the proposal** that decide the fate of **€ 5.000.000.000**.

(4) It can be estimated that the **cost of the proceedings** that are potentially governed by the scope of the Regulation is at least another **€ 3.000.000.000**. Adding case value to the direct cost of the proceedings potentially governed by the Regulation gives a **"turnover" of at least € 8.000.000.000**.

(5) A reduction of the current **duration of procedures** between **4 and 24 months** to a **maximum of 6 month (as a rule)** would be a significant improvement.

(6) It is estimated that the abolition of the recognition and enforcement procedure will **reduce the potential duration** of cross-border proceedings by **between 1 and 18 months** and will **reduce the costs** by **€ 250 to € 1.300**. This will **reduce the cost and duration** in appropriate cases **by 20%.**

(7) Depending on the Member State and the claim, the **potential cost of a € 2.000 small claim** varies between **€ 520 and € 5.400**. Therefore a potential plaintiff will need to be **well informed about the costs** that may arise in his particular circumstances if he is to proceed without risk of finding that the costs outweigh the value of the claim.

(8) The outcome of the **interplay between the new procedure and existing procedures** is **uncertain**. It can be expected that individual claimants will compare factors such as the expected duration, expected cost, transparency, treatment of evidence, process of enforcement, uncertainties etc. of the new and existing procedures on a case-by-case basis.

(9) The **experience of participants** of the new procedure and the **costs** born by the parties will **vary between Member States**.

(10) The Regulation will **affect most legal professionals** (500.000 lawyers, judges and court clerks, bailiffs and a few hundred thousand of other employees at courts, law firms, debt collection agencies and many businesses).

5. HOW TO MONITOR AND EVALUATE THE RESULTS AND IMPACTS OF THE PROPOSAL AFTER IMPLEMENTATION?

There are proximate and ultimate aspects to the monitoring and evaluation requirements of the proposed European Small Claims Procedure. These may be summarised as follows:

Proximate aspects:

– Monitoring the implementation of the Regulation by Member States;

– Monitoring the extent to which consumers and businesses become aware of the Regulation and understand how to use it;

– Monitoring the extent to which it is used, how, where and in relation to what.

Ultimate aspects:

– Increased confidence in the availability of the legal process to bring resolution to small claims (in relation to domestic and cross-border cases);

– Reduction in the extent to which uncertainty about legal process is a barrier to cross-border trade;

– Increase in intra-EU trade.

Consumer and business awareness of the procedure is best assessed through EU-wide surveys. An ex-post evaluation of the procedure would need to examine issues such as the following:

- Are consumers generally aware of the procedure?
- Are consumers who have had attempted to pursue a claim aware of the procedure?
- If so, did they make use of it?

    If not:

    – Why not?
    – Was another procedure used instead or the claim abandoned?

    If so:

    – How straightforward was the experience?
    – Was the advice available from the court adequate?
    – Was legal advice used?
    – Was an oral hearing required?
    – How long did it take to get a decision?
    – Was enforcement subsequently required?
    – What were the costs?

If the Regulation is successfully used, the ultimate impact would be seen in consumers having fewer concerns about the difficulty of taking legal action through the courts and being more willing to participate in cross-border trade. It is likely that it would take some years for awareness and use of the new procedure to filter through to public opinion surveys. There would nonetheless appear to be a benefit to *Eurobarometer* surveys on consumers' attitudes to the single market and cross-border trade being a more regular occurrence than they have been in the past; and if possible adopt a core set of standard questions so that time-series analysis of changing in attitude would be possible. The *Eurobarometer* surveys appear to be the best available mechanism for testing end-consumer attitudes to the issues that the Regulation is targeted at.

6. STAKEHOLDER CONSULTATION

The adoption of the proposal was preceded by a wide-ranging consultation of both Member States and all interested parties of civil society.

6.1. Meeting of Expert Group

In order to prepare a Green Paper on the issue of Small Claims, the Commission held a meeting of an expert group in May 2002. A paper produced by the Commission which summarised existing procedures and listed possible questions for a Green Paper was the discussed at this meeting.

6.2. Green Paper

The *Green Paper on a European order for payment procedure and on measures to simplify and speed up small claims litigation*[38] was adopted by the Commission in December 2002. It gave an overview of the currently existing Small Claims procedures in the Member States. Based on a comparative study of how Member States deal with the relevant procedural issues it formulated a number of questions concerning the desirable scope and features of a European instrument.

There were more than sixty responses to the Green Paper (from other Community institutions,[39] governments of Member States, representatives of interest groups, business associations, lawyers' representative bodies, consumer associations and academic researchers).

6.3. Public Hearing

The reactions to the Green Paper that were debated in a public hearing organised by the Commission in December 2003 revealed that an instrument to simplify and speed up small claims litigation is almost unanimously considered a step ahead in the creation of

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38 COM (2002) 746 final.

39 In its opinion of 18 June 2003 on the Green Paper, the European Economic and Social Committee welcomed the Commission's initiative to launch a consultation on this issue and the Commission's effort to accelerate civil proceedings and to make them cheaper and more efficient. It supported the establishment of a European procedure to simplify and speed up small claims litigation. It considered that suitable measures for speeding up such litigation should be defined without, at the same time, jeopardising the guarantees afforded to the parties in question under the rule of law (OJ C 220, 16.9.2003, p. 5). In its opinion of 12 February 2004 on the Green Paper, the European Parliament welcomed the Commission's initiative, and stated that the small claims procedure should not only apply to cases relating to payment of a sum of money, on the understanding that a limit must first be determined on the basis of the amount at issue, but also be extended to cover all other disputes concerning economic relationships falling under the heading of obligations. Furthermore, in the small claims procedure alternative dispute resolution (ADR) methods should be applied, the taking of evidence simplified, and the right of appeal limited (*European Parliament resolution on the prospects for approximating civil procedural law in the European Union (COM(2002) 654 + COM(2002) 746 - C5-0201/2003 - 2003/2087(INI)), A5-0041/2004*).

an area of freedom, security and justice. A discussion paper[40] presented a general synthesis of the responses to the Green Paper.

6.4. Meeting of Expert Group

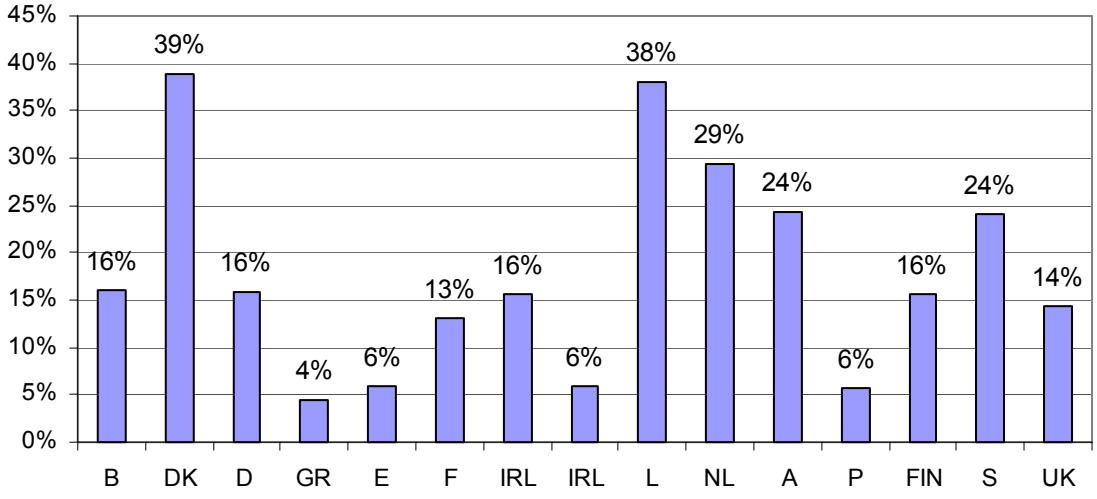
In March 2004 a meeting of experts of the Member States discussed a draft Regulation creating a European Small Claims Procedure. The approach taken by this text was generally appreciated by the delegations, namely to adopt a regulation which would have as objectives to simplify and speed up litigation concerning small claims by creating a European Small Claims Procedure available to litigants as an alternative to the procedures existing under the laws of the Member States which will remain unaffected, and to abolish the intermediate measures to enable the recognition and enforcement of a judgement given in a European Small Claims Procedure in the another Member State.

[40] http://europa.eu.int/comm/justice_home/news/consulting_public/12122003/discussion_paper_en.pdf

Annex I

Table 1.1:[41]

Consumers purchasing from shops or vendors located in another EU countries in the previous 12 months, by Member State (%)

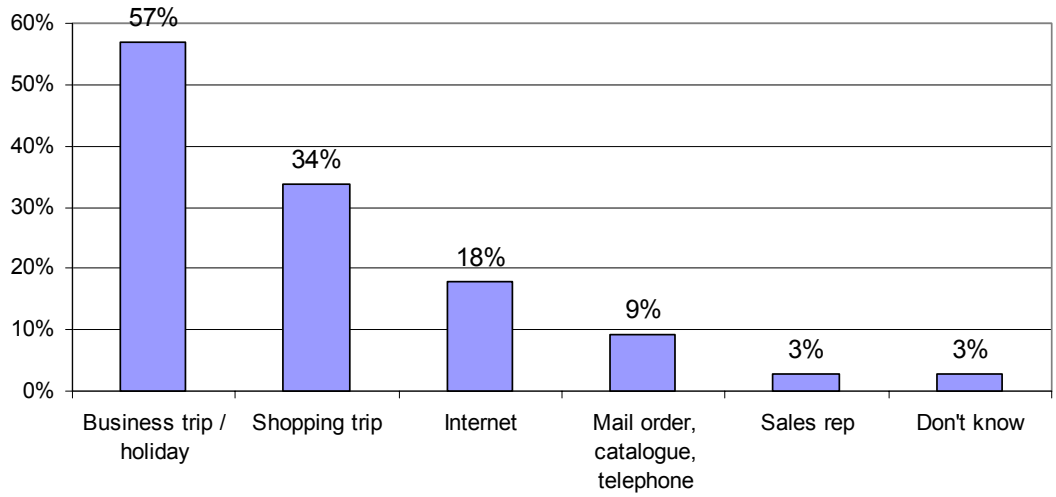


[41] Source: *Eurobarometer* 57.2 – 2002.

Annex II

Table 1.2:[42]

How people conducted their cross-border shopping



Note: Multiple answers were possible, hence replies total more than 100%.

[42] Source: *Eurobarometer* 57.2 – 2002.

Annex III

Table 2.1:[43]

Ranking of main subjects of requests for information to ECCs

Subject	Rank
1	House rental and purchase
2	Car purchase
3	Furniture, household appliances, electronic devices
4	The euro
5	Timesharing
6	Travel
7	Financial services
8	Textiles
9	Distance selling in general
10	Foodstuffs (mainly safety of such)
11	Contracts/guarantees
12	Access to justice

[43] ECC survey, GFA Management GmbH, 2002.

Annex IV

Table 2.2:[44]

Main reasons for lack of confidence/obstacles in cross-border trade from a consumer perspective

	Eurobarometer 57.2 (2002)		**European Consumer Centre Survey (2002)**	
	Average	Rank	Average	Rank
Difficult resolution of after-sales problems – complaints, returns, refunds, guarantees	3.57	1	3.92	1
Difficulty to take legal action through the courts	3.47	2	3.83	2
Greater difficulty to ask public authorities or consumer associations to intervene on one's behalf	3.41	3	3.25	3
Greater risk of practical problems (delivery problems etc.)	3.34	4	3.25	4
Lack of information about consumer protection laws in other EU countries	3.32	5	3.33	5
Lack of trust in foreign shops or sellers, greater risk of fraud or deception	3.18	6	3.08	6
Lower standards of consumer protection laws in other EU countries	3.18	6	2.5	7
Lack of trust in safety of goods and services purchased from foreign sellers	3.15	8	2.16	8

Notes: Scoring - 4 = very important, 1 = not at all important
Eurobarometer data only drew on respondents who were less confident buying from a shop or seller in another EU Member State. 12 of 14 ECCs were covered.

[44] Sources: *Eurobarometer* 57.2; GFA Management, 2002.

Annex V

Table 2.3:[45]

Guarantee that judicial decisions in commercial matters, such as consumer rights or business disputes, are recognised throughout the European Union

	Completely in favour	Somewhat in favour	Somewhat against	Completely against	Don't know
Belgium	54	34	3	2	7
Denmark	39	38	8	4	11
Germany	53	33	4	2	8
Greece	49	33	3	1	14
Spain	50	38	3	1	8
France	43	45	4	2	6
Ireland	44	38	2	1	16
Italy	45	45	4	1	6
Luxembourg	60	32	3	0	5
Netherlands	52	36	5	1	7
Austria	37	41	7	2	13
Portugal	43	41	5	2	9
Finland	36	51	6	1	7
Sweden	52	32	5	3	8
UK	32	42	7	4	15
EU 15	45	40	5	2	9

[45] Source: EB 59.2 (Summer 2003)

Annex VI

Table 2.4:[46]

Set up European Union-wide measures to simplify citizens' access to courts

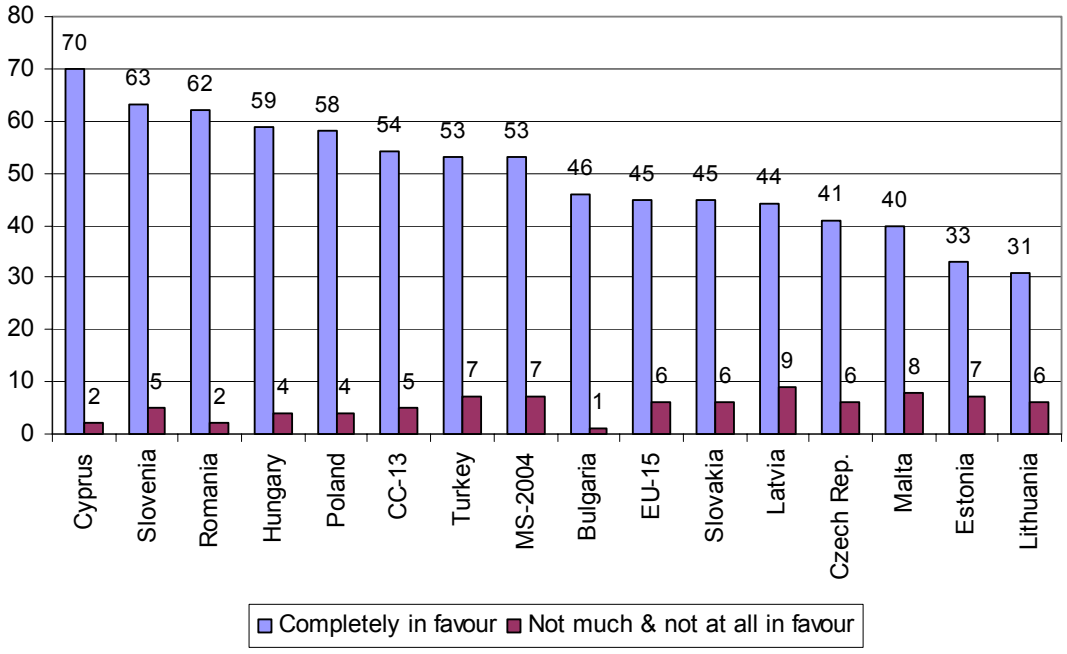
	Completely in favour	Somewhat in favour	Somewhat against	Completely against	Don't know
Belgium	55	37	2	1	6
Denmark	43	37	7	3	10
Germany	50	35	5	2	9
Greece	55	29	2	0	13
Spain	50	38	3	1	9
France	44	46	4	1	5
Ireland	45	39	2	0	15
Italy	41	45	3	1	11
Luxembourg	55	38	4	0	3
Netherlands	49	37	6	2	6
Austria	40	40	8	1	11
Portugal	49	40	4	1	7
Finland	43	45	5	0	7
Sweden	58	30	4	2	6
UK	31	43	7	5	15
EU 15	45	40	4	2	9

[46] Source: EB 59.2 (Summer 2003)

Annex VII

Table 2.5:[47]

Guarantee that judicial decisions in commercial matters are recognised across the European Union (New Member States and Candidate Countries)



[47] Sources: EU-15: Standard *Eurobarometer* 59.2 Spring 2003; Candidate Countries: *Eurobarometer* 2003.3 – Justice and Home Affairs; EU-

Annex VIII

Table 3.1: Activities and their associated cost and duration for a cross-border court dispute by Member State under the proposal

(All costs are in given in 2004 €, Duration in months

	Member State:	B		DK		D		GR		E		F		IRL		I	
	Activity	Cost	Dur.	Cost	Dur.	Cost	Dur.	Cost	Dur.	Cost	Dur.	Cost	Dur.	Cost	Dur.	Cost	Dur.
1.	Preparation of proceeding abroad	120	1	250	1	160	1	50	2	250	1	250	1	250	1	200	2
2.	Additional for foreign client	100	1	50	1	30	1	80	1	50	1	50	1	150	1	50	2
3.	Domestic service of process	20	1	0	1	0	1	20	2	30	1	20	1	20	1	20	2
4.	First instance proceeding	450	5	850	5	740	5	250	5	600	5	1000	5	1000	5	1000	5
5.	Correspondent counsel	60	0	100	0	160	0	30	0	80	0	400	0	300	0	300	0
6.	Domestic enforcement	100	4	250	4	200	4	500	12	200	6	300	4	500	4	450	6
7.	Preparation of service abroad	50	1	0	1	0	1	50	2	50	1	50	1	50	3	50	2
8.	Preparation of enforcement abroad	100	1	400	1	160	1	100	10	500	1	650	1	500	3	200	2
9.	Recognition of foreign judgment	0	1	0	1	0	1	0	1	0	1	0	1	0	1	0	1
10.	Incoming service requests	20	2	0	2	0	1	0	2	20	10	40	11	0	2	0	2

... cont ...

	Member State:	L		NL		A		P		SF		S		UK			
	Activity	Cost	Dur.	Cost	Dur.	Cost	Dur.	Cost	Dur.	Cost	Dur.	Cost	Dur.	Cost	Dur.		
1.	Preparation of proceeding abroad	120	1	120	1	250	1	300	2	600	1	400	2	350	1		

2.	Additional for foreign client	50	1	50	1	50	1	50	2	500	1	500	1	350	1	
3.	Domestic service of process	0	1	20	1	0	1	0	2	0	1	0	1	250	1	
4.	First instance proceeding	800	5	700	5	730	5	900	5	3000	5	3000	5	1500	5	
5.	Correspondent counsel	0	0	100	0	0	0	300	2	1000	0	1000	0	300	0	
6.	Domestic enforcement	250	4	250	4	300	6	600	8	180	8	300	8	250	4	
7.	Preparation of service abroad	50	1	200	1	0	1	0	2	50	1	0	1	100	1	
8.	Preparation of enforcement abroad	200	1	100	1	100	1	200	2	500	1	150	2	300	1	
9.	Recognition of foreign judgment	0	1	0	1	0	1	0	1	0	1	0	1	500	1	
10.	Incoming service requests	0	1	0	3	0	2	0	3	0	2	0	2	0	3	

Notes:

1. A procedure at the defendant's place of residence is the standard under the Brussels Convention; 2. All calculations were made on a conservative, or realistic minimum basis. VAT, translation costs (note 4) and expert witness costs were excluded; 3. For stamp duty, certifications and other costs calculated by pages in some member states, a four page document served as basis; 4. Translation costs of € 50-60 per page (Greece: € 8,30 per page) have to be added; 5.Bank transaction costs of approx. ECU 15 have to be added twice (once for payment to foreign counsel and once for the transmission of the proceeds); 6.Potential recovery of costs by winning plaintiff is complex and ranges between 0% and 80% as foreign counsel fees and additional expenses are generally not recoverable even in member states providing for full recovery in principle; 7.All cost and duration refer to the side of the plaintiff only; 8. figures in 2004 prices (or best estimate of based on available information).

Annex IX

Table 3.2:

Summary of cost and duration for a cross-border court dispute under the proposed Regulation

I.: For a procedure at the defendant's place of residence

Member State:	B		DK		D		GR		E		F		IRL		I		L		NL		A		SF		S		P		UK	
Activity	Cost		Dur.		Cost		Dur.		Cost		Dur.		Cost		Dur.		Cost		Dur.		Cost		Dur.		Cost		Dur.		Cost	
A Preparation Duration	1		1		1		2		1		1		1		2		1		1		1		2		1		2		1	
B Proceeding & Enforcement	11		11		11		20		13		11		11		15		11		11		13		19		15		15		11	
A Preparation Costs	120		250		160		50		250		250		250		200		120		120		250		300		600		400		350	
B Proceeding & Enforcement	730		1250		1130		880		960		1770		1970		1820		1100		1120		1080		1850		4680		4800		2650	
	Cost												Duration																	
	Min		Max		Average								Min			Max		Average											
	780		5400		2097								12			22		14,5											

II.: For a procedure at the plaintiff's residence

Member State:	B		DK		D		GR		E		F		IRL		I		L		NL		A		SF		S		P		UK	
Activity	Cost		Dur.		Cost		Dur.		Cost		Dur.		Cost		Dur.		Cost		Dur.		Cost		Dur.		Cost		Dur.		Cost	

C Typical preparation & proceeding duration	7	7	7	17	7	7	11	9	7	7	7	9	7	8	7
D Typical enforcement	7	7	6	15	17	16	7	9	6	8	9	12	11	11	8
C Typical preparation & proceeding costs	600	1250	900	400	1150	1700	1550	1250	1050	1000	830	1100	3550	3150	1900
D Typical enforcement	120	250	200	500	220	340	500	450	250	250	300	600	180	300	750

Cost			Duration		
Min	Max	Average	Min	Max	Average
520	4300	1773	13	34	18,2

Notes: In Total, 400 combinations are possible. The Table gives an overview on an indicative basis only.

Annex X

Table 3.3:

Costs and Durations related to a proceeding at defendant's residence

	Member State:	B		DK		D		GR		E		F		IRL		I	
	Activity	Cost	Dur.	Cost	Dur.	Cost	Dur.	Cost	Dur.	Cost	Dur.	Cost	Dur.	Cost	Dur.	Cost	Dur.
A1	Prep. of proceeding	120	1	250	1	160	1	50	2	250	1	250	1	250	1	200	2
A	Total (A1)	120	1	250	1	160	1	50	2	250	1	250	1	250	1	200	2
B2	Add. for foreign client	100	1	50	1	30	1	80	1	50	1	50	1	150	1	50	2
B3	Service of process	20	1	0	1	0	1	20	2	30	1	20	1	20	1	20	2
B4	Court proceeding	450	5	850	5	740	5	250	5	600	5	1000	5	1000	5	1000	5
B5	Correspondent counsel	60	0	100	0	160	0	30	0	80	0	400	0	300	0	300	0
B6	Domestic enforcement	100	4	250	4	200	4	500	12	200	6	300	4	500	4	450	6
B	Total (B2-B6)	730	11	1250	11	1130	11	880	20	960	13	1770	11	1970	11	1820	15

... cont ...

	Member State:	L		NL		A		P		SF		S		UK			
	Activity	Cost	Dur.	Cost	Dur.	Cost	Dur.	Cost	Dur.	Cost	Dur.	Cost	Dur.	Cost	Dur.		
A1	Prep. of proceeding	120	1	120	1	250	1	300	2	600	1	400	2	350	1		

A	Total (A1)	120	1	120	1	250	1	300	2	600	1	400	2	350	1		
B2	Add. for foreign client	50	1	50	1	50	1	50	2	500	1	500	1	350	1		
B3	Service of process	0	1	20	1	0	1	0	2	0	1	0	1	250	1		
B4	Court proceeding	800	5	700	5	730	5	900	5	3000	5	3000	5	1500	5		
B5	Correspondent counsel	0	0	100	0	0	0	300	2	1000	0	1000	0	300	0		
B6	Domestic enforcement	250	4	250	4	300	6	600	8	180	8	300	8	250	4		
B	Total (B2-B6)	1100	11	1120	11	1080	13	1850	19	4680	15	4800	15	2650	11		

Notes:

1. A procedure at the defendant’s place of residence is the standard under the Brussels Convention.

2. This table is for comparative purposes only, as the cost arise separately in the Member States.

Annex XI

Table 3.4:

Costs and Durations related to a proceeding at plaintiff's residence

	Member State:	B		DK		D		GR		E		F		IRL		I	
	Activity	Cost	Dur.	Cost	Dur.	Cost	Dur.	Cost	Dur.	Cost	Dur.	Cost	Dur.	Cost	Dur.	Cost	Dur.
C7	Prep. service abroad	50	1	0	1	0	1	50	2	50	1	50	1	50	3	50	2
D10	Incoming request	20	2	0	2	0	1	0	2	20	10	40	11	0	2	0	2
C4	Court proceeding	450	5	850	5	740	5	250	5	600	5	1000	5	1000	5	1000	5
C8	Preparation of enforcement abroad	100	1	400	1	160	1	100	10	500	1	650	1	500	3	200	2
D9	Exequatur	0	1	0	1	0	1	0	1	0	1	0	1	0	1	0	1
D6	Domestic enforcement	100	4	250	4	200	4	500	12	200	6	300	4	500	4	450	6
C	Total (C7,C4,C8)	600	7	1250	7	900	7	400	17	1150	7	1700	7	1550	11	1250	9
D	Total (D10,D9,D6)	120	7	250	7	200	6	500	15	220	17	340	16	500	7	450	9

… cont …

	Member State:	L		NL		A		P		SF		S		UK			
	Activity	Cost	Dur.	Cost	Dur.	Cost	Dur.	Cost	Dur.	Cost	Dur.	Cost	Dur.	Cost	Dur.		
C7	Prep. service abroad	50	1	200	1	0	1	0	2	50	1	0	1	100	1		

D10	Incoming request	0	1	0	3	0	2	0	3	0	2	0	2	0	3		
C4	Court proceeding	800	5	700	5	730	5	900	5	3000	5	3000	5	1500	5		
C8	Preparation of enforcement abroad	200	1	100	1	100	1	200	2	500	1	150	2	300	1		
D9	Exequatur	0	1	0	1	0	1	0	1	0	1	0	1	500	1		
D6	Domestic enforcement	250	4	250	4	300	6	600	8	180	8	300	8	250	4		
C	Total (C7,C4,C8)	1050	7	1000	7	830	7	1100	9	3550	7	3150	8	1900	7		
D	Total (D10,D9,D6)	250	6	250	8	300	9	600	12	180	11	300	11	750	8		

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 15.3.2005
SEC(2005) 352

COMMISSION STAFF WORKING DOCUMENT

Annex to the **:**

Regulation of the European Parliament and of the Council

establishing a European Small Claims Procedure

COMMENTS ON THE SPECIFIC ARTICLES OF THE PROPOSAL

{COM(2005)87 final}

COMMENTS ON THE SPECIFIC ARTICLES OF THE PROPOSAL FOR A REGULATION ESTABLISHING A EUROPEAN SMALL CLAIMS PROCEDURE

Article 1 – Subject matter

This Article summarises the subject matterof the proposal.

On the one hand, the Regulation establishes a "European Small Claims Procedure" intended to simplify and speed up litigation concerning small claims, and reduce costs. It shall be available to litigants as an alternative to the procedures existing under the laws of the Member States which will remain unaffected.

It would be disproportionate to introduce a simplified and less costly European Small Claims procedure, but refrain from abolishing the exequatur procedure for judgments rendered in that procedure since the creditor who seeks enforcement of the judgment obtained in the simplified procedure in another Member State would have to go through a second procedure. Therefore the proposal also eliminates the intermediate measures necessary to enable recognition and enforcement, in other Member States, of judgments, with the exception of judgments on uncontested claims, given in one Member State in a European Small Claims Procedure, including – as is the case in Regulation (EC) No 805/2004 creating a European Enforcement Order for uncontested claims - judgments which were initially of a purely domestic nature.

The procedural rules concerning the European Small Claims Procedure (Chapter 2) aim at striking the balance between on the one hand accelerating Small Claims proceedings and making them cheaper and more efficient, and on the other hand guaranteeing the right to a fair trial as provided for by Article 6 of the European Convention on Human Rights and Article 47 of the Charter of Fundamental Rights of the European Union to the parties.

Article 2 - Scope

The scope of application (civil and commercial matters) coincides with that of Council Regulation (EC) No 44/2001 (Brussels I Regulation). However, the Regulation shall not apply to employment law since for employment matters there are special procedural rules and in some cases even specialized court in many Member States.

In line with the answers to the Green Paper, a quantitative threshold is considered appropriate. A claim is considered as a Small Claim where its value excluding interests, expenses and outlays does not exceed € 2.000. This threshold is appropriate in view of the threshold of the existing Small Claims procedures in the Member States which are currently between 600 € (Germany) and 8234 € (England/Wales). A threshold of € 2000 is high enough so that the European Small Claims procedure has a scope of application with a sufficient practical significance and thus – in accordance with the Tampere conclusions – a direct impact on the lives of citizens. On the other hand, it is not too high so that the simplification of procedural rules could not be justified (such a justification exists only in cases where the costs of the proceedings are out of proportion with the value of the claim at stake). The threshold can be modified in accordance with the procedure referred to in Article 22.

It was the prevailing view in the answers to the Green Paper that Small Claims should not be restricted to monetary claims since – unlike an application for a payment order – the case will be heard by a judge. Accordingly, the scope of application includes also non-monetary claims.

The value of the claim is to be determined according to national law.

The definition of the scope implies in relation to non-monetary claims that the claims can be quantified in order to determine whether any such claim would be within the scope of the Regulation. The basis of calculation is left to national law.

The scope of application includes cross-border cases as well as purely internal cases (see point 2.2.1 of the Explanatory Memorandum).

Article 3 - Commencement of the Procedure

Nearly all contributions to the Green Paper considered the introduction of a form as important in order to facilitate the introduction of the procedure. Paragraph 1 provides that the claimant shall commence the European Small Claims Procedure by completing the claim form set out in Annex I and lodging it with any relevant additional documents at the competent court or tribunal. The information required for filling in the form is limited to what is absolutely necessary in order to enable the claimant to fill in the form without the assistance of a lawyer. In particular, the form does not require the claimant to make any legal references in the application. The claimant can lodge the form at the competent court or tribunal either directly, by post or by any other means of communication such as fax or email acceptable to the Member State in which the procedure is commenced.

In order to ensure that all claimants, including those who do not have a residence in the Member State where the claim is commenced, have easy access to the form, paragraph 6 provides that Member States shall ensure that the claim form is available at all courts or tribunals at which the Small Claims procedure can be commenced. Considering the fact that in most Member States there is support by a court clerk or help desk for the introduction of a procedure, Paragraph 6 also provides that Member States shall ensure that practical assistance is available to assist claimants to complete the form. The purpose of this provision is to further facilitate the filling in of the form and to guarantee effective assistance to parties not represented by a lawyer which is not mandatory (see Article 8). There are further rules concerning the assistance of parties by the court in Article 9 (2) and (3).

Article 4 –Conduct of the Procedure

The answers to the Green Paper show that the use of a written procedure (instead of oral hearings) as a rule is considered as important in order to reduce costs and speed up the procedure. Most contributions stress, however, that there must be exceptions in order to guarantee a fair trial. Considering the fact that the possibility of a purely written procedure exists in many Member States, Paragraph 1 provides that the European Small Claims Procedure shall be a written procedure. However, an oral hearing is held if it is deemed necessary by the court or tribunal which shall take into account possible any observations or demands of the parties in this respect. Article 9 paragraph 1 which provides that the court or tribunal shall respect the right to a fair trial and the principle of an adversarial process must be respected in this context.

Paragraphs 2 to 5 of this Article provide for specific rules on the use of the forms in Annexes I and II and establish time limits for the parties and the court. The use of the forms will facilitate the procedure. The time limits in this Article (and those in Articles 5 (1) and 10 (1)) will speed up the procedure. Article 12 provides for rules in cases in which the times limits set in the Regulation can not be kept.

Paragraphs 2 and 4 (and Article 10 paragraph 2) provide that the court shall serve documents to the parties in accordance with Article 11.

Paragraphs 5 and 6 provide for rules in the case that in his answer the defendant makes a counterclaim against the claimant. If the total value of the counterclaim exceeds the amount set out in Article 2 (1), the court or tribunal shall consider the counterclaim only if it arises from the same legal relationship as the claim and if the court or tribunal considers it appropriate to proceed in the European Small Claims Procedure. Consequently, the court or tribunal has certain discretion and can deal with a counterclaim which exceeds the threshold in the European Small Claims Procedure. However, there must be a legal relationship of the counterclaim with the claim in order to avoid that counterclaims exceeding the threshold substantially are dealt with in the European Small Claims Procedure. In such cases, the court or tribunal continues to apply the rules of the European Small Claims Procedure with respect to the claim, whereas the defendant can commence an ordinary procedure with respect to the counterclaim.

The objective of Paragraph 7 is to reduce translation costs by ensuring that a document is only translated when this is necessary.

Article 5 - Conclusion of the Procedure

Paragraph 1 provides that within one month following receipt of the response from the defendant or the claimant within the time limits, the court or tribunal shall deliver a judgment, or demand further details concerning the claim from the parties within a specified period of time, or summon the parties to a hearing.

Paragraph 2 provides that if the court or tribunal has not received an answer from the defendant within the time limit, the court or tribunal shall deliver a default judgment.

Article 6 - Hearing

As a further means in order to reduce costs, paragraph 1 provides that the court or tribunal may hold a hearing through an audio, video or email conference, if the technical means are available and both parties agree.

In line with most contributions to the Green Paper, paragraph 2 provides that if a party does not attend the hearing and another person represents that party, the court or tribunal may ask that person to present a mandate or other authorization in writing from that party, if this is required by the procedural law applicable in the Member State in which the procedure is conducted.

Article 7 - Taking of evidence

One main characteristic of existing Small Claims procedures is that the rules concerning the taking of evidence are relaxed compared with the ordinary procedure in order to reduce costs and delays. The question of the relaxation of these rules was also considered as crucial by most contributions to the Green Paper. Considering the fact that in many existing Small Claims procedures the judge has a certain amount of discretion with respect to the taking of evidence, this article provides for a flexible model according to which the court may determine the means of proof and the extent to which evidence is taken according to its discretion. In particular, the court may admit the taking of evidence through telephone, written statements of witnesses, and an audio, video or email conference. Accordingly, the court can also decide to apply the rules concerning the taking of evidence applicable in the ordinary procedure, if it considers it necessary. The application of procedural simplifications with respect to the taking of evidence is thus facultative (subject to considerations of the court). The court shall, however, not receive evidence of expert witnesses, unless it is indispensable for the judgment. Article 9 paragraph 1 which must be respected in this context provides that the court or tribunal shall respect the right to a fair trial and the principle of an adversial process.

Article 8 - Representation of parties

In the light of the objective of this proposal to provide creditors with a simple and cost-effective mechanism for the recovery of small claims it would be a contradiction in terms to make the use of this procedure conditional upon the representation by a lawyer. On the contrary, it is – in line with most contributions to the Green Paper and considering that fact that at present no Member States requires mandatory representation by a lawyer in Small Claims procedures - the purpose of this provision to leave it up the parties whether they want to employ legal assistance. Accordingly, in order to reduce the costs of the procedure, the article provides that the parties shall not be required to be represented by a lawyer or another legal professional.

Article 9 - Remit of the court or tribunal

Paragraph 1 provides as a general rule that the court or tribunal shall respect the right to a fair trial and the principle of an adversial process. This principle shall be respected by the court or tribunal in particular when it decides on the necessity of an oral hearing and on the means of proof and the extent to which evidence is taken.

The objective of paragraphs 2 and 3 is to ensure that parties are not de facto obliged to employ a lawyer. In order to guarantee effective assistance to parties not represented by a lawyer (which is not mandatory, see Article 8), paragraph 2 provides that the court shall not oblige the parties to make any legal assessments of the claim. In the same spirit, paragraph 3 provides that the court shall, if necessary, support the parties in procedural questions and may ask them to provide factual information.

In order to encourage settlements between the parties, paragraph 4 provides that whenever appropriate, the court or tribunal shall seek to reach a settlement between the parties.

Article 10 – Judgment

In line with many contributions to the Green Paper, the purpose of this Article is to reduce the delays for rendering the judgement. Taking into account the time limits set in Articles 4 and 5, paragraph 1 provides that the judgment shall be rendered within six months following the registration of the claim form. Article 12 (2) provides for a rule in case this time limit can not be kept.

(1) Paragraph 2 provides that the court or tribunal shall serve the judgment on the parties in accordance with Article 11, unless it is delivered orally at the conclusion of a hearing at which both parties are present.

Article 11 - Service of documents

This purpose of this Article is to limit the costs for the service of documents by providing that documents shall be served as a rule by registered letter with acknowledgment of receipt. Article 14 of 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[1] is based on the assumption that service by post guarantees with sufficient certainty that the addressee receives the document instituting the proceedings.[2] If documents are to be served in the Member State in which the procedure is conducted, Member States can serve documents also by any simpler means (such as simple letter, fax or email), if these simpler means are provided for in their procedural law. If in exceptional circumstances it is not possible to effect service by registered letter with acknowledgment of receipt (or by any simpler means), service may by effected through other means ensuring personal service.

Article 12 - Time limits

Paragraph 1 and 2 provide for rules in cases in which the time limits set in the Regulation can not be kept.

Paragraph 3 provides that for the purpose of calculating the time limits provided for in this Regulation, Regulation No 1182/71 of the Council determining the rules applicable to periods, dates and time limits shall apply.

Article 13 - Enforceability of the judgment

This Article stipulates that the judgment shall be immediately enforceable, notwithstanding any possible appeal, and that it shall not be necessary to provide a security. For the purposes of speeding up the recovery of Small Claims, it is sufficient that judgements are immediately enforceable, whereas the rules concerning the admissibility of appeals remain subject to national law (see Article 15).

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1 OJ L 160, 30.6.2000, p. 37. Article 14 provides that that each Member State shall be free to effect service of judicial documents directly by post to persons residing in another Member State.

2 Most Member States require a registered letter with acknowledgment of receipt under Article 14 (2) in order to have proof that the service has been effected.

Article 14 - Costs

The purpose of this Article is to reduce costs as far as possible and to improve access to justice.

In order not to deter creditors from introducing a European Small Claims procedure, Paragraph 1 provides that the unsuccessful party shall bear the expenses and outlays of the proceedings, except where this would be unfair or unreasonable.

In order to encourage the parties not to employ a lawyer, paragraph 2 provides that when the unsuccessful party is a natural person and is not represented by a lawyer or another legal professional, he shall not be obliged to reimburse the fees of a lawyer or another legal professional of the other party.

Article 15 - Appeal

Considering the fact that the rules of the Member States on the possibility to appeal differ significantly, this Article provides in paragraph 1 that Member States shall communicate to the Commission whether there is an appeal against a judgment rendered in a European Small Claims Procedure, and that the Commission shall make that information publicly available.

In line with Article 8, paragraph 2 of this Article provides that in an appeal procedure against a judgment rendered in a European Small Claims Procedure, parties shall not be required to be represented by a lawyer or another legal professional.

Paragraph 3 provides that there shall be no further ordinary appeal or cassation against an appeal judgment in order to speed up the time required for rendering a final judgment.

Article 16 - Review of the judgment

The purpose of this Article is to ensure that there is effective legal protection for the defendant in cases where the judgment is to be enforced in the Member State where it was rendered, but the defendant has not been served properly with the form in Annex I or the summons to a hearing.

Article 17 - Applicable procedural law

This Article provides that where this Regulation does not contain any specific provisions, the European Small Claims Procedure shall be governed by the procedural law of the Member State in which the procedure is conducted.

Articles 18 - Recognition and enforcement

In line with the Tampere conclusions, this Article eliminates the intermediate measures to enable the recognition and enforcement of a judgement given in a European Small Claims Procedure. It shall not apply to judgments on uncontested claims within the meaning of Article 3 (1) of Regulation (EC) No 805/2004 (see Article 19 for those cases).

Article 19 - Relationship with Regulation (EC) No 805/2004 and with Regulation (EC) No 44/2001

This Article provides that this Regulation shall not affect the application of Regulations (EC) 805/2004 and 44/2001. In particular in cases where recognition and enforcement of a judgement rendered in a European Small Claims procedure is not possible in accordance with Article 18 of this Regulation since the judgment was given on an uncontested claim, recognition and enforcement may be sought in accordance with the provisions of those Regulations.

Article 20 – Information

It is particularly important that the competent national authorities cooperate to provide the general public and professional circles with information on the European Small Claims Procedure, in particular via the European Judicial Network in Civil and Commercial Matters established by Council Decision 2001/470/EC. Improvements to the possibilities of access to justice, in particular in the case of litigation having a cross-border dimension, are likely to be of little effect if possible recipients are not aware of them. The characteristics of national small claims procedures have been published on the site of the European Judicial Network.

Article 21 - Implementing measures and Article 22 - Committee

These Articles refer to the Advisory Committee provided for by Regulation (EC) No 44/2001 that will assist the Commission in the implementation of the Regulation.

41997Y0827(03) Official Journal C 261 , 27/08/1997 p. 0026 - 0037 1

Explanatory Report on the convention, drawn up on the basis of Article K.3 of the Treaty on European Union, on the service in the Member States of the European Union of judicial and extrajudicial documents in civil or commercial matters (Text approved by the Council on 26 June 1999)

EXPLANATORY REPORT on the convention, drawn up on the basis of Article K.3 of the Treaty on European Union, on the service in the Member States of the European Union of judicial and extrajudicial documents in civil or commercial matters (Text approved by the Council on 26 June 1999) (97/C 261/03)

INTRODUCTION

1. The purpose of European Union conventions on judicial cooperation in civil matters is to establish a common judicial area in which parties to legal proceedings pursuing their claims in another Member State are afforded the same safeguards as before their home-country courts.

To this end, rapid procedures and legal certainty are of the essence at a time when the increasing number of transactions, whether in the private domain or in economic or cultural relations, inevitably leads to a growth in litigation.

In particular, the process of transmitting judicial and extrajudicial documents in civil or commercial matters from one Member State to another for the purposes of service, a vital link in the chain of proper procedure, has to be conducted under satisfactory conditions.

2. On 29 and 30 October 1993 the Council of Ministers for Justice set up a Working Party on Simplification of Document Transmission with instructions to draw up an instrument to simplify and speed up procedures for the transmission of documents between Member States. The examination of the replies to the questionnaire devised in April 1992 under the Portuguese Presidency, together with the Netherlands and the United Kingdom, had revealed a complex, variable and inefficient system.

Indeed, since most Member States are Parties not only to the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters but also to a number of bilateral or regional instruments, confusion has gradually built up as to required and recommended procedures, leading to delays and causing mistakes and questionable choices to be made.

In 1993 the Netherlands delegation submitted a draft text amending Article IV of the Protocol annexed to the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters, concerning the service of documents between the Member States of the European Union.

The Working Party began by considering that draft; this was followed by a questionnaire framed by the German Presidency on the procedures applicable in each Member State.

Then, early in 1995, the French Presidency presented a fresh draft, which involved introducing a single mandatory mechanism for all Member States.

On the basis of Member States' suggestions and results of consultations with practitioners carried out on the Commission's initiative, a solution was reached which strikes a balance between the various proposed approaches.

The Working Party having concluded its discussions, the text of the draft Convention was submitted by the Netherlands Presidency, in accordance with Article K.6 of the Treaty on European Union, for scrutiny by the European Parliament (1).

On 26 May 1997, the Council adopted the Convention (2), which was signed on the same day by the representatives of all the Member States.

3. The new Convention applies only between the Union's Member States, subject to any existing or future agreements between two or more Member States enabling them to establish the closer cooperation referred to in Article K.7 of the Treaty on European Union.

The Convention is consistent with the 1965 Hague Convention, to which it owes a number of solutions, while introducing innovations in four main areas.

Firstly, in order to avoid delays building up between successive intermediaries downstream of a document's transmission, the Convention makes provision for establishing more direct channels between the persons or authorities responsible for transmitting a document and those serving it or ensuring it is served.

Next, the Convention provides for certain practical means to be used to ease the practitioners' task, including modern means of document transmission, a complete, user-friendly form and directories of Member States' designated receiving agencies.

In order to safeguard the rights of the parties, it also introduces innovative rules on the translation of documents.

The Convention sets up an Executive Committee charged with ensuring the proper functioning of the Convention, drawing up and updating a manual on designated agencies and a glossary of relevant legal terms and proposing improvements to the Convention's implementation or adjustments to its content.

The Convention is crowned by a Protocol on the interpretation of the Convention, by the Court of Justice of the European Communities, modelled on the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Brussels Convention of 27 September 1968.

As the matter of service of documents is referred to in Article 20 of the Brussels Convention and Article IV of the Protocol annexed thereto, those Articles will require amendment.

This Convention, the first achievement of judicial cooperation in civil matters under Title VI of the Treaty on European Union, is designed to strengthen existing ties between the Member States.

It will be for lawyers and practitioners to ensure its success.

TITLE I

Article 1 Scope

1. Article 1 (1) defines the scope of the Convention, stating that it governs relations between the Member States of the European Union with regard to the transmission of documents in civil and commercial matters.

The relationship between this Convention and other existing or future agreements or arrangements between two or more Member States are governed by Article 20. The reader is therefore referred to the explanations provided for that Article.

The Convention applies to the transmission, for purposes of service, of judicial and extrajudicial documents. These documents are not defined.

'Judicial document` must clearly be taken to mean documents connected with judicial proceedings. The term 'extrajudicial documents`, however, is not amenable to precise definition. It may be taken to cover documents drawn up by a public officer, for example a notarial deed or a writ, documents drawn up by Member States' official authorities or documents of a type or importance which require them to be transmitted and brought to the addressee's attention by official procedure.

Like many other Conventions which use the terms, this Convention does not define 'civil or commercial

matters`, nor does it refer to the definition in the law of the Member State of transmission or of the Member State addressed.

In the interests of consistency between the various Conventions concluded in the European Union framework, reference might usefully be made to the Court of Justice's interpretation of the concept of civil and commercial matters, which establishes the principle of a self-standing definition taking account of the objectives and structure of the Convention and the general principles emerging from all the national legal systems. This does not mean, however, that civil and commercial matters are to be narrowed down to the scope of the Brussels Convention of 1968.

Essentially, criminal and tax cases fall outside the scope of civil and commercial matters, but not civil actions heard in the context of those proceedings. However, these terms will need flexible interpretation if the rights of the parties to an action are to be protected, in particular the rights of the defence.

2. The second paragraph was added to Article 1 in order to discharge requested States of the responsibility of serving a document where the address of the person on whom it is to be served is unknown.

However, this provision does not mean that the agency of the Member State receiving an application for an act to be served on a person whose address in incomplete or incorrect need not try to complete or correct it with the means at its disposal.

If, despite such efforts, the address of the person to be served still cannot be determined, then the document ought to be returned to the transmitting agency as soon as possible.

Article 2 Transmitting and receiving agencies

Article 2 establishes the principle of direct transmission of documents for service between decentralized agencies. This represents a step forward in judicial cooperation between Member States and is one of the Convention's main innovations.

As an antidote to the slow transmission of documents by diplomatic channels, the only route available to Member States not bound by relevant Conventions, a number of existing agreements have set up central authorities to convey documents to their destination, usually in stages; this Convention aims to bypass the intervening stages between a document's dispatch from the Member State of transmission and its service in the Member State addressed.

It is therefore the task of the Member States to designate public officers, judicial or administrative authorities or other persons with the jurisdiction and resources to perform the tasks entrusted to the transmitting and receiving agencies. The Convention does not, however, impose an obligation on Member States to provide the private agencies they may appoint with those resources.

A Member State may therefore designate a single agency to act as both transmitting agency and receiving agency for a given area; conversely it my designate separate agencies.

A federal State, a State in which several legal systems apply or a State with autonomous territorial units may designate more than one such agency.

As an exception to the principle of decentralization, a Member State may also declare that it will designate one agency to act as a transmitting agency and one agency to act as a receiving agency for its entire territory, or even that it will designate a single agency to act as both transmitting and receiving agency. However, the designation of a single agency should not give rise to delays in the procedures for service of documents.

Designation of such centralized agencies will have effect for a period of five years. The Executive Committee set up under Article 18 is required to monitor the operation of decentralized agencies and to satisfy itself that they are effective. Member States which have designated a centralized

agency may wish, after assessing the information collected by the Committee and taking into account the results obtained by Member States that opted for a decentralized system from the outset, to establish decentralized agencies. A Member State's declaration may, however, be renewed every five years.

Under paragraph 4, before the Convention enters into force with regard to a given Member State the latter is required to provide details of the receiving agencies which it has designated and which must be available to other Member States' transmitting agencies if they wish to transmit documents.

Member States' designated agencies will be provided with a manual containing all relevant information; it will be produced and updated annually by the Executive Committee in accordance with Article 18 of the Convention.

Article 3 Central body

In order to enable transmitting and receiving agencies to resolve difficulties arising from implementation of the Convention which cannot be resolved through contacts at agency level, the Convention has provided for central bodies to be set up to solve such problems via direct contacts between the transmitting agency and the central body of the State addressed.

Under point (a) a transmitting agency may seek information from the central body of another State. A transmitting agency lacking the requisite information may need to enquire, for example, as to which receiving agency a given document has to be sent to for service.

Point (b) may relate to specific cases or to more general difficulties. A transmitting agency will be able to seek the help of another Member State's central body if some time has elapsed since it sent a document to that Member State's receiving agency but a number of requests for information have filed to establish what action was taken after the document's transmission. It will also be able to report to a central body any recurrent difficulties in its relations with one or other receiving agencies.

Point (c), which allows applications to be made to the central body of the State addressed for documents to be forwarded for service to the competent receiving agency, may be implemented only 'in exceptional circumstances`. It is not normally within the central body's remit to process directly requests for documents to be transmitted: that is the task of the receiving agency.

The Convention contains a number of clauses enabling transmitting and receiving agencies to resolve difficulties arising from a request for service, and these should be utilized before the central body is called upon.

Thus a document ought not to be transmitted to the central body merely because it is not possible to determine the receiving agency with the relevant territorial jurisdiction; rather a request for information should be sent under Article 3 (a).

If the address of a person on whom a document is to be served cannot be established or if the address provided is wrong so that the receiving agency cannot comply with a request for service, the document must in no event be sent to the central body. The situation then falls under Article 1 (2) of the Convention, viz. the Convention does not apply where the address of the person to be served with the document is not known.

On the other hand, a situation which could justify a document's transmission to the central body would be one where, despite repeated requests as to the receiving agency with territorial jurisdiction to serve documents and the passage of a reasonable length of time, no response had been forthcoming.

More generally, transmission of a document to the central body of the Member State addressed could

be acceptable, for example, if court buildings housing a section designated as a receiving agency or a process server's offices had been destroyed by fire, or if a general strike or a natural catastrophe had brought to a standstill the services in a region of the Member State addressed where the document was to be served.

In any event it is for the transmitting agency to decide in the light of these suggestions whether the exceptional circumstances justifying transmission of a document to the central body of the State addressed do in fact obtain.

The Executive Committee is to monitor the application of Article 3 (c), in accordance with Article 18 (2).

Lastly, it would be advisable for Contracting States to the Hague Convention of 15 November 1965 to designate as their central bodies the central authorities designated under Article 2 of that Convention.

TITLE II JUDICIAL DOCUMENTS

Section 1 Transmission and service of judicial documents

This section lays down the rules on the principal channel for document transmission provided for in the Convention.

Article 4 Transmission of documents

1. In order to expedite the whole process of transmission and service of the document, the transmitting agency must take the necessary steps to ensure that the document is sent directly, and as soon as possible, to the agency competent to receive it. In order to find out which receiving agency is competent to receive the document, having regard to the address of the person to be serviced with it, the transmitting agency will refer to the manual drawn up by the Executive Committee.

2. The Convention does not list the means of transmission which may be used. On the contrary, it allows any appropriate means to be employed, thus enabling a choice to be made in the light of the procedures allowed under domestic law, the circumstances of the case and the type of link-up that can be established with the competent receiving agency.

However, this flexibility to choose the means of transmission must not be allowed to prejudice the interests of the addressee. The Convention therefore provides that the document received must be faithful to that forwarded and that all the information in it must be easily legible. If this is not the case, the documents must be returned to the transmitting agency at once, together with a form with the section marked 'notice of return of request and document` filled in accordingly.

The manual will enable the transmitting agency to find out which means of transmission can be used in correspondence with the receiving agencies in that Member State. Where technical innovations take place or where receiving agencies accept new means of transmission, this can be entered in the manual when it undergoes its annual updating.

3. Documents forwarded by the transmitting agency must be accompanied by a form drawn up in accordance with the specimen request for service annexed to the Convention and available therefore in all language versions.

The Convention does not contain any rules on the language which has to be used for the pre-printed parts of the form. The transmitting agencies are therefore free to use, for example, forms in their own official language, in the official language of the receiving agency, or in the language of the European Union which the State addressed has indicated that it can accept pursuant to paragraph 3.

However, the transmitting agency must complete the form using the official language or one of the official languages of the State addressed, or a language which that State has accepted pursuant to paragraph 3. The transmitting agency will be able to find out which languages can be used by referring to the manual, which will indicate:

(a) firstly:

- either the only official language of the State addressed to be used,
- or the various official languages of the State addressed which may be used,
- or which of the official languages of the State addressed has to be used on account of the address of the person to be served;

(b) secondly:

- any other language of any of the Member States of the European Union which the State addressed has declared it can accept.

The transmitting agency may choose whether to use the appropriate language under point (a) or the language under point (b).

However, it should be pointed out that most of the particulars which have to be entered on the form annexed to the Convention do not require translation and that the Executive Committee will be instructed to draw up a glossary, in all the official languages of the European Union, of the main legal terms likely to be used when filling out the form.

4. Many Conventions provide for legalization to be waived. It would naturally be quite out of the question to require that documents be legalized purely for the purpose of service abroad, especially within the European Union.

Article 49 of the Brussels Convention of 27 September 1968 provides that no legalization or other similar formality can be required by a court in a Member State which receives a request for enforcement of a judgement given in another Member State.

5. This paragraph provides for the possibility of sending the document to the receiving agency in duplicate and asking for one copy to be returned; it would seem that this would be applicable only when documents are sent by conventional means, such as post. However, the practice could be adapted to other means of transmission that may be used in future, as and when they are introduced.

The transmitting agency will be able to supply the receiving agency with the requisite information via the request form sent with the document.

Article 5 Translation of documents

1. When a document has to be sent to another Member State for service, the transmitting agency must advise the applicant that the addressee may refuse to accept the document because of the language used in accordance with Article 8 of the Convention.

The Convention contains no provision regarding the possible legal consequences of refusing to accept a document on account of the language used; it will be for the competent courts to decide on this matter.

The transmitting agency must therefore draw the applicant's attention to the risks that he may be running with regard to the deadlines, effectiveness or correctness of the procedure if he does not have a translation done, as might prove necessary.

2. If the applicant chooses to have the document translated, he will have to pay the cost of translation in advance; however, this rule does not preclude any subsequent ruling on costs enabling the applicant

to be reimbursed for all or part of the expenditure he has incurred, if the law of the Member State in which the proceedings take place so provides.

It should be noted that 'applicant` means in all cases the party interested in transmission of the document. It therefore cannot refer to the courts.

Article 6 Receipt of documents by the receiving agency

1. The provisions of this paragraph are intended to make sure that the transmitting agency is kept informed as to whether the documents it has dispatched have been received by the receiving agency. The emphasis is placed on the speed of the reply which has to be sent by the receiving agency, as the paragraph lays down the principle that a receipt must be sent as soon as possible, by the swiftest possible means. Receiving agencies should therefore endeavour to send the receipt to the transmitting agencies as soon as the documents are received.

It will suffice for the receiving agency to return to the transmitting agency a copy of the form requesting service forwarded with the documents, after filling in the 'acknowledgment of receipt` section (Heading 8 of the form).

When the transmitting agency receives the receipt, it can be sure that the document it has forwarded has indeed reached the competent receiving agency.

If the receipt fails to arrive within a reasonable period of time after expiry of the period of seven days, the receiving agency might presume that the documents had gone astray and should be sent again, at the risk of causing confusion between he two sets of documents.

2. This paragraph is intended to prevent the document and the request for service being returned to the transmitting agency when some additional information or documents would be all that was needed to solve the difficulties which prevent the receiving agency from serving the document or having it served as it stands.

3. This paragraph applies where the receiving agency is quite unable to respond to the request for service, even where additional information or documents have been obtained.

There are two eventualities provided for: where a request falls manifestly outside the scope of the Convention, and where service is impossible owing to failure to comply with the formalities laid down in the Convention.

The first eventuality would arise, for example, where a request for service related to proceedings in a tax matter.

The second might cover, for example, requests relating to illegible documents or, conversely, to documents not accompanied by any request, or a request relating to an addressee whose address could not be established.

This paragraph might also cover failure to reply, at least within a reasonable period of time, to a request for additional information or documents made by the receiving agency pursuant to paragraph 2.

Requests sent in error to a receiving agency in a Member State other than that within whose territory the addressee is present and those which request service in particular forms which are incompatible with local law also have to be returned to the transmitting agency.

4. This paragraph is likewise intended to prevent documents being returned to the transmitting agency simply because the receiving agency which received them did not have territorial jurisdiction, despite being in the right Member State. It therefore provides that a receiving agency which does not have competence must send the document on to the competent receiving agency in the same Member

State.

The document must be sent on as stipulated in Article 4, i. e. directly and as soon as possible, by any appropriate means. Given the delay resulting from the need to send the document on, this must be done with particular dispatch.

Furthermore, in order that the transmitting agency should not remain in ignorance of what has occurred, the Convention provides that the non-competent receiving agency which sent on the document and the competent receiving agency should both notify the transmitting agency accordingly.

The territorially competent agency must notify the transmitting agency as soon as it receives the document, or within seven days at the latest, by the swiftest possible means, in the manner provided for in paragraph 1.

Article 7 Service of documents

1. The receiving agency will be informed of the form of service requested by means of the particulars which the transmitting agency enters on the request form.

If the form of service requested is incompatible with the law of the Member State addressed, the document should be served in accordance with the rules laid down by that State's law provided that the transmitting agency has so requested. The same arrangement must be followed where no specific form of service has been requested by the transmitting agency.

This request may be made under point 5.2.1 of the form.

2. This paragraph places a duty on the receiving agency to effect service with all dispatch. It must immediately take the steps required, or have them taken. However, given the difficulties which may arise, a period of one month has been set as being sufficient to allow the service procedure to be concluded.

The second sentence should not be taken to mean that the receiving agency can neglect its duty to take, or have taken, all the steps required, and then advise the transmitting agency hat the necessary action has not been taken to serve the document within the requisite time limit.

The sentence in fact refers to the duty of the receiving agency to inform the transmitting agency if the procedures undertaken to effect service have so far failed.

Indeed, it may be that in some cases it has not been possible to effect service within the month, but it may be possible within a reasonable period. In that event, the receiving agency is still required to send the certificate contained in the form to the transmitting agency when the one-month time-limit runs out.

Article 8 Refusal to accept a document

1. The rules on language use laid down in Article 8 apply solely to the documents themselves.

With the aim of safeguarding the interests of the addressee of a document, the Convention establishes the principle that the document is to be translated into the official language of the State addressed or, if that State has more than one official language, the official language or one of the official languages of the place where service is to be effected.

In certain cases, however, translation may prove to be an unnecessary expense, or even contrary to the addressee's interests. This may happen, for example, where the addressee is a national of the State of transmission or, in any event, understands the language of that State.

It should be noted that where a document has been drawn up in, or translated into, the official language of the State addressed, or the official language or one of the official languages of the

place where service is to be effected, the addressee may not refuse it on grounds relating to the use of that language.

Conversely, the addressee may refuse the document if it has not been translated and he does not understand the language in which it is drawn up.

However, the Convention does not oblige the applicant to forward the document written in or translated into one of the above languages; it allows the addressee to refuse to accept the document on the grounds that the these rules have not been observed.

If a dispute arises as to whether or not the addressee of the document understands a language, it will be settled in accordance with the relevant rules, for example by raising the question of whether the document was properly served in the court seised of the procedure in connection with which it was transmitted.

The receiving agency must inform the addressee that he can refuse to accept the document if it is not in one of the languages of the place where service is effected or in an official language of the Member State of transmission that he understands.

There are various ways in which it can meet the duty to supply information imposed by this paragraph. Appropriate means will be established in each Member State according to the rules applicable to the service of documents.

Hence, where documents are served in person by a specialized agent, that agent could provide the information verbally.

If, on the other hand, documents are sent by post, the information could be given in a note attached to the documents for the addressee.

In any event, the circumstances in which the addressee was given the information must be stated in point 12 (c) of the certificate of service.

If the addressee refuses the document on account of the language used, he should let this be known within a reasonable time so as not to hold up the procedure.

It should be noted that some Member States may have concluded agreements whereby each of those States considers the others' official languages as its own. This is true, for example, of the Nordic States, which have stated that they will use Danish, Norwegian and Swedish without distinction, in accordance with the conditions laid down in the 1974 Nordic Passport Agreement.

2. In order to enable the transmitting agency and the applicant to take any measures they deem necessary, the receiving agency must inform the transmitting agency as soon as it is aware of the refusal of an addressee to accept a document.

Article 9 Date of service

The provisions of this Article are intended to define the criteria relating to the date to be regarded as the date of service of a document.

In most cases the service of a document will have legal effects, and it may be important to know exactly when they arose.

Given the differences between the various Member States of the Union, both as regards procedural rules for the service of documents and as regards rules of substance, the event to be taken into account varies from one Member State to another.

When drawing up the Convention, the aim was to seek a rule that could replace the rules of domestic law in relations between Member States of the Union; this resulted in adoption of the provisions

of Article 9.

The first paragraph lays down the principle that the date of service is to be the date on which the document is served in accordance with the law of the Member State addressed. It is intended to protect the addressee's rights.

Conversely, the second paragraph is intended to protect the rights of the applicant, who may have an interest in acting within a given period or on a given date. In such cases it seemed appropriate to enable him to assert his rights on a date which he can determine himself, instead of referring to an event (the service of a document in another Member State) over which he has no direct influence and which might occur after the due date.

Article 9 (1) and (2) may be applied cumulatively, so that service produces its effects at different times with regard to the addressee of the document and with regard to the applicant. Such a situation could arise for example under the law of some States if a writ containing a summons to appear were to interrupt a period of limitation.

As regards the point at which the period of limitation is interrupted with regard to the applicant, reference must be made to the law of the Member State of transmission pursuant to Article 9 (2).

However, with regard to the addressee of the document, the date to be taken into consideration for calculating the time for appearance will be the date laid down by the law of the Member State addressed.

The third paragraph provides that Member States may declare that they will not apply the provisions of this Article.

Article 10 Certificate of service and copy of the document served

When the service procedure has been concluded, the corresponding certificate on the form must be completed.

The form must be returned to the transmitting agency, together, where applicable, with a copy of the document.

The rules on the language to be used to fill in the certificate of service are similar to those for the request for service, since the receiving agency has to use either an official language or one of the official languages of the Member State to which the document has to be sent, or a language which it has indicated it can accept that purpose.

Article 11 Costs of service

1. The first paragraph lays down the principle that services rendered by the administrative departments of the Member State addressed are to be free of charge.

2. The second paragraph, on the other hand, allows Member States to charge costs to the applicant where the service formalities are not carried out by their administrations.

An advance on these costs may be demanded before the service procedure is put in hand. The manual drawn up by the Executive Committee will contain the relevant details, in particular whether a payment has to be made when the document is forwarded by the transmitting agency.

Section 2 Other means of transmission and service of judicial documents

This section provides for a number of subsidiary means of transmitting documents.

Article 12 Transmission by consular or diplomatic channels

This Article provides for the possibility of using diplomatic or consular channels for the transmission

of documents although it specifies that such means of transmission is to be used only in exceptional cases.

As a result, it should be used only in cases of extreme difficulty, such as those instanced with respect to Article 3 (c), i. e. social or climatic circumstances which mean that the documents cannot be forwarded from one Member State to another by any other means.

Article 13 Service by diplomatic or consular agents

With this Article, the Convention incorporates a method of service traditionally permitted in international relations.

In principle it offers this possibility in respect of any person, regardless of nationality, residing in the territory of a Member State. Member States are nonetheless given the option of entering a reservation.

Article 14 Service by post

This Article establishes the principle that service may be effected by post.

However, Member States may, in order to provide guarantees for persons residing in their territory, specify the conditions under which service may be effected in their regard by post. Such conditions might for instance include the use of registered post or the application of the Convention's rules on the translation of documents.

It will be remembered that the Universal Postal Convention, to which all Member States are parties, provides in particular for the possibility of registered post.

The conditions established by Member States pursuant to paragraph 2 will if necessary be specified in the manual to be drawn up the Executive Committee.

Article 15 Direct service

This Article authorizes any person interested in the transmission of a document covered by this Convention to contact directly the competent persons in the Member States addressed to have service effected.

This Article must not be interpreted as establishing a legal basis for accepting the direct transmission of a document by an interested party to pubic officers. Such direct transmission is only authorized if in accordance with the law of the Member State in which the proceedings take place.

However, since paragraph 2 allows Member States to enter a reservation in this respect, the manual drawn up by the Executive Committee should be consulted to establish whether the State in question is opposed to such procedure.

TITLE III EXTRAJUDICIAL DOCUMENTS

Article 16

For this concept, reference should be made to Article 1.

TITLE IV INTERPRETATION BY THE COURT OF JUSTICE

Article 17

This Article establishes the principle of the jurisdiction of the Court of the European Communities to interpret the Convention. However, since unanimity on this principle proved impossible, the detailed rules governing, in particular, referral to the Court of Justice are contained in the Protocol on the interpretation of the Convention by the Court of Justice.

Only the courts and competent authorities of Member States which have ratified both the Protocol and the Convention are entitled to request the Court to give a ruling.

TITLE V FINAL PROVISIONS

Article 18 Executive Committee

Since in essence the Convention lays down rules for judicial cooperation, an Executive Committee has been established with a view to monitoring its operation and examining all general questions relating to its application.

The Committee is to operate within the structural framework of Title VI of the Treaty on European Union as is stipulated in the declaration for the minutes of the meeting at which the Convention was drawn up.

As a result, it consists of representatives of all the Member States, including those which are not yet parties to the Convention, and the Commission is fully involved in its work. Any rules governing its operation which are not laid down in the Convention are those which apply to the other Council Working Parties.

The Committee is to meet for the first time as soon as three Member States have declared that they will apply the Convention in their relations with the other Member States which have made the same declaration. In accordance with the rules laid down in Articles 18 (2), 24 (4) and 27 (2) (c), that first meeting should be held 90 days after the date of deposit of the third declaration, which date will be published in the Official Journal of the European Communities.

The Committee's functions fall into three main categories.

The Committee's first responsibility is to monitor the operation of the Convention, i. e. to collect all useful information on its implementation by the Member States. It is to examine in particular the effectiveness of the transmitting and receiving agencies, the conditions under which the central agencies receive direct requests for service of documents and the application of the provisions on the date of service.

That careful monitoring of certain provisions of the Convention should allow the Committee to establish whether rules which appeared to cause certain countries implementing difficulties are applied without difficulty by others and could have their scope extended. The information the Executive Committee collects in this way should thus be of particular interest to Member States for their reciprocal information. It will also be the subject of regular reports to the Council, the first three years after the Committee's first meeting and subsequently every five years.

The Council will decide on a case-by-case basis whether each report should be forwarded to the European Parliament.

The Executive Committee's second area of responsibility is the completion of the practical tasks needed for the Convention to operate, such as the drawing up and updating of the manual to be used by transmitting agencies to identify receiving agencies in the other Member States to which they are to forward documents, and the preparation of a glossary of legal terms. If possible the manual will also stipulate the costs relating to service of documents pursuant to Article 11 of the Convention.

Finally, the Committee will be able to make use of the information it collects to suggest improvements to the Convention or simply to the form.

Article 19 Application of Articles 15 and 16 of the Hague Convention of 1965

This Article incorporates the system established in the Hague Convention of 15 November 1965 with one simple formal amendment as regards the procedures for notification by the Member States of the declaration referred to in point 1 (b). It contains a number of rules designed to protect the rights of the addressees of judicial documents forwarded pursuant to this Convention.

Point 1 concerns writs of summons or equivalent documents and requires the judge to stay judgement until he is sure that the document has been served and that it was served or delivered in sufficient time to enable the defendant to prepare his defence. However, Member States which so wish are given the possibility of derogating from that rule by permitting their judges to rule after a certain period of time, provided certain conditions are fulfilled.

Point 2 concerns cases where a judgement has been entered against a defendant who has not appeared, and gives him the possibility of relief from the effects of the expiry of the time for appeal. In order to preclude legal uncertainty, which might prejudice the interests of the applicant before the original court, the Convention provides that Member States may set a limit by declaration on the time allowed for filing an application for relief.

Finally, the provisions of point 2 do not apply to matters concerning the status or capacity of persons. It seemed impossible to allow a decision in default on divorce followed by remarriage to be nullified, as the requirements of legal certainty should take precedence in this area.

Article 20 Relationship with other agreements or arrangements

This Article provides that only this Convention and agreements or arrangements fulfilling the conditions laid down in Article K.7 of the Treaty on European Union, i. e. which contain provisions on the transmission of documents for service which allow for closer cooperation on the matter and do not impede the cooperation established by this Convention, will continue to apply between the Member States party thereto.

It follows, moreover, from this Article in conjunction with Article 1 that no other agreement, convention or arrangement may be applied between the European Union Member States that have ratified this Convention.

In particular, as far as the service of documents is concerned, this Convention will replace the Hague Conventions of 1954 and 1965 in relations between the Member States party thereto.

Thus, where in the course of the same proceedings documents have to be transmitted both to Member States and to non-member States, the rules under the European Convention or the agreements or arrangements referred to in Article 20 are the only rules applicable to documents being transmitted to Member States.

Documents connected with the same proceedings for service in a country which is not a member of the European Union will of course be transmitted in accordance with existing agreements with that country.

The existence of particular agreements or arrangements between Member States will be indicated in the manual drawn up by the Executive Committee.

Article 21 Legal aid

This Article provides that the rules on legal aid contained in any other Conventions which may apply between certain Member States are not affected.

Article 22 Protection of information transmitted

This Article obliges receiving agencies to respect the confidentiality of information brought to

their attention within the context of the exercise of their functions.

The receiving agencies are responsible for implementing their national law on the protection of the confidentiality of information.

The data subjects may of course avail themselves of the relevant provisions of law to obtain information on the use made of such data.

Article 23 Reservations

This Article gives an exhaustive list of the reservations permitted under the Convention. These reservations must be entered at the time of the notification referred to in Article 24 (2) but may be withdrawn at any time.

It should be pointed out that the declaration provided for in Article 14 (2) does not qualify as a reservation.

Article 24 Adoption and entry into force

This Article concerns the entry into force of the Convention under the rules established in this respect by the Council of the European Union.

The Convention enters into force 90 days after the deposit of its instrument of adoption by the last of the 15 States which are members of the European Union as at 26 May 1997, the date of adoption by the Council of the Act drawing up the Convention, to complete that formality.

Nevertheless, as with the judicial cooperation agreements previously concluded between Member States, paragraph 4 allows each Member State to declare, on adopting the Convention or at a later date, that the Convention will apply in advance to its relations with other Member States that have made the same declaration. Such declarations take effect 90 days after the date of deposit.

However, Member States cannot declare that the Court of Justice is competent to interpret the Convention during the period of advance application, as the corresponding provisions of the Convention in this respect would have to be adopted by the 15 Member States.

Article 25 Accession

This Article provides that the Convention is open to accession by any State which becomes a member of the European Union. It sets out the procedures for such accession. No State which is not a member of the European Union may accede to the Convention.

If the Convention has already entered into force when a new Member State accedes to it, it enters into force with respect to that State 90 days after the deposit of its instrument of accession. On the other hand, if the Convention has not entered into force by the end of that 90-day period, the same conditions will obtain for that State as for the others, namely those provided for in Article 24 (4). In that case, the State acceding to the Convention may make a declaration of advance application.

The accession of a new Member State is not, however, a condition of the entry into force of the Convention vis-à-vis the States which were members of the European Union on the date when the Council adopted it.

Article 26 Amendments

This Article covers the procedure for amending the Convention.

Amendments may be proposed not only by Member States which are parties to the Convention or by the Commission in accordance with the rules laid down in Title VI of the Treaty on European Union, but also, pursuant to the rule laid down in Article 18 (4) (c), by the Executive Committee.

Depending on the nature of the amendments proposed, two separate procedures are laid down.

Under the first, as outlined in the first three paragraphs, amendments are adopted by the Council, which recommends that they be adopted by the Member States in accordance with their respective constitutional requirements.

The second, which is described in paragraph 4, involves a simplified procedure, which allows the Council itself to amend the forms annexed to the Convention.

Article 27 Depositary and publications

This Article gives the Secretary-General of the Council the role of depositary of the Convention.

The Secretary-General is to inform the Member States of all notifications concerning the Convention and to order their publication in the 'C` series of the Official Journal of the European Communities.

(1) Opinion delivered on 11 April 1997 (not yet published in the Official Journal).

(2) See p. 1 of this Official Journal.

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SUB JUSTICE AND HOME AFFAIRS

REGISTER 19200000

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Explanatory Report on the Protocol, drawn up on the basis of Article K.3 of the Treaty on European Union, on the interpretation, by the Court of Justice of the European Communities, of the Convention on the service in the Member States of the European Union of judicial and extrajudicial documents in civil or commercial matters (Text approved by the Council on 26 June 1997)

EXPLANATORY REPORT on the Protocol, drawn up on the basis of Article K.3 of the Treaty on European Union, on the interpretation, by the Court of Justice of the European Communities, of the Convention on the service in the Member States of the European Union of judicial and extrajudicial documents in civil or commercial matters (Text approved by the Council on 26 June 1997) (97/C 261/04)

I. GENERAL REMARKS

1. At its meeting on 29 and 30 October 1993, the Council instructed the Working Party on the Simplification of Document Transmission to draw up an instrument designed to simplify and speed up the procedures for the transmission between the Member States of judicial and extrajudicial documents in civil or commercial matters.

In the course of work on the Convention on the service in the Member States of the European Union of judicial and extrajudicial documents in civil or commercial matters, it was considered necessary to give the Court of Justice jurisdiction to interpret its rules, in order to ensure uniform application.

Once the Working Party had completed its work, the Netherlands Presidency submitted the next of the draft Convention for examination by the European Parliament, in accordance with Article K.6 of the Treaty on European Union (1).

On 26 May 1997 the Council adopted this Protocol (2), together with the Convention on the service in the Member States of the European Union of judicial and extrajudicial documents in civil or commercial matters. These instruments were signed on the same day by the representatives of all the Member States.

2. (a) The enacting terms drawn up are based on Article 177 of the EC Treaty; they echo to a very large extent Articles 1 to 4 of the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

In particular, the Protocol subsumes the two methods of bringing proceedings before the Court provided for in the 1971 Protocol.

(b) The procedures for the entry into force of the Protocol are, however, similar to those established by the first and second Protocols of 19 December 1988 on the interpretation of the Convention on the Law applicable to Contractual Obligations.

The principle of assignment of jurisdiction to the Court is referred to in the Convention under discussion, but it is the Protocol which defines in particular the conditions for bringing proceedings and the national courts competent to do so.

The entry into force of the Convention, which will take place after its ratification by the 15 Member States, must precede that of the Protocol, which is subject only to adoption by three of those States.

Accordingly, the earliest that the Protocol can enter into force is at the same time as the Convention. As a result, only the courts of a Member State that is a party to both the Convention and the Protocol will be able to ask the Court of Justice for a ruling or an opinion on a question of interpretation.

(c) Lastly, the final provisions are similar to those laid down in this area by the Council of

the European Union in respect of the Conventions established in the context of Title VI of the Treaty on European Union. They correspond to those of the Convention, mutatis mutandis.

II. COMMENTS ON THE ARTICLES

Article 1

Article 1 establishes the principle, contained in the 1971 Protocol, of assignment of jurisdiction to the Court of Justice for interpreting the provisions of the Convention on the service in the Member States of the European Union of judicial and extrajudicial documents in civil and commercial matters and of the Protocol itself.

Article 2

1. This Article defines the courts of the Member States which are competent to make a referral to the Court of Justice for a preliminary ruling on a question of interpretation.

These are, firstly, the highest courts of Member States, which are listed in paragraph 1 (a).

The list is limitative and any other supreme courts which might exist have no powers of referral, even if their decisions have civil or commercial impact.

Secondly, under the terms of paragraph 1 (b), the courts of Member States sitting in an appellate capacity also have powers of referral to the Court of Justice.

This essentially refers, therefore, to appeal courts, except when they are sitting as tribunals of first instance, and to other national courts hearing cases in their capacity as appeal courts.

Courts sitting in judgement at first instance, however, have no power to refer questions to the Court of Justice.

2. The list given in Article 2 (1) (a) may be modified at the request of the Member State concerned. That possibility was not provided for in the 1971 Protocol.

Such modification may prove necessary, for example, where a change takes place in a Member State's judicial system.

The request must be sent to the Secretary-General of the Council, in his capacity as depositary of the Protocol. He informs the other Member States of the request as quickly as possible, including the States which are not yet party to the Convention.

The decision on the modification of the list is taken by the Council in accordance with the rules of procedure applicable.

Once it has been adopted, the modification displays its effects under the conditions specified in the Council decision (stipulating for instance the date of entry into force of the modification). Given the nature of the decision, it did not seem necessary for it to be adopted by the Member States in accordance with their respective constitutional requirements. Provisions has therefore been made for specific rules, which constitute an exception to the amendment procedure laid down in Article 9 of the Protocol.

In the event of accession to the Protocol by a State which becomes a member of the European Union, that State will have to indicate, when it deposits its instrument of accession, which of its highest

courts will be competent to ask the Court of Justice to rule on a question of interpretation (Article 8 (3) and (4)).

Such a mechanism allows for monitoring by Member States, even those not party to the Convention, of the courts designated, which should enable the system to continue to operate on a sound basis.

Article 3

1. This Article, which is based on Article 177 of the EC Treaty and subsumes Article 3 of the 1971 Protocol on the interpretation by the Court of Justice of the 1968 Brussels Convention, concerns the procedure for referral for a preliminary ruling.

Paragraph 1 stipulates that, where the courts listed in Article 2 (1) (a) consider an interpretation necessary to enable them to give judgment, they must refer such questions to the Court of Justice.

Insofar as it imposes a requirement on the highest courts, the purpose of such a provision is to promote uniform application of the Convention within the Member States of the European Union.

2. Article 3 (2) stipulates that, when sitting in an appellate capacity, courts have the option of referring a question to the Court of Justice with a request for interpretation where they consider a decision necessary on a point raised in a case pending before them.

Article 4

1. This Article echoes Article 4 of the 1971 Protocol. It makes provisions for a second procedure, which enables the Procurators-General of the Courts of Cassation or any other authority designated by the Member States to ask the Court of Justice for a ruling on a question of interpretation, where they see that a judgment by a court in their State which has become res judicata conflicts with the interpretation given on that point by the Court of Justice or by the court of another State party to the Protocol.

This provision is also designed to ensure uniform interpretation of the Convention.

It is for the competent judicial authority to assess the advisability of making a request for interpretation to the Court of Justice in such a case.

2. In addition, all Member States, even those not party to the Protocol, as well as the Commission and the Council of the European Union, are entitled to submit statements of case or written observations to the Court of Justice, once the latter has received a request for interpretation.

Article 5

As in the 1971 Protocol, this Article establishes the principle that the Statute of the Court of Justice and its Rules of Procedures are to apply.

Article 6

This Article, which stipulates that this Protocol may not be subject to any reservation, requires no particular comment.

Article 7

This Article makes provision for the entry into force of the Protocol in accordance with the rules laid down in this regard by the Council of the European Union.

In order to enable the Court of Justice to exercise its jurisdiction as soon as possible, the entry into force of the Protocol has been set at the expiry of a 90 day period following deposit of its instrument of adoption by the third of the 15 States which were members of the European Union on 26 May 1997, the date of adoption by the Council of the Act drawing up this Protocol, to do so.

However, the Protocol cannot enter into force until all 15 Member States have adopted the Convention on the service in the Member States of the European Union of judicial and extrajudicial documents in civil and commercial matters. In accordance with Article 24 of that Convention, it will enter into force 90 days after notification, by the last Member State to complete that formality, of completion of the constitutional procedures required for its adoption.

Thus, advance application of the Convention within the meaning of Article 24 (4) cannot provide a legal basis for the assignment to the Court of Justice of jurisdiction in respect of interpretation. Neither would adoption of the Protocol by all the Member States entitle the Court of Justice to interpret the provisions of the Convention as long as the latter had not entered into force.

Article 8

This Article stipulates that the Protocol is open to accession by any State which becomes a member of the European Union. Conversely, a State which is not a member of the European Union can accede neither to the Convention nor to the Protocol.

With regard to the procedures for acceding to the Protocol, the Article makes provision in particular for simplified procedures for modifying the list of the highest courts contained in Article 2 (1) (a), following the designation of those of a new Member State, in accordance with the principle laid down in Article 2 (2).

Between the date of deposit of the instrument of accession and the date of entry into force of the Protocol with respect to the acceding Member State, the Council is to adopt the modifications to be made to the list of highest courts.

Article 9

This Article concerns the procedure for amending the Protocol.

Only Member States which are party to the Protocol, and the Commission, are entitled to propose amendments.

The Council recommends adoption by the Member States, in accordance with their respective constitutional requirements, of the amendments it adopts.

This procedure does not apply to the simple modification of the list of highest courts.

Article 10

This Article entrusts to the Secretary-General of the Council the role of depositary of the Protocol.

The Secretary-General is to inform the Member States of all notifications concerning the Protocol and ensure their publication in the 'C` series of the Official Journal of the European Communities.

(1) Opinion delivered on 11 April 1997 (not yet published in the Official Journal).

(2) See p. 17 of this Official Journal.

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REGISTER	01405000 ; 19200000
DATES	OF DOCUMENT.....: 26/06/1997 OF END OF VALIDITY: 99/99/9999

Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000

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Regulation (EC) No 1393/2007 of the European Parliament and of the Council

of 13 November 2007

on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and Article 67(5), second indent, thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee [1],

Acting in accordance with the procedure laid down in Article 251 of the Treaty [2],

Whereas:

(1) The Union has set itself the objective of maintaining and developing the Union as an area of freedom, security and justice, in which the free movement of persons is assured. To establish such an area, the Community is to adopt, among others, the measures relating to judicial cooperation in civil matters needed for the proper functioning of the internal market.

(2) The proper functioning of the internal market entails the need to improve and expedite the transmission of judicial and extrajudicial documents in civil or commercial matters for service between the Member States.

(3) The Council, by an Act dated 26 May 1997 [3], drew up a Convention on the service in the Member States of the European Union of judicial and extrajudicial documents in civil or commercial matters and recommended it for adoption by the Member States in accordance with their respective constitutional rules. That Convention has not entered into force. Continuity in the results of the negotiations for conclusion of the Convention should be ensured.

(4) On 29 May 2000 the Council adopted Regulation (EC) No 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters [4]. The main content of that Regulation is based on the Convention.

(5) On 1 October 2004 the Commission adopted a report on the application of Regulation (EC) No 1348/2000. The report concludes that the application of Regulation (EC) No 1348/2000 has generally improved and expedited the transmission and the service of documents between Member States since its entry into force in 2001, but that nevertheless the application of certain provisions is not fully satisfactory.

(6) Efficiency and speed in judicial procedures in civil matters require that judicial and extrajudicial documents be transmitted directly and by rapid means between local bodies designated by the Member States. Member States may indicate their intention to designate only one transmitting or receiving agency or one agency to perform both functions, for a period of five years. This designation may, however, be renewed every five years.

(7) Speed in transmission warrants the use of all appropriate means, provided that certain conditions

as to the legibility and reliability of the document received are observed. Security in transmission requires that the document to be transmitted be accompanied by a standard form, to be completed in the official language or one of the official languages of the place where service is to be effected, or in another language accepted by the Member State in question.

(8) This Regulation should not apply to service of a document on the party's authorised representative in the Member State where the proceedings are taking place regardless of the place of residence of that party.

(9) The service of a document should be effected as soon as possible, and in any event within one month of receipt by the receiving agency.

(10) To secure the effectiveness of this Regulation, the possibility of refusing service of documents should be confined to exceptional situations.

(11) In order to facilitate the transmission and service of documents between Member States, the standard forms set out in the Annexes to this Regulation should be used.

(12) The receiving agency should inform the addressee in writing using the standard form that he may refuse to accept the document to be served at the time of service or by returning the document to the receiving agency within one week if it is not either in a language which he understands or in the official language or one of the official languages of the place of service. This rule should also apply to the subsequent service once the addressee has exercised his right of refusal. These rules on refusal should also apply to service by diplomatic or consular agents, service by postal services and direct service. It should be established that the service of the refused document can be remedied through the service on the addressee of a translation of the document.

(13) Speed in transmission warrants documents being served within days of receipt of the document. However, if service has not been effected after one month has elapsed, the receiving agency should inform the transmitting agency. The expiry of this period should not imply that the request be returned to the transmitting agency where it is clear that service is feasible within a reasonable period.

(14) The receiving agency should continue to take all necessary steps to effect the service of the document also in cases where it has not been possible to effect service within the month, for example, because the defendant has been away from his home on holiday or away from his office on business. However, in order to avoid an open-ended obligation for the receiving agency to take steps to effect the service of a document, the transmitting agency should be able to specify a time limit in the standard form after which service is no longer required.

(15) Given the differences between the Member States as regards their rules of procedure, the material date for the purposes of service varies from one Member State to another. Having regard to such situations and the possible difficulties that may arise, this Regulation should provide for a system where it is the law of the Member State addressed which determines the date of service. However, where according to the law of a Member State a document has to be served within a particular period, the date to be taken into account with respect to the applicant should be that determined by the law of that Member State. This double date system exists only in a limited number of Member States. Those Member States which apply this system should communicate this to the Commission, which should publish the information in the Official Journal of the European Union and make it available through the European Judicial Network in Civil and Commercial Matters established by Council Decision 2001/470/EC [5].

(16) In order to facilitate access to justice, costs occasioned by recourse to a judicial officer or a person competent under the law of the Member State addressed should correspond to a single

fixed fee laid down by that Member State in advance which respects the principles of proportionality and non-discrimination. The requirement of a single fixed fee should not preclude the possibility for Member States to set different fees for different types of service as long as they respect these principles.

(17) Each Member State should be free to effect service of documents directly by postal services on persons residing in another Member State by registered letter with acknowledgement of receipt or equivalent.

(18) It should be possible for any person interested in a judicial proceeding to effect service of documents directly through the judicial officers, officials or other competent persons of the Member State addressed, where such direct service is permitted under the law of that Member State.

(19) The Commission should draw up a manual containing information relevant for the proper application of this Regulation, which should be made available through the European Judicial Network in Civil and Commercial Matters. The Commission and the Member States should do their utmost to ensure that this information is up to date and complete especially as regards contact details of receiving and transmitting agencies.

(20) In calculating the periods and time limits provided for in this Regulation, Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits [6] should apply.

(21) The measures necessary for the implementation of this Regulation should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission [7].

(22) In particular, power should be conferred on the Commission to update or make technical amendments to the standard forms set out in the Annexes. Since those measures are of general scope and are designed to amend/delete non-essential elements of this Regulation, they must be adopted in accordance with the regulatory procedure with scrutiny provided for in Article 5a of Decision 1999/468/EC.

(23) This Regulation prevails over the provisions contained in bilateral or multilateral agreements or arrangements having the same scope, concluded by the Member States, and in particular the Protocol annexed to the Brussels Convention of 27 September 1968 [8] and the Hague Convention of 15 November 1965 [9] in relations between the Member States party thereto. This Regulation does not preclude Member States from maintaining or concluding agreements or arrangements to expedite or simplify the transmission of documents, provided that they are compatible with this Regulation.

(24) The information transmitted pursuant to this Regulation should enjoy suitable protection. This matter falls within the scope of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [10], and of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) [11].

(25) No later than 1 June 2011 and every five years thereafter, the Commission should review the application of this Regulation and propose such amendments as may appear necessary.

(26) Since the objectives of this Regulation cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the action, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those

objectives.

(27) In order to make the provisions more easily accessible and readable, Regulation (EC) No 1348/2000 should be repealed and replaced by this Regulation.

(28) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, the United Kingdom and Ireland are taking part in the adoption and application of this Regulation.

(29) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark does not take part in the adoption of this Regulation and is not bound by it or subject to its application,

HAVE ADOPTED THIS REGULATION:

CHAPTER I

GENERAL PROVISIONS

Article 1

Scope

1. This Regulation shall apply in civil and commercial matters where a judicial or extrajudicial document has to be transmitted from one Member State to another for service there. It shall not extend in particular to revenue, customs or administrative matters or to liability of the State for actions or omissions in the exercise of state authority (acta iure imperii).

2. This Regulation shall not apply where the address of the person to be served with the document is not known.

3. In this Regulation, the term "Member State" shall mean the Member States with the exception of Denmark.

Article 2

Transmitting and receiving agencies

1. Each Member State shall designate the public officers, authorities or other persons, hereinafter referred to as "transmitting agencies", competent for the transmission of judicial or extrajudicial documents to be served in another Member State.

2. Each Member State shall designate the public officers, authorities or other persons, hereinafter referred to as "receiving agencies", competent for the receipt of judicial or extrajudicial documents from another Member State.

3. A Member State may designate one transmitting agency and one receiving agency, or one agency to perform both functions. A federal State, a State in which several legal systems apply or a State with autonomous territorial units shall be free to designate more than one such agency. The designation shall have effect for a period of five years and may be renewed at five-year intervals.

4. Each Member State shall provide the Commission with the following information:

(a) the names and addresses of the receiving agencies referred to in paragraphs 2 and 3;

(b) the geographical areas in which they have jurisdiction;

(c) the means of receipt of documents available to them; and

(d) the languages that may be used for the completion of the standard form set out in Annex I.

Member States shall notify the Commission of any subsequent modification of such information.

Article 3

Central body

Each Member State shall designate a central body responsible for:

(a) supplying information to the transmitting agencies;

(b) seeking solutions to any difficulties which may arise during transmission of documents for service;

(c) forwarding, in exceptional cases, at the request of a transmitting agency, a request for service to the competent receiving agency.

A federal State, a State in which several legal systems apply or a State with autonomous territorial units shall be free to designate more than one central body.

CHAPTER II

JUDICIAL DOCUMENTS

Section 1

Transmission and service of judicial documents

Article 4

Transmission of documents

1. Judicial documents shall be transmitted directly and as soon as possible between the agencies designated pursuant to Article 2.

2. The transmission of documents, requests, confirmations, receipts, certificates and any other papers between transmitting agencies and receiving agencies may be carried out by any appropriate means, provided that the content of the document received is true and faithful to that of the document forwarded and that all information in it is easily legible.

3. The document to be transmitted shall be accompanied by a request drawn up using the standard form set out in Annex I. The form shall be completed in the official language of the Member State addressed or, if there are several official languages in that Member State, the official language or one of the official languages of the place where service is to be effected, or in another language which that Member State has indicated it can accept. Each Member State shall indicate the official language or languages of the institutions of the European Union other than its own which is or are acceptable to it for completion of the form.

4. The documents and all papers that are transmitted shall be exempted from legalisation or any equivalent formality.

5. When the transmitting agency wishes a copy of the document to be returned together with the certificate referred to in Article 10, it shall send the document in duplicate.

Article 5

Translation of documents

1. The applicant shall be advised by the transmitting agency to which he forwards the document for transmission that the addressee may refuse to accept it if it is not in one of the languages provided for in Article 8.

2. The applicant shall bear any costs of translation prior to the transmission of the document, without prejudice to any possible subsequent decision by the court or competent authority on liability for such costs.

Article 6

Receipt of documents by receiving agency

1. On receipt of a document, a receiving agency shall, as soon as possible and in any event within seven days of receipt, send a receipt to the transmitting agency by the swiftest possible means of transmission using the standard form set out in Annex I.

2. Where the request for service cannot be fulfilled on the basis of the information or documents transmitted, the receiving agency shall contact the transmitting agency by the swiftest possible means in order to secure the missing information or documents.

3. If the request for service is manifestly outside the scope of this Regulation or if non-compliance with the formal conditions required makes service impossible, the request and the documents transmitted shall be returned, on receipt, to the transmitting agency, together with the notice of return using the standard form set out in Annex I.

4. A receiving agency receiving a document for service but not having territorial jurisdiction to serve it shall forward it, as well as the request, to the receiving agency having territorial jurisdiction in the same Member State if the request complies with the conditions laid down in Article 4(3) and shall inform the transmitting agency accordingly using the standard form set out in Annex I. That receiving agency shall inform the transmitting agency when it receives the document, in the manner provided for in paragraph 1.

Article 7

Service of documents

1. The receiving agency shall itself serve the document or have it served, either in accordance with the law of the Member State addressed or by a particular method requested by the transmitting agency, unless that method is incompatible with the law of that Member State.

2. The receiving agency shall take all necessary steps to effect the service of the document as soon as possible, and in any event within one month of receipt. If it has not been possible to

effect service within one month of receipt, the receiving agency shall:

(a) immediately inform the transmitting agency by means of the certificate in the standard form set out in Annex I, which shall be drawn up under the conditions referred to in Article 10(2); and

(b) continue to take all necessary steps to effect the service of the document, unless indicated otherwise by the transmitting agency, where service seems to be possible within a reasonable period of time.

Article 8

Refusal to accept a document

1. The receiving agency shall inform the addressee, using the standard form set out in Annex II, that he may refuse to accept the document to be served at the time of service or by returning the document to the receiving agency within one week if it is not written in, or accompanied by a translation into, either of the following languages:

(a) a language which the addressee understands;

or

(b) the official language of the Member State addressed or, if there are several official languages in that Member State, the official language or one of the official languages of the place where service is to be effected.

2. Where the receiving agency is informed that the addressee refuses to accept the document in accordance with paragraph 1, it shall immediately inform the transmitting agency by means of the certificate provided for in Article 10 and return the request and the documents of which a translation is requested.

3. If the addressee has refused to accept the document pursuant to paragraph 1, the service of the document can be remedied through the service on the addressee in accordance with the provisions of this Regulation of the document accompanied by a translation into a language provided for in paragraph 1. In that case, the date of service of the document shall be the date on which the document accompanied by the translation is served in accordance with the law of the Member State addressed. However, where according to the law of a Member State, a document has to be served within a particular period, the date to be taken into account with respect to the applicant shall be the date of the service of the initial document determined pursuant to Article 9(2).

4. Paragraphs 1, 2 and 3 shall also apply to the means of transmission and service of judicial documents provided for in Section 2.

5. For the purposes of paragraph 1, the diplomatic or consular agents, where service is effected in accordance with Article 13, or the authority or person, where service is effected in accordance with Article 14, shall inform the addressee that he may refuse to accept the document and that any document refused must be sent to those agents or to that authority or person respectively.

Article 9

Date of service

1. Without prejudice to Article 8, the date of service of a document pursuant to Article 7 shall be the date on which it is served in accordance with the law of the Member State addressed.

2. However, where according to the law of a Member State a document has to be served within a particular period, the date to be taken into account with respect to the applicant shall be that determined by the law of that Member State.

3. Paragraphs 1 and 2 shall also apply to the means of transmission and service of judicial documents provided for in Section 2.

Article 10

Certificate of service and copy of the document served

1. When the formalities concerning the service of the document have been completed, a certificate of completion of those formalities shall be drawn up in the standard form set out in Annex I and addressed to the transmitting agency, together with, where Article 4(5) applies, a copy of the document served.

2. The certificate shall be completed in the official language or one of the official languages of the Member State of origin or in another language which the Member State of origin has indicated that it can accept. Each Member State shall indicate the official language or languages of the institutions of the European Union other than its own which is or are acceptable to it for completion of the form.

Article 11

Costs of service

1. The service of judicial documents coming from a Member State shall not give rise to any payment or reimbursement of taxes or costs for services rendered by the Member State addressed.

2. However, the applicant shall pay or reimburse the costs occasioned by:

(a) recourse to a judicial officer or to a person competent under the law of the Member State addressed;

(b) the use of a particular method of service.

Costs occasioned by recourse to a judicial officer or to a person competent under the law of the Member State addressed shall correspond to a single fixed fee laid down by that Member State in advance which respects the principles of proportionality and non-discrimination. Member States shall communicate such fixed fees to the Commission.

Section 2

Other means of transmission and service of judicial documents

Article 12

Transmission by consular or diplomatic channels

Each Member State shall be free, in exceptional circumstances, to use consular or diplomatic channels to forward judicial documents, for the purpose of service, to those agencies of another Member State which are designated pursuant to Articles 2 or 3.

Article 13

Service by diplomatic or consular agents

1. Each Member State shall be free to effect service of judicial documents on persons residing in another Member State, without application of any compulsion, directly through its diplomatic or consular agents.

2. Any Member State may make it known, in accordance with Article 23(1), that it is opposed to such service within its territory, unless the documents are to be served on nationals of the Member State in which the documents originate.

Article 14

Service by postal services

Each Member State shall be free to effect service of judicial documents directly by postal services on persons residing in another Member State by registered letter with acknowledgement of receipt or equivalent.

Article 15

Direct service

Any person interested in a judicial proceeding may effect service of judicial documents directly through the judicial officers, officials or other competent persons of the Member State addressed, where such direct service is permitted under the law of that Member State.

CHAPTER III

EXTRAJUDICIAL DOCUMENTS

Article 16

Transmission

Extrajudicial documents may be transmitted for service in another Member State in accordance with the provisions of this Regulation.

CHAPTER IV

FINAL PROVISIONS

Article 17

Implementing rules

Measures designed to amend non-essential elements of this Regulation relating to the updating or to the making of technical amendments to the standard forms set out in Annexes I and II shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 18(2).

Article 18

Committee

1. The Commission shall be assisted by a committee.

2. Where reference is made to this paragraph, Article 5a(1) to (4), and Article 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

Article 19

Defendant not entering an appearance

1. Where a writ of summons or an equivalent document has had to be transmitted to another Member State for the purpose of service under the provisions of this Regulation 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 Member 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 Regulation;

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

2. Each Member State may make it known, in accordance with Article 23(1), that the judge, notwithstanding the provisions of paragraph 1, may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled:

(a) the document was transmitted by one of the methods provided for in this Regulation;

(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 or bodies of the Member State addressed.

3. Notwithstanding paragraphs 1 and 2, the judge may order, in case of urgency, any provisional or protective measures.

4. When a writ of summons or an equivalent document has had to be transmitted to another Member State for the purpose of service under the provisions of this Regulation and a judgment has been entered against a defendant who has not appeared, the judge shall have the power to relieve the

defendant from the effects of the expiry of the time for appeal from the judgment if the following conditions are fulfilled:

(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.

An application for relief may be filed only within a reasonable time after the defendant has knowledge of the judgment.

Each Member State may make it known, in accordance with Article 23(1), that such application will not be entertained if it is filed after the expiry of a time to be stated by it in that communication, but which shall in no case be less than one year following the date of the judgment.

5. Paragraph 4 shall not apply to judgments concerning the status or capacity of persons.

Article 20

Relationship with agreements or arrangements to which Member States are party

1. This Regulation shall, in relation to matters to which it applies, prevail over other provisions contained in bilateral or multilateral agreements or arrangements concluded by the Member States, and in particular Article IV of the Protocol to the Brussels Convention of 1968 and the Hague Convention of 15 November 1965.

2. This Regulation shall not preclude individual Member States from maintaining or concluding agreements or arrangements to expedite further or simplify the transmission of documents, provided that they are compatible with this Regulation.

3. Member States shall send to the Commission:

(a) a copy of the agreements or arrangements referred to in paragraph 2 concluded between the Member States as well as drafts of such agreements or arrangements which they intend to adopt; and

(b) any denunciation of, or amendments to, these agreements or arrangements.

Article 21

Legal aid

This Regulation shall not affect the application of Article 23 of the Convention on civil procedure of 17 July 1905, Article 24 of the Convention on civil procedure of 1 March 1954 or Article 13 of the Convention on international access to justice of 25 October 1980 between the Member States party to those Conventions.

Article 22

Protection of information transmitted

1. Information, including in particular personal data, transmitted under this Regulation shall

be used by the receiving agency only for the purpose for which it was transmitted.

2. Receiving agencies shall ensure the confidentiality of such information, in accordance with their national law.

3. Paragraphs 1 and 2 shall not affect national laws enabling data subjects to be informed of the use made of information transmitted under this Regulation.

4. This Regulation shall be without prejudice to Directives 95/46/EC and 2002/58/EC.

Article 23

Communication and publication

1. Member States shall communicate to the Commission the information referred to in Articles 2, 3, 4, 10, 11, 13, 15 and 19. Member States shall communicate to the Commission if, according to their law, a document has to be served within a particular period as referred to in Articles 8(3) and 9(2).

2. The Commission shall publish the information communicated in accordance with paragraph 1 in the Official Journal of the European Union with the exception of the addresses and other contact details of the agencies and of the central bodies and the geographical areas in which they have jurisdiction.

3. The Commission shall draw up and update regularly a manual containing the information referred to in paragraph 1, which shall be available electronically, in particular through the European Judicial Network in Civil and Commercial Matters.

Article 24

Review

No later than 1 June 2011, and every five years thereafter, the Commission shall present to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Regulation, paying special attention to the effectiveness of the agencies designated pursuant to Article 2 and to the practical application of Article 3(c) and Article 9. The report shall be accompanied if need be by proposals for adaptations of this Regulation in line with the evolution of notification systems.

Article 25

Repeal

1. Regulation (EC) No 1348/2000 shall be repealed as from the date of application of this Regulation.

2. References made to the repealed Regulation shall be construed as being made to this Regulation and should be read in accordance with the correlation table in Annex III.

Article 26

Entry into force

This Regulation shall enter into force on the 20th day following its publication in the Official Journal of the European Union.

It shall apply from 13 November 2008 with the exception of Article 23 which shall apply from 13 August 2008.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

Done at Strasbourg, 13 November 2007.

For the European Parliament

The President

H.-G. Pöttering

For the Council

The President

M. LOBO ANTUNES

[1] OJ C 88, 11.4.2006, p. 7.

[2] Opinion of the European Parliament of 4 July 2006 (OJ C 303 E, 13.12.2006, p. 69), Council Common Position of 28 June 2007 (OJ C 193 E, 21.8.2007, p. 13) and Position of the European Parliament of 24 October 2007.

[3] OJ C 261, 27.8.1997, p. 1. On the same day as the Convention was drawn up the Council took note of the explanatory report on the Convention which is set out on page 26 of the aforementioned Official Journal.

[4] OJ L 160, 30.6.2000, p. 37.

[5] OJ L 174, 27.6.2001, p. 25.

[6] OJ L 124, 8.6.1971, p. 1.

[7] OJ L 184, 17.7.1999, p. 23. Decision as amended by Decision 2006/512/EC (OJ L 200, 22.7.2006, p. 11).

[8] Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ L 299, 31.12.1972, p. 32; consolidated version, OJ C 27, 26.1.1998, p. 1).

[9] Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

[10] OJ L 281, 23.11.1995, p. 31. Directive as amended by Regulation (EC) No 1882/2003 (OJ L 284, 31.10.2003, p. 1).

[11] OJ L 201, 31.7.2002, p. 37. Directive as amended by Directive 2006/24/EC (OJ L 105, 13.4.2006, p. 54).

20071113

ANNEX I

REQUEST FOR SERVICE OF DOCUMENTS

(Article 4(3) of Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (1))

Reference No:...

1. TRANSMITTING AGENCY

1.1. identity

1.2. address

1.2.1. street and number/PO box

1.2.2. place and post code

1.2.3. country

1.3. tel.

1.4. fax (*)

1.5. e-mail (*)

2. RECEIVING AGENCY

2.1. identity

2.2. address

2.2.1. street and number/PO box

2.2.2. place and post code

2.2.3. country

2.3. tel.

2.4. fax (*)

2.5. e-mail (*)

3. APPLICANT

3.1. identity

3.2. address

3.2.1. street and number/PO box

3.2.2. place and post code

3.2.3. country

3.3. tel. (*)

3.4. fax (*)

3.5. e-mail (*)

(1) OJ L 324, 10.12.2007, p. 79.

(*) This item is optional.

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4. ADDRESSEE

4.1. identity

4.2. address

4.2.1. street and number/PO box

4.2.2. place and post code

4.2.3. country

4.3. tel. (*)

4.4. fax (*)

4.5. e-mail (*)

4.6. identification number/social security number/organisation number/or equivalent (*)

5. METHOD OF SERVICE

5.1. in accordance with the law of the Member State addressed

5.2. by the following particular method

5.2.1. if this method is incompatible with the law of the Member State addressed, the document(s) should be served in accordance with the law of that Member State.

5.2.1.1. yes

5.2.1.2. no

6. DOCUMENT TO BE SERVED

6.1. nature of the document

6.1.1. judicial

6.1.1.1. writ of summons

6.1.1.2. judgment

6.1.1.3. appeal

6.1.1.4. other

6.1.2. extrajudicial

6.2. date or time limit after which service is no longer required (*)

... (day) ... (month)... (year)

6.3. language of document

6.3.1. original (BG, ES, CS, DE, ET, EL, EN, FR, GA, IT, LV, LT, HU, MT, NL, PL, PT, RO, SK, SL, FI, SV, other):

6.3.2. translation (*) (BG, ES, CS, DE, ET, EL, EN, FR, GA, IT, LV, LT, HU, MT, NL,

PL, PT, RO, SK, SL, FI, SV, other):

6.4. number of enclosures

7. A COPY OF DOCUMENT TO BE RETURNED WITH THE CERTIFICATE OF SERVICE (Article 4(5) of Regulation (EC) No 1393/2007)

7.1. yes (in this case send two copies of the document to be served)

7.2. no

(*) This item is optional.

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1. You are required by Article 7(2) of Regulation (EC) No 1393/2007 to take all necessary steps to effect the service of the document as soon as possible, and in any event within one month of receipt. If it has not been possible for you to effect service within one month of receipt, you must inform this agency by indicating this in point 13 of the certificate of service or non-service of documents.

2. If you cannot fulfil this request for service on the basis of the information or documents transmitted, you are required by Article 6(2) of Regulation (EC) No 1393/2007 to contact this agency by the swiftest possible means in order to secure the missing information or document.

Done at ...

Date ...

Signature and/or stamp...

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Reference No of the transmitting agency...

Reference No of the receiving agency...

ACKNOWLEDGEMENT OF RECEIPT

(Article 6(1) of Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters)

This acknowledgement must be sent by the swiftest possible means of transmission as soon as possible after receipt of the document and in any event within seven days of receipt.

8. DATE OF RECEIPT

Done at ...

Date ...

Signature and/or stamp...

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Reference No of the transmitting agency...

Reference No of the receiving agency...

NOTICE OF RETURN OF REQUEST AND DOCUMENT

(Article 6(3) of Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents

in civil or commercial matters (1))

The request and document must be returned on receipt.

9. REASON FOR RETURN

9.1. the request is manifestly outside the scope of the Regulation

9.1.1. the document is not civil or commercial

9.1.2. the service is not from one Member State to another Member State

9.2. non-compliance with the formal conditions required makes service impossible

9.2.1. the document is not easily legible

9.2.2. the language used to complete the form is incorrect

9.2.3. the document received is not a true and faithful copy

9.2.4. other (please give details)

9.3. the method of service is incompatible with the law of the Member State addressed (Article 7(1) of Regulation (EC) No 1393/2007)

Done at ...

Date ...

Signature and/or stamp...

(1) OJ L 324, 10.12.2007, p. 79.

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Reference No of the transmitting agency:...

Reference No of the receiving agency:...

NOTICE OF RETRANSMISSION OF REQUEST AND DOCUMENT TO THE APPROPRIATE RECEIVING AGENCY

(Article 6(4) of Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (1))

The request and document were forwarded to the following receiving agency, which has territorial jurisdiction to serve it:

10. APPROPRIATE RECEIVING AGENCY

10.1. identity

10.2. address

10.2.1. street and number/PO box

10.2.2. place and post code

10.2.3. country

10.3. tel.

10.4. fax (*)

10.5. e-mail (*)

Done at ...

Date ...

Signature and/or stamp...

(1) OJ L 324, 10.12.2007, p. 79.

(*) This item is optional.

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Reference No of the transmitting agency:...

Reference No of the appropriate receiving agency:...

NOTICE OF RECEIPT BY THE APPROPRIATE RECEIVING AGENCY HAVING TERRITORIAL JURISDICTION TO THE TRANSMITTING AGENCY

(Article 6(4) of Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (1))

This notice must be sent by the swiftest possible means of transmission as soon as possible after receipt of the document and in any event within seven days of receipt.

11. DATE OF RECEIPT

Done at ...

Date ...

Signature and/or stamp...

(1) OJ L 324, 10.12.2007, p. 79.

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Reference No of the transmitting agency...

Reference No of the receiving agency...

CERTIFICATE OF SERVICE OR NON-SERVICE OF DOCUMENTS

(Article 10 of Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (1))

The service shall be effected as soon as possible. If it has not been possible to effect service within one month of receipt, the receiving agency shall inform the transmitting agency (Article 7(2) of Regulation (EC) No 1393/2007)

12. COMPLETION OF SERVICE

12.1. date and address of service

12.2. the document was

12.2.1. served in accordance with the law of the Member State addressed, namely

12.2.1.1. handed to

12.2.1.1.1. the addressee in person

12.2.1.1.2. another person

12.2.1.1.2.1. name

12.2.1.1.2.2. address

12.2.1.1.2.2.1. street and number/PO box

12.2.1.1.2.2.2. place and post code

12.2.1.1.2.2.3. country

12.2.1.1.2.3. relation to the addressee

family ... employee... other...

12.2.1.1.3. the addressee's address

12.2.1.2. served by postal services

12.2.1.2.1. without acknowledgement of receipt

12.2.1.2.2. with the enclosed acknowledgement of receipt

12.2.1.2.2.1. from the addressee

12.2.1.2.2.2. from another person

12.2.1.2.2.2.1. name

12.2.1.2.2.2.2. address

12.2.1.2.2.2.2.1. street and number/PO box

12.2.1.2.2.2.2.2. place and post code

12.2.1.2.2.2.2.3. country

12.2.1.2.2.2.3. relation to the addressee

family ... employee... other...

(1) OJ L 324, 10.12.2007, p. 79.

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12.2.1.3. served by another method (please state how)

12.2.2. served by the following particular method (please state how)

12.3. The addressee of the document was informed in writing that he may refuse to accept the document if it is not written in or accompanied by a translation into either a language which he understands or the official language or one of the official languages of the place of service.

13. INFORMATION IN ACCORDANCE WITH ARTICLE 7(2) of Regulation (EC) No 1393/2007

It was not possible to effect service within one month of receipt.

14. REFUSAL OF DOCUMENT

The addressee refused to accept the document on account of the language used. The document is annexed to this certificate.

15. REASON FOR NON-SERVICE OF DOCUMENT

15.1. address unknown

15.2. addressee cannot be located

15.3. document could not be served before the date or time limit stated in point 6.2.

15.4. other (please specify)

The document is annexed to this certificate.

Done at ...

Date ...

Signature and/or stamp...

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ANNEX II

INFORMATION TO THE ADDRESSEE ABOUT THE RIGHT TO REFUSE TO ACCEPT A DOCUMENT

(Article 8(1) of Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (1))

BG:

() 1393/2007 - .

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2.2. :

2.3. :

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4. (*):

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(1) OJ L 324, 10.12.2007, p. 79.

(*) .

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CS:

Piloena písemnost je doruovana v souladu s naízením Evropského parlamentu a Rady (ES). 1393/2007 o doruovaní soudních a mimosoudních písemností ve vcech obanskuch a obchodních v lenskuch statech.

Mete odmítnout pijetí písemnosti, není-li vyhotovena v jazyce, kterému rozumíte, nebo v uedním jazyce nebo v jednom z uedních jazyk místa doruení nebo k ní není piloen peklad do jednoho z tchto jazyk.

Pejete-li si vyuít tohoto prava, musíte odmítnout pijetí písemnosti v okamiku doruení pímo osob, ktera písemnost doruuje, nebo písemnost zaslat zpt na níe uvedenou adresu ve lht jednoho tudne s prohlaením, e tuto písemnost odmítate pevzít.

ADRESA:

1. Jméno:

2. Adresa:

2.1 Ulice a íslo/potovní pihradka:

2.2 Místo a potovní smrovací íslo:

2.3 Zem:

3. Telefon:

4. Fax (*):

5. E-mail (*):

PROHLAENI ADRESATA:

Odmítam pijetí pipojené písemnosti, nebo není vyhotovena v jazyce, kterému rozumím, nebo v uedním jazyce nebo v jednom z uedních jazyk místa doruení, ani k ní není piloen peklad do jednoho z tchto jazyk.

Rozumím tomuto jazyku (tmto jazykm):

bulhartina

litevtina

panltina

maartina

etina

malttina

nmina

nizozemtina

estontina

poltina
etina
portugaltina
anglitina
rumuntina
francouztina
sloventina
irtina
slovintina
italtina
fintina
lotytina
védtina
ostatní
prosím upesnte:...
Vyhotoveno v:
Dne:
Podpis nebo razítko:...
(*) Tato poloka je volitelna.
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Bulgarisch
Litauisch
Spanisch
Ungarisch
Tschechisch
Maltesisch
Deutsch
Niederländisch
Estnisch
Polnisch
Griechisch
Portugiesisch
Englisch
Rumänisch

Französisch

Slowakisch

Irisch

Slowenisch

Finnisch

Lettisch

Geschehen zu:

am:

Unterschrift und/oder Stempel:...

DE:

Die Zustellung des beigefügten Schriftstücks erfolgt im Einklang mit der Verordnung (EG) Nr. 1393/2007 des Europäischen Parlaments und des Rates über die Zustellung gerichtlicher und außergerichtlicher Schriftstücke in Zivil- oder Handelssachen in den Mitgliedstaaten.

Sie können die Annahme dieses Schriftstücks verweigern, wenn es weder in einer Sprache, die Sie verstehen, noch in einer Amtssprache oder einer der Amtssprachen des Zustellungsortes abgefasst ist, oder wenn ihm keine Übersetzung in einer dieser Sprachen beigefügt ist.

Wenn Sie von Ihrem Annahmeverweigerungsrecht Gebrauch machen wollen, müssen Sie dies entweder sofort bei der Zustellung gegenüber der das Schriftstück zustellenden Person erklären oder das Schriftstück binnen einer Woche nach der Zustellung an die nachstehende Anschrift mit der Angabe zurücksenden, dass Sie die Annahme verweigern.

ANSCHRIFT:

1. Name/Bezeichnung:

2. Anschrift:

2.1. Straße und Hausnummer/Postfach:

2.2. PLZ und Ort:

2.3. Staat:

3. Tel.

4. Fax (*)

5. E-Mail (*):

ERKLÆRUNG DES EMPFÆNGERS

Ich verweigere die Annahme des beigefügten Schriftstücks, da es entweder nicht in einer Sprache, die ich verstehe, oder nicht in einer Amtssprache oder einer der Amtssprachen des Zustellungsortes abgefasst ist oder da dem Schriftstück keine Übersetzung in einer dieser Sprachen beigefügt ist.

Ich verstehe die folgende(n) Sprache(n):

Italienisch

Schwedisch

Sonstige

bitte angeben:...

(*) Angabe freigestellt.

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EL:

() . 1393/2007 .

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1. :

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2.1. / :

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4. (*):

5. (*):

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Bulgarian

Lithuanian

EN:

The enclosed document is served in accordance with Regulation (EC) No 1393/2007 of the European Parliament and of the Council on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters.

You may refuse to accept the document if it is not written in or accompanied by a translation into either a language which you understand or the official language or one of the official languages of the place of service.

If you wish to exercise this right, you must refuse to accept the document at the time of service directly with the person serving the document or return it to the address indicated below within

one week stating that you refuse to accept it.

ADDRESS

1. identity

2. address

2.1. street and number/PO box

2.2. place and post code

2.3. country

3. tel.

4. fax (*)

5. e-mail (*)

DECLARATION OF THE ADDRESSEE:

I refuse to accept the document attached hereto because it is not written in or accompanied by a translation into either a language which I understand or the official language or one of the official languages of the place of service.

I understand the following language(s)

Spanish

Hungarian

Czech

Maltese

German

Dutch

Estonian

Polish

Greek

Portuguese

English

Romanian

French

Slovak

Irish

Slovene

Italian

Finnish

Latvian

Swedish

Other

(please specify):...

Done at:

Date:

Signature and/or stamp:...

(*) This item is optional.

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ES:

El documento adjunto se notifica o traslada de conformidad con el Reglamento (CE) no 1393/2007 del Parlamento Europeo y del Consejo, relativo a la notificacion y al traslado en los Estados miembros de documentos judiciales y extrajudiciales en materia civil o mercantil.

Puede usted negarse a aceptar el documento si no esta redactado en una lengua que usted entienda o en una lengua oficial o una de las lenguas oficiales del lugar de notificacion o traslado, o si no va acompañado de una traduccion a alguna de esas lenguas.

Si desea usted ejercitar este derecho, debe negarse a aceptar el documento en el momento de la notificacion o traslado directamente ante la persona que notifique o traslade el documento o devolverlo a la direccion que se indica a continuacion dentro del plazo de una semana, declarando que se niega a aceptarlo.

DIRECCION

1. Nombre:

2. Direccion:

2.1. Calle y numero/apartado de correos:

2.2. Lugar y codigo postal:

2.3. País:

3. Tel.:

4. Fax (*):

5. Direccion electronica (*):

DECLARACION DEL DESTINATARIO:

Me niego a aceptar el documento adjunto porque no esta redactado en una lengua que yo entienda o en la lengua oficial o una de las lenguas oficiales del lugar de notificacion o traslado, o por no ir acompañado de una traduccion a alguna de esas lenguas.

Las lenguas que entiendo son las siguientes:

bulgaro

lituano

español

hungaro

checo

maltés
aleman
neerlandés
estonio
polaco
griego
portugués
inglés
rumano
francés
eslovaco
irlandés
esloveno
italiano
finés
leton
sueco
Otra
(se ruega precisar):...
Hecho en:
Fecha:
Firma y/o sello:...
(*) Punto facultativo.
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bulgaaria
leedu
hispaania
ungari
tehhi
malta
saksa
hollandi
eesti
poola

kreeka

portugali

inglise

rumeenia

prantsuse

slovaki

iiri

sloveeni

soome

Koht:

Kuupäev:

Allkiri ja/voi pitser:...

ET:

Lisatud dokument toimetatakse kätte vastavalt Euroopa Parlamendi ja noukogu määrusele (EÜ) nr 1393/2007 kohtu- ja kohtuväliste dokumentide Euroopa Liidu liikmesriikides kättetoimetamise kohta tsiviil- ja kaubandusasjades.

Te voite keelduda dokumenti vastu votmast, kui see ei ole koostatud Teile arusaadavas keeles voi kättetoimetamiskoha ametlikus keeles voi ühes ametlikest keeltest voi kui dokumendile ei ole lisatud tolget ühte nimetatud keeltest.

Kui Te soovite nimetatud oigust kasutada, peate keelduma dokumendi vastuvotmisest vahetult selle kättetoimetamise ajal, tagastades dokumendi seda kättetoimetavale isikule, voi tagastama dokumendi allpool esitatud aadressile ühe nädala jooksul, märkides, et Te keeldute selle vastuvotmisest.

AADRESS:

1. Nimi:

2. Aadress:

2.1. Tänav ja maja number/postkast:

2.2. Linn/vald ja sihtnumber:

2.3. Riik:

3. Tel:

4. Faks(*):

5. E-post(*):

ADRESSAADI AVALDUS

Keeldun lisatud dokumendi vastuvotmisest, kuna see ei ole kirjutatud ei mulle arusaadavas keeles ega kättetoimetamiskoha ametlikus keeles voi ühes ametlikest keeltest ning dokumendile ei ole lisatud tolget ühte nimetatud keeltest.

Saan aru järgmis(t)est keel(t)est:

itaalia

läti

rootsi

muu

(palun täpsustada):...

(*) Ei ole kohustuslik.

+++++ TIFF +++++

bulgaria

liettua

espanja

unkari

tekki

malta

saksa

hollanti

viro

puola

kreikka

portugali

englanti

romania

ranska

slovakki

iiri

sloveeni

italia

suomi

latvia

ruotsi

muu

FI:

Oheinen asiakirja annetaan tiedoksi oikeudenkäynti- ja muiden asiakirjojen tiedoksiannosta jäsenvaltioissa siviili- tai kauppaoikeudellisissa asioissa annetun Euroopan parlamentin ja neuvoston asetuksen (EY) N:o 1393/2007 mukaisesti.

Voitte kieltäytyä vastaanottamasta asiakirjaa, jollei se ole kirjoitettu jollakin kielellä, jota ymmärrätte, tai tiedoksiantopaikan virallisella kielellä tai yhdellä niistä, tai jollei mukana ole

käännöstä jollekin näistä kielistä.

Jos haluatte käyttää tätä oikeuttanne, teidän on kieltäydyttävä vastaanottamasta asiakirjaa tiedoksiannon yhteydessä ilmoittamalla tästä suoraan asiakirjan toimittavalle henkilölle tai palautettava asiakirja viikon kuluessa jäljempänä olevaan osoitteeseen todeten, että kieltäydytte vastaanottamisesta.

OSOITE:

1. Nimi:

2. Osoite:

2.1. Lähiosoite:

2.2. Postinumero ja postitoimipaikka:

2.3. Maa:

3. Puhelin:

4. Faksi (*):

5. Sähköpostiosoite (*):

VASTAANOTTAJAN ILMOITUS:

Kieltäydyn vastaanottamasta oheista asiakirjaa, koska sitä ei ole kirjoitettu ymmärtämälläni kielellä eikä tiedoksiantopaikan virallisella kielellä tai yhdellä niistä eikä mukana ole käännöstä jollekin näistä kielistä.

Ymmärrän seuraavaa kieltä / seuraavia kieliä:

Paikka:

Päivämäärä:

Allekirjoitus ja/tai leima:...

(tarkennetaan):...

(*) Vapaaehtoinen.

+++++ TIFF +++++

FR:

L'acte ci-joint est signifié ou notifié conformément au règlement (CE) no 1393/2007 du Parlement européen et du Conseil du 13 novembre 2007 relatif à la signification et à la notification dans les Etats membres des actes judiciaires et extrajudiciaires en matière civile ou commerciale.

Vous pouvez refuser de recevoir l'acte s'il n'est pas rédigé ou accompagné d'une traduction dans une langue que vous comprenez ou dans la langue officielle ou l'une des langues officielles du lieu de signification ou de notification.

Si vous souhaitez exercer ce droit de refus, vous devez soit faire part de votre refus de recevoir l'acte au moment de la signification ou de la notification directement à la personne signifiant ou notifiant l'acte, soit le renvoyer à l'adresse indiquée ci-dessous dans un délai d'une semaine en indiquant que vous refusez de le recevoir.

ADRESSE:

1. Nom:

2. Adresse:

3. Téléphone:

2.1. Numéro/boite postale et rue:

2.2. Localité et code postal

2.3. Pays:

4. Télécopieur (*):

5. Adresse électronique (*):

DECLARATION DU DESTINATAIRE

Je, soussigné, refuse de recevoir l'acte ci-joint parce qu'il n'est pas rédigé ou accompagné d'une traduction dans une langue que je comprends ou dans la langue officielle ou l'une des langues officielles du lieu de signification ou de notification.

Je comprends la ou les langues suivantes:

Bulgare

Lituanien

Espagnol

Hongrois

Tchèque

Maltais

Allemand

Néerlandais

Estonien

Polonais

Grec

Portugais

Anglais

Roumain

Français

Slovaque

Irlandais

Slovène

Italien

Finnois

Letton

Suédois

Autre

(préciser):...

Fait à:

Date:

Signature et/ou cachet:...

(*) Facultatif.

+++++ TIFF +++++

Bulgairis

Liotuainis

Spainnis

Ungairis

Seicis

Maltais

Gearmainis

Ollainnis

Eastoinis

Polainnis

Gréigis

Portaingéilis

Béarla

Romainis

Fraincis

Slovaicis

Gaeilge

Sloivéinis

Iodailis

Fionlainnis

Laitvis

Sualainnis

GA:

Ta an doiciméad ata faoi iamh a sheirbheail i gcomhréir le Rialachan (CE) Uimh. 1393/2007 o Pharlaimint na hEorpa agus on gComhairle maidir le doiciméid bhreithiunacha agus sheachbhreithiunacha a sheirbheail sna Ballstait in abhair shibhialta no in abhair trachtala.

Féadfaidh tu diultu glacadh leis an doiciméad mura mbeidh sé scríofa i dteanga a thuigeann tu no i dteanga oifigiuil no i gceann de theangacha oifigiula ait na seirbheala no mura mbeidh aistriuchan go teanga a thuigeann tu no go teanga oifigiuil ait na seirbheala no go ceann de theangacha oifigiula ait na seirbheala ag gabhail leis.

Mas mian leat an ceart seo a fheidhmiu, ní mor duit diultu glacadh leis an doiciméad as laimh trath

na seirbheala on duine a sheirbhealann é, no é a chur ar ais laistigh de sheachtain chuig an seoladh a shonraítear thíos, mar aon le raiteas go bhfuil tu ag diultu glacadh leis.

SEOLADH:

1. Ainm:

2. Seoladh:

2.1. Sraid agus uimhir/bosca poist:

2.2. Ait agus cod poist:

2.3. Tír:

3. Teil:

4. Facs (*):

5. Seoladh r-phoist (*):

DEARBHU ON SEOLAI:

Diultaím glacadh leis an doiciméad ata faoi cheangal leis seo de bharr nach bhfuil sé scríofa i dteanga a thuigim no i dteanga oifigiuil no i gceann de theangacha oifigiula ait na seirbheala agus nach bhfuil aistriuchan go teanga a thuigim no go teanga oifigiuil ait na seirbheala no go ceann de theangacha oifigiula ait na seirbheala ag gabhail leis.

Tuigim an teanga/na teangacha a leanas:

Teanga eile

(sonraigh an teanga, le do thoil):...

Arna dhéanamh i/sa:

Data:

Síniu agus/no stampa:...

(*) Ta an sonra seo roghnach.

+++++ TIFF +++++

HU:

A mellékelt iratot a tagallamokban a polgari és kereskedelmi ügyekben a bírosagi és bírosagon kívüli iratok kézbesítésérl szolo 1393/2007/EK europai parlamenti és tanacsi rendelet szerint kézbesítik.

Onnek joga van megtagadni az irat atvételét, amennyiben az nem az On szamara érthet nyelven vagy a kézbesítés helyének hivatalos nyelvén vagy hivatalos nyelvei egyikén készült, és nem mellékeltek hozza ilyen nyelv fordítast.

Amennyiben élni kívan ezzel a jogaval, az irat atvételét a kézbesítéskor kell megtagadnia közvetlenül az iratot kézbesít személynél, vagy egy héten belül vissza kell küldenie azt az alabb megjelölt címre, jelezve, hogy megtagadja annak atvételét.

CIM:

1. Név:

2. Cím:

2.1. Utca és hazszam/postafiok:

2.2. Helység és iranyítoszam:

2.3. Orszag:

3. Telefon:

4. Fax (*):

5. E-mail (*):

A CIMZETT NYILATKOZATA:

Megtagadom a mellékelt dokumentum atvételét, mivel nem az altalam értett nyelven vagy a kézbesítés helyének hivatalos nyelvén vagy hivatalos nyelvei egyikén készült, és nem mellékeltek hozza ilyen nyelv fordítast.

A következ nyelve(ke)t értem:

bolgar

litvan

spanyol

magyar

cseh

maltai

német

holland

észt

lengyel

görög

portugal

angol

roman

francia

szlovak

ír

szlovén

olasz

finn

lett

svéd

egyéb

(kérjük, nevezze meg):...

Kelt:

Datum:

Alaíras és/vagy bélyegz:...

(*) Ezt a mezt nem kötelez kitölteni.

+++++ TIFF +++++

IT:

L'atto accluso è notificato o comunicato in conformità del regolamento (CE) n. 1393/2007 del Parlamento europeo e del Consiglio relativo alla notificazione e alla comunicazione negli Stati membri degli atti giudiziari ed extragiudiziali in materia civile e commerciale.

E prevista la facoltà di rifiutare di ricevere l'atto se non è redatto o accompagnato da una traduzione in una lingua compresa dal destinatario oppure nella lingua ufficiale o in una delle lingue ufficiali del luogo di notificazione o di comunicazione.

Chi vuole avvalersi di tale diritto puo dichiarare il proprio rifiuto al momento della notificazione o della comunicazione direttamente alla persona che la effettua, oppure puo rispedire l'atto entro una settimana all'indirizzo sottoindicato, dichiarando il proprio rifiuto di riceverlo.

INDIRIZZO:

1. Nome:

2. Indirizzo:

2.1. Via e numero/C.P.:

2.2. Luogo e codice postale:

2.3. Paese:

3. Tel.

4. Fax (*)

5. E-mail (*):

DICHIARAZIONE DEL DESTINATARIO

Rifiuto di ricevere l'atto allegato in quanto non è redatto o accompagnato da una traduzione in una lingua da me compresa oppure nella lingua ufficiale o in una delle lingue ufficiali del luogo di notificazione o di comunicazione.

Comprendo le seguenti lingue:

Bulgaro

Lituano

Spagnolo

Ungherese

Ceco

Maltese

Tedesco

Olandese

Estone

Polacco
Greco
Portoghese
Inglese
Rumeno
Francese
Slovacco
Irlandese
Sloveno
Italiano
Finlandese
Lettone
Svedese
Altra
(precisare):...
Fatto a:
Data:
Firma e/o timbro:...
(*) Voce facoltativa.
+++++ TIFF +++++
Bulgar
Lietuvi
Ispan
Vengr
ek
Maltiei
Vokiei
Oland
Est
Lenk
Graik
Portugal
Angl
Rumun

Prancz

Slovak

Airi

Slovn

Suomi

Parengta:

Data:

Paraas ir (arba) antspaudas:...

LT:

Pridedamas dokumentas teikiamas pagal Europos Parlamento ir Tarybos reglament (EB) Nr. 1393/2007 dl teismini ir neteismini dokument civilinse arba komercinse bylose teikimo valstybse narse.

Galite atsisakyti priimti dokument, jeigu jis nra parengtas kalba, kuri suprantate, ar teikimo vietos oficialia kalba arba viena i oficiali kalb, arba nra pridta vertimo kalb, kuri suprantate, ar teikimo vietos oficiali kalb arba vien i oficiali kalb.

Jei norite pasinaudoti ia teise, privalote atsisakyti priimti dokument jo teikimo metu tiesiogiai pranedami apie tai dokument teikianiam asmeniui arba per vien savait grinti j toliau nurodytu adresu, pareikdami, kad atsisakote j priimti.

ADRESAS:

1. Vardas ir pavard:

2. Adresas:

2.1. Gatv ir numeris/pato dut:

2.2. Vieta ir pato indeksas:

2.3. Valstyb:

3. Telefonas:

4. Faksas (*):

5. El. patas (*):

ADRESATO PAREIKIMAS:

Atsisakau priimti prie io pareikimo pridedam dokument, kadangi jis nra parengtas kalba, kuri suprantu, ar teikimo vietos oficialia kalba arba viena i oficiali kalb, arba nra pridta vertimo kalb, kuri suprantu, ar teikimo vietos oficiali kalb arba vien i oficiali kalb.

Suprantu i (-ias) kalb (-as):

Ital

Latvi

ved

Kitas

(praom nurodyti)...

(*) is raas neprivalomas.

+++++ TIFF +++++

LV:

Pievienoto dokumentu izsniedz saska ar Eiropas Parlamenta un Padomes Regulu (EK) Nr. 1393/2007 par tiesas un rpustiesas civillietu vai komerclietu dokumentu izsnieganu dalbvalsts.

Jums ir tiesbas atteikties pieemt dokumentu, ja tas nav iesniegts rakstiski vai tam nav pievienots tulkojums valod, ko js saprotat, vai dokumenta izsnieganas vietas oficilaj valod, vai vien no oficilajm valodm.

Ja vlaties stenot s tiesbas, Jums tiei dokumenta izsniedzjam izsnieganas laik ir jatsaks pieemt dokumentu vai tas jnosta atpaka uz nordto adresi vienas nedas laik kop ar paziojumu, ka esat atteicies to pieemt.

ADRESE:

1. Vrds, uzvrds vai nosaukums:

2. Adrese:

2.1. Ielas nosaukums un numurs/p.k. Nr.:

2.2. Vieta un pasta kods:

2.3. Valsts:

3. Tlr.:

4. Fakss (*):

5. E-pasta adrese (*):

ADRESTA PAZIOJUMS:

Es atsakos pieemt pievienoto dokumentu, jo tas nav uzrakstts vai tam nav pievienots tulkojums valod, ko es saprotu, vai dokumenta izsnieganas oficilaj valod, vai vien no oficilajm valodm.

Es saprotu du(-as) valodu(-as):

bulgru

lietuvieu

spu

ungru

ehu

maltieu

vcu

holandieu

igauu

pou

grieu

portugu

angu

rumu

franu

slovku

ru

slovu

itu

somu

latvieu

zviedru

citu

(ldzu, nordiet):...

Sastdts:

Datums:

Paraksts un/vai zmogs:...

(*) Nav obligts.

+++++ TIFF +++++

MT:

Id-dokument mehmu huwa nnotifikat f'konformità mar-Regolament (KE) Nru 1393/2007 tal-Parlament Ewropew u l-Kunsill dwar is-servizz fl-Istati Membri ta' dokumenti udizzjarji u extra-udizzjarji fi kwistjonijiet ivili jew kummerjali.

Inti tista' tirrifjuta li taetta d-dokument jekk dan mhux miktub bi jew m'gandux miegu traduzzjoni f'wada mil-lingwi li tifhem int jew bil-lingwa uffijali jew wada mill-lingwi uffijali tal-post fejn qed issir in-notifika jew il-komunikazzjoni.

Jekk tixtieq teerita dan id-dritt, trid tirrifjuta li taetta d-dokument fil-mument li ssir in-notifika u dan trid tagmlu mal-persuna li tikkunsinnalek id-dokument jew inkella billi tibagtu lura fl-indirizz li jidher hawn tat fi mien imga u tistqarr li int qed tirrifjuta li taettah.

INDIRIZZ:

1. Identità:

2. Indirizz:

2.1. Triq u numru/Kaxxa Postali:

2.2. Lokalità u kodii postali

2.3. Pajji:

3. Tel.

4. Fax (*):

5. Indirizz elettroniku (*):

DIKJARAZZJONI TAD-DESTINATARJU:

Jien nirrifjuta li naetta d-dokument mehmu galiex mhux miktub bi jew m'gandux miegu traduzzjoni f'wada mil-lingwi li nifhem jien jew bil-lingwa uffijali tal-post fejn qed issir in-notifika.

Jien nifhem bil-lingwa/lingwi li ejja/ejjin:

Bulgaru

Litwan

Spanjol

Ungeri

ek

Malti

ermani

Olandi

Estonjan

Pollakk

Grieg

Portugi

Ingli

Rumen

Frani

Slovakk

Irlandi

Sloven

Taljan

Finlandi

Lavjan

Svedi

Orajn

jekk jogbok speifika:...

Magmul fi:

Data:

Firma u/jew timbru:...

(*) Dan il-punt mhux obbligatorju.

+++++ TIFF +++++

Bulgaars

Litouws

Spaans

Hongaars

Tsjechisch

Maltees

Duits

Nederlands

Ests

Pools

Grieks

Portugees

Engels

Roemeens

Frans

Slowaaks

NL:

De betekening of kennisgeving van het bijgevoegde stuk is geschied overeenkomstig Verordening (EG) nr. 1393/2007 van het Europees Parlement en de Raad inzake de betekening en de kennisgeving in de lidstaten van gerechtelijke en buitengerechtelijke stukken in burgerlijke of in handelszaken.

U kunt weigeren het stuk in ontvangst te nemen indien het niet gesteld is in of vergezeld gaat van een vertaling, ofwel in een taal die u begrijpt ofwel in de officiele taal/een van de officiele talen van de plaats van betekening of kennisgeving.

Indien u dat recht wenst uit te oefenen, moet u onmiddellijk bij de betekening of kennisgeving van het stuk en rechtstreeks ten aanzien van de persoon die de betekening of kennisgeving verricht de ontvangst ervan weigeren of moet u het stuk binnen een week terugzenden naar het onderstaande adres en verklaren dat u de ontvangst ervan weigert.

ADRES:

1. Naam:

2. Adres:

2.1. Straat + nummer/postbus:

2.2. Postcode + plaats:

2.3. Land:

3. Telefoon:

4. Fax (*):

5. E-mail (*):

VERKLARING VAN DE GEADRESSEERDE:

Ik weiger de ontvangst van het hieraan gehechte stuk, omdat dit niet gesteld is in of vergezeld gaat van een vertaling, ofwel in een taal die ik begrijp ofwel in de officiele taal/een van de officiele

talen van de plaats van betekening of kennisgeving.

Ik begrijp de volgende taal (talen):

Iers

Sloveens

Italiaans

Fins

Lets

Zweeds

Overige

gelieve te preciseren:...

Gedaan te:

Datum:

Ondertekening en/of stempel:...

(*) Facultatief.

+++++ TIFF +++++

bugarski

otewski

hiszpaski

wgierski

czeski

maltaski

niemiecki

niderlandzki

estoski

polski

grecki

portugalski

angielski

rumuski

francuski

sowacki

irlandzki

soweski

woski

fiski

inny

PL:

Zaczony dokument jest dorczany zgodnie z rozporzdzeniem (WE) nr 1393/2007 Parlamentu Europejskiego i Rady dotyczcym dorczania w pastwach czonkowskich dokumentow sdowych i pozasdowych w sprawach cywilnych i handlowych

Adresat moe odmowi przyjcia dokumentu, jeeli nie zosta on sporzdzony w jzyku, ktory rozumie, ani w jzyku urzdowym lub w jednym z jzykow urzdowych miejsca dorczenia lub jeeli nie doczono do niego tumaczenia na taki jzyk.

Jeeli adresat chce skorzysta z tego prawa, musi odmowi przyjcia dokumentu w momencie jego dorczenia bezporednio w obecnoci osoby dorczajcej lub zwroci dokument na niej wskazany adres w terminie tygodnia wraz z owiadczeniem o odmowie przyjcia.

ADRES:

1. Imi i nazwisko/nazwa:

2. Adres:

2.1. Ulica i numer domu/skrytka pocztowa:

2.2. Miejscowo i kod pocztowy:

2.3. Kraj:

3. Telefon:

4. Faks (*):

5. E-mail (*):

OWIADCZENIE ADRESATA

Niniejszym odmawiam przyjcia zaczonego dokumentu, poniewa nie zosta on sporzdzony w jzyku, ktory rozumiem, ani w jzyku urzdowym lub w jednym z jzykow urzdowych miejsca dorczenia, ani nie doczono do niego tumaczenia na taki jzyk.

Rozumiem nastpujcy(-e) jzyk(-i):

prosz okreli:...

Sporzdzono w:

Data:

Podpis i/lub piecz:...

(*) Nieobowizkowo.

+++++ TIFF +++++

PT:

O acto em anexo é citado ou notificado nos termos do Regulamento (CE) n.o 1393/2007 do Parlamento Europeu e do Conselho relativo à citaçao e à notificaçao dos actos judiciais e extrajudiciais em matérias civil e comercial nos Estados-Membros.

Tem a possibilidade de recusar a recepçao do acto se este nao estiver redigido, ou acompanhado de uma traduçao, numa língua que compreenda ou na língua oficial ou numa das línguas oficiais do

local de citaçao ou notificaçao.

Se desejar exercer esse direito, deve recusar o acto no momento da citaçao ou notificaçao, directamente junto da pessoa que a ela procede, ou devolvê-lo ao endereço seguidamente indicado, no prazo de uma semana, declarando que recusa aceita-lo.

ENDEREÇO:

1. Identificaçao:

2. Endereço:

2.1. Rua + numero/caixa postal:

2.2. Localidade + codigo postal:

2.3. País:

3. Telefone:

4. Fax (*):

5. Correio electronico (e-mail) (*):

DECLARAÇAO DO DESTINATARIO:

Eu, abaixo assinado(a), recuso aceitar o acto em anexo porque o mesmo nao esta redigido nem acompanhado de uma traduçao numa língua que eu compreenda ou na língua oficial ou numa das línguas oficiais do local de citaçao ou notificaçao.

Compreendo a(s) seguinte(s) língua(s):

Bulgaro

Lituano

Espanhol

Hungaro

Checo

Maltês

Alemao

Neerlandês

Estonio

Polaco

Grego

Português

Inglês

Romeno

Francês

Eslovaco

Irlandês

Esloveno
Italiano
Finlandês
Letao
Sueco
Outra
queira precisar:...
Feito em:
Data:
Assinatura e/ou carimbo:...
(*) Esta informaçao é facultativa.
+++++ TIFF +++++
Bulgar
Lituanian
Spaniol
Maghiar
Ceh
Maltez
German
Olandez
Eston
Polonez
Greac
Portughez
Englez
Român
Francez
Slovac
Irlandez
Sloven
Italian
Finlandez
Leton
Suedez

Altele

v rugm, precizai:...

RO:

Documentul anexat este notificat sau comunicat in conformitate cu Regulamentul (CE) nr. 1393/2007 al Parlamentului European i al Consiliului privind notificarea sau comunicarea in statele membre a actelor judiciare i extrajudiciare in materie civil sau comercial.

Putei refuza primirea actului in cazul in care acesta nu este redactat sau insoit de o traducere intr-una dintre limbile pe care le inelegei sau in limba oficial sau una dintre limbile oficiale ale locului de notificare sau comunicare.

Dac dorii s exercitai acest drept, refuzai primirea actului in momentul notificrii sau al comunicrii, transmiând acest lucru direct persoanei care notific sau comunic actul, ori returnai actul la adresa indicat mai jos, in termen de o sptmân, precizând c refuzai primirea acestuia.

ADRES:

1. Nume:

2. Adres:

2.1. Strad i numr/C.P.:

2.2. Localitate i cod potal:

2.3. ara

3. Tel.:

4. Fax (*):

5. E-mail (*):

DECLARAIA DESTINATARULUI:

Refuz primirea actului anexat deoarece acesta nu este redactat sau insoit de o traducere in una dintre limbile pe care le ineleg sau in limba oficial sau una dintre limbile oficiale ale locului de notificare sau comunicare.

îneleg urmtoarea (urmtoarele) limb (limbi):

întocmit la:

Data:

Semntura i/sau tampila:...

(*) Element facultativ.

+++++ TIFF +++++

SK:

Priloena písomnos sa doruuje v sulade s nariadením Europskeho parlamentu a Rady (ES). 1393/2007 o doruovaní sudnych a mimosudnych písomností v obianskych a obchodnuch veciach v lenskuch tatoch.

Tuto písomnos môete odmietnu prevzia, ak nie je vyhotovena ani v jazyku, ktorému rozumiete, ani v uradnom jazyku miesta doruenia alebo v jednom z uradnuch jazykov miesta doruenia, ani k nej nie je pripojenu preklad do niektorého z tuchto jazykov.

Ak si elate vyui toto pravo, prevzatie písomnosti musíte odmietnu pri jej doruení priamo osobe,

ktora písomnos doruuje, alebo písomnos musíte do jedného tuda vrati na niie uvedenu adresu s vyhlasením, e ju odmietate prevzia.

ADRESA:

1. Oznaenie:

2. Adresa:

2.1. Ulica a íslo/P. O. Box:

2.2. Miesto a PS:

2.3. tat:

3. Tel.:

4. Fax (*):

5. E-mail (*):

VYHLASENIE ADRESATA:

Odmietam prevzia pripojenu písomnos, pretoe nie je vyhotovena ani v jazyku, ktorému rozumiem, ani v uradnom jazyku miesta doruenia alebo v jednom z uradnuch jazykov miesta doruenia, ani k nej nie je pripojenu preklad do niektorého z tuchto jazykov.

Rozumiem tomuto jazyku/tumto jazykom:

bulharina

litovina

panielina

maarina

etina

maltina

nemina

holandina

estonina

potina

grétina

portugalina

anglitina

rumunina

francuztina

slovenina

írina

slovinina

talianina

finina

lotytina

védina

inu

(uvete): ...

V:

Da:

Podpis a/alebo odtlaok peiatky:...

(*) Tento udaj je nepovinnu.

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SL:

Priloeno pisanje se vroa v skladu z Uredbo (ES) t. 1393/2007 Evropskega parlamenta in Sveta o vroanju sodnih in izvensodnih pisanj v civilnih ali gospodarskih zadevah v dravah lanicah.

Sprejem pisanja lahko zavrnete, e ni sestavljeno v jeziku, ki ga razumete, ali v uradnem jeziku ali v enem od uradnih jezikov kraja vroitve, oziroma mu ni priloen prevod v enega od teh jezikov.

e elite uveljaviti to pravico, morate zavrniti sprejem pisanja v trenutku vroitve, in sicer neposredno pri osebi, ki pisanje vroa, ali pisanje vrniti na spodaj navedeni naslov v roku enega tedna z izjavo, da sprejem zavraate.

NASLOV:

1. Ime:

2. Naslov:

2.1 Ulica in tevilka/potni predal:

2.2 Kraj in potna tevilka:

2.3 Drava:

3. Telefon:

4. Faks (*):

5. Elektronska pota (*):

IZJAVA NASLOVNIKA:

Zavraam sprejem priloenega pisanja, ker ni sestavljeno v jeziku, ki ga razumem, ali v uradnem jeziku ali v enem od uradnih jezikov kraja vroitve, oziroma mu ni priloen prevod v enega od teh jezikov.

Razumem naslednje jezike:

bolgarino

litovino

panino

madarino

eino

malteino

nemino

nizozemino

estonino

poljino

grino

portugalino

angleino

romunino

francoino

slovaino

irino

slovenino

italijanino

finino

latvijino

vedino

drugo

prosimo, navedite:...

V:

Datum:

Podpis in/ali ig:...

(*) Ni obvezno.

+++++ TIFF +++++

SV:

Den bifogade handlingen har delgetts i enlighet med Europaparlamentets och rådets förordning (EG) nr 1393/2007 av den 13 november 2007 om delgivning i medlemsstaterna av rättegångshandlingar och andra handlingar i mål och ärenden av civil eller kommersiell natur.

Ni får vägra att ta emot handlingen om den inte är avfattad på, eller åtföljs av en översättning till, antingen ett språk som ni förstår eller det officiella språket eller något av de officiella språken på delgivningsorten.

Om ni önskar utnyttja denna rättighet, måste ni vägra att emot handlingen vid delgivningen genom att vända er direkt till delgivningsmannen eller genom att återsända handling inom en vecka till nedanstående adress och ange att ni vägrar att ta emot den.

ADRESS

1. Namn:

2. Adress:

2.1 Gatuadress/box:

2.2 Postnummer och ort:

2.3 Land:

3. Tfn

4. Fax (*):

5. E-post (*):

ADRESSATENS FORKLARING

Jag vägrar att ta emot bifogade handling eftersom den inte är avfattad på, eller åtföljs av en översättning till, ett språk som jag förstår eller det officiella språket eller något av de officiella språken på delgivningsorten.

Jag förstår följande språk:

Bulgariska

Litauiska

Spanska

Ungerska

Tjeckiska

Maltesiska

Tyska

Nederländska

Estniska

Polska

Grekiska

Portugisiska

Engelska

Rumänska

Franska

Slovakiska

Irländska

Slovenska

Italienska

Finska

Lettiska

Svenska

Annat språk

(ange vilket):...

(*) Ej obligatoriskt.

+++++ TIFF +++++

Ort:

Datum:

Underskrift och/eller stämpel:...

(*)

Bulgarsk

Litauisk

Spansk

Ungarsk

Tjekkisk

Maltesisk

Tysk

(*) The information contained in this Annex would have read as follows in Danish if the Regulation had applied in Denmark:

DA:

Vedlagte dokument forkyndes hermed i overensstemmelse med Europa-Parlamentets og Rådets forordning (EF) nr. 1393/2007 om forkyndelse i medlemsstaterne af retslige og udenretslige dokumenter i civile og kommercielle sager.

De kan nægte at modtage dokumentet, hvis det ikke er affattet på eller ledsaget af en oversættelse til enten et sprog, som De forstår, eller det officielle sprog eller et af de officielle sprog på forkyndelsesstedet.

Hvis De ønsker at gøre brug af denne ret, skal De nægte at modtage dokumentet ved forkyndelsen direkte over for den person, der forkynder det, eller returnere det til nedenstående adresse senest en uge efter forkyndelsen med angivelse af, at De nægter at modtage det.

ADRESSE:

1. Navn:

2. Adresse:

2.1. Gade og nummer/postboks:

2.2. Postnummer og bynavn:

2.3. Land:

3. Tlf.:

4. Fax (*):

5. E-mail (*):

ERKLÆRING FRA ADRESSATEN:

Jeg nægter at modtage vedlagte dokument, da det ikke er affattet på eller ledsaget af en oversættelse til et sprog, som jeg forstår, eller det officielle sprog eller et af de officielle sprog på forkyndelsesstedet.

Jeg forstår følgende sprog:

Nederlandsk

Estisk

Polsk

Græsk

Portugisisk

Engelsk

Rumænsk

Fransk

Slovakisk

Irsk

Slovensk

Italiensk

Finsk

Lettisk

Svensk

Andet:

præciseres:...

Udfærdiget i:

Den:

Underskrift og/eller stempel:...

(*) Fakultativt.

+++++ TIFF +++++

20071113

ANNEX III

CORRELATION TABLE

Regulation (EC) No 1348/2000 ¦ This Regulation ¦

Article 1(1) ¦ Article 1(1) first sentence ¦

- ¦ Article 1(1) second sentence ¦

Article 1(2) ¦ Article 1(2) ¦

- ¦ Article 1(3) ¦
Article 2 ¦ Article 2 ¦
Article 3 ¦ Article 3 ¦
Article 4 ¦ Article 4 ¦
Article 5 ¦ Article 5 ¦
Article 6 ¦ Article 6 ¦
Article 7(1) ¦ Article 7(1) ¦
Article 7(2) first sentence ¦ Article 7(2) first sentence ¦
Article 7(2) second sentence ¦ Article 7(2) second sentence (introductory phrase) and Article 7(2)(a) ¦
- ¦ Article 7(2)(b) ¦
Article 7(2) third sentence ¦ - ¦
Article 8(1) introductory phrase ¦ Article 8(1) introductory phrase ¦
Article 8(1)(a) ¦ Article 8(1)(b) ¦
Article 8(1)(b) ¦ Article 8(1)(a) ¦
Article 8(2) ¦ Article 8(2) ¦
- ¦ Article 8(3) to (5) ¦
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Article 9(3) ¦ - ¦
- ¦ Article 9(3) ¦
Article 10 ¦ Article 10 ¦
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Article 11(2) ¦ Article 11(2) first subparagraph ¦
- ¦ Article 11(2) second subparagraph ¦
Article 12 ¦ Article 12 ¦
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Article 17, introductory phrase ¦ Article 17 ¦
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Article 18(1) and (2) ¦ Article 18(1) and (2) ¦
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Article 19	Article 19
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Article 23(1)	Article 23(1) first sentence
-	Article 23(1) second sentence
Article 23(2)	Article 23(2)
-	Article 23(3)
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Article 25	-
-	Article 25
-	Article 26
Annex	Annex I
-	Annex II
-	Annex III

DOCNUM	32007R1393
AUTHOR	European Parliament ; Council
FORM	Regulation
TREATY	European Community
PUBREF	OJ L 324, 10.12.2007, p. 79-120 (BG, ES, CS, DA, DE, ET, EL, EN, FR, GA, IT, LV, LT, HU, MT, NL, PL, PT, RO, SK, SL, FI, SV)
PUB	2007/12/10
DOC	2007/11/13
INFORCE	2008/11/13=MA ; 2008/08/13=MA/PART ; 2007/12/30=EV
ENDVAL	9999/99/99
LEGBASE	12006E061 12006E067 12006E251

LEGCIT	41968A0927(01) 41998A0126 31997F0827(01) 41997A0827(01)
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REGISTER	19200000
PREPWORK	PR;COMM;CO 2005/0305 FIN AV;CES;JO C 88/2006 P 7 PCODE;; AV;PE;JO C 303E/2006 P 69 POCO;CONS;JO C 193E/2007 P 13 PO;PE;RENDU 24/10/2007
MISCINF	COD 2005/126 N/APPL DK
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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

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

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and Article 67(1) thereof,

Having regard to the proposal from the Commission(1),

Having regard to the opinion of the European Parliament(2),

Having regard to the opinion of the Economic and Social Committee(3),

Whereas:

(1) The Union has set itself the objective of maintaining and developing the Union as an area of freedom, security and justice, in which the free movement of persons is assured. To establish such an area, the Community is to adopt, among others, the measures relating to judicial cooperation in civil matters needed for the proper functioning of the internal market.

(2) The proper functioning of the internal market entails the need to improve and expedite the transmission of judicial and extrajudicial documents in civil or commercial matters for service between the Member States.

(3) This is a subject now falling within the ambit of Article 65 of the Treaty.

(4) In accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty, the objectives of this Regulation cannot be sufficiently achieved by the Member States and can therefore be better achieved by the Community. This Regulation does not go beyond what is necessary to achieve those objectives.

(5) The Council, by an Act dated 26 May 1997(4), drew up a Convention on the service in the Member States of the European Union of judicial and extrajudicial documents in civil or commercial matters and recommended it for adoption by the Member States in accordance with their respective constitutional rules. That Convention has not entered into force. Continuity in the results of the negotiations for conclusion of the Convention should be ensured. The main content of this Regulation is substantially taken over from it.

(6) Efficiency and speed in judicial procedures in civil matters means that the transmission of judicial and extrajudicial documents is to be made direct and by rapid means between local bodies designated by the Member States. However, the Member States may indicate their intention of designating only one transmitting or receiving agency or one agency to perform both functions for a period of five years. This designation may, however, be renewed every five years.

(7) Speed in transmission warrants the use of all appropriate means, provided that certain conditions as to the legibility and reliability of the document received are observed. Security in transmission requires that the document to be transmitted be accompanied by a pre-printed form, to be completed in the language of the place where service is to be effected, or in another language accepted by the Member State in question.

(8) To secure the effectiveness of this Regulation, the possibility of refusing service of documents is confined to exceptional situations.

(9) Speed of transmission warrants documents being served within days of reception of the document. However, if service has not been effected after one month has elapsed, the receiving agency should inform the transmitting agency. The expiry of this period should not imply that the request be returned to the transmitting agency where it is clear that service is feasible within a reasonable period.

(10) For the protection of the addressee's interests, service should be effected in the official language or one of the official languages of the place where it is to be effected or in another language of the originating Member State which the addressee understands.

(11) Given the differences between the Member States as regards their rules of procedure, the material date for the purposes of service varies from one Member State to another. Having regard to such situations and the possible difficulties that may arise, this Regulation should provide for a system where it is the law of the receiving Member State which determines the date of service. However, if the relevant documents in the context of proceedings to be brought or pending in the Member State of origin are to be served within a specified period, the date to be taken into consideration with respect to the applicant shall be that determined according to the law of the Member State of origin. A Member State is, however, authorised to derogate from the aforementioned provisions for a transitional period of five years, for appropriate reasons. Such a derogation may be renewed by a Member State at five-year intervals due to reasons related to its legal system.

(12) This Regulation prevails over the provisions contained in bilateral or multilateral agreements or arrangements having the same scope, concluded by the Member States, and in particular the Protocol annexed to the Brussels Convention of 27 September 1968(5) and the Hague Convention of 15 November 1965 in relations between the Member States party thereto. This Regulation does not preclude Member States from maintaining or concluding agreements or arrangements to expedite or simplify the transmission of documents, provided that they are compatible with the Regulation.

(13) The information transmitted pursuant to this Regulation should enjoy suitable protection. This matter falls within the scope of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data(6), and of Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector(7).

(14) The measures necessary for the implementation of this Regulation should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission(8).

(15) These measures also include drawing up and updating the manual using appropriate modern means.

(16) No later than three years after the date of entry into force of this Regulation, the Commission should review its application and propose such amendments as may appear necessary.

(17) The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community, have given notice of their wish to take part in the adoption and application of this Regulation.

(18) Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, is not

participating in the adoption of this Regulation, and is therefore not bound by it nor subject to its application,

HAS ADOPTED THIS REGULATION:

CHAPTER I

GENERAL PROVISIONS

Article 1

Scope

1. This Regulation shall apply in civil and commercial matters where a judicial or extrajudicial document has to be transmitted from one Member State to another for service there.

2. This Regulation shall not apply where the address of the person to be served with the document is not known.

Article 2

Transmitting and receiving agencies

1. Each Member State shall designate the public officers, authorities or other persons, hereinafter referred to as "transmitting agencies", competent for the transmission of judicial or extrajudicial documents to be served in another Member State.

2. Each Member State shall designate the public officers, authorities or other persons, hereinafter referred to as "receiving agencies", competent for the receipt of judicial or extrajudicial documents from another Member State.

3. A Member State may designate one transmitting agency and one receiving agency or one agency to perform both functions. A federal State, a State in which several legal systems apply or a State with autonomous territorial units shall be free to designate more than one such agency. The designation shall have effect for a period of five years and may be renewed at five-year intervals.

4. Each Member State shall provide the Commission with the following information:

(a) the names and addresses of the receiving agencies referred to in paragraphs 2 and 3;

(b) the geographical areas in which they have jurisdiction;

(c) the means of receipt of documents available to them; and

(d) the languages that may be used for the completion of the standard form in the Annex.

Member States shall notify the Commission of any subsequent modification of such information.

Article 3

Central body

Each Member State shall designate a central body responsible for:

(a) supplying information to the transmitting agencies;

(b) seeking solutions to any difficulties which may arise during transmission of documents for service;

(c) forwarding, in exceptional cases, at the request of a transmitting agency, a request for service to the competent receiving agency.

A federal State, a State in which several legal systems apply or a State with autonomous territorial units shall be free to designate more than one central body.

CHAPTER II

JUDICIAL DOCUMENTS

Section 1

Transmission and service of judicial documents

Article 4

Transmission of documents

1. Judicial documents shall be transmitted directly and as soon as possible between the agencies designated on the basis of Article 2.

2. The transmission of documents, requests, confirmations, receipts, certificates and any other papers between transmitting agencies and receiving agencies may be carried out by any appropriate means, provided that the content of the document received is true and faithful to that of the document forwarded and that all information in it is easily legible.

3. The document to be transmitted shall be accompanied by a request drawn up using the standard form in the Annex. The form shall be completed in the official language of the Member State addressed or, if there are several official languages in that Member State, the official language or one of the official languages of the place where service is to be effected, or in another language which that Member State has indicated it can accept. Each Member State shall indicate the official language or languages of the European Union other than its own which is or are acceptable to it for completion of the form.

4. The documents and all papers that are transmitted shall be exempted from legalisation or any equivalent formality.

5. When the transmitting agency wishes a copy of the document to be returned together with the certificate referred to in Article 10, it shall send the document in duplicate.

Article 5

Translation of documents

1. The applicant shall be advised by the transmitting agency to which he or she forwards the document for transmission that the addressee may refuse to accept it if it is not in one of the languages provided for in Article 8.

2. The applicant shall bear any costs of translation prior to the transmission of the document, without prejudice to any possible subsequent decision by the court or competent authority on liability

for such costs.

Article 6

Receipt of documents by receiving agency

1. On receipt of a document, a receiving agency shall, as soon as possible and in any event within seven days of receipt, send a receipt to the transmitting agency by the swiftest possible means of transmission using the standard form in the Annex.

2. Where the request for service cannot be fulfilled on the basis of the information or documents transmitted, the receiving agency shall contact the transmitting agency by the swiftest possible means in order to secure the missing information or documents.

3. If the request for service is manifestly outside the scope of this Regulation or if non-compliance with the formal conditions required makes service impossible, the request and the documents transmitted shall be returned, on receipt, to the transmitting agency, together with the notice of return in the standard form in the Annex.

4. A receiving agency receiving a document for service but not having territorial jurisdiction to serve it shall forward it, as well as the request, to the receiving agency having territorial jurisdiction in the same Member State if the request complies with the conditions laid down in Article 4(3) and shall inform the transmitting agency accordingly, using the standard form in the Annex. That receiving agency shall inform the transmitting agency when it receives the document, in the manner provided for in paragraph 1.

Article 7

Service of documents

1. The receiving agency shall itself serve the document or have it served, either in accordance with the law of the Member State addressed or by a particular form requested by the transmitting agency, unless such a method is incompatible with the law of that Member State.

2. All steps required for service of the document shall be effected as soon as possible. In any event, if it has not been possible to effect service within one month of receipt, the receiving agency shall inform the transmitting agency by means of the certificate in the standard form in the Annex, which shall be drawn up under the conditions referred to in Article 10(2). The period shall be calculated in accordance with the law of the Member State addressed.

Article 8

Refusal to accept a document

1. The receiving agency shall inform the addressee that he or she may refuse to accept the document to be served if it is in a language other than either of the following languages:

(a) the official language of the Member State addressed or, if there are several official languages in that Member State, the official language or one of the official languages of the place where

service is to be effected; or

(b) a language of the Member State of transmission which the addressee understands.

2. Where the receiving agency is informed that the addressee refuses to accept the document in accordance with paragraph 1, it shall immediately inform the transmitting agency by means of the certificate provided for in Article 10 and return the request and the documents of which a translation is requested.

Article 9

Date of service

1. Without prejudice to Article 8, the date of service of a document pursuant to Article 7 shall be the date on which it is served in accordance with the law of the Member State addressed.

2. However, where a document shall be served within a particular period in the context of proceedings to be brought or pending in the Member State of origin, the date to be taken into account with respect to the applicant shall be that fixed by the law of that Member State.

3. A Member State shall be authorised to derogate from the provisions of paragraphs 1 and 2 for a transitional period of five years, for appropriate reasons.

This transitional period may be renewed by a Member State at five-yearly intervals due to reasons related to its legal system. That Member State shall inform the Commission of the content of such a derogation and the circumstances of the case.

Article 10

Certificate of service and copy of the document served

1. When the formalities concerning the service of the document have been completed, a certificate of completion of those formalities shall be drawn up in the standard form in the Annex and addressed to the transmitting agency, together with, where Article 4(5) applies, a copy of the document served.

2. The certificate shall be completed in the official language or one of the official languages of the Member State of origin or in another language which the Member State of origin has indicated that it can accept. Each Member State shall indicate the official language or languages of the European Union other than its own which is or are acceptable to it for completion of the form.

Article 11

Costs of service

1. The service of judicial documents coming from a Member State shall not give rise to any payment or reimbursement of taxes or costs for services rendered by the Member State addressed.

2. The applicant shall pay or reimburse the costs occasioned by:

(a) the employment of a judicial officer or of a person competent under the law of the Member State addressed;

(b) the use of a particular method of service.

Section 2

Other means of transmission and service of judicial documents

Article 12

Transmission by consular or diplomatic channels

Each Member State shall be free, in exceptional circumstances, to use consular or diplomatic channels to forward judicial documents, for the purpose of service, to those agencies of another Member State which are designated pursuant to Article 2 or 3.

Article 13

Service by diplomatic or consular agents

1. Each Member State shall be free to effect service of judicial documents on persons residing in another Member State, without application of any compulsion, directly through its diplomatic or consular agents.

2. Any Member State may make it known, in accordance with Article 23(1), that it is opposed to such service within its territory, unless the documents are to be served on nationals of the Member State in which the documents originate.

Article 14

Service by post

1. Each Member State shall be free to effect service of judicial documents directly by post to persons residing in another Member State.

2. Any Member State may specify, in accordance with Article 23(1), the conditions under which it will accept service of judicial documents by post.

Article 15

Direct service

1. This Regulation shall not interfere with the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the Member State addressed.

2. Any Member State may make it known, in accordance with Article 23(1), that it is opposed to the service of judicial documents in its territory pursuant to paragraph 1.

CHAPTER III

EXTRAJUDICIAL DOCUMENTS

Article 16

Transmission

Extrajudicial documents may be transmitted for service in another Member State in accordance with the provisions of this Regulation.

CHAPTER IV

FINAL PROVISIONS

Article 17

Implementing rules

The measures necessary for the implementation of this Regulation relating to the matters referred to below shall be adopted in accordance with the advisory procedure referred to in Article 18(2):

(a) drawing up and annually updating a manual containing the information provided by Member States in accordance with Article 2(4);

(b) drawing up a glossary in the official languages of the European Union of documents which may be served under this Regulation;

(c) updating or making technical amendments to the standard form set out in the Annex.

Article 18

Committee

1. The Commission shall be assisted by a committee.

2. Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468/EC shall apply.

3. The Committee shall adopt its rules of procedure.

Article 19

Defendant not entering an appearance

1. Where a writ of summons or an equivalent document has had to be transmitted to another Member State for the purpose of service, under the provisions of this Regulation, 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 Member 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 Regulation;

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

2. Each Member State shall be free to make it known, in accordance with Article 23(1), that the judge, notwithstanding the provisions of paragraph 1, may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled:

(a) the document was transmitted by one of the methods provided for in this Regulation;

(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 or bodies of the Member State addressed.

3. Notwithstanding paragraphs 1 and 2, the judge may order, in case of urgency, any provisional or protective measures.

4. When a writ of summons or an equivalent document has had to be transmitted to another Member State for the purpose of service, under the provisions of this Regulation, and a judgment has been entered against a defendant who has not appeared, the judge shall have the power to relieve the defendant from the effects of the expiration of the time for appeal from the judgment if the following conditions are fulfilled:

(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.

An application for relief may be filed only within a reasonable time after the defendant has knowledge of the judgment.

Each Member State may make it known, in accordance with Article 23(1), that such application will not be entertained if it is filed after the expiration of a time to be stated by it in that communication, but which shall in no case be less than one year following the date of the judgment.

5. Paragraph 4 shall not apply to judgments concerning status or capacity of persons.

Article 20

Relationship with agreements or arrangements to which Member States are Parties

1. This Regulation shall, in relation to matters to which it applies, prevail over other provisions contained in bilateral or multilateral agreements or arrangements concluded by the Member States, and in particular Article IV of the Protocol to the Brussels Convention of 1968 and the Hague Convention of 15 November 1965.

2. This Regulation shall not preclude individual Member States from maintaining or concluding agreements or arrangements to expedite further or simplify the transmission of documents, provided that they are compatible with this Regulation.

3. Member States shall send to the Commission:

(a) a copy of the agreements or arrangements referred to in paragraph 2 concluded between the Member

States as well as drafts of such agreements or arrangements which they intend to adopt;

and

(b) any denunciation of, or amendments to, these agreements or arrangements.

Article 21

Legal aid

This Regulation shall not affect the application of Article 23 of the Convention on Civil Procedure of 17 July 1905, Article 24 of the Convention on Civil Procedure of 1 March 1954 or Article 13 of the Convention on International Access to Justice of 25 October 1980 between the Member States Parties to these Conventions.

Article 22

Protection of information transmitted

1. Information, including in particular personal data, transmitted under this Regulation shall be used by the receiving agency only for the purpose for which it was transmitted.

2. Receiving agencies shall ensure the confidentiality of such information, in accordance with their national law.

3. Paragraphs 1 and 2 shall not affect national laws enabling data subjects to be informed of the use made of information transmitted under this Regulation.

4. This Regulation shall be without prejudice to Directives 95/46/EC and 97/66/EC.

Article 23

Communication and publication

1. Member States shall communicate to the Commission the information referred to in Articles 2, 3, 4, 9, 10, 13, 14, 15, 17(a) and 19.

2. The Commission shall publish in the Official Journal of the European Communities the information referred to in paragraph 1.

Article 24

Review

No later than 1 June 2004, and every five years thereafter, the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Regulation, paying special attention to the effectiveness of the bodies designated pursuant to Article 2 and to the practical application of point (c) of Article 3 and Article 9. The report shall be accompanied if need be by proposals for adaptations of this Regulation in line with the

evolution of notification systems.

Article 25

Entry into force

This Regulation shall enter into force on 31 May 2001.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

Done at Brussels, 29 May 2000.

For the Council

The President

A. Costa

(1) OJ C 247 E, 31.8.1999, p. 11.

(2) Opinion of 17 November 1999 (not yet published in the Official Journal).

(3) OJ C 368, 20.12.1999, p. 47.

(4) OJ C 261, 27.8.1997, p. 1. On the same day as the Convention was drawn up the Council took note of the explanatory report on the Convention which is set out on page 26 of the aforementioned Official Journal.

(5) Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ L 299, 13.12.1972, p. 32; consolidated version, OJ C 27, 26.1.1998, p. 1).

(6) OJ L 281, 23.11.1995, p. 31.

(7) OJ L 24, 30.1.1998, p. 1.

(8) OJ L 184, 17.7.1999, p. 23.

ANNEX

! PIC FILE= "L_2000160EN.004402.EPS"!

! PIC FILE= "L_2000160EN.004501.EPS"!

! PIC FILE= "L_2000160EN.004601.EPS"!

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! PIC FILE= "L_2000160EN.005001.EPS"!

! PIC FILE= "L_2000160EN.005101.EPS"!

! PIC FILE= "L_2000160EN.005201.EPS"!

DOCNUM	32000R1348
AUTHOR	Council
FORM	Regulation
TREATY	European Community
TYPDOC	3 ; secondary legislation ; 2000 ; R
PUBREF	Official Journal L 160 , 30/06/2000 P. 0037 - 0052
DESCRIPT	civil law ; commercial law ; Community act ; EC countries
PUB	2000/06/30
DOC	2000/05/29
INFORCE	2001/05/31=EV
DEADL1	2004/06/01
ENDVAL	9999/99/99
LEGBASE	11997E061-PTC..... 11997E067-P1.....
LEGCIT	41968A0927(01)..... 31995L0046..... 11997D/PRO/04..... 11997D/PRO/05..... 11997E005..... 11997E065..... 31997L0066..... 41997Y0827(01)..... 31999D0468.....
MODIFIES	51999PC0219..... Adoption.....
MODIFIED	Relation..... 52001XX0522(01).....
SUBSPREP	Relation..... 32001D0781.....
SUB	Internal market ; Justice and home affairs
REGISTER	19200000
PREPWORK	Proposal Commission;Com 99/0219 Final;OJ C 247E/99 P 11 Consultation procedure ;Opinion European Parliament;given on 17/11/99 Opinion Economic and Social Committee;OJ C 368/99 P 47
MISCINF	CNS 92012
DATES	of document: 29/05/2000 of effect: 31/05/2001 Entry into force See Art 25

Agreement between the European Community and the Kingdom of Denmark on the service of judicial and extrajudicial documents in civil or commercial matters

Agreement

between the European Community and the Kingdom of Denmark on the service of judicial and extrajudicial documents in civil or commercial matters

THE EUROPEAN COMMUNITY, hereinafter referred to as "the Community",

of the one part, and

THE KINGDOM OF DENMARK, hereinafter referred to as "Denmark",

of the other part,

HAVE AGREED AS FOLLOWS:

Article 1

Aim

1. The aim of this Agreement is to apply the provisions of the Regulation on the service of documents and its implementing measures to the relations between the Community and Denmark, in accordance with Article 2(1) of this Agreement.

2. It is the objective of the Contracting Parties to arrive at a uniform application and interpretation of the provisions of the Regulation on the service of documents and its implementing measures in all Member States.

3. The provisions of Articles 3(1), 4(1) and 5(1) of this Agreement result from the Protocol on the position of Denmark.

Article 2

Cooperation on the service of documents

1. The provisions of the Regulation on the service of documents, which is annexed to this Agreement and forms part thereof, together with its implementing measures adopted pursuant to Article 17 of the Regulation and - in respect of implementing measures adopted after the entry into force of this Agreement - implemented by Denmark as referred to in Article 4 of this Agreement, and the information communicated by Member States under Article 23 of the Regulation, shall under international law apply to the relations between the Community and Denmark.

2. The date of entry into force of this Agreement shall apply instead of the date referred to in Article 25 of the Regulation.

Article 3

Amendments to the Regulation on the service of documents

1. Denmark shall not take part in the adoption of amendments to the Regulation on the service of

documents and no such amendments shall be binding upon or applicable in Denmark.

2. Whenever amendments to the Regulation are adopted Denmark shall notify the Commission of its decision whether or not to implement the content of such amendments. Notification shall be given at the time of the adoption of the amendments or within 30 days thereafter.

3. If Denmark decides that it will implement the content of the amendments the notification shall indicate whether implementation can take place administratively or requires parliamentary approval.

4. If the notification indicates that implementation can take place administratively the notification shall, moreover, state that all necessary administrative measures enter into force on the date of entry into force of the amendments to the Regulation or have entered into force on the date of the notification, whichever date is the latest.

5. If the notification indicates that implementation requires parliamentary approval in Denmark, the following rules shall apply:

(a) legislative measures in Denmark shall enter into force on the date of entry into force of the amendments to the Regulation or within 6 months after the notification, whichever date is the latest;

(b) Denmark shall notify the Commission of the date upon which the implementing legislative measures enter into force.

6. A Danish notification that the content of the amendments have been implemented in Denmark, in accordance with paragraph 4 and 5, creates mutual obligations under international law between Denmark and the Community. The amendments to the Regulation shall then constitute amendments to this Agreement and shall be considered annexed hereto.

7. In cases where:

(a) Denmark notifies its decision not to implement the content of the amendments; or

(b) Denmark does not make a notification within the 30-day time limit set out in paragraph 2; or

(c) legislative measures in Denmark do not enter into force within the time limits set out in paragraph 5,

this Agreement shall be considered terminated unless the parties decide otherwise within 90 days or, in the situation referred to under (c), legislative measures in Denmark enter into force within the same period. Termination shall take effect three months after the expiry of the 90-day period.

8. Requests that have been transmitted before the date of termination of the Agreement as set out in paragraph 7 are not affected hereby.

Article 4

Implementing measures

1. Denmark shall not take part in the adoption of opinions by the Committee referred to in Article 18 of the Regulation on the service of documents. Implementing measures adopted pursuant to Article 17 of that Regulation shall not be binding upon and shall not be applicable in Denmark.

2. Whenever implementing measures are adopted pursuant to Article 17 of the Regulation, the implementing measures shall be communicated to Denmark. Denmark shall notify the Commission of its decision whether or not to implement the content of the implementing measures. Notification shall be given

upon receipt of the implementing measures or within 30 days thereafter.

3. The notification shall state that all necessary administrative measures in Denmark enter into force on the date of entry into force of the implementing measures or have entered into force on the date of the notification, whichever date is the latest.

4. A Danish notification that the content of the implementing measures has been implemented in Denmark creates mutual obligations under international law between Denmark and the Community. The implementing measures will then form part of this Agreement.

5. In cases where:

(a) Denmark notifies its decision not to implement the content of the implementing measures; or

(b) Denmark does not make a notification within the 30-day time limit set out in paragraph 2,

this Agreement shall be considered terminated unless the parties decide otherwise within 90 days. Termination shall take effect three months after the expiry of the 90-day period.

6. Requests that have been transmitted before the date of termination of the Agreement as set out in paragraph 5 are not affected hereby.

7. If in exceptional cases the implementation requires parliamentary approval in Denmark, the Danish notification under paragraph 2 shall indicate this and the provisions of Article 3(5) to (8), shall apply.

8. Denmark shall communicate to the Commission the information referred to in Articles 2, 3, 4, 9, 10, 13, 14, 15, 17(a) and 19 of the Regulation on the service of documents. The Commission shall publish this information together with the relevant information concerning the other Member States. The manual and the glossary drawn up pursuant to Article 17 of that Regulation shall include also the relevant information on Denmark.

Article 5

International agreements which affect the Regulation on the service of documents

1. International agreements entered into by the Community when exercising its external competence based on the rules of the Regulation on the service of documents shall not be binding upon and shall not be applicable in Denmark.

2. Denmark will abstain from entering into international agreements which may affect or alter the scope of the Regulation on the service of documents as annexed to this Agreement unless it is done in agreement with the Community and satisfactory arrangements have been made with regard to the relationship between this Agreement and the international agreement in question.

3. When negotiating international agreements that may affect or alter the scope of the Regulation on the service of documents as annexed to this Agreement, Denmark will coordinate its position with the Community and will abstain from any actions that would jeopardise the objectives of a coordinated position of the Community within its sphere of competence in such negotiations.

Article 6

Jurisdiction of the Court of Justice of the European Communities in relation to the interpretation

of the Agreement

1. Where a question on the validity or interpretation of this Agreement is raised in a case pending before a Danish court or tribunal, that court or tribunal shall request the Court of Justice to give a ruling thereon whenever under the same circumstances a court or tribunal of another Member State of the European Union would be required to do so in respect of the Regulation on the service of documents and its implementing measures referred to in Article 2(1) of this Agreement.

2. Under Danish law, the courts in Denmark shall, when interpreting this Agreement, take due account of the rulings contained in the case law of the Court of Justice in respect of provisions of the Regulation on the service of documents and any implementing Community measures.

3. Denmark may, like the Council, the Commission and any Member State, request the Court of Justice to give a ruling on a question of interpretation of this Agreement. The ruling given by the Court of Justice in response to such a request shall not apply to judgments of courts or tribunals of the Member States which have become res judicata.

4. Denmark shall be entitled to submit observations to the Court of Justice in cases where a question has been referred to it by a court or tribunal of a Member State for a preliminary ruling concerning the interpretation of any provision referred to in Article 2(1).

5. The Protocol on the Statute of the Court of Justice of the European Communities and its Rules of Procedure shall apply.

6. If the provisions of the Treaty establishing the European Community regarding rulings by the Court of Justice are amended with consequences for rulings in respect of the Regulation on the service of documents, Denmark may notify the Commission of its decision not to apply the amendments under this Agreement. Notification shall be given at the time of the entry into force of the amendments or within 60 days thereafter.

In such a case this Agreement shall be considered terminated. Termination shall take effect three months after the notification.

7. Requests that have been transmitted before the date of termination of the Agreement as set out in paragraph 6 are not affected hereby.

Article 7

Jurisdiction of the Court of Justice of the European Communities in relation to compliance with the Agreement

1. The Commission may bring before the Court of Justice cases against Denmark concerning non-compliance with any obligation under this Agreement.

2. Denmark may bring a complaint before the Commission as to the non-compliance by a Member State of its obligations under this Agreement.

3. The relevant provisions of the Treaty establishing the European Community governing proceedings before the Court of Justice as well as the Protocol on the Statute of the Court of Justice of the European Communities and its Rules of Procedure shall apply.

Article 8

Territorial application

This Agreement shall apply to the territories referred to in Article 299 of the Treaty establishing the European Community.

Article 9

Termination of the Agreement

1. This Agreement shall terminate if Denmark informs the other Member States that it no longer wishes to avail itself of the provisions of Part I of the Protocol on the position of Denmark, in accordance with Article 7 of that Protocol.

2. This Agreement may be terminated by either Contracting Party giving notice to the other Contracting Party. Termination shall be effective six months after the date of such notice.

3. Requests that have been transmitted before the date of termination of the Agreement as set out in paragraph 1 or 2 are not affected hereby.

Article 10

Entry into force

1. The Agreement shall be adopted by the Contracting Parties in accordance with their respective procedures.

2. The Agreement shall enter into force on the first day of the sixth month following the notification by the Contracting Parties of the completion of their respective procedures required for this purpose.

Article 11

Authenticity of texts

This Agreement is drawn up in duplicate in the Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovene, Slovak, Spanish and Swedish languages, each of these texts being equally authentic.

Hecho en Bruselas, el diecinueve de octubre del dos mil cinco.

V Bruselu dne devatenactého íjna dva tisíce pt.

Udfærdiget i Bruxelles den nittende oktober to tusind og fem.

Geschehen zu Brüssel am neunzehnten Oktober zweitausendfünf.

Kahe tuhande viienda aasta oktoobrikuu üheksateistkümnendal päeval Brüsselis.

, .

Done at Brussels on the nineteenth day of October in the year two thousand and five.

Fait à Bruxelles, le dix-neuf octobre deux mille cinq.

Fatto a Bruxelles, addi diciannove ottobre duemilacinque.

Brisel, divtksto piekt gada devipadsmitaj oktobr.

Priimta du tkstaniai penkt met spalio devyniolikt dien Briuselyje.

Kelt Brüsszelben, a kettezer ötödik év október tizenkilencedik napjan.

Magmul fi Brussel, fid-dsatax jum ta' Ottubru tas-sena elfejn u amsa.

Gedaan te Brussel, de negentiende oktober tweeduizend vijf.

Sporzdzono w Brukseli dnia dziewitnastego padziernika roku dwa tysice pitego.

Feito em Bruxelas, em dezanove de Outubro de dois mil e cinco.

V Bruseli da devätnasteho oktobra dvetisícpä.

V Bruslju, devetnajstega oktobra leta dva tiso pet.

Tehty Brysselissä yhdeksäntenätoista päivänä lokakuuta vuonna kaksituhattaviisi.

Som skedde i Bryssel den nittonde oktober tjugohundrafem.

Por la Comunidad Europea

Za Evropské spoleenství

For Det Europæiske Fællesskab

Für die Europäische Gemeinschaft

Euroopa Ühenduse nimel

For the European Community

Pour la Communauté européenne

Per la Comunità europea

Eiropas Kopienas vrd

Europos bendrijos vardu

Az Európai Közösség részérl

Gall-Komunità Ewropea

Voor de Europese Gemeenschap

W imieniu Wspolonoty Europejskiej

Pela Comunidade Europeia

Za Europske spoloenstvo

Za Evropsko skupnost

Euroopan yhteisön puolesta

På Europeiska gemenskapens vägnar

Por el Reino de Dinamarca

Za Danské kralovství

For Kongeriget Danmark

Für das Königreich Dänemark

Taani Kuningriigi nimel

For the Kingdom of Denmark

Pour le Royaume de Danemark

Per il Regno di Danimarca

Dnijas Karalistes vrd

Danijos Karalysts vardu

A Dan Kiralysag részérl

Gar-Renju tad-Danimarka

Voor het Koninkrijk Denemarken

W imieniu Krolestwa Danii

Pelo Reino da Dinamarca

Za Danske kraovstvo

Za Kraljevino Dansko

Tanskan kuningaskunnan puolesta

På Konungariket Danmarks vägnar

[1] OJ C 261, 27.8.1997, p. 1. On the same day as the Convention was drawn up the Council took note of the explanatory report on the Convention which is set out on p. 26 of the aforementioned Official Journal.

[2] OJ L 160, 30.6.2000, p. 37.

DOCNUM	22005A1117(01)
AUTHOR	European Community ; Denmark
FORM	Agreement
TREATY	European Community
PUBREF	OJ L 300, 17.11.2005, p. 55-60 (ES, CS, DA, DE, ET, EL, EN, FR, IT, LV, LT, HU, NL, PL, PT, SK, SL, FI, SV) OJ L 175M , 29.6.2006, p. 3-8 (MT)
DOC	2005/10/19
INFORCE	2007/07/01=EV
ENDVAL	9999/99/99

SIGNED	2005/10/19=BRUXELLES
LEGBASE	12002E061 12002E300 12002E300
LEGCIT	31997F0827(01) 32000R1348 12002E299 11997D/PRO/05 12002E068 31991Q0704(02)
MODIFIED	Relation 32005D0794 Adopted by 32006D0326 from 27/04/2006
SUBSPREP	Relation 22007X0404(01)
SUB	Justice and home affairs
REGISTER	19200000
AUTLANG	The official languages ; German ; English ; Danish ; Spanish ; Estonian ; Finnish ; French ; Greek ; Hungarian ; Italian ; Latvian ; Lithuanian ; Maltese ; Dutch ; Polish ; Portuguese ; Slovenian ; Slovak ; Swedish ; Czech
MISCINF	DEN/PREAV 6 MOISS
DATES	of document: 19/10/2005 of effect: 01/07/2007; Entry into force See Art 10.2 + 22007X0404(01) of signature: 19/10/2005; Brussels end of validity: 99/99/9999

Information concerning the date of entry into force of the Agreement between the European Community and the Kingdom of Denmark on the service of judicial and extrajudicial documents in civil or commercial matters

Information concerning the date of entry into force of the Agreement between the European Community and the Kingdom of Denmark on the service of judicial and extrajudicial documents in civil or commercial matters

The Agreement between the European Community and the Kingdom of Denmark on the service of judicial and extrajudicial documents in civil or commercial matters [1] signed in Brussels on 19 October 2005 will enter into force on 1 July 2007 in accordance with Article 10(2) of the Agreement.

[1] OJ L 300, 17.11.2005, p. 55.

DOCNUM	22007X0404(01)
AUTHOR	Council
FORM	Info
TREATY	European Community
PUBREF	OJ L 94, 4.4.2007, p. 70-70 (BG, ES, CS, DA, DE, ET, EL, EN, FR, IT, LV, LT, HU, NL, PL, PT, RO, SK, SL, FI, SV) OJ L 4M , 8.1.2008, p. 324-324 (MT)
PUB	2007/04/04
DOC	2007/04/04
ENDVAL	9999/99/99
EARLACTS	22005A1117(01) Relation
SUB	Justice and home affairs
REGISTER	19200000
DATES	of document: 04/04/2007; Date of publication end of validity: 99/99/9999

2006/326/EC: Council Decision of 27 April 2006 concerning the conclusion of the Agreement between the European Community and the Kingdom of Denmark on the service of judicial and extrajudicial documents in civil or commercial matters

Council Decision

of 27 April 2006

concerning the conclusion of the Agreement between the European Community and the Kingdom of Denmark on the service of judicial and extrajudicial documents in civil or commercial matters

(2006/326/EC)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) thereof, in conjunction with the first sentence of the first subparagraph of Article 300(2) and the first subparagraph of Article 300(3) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament [1],

Whereas:

(1) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, Denmark is not bound by the provisions of 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 [2], nor subject to their application.

(2) The Commission has negotiated an Agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of Regulation (EC) No 1348/2000.

(3) The Agreement was signed, on behalf of the European Community, on 19 October 2005, subject to its possible conclusion at a later date, in accordance with Council Decision 2005/794/EC of 20 September 2005 [3].

(4) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community, the United Kingdom and Ireland are taking part in the adoption and application of this Decision.

(5) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, Denmark is not taking part in the adoption of this Decision and is not bound by it or subject to its application.

(6) The Agreement should be approved,

HAS DECIDED AS FOLLOWS:

Article 1

The Agreement between the European Community and the Kingdom of Denmark on the service of judicial and extrajudicial documents in civil or commercial matters is hereby approved on behalf of the Community.

Article 2

The President of the Council is hereby authorised to designate the person empowered to make the notification provided for in Article 10(2) of the Agreement.

Done at Luxembourg, 27 April 2006.

For the Council

The President

L. Prokop

[1] Opinion delivered on 23 March 2006 (not yet published in the Official Journal).

[2] OJ L 160, 30.6.2000, p. 37.

[3] OJ L 300, 17.11.2005, p. 53.

DOCNUM	32006D0326
AUTHOR	Council
FORM	Decision sui generis
TREATY	European Community
PUBREF	OJ L 120, 5.5.2006, p. 23-23 (ES, CS, DA, DE, ET, EL, EN, FR, IT, LV, LT, HU, NL, PL, PT, SK, SL, FI, SV) OJ L 294M , 25.10.2006, p. 9-9 (MT)
PUB	2006/05/05
DOC	2006/04/27
INFORCE	2006/04/27=EV
ENDVAL	9999/99/99
LEGBASE	12002E061 12002E300 12002E300
LEGCIT	32000R1348 32005D0794 11997D/PRO/05 11997D/PRO/04

MODIFIES	22005A1117(01) Adoption from 27/04/2006 52005PC0146(02) Adoption
SUB	Justice and home affairs
REGISTER	19200000
PREPWORK	PR;COMM;CO 2005/0146 FIN PCONS;; AV;PE;RENDU 23/03/2006
MISCINF	CNS 2005/0056 N/APPL DK
DATES	of document: 27/04/2006 of effect: 27/04/2006; Entry into force Date of document end of validity: 99/99/9999

52005PC0146(02)
OC>

Proposal for a Council Decision concerning the conclusion of the Agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of Council Regulation (EC) No 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters

[pic] ¦ COMMISSION OF THE EUROPEAN COMMUNITIES ¦

Brussels, 18.04.2005

COM(2005) 146 final

2005/0056 (CNS)

Proposal for a

COUNCIL DECISION

concerning the signing of the Agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of Council Regulation (EC) No 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters

Proposal for a

COUNCIL DECISION

concerning the conclusion of the Agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of Council Regulation (EC) No 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters

(presented by the Commission)

EXPLANATORY MEMORANDUM

1. Political and legal background

Pursuant to Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on the European Union and the Treaty establishing the European Community, Denmark does not participate in Title IV of the Treaty. As a consequence, Community instruments adopted in the field of, among others, judicial cooperation in civil matters are not binding upon or applicable in Denmark.

One of these Community instruments is Council Regulation (EC) No. 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters. The United Kingdom and Ireland having exercised their right to opt in, this Regulation applies to all Member States except Denmark. Regulation 1348/2000 plays an important role for the functioning of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, since the latter refers to its provisions for the service of documents instituting proceedings or equivalent documents[1]. Regulation 44/2001 also applies to all Member States except Denmark. It revised and modernized the rules of the Brussels Convention of 1968 on jurisdiction and the recognition and enforcement of judgements to which all Member States including Denmark are a party. The non-application in Denmark of Regulation 44/2001 results in an unsatisfactory legal situation, where applicable rules on jurisdiction, recognition and enforcement of judgments in Denmark and in other Member States of the European Union differ from each other. This constitutes a step backwards given that prior to the entry into force of Regulation 44/2001 the rules of the Brussels Convention applied uniformly to all Member States. The current situation therefore jeopardizes the uniformity and legal certainty of the Community rules.

Denmark has expressed on several occasions its interest to participate in the regime constituted by Regulations 44/2001 and 1348/2000. After in depth discussions, the Commission accepted to negotiate

parallel agreements with Denmark, provided that the following conditions were fulfilled: Such a solution would have to be of an exceptional nature and for a transitional period only, the participation of Denmark in the Community regime would have to be fully in the interests of the Community and its citizens and the requirements imposed on Denmark would have to be identical to those imposed on all Member States, so as to ensure that rules with the same content are applied in Denmark and in the other Member States.

In view of the situation outlined above, the Commission considered it to be in the Community interest to extend to Denmark the provisions of Regulation 44/2001 and Regulation 1348/2000. The agreement extending the provisions of Regulation 44/2001 to Denmark is the subject matter of a separate Council decision. In particular, the Commission considered that if the provisions of Regulation 44/2001 are extended to Denmark by virtue of a parallel agreement, the provisions of Regulation 1348/2000 had to be so extended as well due to the close link of the two instruments.

The Commission presented on 28th June 2002 a recommendation for a Council Decision authorizing the Commission to open negotiations for the conclusion of two agreements between the European Community and Denmark, extending both Regulation 44/2001 and Regulation 1348/2000 to Denmark.

The Council decided on 8 Mai 2003 to exceptionally authorize the Commission to negotiate an agreement with Denmark with the view to make the provisions of Regulation (EC) 44/2001 as well as the provisions of Regulation (EC) No 1348/2000 applicable to Denmark under international law.

2. Results of the Negotiations

The Commission negotiated the parallel agreement extending to Denmark the provisions of Regulation 1348/2000 on the service of judicial and extrajudicial documents in civil and commercial matters in accordance with the Council's negotiating directives, carefully ensuring that rights and obligations of Denmark under this agreement correspond to rights and obligations of the other Member States.

As a result, the parallel agreement contains in particular the following provisions:

- appropriate rules on the role of the Court of Justice to ensure the uniform interpretation of the instrument applied by the parallel agreement between Denmark and the other Member States;

- a mechanism to enable Denmark to accept future amendments by the Council to the basic instrument and the future implementing measures to be adopted under Article 202 of the EC Treaty;

- a clause providing that the agreement is considered terminated if Denmark refuses to accept such future amendments and implementing measures;

- rules specifying Denmark's obligations in negotiations with third countries for agreements concerning matters covered by the parallel agreement;

- the possibility of denouncing the parallel agreement by giving notice to the other Contracting Party.

3. Conclusions

In view of the positive outcome of the negotiations, the Commission recommends that the Council adopt the following two decisions:

Firstly, a decision concerning the signing of the Agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of Council Regulation (EC) No 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters.

Secondly, a decision concerning the conclusion of the Agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of Council Regulation (EC) No

1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters.

Proposal for a

COUNCIL DECISION

concerning the signing of the Agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of Council Regulation (EC) No 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and in conjunction with the first subparagraph of Article 300(2) thereof,

Having regard to the proposal from the Commission[2],

Whereas:

(1) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and the Treaty establishing the European Community, Denmark is not bound by the provisions of Regulation (EC) No 1348/2000[3], nor subject to their application.

(2) By Decision of 8 May 2003, the Council authorised the Commission to negotiate an agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of the above-mentioned Regulation.

(3) The Commission has negotiated such agreement, on behalf of the Community, with the Kingdom of Denmark.

(4) The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the TEU and the TEC, are taking part in the adoption and application of this Decision.

(5) In accordance with Articles 1 and 2 of the above-mentioned Protocol on the position of Denmark, Denmark is not taking part in the adoption and application of this Decision.

(6) The Agreement, initialled at Brussels on 17 January 2005, should be signed.

HAS DECIDED AS FOLLOWS:

Sole Article

Subject to a possible conclusion at a later date, the President of the Council is hereby authorised to designate the person(s) empowered to sign, on behalf of the European Community, the Agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of Regulation (EC) No. 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters.

Done at Brussels,

For the Council

The President

2005/0056 (CNS)

Proposal for a

COUNCIL DECISION

concerning the conclusion of the Agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of Council Regulation (EC) No 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and in conjunction with the first subparagraph of Article 300(2) and the first subparagraph of Article 300 (3) thereof,

Having regard to the proposal from the Commission[4],

Having regard to the opinion of the European Parliament[5],

Whereas:

(1) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and the Treaty establishing the European Community, Denmark is not bound by the provisions of Regulation (EC) No 1348/2000[6], nor subject to their application.

(2) The Commission has negotiated an agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of the above-mentioned Regulation.

(3) The Agreement was signed, on behalf of the European Community, on .....2005, subject to its possible conclusion at a later date, in accordance with Decision.../.../EC of the Council of [.....].

(4) The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the TEU and the TEC, are taking part in the adoption and application of this Decision.

(5) In accordance with Articles 1 and 2 of the above-mentioned Protocol on the position of Denmark, Denmark is not taking part in the adoption and application of this Decision.

(6) This Agreement should be approved.

HAS DECIDED AS FOLLOWS:

Article 1

The Agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of Council Regulation (EC) No 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters is approved on behalf of the Community.

The text of the Agreement is attached to this Decision.

Article 2

The President of the Council is hereby authorised to designate the person empowered to make the notification provided for in Article 10(2) of the Agreement.

Done at Brussels,

For the Council

B5>**52005PC0146(02)**

The President

ANNEX

AGREEMENT

between the European Community and

the Kingdom of Denmark

on

the service of judicial and extrajudicial documents in civil or commercial matters

THE EUROPEAN COMMUNITY,

hereinafter referred to as the Community, of the one part, and

THE KINGDOM OF DENMARK,

hereinafter referred to as Denmark, of the other part,

1. DESIRING to improve and expedite transmission between Denmark and the other Member States of the Community of judicial and extrajudicial documents in civil or commercial matters,

2. CONSIDERING that transmission for this purpose is to be made directly between local bodies designated by the Contracting Parties,

3. CONSIDERING that speed in transmission warrants the use of all appropriate means, provided that certain conditions as to the legibility and reliability of the documents received are observed,

4. CONSIDERING that security in transmission requires that the document to be transmitted be accompanied by a pre-printed form, to be completed in the language of the place where the service is to be effected, or in another language accepted by the receiving Member State,

5. CONSIDERING that to secure the effectiveness of this Agreement, the possibility of refusing service of documents should be confined to exceptional situations,

6. WHEREAS the Convention on the service in the Member States of the European Union of judicial and extrajudicial documents in civil or commercial matters drawn up by the Council of the European Union by Act of 26 May 1997[7] has not entered into force and that continuity in the results of the negotiations for conclusion of the Convention should be ensured,

7. WHEREAS the main content of that Convention has been taken over in the Council of the European Union Regulation No. 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters[8] (the Regulation on the service of documents),

8. REFERRING to the Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty establishing the European Community (the Protocol on the position of Denmark) pursuant to which the Regulation on the service of documents shall not be binding upon or applicable in Denmark,

9. DESIRING that the provisions of the Regulation on the service of documents, future amendments hereto and the implementing measures relating to it should under international law apply to the relations between the Community and Denmark being a Member State with a special position with respect to Title IV of the Treaty establishing the European Community,

10. STRESSING the importance of proper co-ordination between the Community and Denmark with regard to the negotiation and conclusion of international agreements that may affect or alter the scope of the Regulation on the service of documents,

11. STRESSING that Denmark should seek to join international agreements entered into by the Community where Danish participation in such agreements is relevant for the coherent application of the Regulation on the service of documents and this Agreement,

12. STATING that the Court of Justice of the European Communities should have jurisdiction in order to secure the uniform application and interpretation of this Agreement including the provisions of the Regulation on the service of documents and any implementing Community measures forming part of this Agreement,

13. REFERRING to the jurisdiction conferred to the Court of Justice of the European Communities pursuant to Article 68(1) of the Treaty establishing the European Community to give rulings on preliminary questions relating to the validity and interpretation of acts of the institutions of the Community based on Title IV of the Treaty, including the validity and interpretation of this Agreement, and to the circumstance that this provision shall not be binding upon or applicable in Denmark, as results from the Protocol on the position of Denmark,

14. CONSIDERING that the Court of Justice of the European Communities should have jurisdiction under the same conditions to give preliminary rulings on questions concerning the validity and interpretation of this Agreement which are raised by a Danish court or tribunal, and that Danish courts and tribunals should therefore request preliminary rulings under the same conditions as courts and tribunals of other Member States in respect of the interpretation of the Regulation on the service of documents and its implementing measures,

15. REFERRING to the provision that, pursuant to Article 68(3) of the Treaty establishing the European Community, the Council of the European Union, the European Commission and the Member States may request the Court of Justice of the European Communities to give a ruling on the interpretation of acts of the institutions of the Community based on Title IV of the Treaty, including the interpretation of this Agreement, and the circumstance that this provision shall not be binding upon or applicable in Denmark, as results from the Protocol on the position of Denmark,

16. CONSIDERING that Denmark should, under the same conditions as other Member States in respect of the Regulation on the service of documents and its implementing measures, be accorded the possibility to request the Court of Justice of the European Communities to give rulings on questions relating to the interpretation of this Agreement,

17. STRESSING that under Danish law the courts in Denmark should- when interpreting this Agreement including the provisions of the Regulation on the service of documents and any implementing Community measures forming part of this Agreement - take due account of the rulings contained in the case law of the Court of Justice of the European Communities and of the courts of the Member States of the European Communities in respect of provisions of the Regulation on the service of documents and any implementing Community measures,

18. CONSIDERING that it should be possible to request the Court of Justice of the European Communities to rule on questions relating to compliance with obligations under this Agreement pursuant to the provisions of the Treaty establishing the European Community governing proceedings before the Court,

19. Whereas, by virtue of article 300(7) of the Treaty establishing the European Community, this agreement binds Member States; it is therefore appropriate that Denmark, in the case of non compliance by a Member State, should be able to seize the Commission as guardian of the Treaty;

B7>**52005PC0146(02)**

HAVE AGREED AS FOLLOWS:

ARTICLE 1

Aim

1. The aim of this Agreement is to apply the provisions of 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 (the Regulation on the service of documents) and its implementing measures to the relations between the Community and Denmark, in accordance with Article 2(1).

2. It is the objective of the Contracting Parties to arrive at a uniform application and interpretation of the provisions of the Regulation on the service of documents and its implementing measures in all Member States.

3. The provisions of Articles 3(1), 4(1) and 5(1) of this Agreement result from the Protocol on the position of Denmark.

ARTICLE 2

Cooperation on the service of documents

1. The provisions of the Regulation on the service of documents, which is annexed to this Agreement and forms part thereof, together with its implementing measures adopted pursuant to Article 17 of the Regulation and - in respect of implementing measures adopted after the entry into force of this Agreement - implemented by Denmark as referred to in Article 4 of this Agreement, and the information communicated by Member States under Article 23 of the Regulation, shall under international law apply to the relation between the Community and Denmark.

2. The date of entry into force of this Agreement shall apply instead of the date referred to in Article 25 of the Regulation.

ARTICLE 3

Amendments to the Regulation on the service of documents

1. Denmark shall not take part in the adoption of amendments to the Regulation on the service of documents and no such amendments shall be binding upon or applicable in Denmark.

2. Whenever amendments to the Regulation are adopted Denmark shall notify the Commission of its decision whether or not to implement the content of such amendments. Notification shall be given at the time of the adoption of the amendments or within 30 days hereafter.

3. If Denmark decides that it will implement the content of the amendments the notification shall indicate whether implementation can take place administratively or requires parliamentary approval.

4. If the notification indicates that implementation can take place administratively the notification shall, moreover, state that all necessary administrative measures enter into force on the date of entry into force of the amendments to the Regulation or have entered into force on the date of the notification, whichever date is the latest.

5. If the notification indicates that implementation requires parliamentary approval in Denmark the following rules shall apply:

1. Legislative measures in Denmark shall enter into force on the date of entry into force of the amendments to the Regulation or within 6 months after the notification, whichever date is the latest;

2. Denmark shall notify the Commission of the date upon which the implementing legislative measures enter into force.

6. A Danish notification that the content of the amendments have been implemented in Denmark, cf. paragraph 4 and 5, creates mutual obligations under international law between Denmark and the Community. The amendments to the Regulation shall then constitute amendments to this Agreement and shall be considered annexed hereto.

7. In case:

3. Denmark notifies its decision not to implement the content of the amendments; or

4. Denmark does not make a notification within the 30 days time limit set out in paragraph 2; or

5. Legislative measures in Denmark do not enter into force within the time limits set out in paragraph 5;

this Agreement shall be considered terminated unless the parties decide otherwise within 90 days or, in the situation referred to under c, legislative measures in Denmark enter into force within the same period. Termination shall take effect 3 months after the expiry of the 90 days period.

8. Requests that have been transmitted before the date of termination of the Agreement as set out in paragraph 7 are not affected hereby.

ARTICLE 4

Implementing measures

1. Denmark shall not take part in the adoption of opinions by the Committee referred to in Article 18 of the Regulation on the service of documents. Implementing measures adopted pursuant to Article 17 shall not be binding upon and shall not be applicable in Denmark.

2. Whenever implementing measures are adopted pursuant to Article 17 of the Regulation, the implementing measures shall be communicated to Denmark. Denmark shall notify the Commission of its decision whether or not to implement the content of the implementing measures. Notification shall be given upon receipt of the implementing measures or within 30 days hereafter.

3. The notification shall state that all necessary administrative measures in Denmark enter into force on the date of entry into force of the implementing measures or have entered into force on the date of the notification, whichever date is the latest.

4. A Danish notification that the content of the implementing measures has been implemented in Denmark creates mutual obligations under international law between Denmark and the Community. The implementing measures will then form part of this Agreement.

5. In case:

6. Denmark notifies its decision not to implement the content of the implementing measures; or

7. Denmark does not make a notification within the 30 days time limit set out in paragraph 2;

this Agreement shall be considered terminated unless the parties decide otherwise within 90 days. Termination shall take effect 3 months after the expiry of the 90 days period.

6. Requests that have been transmitted before the date of termination of the Agreement as set out in paragraph 5 are not affected hereby.

7. If in exceptional cases the implementation requires parliamentary approval in Denmark, the Danish notification under paragraph 2 shall indicate this and the provisions of Article 3(5)-(8), shall apply.

8. Denmark shall communicate to the Commission the information referred to in Articles 2, 3, 4, 9, 10, 13, 14, 15, 17(a) and 19 of the Regulation on the service of documents. The Commission shall publish this information together with the relevant information concerning the other Member States. The manual and the glossary drawn up pursuant to Article 17 shall include also the relevant information on Denmark.

ARTICLE 5

International agreements which affect the Regulation on the service of documents

1. International agreements entered into by the Community when exercising its external competence based on the rules of the Regulation on the service of documents shall not be binding upon and shall not be applicable in Denmark.

2. Denmark will abstain from entering into international agreements which may affect or alter the scope of the Regulation on the service of documents as annexed to this Agreement unless it is done in agreement with the Community and satisfactory arrangements have been made with regard to the relationship between this Agreement and the international agreement in question.

3. When negotiating international agreements that may affect or alter the scope of the Regulation on the service of documents as annexed to this Agreement, Denmark will co-ordinate its position with the Community and will abstain from any actions that would jeopardise the objectives of a co-ordinated position of the Community within its sphere of competence in such negotiations.

ARTICLE 6

Jurisdiction of the Court of Justice of the European Communities in relation to the interpretation of the Agreement

1. Where a question on the validity or interpretation of this Agreement is raised in a case pending before a Danish court or tribunal, that court or tribunal shall request the Court of Justice to give a ruling thereon whenever under the same circumstances a court or tribunal of another Member State of the European Union would be required to do so in respect of the Regulation on the service of documents and its implementing measures referred to in Article 2(1).

2. Under Danish law, the courts in Denmark shall, when interpreting this Agreement, take due account of the rulings contained in the case law of the Court of Justice in respect of provisions of the Regulation on the service of documents and any implementing Community measures.

3. Denmark may, like the Council, the Commission and any Member State, request the Court of Justice to give a ruling on a question of interpretation of this Agreement. The ruling given by the Court

of Justice in response to such a request shall not apply to judgments of courts or tribunals of the Member States which have become res judicata.

4. Denmark shall be entitled to submit observations to the Court of Justice in cases where a question has been referred to it by a court or tribunal of a Member State for a preliminary ruling concerning the interpretation of any provision referred to in Article 2(1).

5. The Protocol on the Statute of the Court of Justice of the European Communities and its Rules of Procedure shall apply.

6. If the provisions of the Treaty establishing the European Community regarding rulings by the Court of Justice are amended with consequences for rulings in respect of the Regulation on the service of documents, Denmark may notify the Commission of its decision not to apply the amendments under this Agreement. Notification shall be given at the time of the entry into force of the amendments or within 60 days hereafter.

In such a case this Agreement shall be considered terminated. Termination shall take effect 3 months after the notification.

7. Requests that have been transmitted before the date of termination of the Agreement as set out in paragraph 6 are not affected hereby.

ARTICLE 7

Jurisdiction of the Court of Justice of the European Communities in relation to compliance with the Agreement

1. The Commission may bring before the Court of Justice cases against Denmark concerning non-compliance with any obligation under this Agreement.

2. Denmark may bring a complaint to the Commission as to the non-compliance by a Member State of its obligations by virtue of this agreement.

3. The relevant provisions of the Treaty establishing the European Community governing proceedings before the Court of Justice as well as the Protocol on the Statute of the Court of Justice of the European Communities and its Rules of Procedure shall apply.

ARTICLE 8

Territorial application

This Agreement shall apply to the territories referred to in Article 299 of the Treaty establishing the European Community.

ARTICLE 9

Termination of the Agreement

1. This Agreement shall terminate if Denmark informs the other Member States that it no longer wishes to avail itself of the provisions of Part I of the Protocol on the position of Denmark,

cf. Article 7 of that Protocol.

2. This Agreement may be terminated by either Contracting Party giving notice to the other Contracting Party. Termination shall be effective six months after the date of such notice.

3. Requests that have been transmitted before the date of termination of the Agreement as set out in paragraph 1 or 2 are not affected hereby.

ARTICLE 10

Entry into force

1. The Agreement shall be adopted by the Contracting Parties in accordance with their respective procedures.

2. The Agreement shall enter into force on the first day of the sixth month following the notification by the Contracting Parties of the completion of their respective procedures required for this purpose.

ARTICLE 11

Authenticity of texts

This Agreement is drawn up in duplicate in the Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovene, Slovak, Spanish and Swedish languages, each of these texts being equally authentic.

Annex

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.

[1] Cf. Art. 26 (3) of Regulation 44/2001.

[2] OJ C [...] [...], p.[...]

[3] OJ L 160, 30.6.2000, p. 37.

[4] OJ C [...] [...], p.[...]

[5] OJ C [...] [...], p.[...]

[6] OJ L 160, 30.6.2000, p. 37.

[7] OJ C 261, 27.8.1997, p. 1. On the same day as the Convention was drawn up the Council took note of the explanatory report on the Convention which is set out on p. 26 of the aforementioned Official Journal.

[8] OJ L 160, 30.6.2000, p. 37.

DOCNUM 52005PC0146(02)

B12>**52005PC0146(02)**

AUTHOR	European Commission
FORM	Proposal for a decision sui generis
TREATY	European Community
DOC	2005/04/18
DESPATCH	2005/04/18
ENDVAL	2006/04/27
LEGBASE	12002E061 12002E300
MODIFIED	Adopted by 32006D0326
SUB	Approximation of laws ; Justice and home affairs
REGISTER	19200000
MISCINF	CNS 2005/0056
DATES	of document: 18/04/2005 of transmission: 18/04/2005; Forwarded to the Council end of validity: 27/04/2006; Adopted by 32006D0326

2005/794/EC: Council Decision of 20 September 2005 on the signing, on behalf of the Community, of the Agreement between the European Community and the Kingdom of Denmark on the service of judicial and extrajudicial documents in civil or commercial matters

Council Decision

of 20 September 2005

on the signing, on behalf of the Community, of the Agreement between the European Community and the Kingdom of Denmark on the service of judicial and extrajudicial documents in civil or commercial matters

(2005/794/EC)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) thereof, in conjunction with the first sentence of the first subparagraph of Article 300(2) thereof,

Having regard to the proposal from the Commission,

Whereas:

(1) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, Denmark is not bound by the provisions of 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 [1], nor subject to their application.

(2) By Decision of 8 May 2003, the Council authorised exceptionally the Commission to negotiate an agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of the abovementioned Regulation.

(3) The Commission has negotiated such agreement, on behalf of the Community, with the Kingdom of Denmark.

(4) The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community, are taking part in the adoption and application of this Decision.

(5) In accordance with Articles 1 and 2 of the abovementioned Protocol on the position of Denmark, Denmark is not taking part in the adoption of this Decision and is not bound by it or subject to its application.

(6) The Agreement, initialled at Brussels on 17 January 2005, should be signed,

HAS DECIDED AS FOLLOWS:

Article 1

The signing of the Agreement between the European Community and the Kingdom of Denmark on the service of judicial and extrajudicial documents in civil or commercial matters is hereby approved on behalf of the Community, subject to the Council Decision concerning the conclusion of the said Agreement.

The text of the Agreement is attached to this Decision.

Article 2

The President of the Council is hereby authorised to designate the person(s) empowered to sign the Agreement on behalf of the Community subject to its conclusion.

Done at Brussels, 20 September 2005.

For the Council

The President

M. Beckett

[1] OJ L 160, 30.6.2000, p. 37.

DOCNUM	32005D0794
AUTHOR	Council
FORM	Decision sui generis
TREATY	European Community
PUBREF	OJ L 300, 17.11.2005, p. 53-54 (ES, CS, DA, DE, ET, EL, EN, FR, IT, LV, LT, HU, NL, PL, PT, SK, SL, FI, SV) OJ L 175M , 29.6.2006, p. 1-2 (MT)
DOC	2005/09/20
INFORCE	2005/09/20=EV
ENDVAL	9999/99/99
LEGBASE	12002E061 12002E300
LEGCIT	32000R1348 11997D/PRO/05 11997D/PRO/04
MODIFIES	22005A1117(01) Relation 52005PC0146(01) Adoption
SUB	Justice and home affairs

REGISTER	19200000
PREPWORK	PR;COMM;CO 2005/0146 FIN
MISCINF	N/APPL DK
DATES	of document: 20/09/2005 of effect: 20/09/2005; Entry into force Date of document end of validity: 99/99/9999

52005PC0146(01)
OC>

Proposal for a Council Decision concerning the signing of the Agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of Council Regulation (EC) No 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters

[pic] ¦ COMMISSION OF THE EUROPEAN COMMUNITIES ¦

Brussels, 18.04.2005

COM(2005) 146 final

2005/0056 (CNS)

Proposal for a

COUNCIL DECISION

concerning the signing of the Agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of Council Regulation (EC) No 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters

Proposal for a

COUNCIL DECISION

concerning the conclusion of the Agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of Council Regulation (EC) No 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters

(presented by the Commission)

EXPLANATORY MEMORANDUM

1. Political and legal background

Pursuant to Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on the European Union and the Treaty establishing the European Community, Denmark does not participate in Title IV of the Treaty. As a consequence, Community instruments adopted in the field of, among others, judicial cooperation in civil matters are not binding upon or applicable in Denmark.

One of these Community instruments is Council Regulation (EC) No. 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters. The United Kingdom and Ireland having exercised their right to opt in, this Regulation applies to all Member States except Denmark. Regulation 1348/2000 plays an important role for the functioning of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, since the latter refers to its provisions for the service of documents instituting proceedings or equivalent documents[1]. Regulation 44/2001 also applies to all Member States except Denmark. It revised and modernized the rules of the Brussels Convention of 1968 on jurisdiction and the recognition and enforcement of judgements to which all Member States including Denmark are a party. The non-application in Denmark of Regulation 44/2001 results in an unsatisfactory legal situation, where applicable rules on jurisdiction, recognition and enforcement of judgments in Denmark and in other Member States of the European Union differ from each other. This constitutes a step backwards given that prior to the entry into force of Regulation 44/2001 the rules of the Brussels Convention applied uniformly to all Member States. The current situation therefore jeopardizes the uniformity and legal certainty of the Community rules.

Denmark has expressed on several occasions its interest to participate in the regime constituted by Regulations 44/2001 and 1348/2000. After in depth discussions, the Commission accepted to negotiate

parallel agreements with Denmark, provided that the following conditions were fulfilled: Such a solution would have to be of an exceptional nature and for a transitional period only, the participation of Denmark in the Community regime would have to be fully in the interests of the Community and its citizens and the requirements imposed on Denmark would have to be identical to those imposed on all Member States, so as to ensure that rules with the same content are applied in Denmark and in the other Member States.

In view of the situation outlined above, the Commission considered it to be in the Community interest to extend to Denmark the provisions of Regulation 44/2001 and Regulation 1348/2000. The agreement extending the provisions of Regulation 44/2001 to Denmark is the subject matter of a separate Council decision. In particular, the Commission considered that if the provisions of Regulation 44/2001 are extended to Denmark by virtue of a parallel agreement, the provisions of Regulation 1348/2000 had to be so extended as well due to the close link of the two instruments.

The Commission presented on 28th June 2002 a recommendation for a Council Decision authorizing the Commission to open negotiations for the conclusion of two agreements between the European Community and Denmark, extending both Regulation 44/2001 and Regulation 1348/2000 to Denmark.

The Council decided on 8 Mai 2003 to exceptionally authorize the Commission to negotiate an agreement with Denmark with the view to make the provisions of Regulation (EC) 44/2001 as well as the provisions of Regulation (EC) No 1348/2000 applicable to Denmark under international law.

2. Results of the Negotiations

The Commission negotiated the parallel agreement extending to Denmark the provisions of Regulation 1348/2000 on the service of judicial and extrajudicial documents in civil and commercial matters in accordance with the Council's negotiating directives, carefully ensuring that rights and obligations of Denmark under this agreement correspond to rights and obligations of the other Member States.

As a result, the parallel agreement contains in particular the following provisions:

- appropriate rules on the role of the Court of Justice to ensure the uniform interpretation of the instrument applied by the parallel agreement between Denmark and the other Member States;

- a mechanism to enable Denmark to accept future amendments by the Council to the basic instrument and the future implementing measures to be adopted under Article 202 of the EC Treaty;

- a clause providing that the agreement is considered terminated if Denmark refuses to accept such future amendments and implementing measures;

- rules specifying Denmark's obligations in negotiations with third countries for agreements concerning matters covered by the parallel agreement;

- the possibility of denouncing the parallel agreement by giving notice to the other Contracting Party.

3. Conclusions

In view of the positive outcome of the negotiations, the Commission recommends that the Council adopt the following two decisions:

Firstly, a decision concerning the signing of the Agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of Council Regulation (EC) No 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters.

Secondly, a decision concerning the conclusion of the Agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of Council Regulation (EC) No

1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters.

Proposal for a

COUNCIL DECISION

concerning the signing of the Agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of Council Regulation (EC) No 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and in conjunction with the first subparagraph of Article 300(2) thereof,

Having regard to the proposal from the Commission[2],

Whereas:

(1) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and the Treaty establishing the European Community, Denmark is not bound by the provisions of Regulation (EC) No 1348/2000[3], nor subject to their application.

(2) By Decision of 8 May 2003, the Council authorised the Commission to negotiate an agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of the above-mentioned Regulation.

(3) The Commission has negotiated such agreement, on behalf of the Community, with the Kingdom of Denmark.

(4) The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the TEU and the TEC, are taking part in the adoption and application of this Decision.

(5) In accordance with Articles 1 and 2 of the above-mentioned Protocol on the position of Denmark, Denmark is not taking part in the adoption and application of this Decision.

(6) The Agreement, initialled at Brussels on 17 January 2005, should be signed.

HAS DECIDED AS FOLLOWS:

Sole Article

Subject to a possible conclusion at a later date, the President of the Council is hereby authorised to designate the person(s) empowered to sign, on behalf of the European Community, the Agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of Regulation (EC) No. 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters.

Done at Brussels,

For the Council

The President

2005/0056 (CNS)

Proposal for a

COUNCIL DECISION

concerning the conclusion of the Agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of Council Regulation (EC) No 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and in conjunction with the first subparagraph of Article 300(2) and the first subparagraph of Article 300 (3) thereof,

Having regard to the proposal from the Commission[4],

Having regard to the opinion of the European Parliament[5],

Whereas:

(1) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and the Treaty establishing the European Community, Denmark is not bound by the provisions of Regulation (EC) No 1348/2000[6], nor subject to their application.

(2) The Commission has negotiated an agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of the above-mentioned Regulation.

(3) The Agreement was signed, on behalf of the European Community, on .....2005, subject to its possible conclusion at a later date, in accordance with Decision.../.../EC of the Council of [.....].

(4) The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the TEU and the TEC, are taking part in the adoption and application of this Decision.

(5) In accordance with Articles 1 and 2 of the above-mentioned Protocol on the position of Denmark, Denmark is not taking part in the adoption and application of this Decision.

(6) This Agreement should be approved.

HAS DECIDED AS FOLLOWS:

Article 1

The Agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of Council Regulation (EC) No 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters is approved on behalf of the Community.

The text of the Agreement is attached to this Decision.

Article 2

The President of the Council is hereby authorised to designate the person empowered to make the notification provided for in Article 10(2) of the Agreement.

Done at Brussels,

For the Council

B5>**52005PC0146(01)**

The President

ANNEX

AGREEMENT

between the European Community and

the Kingdom of Denmark

on

the service of judicial and extrajudicial documents in civil or commercial matters

THE EUROPEAN COMMUNITY,

hereinafter referred to as the Community, of the one part, and

THE KINGDOM OF DENMARK,

hereinafter referred to as Denmark, of the other part,

1. DESIRING to improve and expedite transmission between Denmark and the other Member States of the Community of judicial and extrajudicial documents in civil or commercial matters,

2. CONSIDERING that transmission for this purpose is to be made directly between local bodies designated by the Contracting Parties,

3. CONSIDERING that speed in transmission warrants the use of all appropriate means, provided that certain conditions as to the legibility and reliability of the documents received are observed,

4. CONSIDERING that security in transmission requires that the document to be transmitted be accompanied by a pre-printed form, to be completed in the language of the place where the service is to be effected, or in another language accepted by the receiving Member State,

5. CONSIDERING that to secure the effectiveness of this Agreement, the possibility of refusing service of documents should be confined to exceptional situations,

6. WHEREAS the Convention on the service in the Member States of the European Union of judicial and extrajudicial documents in civil or commercial matters drawn up by the Council of the European Union by Act of 26 May 1997[7] has not entered into force and that continuity in the results of the negotiations for conclusion of the Convention should be ensured,

7. WHEREAS the main content of that Convention has been taken over in the Council of the European Union Regulation No. 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters[8] (the Regulation on the service of documents),

8. REFERRING to the Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty establishing the European Community (the Protocol on the position of Denmark) pursuant to which the Regulation on the service of documents shall not be binding upon or applicable in Denmark,

9. DESIRING that the provisions of the Regulation on the service of documents, future amendments hereto and the implementing measures relating to it should under international law apply to the relations between the Community and Denmark being a Member State with a special position with respect to Title IV of the Treaty establishing the European Community,

10. STRESSING the importance of proper co-ordination between the Community and Denmark with regard to the negotiation and conclusion of international agreements that may affect or alter the scope of the Regulation on the service of documents,

11. STRESSING that Denmark should seek to join international agreements entered into by the Community where Danish participation in such agreements is relevant for the coherent application of the Regulation on the service of documents and this Agreement,

12. STATING that the Court of Justice of the European Communities should have jurisdiction in order to secure the uniform application and interpretation of this Agreement including the provisions of the Regulation on the service of documents and any implementing Community measures forming part of this Agreement,

13. REFERRING to the jurisdiction conferred to the Court of Justice of the European Communities pursuant to Article 68(1) of the Treaty establishing the European Community to give rulings on preliminary questions relating to the validity and interpretation of acts of the institutions of the Community based on Title IV of the Treaty, including the validity and interpretation of this Agreement, and to the circumstance that this provision shall not be binding upon or applicable in Denmark, as results from the Protocol on the position of Denmark,

14. CONSIDERING that the Court of Justice of the European Communities should have jurisdiction under the same conditions to give preliminary rulings on questions concerning the validity and interpretation of this Agreement which are raised by a Danish court or tribunal, and that Danish courts and tribunals should therefore request preliminary rulings under the same conditions as courts and tribunals of other Member States in respect of the interpretation of the Regulation on the service of documents and its implementing measures,

15. REFERRING to the provision that, pursuant to Article 68(3) of the Treaty establishing the European Community, the Council of the European Union, the European Commission and the Member States may request the Court of Justice of the European Communities to give a ruling on the interpretation of acts of the institutions of the Community based on Title IV of the Treaty, including the interpretation of this Agreement, and the circumstance that this provision shall not be binding upon or applicable in Denmark, as results from the Protocol on the position of Denmark,

16. CONSIDERING that Denmark should, under the same conditions as other Member States in respect of the Regulation on the service of documents and its implementing measures, be accorded the possibility to request the Court of Justice of the European Communities to give rulings on questions relating to the interpretation of this Agreement,

17. STRESSING that under Danish law the courts in Denmark should- when interpreting this Agreement including the provisions of the Regulation on the service of documents and any implementing Community measures forming part of this Agreement - take due account of the rulings contained in the case law of the Court of Justice of the European Communities and of the courts of the Member States of the European Communities in respect of provisions of the Regulation on the service of documents and any implementing Community measures,

18. CONSIDERING that it should be possible to request the Court of Justice of the European Communities to rule on questions relating to compliance with obligations under this Agreement pursuant to the provisions of the Treaty establishing the European Community governing proceedings before the Court,

19. Whereas, by virtue of article 300(7) of the Treaty establishing the European Community, this agreement binds Member States; it is therefore appropriate that Denmark, in the case of non compliance by a Member State, should be able to seize the Commission as guardian of the Treaty;

B7>**52005PC0146(01)**

HAVE AGREED AS FOLLOWS:

ARTICLE 1

Aim

1. The aim of this Agreement is to apply the provisions of 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 (the Regulation on the service of documents) and its implementing measures to the relations between the Community and Denmark, in accordance with Article 2(1).

2. It is the objective of the Contracting Parties to arrive at a uniform application and interpretation of the provisions of the Regulation on the service of documents and its implementing measures in all Member States.

3. The provisions of Articles 3(1), 4(1) and 5(1) of this Agreement result from the Protocol on the position of Denmark.

ARTICLE 2

Cooperation on the service of documents

1. The provisions of the Regulation on the service of documents, which is annexed to this Agreement and forms part thereof, together with its implementing measures adopted pursuant to Article 17 of the Regulation and - in respect of implementing measures adopted after the entry into force of this Agreement - implemented by Denmark as referred to in Article 4 of this Agreement, and the information communicated by Member States under Article 23 of the Regulation, shall under international law apply to the relation between the Community and Denmark.

2. The date of entry into force of this Agreement shall apply instead of the date referred to in Article 25 of the Regulation.

ARTICLE 3

Amendments to the Regulation on the service of documents

1. Denmark shall not take part in the adoption of amendments to the Regulation on the service of documents and no such amendments shall be binding upon or applicable in Denmark.

2. Whenever amendments to the Regulation are adopted Denmark shall notify the Commission of its decision whether or not to implement the content of such amendments. Notification shall be given at the time of the adoption of the amendments or within 30 days hereafter.

3. If Denmark decides that it will implement the content of the amendments the notification shall indicate whether implementation can take place administratively or requires parliamentary approval.

4. If the notification indicates that implementation can take place administratively the notification shall, moreover, state that all necessary administrative measures enter into force on the date of entry into force of the amendments to the Regulation or have entered into force on the date of the notification, whichever date is the latest.

5. If the notification indicates that implementation requires parliamentary approval in Denmark the following rules shall apply:

1. Legislative measures in Denmark shall enter into force on the date of entry into force of the amendments to the Regulation or within 6 months after the notification, whichever date is the latest;

2. Denmark shall notify the Commission of the date upon which the implementing legislative measures enter into force.

6. A Danish notification that the content of the amendments have been implemented in Denmark, cf. paragraph 4 and 5, creates mutual obligations under international law between Denmark and the Community. The amendments to the Regulation shall then constitute amendments to this Agreement and shall be considered annexed hereto.

7. In case:

3. Denmark notifies its decision not to implement the content of the amendments; or

4. Denmark does not make a notification within the 30 days time limit set out in paragraph 2; or

5. Legislative measures in Denmark do not enter into force within the time limits set out in paragraph 5;

this Agreement shall be considered terminated unless the parties decide otherwise within 90 days or, in the situation referred to under c, legislative measures in Denmark enter into force within the same period. Termination shall take effect 3 months after the expiry of the 90 days period.

8. Requests that have been transmitted before the date of termination of the Agreement as set out in paragraph 7 are not affected hereby.

ARTICLE 4

Implementing measures

1. Denmark shall not take part in the adoption of opinions by the Committee referred to in Article 18 of the Regulation on the service of documents. Implementing measures adopted pursuant to Article 17 shall not be binding upon and shall not be applicable in Denmark.

2. Whenever implementing measures are adopted pursuant to Article 17 of the Regulation, the implementing measures shall be communicated to Denmark. Denmark shall notify the Commission of its decision whether or not to implement the content of the implementing measures. Notification shall be given upon receipt of the implementing measures or within 30 days hereafter.

3. The notification shall state that all necessary administrative measures in Denmark enter into force on the date of entry into force of the implementing measures or have entered into force on the date of the notification, whichever date is the latest.

4. A Danish notification that the content of the implementing measures has been implemented in Denmark creates mutual obligations under international law between Denmark and the Community. The implementing measures will then form part of this Agreement.

5. In case:

6. Denmark notifies its decision not to implement the content of the implementing measures; or

7. Denmark does not make a notification within the 30 days time limit set out in paragraph 2;

this Agreement shall be considered terminated unless the parties decide otherwise within 90 days. Termination shall take effect 3 months after the expiry of the 90 days period.

6. Requests that have been transmitted before the date of termination of the Agreement as set out in paragraph 5 are not affected hereby.

7. If in exceptional cases the implementation requires parliamentary approval in Denmark, the Danish notification under paragraph 2 shall indicate this and the provisions of Article 3(5)-(8), shall apply.

8. Denmark shall communicate to the Commission the information referred to in Articles 2, 3, 4, 9, 10, 13, 14, 15, 17(a) and 19 of the Regulation on the service of documents. The Commission shall publish this information together with the relevant information concerning the other Member States. The manual and the glossary drawn up pursuant to Article 17 shall include also the relevant information on Denmark.

ARTICLE 5

International agreements which affect the Regulation on the service of documents

1. International agreements entered into by the Community when exercising its external competence based on the rules of the Regulation on the service of documents shall not be binding upon and shall not be applicable in Denmark.

2. Denmark will abstain from entering into international agreements which may affect or alter the scope of the Regulation on the service of documents as annexed to this Agreement unless it is done in agreement with the Community and satisfactory arrangements have been made with regard to the relationship between this Agreement and the international agreement in question.

3. When negotiating international agreements that may affect or alter the scope of the Regulation on the service of documents as annexed to this Agreement, Denmark will co-ordinate its position with the Community and will abstain from any actions that would jeopardise the objectives of a co-ordinated position of the Community within its sphere of competence in such negotiations.

ARTICLE 6

Jurisdiction of the Court of Justice of the European Communities in relation to the interpretation of the Agreement

1. Where a question on the validity or interpretation of this Agreement is raised in a case pending before a Danish court or tribunal, that court or tribunal shall request the Court of Justice to give a ruling thereon whenever under the same circumstances a court or tribunal of another Member State of the European Union would be required to do so in respect of the Regulation on the service of documents and its implementing measures referred to in Article 2(1).

2. Under Danish law, the courts in Denmark shall, when interpreting this Agreement, take due account of the rulings contained in the case law of the Court of Justice in respect of provisions of the Regulation on the service of documents and any implementing Community measures.

3. Denmark may, like the Council, the Commission and any Member State, request the Court of Justice to give a ruling on a question of interpretation of this Agreement. The ruling given by the Court

of Justice in response to such a request shall not apply to judgments of courts or tribunals of the Member States which have become res judicata.

4. Denmark shall be entitled to submit observations to the Court of Justice in cases where a question has been referred to it by a court or tribunal of a Member State for a preliminary ruling concerning the interpretation of any provision referred to in Article 2(1).

5. The Protocol on the Statute of the Court of Justice of the European Communities and its Rules of Procedure shall apply.

6. If the provisions of the Treaty establishing the European Community regarding rulings by the Court of Justice are amended with consequences for rulings in respect of the Regulation on the service of documents, Denmark may notify the Commission of its decision not to apply the amendments under this Agreement. Notification shall be given at the time of the entry into force of the amendments or within 60 days hereafter.

In such a case this Agreement shall be considered terminated. Termination shall take effect 3 months after the notification.

7. Requests that have been transmitted before the date of termination of the Agreement as set out in paragraph 6 are not affected hereby.

ARTICLE 7

Jurisdiction of the Court of Justice of the European Communities in relation to compliance with the Agreement

1. The Commission may bring before the Court of Justice cases against Denmark concerning non-compliance with any obligation under this Agreement.

2. Denmark may bring a complaint to the Commission as to the non-compliance by a Member State of its obligations by virtue of this agreement.

3. The relevant provisions of the Treaty establishing the European Community governing proceedings before the Court of Justice as well as the Protocol on the Statute of the Court of Justice of the European Communities and its Rules of Procedure shall apply.

ARTICLE 8

Territorial application

This Agreement shall apply to the territories referred to in Article 299 of the Treaty establishing the European Community.

ARTICLE 9

Termination of the Agreement

1. This Agreement shall terminate if Denmark informs the other Member States that it no longer wishes to avail itself of the provisions of Part I of the Protocol on the position of Denmark,

cf. Article 7 of that Protocol.

2. This Agreement may be terminated by either Contracting Party giving notice to the other Contracting Party. Termination shall be effective six months after the date of such notice.

3. Requests that have been transmitted before the date of termination of the Agreement as set out in paragraph 1 or 2 are not affected hereby.

ARTICLE 10

Entry into force

1. The Agreement shall be adopted by the Contracting Parties in accordance with their respective procedures.

2. The Agreement shall enter into force on the first day of the sixth month following the notification by the Contracting Parties of the completion of their respective procedures required for this purpose.

ARTICLE 11

Authenticity of texts

This Agreement is drawn up in duplicate in the Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovene, Slovak, Spanish and Swedish languages, each of these texts being equally authentic.

Annex

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.

[1] Cf. Art. 26 (3) of Regulation 44/2001.

[2] OJ C [...] [...], p.[...]

[3] OJ L 160, 30.6.2000, p. 37.

[4] OJ C [...] [...], p.[...]

[5] OJ C [...] [...], p.[...]

[6] OJ L 160, 30.6.2000, p. 37.

[7] OJ C 261, 27.8.1997, p. 1. On the same day as the Convention was drawn up the Council took note of the explanatory report on the Convention which is set out on p. 26 of the aforementioned Official Journal.

[8] OJ L 160, 30.6.2000, p. 37.

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B12>**52005PC0146(01)**

AUTHOR	European Commission
FORM	Proposal for a decision sui generis
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REGISTER	19200000
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Go to the Service Section

(In the relations between the Contracting States, this Convention replaces the first chapter of the Convention on civil procedure of 1 March 1954)

CONVENTION ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS

(Concluded 15 November 1965)
(Entered into force 10 February 1969)

The States signatory to the present Convention,
Desiring to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time,
Desiring to improve the organisation of mutual judicial assistance for that purpose by simplifying and expediting the procedure,
Have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

Article 1
The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad.
This Convention shall not apply where the address of the person to be served with the document is not known.

CHAPTER I – JUDICIAL DOCUMENTS

Article 2
Each Contracting State shall designate a Central Authority which will undertake to receive requests for service coming from other Contracting States and to proceed in conformity with the provisions of Articles 3 to 6.
Each State shall organise the Central Authority in conformity with its own law.

Article 3
The authority or judicial officer competent under the law of the State in which the documents originate shall forward to the Central Authority of the State addressed a request conforming to the model annexed to the present Convention, without any requirement of legalisation or other equivalent formality.
The document to be served or a copy thereof shall be annexed to the request. The request and the document shall both be furnished in duplicate.

Article 4
If the Central Authority considers that the request does not comply with the provisions of the present Convention it shall promptly inform the applicant and specify its objections to the request.

Article 5
The Central Authority of the State addressed shall itself serve the document or shall arrange to have it served by an appropriate agency, either –
a) by a method prescribed by its internal law 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.
Subject to sub-paragraph *(b)* of the first paragraph of this Article, the document may always be served by delivery

to an addressee who accepts it voluntarily.
If the document is to be served under the first paragraph above, the Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of the State addressed. That part of the request, in the form attached to the present Convention, which contains a summary of the document to be served, shall be served with the document.

Article 6
The Central Authority of the State addressed or any authority which it may have designated for that purpose, shall complete a certificate in the form of the model annexed to the present Convention.
The certificate shall state that the document has been served and shall include the method, the place and the date of service and the person to whom the document was delivered. If the document has not been served, the certificate shall set out the reasons which have prevented service.
The applicant may require that a certificate not completed by a Central Authority or by a judicial authority shall be countersigned by one of these authorities.
The certificate shall be forwarded directly to the applicant.

Article 7
The standard terms in the model annexed to the present Convention shall in all cases be written either in French or in English. They may also be written in the official language, or in one of the official languages, of the State in which the documents originate.
The corresponding blanks shall be completed either in the language of the State addressed or in French or in English.

Article 8
Each Contracting State shall be free to effect service of judicial documents upon persons abroad, without application of any compulsion, directly through its diplomatic or consular agents.
Any State may declare that it is opposed to such service within its territory, unless the document is to be served upon a national of the State in which the documents originate.

Article 9
Each Contracting State shall be free, in addition, 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 for this purpose.
Each Contracting State may, if exceptional circumstances so require, use diplomatic channels for the same purpose.

Article 10
Provided the State of destination does not object, the present Convention shall not interfere with –
a) the freedom to send judicial documents, by postal channels, directly to persons abroad,
b) 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,
c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

Article 11
The present Convention shall not prevent two or more Contracting States from agreeing to permit, for the purpose of service of judicial documents, channels of transmission other than those provided for in the preceding Articles and, in particular, direct communication between their respective authorities.

Article 12

The 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 by the State addressed.

The applicant shall pay or reimburse the costs occasioned by-

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

b) the use of a particular method of service.

Article 13

Where a request for service complies with the terms of the present Convention, the State addressed may refuse to comply therewith only if it deems that compliance would infringe its sovereignty or security.

It may not refuse to comply solely on the ground that, under its internal law, it claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not permit the action upon which the application is based.

The Central Authority shall, in case of refusal, promptly inform the applicant and state the reasons for the refusal.

Article 14

Difficulties which may arise in connection with the transmission of judicial documents for service shall be settled through diplomatic channels.

Article 15

Where a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, 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.

Each Contracting State shall be free to declare that the judge, notwithstanding the provisions of the first paragraph of this Article, may give judgment even if no certificate of service or delivery 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.

Notwithstanding the provisions of the preceding paragraphs the judge may order, in case of urgency, any provisional or protective measures.

Article 16

When a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and a judgment has been entered against a defendant who has not appeared, the judge shall have the power to relieve the defendant from the effects of the expiration of the time for appeal from the judgment if the following conditions are fulfilled –

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.

An application for relief may be filed only within a reasonable time after the defendant has knowledge of the

judgment.
Each Contracting State may declare that the application will not be entertained if it is filed after the expiration of a time to be stated in the declaration, but which shall in no case be less than one year following the date of the judgment.
This Article shall not apply to judgments concerning status or capacity of persons.

CHAPTER II – EXTRAJUDICIAL DOCUMENTS

Article 17

Extrajudicial documents emanating from authorities and judicial officers of a Contracting State may be transmitted for the purpose of service in another Contracting State by the methods and under the provisions of the present Convention.

CHAPTER III – GENERAL CLAUSES

Article 18

Each Contracting State may designate other authorities in addition to the Central Authority and shall determine the extent of their competence.
The applicant shall, however, in all cases, have the right to address a request directly to the Central Authority.
Federal States shall be free to designate more than one Central Authority.

Article 19

To the extent that the internal law of a Contracting State permits methods of transmission, other than those provided for in the preceding Articles, of documents coming from abroad, for service within its territory, the present Convention shall not affect such provisions.

Article 20

The present Convention shall not prevent an agreement between any two or more Contracting States to dispense with –
a) the necessity for duplicate copies of transmitted documents as required by the second paragraph of Article 3,
b) the language requirements of the third paragraph of Article 5 and Article 7,
c) the provisions of the fourth paragraph of Article 5,
d) the provisions of the second paragraph of Article 12.

Article 21

Each Contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the following –
a) the designation of authorities, pursuant to Articles 2 and 18,
b) the designation of the authority competent to complete the certificate pursuant to Article 6,
c) the designation of the authority competent to receive documents transmitted by consular channels, pursuant to Article 9.
Each Contracting State shall similarly inform the Ministry, where appropriate, of –
a) opposition to the use of methods of transmission pursuant to Articles 8 and 10,
b) declarations pursuant to the second paragraph of Article 15 and the third paragraph of Article 16,
c) all modifications of the above designations, oppositions and declarations.

Article 22

Where Parties to the present Convention are also Parties to one or both of the Conventions on civil procedure signed at The Hague on 17th July 1905, and on 1st March 1954, this Convention shall replace as between them Articles 1 to 7 of the earlier Conventions.

Article 23
The present Convention shall not affect the application of Article 23 of the Convention on civil procedure signed at The Hague on 17th July 1905, or of Article 24 of the Convention on civil procedure signed at The Hague on 1st March 1954.
These Articles shall, however, apply only if methods of communication, identical to those provided for in these Conventions, are used.

Article 24
Supplementary agreements between Parties to the Conventions of 1905 and 1954 shall be considered as equally applicable to the present Convention, unless the Parties have otherwise agreed.

Article 25
Without prejudice to the provisions of Articles 22 and 24, the present Convention shall not derogate from Conventions containing provisions on the matters governed by this Convention to which the Contracting States are, or shall become, Parties.

Article 26
The present Convention shall be open for signature by the States represented at the Tenth Session of the Hague Conference on Private International Law.
It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 27
The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of Article 26.
The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

Article 28
Any State not represented at the Tenth Session of the Hague Conference on Private International Law may accede to the present Convention after it has entered into force in accordance with the first paragraph of Article 27. The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.
The Convention shall enter into force for such a State in the absence of any objection from a State, which has ratified the Convention before such deposit, notified to the Ministry of Foreign Affairs of the Netherlands within a period of six months after the date on which the said Ministry has notified it of such accession.
In the absence of any such objection, the Convention shall enter into force for the acceding State on the first day of the month following the expiration of the last of the periods referred to in the preceding paragraph.

Article 29
Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.
At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.
The Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification referred to in the preceding paragraph.

Article 30
The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 27, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.
Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.
It may be limited to certain of the territories to which the Convention applies.
The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 31
The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in Article 26, and to the States which have acceded in accordance with Article 28, of the following –
a) the signatures and ratifications referred to in Article 26;
b) the date on which the present Convention enters into force in accordance with the first paragraph of Article 27;
c) the accessions referred to in Article 28 and the dates on which they take effect;
d) the extensions referred to in Article 29 and the dates on which they take effect;
e) the designations, oppositions and declarations referred to in Article 21;
f) the denunciations referred to in the third paragraph of Article 30.

In witness whereof the undersigned, being duly authorised thereto, have signed the present Convention.
Done at The Hague, on the 15th day of November, 1965, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States represented at the Tenth Session of the Hague Conference on Private International Law.

N.B. On 25 October 1980 the Fourteenth Session adopted a Recommendation *on information to accompany judicial and extrajudicial documents to be sent or served abroad in civil or commercial matters (Actes et documents de la Quatorzième session (1980)*, Tome I, *Matières diverses*, p. I-67; *idem*, Tome IV, *Entraide judiciaire*, p. 339; *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).*

ANNEX TO THE CONVENTION

Active Model Forms (Request, Certificate, Summary)

OUTLINE

HAGUE SERVICE CONVENTION

Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters

Purpose of the Service Convention

The Service Convention provides for the channels of transmission to be used when a judicial or extrajudicial document is to be transmitted from one State party to the Convention to another State party for service in the latter.[1] The Convention deals primarily with the *transmission* of documents; it does not address or comprise substantive rules relating to the actual service of process.[2]

When does the Service Convention apply?

For the Convention to be applicable, the following requirements must be met: (i) a document is to be transmitted from one State party to the Convention to another State party for service in the latter (the law of the forum State determines whether or not a document has to be transmitted abroad for service in the other State – the Convention is *non-mandatory*), (ii) an address for the person to be served is known, (iii) the document to be served is a judicial or extrajudicial document, and (iv) the document to be served relates to a civil or commercial matter. If all these requirements are met, the transmission channels provided for under the Convention must be applied (the Convention is *exclusive*).

What are the channels of transmission provided for by the Service Convention?

The Convention provides for *one main channel* of transmission and *several alternative channels* of transmission (see the attached Explanatory Charts 1 and 2 – the paragraph-numbers refer to the Practical Handbook (2006), see below).

Under the main channel of transmission provided for by the Convention, the authority or judicial officer competent under the law of the requesting State (State where the document to be served originates) transmits the document to be served to the *Central Authority* of the requested State (State where the service is to occur).[3] The request for service transmitted to the Central Authority must comply with the *Model Form*[4] annexed to the Convention and be accompanied by the documents to be served. The Central Authority of the requested State will execute the request for service or cause it to be executed either (i) by informal delivery to the addressee who accepts it voluntarily, or (ii) by a method provided for under

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1 A comprehensive and updated list of the Contracting States of the Convention is available on the "Service Section" of the HCCH website (< www.hcch.net >).

2 There are, however, two channels of transmission provided for by the Convention where the transmission process includes service of process upon the ultimate addressee: the direct diplomatic or consular channels and the postal channel. For all the other channels of transmission provided for by the Convention an additional step, not governed by the Convention, is required to serve process on the ultimate addressee.

3 The Convention specifies that the forwarding authority must be an authority or judicial officer of the requesting State. It is that State's law which determines which authorities or judicial officers are competent to forward the request for service. Thus, in certain countries, attorneys, solicitors or private process servers are authorised to send such a request. Under the Convention, private persons are not entitled to send directly a request for service to the Central Authority of the requested State.

4 The Model Form is in three parts: a *Request* for service (which is sent to the Central Authority of the requested State), a *Certificate* (which is reproduced on the reverse side of the Request and which confirms whether or not the documents have been served), and a form entitled *"Summary of the document to be served"* (to be delivered to the addressee). In addition, the Fourteenth Session of the HCCH recommended that the Summary be preceded by a *warning* relating to the legal nature, purpose and effects of the document to be served. An Active Model Form that can be completed electronically and printed is available on the "Service Section" of the HCCH website (< www.hcch.net >).

the law of the requested State, or (iii) by a particular method requested by the applicant, unless it is incompatible with the law of the requested State. Under Article 5(3), the Central Authority of the requested State may request a translation of the documents to be served if they are to be served by a method prescribed by the internal law of the requested State for the service of documents in domestic actions upon persons who are within its territory (Art. 5(1)(a)), or if service by a particular method is requested by the applicant (Art. 5(1)(b)). A State party shall not charge for its services rendered under the Convention (Art. 12(1)). Thus, the services rendered by the Central Authority shall not give rise to any payment or reimbursement of costs. Under Article 12(2), however, an applicant shall pay or reimburse costs occasioned by the employment of a judicial officer or other competent person or by the use of a particular method of service. A Central Authority may request such costs to be paid in advance.

The alternative channels of transmission are: the *consular or diplomatic channels* (direct and indirect) (Arts. 8(1) and 9), *postal channels* (Art. 10(a)), *direct communication between judicial officers, officials or other competent persons* of the State of origin and the State of destination (Art. 10(b)), and *direct communication between an interested party and judicial officers, officials or other competent persons* of the State of destination (Art. 10(c)). The Convention entitles a State to object to the use of some of these alternative channels of transmission. There is neither a hierarchy nor any order of importance among the channels of transmission, and transmission through one of the alternative channels does not lead to service of lesser quality.

Protection of the plaintiff's and defendant's interests

Regardless of the applicable channel of transmission, the Convention contains two key provisions which protect the defendant *prior* to a judgment by default (Art. 15) and *after* a judgment by default (Art. 16). Articles 15 and 16 require the judge to stay entry of judgment (Art. 15) or allow the judge to relieve the defendant from the effects of the expiry of the time for appeal (Art. 16), subject to certain requirements (for more details, see the attached Explanatory Charts 3 and 4 – the paragraph-numbers refer to the Practical Handbook (2006), see below).

Practical Handbook (2006)

In 2006, the Permanent Bureau published a fully revised and expanded edition of the *Practical Handbook on the Operation of the Hague Service Convention*. This publication, which comes with a fully searchable and easy-to-use *e-book*, offers detailed explanations on the general operation of the Convention as well as authoritative commentaries on the major issues raised by practice over the past forty years. To order the Handbook, see the "Service Section" of the HCCH website (< www.hcch.net >). Furthermore, the "Service Section" offers a wide range of practical information relating to service of process in the States party to the Convention.

CHART 1
OPERATION OF THE MAIN CHANNEL OF TRANSMISSION [paras. 82 *et seq.*]

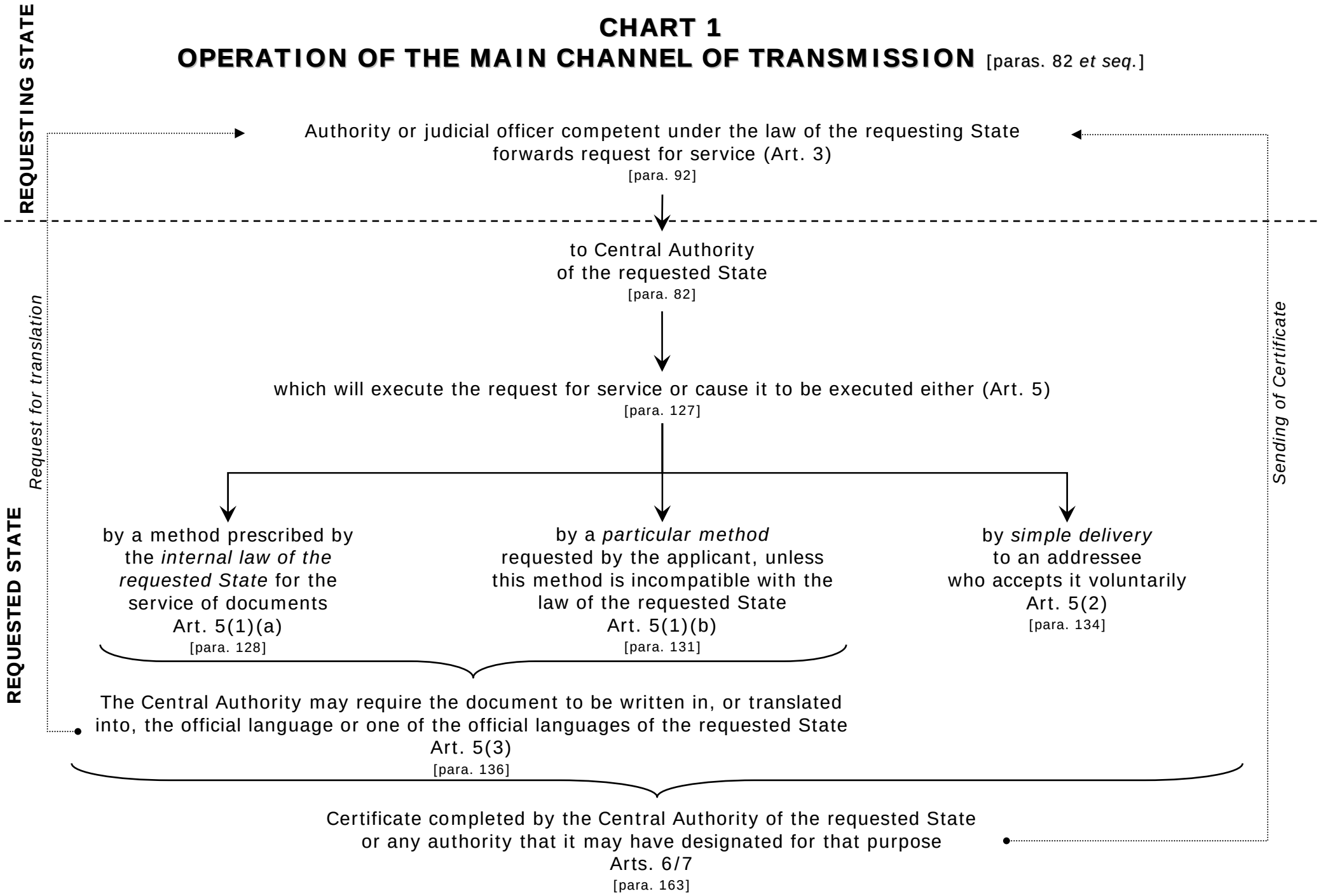

CHART 2
OPERATION OF THE ALTERNATIVE AND DEROGATORY CHANNELS OF TRANSMISSION [paras. 183 *et seq.*]

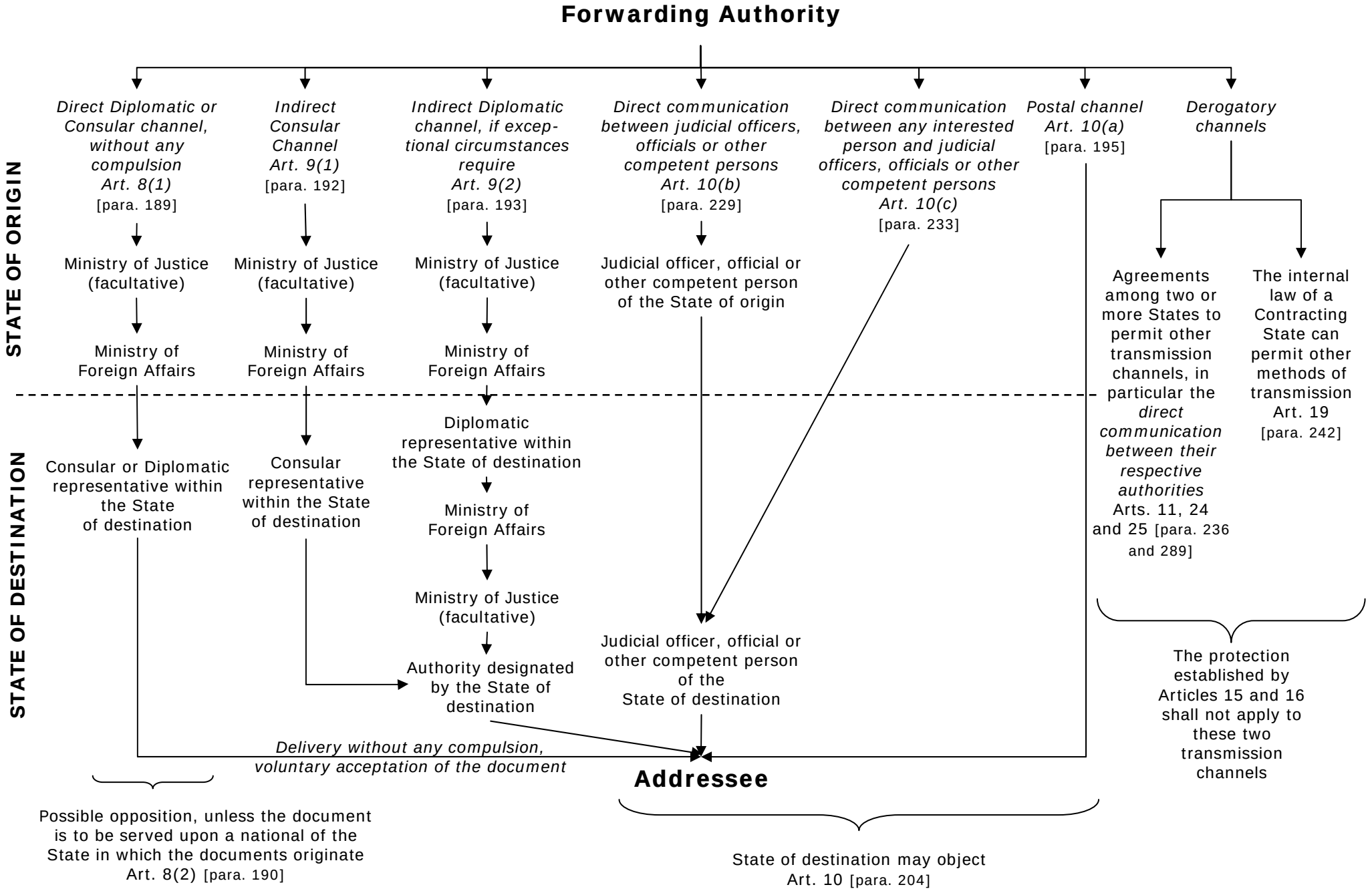

CHART 3
ARTICLE 15: DEFENDANT'S PROTECTION PRIOR TO DECISION [paras. 275 *et seq.*]

Transmission abroad for the purpose of service,
under the provision of the Convention

↓

If the defendant has not appeared,
judgment *shall not* be given until it is established that:

The document was served by a method prescribed by the *internal law* of the requested State (or, in the case of an alternative channel of transmission, the State of destination)
and

The document was actually delivered to the defendant or to his/her residence *by another method provided for by the Convention*
and

the service or delivery was effected in *sufficient time* to enable the defendant to defend

↓

The judge may nonetheless give judgment
if all the following conditions are fulfilled:

- The Contracting State has made a declaration to this effect
- The document was transmitted by one of the methods provided for in the Convention
- 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 requested State (or, in the case of an alternative channel transmission, the State of destination)
- A period of time considered adequate by the judge, but of not less than six months, has elapsed since the date of the transmission of the document

↓

Judgment by default

CHART 4
ARTICLE 16: DEFENDANT'S PROTECTION AFTER A DECISION [paras. 286 *et seq.*]

Writ of summons or equivalent document had to be transmitted abroad, under the provisions of the Convention, for the purpose of service

Judgment by default has been rendered

The judge can relieve defendant from effects of the expiration of the time for appeal if all the following conditions are fulfilled:

- application for relief is filled *within a reasonable time* after the defendant has knowledge of the judgment or within the time fixed by the State in its declaration to the Depository to this effect (this time shall in no case be less than one year following the date of judgment)

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

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

[translation of the Permanent Bureau]
(In the relations between the Contracting States, this Convention replaces the Convention of 17 July 1905 on civil procedure)

CONVENTION ON CIVIL PROCEDURE

(Concluded 1 March 1954)
(Entered into force 12 April 1957)

The States signatory to the present Convention;
Desiring to make in the Convention of 17th July 1905, on civil procedure, the improvements suggested by experience;
Have resolved to conclude a new Convention to this effect, and have agreed upon the following provisions -

I. COMMUNICATION OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS

Article 1

In civil or commercial matters, the service of documents addressed to persons abroad shall be effected in the Contracting States on request of a consul of the requesting State, made to the authority which shall be designated by the State addressed. The request, specifying the authority originating the document forwarded, the names and capacities of the parties, the address of the addressee, and the nature of the document in question, shall be in the language of the requested authority. This authority shall send to the consul the certificate showing service or indicating the fact which prevented it.
All difficulties which may arise in connection with the consul's request shall be settled through diplomatic channels.
Any Contracting State may declare, in a communication addressed to the other Contracting States, that it intends that requests for service to be effected on its territory, giving the specifications mentioned in the first paragraph, be addressed to it through diplomatic channels.
The foregoing provisions shall not prevent two Contracting States from agreeing to allow direct communication between their respective authorities.

Article 2

Service shall be effected by the authority which is competent according to the laws of the State addressed. That authority, except in the cases mentioned in Article 3, may confine itself to serving the document by delivery to an addressee who accepts it voluntarily.

Article 3

The request shall be accompanied by the document to be served in duplicate.
If the document to be served is written, either in the language of the requested authority, or in the language agreed on between the two States concerned, or if it is accompanied by a translation into one of those languages, the requested authority, should the desire be expressed in the request, shall have the document served by a method prescribed by its internal legislation for effecting similar service, or by a special method, unless it is contrary to that law. If such a desire is not expressed, the requested authority shall first seek to effect delivery in accordance with Article 2.
Unless there is agreement to the contrary, the translation provided for in the preceding paragraph shall be certified

as correct by the diplomatic officer or consular agent of the requesting State or by a sworn translator of the State addressed.

Article 4

Where a request for service complies with Articles 1, 2 and 3, the State on the territory of which it has to be effected may refuse to comply therewith only if it deems that compliance would infringe its sovereignty or security.

Article 5

Service shall be proved by either a dated and legalised receipt from the addressee or a certificate from the authority of the State addressed, establishing the fact, method and date of the service.

The receipt or the certificate should appear on one of the two copies of the document served, or be annexed thereto.

Article 6

The provisions of the foregoing Articles shall not interfere with -

(1) the freedom to send documents, through postal channels, directly to the persons concerned abroad;

(2) the freedom of the persons concerned to have service effected directly through the judicial officers or competent officials of the country of destination;

(3) the freedom of each State to have service effected directly by its diplomatic or consular agents of documents intended for persons abroad.

In each of these cases, the freedom mentioned shall only exist if allowed by conventions concluded between the States concerned or if, should there be no convention, the State on the territory of which service must be effected does not object. That State may not object when, in the cases mentioned in sub-paragraph 3 of the above paragraph, the document is to be served without any compulsion on a national of the requesting State.

Article 7

The service of judicial documents shall not give rise to reimbursement of taxes or costs of any nature.

However, should there be no agreement to the contrary, the State addressed will have the right to require from the requesting State the reimbursement of the costs occasioned by the employment of a judicial officer or by the use of a particular method of service in the cases mentioned in Article 3.

II. LETTERS OF REQUEST

Article 8

In civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, apply, by means of a Letter of Request, to the competent authority of another Contracting State to request it, within its jurisdiction, to obtain evidence, or to perform some other judicial act.

Article 9

Letters of Request shall be transmitted by the consul of the requesting State to the authority which shall be designated by the State of execution. That authority shall send to the consul the document establishing the execution of the Letter of Request or indicating the fact which prevented its execution.

Any difficulties which may arise in connection with the transmission shall be settled through diplomatic channels.

Any Contracting State may declare, by a communication addressed to the other Contracting States, that it intends that Letters of Request to be executed on its territory be transmitted through diplomatic channels.

The foregoing provisions shall not prevent two Contracting States agreeing to allow the direct transmission of Letters of Request between their respective authorities.

Article 10

Unless there is agreement to the contrary, the Letter of Request must be written either in the language of the requested authority, or in the language agreed between the two States concerned, or else it must be accompanied by a translation, done in one of those languages and certified as correct by a diplomatic officer or consular agent

of the requesting State of origin or by a sworn translator of the State of execution.

Article 11

The judicial authority, to which the Letter of Request is addressed, shall be obliged to comply with it using the same measures of compulsion as for the execution of orders issued by the authorities of the State of execution or of requests made by parties in internal proceedings. These measures of compulsion shall not necessarily be employed where the appearance of the parties to the case is involved.

The requesting authority shall, if it so requests, be informed of the date and place of execution of the measure sought, so that the party concerned may be able to be present.

The execution of the Letter of Request may be refused only -

(1) if the authenticity of the document is not established;

(2) if, in the State of execution, the execution of the Letter does not fall within the functions of the judiciary;

(3) if the State, on the territory of which the execution is to be effected, considers that its sovereignty or its security would be prejudiced thereby.

Article 12

If the authority to whom a Letter of Request has been transmitted is not competent to execute it, the Letter shall be automatically sent to the authority in the same State which is competent to execute it in accordance with the provisions of its own law.

Article 13

In all cases where the Letter of Request is not executed by the requested authority, the latter shall immediately so inform the requesting authority, indicating, in the case of Article 11, the reasons why execution of the Letter was refused and, in the case of Article 12, the authority to which the Letter has been transmitted.

Article 14

The judicial authority which executes a Letter of Request shall apply its own law as to the methods and procedures to be followed.

However, it will follow a request of the requesting authority that a special method or procedure be followed, provided that this is not contrary to the law of the State of execution.

Article 15

The provisions of the foregoing Articles shall not exclude the right of each State to have Letters of Request executed directly by its diplomatic officers or consular agents, if that is allowed by conventions concluded between the States concerned or if the State on the territory of which the Letter is to be executed does not object.

Article 16

The execution of Letters of Request shall not give rise to reimbursement of taxes or costs of any nature.

However, unless there is agreement to the contrary, the State of execution shall have the right to require the State of origin to reimburse the fees paid to witnesses or experts, and the costs occasioned by the employment of a judicial officer, rendered necessary because the witnesses did not appear voluntarily, or the costs resulting from any application of the second paragraph of Article 14.

III. SECURITY FOR COSTS

Article 17

No security, bond or deposit of any kind, may be imposed by reason of their foreign nationality, or of lack of domicile or residence in the country, upon nationals of one of the Contracting States, having their domicile in one of these States, who are plaintiffs or parties intervening before the courts of another of those States.

The same rule shall apply to any payment required of plaintiffs or intervening parties as security for court fees.

All conventions under which Contracting States have agreed that their nationals will be exempt from providing security for costs or for payment of court fees regardless of domicile shall continue to apply.

Article 18

Orders for costs and expenses of the proceedings, made in one of the Contracting States against the plaintiff or

party intervening exempted from the provision of security, deposit or payment under the first and second paragraphs of Article 17, or under the law of the State where the proceedings have been instituted, shall, upon request made through diplomatic channels, be rendered enforceable without charge by the competent authority, in each of the other Contracting States.
The same rule shall apply to the judicial decisions whereby the amount of the costs of the proceedings is subsequently fixed.
Nothing in the foregoing provisions shall prevent two Contracting States from agreeing that applications for enforcement may also be made directly by the interested party.
Article 19
The order for costs and expenses shall be rendered enforceable without a hearing, but subject to subsequent appeal by the losing party in accordance with the legislation of the country where enforcement is sought.
The authority competent to decide on the request for enforcement shall itself examine -
(1) whether, under the law of the country where the judgment was rendered, the copy of the judgment fulfils the conditions required for its authenticity;
(2) whether, under the same law, the decision has the force of res judicata;
(3) whether that part of the judgment which constitutes the decision is worded in the language of the authority addressed, or in the language agreed between the two States concerned, or whether it is accompanied by a translation, in one of those languages and, unless there is agreement to the contrary, certified as correct by a diplomatic officer or consular agent of the requesting State or by a sworn translator of the State addressed.
To satisfy the conditions laid down in the second paragraph, sub-paragraphs 1 and 2, it shall be sufficient either for there to be a statement by the competent authority of the State of origin establishing that the judgment has the force of res judicata, or for duly legalised documents to be presented showing that the judgment has the force of res judicata. The competence of the authority mentioned above shall, unless there is agreement to the contrary, be certified by the highest official in charge of the administration of justice in the requesting State of origin. The statement and the certificate just mentioned must be worded or translated in accordance with the rule laid down in the second paragraph, sub-paragraph 3.
The authority competent to decide on the request for enforcement shall assess, provided the party concerned so requests at the same time, the amount of the cost of attestation, translation and legalisation referred to in sub-paragraph 3 of the second paragraph. Those costs shall be considered to be costs and expenses of the proceedings.

IV. FREE LEGAL AID
Article 20
In civil and commercial matters, nationals of the Contracting States shall be granted free legal aid in all the other Contracting States, on the same basis as nationals of these States, upon compliance with the legislation of the State where the free legal aid is sought.
In the States where legal aid is provided in administrative matters, the provisions of the preceding paragraph shall also apply to cases brought before the courts or tribunals competent in such matters.
Article 21
In all cases, the certificate or declaration of need must be issued or received by the authorities of the habitual residence of the foreigner, or, if not by them, by the authorities of his current residence. Should the latter authorities not belong to a Contracting State and not receive or issue certificates or declarations of that kind, it will be enough to have a certificate or a declaration issued or received by a diplomatic officer or consular agent of the country to which the foreigner belongs.
If the petitioner does not reside in the country were the request is made, the certificate or declaration of need shall be legalised free of charge by a diplomatic officer or consular agent of the country where the document is to be produced.
Article 22
The authority competent to issue the certificate or receive the declaration of need may obtain information about

the financial position of the petitioner from the authorities of the other Contracting States.
The authority responsible for deciding on the application for free legal aid shall retain, within the limits of its powers , the right to verify the certificates, declarations and information given to it and to secure for purposes of further clarification, additional information.

Article 23

When the indigent person concerned is in a country other than that in which the free legal aid is to be sought, his application for legal aid, accompanied by certificates, declarations of need and, where necessary, other supporting documents which would facilitate examination of the application, may be transmitted by the consul of his country to the authority competent to decide on that application, or to the authority designated by the State where the application is to be examined.
The provisions in Article 9, paragraphs 2, 3 and 4, and in Articles 10 and 12 above, concerning Letters of Request, shall apply to the transmission of applications for free legal aid, and their annexes.

Article 24

If the benefit of legal aid has been granted to a national of one of the Contracting States, service of documents relating to his case in another Contracting State, regardless of the method to which it is to be effected, shall not give rise to any reimbursement of costs by the State of origin to the State addressed.
The same shall apply to Letters of Request, with the exception of the fees paid to experts.

V. FREE ISSUE OF EXTRACTS FROM CIVIL STATUS RECORDS

Article 25

Indigent persons who are nationals of one of the Contracting States may obtain on the same terms as nationals of the State concerned extracts from civil status records, without charge. The documents necessary for their marriage shall be legalised without cost by the diplomatic officers or consular agents of the Contracting States.

VI. PHYSICAL DETENTION

Article 26

Physical detention, either as a means of enforcement, or as a merely precautionary measure, shall not, in civil or commercial matters, be employed against foreigners, belonging to one of the Contracting States, in circumstances where it cannot be employed against nationals of the country concerned. A fact, which may be invoked by a national domiciled in such a country, to obtain release from physical detention, may be invoked with the same effect by a national of a Contracting State, even if the fact occurred abroad.

VII. FINAL CLAUSES

Article 27

This Convention shall be open for signature by the States represented at the Seventh Session of the Conference on Private International Law.
It shall be ratified and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.
A record shall be made of every deposit of instruments of ratification, and a certified copy of that record shall be sent through diplomatic channels to each of the signatory States.

Article 28

This Convention shall enter into force on the sixtieth day after the deposit of the fourth instrument of ratification as provided in the second paragraph of Article 27.
For each signatory State subsequently ratifying the Convention, it shall enter into force on the sixtieth day after the day of deposit of its instrument of ratification.

Article 29

The present Convention shall replace, in relations between the States which have ratified it, the Convention on Civil Procedure signed at The Hague on 17th July 1905.

Article 30

The present Convention shall apply by law in the metropolitan territories of the Contracting States.
If a Contracting State desires it to be put into force in all or certain of the other territories, for the international relations of which it is responsible, it shall give notice of its intention to that effect in a document which shall be deposited with the Netherlands Ministry of Foreign Affairs. The latter shall send, through diplomatic channels, a certified copy to each of the Contracting States.
The Convention shall enter into force in relations between the States which have not raised an objection in the six months following that communication and the territory or territories for the international relations of which the State in question is responsible, and in respect of which the said notice has been given.

Article 31

Any State not represented at the Seventh Session of the Conference may accede to the present Convention, unless a State or several States which have ratified the Convention object, within a period of six months from the date of the notification by the Netherlands Government of that accession. Accession shall be by the method indicated in the second paragraph of Article 27.
It is understood that the accessions shall not be able to take place until after the entry into force of the present Convention, by virtue of the first paragraph of Article 28.

Article 32

Each Contracting State, on signing or ratifying this Convention or on acceding to it, may reserve the right to limit the application of Article 17 to the nationals of Contracting States having their habitual residence in its territory.
A State availing itself of the right mentioned in the preceding paragraph shall be able to claim application of Article 17 by the other Contracting States only on behalf of its nationals who have their habitual residence within the territory of the Contracting State before the court of which they are plaintiffs or intervening parties.

Article 33

The present Convention shall remain in force for five years from the date indicated in the first paragraph of Article 28 of the Convention.
This period shall start to run as from that date, even for States which shall have ratified it or acceded to it subsequently.
The Convention shall be renewed tacitly every five years, unless denounced. Denunciation must, at least six months before expiry of the period, be notified to the Ministry of Foreign Affairs of the Netherlands, which shall inform all the other Contracting States of it.
The denunciation may be limited to the territories or to certain of the territories indicated in a notification, given in accordance with the second paragraph of Article 30.
The denunciation shall only take effect in respect of the State which has notified it. The Convention shall remain in force for the other Contracting States.

In witness whereof, the undersigned, being duly authorised by their respective Governments, have signed this Convention.
Done at The Hague, on the first day of March, 1954, in a single copy, which shall be deposited in the archives of the Government of the Netherlands and of which a certified copy shall be sent through diplomatic channels to each of the States represented at the Seventh Session of the Hague Conference on Private International Law.

Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters

Council Regulation (EC) No 1206/2001

of 28 May 2001

on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and Article 67(1) thereof,

Having regard to the initiative of the Federal Republic of Germany(1),

Having regard to the opinion of the European Parliament(2),

Having regard to the opinion of the Economic and Social Committee(3),

Whereas:

(1) The European Union has set itself the objective of maintaining and developing the European Union as an area of freedom, security and justice in which the free movement of persons is ensured. For the gradual establishment of such an area, the Community is to adopt, among others, the measures relating to judicial cooperation in civil matters needed for the proper functioning of the internal market.

(2) For the purpose of the proper functioning of the internal market, cooperation between courts in the taking of evidence should be improved, and in particular simplified and accelerated.

(3) At its meeting in Tampere on 15 and 16 October 1999, the European Council recalled that new procedural legislation in cross-border cases, in particular on the taking of evidence, should be prepared.

(4) This area falls within the scope of Article 65 of the Treaty.

(5) The objectives of the proposed action, namely the improvement of cooperation between the courts on the taking of evidence in civil or commercial matters, cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level. The Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary to achieve those objectives.

(6) To date, there is no binding instrument between all the Member States concerning the taking of evidence. The Hague Convention of 18 March 1970 on the taking of evidence abroad in civil or commercial matters applies between only 11 Member States of the European Union.

(7) As it is often essential for a decision in a civil or commercial matter pending before a court in a Member State to take evidence in another Member State, the Community's activity cannot be limited to the field of transmission of judicial and extrajudicial documents in civil or commercial matters which falls within the scope of Council Regulation (EC) No 1348/2000 of 29 May 2000 on the serving in the Member States of judicial and extrajudicial documents in civil or commercial matters(4). It is therefore necessary to continue the improvement of cooperation between courts of Member States in the field of taking of evidence.

(8) The efficiency of judicial procedures in civil or commercial matters requires that the transmission and execution of requests for the performance of taking of evidence is to be made directly and by the most rapid means possible between Member States' courts.

(9) Speed in transmission of requests for the performance of taking of evidence warrants the use of all appropriate means, provided that certain conditions as to the legibility and reliability of the document received are observed. So as to ensure the utmost clarity and legal certainty the request for the performance of taking of evidence must be transmitted on a form to be completed in the language of the Member State of the requested court or in another language accepted by that State. For the same reasons, forms should also be used as far as possible for further communication between the relevant courts.

(10) A request for the performance of the taking of evidence should be executed expeditiously. If it is not possible for the request to be executed within 90 days of receipt by the requested court, the latter should inform the requesting court accordingly, stating the reasons which prevent the request from being executed swiftly.

(11) To secure the effectiveness of this Regulation, the possibility of refusing to execute the request for the performance of taking of evidence should be confined to strictly limited exceptional situations.

(12) The requested court should execute the request in accordance with the law of its Member State.

(13) The parties and, if any, their representatives, should be able to be present at the performance of the taking of evidence, if that is provided for by the law of the Member State of the requesting court, in order to be able to follow the proceedings in a comparable way as if evidence were taken in the Member State of the requesting court. They should also have the right to request to participate in order to have a more active role in the performance of the taking of evidence. However, the conditions under which they may participate should be determined by the requested court in accordance with the law of its Member State.

(14) The representatives of the requesting court should be able to be present at the performance of the taking of evidence, if that is compatible with the law of the Member State of the requesting court, in order to have an improved possibility of evaluation of evidence. They should also have the right to request to participate, under the conditions laid down by the requested court in accordance with the law of its Member State, in order to have a more active role in the performance of the taking of evidence.

(15) In order to facilitate the taking of evidence it should be possible for a court in a Member State, in accordance with the law of its Member State, to take evidence directly in another Member State, if accepted by the latter, and under the conditions determined by the central body or competent authority of the requested Member State.

(16) The execution of the request, according to Article 10, should not give rise to a claim for any reimbursement of taxes or costs. Nevertheless, if the requested court requires reimbursement, the fees paid to experts and interpreters, as well as the costs occasioned by the application of Article 10(3) and (4), should not be borne by that court. In such a case, the requesting court is to take the necessary measures to ensure reimbursement without delay. Where the opinion of an expert is required, the requested court may, before executing the request, ask the requesting court for an adequate deposit or advance towards the costs.

(17) This Regulation should prevail over the provisions applying to its field of application, contained in international conventions concluded by the Member States. Member States should be free to adopt agreements or arrangements to further facilitate cooperation in the taking of evidence.

(18) The information transmitted pursuant to this Regulation should enjoy protection. Since Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data(5), and Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector(6), are applicable, there is no need for specific provisions on data protection in this Regulation.

(19) The measures necessary for the implementation of this Regulation should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999(7) laying down the procedures for the exercise of implementing powers conferred on the Commission.

(20) For the proper functioning of this Regulation, the Commission should review its application and propose such amendments as may appear necessary.

(21) The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on the European Union and to the Treaty establishing the European Community, have given notice of their wish to take part in the adoption and application of this Regulation.

(22) Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty establishing the European Community, is not participating in the adoption of this Regulation, and is therefore not bound by it nor subject to its application,

HAS ADOPTED THIS REGULATION:

CHAPTER I

GENERAL PROVISIONS

Article 1

Scope

1. This Regulation shall apply in civil or commercial matters where the court of a Member State, in accordance with the provisions of the law of that State, requests:

(a) the competent court of another Member State to take evidence; or

(b) to take evidence directly in another Member State.

2. A request shall not be made to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated.

3. In this Regulation, the term "Member State" shall mean Member States with the exception of Denmark.

Article 2

Direct transmission between the courts

1. Requests pursuant to Article 1(1)(a), hereinafter referred to as "requests", shall be transmitted by the court before which the proceedings are commenced or contemplated, hereinafter referred to as the "requesting court", directly to the competent court of another Member State, hereinafter

referred to as the "requested court", for the performance of the taking of evidence.

2. Each Member State shall draw up a list of the courts competent for the performance of taking of evidence according to this Regulation. The list shall also indicate the territorial and, where appropriate, the special jurisdiction of those courts.

Article 3

Central body

1. Each Member State shall designate a central body responsible for:

(a) supplying information to the courts;

(b) seeking solutions to any difficulties which may arise in respect of a request;

(c) forwarding, in exceptional cases, at the request of a requesting court, a request to the competent court.

2. A federal State, a State in which several legal systems apply or a State with autonomous territorial entities shall be free to designate more than one central body.

3. Each Member State shall also designate the central body referred to in paragraph 1 or one or several competent authority(ies) to be responsible for taking decisions on requests pursuant to Article 17.

CHAPTER II

TRANSMISSION AND EXECUTION OF REQUESTS

Section 1

Transmission of the request

Article 4

Form and content of the request

1. The request shall be made using form A or, where appropriate, form I in the Annex. It shall contain the following details:

(a) the requesting and, where appropriate, the requested court;

(b) the names and addresses of the parties to the proceedings and their representatives, if any;

(c) the nature and subject matter of the case and a brief statement of the facts;

(d) a description of the taking of evidence to be performed;

(e) where the request is for the examination of a person:

- the name(s) and address(es) of the person(s) to be examined,

- the questions to be put to the person(s) to be examined or a statement of the facts about which he is (they are) to be examined,

- where appropriate, a reference to a right to refuse to testify under the law of the Member State

of the requesting court,

- any requirement that the examination is to be carried out under oath or affirmation in lieu thereof, and any special form to be used,

- where appropriate, any other information that the requesting court deems necessary;

(f) where the request is for any other form of taking of evidence, the documents or other objects to be inspected;

(g) where appropriate, any request pursuant to Article 10(3) and (4), and Articles 11 and 12 and any information necessary for the application thereof.

2. The request and all documents accompanying the request shall be exempted from authentication or any equivalent formality.

3. Documents which the requesting court deems it necessary to enclose for the execution of the request shall be accompanied by a translation into the language in which the request was written.

Article 5

Language

The request and communications pursuant to this Regulation shall be drawn up in the official language of the requested Member State or, if there are several official languages in that Member State, in the official language or one of the official languages of the place where the requested taking of evidence is to be performed, or in another language which the requested Member State has indicated it can accept. Each Member State shall indicate the official language or languages of the institutions of the European Community other than its own which is or are acceptable to it for completion of the forms.

Article 6

Transmission of requests and other communications

Requests and communications pursuant to this Regulation shall be transmitted by the swiftest possible means, which the requested Member State has indicated it can accept. The transmission may be carried out by any appropriate means, provided that the document received accurately reflects the content of the document forwarded and that all information in it is legible.

Section 2

Receipt of request

Article 7

Receipt of request

1. Within seven days of receipt of the request, the requested competent court shall send an acknowledgement of receipt to the requesting court using form B in the Annex. Where the request does not comply with the conditions laid down in Articles 5 and 6, the requested court shall enter a note to that

effect in the acknowledgement of receipt.

2. Where the execution of a request made using form A in the Annex, which complies with the conditions laid down in Article 5, does not fall within the jurisdiction of the court to which it was transmitted, the latter shall forward the request to the competent court of its Member State and shall inform the requesting court thereof using form A in the Annex.

Article 8

Incomplete request

1. If a request cannot be executed because it does not contain all of the necessary information pursuant to Article 4, the requested court shall inform the requesting court thereof without delay and, at the latest, within 30 days of receipt of the request using form C in the Annex, and shall request it to send the missing information, which should be indicated as precisely as possible.

2. If a request cannot be executed because a deposit or advance is necessary in accordance with Article 18(3), the requested court shall inform the requesting court thereof without delay and, at the latest, within 30 days of receipt of the request using form C in the Annex and inform the requesting court how the deposit or advance should be made. The requested Court shall acknowledge receipt of the deposit or advance without delay, at the latest within 10 days of receipt of the deposit or the advance using form D.

Article 9

Completion of the request

1. If the requested court has noted on the acknowledgement of receipt pursuant to Article 7(1) that the request does not comply with the conditions laid down in Articles 5 and 6 or has informed the requesting court pursuant to Article 8 that the request cannot be executed because it does not contain all of the necessary information pursuant to Article 4, the time limit pursuant to Article 10 shall begin to run when the requested court received the request duly completed.

2. Where the requested court has asked for a deposit or advance in accordance with Article 18(3), this time limit shall begin to run when the deposit or the advance is made.

Section 3

Taking of evidence by the requested court

Article 10

General provisions on the execution of the request

1. The requested court shall execute the request without delay and, at the latest, within 90 days of receipt of the request.

2. The requested court shall execute the request in accordance with the law of its Member State.

3. The requesting court may call for the request to be executed in accordance with a special procedure

provided for by the law of its Member State, using form A in the Annex. The requested court shall comply with such a requirement unless this procedure is incompatible with the law of the Member State of the requested court or by reason of major practical difficulties. If the requested court does not comply with the requirement for one of these reasons it shall inform the requesting court using form E in the Annex.

4. The requesting court may ask the requested court to use communications technology at the performance of the taking of evidence, in particular by using videoconference and teleconference.

The requested court shall comply with such a requirement unless this is incompatible with the law of the Member State of the requested court or by reason of major practical difficulties.

If the requested court does not comply with the requirement for one of these reasons, it shall inform the requesting court, using form E in the Annex.

If there is no access to the technical means referred to above in the requesting or in the requested court, such means may be made available by the courts by mutual agreement.

Article 11

Performance with the presence and participation of the parties

1. If it is provided for by the law of the Member State of the requesting court, the parties and, if any, their representatives, have the right to be present at the performance of the taking of evidence by the requested court.

2. The requesting court shall, in its request, inform the requested court that the parties and, if any, their representatives, will be present and, where appropriate, that their participation is requested, using form A in the Annex. This information may also be given at any other appropriate time.

3. If the participation of the parties and, if any, their representatives, is requested at the performance of the taking of evidence, the requested court shall determine, in accordance with Article 10, the conditions under which they may participate.

4. The requested court shall notify the parties and, if any, their representatives, of the time when, the place where, the proceedings will take place, and, where appropriate, the conditions under which they may participate, using form F in the Annex.

5. Paragraphs 1 to 4 shall not affect the possibility for the requested court of asking the parties and, if any their representatives, to be present at or to participate in the performance of the taking of evidence if that possibility is provided for by the law of its Member State.

Article 12

Performance with the presence and participation of representatives of the requesting court

1. If it is compatible with the law of the Member State of the requesting court, representatives of the requesting court have the right to be present in the performance of the taking of evidence by the requested court.

2. For the purpose of this Article, the term "representative" shall include members of the judicial

personnel designated by the requesting court, in accordance with the law of its Member State. The requesting court may also designate, in accordance with the law of its Member State, any other person, such as an expert.

3. The requesting court shall, in its request, inform the requested court that its representatives will be present and, where appropriate, that their participation is requested, using form A in the Annex. This information may also be given at any other appropriate time.

4. If the participation of the representatives of the requesting court is requested in the performance of the taking of evidence, the requested court shall determine, in accordance with Article 10, the conditions under which they may participate.

5. The requested court shall notify the requesting court, of the time when, and the place where, the proceedings will take place, and, where appropriate, the conditions under which the representatives may participate, using form F in the Annex.

Article 13

Coercive measures

Where necessary, in executing a request the requested court shall apply the appropriate coercive measures in the instances and to the extent as are provided for by the law of the Member State of the requested court for the execution of a request made for the same purpose by its national authorities or one of the parties concerned.

Article 14

Refusal to execute

1. A request for the hearing of a person shall not be executed when the person concerned claims the right to refuse to give evidence or to be prohibited from giving evidence,

(a) under the law of the Member State of the requested court; or

(b) under the law of the Member State of the requesting court, and such right has been specified in the request, or, if need be, at the instance of the requested court, has been confirmed by the requesting court.

2. In addition to the grounds referred to in paragraph 1, the execution of a request may be refused only if:

(a) the request does not fall within the scope of this Regulation as set out in Article 1; or

(b) the execution of the request under the law of the Member State of the requested court does not fall within the functions of the judiciary; or

(c) the requesting court does not comply with the request of the requested court to complete the request pursuant to Article 8 within 30 days after the requested court asked it to do so; or

(d) a deposit or advance asked for in accordance with Article 18(3) is not made within 60 days after the requested court asked for such a deposit or advance.

3. Execution may not be refused by the requested court solely on the ground that under the law of its Member State a court of that Member State has exclusive jurisdiction over the subject matter

of the action or that the law of that Member State would not admit the right of action on it.

4. If execution of the request is refused on one of the grounds referred to in paragraph 2, the requested court shall notify the requesting court thereof within 60 days of receipt of the request by the requested court using form H in the Annex.

Article 15

Notification of delay

If the requested court is not in a position to execute the request within 90 days of receipt, it shall inform the requesting court thereof, using form G in the Annex. When it does so, the grounds for the delay shall be given as well as the estimated time that the requested court expects it will need to execute the request.

Article 16

Procedure after execution of the request

The requested court shall send without delay to the requesting court the documents establishing the execution of the request and, where appropriate, return the documents received from the requesting court. The documents shall be accompanied by a confirmation of execution using form H in the Annex.

Section 4

Direct taking of evidence by the requesting court

Article 17

1. Where a court requests to take evidence directly in another Member State, it shall submit a request to the central body or the competent authority referred to in Article 3(3) in that State, using form I in the Annex.

2. Direct taking of evidence may only take place if it can be performed on a voluntary basis without the need for coercive measures.

Where the direct taking of evidence implies that a person shall be heard, the requesting court shall inform that person that the performance shall take place on a voluntary basis.

3. The taking of evidence shall be performed by a member of the judicial personnel or by any other person such as an expert, who will be designated, in accordance with the law of the Member State of the requesting court.

4. Within 30 days of receiving the request, the central body or the competent authority of the requested Member State shall inform the requesting court if the request is accepted and, if necessary, under what conditions according to the law of its Member State such performance is to be carried out, using form J.

In particular, the central body or the competent authority may assign a court of its Member State to take part in the performance of the taking of evidence in order to ensure the proper application

of this Article and the conditions that have been set out.

The central body or the competent authority shall encourage the use of communications technology, such as videoconferences and teleconferences.

5. The central body or the competent authority may refuse direct taking of evidence only if:

(a) the request does not fall within the scope of this Regulation as set out in Article 1;

(b) the request does not contain all of the necessary information pursuant to Article 4; or

(c) the direct taking of evidence requested is contrary to fundamental principles of law in its Member State.

6. Without prejudice to the conditions laid down in accordance with paragraph 4, the requesting court shall execute the request in accordance with the law of its Member State.

Section 5

Costs

Article 18

1. The execution of the request, in accordance with Article 10, shall not give rise to a claim for any reimbursement of taxes or costs.

2. Nevertheless, if the requested court so requires, the requesting court shall ensure the reimbursement, without delay, of:

- the fees paid to experts and interpreters, and

- the costs occasioned by the application of Article 10(3) and(4).

The duty for the parties to bear these fees or costs shall be governed by the law of the Member State of the requesting court.

3. Where the opinion of an expert is required, the requested court may, before executing the request, ask the requesting court for an adequate deposit or advance towards the requested costs. In all other cases, a deposit or advance shall not be a condition for the execution of a request.

The deposit or advance shall be made by the parties if that is provided for by the law of the Member State of the requesting court.

CHAPTER III

FINAL PROVISIONS

Article 19

Implementing rules

1. The Commission shall draw up and regularly update a manual, which shall also be available electronically, containing the information provided by the Member States in accordance with Article 22 and the agreements or arrangements in force, according to Article 21.

2. The updating or making of technical amendments to the standard forms set out in the Annex shall

be carried out in accordance with the advisory procedure set out in Article 20(2).

Article 20

Committee

1. The Commission shall be assisted by a Committee.

2. Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468/EC shall apply.

3. The Committee shall adopt its Rules of Procedure.

Article 21

Relationship with existing or future agreements or arrangements between Member States

1. This Regulation shall, in relation to matters to which it applies, prevail over other provisions contained in bilateral or multilateral agreements or arrangements concluded by the Member States and in particular the Hague Convention of 1 March 1954 on Civil Procedure and the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, in relations between the Member States party thereto.

2. This Regulation shall not preclude Member States from maintaining or concluding agreements or arrangements between two or more of them to further facilitate the taking of evidence, provided that they are compatible with this Regulation.

3. Member States shall send to the Commission:

(a) by 1 July 2003, a copy of the agreements or arrangements maintained between the Member States referred to in paragraph 2;

(b) a copy of the agreements or arrangements concluded between the Member States referred to in paragraph 2 as well as drafts of such agreements or arrangements which they intend to adopt; and

(c) any denunciation of, or amendments to, these agreements or arrangements.

Article 22

Communication

By 1 July 2003 each Member State shall communicate to the Commission the following:

(a) the list pursuant to Article 2(2) indicating the territorial and, where appropriate, the special jurisdiction of the courts;

(b) the names and addresses of the central bodies and competent authorities pursuant to Article 3, indicating their territorial jurisdiction;

(c) the technical means for the receipt of requests available to the courts on the list pursuant to Article 2(2);

(d) the languages accepted for the requests as referred to in Article 5.

Member States shall inform the Commission of any subsequent changes to this information.

Article 23

Review

No later than 1 January 2007, and every five years thereafter, the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Regulation, paying special attention to the practical application of Article 3(1)(c) and 3, and Articles 17 and 18.

Article 24

Entry into force

1. This Regulation shall enter into force on 1 July 2001.

2. This Regulation shall apply from 1 January 2004, except for Articles 19, 21 and 22, which shall apply from 1 July 2001.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

Done at Brussels, 28 May 2001.

For the Council

The President

T. Bodström

(1) OJ C 314, 3.11.2000, p. 2.

(2) Opinion delivered on 14 March 2001 (not yet published in the Official Journal).

(3) Opinion delivered on 28 February 2001 (not yet published in the Official Journal).

(4) OJ L 160, 30.6.2000, p. 37.

(5) OJ L 281, 23.11.1995, p. 31.

(6) OJ L 24, 30.1.1998, p. 1.

(7) OJ L 184, 17.7.1999, p. 23.

ANNEX

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Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes

Council Directive 2002/8/EC

of 27 January 2003

to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 61(c) and 67 thereof,

Having regard to the proposal from the Commission(1),

Having regard to the opinion of the European Parliament(2),

Having regard to the opinion of the Economic and Social Committee(3),

Whereas:

(1) The European Union has set itself the objective of maintaining and developing an area of freedom, security and justice in which the free movement of persons is ensured. For the gradual establishment of such an area, the Community is to adopt, among others, the measures relating to judicial cooperation in civil matters having cross-border implications and needed for the proper functioning of the internal market.

(2) According to Article 65(c) of the Treaty, these measures are to include measures eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.

(3) The Tampere European Council on 15 and 16 October 1999 called on the Council to establish minimum standards ensuring an adequate level of legal aid in cross-border cases throughout the Union.

(4) All Member States are contracting parties to the European Convention for the Protection of Human Rights and Fundamental Freedom of 4 November 1950. The matters referred to in this Directive shall be dealt with in compliance with that Convention and in particular the respect of the principle of equality of both parties in a dispute.

(5) This Directive seeks to promote the application of legal aid in cross-border disputes for persons who lack sufficient resources where aid is necessary to secure effective access to justice. The generally recognised right to access to justice is also reaffirmed by Article 47 of the Charter of Fundamental Rights of the European Union.

(6) Neither the lack of resources of a litigant, whether acting as claimant or as defendant, nor the difficulties flowing from a dispute's cross-border dimension should be allowed to hamper effective access to justice.

(7) Since the objectives of this Directive cannot be sufficiently achieved by the Member States acting alone and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(8) The main purpose of this Directive is to guarantee an adequate level of legal aid in cross-border

disputes by laying down certain minimum common standards relating to legal aid in such disputes. A Council directive is the most suitable legislative instrument for this purpose.

(9) This Directive applies in cross-border disputes, to civil and commercial matters.

(10) All persons involved in a civil or commercial dispute within the scope of this Directive must be able to assert their rights in the courts even if their personal financial situation makes it impossible for them to bear the costs of the proceedings. Legal aid is regarded as appropriate when it allows the recipient effective access to justice under the conditions laid down in this Directive.

(11) Legal aid should cover pre-litigation advice with a view to reaching a settlement prior to bringing legal proceedings, legal assistance in bringing a case before a court and representation in court and assistance with or exemption from the cost of proceedings.

(12) It shall be left to the law of the Member State in which the court is sitting or where enforcement is sought whether the costs of proceedings may include the costs of the opponent imposed on the recipient of legal aid.

(13) All Union citizens, wherever they are domiciled or habitually resident in the territory of a Member State, must be eligible for legal aid in cross-border disputes if they meet the conditions provided for by this Directive. The same applies to third-country nationals who habitually and lawfully reside in a Member State.

(14) Member States should be left free to define the threshold above which a person would be presumed able to bear the costs of proceedings, in the conditions defined in this Directive. Such thresholds are to be defined in the light of various objective factors such as income, capital or family situation.

(15) The objective of this Directive could not, however, be attained if legal aid applicants did not have the possibility of proving that they cannot bear the costs of proceedings even if their resources exceed the threshold defined by the Member State where the court is sitting. When making the assessment of whether legal aid is to be granted on this basis, the authorities in the Member State where the court is sitting may take into account information as to the fact that the applicant satisfies criteria in respect of financial eligibility in the Member State of domicile or habitual residence.

(16) The possibility in the instant case of resorting to other mechanisms to ensure effective access to justice is not a form of legal aid. But it can warrant a presumption that the person concerned can bear the costs of the procedure despite his/her unfavourable financial situation.

(17) Member States should be allowed to reject applications for legal aid in respect of manifestly unfounded actions or on grounds related to the merits of the case in so far as pre-litigation advice is offered and access to justice is guaranteed. When taking a decision on the merits of an application, Member States may reject legal aid applications when the applicant is claiming damage to his or her reputation, but has suffered no material or financial loss or the application concerns a claim arising directly out of the applicant's trade or self-employed profession.

(18) The complexity of and differences between the legal systems of the Member States and the costs inherent in the cross-border dimension of a dispute should not preclude access to justice. Legal aid should accordingly cover costs directly connected with the cross-border dimension of a dispute.

(19) When considering if the physical presence of a person in court is required, the courts of a Member State should take into consideration the full advantage of the possibilities offered by Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters(4).

(20) If legal aid is granted, it must cover the entire proceeding, including expenses incurred in having a judgment enforced; the recipient should continue receiving this aid if an appeal is brought either against or by the recipient in so far as the conditions relating to the financial resources and the substance of the dispute remain fulfilled.

(21) Legal aid is to be granted on the same terms both for conventional legal proceedings and for out-of-court procedures such as mediation, where recourse to them is required by the law, or ordered by the court.

(22) Legal aid should also be granted for the enforcement of authentic instruments in another Member State under the conditions defined in this Directive.

(23) Since legal aid is given by the Member State in which the court is sitting or where enforcement is sought, except pre-litigation assistance if the legal aid applicant is not domiciled or habitually resident in the Member State where the court is sitting, that Member State must apply its own legislation, in compliance with the principles of this Directive.

(24) It is appropriate that legal aid is granted or refused by the competent authority of the Member State in which the court is sitting or where a judgment is to be enforced. This is the case both when that court is trying the case in substance and when it first has to decide whether it has jurisdiction.

(25) Judicial cooperation in civil matters should be organised between Member States to encourage information for the public and professional circles and to simplify and accelerate the transmission of legal aid applications between Member States.

(26) The notification and transmission mechanisms provided for by this Directive are inspired directly by those of the European Agreement on the transmission of applications for legal aid, signed in Strasbourg on 27 January 1977, hereinafter referred to as "1977 Agreement". A time limit, not provided for by the 1977 Agreement, is set for the transmission of legal aid applications. A relatively short time limit contributes to the smooth operation of justice.

(27) The information transmitted pursuant to this Directive should enjoy protection. Since Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data(5), and Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector(6), are applicable, there is no need for specific provisions on data protection in this Directive.

(28) The establishment of a standard form for legal aid applications and for the transmission of legal aid applications in the event of cross-border litigation will make the procedures easier and faster.

(29) Moreover, these application forms, as well as national application forms, should be made available on a European level through the information system of the European Judicial Network, established in accordance with Decision 2001/470/EC(7).

(30) The measures necessary for the implementation of this Directive should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission(8).

(31) It should be specified that the establishment of minimum standards in cross-border disputes does not prevent Member States from making provision for more favourable arrangements for legal aid applicants and recipients.

(32) The 1977 Agreement and the additional Protocol to the European Agreement on the transmission of applications for legal aid, signed in Moscow in 2001, remain applicable to relations between

Member States and third countries that are parties to the 1977 Agreement or the Protocol. But this Directive takes precedence over provisions contained in the 1977 Agreement and the Protocol in relations between Member States.

(33) The United Kingdom and Ireland have given notice of their wish to participate in the adoption of this Directive in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and to the Treaty establishing the European Community.

(34) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application,

HAS ADOPTED THIS DIRECTIVE:

CHAPTER I

SCOPE AND DEFINITIONS

Article 1

Aims and scope

1. The purpose of this Directive is to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid in such disputes.

2. It shall apply, in cross-border disputes, to civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.

3. In this Directive, "Member State" shall mean Member States with the exception of Denmark.

Article 2

Cross-border disputes

1. For the purposes of this Directive, a cross-border dispute is one where the party applying for legal aid in the context of this Directive is domiciled or habitually resident in a Member State other than the Member State where the court is sitting or where the decision is to be enforced.

2. The Member State in which a party is domiciled shall be determined in accordance with Article 59 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters(9).

3. The relevant moment to determine if there is a cross-border dispute is the time when the application is submitted, in accordance with this Directive.

CHAPTER II

RIGHT TO LEGAL AID

Article 3

Right to legal aid

1. Natural persons involved in a dispute covered by this Directive shall be entitled to receive appropriate legal aid in order to ensure their effective access to justice in accordance with the conditions laid down in this Directive.

2. Legal aid is considered to be appropriate when it guarantees:

(a) pre-litigation advice with a view to reaching a settlement prior to bringing legal proceedings;

(b) legal assistance and representation in court, and exemption from, or assistance with, the cost of proceedings of the recipient, including the costs referred to in Article 7 and the fees to persons mandated by the court to perform acts during the proceedings.

In Member States in which a losing party is liable for the costs of the opposing party, if the recipient loses the case, the legal aid shall cover the costs incurred by the opposing party, if it would have covered such costs had the recipient been domiciled or habitually resident in the Member State in which the court is sitting.

3. Member States need not provide legal assistance or representation in the courts or tribunals in proceedings especially designed to enable litigants to make their case in person, except when the courts or any other competent authority otherwise decide in order to ensure equality of parties or in view of the complexity of the case.

4. Member States may request that legal aid recipients pay reasonable contributions towards the costs of proceedings taking into account the conditions referred to in Article 5.

5. Member States may provide that the competent authority may decide that recipients of legal aid must refund it in whole or in part if their financial situation has substantially improved or if the decision to grant legal aid had been taken on the basis of inaccurate information given by the recipient.

Article 4

Non-discrimination

Member States shall grant legal aid without discrimination to Union citizens and third-country nationals residing lawfully in a Member State.

CHAPTER III

CONDITIONS AND EXTENT OF LEGAL AID

Article 5

Conditions relating to financial resources

1. Member States shall grant legal aid to persons referred to in Article 3(1) who are partly or totally unable to meet the costs of proceedings referred to in Article 3(2) as a result of their

economic situation, in order to ensure their effective access to justice.

2. The economic situation of a person shall be assessed by the competent authority of the Member State in which the court is sitting, in the light of various objective factors such as income, capital or family situation, including an assessment of the resources of persons who are financially dependant on the applicant.

3. Member States may define thresholds above which legal aid applicants are deemed partly or totally able to bear the costs of proceedings set out in Article 3(2). These thresholds shall be defined on the basis of the criteria defined in paragraph 2 of this Article.

4. Thresholds defined according to paragraph 3 of this Article may not prevent legal aid applicants who are above the thresholds from being granted legal aid if they prove that they are unable to pay the cost of the proceedings referred to in Article 3(2) as a result of differences in the cost of living between the Member States of domicile or habitual residence and of the forum.

5. Legal aid does not need to be granted to applicants in so far as they enjoy, in the instant case, effective access to other mechanisms that cover the cost of proceedings referred to in Article 3(2).

Article 6

Conditions relating to the substance of disputes

1. Member States may provide that legal aid applications for actions which appear to be manifestly unfounded may be rejected by the competent authorities.

2. If pre-litigation advice is offered, the benefit of further legal aid may be refused or cancelled on grounds related to the merits of the case in so far as access to justice is guaranteed.

3. When taking a decision on the merits of an application and without prejudice to Article 5, Member States shall consider the importance of the individual case to the applicant but may also take into account the nature of the case when the applicant is claiming damage to his or her reputation but has suffered no material or financial loss or when the application concerns a claim arising directly out of the applicant's trade or self-employed profession.

Article 7

Costs related to the cross-border nature of the dispute

Legal aid granted in the Member State in which the court is sitting shall cover the following costs directly related to the cross-border nature of the dispute:

(a) interpretation;

(b) translation of the documents required by the court or by the competent authority and presented by the recipient which are necessary for the resolution of the case; and

(c) travel costs to be borne by the applicant where the physical presence of the persons concerned with the presentation of the applicant's case is required in court by the law or by the court of that Member State and the court decides that the persons concerned cannot be heard to the satisfaction of the court by any other means.

Article 8

Costs covered by the Member State of the domicile or habitual residence

The Member State in which the legal aid applicant is domiciled or habitually resident shall provide legal aid, as referred to in Article 3(2), necessary to cover:

(a) costs relating to the assistance of a local lawyer or any other person entitled by the law to give legal advice, incurred in that Member State until the application for legal aid has been received, in accordance with this Directive, in the Member State where the court is sitting;

(b) the translation of the application and of the necessary supporting documents when the application is submitted to the authorities in that Member State.

Article 9

Continuity of legal aid

1. Legal aid shall continue to be granted totally or partially to recipients to cover expenses incurred in having a judgment enforced in the Member State where the court is sitting.

2. A recipient who in the Member State where the court is sitting has received legal aid shall receive legal aid provided for by the law of the Member State where recognition or enforcement is sought.

3. Legal aid shall continue to be available if an appeal is brought either against or by the recipient, subject to Articles 5 and 6.

4. Member States may make provision for the re-examination of the application at any stage in the proceedings on the grounds set out in Articles 3(3) and (5), 5 and 6, including proceedings referred to in paragraphs 1 to 3 of this Article.

Article 10

Extrajudicial procedures

Legal aid shall also be extended to extrajudicial procedures, under the conditions defined in this Directive, if the law requires the parties to use them, or if the parties to the dispute are ordered by the court to have recourse to them.

Article 11

Authentic instruments

Legal aid shall be granted for the enforcement of authentic instruments in another Member State under the conditions defined in this Directive.

CHAPTER IV

PROCEDURE

Article 12

Authority granting legal aid

Legal aid shall be granted or refused by the competent authority of the Member State in which the court is sitting, without prejudice to Article 8.

Article 13

Introduction and transmission of legal aid applications

1. Legal aid applications may be submitted to either:

(a) the competent authority of the Member State in which the applicant is domiciled or habitually resident (transmitting authority); or

(b) the competent authority of the Member State in which the court is sitting or where the decision is to be enforced (receiving authority).

2. Legal aid applications shall be completed in, and supporting documents translated into:

(a) the official language or one of the languages of the Member State of the competent receiving authority which corresponds to one of the languages of the Community institutions; or

(b) another language which that Member State has indicated it can accept in accordance with Article 14(3).

3. The competent transmitting authorities may decide to refuse to transmit an application if it is manifestly:

(a) unfounded; or

(b) outside the scope of this Directive.

The conditions referred to in Article 15(2) and (3) apply to such decisions.

4. The competent transmitting authority shall assist the applicant in ensuring that the application is accompanied by all the supporting documents known by it to be required to enable the application to be determined. It shall also assist the applicant in providing any necessary translation of the supporting documents, in accordance with Article 8(b).

The competent transmitting authority shall transmit the application to the competent receiving authority in the other Member State within 15 days of the receipt of the application duly completed in one of the languages referred to in paragraph 2, and the supporting documents, translated, where necessary, into one of those languages.

5. Documents transmitted under this Directive shall be exempt from legalisation or any equivalent formality.

6. The Member States may not charge for services rendered in accordance with paragraph 4. Member States in which the legal aid applicant is domiciled or habitually resident may lay down that the applicant must repay the costs of translation borne by the competent transmitting authority if the application for legal aid is rejected by the competent authority.

Article 14

Competent authorities and language

1. Member States shall designate the authority or authorities competent to send (transmitting authorities) and receive (receiving authorities) the application.

2. Each Member State shall provide the Commission with the following information:

- the names and addresses of the competent receiving or transmitting authorities referred to in paragraph 1,

- the geographical areas in which they have jurisdiction,

- the means by which they are available to receive applications, and

- the languages that may be used for the completion of the application.

3. Member States shall notify the Commission of the official language or languages of the Community institutions other than their own which is or are acceptable to the competent receiving authority for completion of the legal aid applications to be received, in accordance with this Directive.

4. Member States shall communicate to the Commission the information referred to in paragraphs 2 and 3 before 30 November 2004. Any subsequent modification of such information shall be notified to the Commission no later than two months before the modification enters into force in that Member State.

5. The information referred to in paragraphs 2 and 3 shall be published in the Official Journal of the European Communities.

Article 15

Processing of applications

1. The national authorities empowered to rule on legal aid applications shall ensure that the applicant is fully informed of the processing of the application.

2. Where applications are totally or partially rejected, the reasons for rejection shall be given.

3. Member States shall make provision for review of or appeals against decisions rejecting legal aid applications. Member States may exempt cases where the request for legal aid is rejected by a court or tribunal against whose decision on the subject of the case there is no judicial remedy under national law or by a court of appeal.

4. When the appeals against a decision refusing or cancelling legal aid by virtue of Article 6 are of an administrative nature, they shall always be ultimately subject to judicial review.

Article 16

Standard form

1. To facilitate transmission, a standard form for legal aid applications and for the transmission

of such applications shall be established in accordance with the procedure set out in Article 17(2).

2. The standard form for the transmission of legal aid applications shall be established at the latest by 30 May 2003.

The standard form for legal aid applications shall be established at the latest by 30 November 2004.

CHAPTER V

FINAL PROVISIONS

Article 17

Committee

1. The Commission shall be assisted by a Committee.

2. Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468/EC shall apply.

3. The Committee shall adopt its Rules of Procedure.

Article 18

Information

The competent national authorities shall cooperate to provide the general public and professional circles with information on the various systems of legal aid, in particular via the European Judicial Network, established in accordance with Decision 2001/470/EC.

Article 19

More favourable provisions

This Directive shall not prevent the Member States from making provision for more favourable arrangements for legal aid applicants and recipients.

Article 20

Relation with other instruments

This Directive shall, as between the Member States, and in relation to matters to which it applies, take precedence over provisions contained in bilateral and multilateral agreements concluded by Member States including:

(a) the European Agreement on the transmission of applications for legal aid, signed in Strasbourg on 27 January 1977, as amended by the additional Protocol to the European Agreement on the transmission of applications for legal aid, signed in Moscow in 2001;

(b) the Hague Convention of 25 October 1980 on International Access to Justice.

Article 21

Transposition into national law

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive no later than 30 November 2004 with the exception of Article 3(2)(a) where the transposition of this Directive into national law shall take place no later than 30 May 2006. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such a reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 22

Entry into force

This Directive shall enter into force on the date of its publication in the Official Journal of the European Communities.

Article 23

Addressees

This Directive is addressed to the Member States in accordance with the Treaty establishing the European Community.

Done at Brussels, 27 January 2003.

For the Council

The President

G. Papandreou

(1) OJ C 103 E, 30.4.2002, p. 368.

(2) Opinion delivered on 25 September 2002 (not yet published in the Official Journal).

(3) OJ C 221, 17.9.2002, p. 64.

(4) OJ L 174, 27.6.2001, p. 1.

(5) OJ L 281, 23.11.1995, p. 31.

(6) OJ L 24, 30.1.1998, p. 1.

(7) OJ L 174, 27.6.2001, p. 25.

(8) OJ L 184, 17.7.1999, p. 23.

(9) OJ L 12, 16.1.2001, p. 1; Regulation as amended by Commission Regulation (EC) No 1496/2002 (OJ L 225, 22.8.2002, p. 13).

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BELPROV

Transposition: 30/05/2006
Loi du 21 février 2005 modifiant le Code judiciaire en ce qui concerne la médiation
Loi; Moniteur Belge
, date pub:
22/03/2005
, page:
12772-12772
; ref.:
(MNE(2006)55837)
Loi du 23 novembre 1998 relative à l'aide juridique
Loi; Moniteur Belge
, date pub:
22/12/1998

, page:
40568-40573
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(MNE(2006)55836)
Loi du 15 juin 2006 modifiant le Code judiciaire en ce qui concerne l'aide judiciaire
Loi; Moniteur Belge
, date pub:
31/07/2006
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37182-37193
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(MNE(2006)55198)
Loi du 15 juin 2006 modifiant le Code judiciaire en ce qui concerne l'aide judiciaire - Erratum
Loi; Moniteur Belge
, date pub:
10/08/2006
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39181-39181
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(MNE(2006)55199)
Loi du 1er juillet 2006 modifiant le Code judiciaire en ce qui concerne l'assistance judiciaire
Loi; Moniteur Belge
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(MNE(2006)55200)

DEUPROV

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BGBl. I S. 3392
Gesetz; Bundesgesetzblatt Teil 1 (BGB 1)
, date pub:
20/12/2004
; date into force/en vigueur:
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DNKPROV

NO REFERENCE AVAILABLE

ESPPROV

Transposition: 30/05/2006
LEY 16/2005, de 18 de julio, por la que se modifica la Ley 1/1996, de 10 de enero, de asistencia jurídica gratuita, para regular las especialidades de los litigios transfronterizos civiles y mercantiles en la Union Europea
Ley
, no.:
16/2005; Boletín Oficial del Estado (B.O.E)
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171/2005
, date pub:
19/07/2005
, page:
25558-25563
; date into force/en vigueur:
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; ref.:
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LEY 16/2005, de 18 de julio, por la que se modifica la Ley 1/1996, de 10 de enero, de asistencia jurídica gratuita, para regular las especialidades de los litigios transfronterizos civiles y mercantiles en la Union Europea

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FRAPROV

Transposition: 30/05/2006
Décret n° 2005-1470 du 29/11/2005 relatif à l'aide juridictionnelle accordée dans les litiges transfrontaliers en matiére civile ou commerciale et modifiant le décret n° 91-1266 du 19/12/1991.
Décret
, no.:
2005/1470; Journal Officiel de la République Française (JORF)
, date pub:
30/11/2005
, page:
00001-00002
; ref.:
(MNE(2005)60443)
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Décret
, no.:
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GRCPROV

Transposition: 30/11/2004
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IRLPROV

Transposition: 30/05/2006
Civil Legal Aid Act 1995
Act (primary legislation)
, no.:
1995/32; Iris Oifigiul
, date pub:
22/12/1995
; date into force/en vigueur:
16/12/1995
; ref.:
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Civil Legal Aid Act 1995
Act (primary legislation)
, no.:
1995/32; Iris Oifigiul
, date pub:
22/12/1995
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16/12/1995
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(MNE(2005)56189)
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Concordance table; Iris Oifigiul
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ITAPROV

Transposition: 30/05/2006
Attuazione della direttiva 2003/8/CE intesa a migliorare l'accesso alla giustizia nelle controversie transfrontaliere attraverso la definizione di norme minime comuni relative al patrocinio a spese dello Stato in tali controversie.
Decreto legislativo
, no.:
116; Gazzetta Ufficiale della Repubblica Italiana
, no.:
151
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01/07/2005
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(MNE(2005)52361)
Attuazione della direttiva 2003/8/CE intesa a migliorare l'accesso alla giustizia nelle controversie transfrontaliere attraverso la definizione di norme minime comuni relative al patrocinio a spese dello Stato in tali controversie.
Decreto legislativo

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116; Gazzetta Ufficiale della Repubblica Italiana
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151
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LUXPROV

Transposition: 30/05/2006
Concordance table
Concordance table; Mémorial Luxembourgeois A
; ref.:
(MNE(2005)55421)
Loi du 21 juin 2007 portant modification de la loi modifiée du 10 août 1991 sur la profession d'avocat, et transposant certaines dispositions de la Directive 2003/8/CE du Conseil du 27 janvier 2003 visant à améliorer l'accès à la justice dans les affaires transfrontalières par l'établissement de règles minimales communes relatives à l'aide judiciaire accordée dans le cadre de telles affaires.
Loi; Mémorial Luxembourgeois A
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26/06/2007
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NLDPROV

Transposition: 30/11/2004
Wet van 19/02/2005 tot aanpassing van de Wet op de rechsbijstand aan richtlijn 2003/8/EG van de Raad van 27/1/2003 tot verbetering van de toegang tot de rechter bij grensoverschrijdende geschillen, door middel van gemeenschappelijke minimumvoorschriften betreffende rechtsbijstand bij die geschillen (Implementatie richtlijn rechtsbijstand).
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PRTPROV

Transposition: 30/05/2006
Assembleia da Republica
Altera o regime de acesso ao direito e aos tribunais e transpoe para a ordem jurídica nacional a Directiva n.o 2003/8/CE, do Conselho, de 27 de Janeiro, relativa à melhoria do acesso à justiça nos litígios transfronteiriços através do estabelecimento de regras mínimas comuns relativas ao apoio judiciario no âmbito desses litígios
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177 SERIE I-A
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Altera o regime de acesso ao direito e aos tribunais e transpoe para a ordem jurídica nacional a Directiva n.o 2003/8/CE, do Conselho, de 27 de Janeiro, relativa à melhoria do acesso à justiça nos litígios transfronteiriços através do estabelecimento de regras mínimas comuns relativas ao apoio judiciario no âmbito desses litígios
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GBRPROV

Transposition: 30/11/2004
Legal Aid, Advice and Assistance (Northern Ireland) Order 1981
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The Community Legal Service (Financial) Regulations 2000
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The Community Legal Service (Funding) Order 2000
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Statutory instrument (SI)
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30/11/2004
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Access to Justice (Northern Ireland) Order 2003
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, no.:
2003/20030435; Her Majesty's Stationery Office (HMSO)
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AUTPROV

Transposition: 30/05/2006
Zivilverfahrens-Novelle 2004
Verwaltungsmassnahmen
, no.:
I Nr 128/2004; Bundesgesetzblatt für die Republik Osterreich (BGBl.)
, no.:
I Nr 128/2004
, date pub:
18/11/2004
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SVEPROV

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4º Rättshjälpslag (1996:1619) Utfärdad 1996-12-05.
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1996:1619; Svensk författningssamling (SFS)
, date pub:
05/12/1996
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19/10/2004
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Ustawa; Dziennik Ustaw
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Zakon o spremembah in dopolnitvah zakona o brezplani pravni pomoi
Zakon; Uradni list RS
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2001/470/EC: Council Decision of 28 May 2001 establishing a European Judicial Network in civil and commercial matters

Council Decision

of 28 May 2001

establishing a European Judicial Network in civil and commercial matters

(2001/470/EC)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 61(c) and (d), 66 and 67(1) thereof,

Having regard to the proposal from the Commission(1),

Having regard to the opinion of the European Parliament(2),

Having regard to the opinion of the Economic and Social Committee(3),

Whereas:

(1) The European Union has set itself the objective of maintaining and developing the European Union as an area of freedom, security and justice, in which the free movement of persons is assured.

(2) The gradual establishment of this area and the sound operation of the internal market entails the need to improve, simplify and expedite effective judicial cooperation between the Member States in civil and commercial matters.

(3) The action plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice(4) which was adopted by the Council on 3 December 1998 and approved by the European Council on 11 and 12 December 1998 acknowledges that reinforcement of judicial cooperation in civil matters represents a fundamental stage in the creation of a European judicial area which will bring tangible benefits for every European Union citizen.

(4) One of the measures provided for in paragraph 40 of the action plan is to examine the possibility of extending the concept of the European Judicial Network in criminal matters to embrace civil proceedings.

(5) The conclusions of the special European Council held at Tampere on 15 and 16 October 1999 recommend the establishment of an easily accessible information system, to be maintained and updated by a Network of competent national authorities.

(6) In order to improve, simplify and expedite effective judicial cooperation between the Member States in civil and commercial matters, it is necessary to establish at Community level a network cooperation structure - the European Judicial Network in civil and commercial matters.

(7) This is a subject falling within the ambit of Articles 65 and 66 of the Treaty, and the measures are to be adopted in accordance with Article 67.

(8) To ensure the attainment of the objectives of the European Judicial Network in civil and commercial matters, the rules governing its establishment should be laid down in a mandatory instrument of Community law.

(9) The objectives of the proposed action, namely to improve effective judicial cooperation between the Member States and effective access to justice for persons engaging in cross-border litigation cannot be sufficiently achieved by the Member States and can therefore by reason of the scale or

effects of the action be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality as set out in that Article, this Decision does not go beyond what is necessary in order to achieve those objectives.

(10) The European Judicial Network in civil and commercial matters established by this Decision seeks to facilitate judicial cooperation between the Member States in civil and commercial matters both in areas to which existing instruments apply and in those where no instrument is currently applicable.

(11) In certain specific areas, Community or international instruments relating to judicial cooperation in civil and commercial matters already provide for cooperation mechanisms. The European Judicial Network in civil and commercial matters does not set out to replace these mechanisms, and it must operate in full compliance with them. This Decision will consequently be without prejudice to Community or international instruments relating to judicial cooperation in civil or commercial matters.

(12) The European Judicial Network in civil and commercial matters should be established in stages on the basis of the closest cooperation between the Commission and the Member States. It should be able to take advantage of modern communication and information technologies.

(13) To attain its objectives, the European Judicial Network in civil and commercial matters needs to be supported by contact points designated by the Member States and to be sure of the participation of their authorities with specific responsibilities for judicial cooperation in civil and commercial matters. Contacts between them and periodic meetings are essential to the operation of the Network.

(14) It is essential that efforts to establish an area of freedom, security and justice produce tangible benefits for persons engaging in cross-border litigation. It is accordingly necessary for the European Judicial Network in civil and commercial matters to promote access to justice. To this end, using the information supplied and updated by the contact points, the Network should progressively establish an information system that is accessible to the public, both the general public and specialists.

(15) This Decision does not preclude the provision of other information than that which is provided for herein, within the European Judicial Network in civil and commercial matters and to the public. The enumeration in Title III is accordingly not to be regarded as exhaustive.

(16) Processing of information and data should take place in compliance with Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and of the free movement of such data(5) and Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector(6).

(17) To ensure that the European Judicial Network in civil and commercial matters remains an effective instrument, incorporates the best practice in judicial cooperation and internal operation and meets the public's expectations, provision should be made for periodic evaluations and for proposals for such changes as may be found necessary.

(18) The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and to the Treaty establishing the European Community, have given notice of their wish to take part in the adoption and application of this Decision.

(19) Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, is not participating in the adoption of this Decision and is therefore not bound by it nor subject

to its application,

HAS ADOPTED THIS DECISION:

TITLE I

PRINCIPLES OF THE EUROPEAN JUDICIAL NETWORK IN CIVIL AND COMMERCIAL MATTERS

Article 1

Establishment

1. A European Judicial Network in civil and commercial matters ("the Network") is hereby established among the Member States.

2. In this Decision, the term "Member State" shall mean Member States with the exception of Denmark.

Article 2

Composition

1. The Network shall be composed of:

(a) contact points designated by the Member States, in accordance with paragraph 2;

(b) central bodies and central authorities provided for in Community instruments, instruments of international law to which the Member States are parties or rules of domestic law in the area of judicial cooperation in civil and commercial matters;

(c) the liaison magistrates to whom Joint Action 96/277/JAI of 22 April 1996 concerning a framework for the exchange of liaison magistrates to improve judicial cooperation between the Member States of the European Union(7) applies, where they have responsibilities in cooperation in civil and commercial matters;

(d) any other appropriate judicial or administrative authority with responsibilities for judicial cooperation in civil and commercial matters whose membership of the Network is considered to be useful by the Member State to which it belongs.

2. Each Member State shall designate a contact point. Each Member State may, however, designate a limited number of other contact points if they consider this necessary on the basis of the existence of separate legal systems, the domestic distribution of jurisdiction, the tasks to be entrusted to the contact points or in order to associate judicial bodies that frequently deal with cross-border litigation directly with the activities of the contact points.

Where a Member State designates several contact points, it shall ensure that appropriate coordination mechanisms apply between them.

3. The Member States shall identify the authorities mentioned at points (b) and (c) of paragraph 1.

4. The Member States shall designate the authorities mentioned at point (d) of paragraph 1.

5. The Member States shall notify the Commission, in accordance with Article 20, of the names and full addresses of the authorities referred to in paragraph 1, specifying:

(a) the communication facilities available to them;

(b) their knowledge of languages; and

(c) where appropriate, their specific functions in the Network.

Article 3

Tasks and activities of the Network

1. The Network shall be responsible for:

(a) facilitating judicial cooperation between the Member States in civil and commercial matters, including devising, progressively establishing and updating an information system for the members of the Network;

(b) devising, progressively establishing and updating an information system that is accessible to the public.

2. Without prejudice to other Community or international instruments relating to judicial cooperation in civil or commercial matters, the Network shall develop its activities for the following purposes in particular:

(a) the smooth operation of procedures having a cross-border impact and the facilitation of requests for judicial cooperation between the Member States, in particular where no Community or international instrument is applicable;

(b) the effective and practical application of Community instruments or conventions in force between two or more Member States;

(c) the establishment and maintenance of an information system for the public on judicial cooperation in civil and commercial matters in the European Union, relevant Community and international instruments and the domestic law of the Member States, with particular reference to access to justice.

Article 4

Modus operandi of the Network

The Network shall accomplish its tasks in particular by the following means:

1. it shall facilitate appropriate contacts between the authorities of the Member States mentioned in Article 2(1) for the accomplishment of the tasks provided for by Article 3;

2. it shall organise periodic meetings of the contact points and of the members of the Network in accordance with the rules laid down in Title II;

3. it shall draw up and keep updated the information on judicial cooperation in civil and commercial matters and the legal systems of the Member States referred to in Title III, in accordance with the rules laid down in that Title.

Article 5

Contact points

1. The contact points shall be at the disposal of the authorities referred to in Article 2(1)(b) to (d) for the accomplishment of the tasks provided for by Article 3.

The contact points shall also be at the disposal of the local judicial authorities in their own Member State for the same purposes, in accordance with rules to be determined by each Member State.

2. In particular, the contact points shall:

(a) supply the other contact points, the authorities mentioned in Article 2(1)(b) to (d) and the local judicial authorities in their own Member State with all the information needed for sound judicial cooperation between the Member States in accordance with Article 3, in order to assist them in preparing operable requests for judicial cooperation and in establishing the most appropriate direct contacts;

(b) seek solutions to difficulties arising on the occasion of a request for judicial cooperation, without prejudice to paragraph 4 of this Article and to Article 6;

(c) facilitate coordination of the processing of requests for judicial cooperation in the relevant Member State, in particular where several requests from the judicial authorities in that Member State fall to be executed in another Member State;

(d) collaborate in the organisation of, and participate in, the meetings referred to in Article 9;

(e) assist with the preparation and updating of the information referred to in Title III, and in particular with the information system for the public, in accordance with the rules laid down in that Title.

3. Where a contact point receives a request for information from another member of the Network to which it is unable to respond, it shall forward it to the contact point or the member of the Network which is best able to respond to it. The contact point shall remain available for any such assistance as may be useful for subsequent contacts.

4. In areas where Community or international instruments governing judicial cooperation already provide for the designation of authorities responsible for facilitating judicial cooperation, contact points shall address requesters to such authorities.

Article 6

Relevant authorities for the purposes of Community or international instruments relating to judicial cooperation in civil and commercial matters

1. The involvement of relevant authorities provided for by Community or international instruments relating to judicial cooperation in civil and commercial matters in the Network shall be without prejudice to the powers conferred on them by the instrument providing for their designation.

Contacts within the Network shall be without prejudice to regular or occasional contacts between these authorities.

2. In each Member State the authorities provided for by Community or international instruments relating to judicial cooperation in civil and commercial matters and the contact points of the Network shall engage in regular exchanges of views and contacts to ensure that their respective experience is disseminated as widely as possible.

3. The contact points of the Network shall be at the disposal of the authorities provided for by Community or international instruments relating to judicial cooperation in civil and commercial matters and shall assist them in all practicable ways.

Article 7

Language knowledge of the contact points

To facilitate the practical operation of the Network, each Member State shall ensure that the contact points have adequate knowledge of an official language of the institutions of the European Community other than their own, given that they need to be able to communicate with the contact points in other Member States.

Member States shall facilitate and encourage specialised language training for contact point staff and promote exchanges of staff between contact points in the Member States.

Article 8

Communication facilities

The contact points shall use the most appropriate technological facilities in order to reply as efficiently and as swiftly as possible to requests made to them.

TITLE II

MEETINGS WITHIN THE NETWORK

Article 9

Meetings of the contact points

1. The contact points of the Network shall meet no less of ten than once each half year, in accordance with Article 12.

2. Each Member State shall be represented at these meetings by one or more contact points, who may be accompanied by other members of the Network, but there shall be no more than four representatives per Member State.

3. The first meeting of the contact points shall be held no later than 1 March 2003 without prejudice to the possibility of prior preparatory meetings.

Article 10

Purpose of periodic meetings of contact points

1. The purpose of the periodic meetings of contact points shall be to:

(a) enable the contact points to get to know each other and exchange experience, in particular as regards the operation of the Network;

(b) provide a platform for discussion of practical and legal problems encountered by the Member States in the course of judicial cooperation, with particular reference to the application of measures adopted by the European Community;

(c) identify best practices in judicial cooperation in civil and commercial matters and ensure that relevant information is disseminated within the Network;

(d) exchange data and views, in particular on the structure, organisation and content of and access to the available information mentioned in Title III;

(e) draw up guidelines for progressively establishing the practical information sheets provided for by Article 15, in particular as regards the subject matter to be covered and the form of such information sheets;

(f) identify specific initiatives other than those referred to in Title III which pursue comparable objectives.

2. The Member States shall ensure that experience in the operation of specific cooperation mechanisms provided for by Community or international instruments is shared at meetings of the contact points.

Article 11

Meetings of members of the Network

1. Meetings open to all members of the Network shall be held to enable them to get to know each other and exchange experience, to provide a platform for discussion of practical and legal problems met and to deal with specific questions.

Meetings can also be held on specific issues.

2. Meetings shall be convened, where appropriate, in accordance with Article 12.

3. The Commission, in close cooperation with the Presidency of the Council and with the Member States, shall fix for each meeting the maximum number of participants.

Article 12

Organisation and proceedings of meetings of the Network

1. The Commission, in close cooperation with the Presidency of the Council and with the Member States, shall convene the meetings provided for by Articles 9 and 11. It shall chair them and provide secretarial services.

2. Before each meeting the Commission shall prepare the draft agenda in agreement with the Presidency of the Council and in consultation with the Member States via their respective contact points.

3. The contact points shall be notified of the agenda prior to the meeting. They may ask for changes to be made or for additional items to be entered.

4. After each meeting the Commission shall prepare a record, which shall be notified to the contact points.

5. Meetings of the contact points and of members of the Network may take place in any Member State.

TITLE III

INFORMATION AVAILABLE WITHIN THE NETWORK, AND INFORMATION SYSTEM FOR THE PUBLIC

Article 13

Information disseminated within the Network

1. The information disseminated within the network shall include:

(a) the information referred to in Article 2(5);

(b) any further information deemed useful by the contact points for the proper functioning of the Network.

2. For the purpose of paragraph 1, the Commission shall progressively establish a secure limited-access electronic information exchange-system in consultation with the contact points.

Article 14

Information system for the public

1. An Internet-based information system for the public, including the dedicated website for the Network, shall be progressively established in accordance with Articles 17 and 18.

2. The information system shall comprise the following elements:

(a) Community instruments in force or in preparation relating to judicial cooperation in civil and commercial matters;

(b) national measures for the domestic implementation of the instruments in force referred to in point (a);

(c) international instruments in force relating to judicial cooperation in civil and commercial matters to which the Member States are parties, and declarations and reservations made in connection with such instruments;

(d) the relevant elements of Community case-law in the area of judicial cooperation in civil and commercial matters;

(e) the information sheets provided for by Article 15.

3. For the purposes of access to the information mentioned in paragraph 2(a) to (d), the Network should, where appropriate, in its site, make use of links to other sites where the original information is to be found.

4. The site dedicated to the Network shall likewise facilitate access to comparable public information initiatives in related matters and to sites containing information relating to the legal systems of the Member States.

Article 15

Information sheets

1. The information sheets shall be devoted by way of priority to questions relating to access to justice in the Member States and shall include information on the procedures for bringing cases in the courts and for obtaining legal aid, without prejudice to other Community initiatives, to which the Network shall have the fullest regard.

2. Information sheets shall be of a practical and concise nature. They shall be written in easily comprehensible language and contain practical information for the public. They shall progressively be produced on at least the following subjects:

(a) principles of the legal system and judicial organisation of the Member States;

(b) procedures for bringing cases to court, with particular reference to small claims, and subsequent court procedures, including appeal possibilities and procedures;

(c) conditions and procedures for obtaining legal aid, including descriptions of the tasks of non-governmental organisations active in this field, account being taken of work already done in the Dialogue with Citizens;

(d) national rules governing the service of documents;

(e) rules and procedures for the enforcement of judgments given in other Member States;

(f) possibilities and procedures for obtaining interim relief measures, with particular reference to seizures of assets for the purposes of enforcement;

(g) alternative dispute-settlement possibilities, with an indication of the national information and advice centres of the Community-wide Network for the Extra-Judicial Settlement of Consumer Disputes;

(h) organisation and operation of the legal professions.

4. The information sheets shall, where appropriate, include elements of the relevant case-law of the Member States.

5. The information sheets may provide more detailed information for the specialists.

Article 16

Updating of information

All information distributed within the Network and to the public under Articles 13 to 15 shall be updated regularly.

Article 17

Role of the Commission in the public information system

The Commission shall:

1. be responsible for managing the information system for the public;

2. construct, in consultation with the contact points, a dedicated website for the Network on its Internet site;

3. provide information on relevant aspects of Community law and procedures, including Community

case-law, in accordance with Article 14;

4. (a) ensure that the format of the information sheets is consistent and that they include all information considered necessary by the Network;

(b) thereafter arrange for them to be translated into the other official languages of the Institutions of the Community, and install them on the site dedicated to the Network.

Article 18

Role of contact points in the public information system

Contact points shall ensure that

1. the appropriate information needed to create and operate the information system is supplied to the Commission;

2. the information installed in the system is accurate;

3. the Commission is notified forthwith of any updates as soon as an item of information requires changing;

4. the information sheets relating to their respective Member States are progressively established, according to the guidelines referred to in Article 10(1)(e);

5. the broadest possible dissemination of the information sheets installed on the site dedicated to the Network is arranged in their Member State.

TITLE IV

FINAL PROVISIONS

Article 19

Review

1. No later than 1 December 2005, and at least every five years thereafter, the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Decision on the basis of information supplied by the contact points. The report shall be accompanied if need be by proposals for adaptations.

2. The report shall consider, among other relevant matters, the question of possible direct public access to the contact points of the Network, access to and involvement of the legal professions in its activities, and synergy with the Community-wide Network for the Extra-Judicial Settlement of Consumer Disputes. It shall also consider the relationship between the contact points of the Network and the competent authorities provided for in Community or international instruments relating to judicial cooperation in civil and commercial matters.

Article 20

Establishment of the basic components of the Network

No later than 1 June 2002, the Member States shall notify the Commission of the information required by Article 2(5).

Article 21

Date of application

This Decision shall apply from 1 December 2002, except for Articles 2 and 20 which shall apply from the date of notification of the Decision to the Member States to which it is addressed.

This Decision is addressed to the Member States in accordance with the Treaty establishing the European Community.

Done at Brussels, 28 May 2001.

For the Council

The President

T. Bodström

(1) OJ C 29 E, 30.1.2001, p. 281.

(2) Opinion delivered on 5 April 2001 (not yet published in the Official Journal).

(3) OJ C 139, 11.5.2001, p. 6.

(4) OJ C 19, 23.1.1999, p. 1.

(5) OJ L 281, 23.11.1995, p. 31.

(6) OJ L 24, 30.1.1998, p. 1.

(7) OJ L 105, 27.4.1996, p. 1.

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2001/470/EC: Council Decision of 28 May 2001 establishing a European Judicial Network in civil and commercial matters

Council Decision

of 28 May 2001

establishing a European Judicial Network in civil and commercial matters

(2001/470/EC)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 61(c) and (d), 66 and 67(1) thereof,

Having regard to the proposal from the Commission(1),

Having regard to the opinion of the European Parliament(2),

Having regard to the opinion of the Economic and Social Committee(3),

Whereas:

(1) The European Union has set itself the objective of maintaining and developing the European Union as an area of freedom, security and justice, in which the free movement of persons is assured.

(2) The gradual establishment of this area and the sound operation of the internal market entails the need to improve, simplify and expedite effective judicial cooperation between the Member States in civil and commercial matters.

(3) The action plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice(4) which was adopted by the Council on 3 December 1998 and approved by the European Council on 11 and 12 December 1998 acknowledges that reinforcement of judicial cooperation in civil matters represents a fundamental stage in the creation of a European judicial area which will bring tangible benefits for every European Union citizen.

(4) One of the measures provided for in paragraph 40 of the action plan is to examine the possibility of extending the concept of the European Judicial Network in criminal matters to embrace civil proceedings.

(5) The conclusions of the special European Council held at Tampere on 15 and 16 October 1999 recommend the establishment of an easily accessible information system, to be maintained and updated by a Network of competent national authorities.

(6) In order to improve, simplify and expedite effective judicial cooperation between the Member States in civil and commercial matters, it is necessary to establish at Community level a network cooperation structure - the European Judicial Network in civil and commercial matters.

(7) This is a subject falling within the ambit of Articles 65 and 66 of the Treaty, and the measures are to be adopted in accordance with Article 67.

(8) To ensure the attainment of the objectives of the European Judicial Network in civil and commercial matters, the rules governing its establishment should be laid down in a mandatory instrument of Community law.

(9) The objectives of the proposed action, namely to improve effective judicial cooperation between the Member States and effective access to justice for persons engaging in cross-border litigation cannot be sufficiently achieved by the Member States and can therefore by reason of the scale or

effects of the action be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality as set out in that Article, this Decision does not go beyond what is necessary in order to achieve those objectives.

(10) The European Judicial Network in civil and commercial matters established by this Decision seeks to facilitate judicial cooperation between the Member States in civil and commercial matters both in areas to which existing instruments apply and in those where no instrument is currently applicable.

(11) In certain specific areas, Community or international instruments relating to judicial cooperation in civil and commercial matters already provide for cooperation mechanisms. The European Judicial Network in civil and commercial matters does not set out to replace these mechanisms, and it must operate in full compliance with them. This Decision will consequently be without prejudice to Community or international instruments relating to judicial cooperation in civil or commercial matters.

(12) The European Judicial Network in civil and commercial matters should be established in stages on the basis of the closest cooperation between the Commission and the Member States. It should be able to take advantage of modern communication and information technologies.

(13) To attain its objectives, the European Judicial Network in civil and commercial matters needs to be supported by contact points designated by the Member States and to be sure of the participation of their authorities with specific responsibilities for judicial cooperation in civil and commercial matters. Contacts between them and periodic meetings are essential to the operation of the Network.

(14) It is essential that efforts to establish an area of freedom, security and justice produce tangible benefits for persons engaging in cross-border litigation. It is accordingly necessary for the European Judicial Network in civil and commercial matters to promote access to justice. To this end, using the information supplied and updated by the contact points, the Network should progressively establish an information system that is accessible to the public, both the general public and specialists.

(15) This Decision does not preclude the provision of other information than that which is provided for herein, within the European Judicial Network in civil and commercial matters and to the public. The enumeration in Title III is accordingly not to be regarded as exhaustive.

(16) Processing of information and data should take place in compliance with Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and of the free movement of such data(5) and Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector(6).

(17) To ensure that the European Judicial Network in civil and commercial matters remains an effective instrument, incorporates the best practice in judicial cooperation and internal operation and meets the public's expectations, provision should be made for periodic evaluations and for proposals for such changes as may be found necessary.

(18) The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and to the Treaty establishing the European Community, have given notice of their wish to take part in the adoption and application of this Decision.

(19) Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, is not participating in the adoption of this Decision and is therefore not bound by it nor subject

to its application,

HAS ADOPTED THIS DECISION:

TITLE I

PRINCIPLES OF THE EUROPEAN JUDICIAL NETWORK IN CIVIL AND COMMERCIAL MATTERS

Article 1

Establishment

1. A European Judicial Network in civil and commercial matters ("the Network") is hereby established among the Member States.

2. In this Decision, the term "Member State" shall mean Member States with the exception of Denmark.

Article 2

Composition

1. The Network shall be composed of:

(a) contact points designated by the Member States, in accordance with paragraph 2;

(b) central bodies and central authorities provided for in Community instruments, instruments of international law to which the Member States are parties or rules of domestic law in the area of judicial cooperation in civil and commercial matters;

(c) the liaison magistrates to whom Joint Action 96/277/JAI of 22 April 1996 concerning a framework for the exchange of liaison magistrates to improve judicial cooperation between the Member States of the European Union(7) applies, where they have responsibilities in cooperation in civil and commercial matters;

(d) any other appropriate judicial or administrative authority with responsibilities for judicial cooperation in civil and commercial matters whose membership of the Network is considered to be useful by the Member State to which it belongs.

2. Each Member State shall designate a contact point. Each Member State may, however, designate a limited number of other contact points if they consider this necessary on the basis of the existence of separate legal systems, the domestic distribution of jurisdiction, the tasks to be entrusted to the contact points or in order to associate judicial bodies that frequently deal with cross-border litigation directly with the activities of the contact points.

Where a Member State designates several contact points, it shall ensure that appropriate coordination mechanisms apply between them.

3. The Member States shall identify the authorities mentioned at points (b) and (c) of paragraph 1.

4. The Member States shall designate the authorities mentioned at point (d) of paragraph 1.

5. The Member States shall notify the Commission, in accordance with Article 20, of the names and full addresses of the authorities referred to in paragraph 1, specifying:

(a) the communication facilities available to them;

(b) their knowledge of languages; and

(c) where appropriate, their specific functions in the Network.

Article 3

Tasks and activities of the Network

1. The Network shall be responsible for:

(a) facilitating judicial cooperation between the Member States in civil and commercial matters, including devising, progressively establishing and updating an information system for the members of the Network;

(b) devising, progressively establishing and updating an information system that is accessible to the public.

2. Without prejudice to other Community or international instruments relating to judicial cooperation in civil or commercial matters, the Network shall develop its activities for the following purposes in particular:

(a) the smooth operation of procedures having a cross-border impact and the facilitation of requests for judicial cooperation between the Member States, in particular where no Community or international instrument is applicable;

(b) the effective and practical application of Community instruments or conventions in force between two or more Member States;

(c) the establishment and maintenance of an information system for the public on judicial cooperation in civil and commercial matters in the European Union, relevant Community and international instruments and the domestic law of the Member States, with particular reference to access to justice.

Article 4

Modus operandi of the Network

The Network shall accomplish its tasks in particular by the following means:

1. it shall facilitate appropriate contacts between the authorities of the Member States mentioned in Article 2(1) for the accomplishment of the tasks provided for by Article 3;

2. it shall organise periodic meetings of the contact points and of the members of the Network in accordance with the rules laid down in Title II;

3. it shall draw up and keep updated the information on judicial cooperation in civil and commercial matters and the legal systems of the Member States referred to in Title III, in accordance with the rules laid down in that Title.

Article 5

Contact points

1. The contact points shall be at the disposal of the authorities referred to in Article 2(1)(b) to (d) for the accomplishment of the tasks provided for by Article 3.

The contact points shall also be at the disposal of the local judicial authorities in their own Member State for the same purposes, in accordance with rules to be determined by each Member State.

2. In particular, the contact points shall:

(a) supply the other contact points, the authorities mentioned in Article 2(1)(b) to (d) and the local judicial authorities in their own Member State with all the information needed for sound judicial cooperation between the Member States in accordance with Article 3, in order to assist them in preparing operable requests for judicial cooperation and in establishing the most appropriate direct contacts;

(b) seek solutions to difficulties arising on the occasion of a request for judicial cooperation, without prejudice to paragraph 4 of this Article and to Article 6;

(c) facilitate coordination of the processing of requests for judicial cooperation in the relevant Member State, in particular where several requests from the judicial authorities in that Member State fall to be executed in another Member State;

(d) collaborate in the organisation of, and participate in, the meetings referred to in Article 9;

(e) assist with the preparation and updating of the information referred to in Title III, and in particular with the information system for the public, in accordance with the rules laid down in that Title.

3. Where a contact point receives a request for information from another member of the Network to which it is unable to respond, it shall forward it to the contact point or the member of the Network which is best able to respond to it. The contact point shall remain available for any such assistance as may be useful for subsequent contacts.

4. In areas where Community or international instruments governing judicial cooperation already provide for the designation of authorities responsible for facilitating judicial cooperation, contact points shall address requesters to such authorities.

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Relevant authorities for the purposes of Community or international instruments relating to judicial cooperation in civil and commercial matters

1. The involvement of relevant authorities provided for by Community or international instruments relating to judicial cooperation in civil and commercial matters in the Network shall be without prejudice to the powers conferred on them by the instrument providing for their designation.

Contacts within the Network shall be without prejudice to regular or occasional contacts between these authorities.

2. In each Member State the authorities provided for by Community or international instruments relating to judicial cooperation in civil and commercial matters and the contact points of the Network shall engage in regular exchanges of views and contacts to ensure that their respective experience is disseminated as widely as possible.

3. The contact points of the Network shall be at the disposal of the authorities provided for by Community or international instruments relating to judicial cooperation in civil and commercial matters and shall assist them in all practicable ways.

Article 7

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To facilitate the practical operation of the Network, each Member State shall ensure that the contact points have adequate knowledge of an official language of the institutions of the European Community other than their own, given that they need to be able to communicate with the contact points in other Member States.

Member States shall facilitate and encourage specialised language training for contact point staff and promote exchanges of staff between contact points in the Member States.

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The contact points shall use the most appropriate technological facilities in order to reply as efficiently and as swiftly as possible to requests made to them.

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Article 9

Meetings of the contact points

1. The contact points of the Network shall meet no less of ten than once each half year, in accordance with Article 12.

2. Each Member State shall be represented at these meetings by one or more contact points, who may be accompanied by other members of the Network, but there shall be no more than four representatives per Member State.

3. The first meeting of the contact points shall be held no later than 1 March 2003 without prejudice to the possibility of prior preparatory meetings.

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1. The purpose of the periodic meetings of contact points shall be to:

(a) enable the contact points to get to know each other and exchange experience, in particular as regards the operation of the Network;

(b) provide a platform for discussion of practical and legal problems encountered by the Member States in the course of judicial cooperation, with particular reference to the application of measures adopted by the European Community;

(c) identify best practices in judicial cooperation in civil and commercial matters and ensure that relevant information is disseminated within the Network;

(d) exchange data and views, in particular on the structure, organisation and content of and access to the available information mentioned in Title III;

(e) draw up guidelines for progressively establishing the practical information sheets provided for by Article 15, in particular as regards the subject matter to be covered and the form of such information sheets;

(f) identify specific initiatives other than those referred to in Title III which pursue comparable objectives.

2. The Member States shall ensure that experience in the operation of specific cooperation mechanisms provided for by Community or international instruments is shared at meetings of the contact points.

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Meetings can also be held on specific issues.

2. Meetings shall be convened, where appropriate, in accordance with Article 12.

3. The Commission, in close cooperation with the Presidency of the Council and with the Member States, shall fix for each meeting the maximum number of participants.

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1. The Commission, in close cooperation with the Presidency of the Council and with the Member States, shall convene the meetings provided for by Articles 9 and 11. It shall chair them and provide secretarial services.

2. Before each meeting the Commission shall prepare the draft agenda in agreement with the Presidency of the Council and in consultation with the Member States via their respective contact points.

3. The contact points shall be notified of the agenda prior to the meeting. They may ask for changes to be made or for additional items to be entered.

4. After each meeting the Commission shall prepare a record, which shall be notified to the contact points.

5. Meetings of the contact points and of members of the Network may take place in any Member State.

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INFORMATION AVAILABLE WITHIN THE NETWORK, AND INFORMATION SYSTEM FOR THE PUBLIC

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1. An Internet-based information system for the public, including the dedicated website for the Network, shall be progressively established in accordance with Articles 17 and 18.

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(a) Community instruments in force or in preparation relating to judicial cooperation in civil and commercial matters;

(b) national measures for the domestic implementation of the instruments in force referred to in point (a);

(c) international instruments in force relating to judicial cooperation in civil and commercial matters to which the Member States are parties, and declarations and reservations made in connection with such instruments;

(d) the relevant elements of Community case-law in the area of judicial cooperation in civil and commercial matters;

(e) the information sheets provided for by Article 15.

3. For the purposes of access to the information mentioned in paragraph 2(a) to (d), the Network should, where appropriate, in its site, make use of links to other sites where the original information is to be found.

4. The site dedicated to the Network shall likewise facilitate access to comparable public information initiatives in related matters and to sites containing information relating to the legal systems of the Member States.

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1. The information sheets shall be devoted by way of priority to questions relating to access to justice in the Member States and shall include information on the procedures for bringing cases in the courts and for obtaining legal aid, without prejudice to other Community initiatives, to which the Network shall have the fullest regard.

2. Information sheets shall be of a practical and concise nature. They shall be written in easily comprehensible language and contain practical information for the public. They shall progressively be produced on at least the following subjects:

(a) principles of the legal system and judicial organisation of the Member States;

(b) procedures for bringing cases to court, with particular reference to small claims, and subsequent court procedures, including appeal possibilities and procedures;

(c) conditions and procedures for obtaining legal aid, including descriptions of the tasks of non-governmental organisations active in this field, account being taken of work already done in the Dialogue with Citizens;

(d) national rules governing the service of documents;

(e) rules and procedures for the enforcement of judgments given in other Member States;

(f) possibilities and procedures for obtaining interim relief measures, with particular reference to seizures of assets for the purposes of enforcement;

(g) alternative dispute-settlement possibilities, with an indication of the national information and advice centres of the Community-wide Network for the Extra-Judicial Settlement of Consumer Disputes;

(h) organisation and operation of the legal professions.

4. The information sheets shall, where appropriate, include elements of the relevant case-law of the Member States.

5. The information sheets may provide more detailed information for the specialists.

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1. be responsible for managing the information system for the public;

2. construct, in consultation with the contact points, a dedicated website for the Network on its Internet site;

3. provide information on relevant aspects of Community law and procedures, including Community

case-law, in accordance with Article 14;

4. (a) ensure that the format of the information sheets is consistent and that they include all information considered necessary by the Network;

(b) thereafter arrange for them to be translated into the other official languages of the Institutions of the Community, and install them on the site dedicated to the Network.

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Contact points shall ensure that

1. the appropriate information needed to create and operate the information system is supplied to the Commission;

2. the information installed in the system is accurate;

3. the Commission is notified forthwith of any updates as soon as an item of information requires changing;

4. the information sheets relating to their respective Member States are progressively established, according to the guidelines referred to in Article 10(1)(e);

5. the broadest possible dissemination of the information sheets installed on the site dedicated to the Network is arranged in their Member State.

TITLE IV

FINAL PROVISIONS

Article 19

Review

1. No later than 1 December 2005, and at least every five years thereafter, the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Decision on the basis of information supplied by the contact points. The report shall be accompanied if need be by proposals for adaptations.

2. The report shall consider, among other relevant matters, the question of possible direct public access to the contact points of the Network, access to and involvement of the legal professions in its activities, and synergy with the Community-wide Network for the Extra-Judicial Settlement of Consumer Disputes. It shall also consider the relationship between the contact points of the Network and the competent authorities provided for in Community or international instruments relating to judicial cooperation in civil and commercial matters.

Article 20

Establishment of the basic components of the Network

No later than 1 June 2002, the Member States shall notify the Commission of the information required by Article 2(5).

Article 21

Date of application

This Decision shall apply from 1 December 2002, except for Articles 2 and 20 which shall apply from the date of notification of the Decision to the Member States to which it is addressed.

This Decision is addressed to the Member States in accordance with the Treaty establishing the European Community.

Done at Brussels, 28 May 2001.

For the Council

The President

T. Bodström

(1) OJ C 29 E, 30.1.2001, p. 281.

(2) Opinion delivered on 5 April 2001 (not yet published in the Official Journal).

(3) OJ C 139, 11.5.2001, p. 6.

(4) OJ C 19, 23.1.1999, p. 1.

(5) OJ L 281, 23.11.1995, p. 31.

(6) OJ L 24, 30.1.1998, p. 1.

(7) OJ L 105, 27.4.1996, p. 1.

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Decision No 1149/2007/EC of the European Parliament and of the Council of 25 September 2007 establishing for the period 2007-2013 the Specific Programme Civil Justice as part of the General Programme Fundamental Rights and Justice

20070925

Decision No 1149/2007/EC of the European Parliament and of the Council

of 25 September 2007

establishing for the period 2007-2013 the Specific Programme "Civil Justice" as part of the General Programme "Fundamental Rights and Justice"

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and Article 67(5) thereof,

Having regard to the proposal from the Commission,

Acting in accordance with the procedure laid down in Article 251 of the Treaty [1],

Whereas:

(1) The Community has set itself the objective of maintaining and developing an area of freedom, security and justice, in which the free movement of persons is assured. To this end, the Community is to adopt, inter alia, measures in the field of judicial cooperation in civil matters necessary for the proper functioning of the internal market.

(2) Following previous programmes, such as Grotius [2] and the Robert Schuman project [3], Council Regulation (EC) No 743/2002 [4] established, for the period 2002-2006, a general Community framework of activities to facilitate the implementation of judicial cooperation in civil matters.

(3) The Brussels European Council of 4 and 5 November 2004 adopted the Hague Programme: Strengthening freedom, security and justice in the European Union [5] (hereinafter referred to as "the Hague Programme").

(4) In June 2005, the Council and the Commission adopted the Action Plan implementing the Hague Programme [6].

(5) The ambitious objectives set by the Treaty and the Hague Programme should be achieved through the establishment of a flexible and effective programme that will facilitate planning and implementation.

(6) The programme "Civil Justice" should provide for initiatives taken by the Commission, in compliance with the principle of subsidiarity, for actions in support of organisations promoting and facilitating judicial cooperation in civil matters, and for actions in support of specific projects.

(7) A general programme in the field of civil justice aimed at better mutual understanding of the legal and judicial systems of the Member States will contribute to lowering the barriers to judicial cooperation in civil matters, which will improve the functioning of the internal market.

(8) According to the Hague Programme, strengthening mutual confidence requires an explicit effort to improve mutual understanding among judicial authorities and different legal systems. European networks of national public authorities should be given special attention and support in this respect.

(9) This Decision should provide for the possibility to co-finance the activities of certain European networks to the extent that the expenditure is incurred in pursuing an objective of general European interest. However, such co-financing should not imply that a future programme would cover such networks, nor should it prevent other European networks from benefiting from support to their activities

in accordance with this Decision.

(10) Any institution, association or network receiving a grant under the programme "Civil Justice" should acknowledge the Community support received in accordance with the visibility guidelines to be laid down by the Commission.

(11) This Decision lays down, for the entire duration of the programme, a financial envelope constituting the prime reference, within the meaning of point 37 of the Interinstitutional Agreement of 17 May 2006 between the European Parliament, the Council and the Commission on budgetary discipline and sound financial management [7], for the budgetary authority during the annual budgetary procedure.

(12) Since the objectives of this Decision cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of the programme, be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Decision does not go beyond what is necessary in order to achieve those objectives.

(13) Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities [8] (hereinafter referred to as "the Financial Regulation") and Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 [9], which safeguard the Community financial interests, have to be applied taking into account the principles of simplicity and consistency in the choice of budgetary instruments, a limitation on the number of cases where the Commission retains direct responsibility for implementation and management, and the required proportionality between the level of resources and the administrative burden related to their use.

(14) Appropriate measures should also be taken to prevent irregularities and fraud, and the necessary steps should be taken to recover funds lost, wrongly paid or incorrectly used in accordance with Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the Communities' financial interests [10], Council Regulation (Euratom, EC) No 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities [11] and Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) [12].

(15) The Financial Regulation requires a basic act to be provided to cover operating grants.

(16) The measures necessary for the implementation of this Decision should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission [13], with a distinction being made between those measures which are subject to the management procedure and those which are subject to the advisory procedure, the advisory procedure being in certain cases, with a view to increased efficiency, the more appropriate.

(17) In accordance with Article 7(3) of Decision 1999/468/EC, the European Parliament should be informed by the Commission of committee proceedings relating to the implementation of this programme. In particular, the European Parliament should receive the draft annual programme when it is submitted to the management committee. In addition, the European Parliament should receive the results of voting and summary records of the meetings of that committee.

(18) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, the United Kingdom and Ireland have notified their wish to take part in the adoption and application

of this Decision.

(19) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark does not take part in the adoption of this Decision and is not bound by it or subject to its application.

(20) The European Economic and Social Committee has delivered an opinion on this Decision [14].

(21) In order to ensure the effective and timely implementation of this programme, this Decision should apply from 1 January 2007,

HAVE DECIDED AS FOLLOWS:

Article 1

Establishment of the Programme

1. This Decision establishes the Specific Programme "Civil Justice", hereinafter referred to as "the Programme", as part of the General Programme "Fundamental Rights and Justice", in order to contribute to the progressive establishment of the area of freedom, security and justice.

2. The Programme shall cover the period from 1 January 2007 to 31 December 2013.

3. In this Decision, the term "Member State" shall mean Member States with the exception of Denmark.

Article 2

General objectives

1. The Programme shall have the following general objectives:

(a) to promote judicial cooperation with the aim of contributing to the creation of a genuine European area of justice in civil matters based on mutual recognition and mutual confidence;

(b) to promote the elimination of obstacles to the good functioning of cross-border civil proceedings in the Member States;

(c) to improve the daily life of individuals and businesses by enabling them to assert their rights throughout the European Union, notably by fostering access to justice;

(d) to improve the contacts, exchange of information and networking between legal, judicial and administrative authorities and the legal professions, including by way of support of judicial training, with the aim of better mutual understanding among such authorities and professionals.

2. Without prejudice to the objectives and powers of the Community, the general objectives of the Programme shall contribute to the development of Community policies, and more specifically to the creation of a judicial area.

Article 3

Specific objectives

The Programme shall have the following specific objectives:

(a) to foster judicial cooperation in civil matters aiming at:

(i) ensuring legal certainty and improving access to justice;

(ii) promoting mutual recognition of decisions in civil and commercial cases;

(iii) eliminating obstacles to cross-border litigation created by disparities in civil law and civil procedures and promoting the necessary compatibility of legislation for that purpose;

(iv) guaranteeing a proper administration of justice by avoiding conflicts of jurisdiction;

(b) to improve mutual knowledge of Member States' legal and judicial systems in civil matters and to promote and strengthen networking, mutual cooperation, exchange and dissemination of information, experience and best practices;

(c) to ensure the sound implementation, the correct and concrete application and the evaluation of Community instruments in the area of judicial cooperation in civil and commercial matters;

(d) to improve information on the legal systems in the Member States and access to justice;

(e) to promote the training of legal practitioners in Union and Community law;

(f) to evaluate the general conditions necessary to reinforce mutual confidence, while fully respecting the independence of the judiciary;

(g) to facilitate the operation of the European Judicial Network in civil and commercial matters established by Council Decision 2001/470/EC [15].

Article 4

Actions

With a view to pursuing the general and specific objectives set out in Articles 2 and 3, the Programme shall support the following types of action under the conditions set out in the annual work programmes referred to in Article 9(2):

(a) specific actions initiated by the Commission, such as studies and research, opinion polls and surveys, formulation of indicators and common methodologies, collection, development and dissemination of data and statistics, seminars, conferences and expert meetings, organisation of public campaigns and events, development and maintenance of websites, preparation and dissemination of information material, support for and management of networks of national experts, analytical, monitoring and evaluation activities; or

(b) specific transnational projects of Community interest presented by an authority or any other body of a Member State, an international organisation or a non-governmental organisation, and involving in any case at least two Member States or at least one Member State and one other State which may be either an acceding country or a candidate country; or

(c) the activities of non-governmental organisations or other entities pursuing an aim of general European interest in accordance with the general objectives of the Programme under the conditions set out in the annual work programmes; or

(d) operating grants to co-finance expenditure associated with the permanent work programmes of the European Network of Councils for the Judiciary and the Network of the Presidents of the Supreme Judicial Courts of the European Union, insofar as it is incurred in pursuing an objective of general European interest by promoting exchanges of views and experience on matters concerning case-law

and the organisation and functioning of the members of those networks in the performance of their judicial and/or advisory functions with regard to Community law.

Article 5

Participation

1. The following countries may participate in the actions of the Programme: the acceding countries, the candidate countries and the Western Balkan countries included in the stabilisation and association process in accordance with the conditions laid down in the association agreements or additional protocols thereto relating to participation in Community programmes concluded or to be concluded with those countries.

2. Projects may associate legal practitioners from Denmark, from candidate countries not participating in the Programme where this would contribute to their preparation for accession, or from other third countries not participating in the Programme where this serves the aim of the projects.

Article 6

Target groups

1. The Programme is targeted at, inter alia, legal practitioners, national authorities and the citizens of the Union in general.

2. For the purposes of this Decision, "legal practitioners" shall mean judges, prosecutors, advocates, solicitors, notaries, academic and scientific personnel, ministry officials, court officers, bailiffs, court interpreters and other professionals associated with the judiciary in the area of civil law.

Article 7

Access to the Programme

Access to the Programme shall be open to institutions and public or private organisations, including professional organisations, universities, research institutes and legal and judicial training institutes for legal practitioners, international organisations and non-governmental organisations of the Member States.

Article 8

Types of intervention

1. Community financing may take the following legal forms:

(a) grants;

(b) public procurement contracts.

2. Community grants shall be awarded further to calls for proposals and shall be provided through operating grants and grants to actions. The maximum rate of co-financing shall be specified in the annual work programmes.

3. Furthermore, provision shall be made for expenditure on accompanying measures, by means of public procurement contracts, in which case Community financing shall cover the purchase of goods and services. This shall cover, inter alia, expenditure on information and communication, preparation, implementation, monitoring, checking and evaluation of projects, policies, programmes and legislation.

Article 9

Implementing measures

1. The Commission shall implement the Community financial support in accordance with the Financial Regulation.

2. To implement the Programme, the Commission shall, within the limits of the general objectives set out in Article 2, adopt annual work programmes specifying specific objectives, thematic priorities, the accompanying measures referred to in Article 8(3) and, if necessary, a list of other actions.

3. The annual work programmes shall be adopted in accordance with the procedure referred to in Article 10(2).

4. The evaluation and award procedures relating to grants to actions shall take into account, inter alia, the following criteria:

(a) conformity of the proposed action with the annual work programme, the objectives set out in Articles 2 and 3 and the types of action set out in Article 4;

(b) quality of the proposed action in terms of its design, organisation, presentation and expected results;

(c) amount requested for Community financing and its appropriateness in relation to expected results;

(d) impact of the expected results on the objectives set out in Articles 2 and 3 and on the actions referred to in Article 4.

5. Applications for operating grants referred to in Article 4(d) shall be assessed in the light of:

(a) consistency with the objectives of the Programme;

(b) quality of the planned activities;

(c) likely multiplier effect on the public of these activities;

(d) geographical impact of the activities carried out;

(e) citizens' involvement in the organisation of the bodies concerned;

(f) cost/benefit ratio of the activity proposed.

6. The Commission shall examine each of the proposed actions submitted to it under Article 4(b) and (c). Decisions relating to these actions shall be adopted in accordance with the procedure referred to in Article 11(2).

Article 10

Management Committee

1. The Commission shall be assisted by a Management Committee.

2. Where reference is made to this paragraph, Articles 4 and 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

The period laid down in Article 4(3) of Decision 1999/468/EC shall be set at three months.

Article 11

Advisory Committee

1. The Commission shall be assisted by an Advisory Committee.

2. Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

Article 12

Complementarity

1. Synergies and complementarity shall be sought with other Community instruments, in particular the Specific Programme "Criminal Justice" as part of the General Programme "Fundamental Rights and Justice", and the General Programmes "Security and Safeguarding Liberties" and "Solidarity and Management of Migration Flows". The statistical element of information on civil justice shall be developed in collaboration with Member States, using as necessary the Community Statistical Programme.

2. The Programme may exceptionally share resources with other Community instruments, in particular the Specific Programme "Criminal Justice", as part of the General Programme "Fundamental Rights and Justice", in order to implement actions meeting the objectives of both Programmes.

3. Operations financed under this Decision shall not receive financial support for the same purpose from other Union or Community financial instruments. The beneficiaries of the Programme shall provide the Commission with information about financing received from the general budget of the European Union and from other sources, as well as information about ongoing applications for financing.

Article 13

Budgetary resources

1. The financial envelope for the implementation of this Decision shall be set at EUR 109300000 for the period set out in Article 1.

2. The budgetary resources allocated to the actions provided for in the Programme shall be entered in the annual appropriations of the general budget of the European Union. The available annual

appropriations shall be authorised by the budgetary authority within the limits of the financial framework.

Article 14

Monitoring

1. The Commission shall ensure that for any action financed by the Programme, the beneficiary submits technical and financial reports on the progress of work and that a final report is submitted within three months of the completion of the action. The Commission shall determine the form and content of the reports. The Commission shall make the reports available to Member States.

2. Without prejudice to the audits carried out by the Court of Auditors in liaison with the competent national audit bodies or departments pursuant to Article 248 of the Treaty, or any inspection carried out pursuant to point (b) of the first subparagraph of Article 279(1) of the Treaty, officials and other staff of the Commission may carry out on-the-spot checks, including sample checks, on actions financed under the Programme.

3. The Commission shall ensure that contracts and agreements resulting from the implementation of the Programme provide in particular for supervision and financial control by the Commission (or any representative authorised by it), if necessary on-the-spot, and for audits by the Court of Auditors.

4. The Commission shall ensure that for a period of five years following the last payment in respect of any action, the beneficiary of financial support keeps available for the Commission all the supporting documents regarding expenditure on the action.

5. On the basis of the results of the reports and sample checks referred to in paragraphs 1 and 2, the Commission shall ensure that, if necessary, the scale or the conditions of allocation of the financial support originally approved and also the timetable for payments are adjusted.

6. The Commission shall ensure that every other step necessary to verify that the actions financed are carried out properly and in compliance with the provisions of this Decision and the Financial Regulation, is taken.

Article 15

Protection of Community financial interests

1. The Commission shall ensure that, when actions financed under this Decision are implemented, the financial interests of the Community are protected by the application of preventive measures against fraud, corruption and any other illegal activities, by effective checks and by the recovery of the amounts wrongly paid and, if irregularities are detected, by effective, proportional and dissuasive penalties, in accordance with Regulations (EC, Euratom) No 2988/95, (Euratom, EC) No 2185/96 and (EC) No 1073/1999.

2. For the Community actions financed under this Decision, Regulations (EC, Euratom) No 2988/95 and (Euratom, EC) No 2185/96 shall apply to any infringement of a provision of Community law, including infringements of a contractual obligation stipulated on the basis of the Programme, resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the European Union or budgets managed by the European Communities by an unjustified item of expenditure.

3. The Commission shall ensure that the amount of financial support granted for an action is reduced, suspended or recovered if it finds irregularities, including non-compliance with the provisions of this Decision or the individual decision or the contract or agreement granting the financial support in question, or if it transpires that, without Commission approval having been sought, the action has been subjected to a change which conflicts with the nature or implementing conditions of the project.

4. If the time limits have not been observed or if only part of the allocated financial support is justified by the progress made with implementing an action, the beneficiary shall submit observations to the Commission within a specified period. If the beneficiary does not give a satisfactory answer, the Commission shall ensure that the remaining financial support may be cancelled and that sums already paid are demanded to be repaid.

5. The Commission shall ensure that any undue payment is repaid to the Commission. Interest shall be added to any sums not repaid in good time under the conditions laid down by the Financial Regulation.

Article 16

Evaluation

1. The Programme shall be monitored regularly in order to follow the implementation of activities carried out under it.

2. The Commission shall ensure a regular, independent and external evaluation of the Programme.

3. The Commission shall submit to the European Parliament and the Council:

(a) an annual presentation on the implementation of the Programme;

(b) an interim evaluation report on the results obtained and the qualitative and quantitative aspects of the implementation of the Programme, including on the work carried out by the beneficiaries of operating grants referred to in Article 4(d), not later than 31 March 2011;

(c) a communication on the continuation of the Programme not later than 30 August 2012;

(d) an ex-post evaluation report not later than 31 December 2014.

Article 17

Publication of actions

Each year the Commission shall publish a list of the actions financed under the Programme with a short description of each project.

Article 18

Visibility

The Commission shall lay down guidelines to ensure the visibility of the financial support granted under this Decision.

Article 19

Entry into force

This Decision shall enter into force on the twentieth day following its publication in the Official Journal of the European Union.

It shall apply from 1 January 2007.

Done at Strasbourg, 25 September 2007.

For the European Parliament

The President

H.-G. Pöttering

For the Council

The President

M. Lobo Antunes

[1] Position of the European Parliament of 14 December 2006 (not yet published in the Official Journal), Council Common Position of 13 June 2007 (OJ C 171 E, 24.7.2007, p. 1) and Position of the European Parliament of 11 July 2007 (not yet published in the Official Journal). Council Decision of 18 September 2007.

[2] Joint Action 96/636/JHA of 28 October 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on a programme of incentives and exchanges for legal practitioners (Grotius) (OJ L 287, 8.11.1996, p. 3); Council Regulation (EC) No 290/2001 of 12 February 2001 extending the programme of incentives and exchanges for legal practitioners in the area of civil law (Grotius-civil) (OJ L 43, 14.2.2001, p. 1).

[3] Decision No 1496/98/EC of the European Parliament and of the Council of 22 June 1998 establishing an action programme to improve awareness of Community law within the legal professions (Robert Schuman project) (OJ L 196, 14.7.1998, p. 24).

[4] OJ L 115, 1.5.2002, p. 1.

[5] OJ C 53, 3.3.2005, p. 1.

[6] OJ C 198, 12.8.2005, p. 1.

[7] OJ C 139, 14.6.2006, p. 1.

[8] OJ L 248, 16.9.2002, p. 1. Regulation as amended by Regulation (EC, Euratom) No 1995/2006 (OJ L 390, 30.12.2006, p. 1).

[9] OJ L 357, 31.12.2002, p. 1. Regulation as last amended by Regulation (EC, Euratom) No 478/2007 (OJ L 111, 28.4.2007, p. 13).

[10] OJ L 312, 23.12.1995, p. 1.

[11] OJ L 292, 15.11.1996, p. 2.

[12] OJ L 136, 31.5.1999, p. 1.

[13] OJ L 184, 17.7.1999, p. 23. Decision as amended by Decision 2006/512/EC (OJ L 200, 22.7.2006, p. 11).

[14] OJ C 69, 21.3.2006, p. 1.

[15] OJ L 174, 27.6.2001, p. 25.

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FORM	Decision sui generis
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2006/719/EC: Council Decision of 5 October 2006 on the accession of the Community to the Hague Conference on Private International Law

Council Decision

of 5 October 2006

on the accession of the Community to the Hague Conference on Private International Law

(2006/719/EC)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c), in conjunction with the first subparagraph of Article 300(2) and the second subparagraph of Article 300(3) thereof,

Having regard to the proposal from the Commission,

Having regard to the assent of the European Parliament [1],

Whereas:

(1) The objective of the Hague Conference on Private International Law (HCCH) is to work for the progressive unification of the rules of private international law. The HCCH has to date adopted a substantial number of conventions in different fields of private international law.

(2) Since the entry into force of the Treaty of Amsterdam, the Community has competence to adopt measures in the field of judicial cooperation in civil matters having cross-border implications insofar as necessary for the proper functioning of the internal market. The Community has exerted this competence by adopting a number of instruments, many of which coincide, partially or fully, with the areas of work of the HCCH.

(3) It is essential that the Community be granted a status that corresponds to its new role as a major international player in the field of civil judicial cooperation and that it be able to exercise its external competence by participating as a full member in the negotiations of conventions by the HCCH in areas of its competence.

(4) By decision of 28 November 2002, the Council authorised the Commission to negotiate the conditions and modalities of Community accession to the HCCH.

(5) By a joint letter from the Commission and the Presidency to the HCCH of 19 December 2002, the Community applied to become a member of the HCCH, and requested the opening of negotiations.

(6) In April 2004, a Special Commission on General Affairs and Policy of the HCCH expressed the unanimous view that, as a matter of principle, the Community should become a Member of the HCCH and determined certain criteria and procedures for the modalities of its membership.

(7) In June 2005, the Diplomatic Conference of the HCCH adopted by consensus the amendments to the Statute of the HCCH (Statute) necessary to allow the accession of a Regional Economic Integration Organisation and the Members of the HCCH were subsequently invited to cast their votes on the amendments, if possible within a period of nine months.

(8) The amendments to the Statute will enter into force three months after the Secretary General of the HCCH has informed the Members that the required two-thirds majority for amending the Statute has been reached. Shortly after the entry into force, an extraordinary meeting of the Council on General Affairs and Policy will formally decide upon the Community's accession to the HCCH.

(9) The outcome of the negotiations on the revision of the Statute is satisfactory, taking into account the interests of the Community.

(10) Article 2A of the revised Statute entitles the Community, as a Regional Economic Integration Organisation, to become a Member of the HCCH.

(11) The Community should accede to the HCCH.

(12) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on the European Union and the Treaty establishing the European Community, the United Kingdom and Ireland are taking part in the adoption of this Decision.

(13) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on the European Union and the Treaty establishing the European Community, Denmark does not take part in the adoption of this Decision and is not bound by it or subject to its application,

HAS DECIDED AS FOLLOWS:

Sole Article

1. The Community shall accede to the Hague Conference on Private International Law (HCCH) by means of the declaration of acceptance of the Statute of the HCCH (Statute), as set out in Annex I to this Decision, as soon as the HCCH has taken the formal decision to admit the Community as a Member.

2. The Community shall also deposit a declaration of competence specifying the matters in respect of which competence has been transferred to it by its Member States, as set out in Annex II to this Decision, and a declaration on certain matters concerning the HCCH, as set out in Annex III to this Decision.

3. The President of the Council is hereby authorised to carry out such procedures as may be necessary to give effect to paragraphs 1 and 2.

4. The text of the Statute is attached to this Decision as Annex IV.

5. For the purpose of this Decision the term "Member State" shall mean Member States with the exception of Denmark.

Done at Luxembourg, 5 October 2006.

For the Council

The President

K. Rajamäki

[1] Not yet published on the Official Journal.

ANNEX I

Instrument of accession to the Hague Conference on Private International Law

Mr J.H.A. VAN LOON

Secretary-General

Hague Conference on Private International Law

Scheveningseweg 6

2517 THE HAGUE

Netherlands

Dear Sir,

I have the honour to inform you that the European Community has decided to accede to the Hague Conference on Private International Law. I therefore ask you to accept this instrument, by which the European Community accepts the Statute of the Hague Conference on Private International Law in accordance with Article 2A thereof. I enclose a declaration by the European Community specifying the matters in respect of which competence has been transferred to it by its Member States and a declaration on certain matters concerning the Hague Conference on Private International Law.

The European Community formally and without reservation accepts the obligations arising from its membership of the Hague Conference on Private International Law, as set out in the Statute, and formally undertakes to fulfil the obligations upon it at the time of its accession.

I have the honour to be, Sir, yours faithfully,

President of the Council of the European Union

ANNEX II

Declaration of competence of the European Community specifying the matters in respect of which competence has been transferred to it by its Member States

1. This Declaration is given pursuant to Article 2A(3) of the Statute of the Hague Conference on Private International Law and specifies the matters in respect of which competence has been transferred to the European Community by its Member States.

2. The European Community has internal competence to adopt general and specific measures relating to private international law in various fields in its Member States. In respect of matters within the purview of the HCCH, the European Community notably has competence under Title IV of the EC Treaty to adopt measures in the field of judicial cooperation in civil matters having cross-border implications insofar as necessary for the proper functioning of the internal market (Articles 61(c) and 65 EC Treaty). Such measures include:

(a) improving and simplifying the system for cross-border service of judicial and extrajudicial documents; cooperation in the taking of evidence; the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases;

(b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction;

(c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.

3. In areas which do not fall within its exclusive competence, the European Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives

of the proposed action cannot be sufficiently achieved by Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the European Community. Any action by the European Community shall not go beyond what is necessary to achieve the objectives.

4. Furthermore, the European Community has competence in other fields which can be subject to conventions of the HCCH, as in the field of the internal market (Article 95 EC Treaty) or consumer protection (Article 153 EC Treaty).

5. The European Community has made use of its competence by adopting a number of instruments under Article 61(c) of the EC Treaty, such as:

- Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings,

- 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,

- Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction, recognition and enforcement in civil and commercial matters,

- Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters,

- Council Directive 2003/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes,

- Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, and

- Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims.

Provisions on private international law can also be found in other Community legislation, notably in the area of consumer protection, insurance, financial services and intellectual property. Thus, the Community Directives affected by the Hague Convention on the Law Applicable to Certain Rights of Securities held with an Intermediary were adopted on the basis of Article 95 of the EC Treaty.

6. Even if there is no explicit reference to external competence in the EC Treaty, it results from the jurisprudence of the Court of Justice of the European Communities that the provisions of the EC Treaty referred to above constitute legal bases not only for internal acts of the Community, but also for the conclusion of international agreements by the Community. The Community may conclude international agreements whenever the internal competence has already been used in order to adopt measures for implementing common policies, as listed above, or if international agreement is necessary to obtain one of the European Community's objectives [1]. The Community's external competence is exclusive to the extent to which an international agreement affects internal Community rules or alters their scope [2]. Where this is the case, it is not for the Member States but for the Community to enter into external undertakings with third States or International Organisations. An international agreement can fall entirely or only to some extent within exclusive Community competence.

7. Community instruments are normally binding for all Member States. Concerning Title IV of the EC Treaty which comprises the legal basis for judicial cooperation in civil matters, a special regime applies to Denmark, Ireland and the United Kingdom. Measures taken under Title IV of the EC Treaty are not binding upon or applicable in Denmark. Ireland and the United Kingdom take part in legal instruments adopted under Title IV of the EC Treaty if they notify the Council to that effect. Ireland and the United Kingdom have decided to opt in on all measures listed at

point 5 above.

8. The extent of competence which the Member States have transferred to the European Community pursuant to the EC Treaty is, by its nature, liable to continuous development. The European Community and its Member States will ensure that any change in the Community's competences will be promptly notified to the Secretary-General of the HCCH as stipulated in Article 2A(4) of the Statute.

[1] Opinion 1/76 of the Court of Justice, ECR 1977, p. 741; Opinion 2/91, ECR 1993, p. I-1061; Case 22/70 (AETR); Commission v Council, ECR 1971, p. 263; Case-C-467/98 (open skies), Commission v Denmark, ECR 2002, p. I-9519.

[2] Case 22/70 ("AETR"), Commission v Council, Case-C-467/98 ("open skie"), Commission v. Denmark.

ANNEX III

Declaration by the Community on certain matters concerning the Hague Conference on Private International law

The European Community endeavours to examine whether it is in its interest to join existing Hague Conventions in respect of which there is Community competence. Where this interest exists, the European Community, in cooperation with the HCCH, will make every effort to overcome the difficulties resulting from the absence of a clause providing for the accession of a Regional Economic Integration Organisation to those Conventions.

The European Community further endeavours to make it possible for representatives of the Permanent Bureau of the HCCH to take part in meetings of experts organised by the Commission of the European Communities where matters of interest to the HCCH are being discussed.

ANNEX IV

STATUTE OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

The Governments of the countries hereinafter specified:

the Federal Republic of Germany, Austria, Belgium, Denmark, Spain, Finland, France, Italy, Japan, Luxembourg, Norway, the Netherlands, Portugal, the United Kingdom of Great Britain and Northern Ireland, Sweden and Switzerland;

In view of the permanent character of the Hague Conference on Private International Law;

Desiring to stress that character;

Having, to that end, deemed it desirable to provide the Conference with a Statute;

Have agreed upon the following provisions:

Article 1

The purpose of the Hague Conference is to work for the progressive unification of the rules of private international law.

Article 2

Members of the Hague Conference on Private International Law are the States which have already participated in one or more Sessions of the Conference and which accept the present Statute.

Any other State, the participation of which is from a juridical point of view of importance for the work of the Conference, may become a Member. The admission of new Member States shall be decided upon by the Governments of the participating States, upon the proposal of one or more of them, by a majority of the votes cast, within a period of six months from the date on which that proposal is submitted to the Governments.

The admission shall become effective upon the acceptance of the present Statute by the State concerned.

Article 2A

1. The Member States may, at a meeting concerning General Affairs and Policy where the majority of Member States is present, by a majority of the votes cast, decide to admit also as a Member any Regional Economic Integration Organisation which has submitted an application for membership to the Secretary General. References to Members under this Statute shall include such Member Organisations, except as otherwise expressly provided. The admission shall become effective upon the acceptance of the Statute by the Regional Economic Integration Organisation concerned.

2. To be eligible to apply for membership of the Conference, a Regional Economic Integration Organisation must be one constituted solely by sovereign States to which its Member States have transferred competence over a range of matters within the purview of the Conference, including the authority to make decisions binding on its Member States in respect of those matters.

3. Each Regional Economic Integration Organisation applying for membership shall, at the time of such application, submit a declaration of competence specifying the matters in respect of which competence has been transferred to it by its Member States.

4. Each Member Organisation and its Member States shall ensure that any change regarding the competence of the Member Organisation or in its membership shall be notified to the Secretary General, who shall circulate such information to the other Members of the Conference.

5. Member States of the Member Organisation shall be presumed to retain competence over all matters in respect of which transfers of competence have not been specifically declared or notified.

6. Any Member of the Conference may request the Member Organisation and its Member States to provide information as to whether the Member Organisation has competence in respect of any specific question which is before the Conference. The Member Organisation and its Member States shall ensure that this information is provided on such request.

7. The Member Organisation shall exercise membership rights on an alternative basis with its Member States that are Members of the Conference, in the areas of their respective competences.

8. The Member Organisation may exercise on matters within its competence, in any meetings of the Conference in which it is entitled to participate, a number of votes equal to the number of its

Member States which have transferred competence to the Member Organisation in respect of the matter in question, and which are entitled to vote in and have registered for such meetings. Whenever the Member Organisation exercises its right to vote its Member States shall not exercise theirs, and conversely.

9. "Regional Economic Integration Organisation" means an international organisation that is constituted solely by sovereign States, and to which its Member States have transferred competence over a range of matters, including the authority to make decisions binding on its Member States in respect of those matters.

Article 3

1. The Council on General Affairs and Policy (hereafter the Council), composed of all Members, has charge of the operation of the Conference. Meetings of the Council shall, in principle, be held annually.

2. The Council ensures such operation through a Permanent Bureau the activities of which it directs.

3. The Council shall examine all proposals intended to be placed on the agenda of the Conference. It shall be free to determine the action to be taken on such proposals.

4. The Netherlands Standing Government Committee, instituted by Royal Decree of February 20 1897 with a view to promoting the codification of private international law, shall, after consultation with the Members of the Conference, determine the date of the Diplomatic Sessions.

5. The Standing Government Committee shall address itself to the Government of the Netherlands for the convocation of the Members. The Chair of the Standing Government Committee presides over the Sessions of the Conference.

6. The Ordinary Sessions of the Conference shall, in principle, be held every four years.

7. If necessary, the Council may, after consultation with the Standing Government Committee, request the Government of the Netherlands to convene the Conference in Extraordinary Session.

8. The Council may consult the Standing Government Committee on any other matter relevant to the Conference.

Article 4

1. The Permanent Bureau shall have its seat at The Hague. It shall be composed of a Secretary General and four Secretaries who shall be appointed by the Government of the Netherlands upon presentation by the Standing Government Committee.

2. The Secretary General and the Secretaries must possess appropriate legal knowledge and practical experience. In their appointment account shall also be taken of diversity of geographic representation and of legal expertise.

3. The number of Secretaries may be increased after consultation with the Council and in accordance with Article 9.

Article 5

Under the direction of the Council, the Permanent Bureau shall be charged with:

(a) the preparation and organisation of the Sessions of the Hague Conference and the meetings of the Council and of any Special Commissions;

(b) the work of the Secretariat of the Sessions and meetings envisaged above;

(c) all the tasks which are included in the activity of a secretariat.

Article 6

1. With a view to facilitating communication between the Members of the Conference and the Permanent Bureau, the Government of each of the Member States shall designate a national organ and each Member Organisation a contact organ.

2. The Permanent Bureau may correspond with all the organs so designated and with the competent international organisations.

Article 7

1. The Sessions and, in the interval between Sessions, the Council, may set up Special Commissions to prepare draft Conventions or to study all questions of private international law which come within the purpose of the Conference.

2. The Sessions, Council and Special Commissions shall, to the furthest extent possible, operate on the basis of consensus.

Article 8

1. The budgeted costs of the Conference shall be apportioned among the Member States of the Conference.

2. A Member Organisation shall not be required to contribute in addition to its Member States to the annual budget of the Conference, but shall pay a sum to be determined by the Conference, in consultation with the Member Organisation, to cover additional administrative expenses arising out of its membership.

3. In any case, travelling and living expenses of the delegates to the Council and the Special Commissions shall be payable by the Members represented.

Article 9

1. The budget of the Conference shall be submitted each year to the Council of Diplomatic Representatives at The Hague for approval.

2. These Representatives shall also apportion among the Member States the expenses which are charged in that budget to the latter.

3. The Diplomatic Representatives shall meet for such purposes under the chairmanship of the Minister of Foreign Affairs of the Kingdom of the Netherlands.

Article 10

1. The expenses resulting from the Ordinary and Extraordinary Sessions of the Conference shall be borne by the Government of the Netherlands.

2. In any case, the travelling and living expenses of the delegates shall be payable by the respective Members.

Article 11 (French text only)

Les usages de la Conférence continuent à être en vigueur pour tout ce qui n'est pas contraire au présent Statut ou aux Règlements.

Article 12

1. Amendments to the present Statute must be adopted by consensus of the Member States present at a meeting concerning General Affairs and Policy.

2. Such amendments shall enter into force, for all Members, three months after they are approved by two thirds of the Member States in accordance with their respective internal procedures, but not earlier than nine months from the date of their adoption.

3. The meeting referred to in paragraph 1 may change by consensus the periods of time referred to in paragraph 2.

Article 13

To provide for their execution, the provisions of the present Statute will be complemented by Regulations. The Regulations shall be established by the Permanent Bureau and submitted to a Diplomatic Session, the Council of Diplomatic Representatives or the Council on General Affairs and Policy for approval.

Article 14

1. The present Statute shall be submitted for acceptance to the Governments of States which participated in one or more Sessions of the Conference. It shall enter into force as soon as it is accepted by the majority of the States represented at the Seventh Session.

2. The statement of acceptance shall be deposited with the Netherlands Government, which shall make it known to the Governments referred to in the first paragraph of this Article.

3. The Netherlands Government shall, in the case of the admission of a new Member, inform all Members of the statement of acceptance of that new Member.

Article 15

1. Each Member may denounce the present Statute after a period of five years from the date of its entry into force under the terms of Article 14(1).

2. Notice of the denunciation shall be given to the Ministry of Foreign Affairs of the Kingdom of the Netherlands at least six months before the expiration of the budgetary year of the Conference, and shall become effective at the expiration of the said year, but only with respect to the Member which has given notice thereof.

The English and French texts of this Statute, as amended on..... 200..., are equally authentic.

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